

THE RIGHT TO COUNSEL IN ARMSTRONG COUNTY & POTTER COUNTY, TEXAS

EVALUATION OF ADULT TRIAL LEVEL INDIGENT DEFENSE REPRESENTATION



NOVEMBER 2019



SIXTH
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CENTER

The Right to Counsel in Armstrong County and Potter County, Texas:
Evaluation of Adult Trial Level Indigent Defense Representation
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Publication Number: 2019.004

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The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing the potential loss of liberty in a criminal or delinquency proceeding.

Prepared for

Armstrong County and Potter County commissioned this report. The U.S. Department of Justice funded the work through the Bureau of Justice Assistance, FY 17 National Initiatives Adjudication: Training and Technical Assistance to Support Protection of Constitutional Rights Under the Sixth Amendment (DOJ Office of Justice Programs Grant Award # 2017-YA-BX-K003.) The Defender Initiative of the Seattle University School of Law administers the U.S. Department of Justice grant. The Defender Initiative is part of the Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education.

The report solely reflects the opinions of the authors and does not necessarily reflect the views of Armstrong County, Potter County, or the U.S. Department of Justice, Bureau of Justice Assistance.

EXECUTIVE SUMMARY

The U.S. Supreme Court held in *Gideon v. Wainwright* that providing and protecting the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is a constitutional obligation of the states – not local governments – under the due process clause of the Fourteenth Amendment. Every state in the nation must therefore have a system for providing an attorney to represent each indigent defendant who is charged with a crime and facing the possible loss of their liberty. Texas state law requires the county in which a criminal prosecution is instituted to pay the cost of appointed counsel and all reasonable and necessary expenses of the defense at both trial and appeal. State law also requires the trial court judges who have jurisdiction over criminal cases in each county to adopt a local plan to provide and oversee attorneys to represent indigent defendants. If a state chooses to delegate its right to counsel responsibilities to its counties and judges, the state must guarantee not only that those local governments and local officials are capable of providing effective representation but also that they are in fact doing so.

The state legislature enacted the Texas Fair Defense Act in 2002, creating what is today the Texas Indigent Defense Commission (TIDC). TIDC disseminates limited state funding through grants to counties, but TIDC does not provide direct representation to indigent defendants and it does not have the power to force counties or judges to comply with any law, rule, standard, or policy relating to the provision of indigent defense services. Even if TIDC did have the authority to enforce the State of Texas' Sixth and Fourteenth Amendment right to counsel obligations, TIDC has extremely limited ability to do so. TIDC operates with just 11 full-time equivalent employees who are responsible for ensuring that each and every person facing the potential loss of liberty has an effective lawyer at every critical stage of a criminal prosecution in each of Texas' well over 900 trial courts spread across 254 counties.

In the absence of state oversight, this report explains right to counsel services as provided to adults at the trial level in Armstrong County and Potter County (Amarillo). The Sixth Amendment Center (6AC), a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders, conducted this assessment under a grant of the U.S. Department of Justice, Bureau of Justice Assistance, as detailed in the chapter 1 introduction (pages 5-22). The State of Texas' responsibilities to indigent defendants and the manner in which it has delegated those responsibilities to counties and trial court judges are explained in chapter 2 (pages 23-51). Texas' inability to make informed policy decisions because of a dearth of relevant data is discussed in chapter 3 (pages 52-67).

The balance of the report consists of the assessment, findings, and recommendations. chapter 4 (pages 68-80) describes the unique challenges faced by rural Armstrong County in providing lawyers to the indigent accused. Chapter 5 explains the system established by the judges of Armstrong and Potter counties to select, train, and supervise the private attorneys who are appointed to represent indigent defendants in criminal cases (pages 81-98).

The 6AC finds that a significant number of indigent defendants who face the possibility of incarceration in Armstrong County and Potter County are denied the right to counsel at critical stages of criminal cases. As explained in chapter 6 (pages 99-124), this unconstitutional practice is particularly egregious in Potter County misdemeanors, where sheriff's office personnel, county attorney's office personnel, and county court at law judges exert direct, overt pressure on indigent defendants to forego exercise of their constitutional right to counsel. More than 74% of all misdemeanor defendants in Potter County are estimated to be *pro se* (not having a lawyer).

Misdemeanors matter. For most people, our nation's misdemeanor courts are the place of initial contact with our criminal justice systems. Much of a citizenry's confidence in the courts as a whole – their faith in the state's ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as severe. Going to jail for even a few days may result in a person losing professional licenses, being excluded from public housing and student loan eligibility, or even being deported. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers' expense.

The actual denial of counsel is not the only systemic deficiency identified during the assessment. As the U.S. Supreme Court explains in *United States v. Cronin*, deficiencies in indigent defense systems can make any lawyer – even the best attorney – perform in a non-adversarial way. Hallmarks of a structurally sound indigent defense system under *Cronin* include the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel – what the U.S. Supreme Court calls a constructive denial of counsel.

Chapter 7 (pages 125-143) shows how even those indigent defendants who do receive counsel in the early stages of a felony and misdemeanor cases oftentimes have an attorney in name only. For example, attorneys appointed in both Armstrong and Potter counties widely acknowledge – and there is near universal agreement by judges, prosecutors, jailers, and community leaders – that they do not visit their in-custody

clients in jail. Likewise, many attorneys do not meet with out of custody clients either. Instead, most appointed attorneys meet with the defendants they are appointed to represent, both in-custody and out of custody, only at the courthouse before or after scheduled court proceedings.

According to judges in Armstrong and Potter counties, court appointed lawyers “never” use investigators in misdemeanor cases and rarely do so in felony cases. One lawyer who has been on the court appointed counsel list for 10 years says he has used an investigator in only four cases. A different lawyer says she has “never” used an investigator in her 10 years on the Potter County list. As the table on page 139 indicates, in five years Armstrong County appointed attorneys have only used \$350 worth of investigative services and \$0 expert assistance in the defense of their indigent clients. Over five years, appointed attorneys have only used \$429 in investigative services and \$1,400 in expert assistance in misdemeanor cases in Potter County.

Constructive denial of counsel in Armstrong and Potter counties is rooted in insufficient resources and low attorney compensation, as explained in chapter 8 (pages 144-154). Court-appointed attorneys in Armstrong and Potter counties are paid a single flat fee, in most cases, without regard to how much or how little time the attorney must devote to that case (e.g., \$400-\$500 for a misdemeanor or state jail felony). Although the indigent defense plan in Armstrong and Potter counties calls for “reasonable” attorney compensation as determined by the “time and effort expended” by the attorney, payment of a presumptive flat fee per case does just the opposite. Because attorneys are presumptively paid exactly the same amount no matter how few or how many hours they devote to a defendant’s case, it is in the attorney’s own financial interest to spend as little time as possible on each individual defendant’s case.

Flat fee compensation for appointed attorneys means that the public defense lawyers can increase their earnings only by taking as many cases as possible and disposing of them as quickly as possible. Chapter 9 (pages 155-171) explains how the judges in Armstrong County and Potter County do not monitor the number of appointments they make to each lawyer, making it impossible to know whether any given attorney’s caseload or workload is excessive. This chapter also explains how best to measure whether a public defense attorney’s workload is excessive, applying the non-binding Texas caseload guidelines created at the direction of the Texas legislature. The workloads of court-appointed lawyers in Armstrong and Potter counties are particularly troubling in comparison to these standards. For example:

- One attorney had 231 felony cases paid in FY2018, or a felony caseload nearing twice that of the 128 felony cases allowed by the summarized Texas guidelines. But this same attorney was also paid in 18 juvenile cases and 52 misdemeanors. The lawyer reported devoting 91% of his total practice time across all counties to indigent adult criminal defense appointments and 2% to indigent juvenile defense appointments. Thus, this attorney carried an indigent

defense workload at 230% of the Texas caseload guidelines after adjusting for his reported practice time.

- A different attorney was paid for a caseload at 152% of the Texas caseload guidelines, but he spent only 18% of his time on that caseload. After accounting for the limited time available to his indigent clients, this attorney's adjusted workload was 844% of the Texas caseload guidelines. Stated differently, this lawyer was carrying an indigent defense caseload in FY2018 that required *more than eight* full time attorneys under the Texas caseload guidelines.

Indigent defendants are routinely required to repay Armstrong County and Potter County for the cost of the Sixth Amendment representation provided to them, despite having been determined by a court to be indigent and without any hearing (or evidence) to show that they have the financial ability to pay these costs, in violation of state law.

Chapter 10 (pages 172-192) summarizes the 6AC's findings and makes a series of recommendations. It is difficult, at best, to make local-based recommendations for the improvement of indigent defense services in Armstrong County and Potter County, because so many of the problems described throughout this report are inherently tied to decisions made by the state.

For example, under Texas law, the judges of each county are responsible for establishing "countywide procedures" for the provision of counsel to indigent defendants at trial and appeal for crimes punishable by incarceration. Thus, in implementing Texas' statutory scheme, nearly every aspect of the provision of trial level right to counsel services is subject to undue judicial interference, because judges in Texas are required to:

- set the qualifications and training required of attorneys to be appointed in indigent defense cases;
- select the attorneys eligible to be appointed in criminal cases, and individual judges directly choose the attorney who is appointed in each specific case;
- provide supervision over cases if supervision occurs;
- determine whether and when attorneys are removed from eligibility to be appointed in criminal cases;
- set the compensation paid to attorneys appointed to represent indigent defendants through funds allocated by the counties; and
- determine whether experts and investigators are allowed in each specific criminal case and set the compensation paid to experts and investigators in the criminal cases of indigent defendants.

Statutorily required judicial interference opens the door for judges to unduly influence appointed attorneys. To be clear, it is not that the Armstrong and Potter County judges who oversee indigent defense services are malicious or consciously trying

to undermine the basic constitutional right to counsel. Instead, the judges there are working within a legal and financial construct created by the State of Texas that presents them with a series of impossible choices.

Still, when public defense attorneys are provided through a system overseen by judges, the appointed attorneys inevitably bring into their calculations what they think they need to do to stay in favor with the judge who appoints and pays them, rather than solely advocating for the stated interests of the defendant they are appointed to represent, as is their ethical and constitutional duty. Public defense attorneys in judicially controlled systems understand that their personal compensation along with the resources needed to properly defend an indigent person require the approval of the judges. So, it does not take a judge to say overtly, for example: “Do not file motions in my courtroom.” Fearing the loss of income that can result from displeasing the judge, appointed attorneys often take on more cases than they can ethically handle, triage their available working hours in favor of some clients but to the detriment of others, and agree to work without resources necessary to effective representation, thereby failing to meet the parameters of ethical representation owed to all clients – all issues that have been documented throughout this report. Yet, policymakers in Armstrong and Potter counties do not have the authority to change state law.

Because the 6AC was asked by local policymakers and criminal justice stakeholders in Armstrong and Potter counties to study their system, and because we cannot assume that the problems in two counties are representative of indigent defense issues in Texas’ other 252 counties, we make recommendations only at the local level.

RECOMMENDATION A: Local Armstrong County and Potter County policymakers and stakeholders should advocate for the State of Texas to form a legislative committee to study how best to fulfill the state’s Sixth and Fourteenth Amendment responsibilities to ensure that each indigent defendant who faces the possibility of incarceration in a criminal case receives effective assistance of counsel.

RECOMMENDATION B: The trial court judges responsible under Texas law for providing and overseeing the Sixth Amendment right to counsel of indigent defendants in Armstrong County and Potter County should establish a non-partisan independent commission to oversee all aspects of indigent defense services, in order to eliminate the dangers of possible undue interference by the judicial and political branches of county government. The county commissioners courts responsible under Texas law for funding the right to counsel should fund the operations of the commission and the implementation of the methods and standards it adopts.

RECOMMENDATION C: To ensure that all waivers of the right to counsel are made knowingly, voluntarily, and intelligently, all Armstrong County and Potter County criminal justice system participants should follow state law and prohibit all communication between prosecutors & prosecution staff and unrepresented defendants,

unless and until defendants have been informed of their right to appointed counsel by a judicial officer, a judge has conducted the legally required colloquy, and a defendant has executed a written waiver of the right to counsel. Law enforcement personnel should be prohibited from giving defendants advice about their right to counsel choices.

RECOMMENDATION D: All judges in Armstrong County and in Potter County should cease ordering indigent defendants to pay the costs of their indigent defense representation unless and until defendants have been proven through evidence at a contradictory hearing to have the present ability to pay.

SUMMARY OF FINDINGS

FINDING 1: The State of Texas delegates to local policymakers and judges most of its constitutional obligation to ensure the provision of effective right to counsel services in Armstrong County and Potter County, while failing to ensure that each and every indigent defendant has an attorney with the time, training, and resources to provide effective representation at every critical stage of a criminal case.

FINDING 2: The system for providing the Sixth Amendment right to counsel to indigent defendants in Armstrong County and Potter County lacks independence from both the judicial and the political branches of county government. Every aspect of providing representation to indigent defendants who face incarceration in the counties is subject to undue interference by the trial court judges.

FINDING 3: Because the judges in Armstrong and Potter counties recognize the inherent conflict in supervising defense attorneys, there is no oversight of the attorneys appointed to represent indigent defendants in the two counties. The qualifications, training, and supervision required for appointed private attorneys in Armstrong County and Potter County are inadequate to ensure effective assistance of counsel to indigent defendants, and a significant number of those attorneys accept more appointed cases across Texas' trial courts than national standards and the *Texas Guidelines for Indigent Defense Caseloads* say is acceptable.

FINDING 4: The Armstrong County and Potter County plan for compensating appointed private attorneys and for providing necessary expenses in indigent defendants' cases – including investigators and experts – creates conflicts of interest between the financial interests of the appointed attorneys and the case related interests of the indigent defendants whom they are appointed to represent.

FINDING 5: The combination of a lack of independence, no supervision, and inadequate attorney compensation means some indigent defendants who face the possibility of incarceration in Armstrong County and Potter County are constructively

denied the right to counsel at critical stages of criminal cases, because the appointed private attorneys do not provide effective assistance of counsel.

FINDING 6: Some indigent defendants who face the possibility of incarceration in Armstrong County and Potter County are denied the right to counsel at critical stages of criminal cases. This problem is particularly egregious in Potter County where misdemeanor defendants face direct, overt pressure to forego exercise of their constitutional right to counsel and where more than 74% of all misdemeanor defendants in Potter County are estimated to be *pro se*.

FINDING 7: Indigent defendants are routinely required to repay Armstrong County and Potter County for the cost of the Sixth Amendment representation provided to them, despite having been determined by a court to be indigent and without any hearing (or evidence) to show that they have the financial ability to pay these costs.

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NOVEMBER 2019

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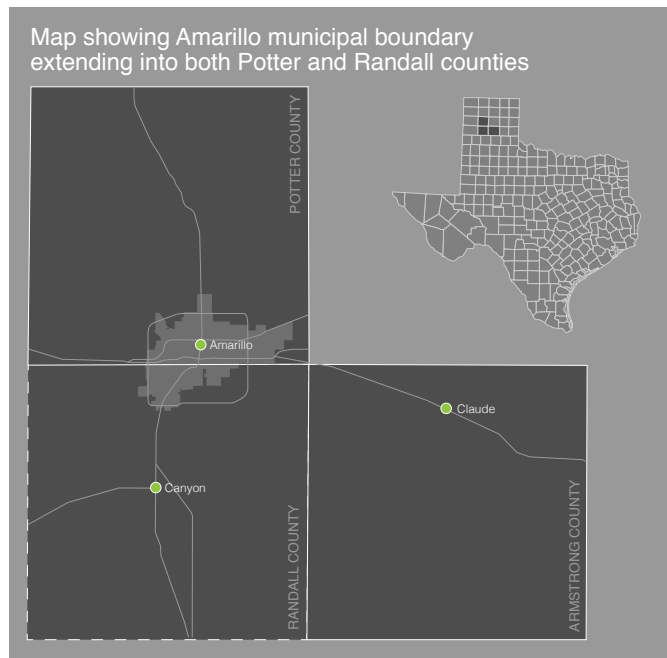
CHAPTER 1

INTRODUCTION

Texas has 254 counties, and the criminal justice system in each of those counties operates differently from all others. This report explains the right to counsel that is mandated by the Sixth Amendment, as it is provided to adults at the trial level in Armstrong County and Potter County.¹

Aside from proximity, the two counties have few apparent similarities. Potter County and Armstrong County sit catty-cornered to each other in the panhandle region of Texas, with Potter County to the northwest and Armstrong County to the southeast. The two counties are similar in geographic size at roughly 910 square miles each, but dramatically different in population – in 2018, Armstrong County’s population was estimated at only 1,892,² while Potter County’s population was estimated to be more than 63 times larger at 119,648.³ According to local policymakers, Armstrong County is largely agricultural and “very poor.”

Meanwhile, the county seat of Potter County is Amarillo, which is the 14th largest city in Texas (and second in size in the panhandle only to Lubbock).⁴



¹ This evaluation does not address the right to counsel for children in delinquency proceedings, nor does it address the right to counsel on direct appeal or as provided by Texas in later stages of criminal cases.

² See *Quickfacts: Armstrong County, Texas*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/armstrongcountytexas/PST045218>.

³ See *Quickfacts: Potter County, Texas*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/pottercountytexas/PST045217>.

⁴ See *Quickfacts: Amarillo, Texas*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/amarillocitytexas/POP060210>. The population of the City of Amarillo is larger than that of Potter County, because part of Amarillo extends into neighboring Randall County.

When it comes to providing the right to counsel, though, decisions made by the Texas legislature about the structure of the courts, prosecutorial authority, law enforcement authority, and county responsibilities all combine to inextricably intertwine the two counties. Adding a further complication, neighboring Randall County has overlapping criminal justice, fiscal, and demographic interests but declined to participate in this evaluation.

The right to counsel in Texas

The Sixth Amendment to the United States Constitution states that in “all criminal prosecutions” the accused shall enjoy the right, among others, to “have the Assistance of Counsel for his defence.”⁵ In 1963 in *Gideon v. Wainwright*, the U.S. Supreme Court declared it an “obvious truth” that anyone accused of a crime who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.”⁶ As the U.S. Supreme Court has noted, “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”⁷

Since *Gideon v. Wainwright*, the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him in all federal and state courts whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney.⁸ In subsequent cases, the U.S. Supreme Court found that the Sixth Amendment requires the appointment of counsel for the poor threatened with jail time not only in felonies but also in misdemeanors,⁹ misdemeanors with suspended sentences,¹⁰ direct appeals,¹¹ and appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance.¹² Children in delinquency proceedings, no less than

⁵ U.S. CONST. amend. VI.

⁶ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁷ *United States v. Cronin*, 466 U.S. 648, 654 (1984). *See also* *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁹ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹⁰ *Alabama v. Shelton*, 505 U.S. 654 (2002).

¹¹ *Douglas v. California*, 372 U.S. 353 (1963).

¹² *Halbert v. Michigan*, 545 U.S. 605 (2005).

adults in criminal courts, are entitled to appointed counsel when facing the loss of liberty.¹³ Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card.¹⁴ The attorney must also be effective,¹⁵ subjecting the prosecution's case to "the crucible of meaningful adversarial testing."¹⁶

All criminal offenses in Texas, whether enacted by state statute or by county or municipal ordinance, are either a felony or a misdemeanor.¹⁷ All felonies are punishable by incarceration,¹⁸ and they are classified from most serious to least serious as capital, first degree, second degree, third degree, and state jail felonies.¹⁹ Misdemeanors can be punished by jail or by fine or by both,²⁰ and they are classified from most serious to least serious as Class A, Class B, or Class C.²¹ Class C

¹³ *In re Gault*, 387 U.S. 1 (1967). "[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 27-28. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.' . . . [T]he assistance of counsel is essential for purposes of waiver proceedings, [and] we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juveniles reaches the age of 21." *Id.* at 36.

¹⁴ As the Court noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), "[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command."

¹⁵ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). To be effective, an attorney must be reasonably competent, providing to the particular defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those "reflected in American Bar Association standards and the like." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

¹⁶ *United States v. Cronin*, 466 U.S. 648, 656 (1984).

¹⁷ TEX. PENAL CODE ANN. § 12.02 (West 2017); *see* TEX. PENAL CODE ANN. § 1.03 (West 2017).

¹⁸ TEX. PENAL CODE ANN. § 1.07(a)(23) (West 2017).

¹⁹ TEX. PENAL CODE ANN. § 12.04 (West 2017). The range of penalty for each type of felony is:

- Capital felony – life without parole or death penalty. TEX. PENAL CODE ANN. § 12.31 (West 2017).
- First degree felony – 5 to 99 years in the Texas Department of Criminal Justice, and a fine up to \$10,000. TEX. PENAL CODE ANN. § 12.32 (West 2017).
- Second degree felony – 2 to 20 years in the Texas Department of Criminal Justice, and a fine up to \$10,000. TEX. PENAL CODE ANN. § 12.33 (West 2017).
- Third degree felony – 2 to 10 years in the Texas Department of Criminal Justice, and a fine up to \$10,000. TEX. PENAL CODE ANN. § 12.34 (West 2017).
- State jail felony – 180 days to 2 years in a state jail, and a fine up to \$10,000. TEX. PENAL CODE ANN. § 12.35 (West 2017).

²⁰ TEX. PENAL CODE ANN. § 1.07(a)(31) (West 2017).

²¹ TEX. PENAL CODE ANN. § 12.03 (West 2017). The range of penalty for each type of misdemeanor is:

- Class A – up to one year in jail and/or a fine up to \$4,000. TEX. PENAL CODE ANN. § 12.21 (West 2017).

When a person is an adult in Texas

A person 17 years old or older at the time of alleged commission of an offense will be charged and tried in the criminal courts.^a The juvenile court has exclusive original jurisdiction over a person under 17 years old at the time of alleged commission of an offense, but:

- A child of 14 or 15 at commission of certain felony offenses can be waived to adult court after a transfer hearing;^b
- Once a child turns 18, they can be waived to adult court after a transfer hearing for certain felony offenses committed at the ages of 10 to 17 if adjudication has not yet occurred in the juvenile court;^c and
- A child alleged to have committed any felony, who was previously transferred to adult criminal court and convicted, is mandatorily transferred to adult court.^d

^a See TEX. FAM. CODE ANN. § 51.02(2) (West 2017).

^b TEX. FAM. CODE ANN. § 54.02(a) (West 2017).

^c TEX. FAM. CODE ANN. § 54.02(j) (West 2017).

^d TEX. FAM. CODE ANN. § 54.02(m) (West 2017).

misdemeanors are the only criminal offenses in Texas that do not carry the possibility of incarceration, and Texas law expressly provides that “[c]onviction of a Class C misdemeanor does not impose any legal disability or disadvantage.”²²

The Texas Constitution guarantees that, “[i]n all criminal prosecutions the accused . . . shall have the right of being heard by himself or counsel, or both . . .,” and this same promise appears word for word in Texas’ statutes.²³ Under Texas law, an indigent defendant is entitled to appointed counsel “in any adversary judicial proceeding that may result in punishment by confinement,”²⁴ including on direct appeal.²⁵ Children in delinquency proceedings, whose parents are indigent, are guaranteed the right to counsel at certain stages of the proceedings.²⁶

“States are free to provide greater protections in their criminal justice system than the Federal Constitution requires,”²⁷ but they cannot provide less. Though the federal

- Class B – up to 180 days in jail and/or a fine up to \$2,000. TEX. PENAL CODE ANN. § 12.22 (West 2017).
- Class C – fine up to \$500. TEX. PENAL CODE ANN. § 12.23 (West 2017).

²² TEX. PENAL CODE ANN. § 12.03(c) (West 2017).

²³ TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (West 2017).

²⁴ TEX. CODE CRIM. PROC. ANN. art. 1.051(c) (West 2017).

²⁵ TEX. CODE CRIM. PROC. ANN. art. 1.051(d)(1)-(2) (West 2017).

²⁶ TEX. FAM. CODE ANN. §§ 51.10, 51.101 (West 2017).

²⁷ *California v. Ramos*, 463 U.S. 992, 1014 (1983). See, e.g., *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *O’Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (“The states may, as the United States Supreme Court has often recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are ‘independently responsible for safeguarding the rights of their citizens.’”); *South Dakota v.*

Constitution does not require it,²⁸ Texas statutorily guarantees appointed counsel to indigent defendants in some later stages of a criminal case: in any criminal case where the Court of Criminal Appeals grants discretionary review;²⁹ in state habeas corpus proceedings in death penalty cases;³⁰ and in state habeas corpus proceedings in non-capital cases where the state alleges wrongful conviction.³¹

The structure of the criminal justice systems in Armstrong and Potter counties

Criminal justice is often referred to metaphorically as a three-legged stool, relying on judges, prosecutors, and defense attorneys in equal measure. Each leg of the stool has different responsibilities in the criminal justice system, but the structures and policy decisions of each affect the others. The right to counsel is carried out in the courts, and in Texas the courts that exercise trial level jurisdiction over jailable criminal offenses vary from county to county. Decisions about the number and type of criminal cases in a county's courts are made by law enforcement officers as they make arrests and by prosecutors as they institute cases. Like with the courts, the allocation of prosecutorial and law enforcement responsibility differs from one county to the next in Texas. The systems in Texas for providing the right to counsel to indigent defendants who face possible loss of liberty are layered on top of the courts and prosecution.

Because the indigent defense system is enmeshed with the other components of the criminal justice system, this section explains how some courts and prosecutors in Armstrong and Potter counties overlap while others are separate, and it introduces the resulting similarities and differences that present challenges to the counties in providing the right to counsel. The following graphic provides a simplified at-a-glance visualization of Armstrong and Potter counties' criminal justice frameworks for the courts, prosecution, and law enforcement, including those felony courts that overlap with neighboring Randall County. Courts shown in gray could exercise criminal jurisdiction, but do not presently do so, as will be explained.

Opperman, 247 N.W.2d 673, 674 (S.D. 1976) ("There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution.").

²⁸ Murray v. Giarratano, 492 U.S. 1, 10 (1989); Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987); Ross v. Moffitt, 417 U.S. 600, 610-12, 617-18 (1974).

²⁹ TEX. CODE CRIM. PROC. ANN. art. 1.051(d)(2) (West 2017).

³⁰ TEX. CODE CRIM. PROC. ANN. art. 11.071 (West 2017).

³¹ TEX. CODE CRIM. PROC. ANN. art. 11.074 (West 2017).

Table: Criminal justice frameworks at-a-glance

	ARMSTRONG COUNTY county seat Claude	POTTER COUNTY county seat Amarillo	RANDALL COUNTY county seat Canyon
FELONIES			
District courts	47th District Court	47th District Court	47th District Court
		108th District Court	
		181st District Court	181st District Court
		251st District Court	251st District Court
		320th District Court	
Prosecutor	District Attorney for the 47th Judicial District	District Attorney for the 47th Judicial District	Randall County Criminal District Attorney
JAILABLE MISDEMEANORS			
County level courts	Armstrong County Court	Potter County Court	
		Potter County Court at Law No. 1	
		Potter County Court at Law No. 2	
Prosecutor	District Attorney for the 47th Judicial District	Potter County Attorney	
MAGISTRATION IN ALL CRIMINAL CASES			
Magistrate	Armstrong County Justice of the Peace	any of the four Potter County Justices of the Peace: Precinct 1 Precinct 2 Precinct 3 Precinct 4	
PRIMARY LAW ENFORCEMENT AGENCIES			
Sheriff	Armstrong County Sheriff	Potter County Sheriff	Randall County Sheriff
Municipal police dept.		City of Amarillo Police Department	City of Amarillo Police Department

Felony cases

District courts. The district courts have criminal jurisdiction over all felonies, misdemeanors involving official misconduct, and misdemeanors punishable by jail where the defendant pled not guilty in a county court that has a non-lawyer judge.³² A

³² TEX. CODE CRIM. PROC. ANN. arts. 4.01, 4.05, 4.17 (West 2017). A district court has exclusive jurisdiction of every type of case and proceeding for which jurisdiction is not given to some other type of court. TEX. CONST. art. V, § 8; TEX. GOV'T CODE ANN. § 24.007(a) (West 2017). The district courts

single judge is elected to each district court, which can cover a single county or span multiple counties.³³ The district courts established by statute as having jurisdiction in Armstrong and Potter counties are:

Potter, Randall, and Armstrong counties:	47th District Court ³⁴
Potter and Randall counties:	181st District Court ³⁵
	251st District Court ³⁶
Potter County only:	108th District Court ³⁷
	320th District Court ³⁸

Where there is more than one district court in a given county, the district judges can adopt rules about allotment of cases and distribution of work.³⁹ By agreement between the judges, effective January 1, 2019, the 47th District Court does not handle any felony cases in Randall County, and the 181st District Court does not handle any felony cases in Potter County.⁴⁰ As a result, although there are five district courts authorized to hear felony cases in Armstrong and Potter counties, only four of them do so:

Potter and Armstrong counties' felonies:	47th District Court
Potter County felonies:	108th District Court
	251st District Court
	320th District Court

All felony cases in Armstrong County are heard in the 47th District Court. Felony cases in Potter County are divided among the 47th, 108th, 251st, and 320th District Courts.⁴¹

District attorney. There is not necessarily a district attorney in every Texas county.⁴² Where they exist, district attorneys are elected to a four-year term by the voters of

have supervisory control over the commissioners courts of the counties within their judicial district. TEX. CONST. art. V, § 8; TEX. GOV'T CODE ANN. § 24.020 (West 2017).

³³ TEX. CONST. art. V, § 7; TEX. GOV'T CODE ANN. §§ 24.101 through 24.6008 (West 2017).

³⁴ TEX. GOV'T CODE ANN. § 24.149 (West 2017).

³⁵ TEX. GOV'T CODE ANN. § 24.361 (West 2017).

³⁶ TEX. GOV'T CODE ANN. § 24.428 (West 2017).

³⁷ TEX. GOV'T CODE ANN. § 24.210 (West 2017).

³⁸ TEX. GOV'T CODE ANN. § 24.628 (West 2017); *see* TEX. GOV'T CODE ANN. §§ 24.601, 24.607 (West 2017).

³⁹ TEX. GOV'T CODE ANN. § 24.024 (West 2017). District court judges are also allowed to exchange districts and hold court for each other. TEX. CONST. art. V, § 11.

⁴⁰ Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019).

⁴¹ Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019).

⁴² *See generally* TEX. GOV'T CODE ANN. §§ 43.002 through 43.184 (West 2017).

Fine-only non-jailable misdemeanors

Class C misdemeanors are the only criminal offenses in Texas that do not carry the possibility of incarceration, and Texas law expressly provides that “[c]onviction of a Class C misdemeanor does not impose any legal disability or disadvantage.”^a Because indigent people charged with a Class C misdemeanor or a violation of a municipal ordinance do not face the possibility of loss of liberty upon conviction, they are not entitled under Texas law to have counsel appointed to represent them.^b

Municipal courts have exclusive original jurisdiction over all violations of their municipal ordinances (which are by definition fine-only), and they have original jurisdiction over fine-only (Class C) misdemeanors occurring within the territorial limits of the municipality.^c Justice of the peace courts have original jurisdiction over fine-only (Class C) misdemeanors occurring within the justice’s precinct but outside the geographic boundaries of a municipal court.^d

Though justice of the peace courts and municipal courts do not have jurisdiction over jailable misdemeanors, they can nonetheless send a misdemeanant to jail in two situations: they can punish a defendant for contempt of court by up to three days in jail;^e and they can confine a defendant in jail for failure to pay fines & fees.^f

The county level courts have appellate jurisdiction over the Class C misdemeanors tried in the justice courts and municipal courts.^g The appeal to a county level court is de novo from all of the justice courts and from the non-record municipal courts.^h An appeal to a county level court from a municipal court of record “may” be solely based on the record.ⁱ

^a TEX. PENAL CODE ANN. § 12.03(c) (West 2017).

^b See TEX. CODE CRIM. PROC. ANN. art. 1.051(c) (West 2017).

^c TEX. CODE CRIM. PROC. ANN. art. 4.14 (West 2017); TEX. GOV’T CODE ANN. § 29.003 (West 2017).

^d TEX. CONST. art. V, § 19; TEX. CODE CRIM. PROC. ANN. arts. 4.11, 4.12 (West 2017).

^e TEX. GOV’T CODE ANN. § 21.002(a) - (c) (West 2017).

^f TEX. CODE CRIM. PROC. ANN. art. 45.046 (West 2017).

^g TEX. CODE CRIM. PROC. ANN. art. 4.08 (West 2017); TEX. GOV’T CODE ANN. § 25.0003 (West 2017) (statutory county court); TEX. GOV’T CODE ANN. § 26.046 (West 2017) (county court).

^h TEX. CODE CRIM. PROC. ANN. art. 44.17 (West 2017).

ⁱ TEX. GOV’T CODE ANN. § 30.00014(b) (West 2017); see TEX. CODE CRIM. PROC. ANN. art. 44.17 (West 2017).

the judicial district.⁴³ They must be a licensed attorney and cannot have a private law practice.⁴⁴

The voters in Armstrong and Potter counties jointly elect a district attorney (referred to as the district attorney for the 47th judicial district) who prosecutes all criminal cases in the district courts in both counties.⁴⁵

Misdemeanor cases

County level courts. The county level courts have criminal jurisdiction over all jailable misdemeanors (Class A and Class B) occurring anywhere within the county (other than for misdemeanors involving official misconduct).⁴⁶ There are two kinds of county level courts: a county court, or a statutory county court. “County court” means the court that the Texas Constitution creates in each of the state’s 254 counties, sometimes referred to as the constitutional county court.⁴⁷ “Statutory county court” means a county level court created and awarded jurisdiction, on a county-by-county basis, by the legislature through statutes.⁴⁸

⁴³ TEX. CONST. art. V, § 21; see generally TEX. GOV’T CODE ANN. §§ 43.101 through 43.184 (West 2017).

⁴⁴ TEX. GOV’T CODE ANN. §§ 41.001, 46.005(a) (West 2017).

⁴⁵ TEX. CODE CRIM. PROC. ANN. art. 2.01 (West 2017); TEX. GOV’T CODE ANN. § 43.127 (West 2017).

⁴⁶ TEX. CODE CRIM. PROC. ANN. arts. 4.05, 4.07 (West 2017); see TEX. GOV’T CODE ANN. § 25.0003 (West 2017) (statutory county court); TEX. GOV’T CODE ANN. § 26.045 (West 2017) (county court); TEX. PENAL CODE ANN. §§ 12.03, 12.21, 12.22, 12.23 (West 2017).

⁴⁷ TEX. GOV’T CODE ANN. § 21.009(1) (West 2017). See TEX. CONST. art. V, § 15.

The judge in the constitutional county court is the “county judge,” elected by the voters of the county to a four-year term. TEX. CONST. art. V, §§ 15, 16, 30; TEX. GOV’T CODE ANN. § 21.009(3) (West 2017). County judges are not required to be attorneys, but must “be well informed in the law of the State.” TEX. CONST. art. V, § 15. Those county judges (in courts that have any original or appellate jurisdiction) who are licensed attorneys cannot “appear and practice as an attorney” in any county or justice court. TEX. GOV’T CODE ANN. § 82.064(b) (West 2017).

In addition to judicial functions, the county judge has county government administrative functions. TEX. CONST. art. V, § 16. The county judge is a member and presiding officer of the county’s commissioner court, which is responsible for the executive & legislative power over all county business. TEX. CONST. art. V, § 18(b); TEX. LOCAL GOV’T CODE ANN. § 81.001 (West 2017). In most Texas counties, by default the county judge is the budget officer of the county. TEX. LOCAL GOV’T CODE ANN. §§ 111.001, 111.002 (West 2017); but see TEX. LOCAL GOV’T CODE ANN. §§ 111.061, 111.062 (West 2017).

⁴⁸ TEX. GOV’T CODE ANN. § 21.009(2) (West 2017). See TEX. CONST. art. V, § 1; TEX. GOV’T CODE ANN. §§ 25.0041 through 25.2702 (West 2017).

In those counties where the Texas legislature has created statutory county courts, the judges are elected by the voters of the county to a four-year term. TEX. CONST. art. V, § 30. All statutory county court judges must be at least 25 years old, licensed attorneys for at least four years, and live in the county for the two years preceding office. TEX. GOV’T CODE ANN. § 25.0014 (West 2017). They are full-time judges and may not practice law. TEX. GOV’T CODE ANN. § 25.00161 (West 2017).

In Potter County, effective January 1, 2019, criminal cases are no longer allotted to the constitutional county court.⁴⁹ Potter County has two statutory county courts⁵⁰ – Potter County Court at Law No. 1 and Potter County Court at Law No. 2 – and all jailable misdemeanors occurring in the county are randomly allocated between the two courts.⁵¹

In Armstrong County, the constitutional county court is the only county level court and hears all jailable misdemeanors. The Texas legislature has not established any statutory county courts in Armstrong County.

Misdemeanor prosecution. In Armstrong County, the district attorney for the 47th judicial district is responsible for misdemeanor prosecutions in the county court. This is the same district attorney who is responsible for felony prosecutions in the district courts of Armstrong and Potter counties.

In Potter County, however, misdemeanor prosecutions in the county courts at law are the province of the county attorney. There is not necessarily a county attorney in every Texas county.⁵² Where they exist, county attorneys must be a licensed attorney and are elected to a four-year term by the voters of the county.⁵³ In some counties, the county attorney does not have responsibility for any criminal prosecutions.⁵⁴ In some counties, the county attorney performs the duties of a district attorney, including prosecution of felonies in district court, and is considered to be a “state prosecutor” who cannot have a private law practice.⁵⁵ In still other counties, including Potter County, the county attorney does not handle felony cases and is considered to be a “county prosecutor.”⁵⁶

⁴⁹ Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). The Office of Court Administration reports (explained in chapter 3) show the Potter County Court disposed of the following numbers of criminal cases in the five years (Sept. to Aug.) preceding this evaluation: 293 in FY2014; 249 in FY2015; 255 in FY2016; 186 in FY2017; and 340 in FY2018. *See Annual Statistical Supplement, Annual Statistical Reports, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/annual-statistical-reports/> (select year, then Constitutional County Courts, Summary by County).

⁵⁰ TEX. GOV'T CODE ANN. §§ 25.1901, 25.1902 (West 2017).

⁵¹ Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019).

⁵² *See generally* TEX. GOV'T CODE ANN. §§ 45.001 through 45.341 (West 2017).

⁵³ TEX. CONST. art. V, § 21; TEX. GOV'T CODE ANN. § 41.001 (West 2017).

⁵⁴ *See generally* TEX. GOV'T CODE ANN. §§ 45.001 through 45.341 (West 2017).

⁵⁵ *See, e.g.*, TEX. CONST. art. V, § 21; TEX. GOV'T CODE ANN. §§ 46.001(3), 46.002(3), 46.005 (West 2017). *See generally* TEX. GOV'T CODE ANN. §§ 45.001 through 45.341 (West 2017).

⁵⁶ *See, e.g.*, TEX. CONST. art. V, § 21; TEX. GOV'T CODE ANN. § 46.001(1) (West 2017). *See generally* TEX. GOV'T CODE ANN. §§ 45.001 through 45.341 (West 2017).

Appellate courts in Texas

Texas' court structure for appeals and discretionary review in criminal cases and for the administration of criminal cases generally is unique from that found in most states across the country. Although the ambit of this evaluation does not include the right to counsel on direct appeal or as provided by Texas in later stages of criminal cases, the appellate courts have responsibilities that bear on the trial level provision of the right to counsel.

Texas has two courts of last resort: the Supreme Court for civil cases, and the Court of Criminal Appeals for criminal cases. The Texas Supreme Court is responsible for the administration of all of the courts in the state,^a and it is the court of last resort in all but criminal law matters.^b The Texas Court of Criminal Appeals is the court of last resort in criminal cases,^c except it hears death sentence cases on direct appeal,^d and it has rule making authority for "rules of evidence in the trials of criminal cases" and for "posttrial, appellate, and review procedure in criminal cases."^e

Texas is divided into 14 court of appeals districts, with a court of appeals sitting in each district.^f Armstrong and Potter counties, along with 44 other counties, are within the Seventh Court of Appeals District that sits in Amarillo.^g The courts of appeals decide direct appeals of all criminal cases from the district courts and county level courts located within their district, except death penalty cases, and except criminal cases that were originally appealed to a county court (from a justice or municipal court) and in which the penalty imposed does not exceed \$100.^h

^a TEX. CONST. art. V, § 31(a); TEX. GOV'T CODE ANN. §§ 22.003(b), 74.021, 74.024 (West 2017).

^b TEX. CONST. art. V, §§ 3, 3-b; TEX. GOV'T CODE ANN. § 22.001 (West 2017).

^c TEX. CONST. art. V, §§ 1, 5; TEX. CODE CRIM. PROC. ANN. arts. 4.01, 4.04 (West 2017).

^d TEX. CONST. art. V, § 5(b); TEX. CODE CRIM. PROC. ANN. art. 4.04 (West 2017).

^e TEX. CONST. art. V, § 31(c); TEX. GOV'T CODE ANN. §§ 22.108, 22.109 (West 2017).

^f TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. § 22.201 (West 2017).

^g TEX. GOV'T CODE ANN. §§ 22.201(h), 22.208 (West 2017).

^h TEX. CONST. art. V, § 6(a); TEX. CODE CRIM. PROC. ANN. art. 4.03 (West 2017).

Magistrations

In Texas, a criminal defendant's first appearance in court before a judicial officer is referred to as "magistrations."⁵⁷ The proceedings at magistrations (described more fully in chapter 6) are the same whether a defendant is under arrest or appears in response to a citation and whether the defendant is accused of a misdemeanor or a felony.⁵⁸ In brief, the judicial officer: informs the defendant of the accusation and any supporting affidavits; informs the defendant of constitutional rights including the right to appointed counsel if indigent; and admits the defendant to bail "if allowed by law."⁵⁹

The judicial officer who presides over that court appearance is referred to as the "magistrate," but in the abstract the word "magistrate" can literally refer to almost every justice or judge of every type of court in Texas.⁶⁰ Within each county, the district court judges (for felony prosecutions) and the county level court judges (forailable misdemeanor prosecutions) decide which judicial officers will serve as magistrate over magistrations proceedings.⁶¹

In both Armstrong and Potter counties, the judges have designated justices of the peace⁶² to fulfill this function.⁶³ All four of the justices of the peace in Potter County have been designated by the district court judges and by the county level court judges to serve as the magistrates who preside over magistrations proceedings in all criminal cases in the county. Armstrong County's sole justice of the peace has been designated by the district court judge and by the county judge to serve as the magistrate who presides over magistrations proceedings in all criminal cases in the county.

⁵⁷ TEX. CODE CRIM. PROC. ANN. art. 15.17 (West 2017).

⁵⁸ TEX. CODE CRIM. PROC. ANN. art. 15.17 (West 2017).

⁵⁹ TEX. CODE CRIM. PROC. ANN. art. 15.17(a), (g) (West 2017).

⁶⁰ TEX. CODE CRIM. PROC. ANN. art. 2.09 (West 2017).

⁶¹ See TEX. CODE CRIM. PROC. ANN. art. 2.09 (West 2017) (listing judges who are magistrates); TEX. CODE CRIM. PROC. ANN. art. 4.05 (West 2017) (providing district courts have jurisdiction over felonies); TEX. CODE CRIM. PROC. ANN. art. 4.07 (West 2017) (providing statutory county courts have jurisdiction overailable misdemeanors); TEX. GOV'T CODE ANN. §§ 25.003, 26.045 (West 2017) (providing county courts & statutory county courts have jurisdiction overailable misdemeanors).

⁶² Every Texas county is required by the state's constitution to establish some number of between one and eight justice of the peace precincts; the number of precincts required is based on the county's population. TEX. CONST. art. V, § 18(a). In most counties one justice of the peace is elected to a four-year term by the voters of each precinct, though a small number of counties may elect two or more justices of the peace for a given precinct. *Id.* Counties with a federal census population of 150,000 or more may have more than one justice of the peace in each precinct. *Id.* A county with a federal census population less than 150,000 "shall" elect two justices of the peace "in any precinct in which there may be a city of 18,000 or more inhabitants." *Id.* There are no qualifications established for a person to be elected justice of the peace, but they can be removed from office for "incompetency" if they fail to complete an 80-hour course about justice of the peace duties during their first year in office and then a 20-hour course each year thereafter. TEX. GOV'T CODE ANN. § 27.005 (West 2017).

⁶³ There is not, to anyone's recollection, a written order by the judges designating the justices of the peace to preside over magistrations proceedings. It has been done this way in Armstrong County and Potter County for a long time.

This evaluation

In 2017, criminal justice stakeholders in Potter County had concerns about their indigent defense system and wanted to identify the root causes of their problems and determine how they could be resolved effectively and efficiently. As explained in the preceding section, Potter County shares some courts, prosecutorial resources, and law enforcement resources with the adjacent counties of Randall and Armstrong, and so the three counties created a select committee of stakeholders representing each of the counties to work together toward improving their indigent defense systems.

The three-county select committee first met on December 13, 2017, to begin determining whether changes were needed to the three counties' shared system for providing indigent defense services. On February 22, 2018, the staff of the Texas Indigent Defense Commission presented a draft report and explanation about the feasibility and costs of forming a regional public defender office to serve all three counties or, alternatively, for Potter County to establish its own county public defender office. That same day, the select committee received a presentation explaining the managed assigned counsel program in use in Lubbock County, Texas. On March 21, 2018, the select committee learned about the methods used in North Carolina to evaluate indigent defense systems there, with a view toward more adequately measuring the "quality and cost-effectiveness" of indigent defense services.

In May 2018, Potter County sought funding from the U.S. Department of Justice's Bureau of Justice Assistance (BJA) for an evaluation of the county's adult criminal trial level indigent defense services, which it shares in part with Armstrong and Randall counties. On October 2, 2018, the BJA approved a grant for the Sixth Amendment Center⁶⁴ to conduct this evaluation, under BJA's FY 17 National Initiatives Adjudication: Training and Technical Assistance to Support Protection of Constitutional Rights Under the Sixth Amendment (DOJ Office of Justice Programs Grant Award # 2017-YA-BX-K003). The Defender Initiative of the Seattle University School of Law⁶⁵ administers the U.S. Department of Justice grant. Armstrong County chose to participate in the evaluation along with Potter County, while Randall County decided against participating in the evaluation.

⁶⁴ The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing the potential loss of liberty in a criminal or delinquency proceeding. *See* SIXTH AMENDMENT CENTER, <https://sixthamendment.org/>.

⁶⁵ The Defender Initiative is part of the Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education. *See Fred T. Korematsu Center for Law and Equality*, SEATTLE UNIVERSITY SCHOOL OF LAW, <https://law.seattleu.edu/centers-and-institutes/korematsu-center>.

Methodology. The Sixth Amendment Center independently and objectively evaluates indigent defense systems using Sixth Amendment case law and national standards for right to counsel services as the uniform baseline measure for providing attorneys to indigent people, along with the requirements of local and federal laws. The Sixth Amendment Center's evaluation of the court appointed counsel system in Potter and Armstrong counties has been carried out through three basic components.

Data collection and analysis. Information about how a jurisdiction provides right to counsel services exists in a variety of forms, from statistical information to policies and procedures. The Sixth Amendment Center obtained and analyzed relevant hard copy and electronic information at both the local and state levels.

Court observations. Right to counsel services in any jurisdiction involve interactions among at least three critical processes: (1) the process individual defendants experience as their cases advance from arrest or summons through disposition; (2) the process the defense attorney experiences while representing each defendant at the various stages of a case; and (3) the substantive laws and procedural rules that govern the justice system in which indigent representation is provided. The Sixth Amendment Center conducted courtroom observations in the district and county level courts to clarify these processes, travelling to Armstrong County and Potter County for two site visits in April and May 2019.

Interviews. No individual component of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, the Sixth Amendment Center conducted interviews orally and in writing with a broad cross-section of stakeholders before, during, and after site visits to Armstrong and Potter counties, including judges, prosecutors, defense attorneys, court personnel, law enforcement, and county officials and their staff.

Assessment criteria. The criteria used to assess the effectiveness of indigent defense systems and the attorneys who work within them come primarily from two U.S. Supreme Court cases that were decided on the same day: *United States v. Cronin*⁶⁶ and *Strickland v. Washington*.⁶⁷ *Strickland* is used after a criminal case is final to determine retrospectively whether the lawyer provided ineffective assistance of counsel, applying the two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case. *Cronin* explains that, if certain systemic factors are present (or necessary factors are absent) at the outset of a case, then a court should presume that ineffective assistance of counsel will occur.

Hallmarks of a structurally sound indigent defense system under *Cronin* include the early appointment of qualified and trained attorneys, who have sufficient time and

⁶⁶ 466 U.S. 648 (1984).

⁶⁷ 466 U.S. 668 (1984).

Understanding *Cronic* through the American Bar Association's *ABA Ten Principles of a Public Defense Delivery System*

Adopted by the ABA House of Delegates in 2002, the *ABA Ten Principles*^a are self-described as constituting “the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” The *Ten Principles* include the markers of a *Cronic* analysis: independence of the defense function (Principle 1); effective representation by counsel at all critical stages (Principles 3 and 7); sufficiency of time and resources (Principles 4, 5, and 8); and qualifications, supervision, and training of attorneys (Principles 6, 9, and 10).

^aAMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002), *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

resources to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel.

Technology troubles in Potter County's criminal justice system

During the course of this evaluation, Potter County had a comprehensive technology failure that negatively impacted the entirety of the criminal justice system. Similar technology failures can happen to any county or state.⁶⁸ The Potter County experience illustrates at least three aspects of technology in criminal justice systems that all governments must consider and address: the reliance on technology to operate systems and to collect and maintain data to oversee systems; the need for technology integration and redundancy; and the budgetary implications.⁶⁹

As was widely reported in the news,⁷⁰ all of Potter

County's computer systems were shut down by a computer virus on Friday, April 19, 2019. It took some time for county officials to learn the cause of the problem and even longer still to fully comprehend the extent of the loss.

The Potter County IT department and specialists from the Texas Department of Information Resources, with help from the Federal Bureau of Investigation (FBI), determined that three viruses had been planted on the county's servers perhaps as early as January 2019. The viruses were launched onto every county server and every computer connected to those servers on April 19 inadvertently by a county employee. This was a ransomware attack in which encrypted viruses rendered useless all of the county's electronic files. Potter County officials refused to pay the ransom, fearing the hackers would not restore the files even if the ransom were paid.⁷¹

Potter County officials estimated that the full cost to the county resulting from the attack would be, at least, in the hundreds of thousands of dollars, if not more. In terms of how long it would take to fully restore operations and recover lost data, one county official was quoted as saying, "This is going to be a long term conversation. . . . You'll still hear about this a year from now."⁷²

Immediate effects on ability of the criminal justice system to function. On the day of the attack, Potter County's 550 employees were rendered unable to perform their job duties without their computer systems, so the county offices were closed and employees sent home.⁷³ "[T]he Potter County Clerk, Sheriff's Office, and District Clerk [were] hit the hardest."⁷⁴

⁶⁸ See, e.g., RECORDED FUTURE, *EARLY FINDINGS: REVIEW OF STATE AND LOCAL GOVERNMENT RANSOMWARE ATTACKS* (May 10, 2019) (listing and explaining 169 ransomware attacks on state and local government agencies between Nov. 2013 and April 2019).

⁶⁹ See, e.g., TEXAS A&M UNIVERSITY PUBLIC POLICY RESEARCH INSTITUTE, *INDIGENT DEFENSE SPENDING AND COST CONTAINMENT IN TEXAS* 39-41 (Dec. 2018) (discussing cost and time effectiveness of using "automated information technology systems" for "monitoring, evaluation, and improvement" of indigent defense services specifically and the Texas criminal justice system broadly); TEXAS JUDICIAL COUNCIL COMMITTEE REPORT AND RECOMMENDATIONS, *DATA* (June 2018) (making recommendations about collection of court activity and case level statistical data); DELOITTE INSIGHTS AND NATIONAL ASSOC. OF STATE CHIEF INFORMATION OFFICERS, *2018 DELOITTE-NASCIO CYBERSECURITY STUDY* (2018); UNIVERSITY OF MARYLAND BALTIMORE COUNTY AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOC., *CYBERSECURITY 2016 SURVEY – SUMMARY REPORT OF SURVEY RESULTS* (2016).

⁷⁰ Douglas Clark, *Potter County, Texas, Pays Overtime Following IT Virus*, AMARILLO GLOBE-NEWS (June 25, 2019); Douglas Clark, *IT Recovery Ongoing in Potter County, Texas, Following Virus*, AMARILLO GLOBE-NEWS (May 29, 2019); Maria Serrano, *Potter County Judge Nancy Tanner speaks about county's malware*, ABC 7 NEWS (May 13, 2019); Kaley Green, *Potter County Judge: Computer system infected with ransomware*, KAMR LOCAL 4 NEWS (May 7, 2019); Douglas Clark, *County working through viral attack*, AMARILLO GLOBE-NEWS (May 1, 2019); Kaitlin Johnson, *FBI investigating virus attack on Potter County computer systems*, KFDD NEWSCHANNEL 10 (Apr. 25, 2019); Nicolette Perrone, *Potter County officials' computers remain dark after viruses hit*, KFDD NEWSCHANNEL 10 (Apr. 22, 2019); Lisa Carr, *Computer virus shuts down Potter County email system*, AMARILLO GLOBE-NEWS (Apr. 21, 2019).

⁷¹ Maria Serrano, *Potter County Judge Nancy Tanner speaks about county's malware*, ABC 7 NEWS (May 13, 2019).

⁷² Douglas Clark, *IT Recovery Ongoing in Potter County, Texas, Following Virus*, AMARILLO GLOBE-NEWS (May 29, 2019).

⁷³ Lisa Carr, *Computer virus shuts down Potter County email system*, AMARILLO GLOBE-NEWS (Apr. 21, 2019).

⁷⁴ Kaley Green, *Potter County Judge: Computer system infected with ransomware*, KAMR LOCAL 4 NEWS (May 7, 2019).

Every aspect of the sheriff's office was affected, "from calls to bookings in the jail."⁷⁵ Security doors at the jail could not be operated through computers, so jail officers had to escort detainees through the corridors, manually locking and unlocking each door, creating a significant drain on sheriff's department staff. The jail completed booking information for people who were arrested using pen and paper,⁷⁶ but prosecutors, defense attorneys, judges, and court personnel did not have any way to access that information. Documents and information could not be distributed between county officials and employees, because the email system was entirely disabled.⁷⁷

Magistration proceedings for newly arrested people had always been conducted by videoconferencing, but that was not possible because the videoconferencing system was inoperable. Instead, a justice of the peace and necessary court personnel had to go to the jail every day to conduct magistration in person. The judges' court coordinators could not use the normal process to appoint counsel to represent indigent defendants, because doing so required access to the sheriff's department software, the district courts' software, and the county courts at law's software, none of which were functional.

For a time, the county attorney could not commence prosecutions or conduct arraignments,⁷⁸ because the prosecutors had no way to access criminal histories, probable cause affidavits, or charging documents. Arraignments for defendants in custody had traditionally been conducted by videoconferencing between the jail and the courthouse. Even once prosecutors were able to conduct arraignments, they along with their staff and judges and court personnel had to go in person to the jail to arraign in-custody defendants, creating more headaches and time demands for

the jail officials. The county courts at law had to postpone cases that were scheduled for trial.⁷⁹

By May 1, 2019, the county had largely figured out how to operate the criminal justice system, with 75% of the county's servers and 90% of the computers back in service.⁸⁰ Even so, the county still had to address the problem of all of the legal and court records that had been lost.

Recreating lost data and the cost of doing so. Every county department had to set about recreating its lost files.⁸¹ The courts, prosecution, and sheriff's office in Potter County use at least four different computer software systems that do not share data or interact with each other,⁸² so the records for each system had to be independently recovered.

The sheriff's office had to manually enter into computers all of the jail booking information for people arrested during the time the systems were

⁷⁹ Nicolette Perrone, *Potter County officials' computers remain dark after viruses hit*, KFDA NEWSCHANNEL 10 (Apr. 22, 2019).

⁸⁰ Douglas Clark, *County working through viral attack*, AMARILLO GLOBE-NEWS (May 1, 2019).

⁸¹ Kaitlin Johnson, *FBI investigating virus attack on Potter County computer systems*, KFDA NEWSCHANNEL 10 (Apr. 25, 2019).

⁸² The county courts at law use the "attorney program" developed by the Potter County IT department, which is basically a Microsoft Access database for which the IT department wrote macros and created data entry forms. The district clerk and district courts use the Odyssey Case Manager system. *Odyssey Case Manager*, TYLER TECHNOLOGIES, <https://www.tylertech.com/products/odyssey/case-manager>. The district attorney's office uses the TechShare system. *TechShare*, TEXAS CONFERENCE OF URBAN COUNTIES, <https://cuc.org/technology/>. The sheriff's office uses the Spillman Flex system. *Spillman Flex*, MOTOROLA SOLUTIONS, <https://www.spillman.com>.

According to officials in the Potter County criminal justice system, they have been interested for years in having a single software system that can be used by all components of the criminal justice system. With modifications to satisfy the unique work requirements of each component, a single integrated system would reduce duplicative data entry, reduce conflicting data, and generally promote overall efficiency and accuracy. As recently as February 2019, TechShare administrators visited the county to determine whether they could modify the existing system used by prosecutors to integrate the courts' processes.

⁷⁵ Lisa Carr, *Computer virus shuts down Potter County email system*, AMARILLO GLOBE-NEWS (Apr. 21, 2019).

⁷⁶ Lisa Carr, *Computer virus shuts down Potter County email system*, AMARILLO GLOBE-NEWS (Apr. 21, 2019).

⁷⁷ Lisa Carr, *Computer virus shuts down Potter County email system*, AMARILLO GLOBE-NEWS (Apr. 21, 2019).

⁷⁸ Nicolette Perrone, *Potter County officials' computers remain dark after viruses hit*, KFDA NEWSCHANNEL 10 (Apr. 22, 2019).

inoperable. Then it had to recreate all past booking and detention records, and it had to manually recreate approximately 10,000 warrants.⁸³

Because the county courts at law used data systems programmed internally by Potter County IT, it is unclear whether the courts' lost records can ever be recovered. The district courts had not been storing backups of their data, and they also had not been paying their software vendor to back-up their files. Potter County paid the vendor \$31,000 to buy back over a year's worth of the district court records.⁸⁴

In addition to the loss of records resulting from the ransomware attack, in mid-May 2019, the district attorney's office discovered that at least two months of prosecution files and discovery information were missing from its software system. The software vendor anticipated it would take upwards of six weeks for it to recover that lost data for the district attorney's office.

As of June 25, 2019, more than two months after the ransomware attack occurred, Potter County had already approved \$127,800 in overtime pay for county employees' work in recovering and reentering data into the computer systems.⁸⁵ The county "did not have an established timetable for the county IT system returning to normalcy, but categorized the restoration process as remaining in the recovery phase."⁸⁶ By September 8, 2019, a county official reports that the Potter County Sheriff's department was "continuing to input missing data that could not be recovered," but all other core components of the county's technology systems were "back up and running."

⁸³ Douglas Clark, *Potter County, Texas, Pays Overtime Following IT Virus*, AMARILLO GLOBE-NEWS (June 25, 2019).

⁸⁴ Maria Serrano, *Potter County Judge Nancy Tanner speaks about county's malware*, ABC 7 NEWS (May 13, 2019).

⁸⁵ Douglas Clark, *Potter County, Texas, Pays Overtime Following IT Virus*, AMARILLO GLOBE-NEWS (June 25, 2019).

⁸⁶ Douglas Clark, *Potter County, Texas, Pays Overtime Following IT Virus*, AMARILLO GLOBE-NEWS (June 25, 2019).

CHAPTER 2

THE STATE OF TEXAS' RESPONSIBILITY TO INDIGENT DEFENDANTS – THE TEXAS FAIR DEFENSE ACT

In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright* that providing and protecting the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is a constitutional obligation of the states under the due process clause of the Fourteenth Amendment.⁸⁷ Every state in the nation must have a system for providing an attorney to represent each indigent defendant who is charged with a crime and faces the possible loss of their liberty. Because the “responsibility to provide defense services rests with the state,” national standards as summarized in the *ABA Ten Principles of a Public Defense Delivery System* unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”⁸⁸

A brief history of providing the right to counsel in Texas

For 39 years after the *Gideon v. Wainwright* decision, the State of Texas delegated to counties and judges all responsibility for providing and paying for the Sixth Amendment right to counsel of indigent defendants.⁸⁹ As late as the turn of the 21st century, little was actually known about how many Texas defendants required appointed counsel, how judges and counties went about providing attorneys to

⁸⁷ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . [T]he Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, . . . we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

⁸⁸ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 2 cmt. (2002).

⁸⁹ TEXAS INDIGENT DEFENSE COMMISSION, *FAIR DEFENSE LAW: A PRIMER FOR TEXAS LEGISLATORS AND STAFF*, 85TH LEGISLATIVE SESSION 2 (2017).

represent them, and the cost of doing so.⁹⁰ A series of reports released in 2000 laid the groundwork for changes to the provision of indigent defense services in Texas.

First, in September 2000, the State Bar of Texas' Committee on Legal Services to the Poor in Criminal Matters released its report on a three-part survey it conducted over four years, of criminal defense lawyers, prosecutors, and judges who had criminal jurisdiction, providing their "collective assessment of the status of indigent criminal defense in Texas."⁹¹ The report observed that each of the then 862 trial courts spread across Texas' 254 counties operated its own system of providing representation to indigent defendants⁹² and concluded that "[t]he system of representing indigents charged in criminal matters in Texas is in need of serious reform."⁹³

The State Bar committee offered six broad suggestions for "immediate consideration": make a meaningful state level commitment to improve indigent defense; adopt professional standards for the representation of indigent clients; develop accurate and efficient criteria to determine whether a person is indigent; provide adequate compensation and timely payments to appointed attorneys; guarantee necessary support services for the defense of indigent clients; and establish systematic data gathering and monitoring of all indigent defense services.⁹⁴

Second, in October 2000, the Texas Defender Service published a nine-chapter report on Texas' death penalty system.⁹⁵ Two full chapters were devoted to the provision of the right to counsel in capital cases at trial, on direct appeal, and in state habeas corpus

⁹⁰ TEXAS HOUSE OF REPRESENTATIVES HOUSE RESEARCH ORGANIZATION, *THE BEST DEFENSE: REPRESENTING INDIGENT CRIMINAL DEFENDANTS* 1-2 (Nov. 22, 1999).

⁹¹ STATE BAR OF TEXAS COMMITTEE ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, *MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS*, at 5 of 36 (Sept. 22, 2000).

⁹² STATE BAR OF TEXAS COMMITTEE ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, *MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS*, at 4 of 36 (Sept. 22, 2000).

⁹³ STATE BAR OF TEXAS COMMITTEE ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, *MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS*, at 22 of 36 (Sept. 22, 2000). Reflecting the views of judges, prosecutors, and defense attorneys, the report explained in conclusion:

By virtually every standard examined here, the current system of indigent legal representation ignores at least the spirit of *Gideon v. Wainwright*. In Texas, indigent criminal representation is, at times, politicized, ineffective, and provides a different standard of justice when compared to those who can afford their own attorneys. The appointment process unnecessarily and inappropriately considers personal and political relationships. Defense attorneys are frequently provided with neither proper financial incentives nor with sufficient resources to vigorously defend their clients. Most disturbingly, the current system appears to provide a lower standard of justice for the state's poor.

Id.

⁹⁴ STATE BAR OF TEXAS COMMITTEE ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, *MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS* 22-24 (Sept. 22, 2000).

⁹⁵ TEXAS DEFENDER SERVICE, *A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY* (Oct. 2000).

proceedings.⁹⁶ The report detailed a rogues' gallery of appointed attorneys in capital case trials who were underfunded, impaired, asleep during trial, or completely lacking in capital case experience.⁹⁷

The Texas Defender Service made five recommendations toward ensuring the provision of effective assistance of counsel in death penalty cases: establish a statewide capital public defender system; establish statewide statutory standards for capital trial counsel and prohibit appointing counsel who do not meet the standards; allocate state funding for the defense of capital cases; abolish the presumptive fee caps for capital habeas corpus attorneys and pay them reasonable compensation; and monitor the list of qualified capital habeas corpus attorneys and remove attorneys who provide deficient performance.⁹⁸

Finally, in December 2000, the Texas Appleseed Fair Defense Project released what it described as “the most comprehensive study ever conducted of county-level indigent defense practices in Texas.”⁹⁹ In explaining why it was necessary to conduct the study, the report said:

There is a widespread impression that Texas has one of the least fair and least efficient approaches to indigent defense in the nation. While many might contest this view, it is uncontested that the state of Texas does not conduct the kind of oversight, monitoring or systematic data collection

⁹⁶ TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, chs. 6-7 (Oct. 2000).

⁹⁷ TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 81-99 (Oct. 2000). The report observed:

To this day, Texas courts find lawyers for poor capital defendants primarily by tapping local criminal defense attorneys in private practice. Until 1995, courts were virtually unconstrained in these choices. A capital defendant's fate often turned on the preference of the judge who happened to be assigned to preside in his case. While some judges chose competent, well-respected lawyers, others appointed law school friends, campaign contributors, or lawyers who promised to free crowded dockets by trying cases quickly.

. . .

Since 1995, a State statute has required that lawyers in Texas capital cases be chosen from a list of “qualified” attorneys. However, no specific standards are set in the statute; that task is reserved for local committees, which also determines who is qualified for appointments. Because each county is entitled to create its own qualifications for capital defense attorneys, standards vary widely from county to county.

The lack of any centralized standards or controls makes it difficult to ensure indigent defense representation of consistently high quality. . . . Finally, the list of attorneys qualified for appointments is not even mandatory. The Court of Criminal Appeals has held that a judge may ignore the new law and appoint attorneys who are not on the list.

Id. at 79-80.

⁹⁸ TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, at A-43 to A-44 (Oct. 2000).

⁹⁹ TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS 1 (Dec. 2000).

which would enable anyone definitively to refute the claim. Indeed this very lack of information and self-assessment is itself a serious flaw in the Texas approach to indigent defense.

The problems caused by this information vacuum are compounded by the fact that Texas does not have a single “indigent defense system” in the sense of a coherent and consistent scheme built around unifying standards or principles. Rather legal representation for indigent criminal defendants in Texas is provided under independent systems that have evolved separately in each county, with little oversight or guidance from the state – and with no State funding. As a result there is an extraordinary variety of different indigent defense procedures utilized in the 254 different counties in Texas – including even differences among courts within the same county. With more than 800 criminal courts in the state, there are potentially 800+ different indigent defense “systems” in Texas. . . . Without comprehensive, systematic information available about all these different local procedures it is not possible for anyone to fully evaluate the operation of indigent defense in Texas.¹⁰⁰

Based on a special survey of Texas counties about their spending in 1999 on indigent defense representation, carried out for the first time by the Texas Office of Court Administration, Texas Appleseed reported:

It is estimated that Texas taxpayers pay between \$90 million and \$100 million dollars a year to support the current patchwork of indigent defense systems across the state. . . . The public has a right and need to know precisely how these monies are being spent, whether they are being spent efficiently and whether they are purchasing the kind of effective defense representation needed to ensure that the resulting outcome is both fair and accurate.¹⁰¹

After conducting “systematic information gathering and analysis in a representative sample of 23 Texas counties, containing 61% of the state’s population,”¹⁰² Texas Appleseed made 46 specific recommendations to improve indigent defense in Texas in capital cases, in non-capital felonies and misdemeanors, in juvenile court, and for defendants with mental illness.¹⁰³

¹⁰⁰ TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS 3 (Dec. 2000).

¹⁰¹ TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS 3-4 (Dec. 2000).

¹⁰² TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS 4 (Dec. 2000).

¹⁰³ TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: FINDINGS AND RECOMMENDATIONS ON INDIGENT DEFENSE PRACTICES IN TEXAS (Dec. 2000).

The Texas Fair Defense Act

Against this backdrop and beginning January 1, 2002, through the Texas Fair Defense Act,¹⁰⁴ the State of Texas took its first steps toward providing some state funding for and some state level oversight of the Sixth Amendment right to counsel.¹⁰⁵ That legislation did three things:¹⁰⁶

- it amended then-existing Texas laws about how and when counsel is appointed to represent an indigent defendant, the compensation of attorneys who provide that representation, and standards for the representation provided to indigent persons;
- it required judges with jurisdiction over criminal matters to adopt county-wide procedures for appointing attorneys to represent indigent defendants; and
- it created the Task Force on Indigent Defense, with authority to promulgate statewide policies and standards for indigent defense representation, to receive reporting from counties and monitor the counties' compliance with state standards and policies, and to make grants of appropriated state funds to aid counties in the provision of indigent defense services.

The Task Force on Indigent Defense (TFID) was established as a standing committee of the Texas Judicial Council,¹⁰⁷ and the budget for TFID was contained within the budget of the council.¹⁰⁸ The legislation created the Fair Defense Account to hold funds appropriated for the use of TFID in implementing the Texas Fair Defense Act provisions.¹⁰⁹ For FY2002 and FY2003, the legislature appropriated a total of \$19,829,000 to the Fair Defense Account.¹¹⁰ TFID was authorized five full-time positions for its first two years of operation, and of the total funding allocated, \$1,434,500 was appropriated for the establishment and administration of the TFID.¹¹¹ This left \$18,394,500 for TFID to award in grants to Texas' 254 counties over the first two years – an average of \$35,210 per county per year. While roughly nine million dollars for each of two years is a significant sum, it represented only about 10% of the

¹⁰⁴ Texas Fair Defense Act, ch. 906, 2001 Tex. Gen. Laws 1800 (eff. Jan. 1, 2002).

¹⁰⁵ Prior to the Texas Fair Defense Act, the only funding the state provided was for: most of the cost of representation provided to indigent prison inmates accused of committing crimes while an inmate, with counties paying the first \$250 of the costs in any conflict case; and up to \$25,000 per case for indigent defense representation in state habeas corpus proceedings in death penalty cases, with counties paying any additional costs in each case. TEXAS HOUSE OF REPRESENTATIVES HOUSE RESEARCH ORGANIZATION, *THE BEST DEFENSE: REPRESENTING INDIGENT CRIMINAL DEFENDANTS* 4 (Nov. 22, 1999).

¹⁰⁶ *Enrolled Bill Summary, Senate Bill 7*, TEXAS LEGISLATURE ONLINE, <https://capitol.texas.gov/BillLookup/BillSummary.aspx?LegSess=77R&Bill=SB7>.

¹⁰⁷ Texas Fair Defense Act, ch. 906, § 14, 2001 Tex. Gen. Laws 1800, 1812 (eff. Jan. 1, 2002).

¹⁰⁸ Texas Fair Defense Act, ch. 906, § 14, 2001 Tex. Gen. Laws 1800, 1813 (eff. Jan. 1, 2002).

¹⁰⁹ Texas Fair Defense Act, ch. 906, § 14, 2001 Tex. Gen. Laws 1800, 1813 (eff. Jan. 1, 2002).

¹¹⁰ General Appropriations Act, ch. 1515, art. IV-11, 2001 Tex. Gen. Laws 5411, 5928 (eff. Sept. 1, 2001). The appropriations were for \$7,889,000 in FY2002 and \$11,940,000 in FY2003. *Id.*

¹¹¹ General Appropriations Act, ch. 1515, art. IV-11, 2001 Tex. Gen. Laws 5411, 5931 (eff. Sept. 1, 2001). The appropriations were for \$649,000 in FY2002 and \$785,500 in FY2003. *Id.*

\$90 to \$100 million that Texas' counties were collectively estimated to have spent on indigent defense three years earlier in FY1999.¹¹²

In 2011, the legislature created the Texas Indigent Defense Commission (TIDC) as a permanent standing committee of the Texas Judicial Council,¹¹³ replacing the TFID. As of FY2019 (October 2018 through September 2019), TIDC is authorized 11 full-time positions to carry out all of its functions across 254 Texas counties.¹¹⁴

Texas' delegation of right to counsel responsibilities to counties and trial court judges

Seventeen years after implementation of the Texas Fair Defense Act, the judges who have criminal jurisdiction within each county are responsible for providing and overseeing attorneys to represent indigent criminal defendants,¹¹⁵ and the commissioners court in each county is responsible for funding nearly all of the cost of providing indigent defense¹¹⁶ (as well as for funding much of the costs of the courts and prosecution).

The role that the State of Texas exercises today, through the TIDC,¹¹⁷ in overseeing and funding the trial level right to counsel is extremely limited. The TIDC does not

¹¹² TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS 3-4 (Dec. 2000).

¹¹³ Acts 2011, ch. 984, § 1, 2011 Tex. Gen. Laws 2461, 2462 (eff. Sept. 1, 2011).

¹¹⁴ General Appropriations Act, ch. 605, art. IV-23, 2017 Tex. Gen. Laws 1648, 2203 (eff. Sept. 1, 2017).

¹¹⁵ TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2017).

¹¹⁶ TEX. CODE CRIM. PROC. ANN. art. 26.05(f) (West 2017).

¹¹⁷ The only other state-level agencies with responsibilities for representation provided to indigent people are:

- the State Counsel for Offenders, which operates under the Texas Board of Criminal Justice and is responsible for providing representation to indigent defendants who are “charged with an offense committed while in the custody of the correctional institutions division or a correctional facility authorized by Section 495.001, Government Code.” TEX. CODE CRIM. PROC. ANN. art. 26.051 (West 2017). *See State Counsel for Offenders*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, <https://www.tdcj.texas.gov/tbcj/scfo/index.html>; STATE BAR OF TEXAS LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS COMMITTEE, REVIEW OF THE OPERATIONS OF STATE COUNSEL FOR OFFENDERS (Dec. 8, 2017).
- the Office of Capital and Forensic Writs, which is responsible for: representing all death-sentenced defendants in state habeas corpus proceedings, without regard to whether they are indigent and presuming the office is not otherwise prohibited from providing the representation; and representing defendants in cases referred to it by the Texas Forensic Science Commission relating to forensic analysis conducted by crime laboratories. TEX. CODE CRIM. PROC. ANN. art. 11.071(2) (West 2017) (death penalty state habeas corpus); TEX. CODE CRIM. PROC. ANN. art. 38.01(4)(h) (West 2017) (forensic analysis cases); TEX. GOV'T CODE ANN. § 78.054 (West 2017). *See OFFICE OF CAPITAL AND FORENSIC WRITS*, <http://www.ocfw.texas.gov>; NATIONAL ASSOC. FOR PUBLIC DEFENSE, ASSESSMENT OF THE TEXAS OFFICE OF CAPITAL AND FORENSIC WRITS (Apr. 30, 2018).

directly provide representation to indigent defendants. The TIDC also does not have the power to force counties or judges to comply with any law, rule, standard, or policy relating to the provision of indigent defense services; all TIDC can do is withhold state grant funds from counties for non-compliance with conditions of those grants.¹¹⁸

When a state chooses to delegate its right to counsel responsibilities to counties and locally elected governmental officials, the state must guarantee not only that those local governments and local officials are capable of providing adequate representation but also that they are in fact doing so.¹¹⁹

Oversight of the right to counsel

The U.S. Constitution holds the State of Texas responsible for providing and overseeing attorneys to effectively represent indigent defendants.¹²⁰

TIDC policies & standards and limited enforcement authority

The Texas legislature requires TIDC to “develop policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal, and in postconviction proceedings.”¹²¹ The authorizing statute includes a list of 12 separate types of substantive standards that the TIDC is expressly authorized to promulgate, along with a catchall provision for “other policies and standards for providing indigent defense services as determined by the commission to be appropriate.”¹²²

¹¹⁸ TEX. GOV'T CODE ANN. § 79.037(a)(3) (West 2017).

¹¹⁹ Cf. *Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “‘ultimate responsibility’ . . . remains at the state level.”); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); letter and white paper from American Civil Liberties Union Foundation et al to the Nevada Supreme Court, regarding *Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services* (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”), http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

¹²⁰ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

¹²¹ TEX. GOV'T CODE ANN. § 79.034 (West 2017).

¹²² TEX. GOV'T CODE ANN. § 79.034(a) (West 2017).

Despite this broad standard-making authority, the TIDC has adopted only three substantive standards: a requirement that a county's procedures for appointing counsel include a method for defendants to obtain and submit forms requesting appointment of counsel "at any time after the initiation of adversary judicial proceedings";¹²³ a minimum continuing legal education requirement;¹²⁴ and requirements for contract defender programs.¹²⁵ (These TIDC standards and their actual effect on indigent defense representation are explained in detail in the subsequent chapters where they have relevance.) As TIDC explains, "[i]n many policy areas related to indigent defense, the Commission has chosen to promulgate model policies, forms, and procedures rather than mandatory standards or rules."¹²⁶

*Judges' responsibility for providing attorneys to represent indigent defendants in criminal cases*¹²⁷

State law requires the judges who have jurisdiction over criminal cases in each county to adopt by local rule "countywide procedures" for providing counsel to indigent defendants at trial and appeal for crimes punishable by incarceration.¹²⁸ The TIDC refers to this as a county's "plan," and the TIDC provides model templates and forms that judges can follow if they so choose.¹²⁹

As explained in chapter 1, district court judges have jurisdiction over all felony cases, and some district court judges have felony jurisdiction in more than one county.¹³⁰ Meanwhile, county level court judges (constitutional county court and/or statutory county courts) have jurisdiction over jailable misdemeanor cases, but only within the county where the judge is elected.¹³¹ As a result, adopting and implementing countywide procedures can present challenges for the judges in many Texas counties.

The chart below shows the judges in Armstrong and Potter counties (and Randall County) who are responsible under state law for adopting the indigent defense

¹²³ TEX. ADMIN. CODE tit. 1, § 174.51 (2018).

¹²⁴ TEX. ADMIN. CODE tit. 1, §§ 174.1 through 174.4 (2017).

¹²⁵ TEX. ADMIN. CODE tit. 1, §§ 174.10 through 174.25 (2018).

¹²⁶ *Rules, Policies & Standards*, TEXAS INDIGENT DEFENSE COMMISSION, <http://www.tidc.texas.gov/policies-standards/rules/>.

¹²⁷ The provision of the Sixth Amendment right to counsel to children in juvenile delinquency proceedings is outside the scope of this evaluation. State law places responsibility for the provision of counsel to children on a juvenile board established in each county. TEX. FAM. CODE ANN. § 51.102 (West 2017); *see generally*, TEX. HUM. RES. CODE ANN. §§ 152.0001 through 152.2571 (West 2017).

¹²⁸ TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2017).

¹²⁹ *Model Forms & Procedure, Policies & Standards*, TEXAS INDIGENT DEFENSE COMMISSION, www.tidc.texas.gov/policies-standards/model-forms-procedures/.

¹³⁰ TEX. CONST. art. V, §§ 7, 8; TEX. CODE CRIM. PROC. ANN. arts. 4.01, 4.05, 4.17 (West 2017); TEX. GOV'T CODE ANN. §§ 24.007(a), 24.101 through 24.6008 (West 2017).

¹³¹ TEX. CODE CRIM. PROC. ANN. arts. 4.05, 4.07 (West 2017); *see* TEX. GOV'T CODE ANN. § 25.0003 (West 2017) (statutory county court); TEX. GOV'T CODE ANN. § 26.045 (West 2017) (county court); TEX. PENAL CODE ANN. §§ 12.03, 12.21, 12.22, 12.23 (West 2017).

procedures (the courts shown in gray have criminal jurisdiction, though they do not presently preside over criminal cases¹³²):

	ARMSTRONG COUNTY county seat Claude	POTTER COUNTY county seat Amarillo	RANDALL COUNTY county seat Canyon
FELONIES			
District courts	47th District Court	47th District Court	47th District Court
		108th District Court	
		181st District Court	181st District Court
		251st District Court	251st District Court
		320th District Court	
JAILABLE MISDEMEANORS			
County level courts	Armstrong County Court	Potter County Court	
		Potter County Court at Law No. 1	
		Potter County Court at Law No. 2	

There are only two judges in Armstrong County who have criminal jurisdiction – one district court judge and one county court judge – and these two judges are jointly responsible under Texas law for adopting the Armstrong County plan for the provision of counsel to the indigent in criminal cases.¹³³

There is a total of eight judges with criminal jurisdiction in Potter County – five district court judges and three county level court judges – and these eight judges are jointly responsible under Texas law for adopting the Potter County plan for the provision of counsel to the indigent in criminal cases.¹³⁴ Nonetheless, the Potter County Court judge does not participate in adopting the plan for the provision of indigent defense nor in any other aspect of the provision of indigent defense representation in Potter County.

As shown in the chart above, three district court judges including the judge in Armstrong County hold criminal jurisdiction in more than one county. Understandably,

¹³² By agreement between the judges, effective January 1, 2019, the 47th District Court does not handle any felony cases in Randall County, and the 181st District Court does not handle any felony cases in Potter and Armstrong counties. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). In Potter County, effective January 1, 2019, criminal cases are no longer allotted to the constitutional county court. *Id.*

¹³³ TEX. CONST. art. V, § 15 (establishing constitutional county court in every county); TEX. GOV'T CODE ANN. § 24.149 (West 2017) (establishing 47th District Court in Armstrong County).

¹³⁴ TEX. CONST. art. V, § 15 (establishing constitutional county court in every county); TEX. GOV'T CODE ANN. §§ 25.1901, 25.1902 (West 2017) (establishing county courts at law in Potter County); TEX. GOV'T CODE ANN. §§ 24.149, 24.210, 24.361, 24.428, 24.628 (West 2017) (establishing district courts in Potter County).

a district court judge who presides over felonies in more than one county would prefer to use the same procedures for appointing counsel in every county where that judge presides, rather than changing procedures as the judge moves from county to county. At least in part for this reason, in October of 2011, the judges of Armstrong, Potter, and Randall counties jointly adopted a single plan for all three counties to provide the right to counsel to indigent defendants in criminal cases.¹³⁵ The judges of each county could, if they so desired, adopt separate plans in each county.

County reporting and TIDC information gathering

County plans for providing indigent defense services. State law requires that, by November 1 of every odd-numbered year, the judges of each county must: provide to the TIDC a copy of all of the rules, forms, plans, proposals, and contracts that together make up the procedures used in the county to provide appointed counsel to indigent defendants; and notify TIDC of any revisions made to previously submitted information or verify that there have been no changes.¹³⁶ TIDC publishes on its website the plans adopted by all 254 counties.¹³⁷

As published on the TIDC website, the plan adopted by the criminal court judges to provide indigent defense services in Armstrong County and Potter County at the time of this evaluation is entitled “Armstrong, Potter and Randall District Court and County Court Plan.”¹³⁸ It contains eight sections:¹³⁹

- Preamble (dated Oct. 6, 2011);
- I. Prompt Magistration (dated Oct. 5, 2017);
- II. Indigence Determination Standards (dated Oct. 5, 2017);
- III. Minimum Attorney Qualifications (dated Oct. 5, 2017 and June 10, 2013);
- IV. Prompt Appointment of Counsel (dated Oct. 5, 2017);
- V. Attorney Selection Process (dated Oct. 5, 2017);
- VI. Fee and Expenses Payment Process (dated Oct. 5, 2017); and
- Plan Documents.

The published plan for Armstrong County and Potter County contains provisions that are no longer in effect today,¹⁴⁰ despite the judges’ duty to notify TIDC if they make

¹³⁵ Armstrong, Potter and Randall District Court and County Court Plan (adopted Oct. 6, 2011 and subsequently amended). The Potter County Court judge did not participate in adopting the plan.

¹³⁶ TEX. GOV’T CODE ANN. § 79.036(a)-(d) (West 2017).

¹³⁷ See *Current Indigent Defense Plan, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/IDPlanNarrative.aspx>.

¹³⁸ See Armstrong, Potter and Randall District Court and County Court Plan (adopted Oct. 6, 2011 and subsequently amended), <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=212>.

¹³⁹ The numbered sections of the plan correspond to what TIDC characterizes as “The six core requirements of the Fair Defense Act.” See TEX. ADMIN. CODE tit. 1, § 174.28(c) (2018).

¹⁴⁰ See Armstrong, Potter and Randall District Court and County Court Plan (adopted Oct. 6, 2011 and subsequently amended).

any changes.¹⁴¹ The plan says the Caprock Regional Public Defender Office attorneys (CRPD)¹⁴² are on the Armstrong County list for appointments in misdemeanors and (if approved by the district court judge) on the Armstrong County lists for appointments in non-capital felonies, and the plan states that CRPD attorneys “will be appointed as many times as necessary to achieve adequate workload for the CRPD without exceeding its available resources.”¹⁴³ It has been years since the Armstrong County judges chose to no longer participate in the Caprock Regional Public Defender program. The last year during which Armstrong County reported any cases as being handled by any public defender office was FY2014.¹⁴⁴

The published plan for Armstrong County and Potter County fails to contain other provisions used in the counties today,¹⁴⁵ despite the judges’ duty to notify TIDC if they make any changes.¹⁴⁶ The plan does not mention it, but Armstrong and Potter counties both participate in the Regional Public Defender Office for Capital Cases program (RPDO)¹⁴⁷ and have done so since FY2009.¹⁴⁸ Because both counties participate in

¹⁴¹ TEX. GOV’T CODE ANN. § 79.036(a)-(d) (West 2017).

¹⁴² The Caprock Regional Public Defender Office (CRPDO) was and is a law school criminal clinic operated by the Texas Tech University School of Law. *Caprock Regional Public Defender Office*, TEXAS TECH UNIVERSITY SCHOOL OF LAW, <http://www.depts.ttu.edu/law/clinics-and-externships/clinics/crpd/index.php>. Through the law school’s criminal clinic, a licensed attorney supervises qualified law students as they represent indigent defendants. *See* TEX. S.Ct. RULES AND REGULATIONS GOVERNING THE PARTICIPATION OF QUALIFIED LAW STUDENTS AND QUALIFIED UNLICENSED LAW SCHOOL GRADUATES IN THE TRIAL OF CASES IN TEXAS (promulgated pursuant to House Bill 424 of the 64th Legislature (Acts 1975, 64th Leg., ch. 56, p. 120, amending Acts 1971, 62nd Leg., ch. 706, p. 2336), for the purpose of governing the participation of qualified law students and qualified unlicensed law school graduates in the trial of cases in Texas).

CRPDO was established as a regional public defender office in 2011 through a TIDC discretionary grant awarded to Dickens County, and Dickens County “contracted with Texas Tech University School of Law to operate the [CRPDO] program.” TEXAS INDIGENT DEFENSE COMMISSION, FISCAL MONITORING REPORT, CAPROCK REGIONAL PUBLIC DEFENDER OFFICE, TEXAS TECH UNIVERSITY, DISCRETIONARY GRANT FISCAL REVIEW 4 (Mar. 27, 2018). Dickens County enters into interlocal agreements with other panhandle counties for those counties to participate in the CRPDO program. *Id.* CRPDO instructs potential clients that the program may represent them if they are “charged with a crime in . . . any rural county of West Texas.” *Caprock Regional Public Defender Office – Information for Clients*, TEXAS TECH UNIVERSITY SCHOOL OF LAW, <http://www.depts.ttu.edu/law/clinics-and-externships/clinics/crpd/clients.php>. The counties that participate in the CRPDO program can change from year to year.

¹⁴³ *See* Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ II.A.v., III.C., V.C., VI.D. (adopted Oct. 6, 2011 and subsequently amended).

¹⁴⁴ *See* *Armstrong County Expenditure Report Summary – Fiscal Year 2014, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION.

¹⁴⁵ *See* Armstrong, Potter and Randall District Court and County Court Plan (adopted Oct. 6, 2011 and subsequently amended).

¹⁴⁶ TEX. GOV’T CODE ANN. § 79.036(a)-(d) (West 2017).

¹⁴⁷ Interlocal Agreement (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas); Interlocal Agreement (Mar. 24, 2008) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Potter County, Texas).

¹⁴⁸ *See* *Armstrong County Expenditure Report Summary - Fiscal Year 2009, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION; *Potter County Expenditure Report Summary – Fiscal Year*

the RPDO program, if an indigent defendant is charged with capital murder in the county and the prosecutor seeks the death penalty (and assuming the RPDO does not have “a conflict of interest among defendants or a legal liability for [RPDO] to accept appointment”),¹⁴⁹ the RPDO provides a capital defense team of two attorneys, one investigator, and one mitigation specialist to represent that indigent defendant at trial at no additional cost to the county,¹⁵⁰ though the county must pay any other case related expenses of that defendant.¹⁵¹ The judges only use the existing provisions in the published plan to provide representation in a death penalty case at trial when the RPDO has a conflict.¹⁵²

The published plan for Armstrong County and Potter County also contains provisions that are different from those actually used in the counties today,¹⁵³ despite the judges’ duty to notify TIDC if they make any changes.¹⁵⁴ The published plan says the “appointing authority” in Potter County is: Judge Pamela Sirmon for misdemeanor cases in which no case has been filed in the trial court; Judge Doug Woodburn for felony cases in which no case has been filed in the trial court; and the trial court judge for all cases that have been “filed in the trial court.”¹⁵⁵ As actually implemented in Potter County, the appointing authority is: for misdemeanor cases both filed and unfiled, the two Potter County county court at law judges rotate responsibility monthly; for felony cases prior to indictment, the five Potter County district court judges rotate responsibility on a quarterly basis, although the judge of the 47th District Court takes his own quarterly rotation as well as that of the judge of the 181st District Court; for felony cases following indictment, the district court to the which the case was allotted appoints counsel, with the 47th District Court appointing counsel for all cases allotted to both the 47th District Court and the 181st District Court.

A TIDC standard requires that the procedures adopted by a county’s judges “must provide a method to allow defendants to obtain the necessary forms for requesting appointment of counsel and to submit completed forms for requesting appointment of counsel at any time after the initiation of adversary judicial proceedings.”¹⁵⁶

2009, *Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION.

¹⁴⁹ See, e.g., Interlocal Agreement, ¶ 1.02 (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas).

¹⁵⁰ See, e.g., Interlocal Agreement, ¶¶ 1.03, 1.07 (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas).

¹⁵¹ See, e.g., Interlocal Agreement, ¶¶ 1.06, 1.08 (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas).

¹⁵² See Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ III.A.iv., III.B. (adopted Oct. 6, 2011 and subsequently amended).

¹⁵³ See Armstrong, Potter and Randall District Court and County Court Plan (adopted Oct. 6, 2011 and subsequently amended).

¹⁵⁴ TEX. GOV’T CODE ANN. § 79.036(a)-(d) (West 2017).

¹⁵⁵ Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.A.vi. (adopted Oct. 6, 2011 and subsequently amended).

¹⁵⁶ TEX. ADMIN. CODE tit. 1, § 174.51 (2017).

Defendants are given differing information about how to obtain the forms to request appointment of counsel outside of the magistration proceeding, depending on who is instructing them. The plan itself says: “If a defendant wishes to request counsel prior to the initial appearance, the forms required to request counsel may be obtained at the Texas Indigent Defense Commission’s website at <http://tidc.tamu.edu/public.net/> or from: the court coordinator of the court in which the case is pending,”¹⁵⁷ although it is unclear how any indigent defendant would know of the existence of the plan or where to find it in order to see this information. Potter County jail personnel advise felony defendants to contact the District Attorney’s office if they want to request appointed counsel after bonding out of jail, and otherwise the jail personnel say that bondsmen will tell a defendant how to request appointed counsel.

In the published plan for Armstrong County and Potter County, the “Plan Documents” section lists in alphabetical order 10 downloadable documents that, according to state law, are supposed to be those “used in the county to provide appointed counsel to indigent defendants.”¹⁵⁸ The plan documents in the published plan are not always those actually used in the counties today. For example, the magistrate’s warning form and the forms defendants must complete to request appointed counsel, as provided in the plan documents, are not consistently used in Armstrong County and Potter County.

¹⁵⁷ Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ IV.A.i.-ii., v. (adopted Oct. 6, 2011 and subsequently amended).

¹⁵⁸ See Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents (adopted Oct. 6, 2011 and subsequently amended); TEX. GOV’T CODE ANN. § 79.036(a)-(d) (West 2017). As shown in the plan, those “Plan Documents” are:

- Armstrong Potter Randall District and County Court 2011 Request for Court Appointed Attorney (Potter).doc (9/12/2011 3:11:05 PM)
- Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (10/23/2015 11:24:48 AM)
- Armstrong Potter Randall District and County Court Amended Attorney Compliance Certification for Criminal Appointments.docx (3/18/2014 5:24:36 PM)
- Armstrong Potter Randall District and County Court Appointment of Counsel for Out-of-County Warrant.pdf (10/4/2017 3:01:50 PM)
- Armstrong Potter Randall District and County Court Attorney Application for Appointment.docx (12/31/2013 10:54:09 AM)
- Armstrong Potter Randall District and County Court Attorney Compliance Certification for Criminal Appointments.docx (6/6/2013 1:09:42 PM)
- Armstrong Potter Randall District and County Court Attorney Fee Schedule.docx (10/4/2017 2:47:37 PM)
- Armstrong Potter Randall District and County Court Attorney Fee Voucher.doc (3/3/2017 3:52:40 PM)
- Armstrong Potter Randall District and County Court Magistrate’s Warning Form.docx (11/1/2013 11:51:34 AM)
- Armstrong Potter Randall District and County Court Waiver of Counsel.docx (11/1/2013 11:55:10 AM)

Id.

The “Magistrate’s Warning” form contained in the published plan documents is a two-page document with the first page in English and the second page in Spanish,¹⁵⁹ and the form is used during magistration.¹⁶⁰ Armstrong County uses this form at magistration *except* there is no page in Spanish and two small additions have been made at the bottom of the page for “bond info” and “mental health info;” a different form also exists in Armstrong County that is substantively different in content and is not provided in Spanish, although it is unclear by whom this form may be used. Potter County uses this form at magistration (at least by the one justice of the peace who conducts all weekday magistrations) *except* there is no page in Spanish and a second page has been added with blanks to provide bond and bond conditions information for up to six charges.

The published plan documents contain two different versions¹⁶¹ of the form defendants are required to complete to request appointment of counsel.¹⁶²

- The “Financial Information for Request for Court Appointed Attorney”¹⁶³ is used at Potter County in-custody magistration where it is completed in electronic form into the Potter County Sheriff’s Office computers with jail personnel assisting defendants, but it is not used at Potter County misdemeanor arraignments, and it is unclear whether it is used at Potter County felony arraignments.
- The “Affidavit of Indigence”¹⁶⁴ is used at Potter County misdemeanor arraignments where it is completed in paper form with Potter County Attorney personnel assisting defendants, but it is not used at Potter County magistration, and it is unclear whether it is used at Potter County felony arraignments. This form is used in some, but not all, situations in Armstrong County; while a

¹⁵⁹ “Magistrate’s Warning,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Magistrate’s Warning Form.docx (adopted Oct. 6, 2011 and subsequently amended).

¹⁶⁰ See Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.v.-vi., viii. (adopted Oct. 6, 2011 and subsequently amended).

¹⁶¹ One version is “Financial Information for Request for Court Appointed Attorney,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court 2011 Request for Court Appointed Attorney (Potter).doc (adopted Oct. 6, 2011 and subsequently amended). The second version is “Affidavit of Indigence,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (adopted Oct. 6, 2011 and subsequently amended).

¹⁶² See Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.ii.5., I.B.vi., viii., x., II.C.ii., IV.A.v. (adopted Oct. 6, 2011 and subsequently amended).

¹⁶³ “Financial Information for Request for Court Appointed Attorney,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court 2011 Request for Court Appointed Attorney (Potter).doc (adopted Oct. 6, 2011 and subsequently amended).

¹⁶⁴ “Affidavit of Indigence,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (adopted Oct. 6, 2011 and subsequently amended).

slightly modified version, containing a section at the bottom for the judge to name the attorney who is appointed, is used in some situations in Armstrong County.

The waiver of the right to counsel form contained in the published plan documents is a one-page document containing seven simple sentences¹⁶⁵ that must be signed by a defendant who wants to waive the right to counsel, whether to enter a guilty plea or to self-represent at trial.¹⁶⁶ In Potter County, the judge of County Court at Law #2 (who presides over misdemeanors) has prepared, but as of June 2019 had not yet begun using, a two-page densely packed document entitled “Admonishments Regarding Self-Representation.”

The published plan documents contain two different fee schedules,¹⁶⁷ governing the compensation paid to appointed attorneys for representing indigent defendants.¹⁶⁸

- The “Indigent Defendant Fee Schedule, Effective: September 1, 2017,”¹⁶⁹ is believed by the Sixth Amendment Center to be the fee schedule actually being applied in Armstrong and Potter counties.
- The “Indigent Defense Attorney Fee Schedule January 1, 2017,” is the second page of the two-page “Attorney Fee Voucher” form included in the plan documents.¹⁷⁰

The two fee schedules differ in: their effective dates; the compensation for state jail felony pleas; and whether the compensation rate for pleas is based on the level of charge at time of indictment/information or on the level of punishment by virtue of enhancements.

¹⁶⁵ “Waiver of Right to Counsel,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents –Armstrong Potter Randall District and County Court Waiver of Counsel.docx (adopted Oct. 6, 2011 and subsequently amended).

¹⁶⁶ See Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.C. (adopted Oct. 6, 2011 and subsequently amended).

¹⁶⁷ One version is “Indigent Defendant Fee Schedule, Effective: September 1, 2017,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Attorney Fee Schedule.docx (adopted Oct. 6, 2011 and subsequently amended). The second version is “Indigent Defense Attorney Fee Schedule January 1, 2017,” which is the second page of the “Attorney Fee Voucher,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Attorney Fee Voucher.doc (adopted Oct. 6, 2011 and subsequently amended).

¹⁶⁸ See Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.A. (adopted Oct. 6, 2011 and subsequently amended).

¹⁶⁹ “Indigent Defendant Fee Schedule, Effective: September 1, 2017,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Attorney Fee Schedule.docx (adopted Oct. 6, 2011 and subsequently amended).

¹⁷⁰ “Attorney Fee Voucher,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Attorney Fee Voucher.doc (adopted Oct. 6, 2011 and subsequently amended).

Chapter 4 explains the unique challenges that Armstrong County faces in carrying out this plan. Chapters 5 through 9 of this report explain the details of the plan jointly adopted by the criminal court judges of Armstrong, Potter, and Randall counties and how that plan is actually implemented for the provision of the Sixth Amendment right to counsel to adults at the trial level in Armstrong and Potter counties.

County indigent defense cases and expenditures. State law requires every attorney appointed to represent any indigent defendant (adult and juvenile) to submit information, by October 15 of each year for the preceding year, to the county in which an appointment was received, “that describes the percentage of the attorney’s practice time that was dedicated to work based on appointments accepted in the county.”¹⁷¹ By November 1 of every year, state law then requires every county to submit to TIDC the information it received from each appointed attorney, along with the number of appointments made in that county to each attorney.¹⁷² State law also requires each county to report to the TIDC “in the form and manner prescribed by the commission” the total amount the county spends during each fiscal year to provide indigent defense services and also to break out the expenditures for: each district and county level court; criminal cases in which a private attorney is appointed; criminal cases in which a public defender is appointed; cases in which counsel is appointed for an indigent juvenile under the Texas Family Code; and case-related expenses such as investigation and expert witnesses.¹⁷³

The information that TIDC requires each county to report differs slightly but in significant ways from that required by state law, as is explained in detail in chapter 3. The information a county provides to TIDC covers:

- all of the county’s indigent defense spending for attorney fees and defense expenses in criminal cases and in juvenile cases, at both trial and appeal (broken down by the individual trial courts that approved the spending); and
- the total amount, if any, paid by the county for participating in any regional indigent defense program; and
- any costs the county incurs in administering the indigent defense system used in the cases arising out of the courts located within the county; and
- the number of payments made to appointed attorneys plus the number of cases disposed by any public defender office (broken down by case type, and also broken down by the individual trial courts in which the payments were approved or the public defender office cases were disposed).¹⁷⁴

¹⁷¹ TEX. CODE CRIM. PROC. ANN. art. 26.04(j)(4) (West 2017).

¹⁷² TEX. GOV’T CODE ANN. § 79.036(a-1) (West 2017).

¹⁷³ TEX. GOV’T CODE ANN. § 79.036(e) (West 2017).

¹⁷⁴ See TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 2 (Oct. 2018).

TIDC refers to these reports submitted by the counties as a county's "Indigent Defense Expenditure Report" (IDER).¹⁷⁵ TIDC requires each county to submit its IDER by November 1 of each year, providing information for the preceding TIDC fiscal year of October 1 through September 30.¹⁷⁶ This can present challenges for counties, because each Texas county determines its own fiscal year and many counties operate on a different fiscal year period than that of the TIDC. While Potter County uses the same October 1 through September 30 fiscal year as does TIDC, Armstrong County's fiscal year is January 1 through December 31.

TIDC staff review each county's IDER when it is submitted, conducting a "desk review" that "consist[s] of basic questions as to whether the expense reports make sense," followed up by a call to the county if TIDC has questions. Otherwise, TIDC does not have any ability to verify that the information each county provides is accurate unless TIDC conducts a policy or fiscal review of that county. (See discussion of TIDC monitoring of county indigent defense systems at pages 45-47.)

For TIDC fiscal years 2014 through 2018, Armstrong County¹⁷⁷ and Potter County¹⁷⁸ each reported to TIDC the following numbers of case payments made to appointed attorneys for representing adults and juveniles at trial and appeal:¹⁷⁹

		FY2014	FY2015	FY2016	FY2017	FY2018
Armstrong County	adult felony appeal	--	--	--	--	--
	adult misdemeanor appeal	--	--	--	--	--
	juvenile appeal	--	--	--	4	--
	capital trial	--	--	--	--	--
	adult non-capital felony trial	5	8	5	11	9
	adult misdemeanor trial	2AC + 9PD	3	1	6	2
	juvenile trial	--	--	--	--	2
	total appointed cases	16	11	6	21	13

¹⁷⁵ See *Indigent Defense Expenditure Report (IDER), Grants & Reporting*, TEXAS INDIGENT DEFENSE COMMISSION, <http://www.tidc.texas.gov/grants-reporting/ider/>.

¹⁷⁶ See TEXAS INDIGENT DEFENSE COMMISSION, *INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018*, at 2 (Oct. 2018).

¹⁷⁷ *Armstrong County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2018>.

¹⁷⁸ *Potter County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=188&fy=2018>.

¹⁷⁹ TIDC often refers to these reported numbers as "caseloads," leaving the impression that these are the numbers of indigent cases of each type that were handled by appointed counsel in the county during the reporting year. For numerous reasons, this is not entirely correct. See discussion of understanding Texas' criminal justice data at chapter 3.

		FY2014	FY2015	FY2016	FY2017	FY2018
Potter County	adult felony appeal	35	33	29	29	35
	adult misdemeanor appeal	1	2	1	1	1
	juvenile appeal	--	1	--	--	--
	capital trial	5	2	--	--	--
	adult non-capital felony trial	2,130	1,992	1,947	2,069	1,891
	adult misdemeanor trial	555	542	673	578	670
	juvenile trial	156	204	194	195	187
	total appointed cases	2,882	2,776	2,844	2,872	2,784

Appeals include both direct appeals and discretionary post-conviction proceedings arising out of any cases that originated in the county's trial courts. Appeals also include motions to revoke probation. By contrast, motions to revoke community supervision are included as trial cases. See TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 7-8 (Oct. 2018).

The category of "adult felony appeal" includes both capital and non-capital felonies.

The category of "capital trial" is intended to reflect all death penalty cases, both those handled by the RPDO and those for which appointed private attorneys were paid.

During FY2014, Armstrong County paid appointed private attorneys (designated as "AC" in the table) in two misdemeanor cases and attorneys employed by the Caprock Regional Public Defender office (designated as "PD" in the table) disposed of nine misdemeanor cases. Since that time, the judges in Armstrong County chose to no longer participate in the Caprock Regional Public Defender program.

It is notable that Armstrong County's IDER report to TIDC for FY2014, for both the district court and the county court, carries the caveat that: "The cases above are reported based on information from a clerk's office and are not associated with information in the attorney fee voucher."¹⁸⁰ This directly violates TIDC instructions that "[f]iscal officers should prepare the IDER based on the financial records in their offices," because "[a]ll cases where an attorney is appointed to represent a defendant are appointed cases. Appointed cases must be counted and reported on the IDER at the time they are paid in the assigned counsel . . . systems."¹⁸¹ TIDC's instructions today, and in 2014, declare in bold type: "A county that reports the attorney appointment data by utilizing information obtained from the district or county clerks rather than the attorney fee voucher from auditor's/treasurer's office has not correctly completed this report."¹⁸²

(Armstrong and Potter counties' indigent defense expenditures are addressed at page 42.)

¹⁸⁰ *Armstrong County Expenditure Report Summary – Fiscal Year 2014, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2014>.

¹⁸¹ See TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 6-7 (Oct. 2018).

¹⁸² TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 10 (Oct. 2018); TEXAS INDIGENT DEFENSE COMMISSION, PROCEDURE MANUAL FOR THE INDIGENT DEFENSE EXPENDITURE REPORT FISCAL YEAR 2014, at 6 (Sept. 2014).

Funding for the right to counsel

The U.S. Constitution holds the State of Texas responsible for ensuring adequate funding for the right to counsel of indigent defendants.¹⁸³

*Counties' responsibility for funding the right to counsel in criminal cases*¹⁸⁴

State law requires the county in which a criminal prosecution is instituted to pay the cost of appointed counsel and all reasonable and necessary expenses of the defense at both trial and appeal.¹⁸⁵ Each Texas county is governed by a commissioners court made up of four county commissioners, each elected from a precinct of the county to a four-year term, and the constitutional county judge as the presiding officer.¹⁸⁶ A county's commissioners court is both the executive and the legislative authority in the county, and so it is the county governmental body that is responsible for setting the county's budget including funding for the provision of the right to counsel.¹⁸⁷

As a practical matter, the commissioners court in each of Armstrong County and Potter County sets the county indigent defense budget each year largely based on the total cost of the indigent defense expenditures approved by the judges in the prior year. (See chapter 8 for a detailed discussion of funding the right to counsel in criminal cases at trial in Armstrong and Potter counties.)

For TIDC fiscal years 2014 through 2018, Armstrong County¹⁸⁸ and Potter County¹⁸⁹ each reported to TIDC the following county spending for the provision of the right to counsel for adults and juveniles at trial and appeal:

¹⁸³ Gideon v. Wainwright, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

¹⁸⁴ The provision of the Sixth Amendment right to counsel to children in juvenile delinquency proceedings is outside the scope of this evaluation. State law places responsibility for funding the right to counsel of children predominantly on the county in which the proceedings are instituted. TEX. FAM. CODE ANN. § 51.10(i) (West 2017).

¹⁸⁵ TEX. CODE CRIM. PROC. ANN. arts. 26.05(f), 26.052(l) (West 2017).

¹⁸⁶ TEX. CONST. art. V, § 18(b); TEX. LOCAL GOV'T CODE ANN. § 81.001 (West 2017).

¹⁸⁷ TEX. CONST. art. V, § 18(b); TEX. CODE CRIM. PROC. ANN. art. 26.05(a), (f) (West 2017); TEX. LOCAL GOV'T CODE ANN. §§ 111.003, 111.008, 111.068 (West 2017).

¹⁸⁸ *Armstrong County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tfdc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2018>.

¹⁸⁹ *Potter County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tfdc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=188&fy=2018>.

	FY2014	FY2015	FY2016	FY2017	FY2018
Armstrong County	adult felony appeal	\$0	\$0	\$0	\$0
	adult misdemeanor appeal	\$0	\$0	\$0	\$0
	juvenile appeal	\$0	\$0	\$0	\$1,450
	capital trial	\$0	\$0	\$0	\$0
	adult non-capital felony trial	\$1,800	\$4,900	\$4,113	\$8,400
	adult misdemeanor trial	\$1,250	\$1,450	\$900	\$3,580
	juvenile trial	\$0	\$0	\$0	\$1,100
	total attorney fees & expenses	\$3,050	\$6,350	\$5,012	\$13,430
	county administrative costs	\$0	\$0	\$0	\$0
	capital defense RPDO	\$3,520	\$1,000	\$1,000	\$1,000
	total indigent defense costs	\$6,570	\$7,350	\$6,012	\$14,430
Potter County	adult felony appeal	\$111,900	\$64,378	\$58,818	\$83,798
	adult misdemeanor appeal	\$500	\$5,031	\$1,575	\$750
	juvenile appeal	\$0	\$1,706	\$0	\$0
	capital trial	\$46,769	\$22,870	\$0	\$0
	adult non-capital felony trial	\$1,181,783	\$1,130,713	\$1,072,111	\$1,280,454
	adult misdemeanor trial	\$199,391	\$209,714	\$256,001	\$234,039
	juvenile trial	\$53,862	\$74,386	\$71,885	\$83,831
	total attorney fees & expenses	\$1,594,204	\$1,508,796	\$1,460,391	\$1,682,871
	county administrative costs	\$52,964	\$53,726	\$0	\$0
	capital defense RPDO	\$60,457	\$60,457	\$40,014	\$40,015
	total indigent defense costs	\$1,707,625	\$1,622,979	\$1,500,405	\$1,722,886

"Attorney fees & expenses" is the total of the county's spending on attorney fees, licensed investigators, expert witnesses, and other necessary resources provided for representation of individual defendants. See TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 7-8 (Oct. 2018). The total attorney fees & expenses may differ slightly from the sum of the types of cases due to rounding.

"County administrative costs" reflects the county's spending for the administration of indigent defense services. See TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 3-4 (Oct. 2018). In FY2014 and FY2015, Potter County paid a county law library administrative assistant to serve as the county's indigent defense coordinator, but eliminated that position beginning in FY2016.

County spending for capital cases requires some explanation. (Special statutes and rules affect the county expenditures in death penalty cases. See discussion at pages 83-91.) A county's spending on attorney fees & expenses in capital trials is the sum of "capital defense RPDO" and "capital trial" in the table above. A county's spending on attorney fees & expenses in capital appeals is not possible to determine from the expenditure information reported to TIDC, because capital and non-capital felonies are combined in the category of "adult felony appeal" and the category of "adult felony appeal" includes expenditures for both direct appeals and discretionary post-conviction proceedings. See TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 8 (Oct. 2018).

It is notable that Armstrong County's IDER report to TIDC for every year FY2014 through FY2018, for both the district court and the county court, carries the caveat that: "The financial figures are estimates or are for some other reason unreliable."¹⁹⁰ Potter County's IDER report to TIDC for every year FY2014 through FY2018, for

¹⁹⁰ *Armstrong County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2018>.

all five district courts and all county courts (whether two or three in the given year), carries the same caveat.¹⁹¹

TIDC grant-making

The Texas legislature requires TIDC to make grants of state-appropriated funds to assist counties in providing indigent defense services and to monitor the counties that receive those grants to ensure that they comply with the grant conditions.¹⁹² TIDC makes two kinds of grants: formula grants, and discretionary grants; and it has adopted rules about how it makes those grants.¹⁹³

Formula grants are “funding awarded to counties through a formula approved by the Commission.”¹⁹⁴ All 254 Texas counties are eligible to receive a formula grant of a base amount each year (\$5,000 for FY2019), though they must apply for the grant in order to receive it.¹⁹⁵ Beyond the base amount, each county is eligible to receive an additional portion of the remaining TIDC formula grant funds, calculated according to TIDC specifications.¹⁹⁶ Discretionary grants are “discretionary funding awarded on a competitive basis to implement new programs or processes in Texas counties designed to improve the quality of indigent defense services.”¹⁹⁷

¹⁹¹ *Potter County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=188&fy=2018>.

¹⁹² TEX. GOV'T CODE ANN. § 79.037(a) (West 2017).

¹⁹³ TEX. ADMIN. CODE tit. 1, §§ 173.101 through 173.402 (2017).

¹⁹⁴ TEX. ADMIN. CODE tit. 1, § 173.103 (2017).

¹⁹⁵ TEX. ADMIN. CODE tit. 1, § 173.102(10) (2017). *See, e.g.*, TEXAS INDIGENT DEFENSE COMMISSION, FY2019 FORMULA GRANT PROGRAM REQUEST FOR APPLICATIONS (RFA) (Sept. 2018).

¹⁹⁶ TEXAS INDIGENT DEFENSE COMMISSION, FY2019 FORMULA GRANT PROGRAM REQUEST FOR APPLICATIONS (RFA), at 2 (Sept. 2018).

¹⁹⁷ TEX. ADMIN. CODE tit. 1, § 173.102(6) (2017). TIDC rules provide for four kinds of discretionary grants. TEX. ADMIN. CODE tit. 1, § 173.102 (2017).

- Compliance assistance grants are “funding awarded to counties . . . for a specific program designed to promote and assist counties’ compliance with the requirements of state law relating to indigent defense.” TEX. ADMIN. CODE tit. 1, § 173.102(3) (2017).
- Extraordinary disbursement grants are “funding to reimburse a county for actual extraordinary expenses for providing indigent defense services in a case or series of cases causing a financial hardship for a county.” TEX. ADMIN. CODE tit. 1, § 173.102(7) (2017).
- Sustainability grants are “funding awarded to assist counties in maintaining regional public defender programs.” TEX. ADMIN. CODE tit. 1, § 173.102(15) (2017).
- Technical support grants are “funding awarded for special projects to improve the quality of indigent defense services, raise the knowledge base about indigent defense, and establish processes that can be generalized to similar situations in other counties.” TEX. ADMIN. CODE tit. 1, § 173.102(16) (2017).

TIDC’s website also shows four types of discretionary grants, but two of the types are different than those described in the Texas Administrative Code. *Indigent Defense Improvement Grants*, TEXAS INDIGENT DEFENSE COMMISSION, <http://www.tidc.texas.gov/grants-reporting/indigent-defense-improvement-grants/>.

TIDC publishes on its website complete information, both statewide and for each county, showing the amounts of the formula grants and the discretionary grants that it disburses each fiscal year.¹⁹⁸ For TIDC fiscal years 2014 through 2018, every one of Texas' 254 counties has received a formula grant from TIDC save for two instances: Aransas County did not receive a formula grant in FY2014, and Caldwell County did not receive a formula grant in FY2018.¹⁹⁹ By contrast, only 27 of the 254 counties have received a discretionary grant during any year from FY2014 through FY2018.²⁰⁰

Neither Armstrong County nor Potter County have ever applied for or received a discretionary grant. The only state funding of indigent defense in Armstrong and Potter counties is through TIDC formula grants. For TIDC fiscal years 2014 through 2018, TIDC reports that Armstrong County and Potter County received the following funding through TIDC grants:²⁰¹

		FY2014	FY2015	FY2016	FY2017	FY2018
Armstrong County	formula grant	\$7,037	\$6,183	\$6,199	\$6,013	\$6,338
	discretionary grant	\$0	\$0	\$0	\$0	\$0
Potter County	formula grant	\$220,705	\$144,442	\$136,848	\$164,091	\$123,744
	discretionary grant	\$0	\$0	\$0	\$0	\$0

¹⁹⁸ *Summary of Funding for All Counties, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/SummaryReport.aspx>.

¹⁹⁹ *Summary of Funding for All Counties, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/SummaryReport.aspx>.

²⁰⁰ *Summary of Funding for All Counties, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/SummaryReport.aspx>. The 27 counties that have received discretionary grants and the fiscal year(s) during which they received them are: Atascosa (2018), Bee (2015-2018), Bell (2014-2017), Bexar (2016-2018), Bowie (2014), Brown (2014), Burnet (2014-2015), Collin (2014-2016), Coryell (2014-2016), Culberson (2018), Dallas (2014-2018), Dickens (2014-2015), El Paso (2014-2016, 2018), Fort Bend (2014, 2016-2018), Harris (2014), Henderson (2018), Hidalgo (2014-2015), Kaufman (2014-2018), Lubbock (2014-2018), Montgomery (2014-2015), Smith (2018), Starr (2016-2018), Tarrant (2014, 2016), Taylor (2018), Travis (2015-2018), Uvalde (2014), and Wichita (2014-2017).

²⁰¹ *Summary of Funding for All Counties, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/SummaryReport.aspx>.

In FY2014, the TIDC disbursed to counties a surplus that had accumulated in its formula grant account, but which it had been prohibited by the legislature from spending during previous years in order to balance the state budget. Email from Joel Lieurance, Texas Indigent Defense Commission Senior Policy Analyst, to Sixth Amendment Center (Sept. 3, 2019). For Armstrong County, the FY2014 formula grant amount was \$4,184 and the extra disbursement was \$2,853, resulting in a total grant disbursement by TIDC to the county of \$7,037. For Potter County, the FY2014 formula grant amount was \$131,230 and the extra disbursement was \$89,475, resulting in a total grant disbursement by TIDC to the county of \$220,705.

Comparing the state funding provided to Armstrong County and Potter County with the total indigent defense spending by each county shows both dramatic swings within Armstrong County from year to year and an extreme difference between the two counties in the percentage of indigent defense costs that are borne by each county:

		FY2014	FY2015	FY2016	FY2017	FY2018
Armstrong County	total indigent defense costs	\$6,570	\$7,350	\$6,012	\$14,430	\$10,000
	formula grant received	\$7,037	\$6,183	\$6,199	\$6,013	\$6,338
	state grant as percentage of county spending	107%	84%	103%	42%	63%
Potter County	total indigent defense costs	\$1,707,625	\$1,622,979	\$1,500,405	\$1,722,886	\$1,686,160
	formula grant received	\$220,705	\$144,442	\$136,848	\$164,091	\$123,744
	state grant as percentage of county spending	13%	9%	9%	10%	7%

TIDC does not allow a county's formula grant funding in a given year to exceed what the county actually spent in the prior year. See, e.g., TEXAS INDIGENT DEFENSE COMMISSION, FY2019 FORMULA GRANT PROGRAM REQUEST FOR APPLICATIONS (RFA), at 2 (Sept. 2018).

TIDC monitoring of county indigent defense systems

TIDC is required by state law to “use the information reported by a county to monitor the effectiveness of the county’s indigent defense policies, standards, and procedures and to ensure compliance by the county with the requirements of state law relating to indigent defense.”²⁰²

Policy monitoring

The TIDC (then TFID) first adopted formal procedures for monitoring county indigent defense systems in 2009 that took effect July 23, 2009.²⁰³ Prior to TIDC adopting formal monitoring procedures in 2009, it conducted informal monitoring visits in some counties and also conducted what it referred to as program monitoring reviews in some counties. The procedures TIDC uses today took effect September 23, 2015.²⁰⁴ First, using solely the information reported by the counties, the TIDC conducts a “risk assessment” of each of the 254 counties during every fiscal year.²⁰⁵ Second, the TIDC

²⁰² TEX. GOV'T CODE ANN. § 79.035 (West 2017).

²⁰³ 34 Tex. Reg. 4731-32 (July 17, 2009), https://texashistory.unt.edu/ark:/67531/metaph90861/m2/1/high_res_d/0717is.pdf.

²⁰⁴ 40 Tex. Reg. 6349-50 (Sept. 18, 2015), https://texashistory.unt.edu/ark:/67531/metaph654845/m2/1/high_res_d/0918is.pdf (codified at TEX. ADMIN. CODE tit. 1, §§ 174.26 - 174.28 (2018)).

²⁰⁵ TEX. ADMIN. CODE tit. 1, § 174.27 (2017). The non-exclusive list of factors the TIDC considers in a risk assessment are:

- (1) Whether a county reported investigation and expert witness expenses;
- (2) Whether a county reported reimbursements for attorney fees;

selects some number of counties in which it conducts “on-site monitoring visits.”²⁰⁶ The specific counties chosen by TIDC to receive an on-site monitoring visit are “apportioned by administrative judicial region, county size, risk assessment scores, past visits and other documented factors.”²⁰⁷

Fiscal monitoring

TIDC conducts fiscal monitoring only of counties that receive state grant funds through TIDC. Every county that receives a grant from TIDC is subject to fiscal monitoring to ensure that the county is complying with the conditions of the grant it has received.²⁰⁸ TIDC has adopted rules governing the administration of its grants and its fiscal monitoring of counties.²⁰⁹

If a county fails to comply with the terms of a TIDC grant, TIDC is authorized by its own rules to:

- (1) disallow all or part of the cost of the activity or action that is not in compliance and seek a return of the funds;
- (2) impose administrative sanctions, other than fines, on the grantee;
- (3) temporarily withhold all payments pending correction of the deficiency by the grantee;
- (4) withhold future grant payments from the program or grantee; or
- (5) terminate the grant in whole or in part.²¹⁰

TIDC advises counties that it might suspend or withhold formula grant funds from any county that: fails to timely file its annual IDER; fails to timely submit a copy of its plan for providing indigent representation; fails to timely and satisfactorily respond to TIDC

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- (3) Amount of per capita indigent defense expenses;
 - (4) Felony, misdemeanor, and juvenile attorney appointment rates;
 - (5) Population of a county;
 - (6) Whether complaints about a county have been received by the Commission;
 - (7) Whether a county received a multi-year discretionary grant;
 - (8) Whether the justices of the peace or municipal judges reported requests for counsel in their Texas Judicial Council Monthly Court Activity Reports;
 - (9) the ratio of misdemeanor requests for counsel from Article 15.17 hearings as reported in Texas Judicial Council Monthly Activity Reports to the number of misdemeanor cases paid reported by the county; and
 - (10) Whether a county reported appeals cases.

Id.

²⁰⁶ TEX. ADMIN. CODE tit. 1, § 174.27 (2017). The TIDC’s “on-site policy monitoring focuses on the six core requirements of the Fair Defense Act and related rules.” TEX. ADMIN. CODE tit. 1, § 174.28(c) (2018). The TIDC lists those six core requirements as being: (1) prompt and accurate magistration; (2) indigence determination; (3) minimum attorney qualifications; (4) prompt appointment of counsel; (5) attorney selection process; and (6) payment process. TEX. ADMIN. CODE tit. 1, § 174.28(c) (2018).

²⁰⁷ TEX. ADMIN. CODE tit. 1, § 174.27(a) (2017).

²⁰⁸ TEX. GOV’T CODE ANN. § 79.037(a) (West 2017).

²⁰⁹ TEX. ADMIN. CODE tit. 1, §§ 173.301 – 173.311, 173.401 - 173.402 (2017).

²¹⁰ TEX. ADMIN. CODE tit. 1, § 173.307(a) (2017).

policy or fiscal monitoring reports; or where the county and district clerks fail to file with the office of court administration the monthly court activity reports or monthly appointments and fees reports required by state law.²¹¹

TIDC monitoring in Potter and Armstrong counties

Potter County

In July 2007, TIDC (then, TFID) staff conducted an on-site review and a fiscal review of Potter County's indigent defense system and issued a report of its findings in January 2008.²¹² If conducted today, this would be referred to as an "on-site monitoring visit."²¹³ At that time, TIDC had not yet adopted any rules for carrying out policy monitoring.²¹⁴ Despite the lack of formal rules, TIDC's review of Potter County in 2007 focused, as it would today, "on the six core requirements of the Fair Defense Act": (1) prompt and accurate magistration; (2) indigence determination; (3) minimum attorney qualifications; (4) prompt appointment of counsel; (5) attorney selection process; and (6) payment process.²¹⁵

TIDC's 2008 findings regarding adult criminal trial level representation²¹⁶ identified three areas of concern:²¹⁷

- when misdemeanor defendants requested appointed counsel at magistration, those requests were not always being transmitted within 24 hours of arrest to the person with authority to actually appoint counsel;²¹⁸
- some misdemeanor defendants who requested appointed counsel at magistration were determined not to be indigent solely because they had been

²¹¹ See, e.g., TEXAS INDIGENT DEFENSE COMMISSION, FY2019 FORMULA GRANT PROGRAM REQUEST FOR APPLICATIONS (RFA), at 1-2 (Sept. 2018). The reports that court clerks are required to file monthly are explained at pages 52-54.

²¹² TEXAS TASK FORCE ON INDIGENT DEFENSE, REVIEW OF POTTER COUNTY INDIGENT DEFENSE SYSTEMS, SITE VISIT: JULY 23 – JULY 27, 2007 (Jan. 2008).

²¹³ TEX. ADMIN. CODE tit. 1, § 174.27 (2017).

²¹⁴ The TIDC (then TFID) first adopted formal procedures for monitoring county indigent defense systems in 2009, taking effect July 23, 2009. 34 Tex. Reg. 4731-32 (July 17, 2009), https://texashistory.unt.edu/ark:/67531/metaph90861/m2/1/high_res_d/0717is.pdf.

²¹⁵ TEX. ADMIN. CODE tit. 1, § 174.28(c) (2018).

²¹⁶ TIDC's 2007 evaluation of Potter County's indigent defense system included the provision of counsel to juveniles and adults at both trial and appeal.

²¹⁷ TEXAS TASK FORCE ON INDIGENT DEFENSE, REVIEW OF POTTER COUNTY INDIGENT DEFENSE SYSTEMS, SITE VISIT: JULY 23 – JULY 27, 2007, at 4 (Jan. 2008).

²¹⁸ The report explained: "If one only considers incarcerated misdemeanor arrestees, the indigence determination sample seems to indicate that most persons are requesting counsel for the first time at the initial appearance [rather than at magistration]. However, the magistration sample showed 70% of misdemeanor arrestees requesting counsel. Reviewer did not observe a process in place to transfer all requests for counsel (including requests from person who have made bond) to the appointing authority." TEXAS TASK FORCE ON INDIGENT DEFENSE, REVIEW OF POTTER COUNTY INDIGENT DEFENSE SYSTEMS, SITE VISIT: JULY 23 – JULY 27, 2007, at 21 (Jan. 2008).

able to make bail,²¹⁹ and denials of appointed counsel based on a finding that the defendant was not indigent were not always documented;²²⁰ and

- under the local indigent defense plan, the attorney appointed to represent each defendant found entitled to appointed counsel was not required to be chosen from among the next five attorney names appearing on the list, in rotation.²²¹

In May 2009, TIDC staff conducted a follow-up monitoring visit to consider whether Potter County had taken any steps to cure the problems identified in the 2008 report and also to evaluate Potter County's handling of recent changes in the law.²²² That visit caused TIDC to be particularly concerned about the large number of misdemeanor arrestees who requested but did not receive counsel.²²³

The 2009 report found that, of 450 misdemeanor defendants appearing at magistration between September 2008 and December 2008, 346 of them (or 77%) requested counsel.²²⁴ Despite those requests for appointed counsel and contrary to statute,

²¹⁹ Of the 475 files examined by TIDC during the review, “[m]ost of the misdemeanor cases went pro se, in spite of the fact that most misdemeanor arrestees requested counsel. Reviewer asked court personnel about the process for receiving misdemeanor requests for counsel and then determining indigent. Reviewer was told that if the arrestee bakes bond that the request is denied.” TEXAS TASK FORCE ON INDIGENT DEFENSE, REVIEW OF POTTER COUNTY INDIGENT DEFENSE SYSTEMS, SITE VISIT: JULY 23 – JULY 27, 2007, at 20-21 (Jan. 2008).

²²⁰ Of 475 files examined by TIDC during the review, there were only “50 appointments of counsel and 2 denials of indigence. . . . A great majority of the 475 files did not contain either an appointment order or a denial of indigence. This fact is contrary to what one would expect since the magistration sample showed 70% of misdemeanor arrestees requesting counsel, and the magistrate who was interviewed stated that about 90% of arrestees request counsel. Most of those receiving an appointment seemed to be appointed in open court (especially from persons making bond) and not before the initial appearance.” TEXAS TASK FORCE ON INDIGENT DEFENSE, REVIEW OF POTTER COUNTY INDIGENT DEFENSE SYSTEMS, SITE VISIT: JULY 23 – JULY 27, 2007, at 20 (Jan. 2008).

²²¹ TEXAS TASK FORCE ON INDIGENT DEFENSE, REVIEW OF POTTER COUNTY INDIGENT DEFENSE SYSTEMS, SITE VISIT: JULY 23 – JULY 27, 2007, at 24 (Jan. 2008).

²²² During the 2007 legislative session, the Texas code of criminal procedure was “amended to require that defendants sign waivers of counsel prior to handling their cases pro se and to place certain restrictions on when waivers are valid[;] . . . prohibit[] the attorney representing the state from initiating waivers of counsel and from communicating with defendants who have requested counsel[; and] . . . prohibit[] the court from allowing waivers of counsel for defendants who have pending requests for counsel.” TEXAS TASK FORCE ON INDIGENT DEFENSE, POTTER COUNTY POLICY MONITORING FOLLOW-UP VISIT, MAY 11-12, 2009, at 1 of 8 (June 2009).

²²³ TEXAS TASK FORCE ON INDIGENT DEFENSE, POTTER COUNTY POLICY MONITORING FOLLOW-UP VISIT, MAY 11-12, 2009, at 1 of 8 (June 2009). As background, the 2009 report explained that, during the July 2007 visit “it was apparent that many misdemeanor arrestees were asking the magistrate for counsel, but a much smaller percentage of persons were receiving appointed counsel for misdemeanor offenses. However, denials of counsel requests were not common. After the Potter County indigent defense expenses report was submitted for FY2008, the misdemeanor appointment rate dropped from 11.5% for FY2007 to 5.6% for FY2008 (the statewide average is 34%). Given the drop in the misdemeanor appointment rate, it appeared that the County had not rectified problems with timely transferring requests for counsel.” *Id.*

²²⁴ TEXAS TASK FORCE ON INDIGENT DEFENSE, POTTER COUNTY POLICY MONITORING FOLLOW-UP VISIT, MAY 11-12, 2009, at 3 of 8 (June 2009).

the requests were not transferred within 24 hours of the request to the person with authority to appoint counsel, but were instead transferred to the county attorney, delaying appointment of counsel much longer.²²⁵

Perhaps worse yet, TIDC observed that, for in-custody defendants, “the bailiff handles waivers of counsel before the defendant meets with the county attorney. The county attorney then talks to the defendant about the facts of the case and about plea offers prior to meeting with the judge to accept the plea.”²²⁶

TIDC compared the magistration files for 99 misdemeanor defendants with the later county clerk’s office files to determine whether appointed counsel was requested and actually appointed.²²⁷ Two of those 99 defendants represented themselves (were *pro se*), despite the files not containing any documentation of a waiver of the right to counsel. Another 82 defendants waived their right to counsel, but 52 of those waivers occurred *after* the defendant had already requested an appointed attorney, causing TIDC to conclude that fully 63% of the waivers of the right to counsel appeared to be invalid under state law.²²⁸ TIDC staff subsequently summarized the problem for the TIDC’s Policies and Standards Committee: “The consequence of these problems often meant that misdemeanor arrestees who had requested counsel from the magistrate would not have their requests ruled upon. Generally, these arrestees would enter a *pro se* plea.”²²⁹

In August 2009, the Potter County judges responded to the TIDC report and said, in essence, that they would comply with all of TIDC’s recommendations.²³⁰ In particular, the county put in place a “Court Appointed Attorney Form Tracker” and the detention center was instructed to send all affidavits requesting appointed counsel directly to the Potter County Office of Indigent Defense (rather than to the county attorney’s office), where they would be immediately forwarded to the county courts for appointment of counsel.

²²⁵ TEXAS TASK FORCE ON INDIGENT DEFENSE, POTTER COUNTY POLICY MONITORING FOLLOW-UP VISIT, MAY 11-12, 2009, at 4 of 8 (June 2009).

²²⁶ TEXAS TASK FORCE ON INDIGENT DEFENSE, POTTER COUNTY POLICY MONITORING FOLLOW-UP VISIT, MAY 11-12, 2009, at 4 of 8 (June 2009).

²²⁷ TEXAS TASK FORCE ON INDIGENT DEFENSE, POTTER COUNTY POLICY MONITORING FOLLOW-UP VISIT, MAY 11-12, 2009, at 5 of 8 (June 2009).

²²⁸ TEXAS TASK FORCE ON INDIGENT DEFENSE, POTTER COUNTY POLICY MONITORING FOLLOW-UP VISIT, MAY 11-12, 2009, at 5 of 8 (June 2009).

²²⁹ TEXAS TASK FORCE ON INDIGENT DEFENSE, POLICY MONITORING REPORT, at 1 of 4 (June 2010) (staff report to TIDC Policies and Standards Committee).

²³⁰ TEXAS TASK FORCE ON INDIGENT DEFENSE, POLICY MONITORING REPORT, at 1 of 4 (June 2010) (staff report to TIDC Policies and Standards Committee).

After the 2009 follow-up report, TIDC requested additional data and information from Potter County to track compliance with the 2009 recommendations. The county courts handling misdemeanors and the county auditor both submitted mid-year reports to TIDC in April 2010.²³¹

In June 2010, TIDC staff reported to the TIDC Policies and Standards Committee that the primary concerns raised in the 2009 follow-up report appeared to have been addressed at that time. But the additional data provided in Potter County's mid-year reports raised a new concern – it firmly demonstrated that a significant percentage of misdemeanor defendants who requested appointed counsel were denied on the basis that they were not indigent because they had bonded out of jail.²³² TIDC followed up in two telephone calls with one of the Potter County statutory county judges. The judge initially advised that bonded misdemeanor defendants could get appointed counsel at a “bond docket” held about one week after arrest, but faced with further concern by TIDC, the judge assured they would adjust their procedures and rule on bonded misdemeanor defendants' requests for counsel within three days of arrest and without denying indigence on the basis of the defendant having made bond. This was the last formal monitoring conducted by TIDC of Potter County's indigent defense system, beyond the annual “risk assessment” that TIDC conducts for each county²³³ based on the written documentation the counties are required by law to provide to TIDC.

Armstrong County

TIDC staff visited Armstrong County in June 2017 (for the first and only time) for a “drop-in review,” considered by TIDC to be informal. The purpose of the visit was to determine whether misdemeanor defendants were able to request counsel and have those requests ruled upon. TIDC staff “examined 11 misdemeanor case files, all of which contained magistrate warning forms.”²³⁴ (These 11 misdemeanor cases likely represented all or a significant portion of the misdemeanor cases in Armstrong County for the year preceding the TIDC visit. For the period of September 2016 through August 2017, the Office of Court Administration reported prosecution instituted in Armstrong County in eight new misdemeanor cases;²³⁵ and for the period of October 2016 through September 2017, Armstrong County reported to TIDC six payments to

²³¹ TEXAS TASK FORCE ON INDIGENT DEFENSE, POLICY MONITORING REPORT, at 1 of 4 (June 2010) (staff report to TIDC Policies and Standards Committee).

²³² TEXAS TASK FORCE ON INDIGENT DEFENSE, POLICY MONITORING REPORT, at 2 of 4 (June 2010) (staff report to TIDC Policies and Standards Committee). Of 521 misdemeanor defendants who appeared for magistration between Oct. 2009 and Mar. 2010 and completed an affidavit of indigence requesting counsel, 288 were denied counsel; and of those 288 denied counsel, the files of 191 (66.3%) contained a note “indicating that the person made bond.”

²³³ TEX. ADMIN. CODE tit. 1, § 174.27 (2017).

²³⁴ Letter from Joel Lieurance, Texas Indigent Defense Commission Senior Policy Analyst, to Armstrong County Judge Hugh Reed (June 23, 2017).

²³⁵ *Court Activity Database, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/court-activity-database/>.

appointed attorneys in misdemeanor cases.²³⁶) Based on that review, TIDC determined that “Armstrong County’s misdemeanor case files regularly contain magistrate warning forms” and “[w]hen arrestees request counsel, these requests are promptly ruled upon.”²³⁷

²³⁶ *Armstrong County Expenditure Report Summary – Fiscal Year 2017, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2017>.

²³⁷ Letter from Joel Lieurance, Texas Indigent Defense Commission Senior Policy Analyst, to Armstrong County Judge Hugh Reed (June 23, 2017).

CHAPTER 3

THE STATE OF TEXAS' RESPONSIBILITY TO INDIGENT DEFENDANTS – UNDERSTANDING TEXAS' CRIMINAL JUSTICE DATA

Two state level agencies in Texas – the Office of Court Administration and the Texas Indigent Defense Commission – gather and disseminate a large amount of objective data about cases in which the right to counsel must be provided to indigent defendants. There are some nuances that cause the information to be less than completely reliable and that also make the information difficult, at best, to compare between the two agencies and across counties. Finally, there is critical information about the provision of the right to counsel that is unknown and unknowable from the data the two agencies presently collect.

As explained in chapter 2, the State of Texas delegates responsibility for oversight, provision, and funding of indigent defense services to its counties and judges.²³⁸ Yet the trial court judges and county officials in Armstrong County and Potter County cannot rely on data disseminated by Texas' state agencies in making policy and funding decisions about providing the right to counsel. Instead, Armstrong and Potter counties' government officials and judges must record, cumulate, and analyze for themselves critical information about the indigent defense services in their courts, if that information is to be available at all in ensuring effective assistance of counsel to indigent defendants.

Office of Court Administration and court clerks

State law requires the clerks of the Texas courts to submit monthly activity reports to the Office of Court Administration (OCA), not later than 20 days following the end of the month.²³⁹ The OCA provides instructions to the clerks about how to complete these reports.²⁴⁰

²³⁸ TEX. CODE CRIM. PROC. ANN. arts. 26.04(a), 26.05(f) (West 2017).

²³⁹ *See, e.g.*, TEX. GOV'T CODE ANN. §§ 36.001 – 36.006, 71.035, 71.0352, 71.0353, 71.038, 72.081 – 72.087 (West 2017).

²⁴⁰ *See* OFFICE OF COURT ADMINISTRATION, OFFICIAL DISTRICT COURT MONTHLY REPORT INSTRUCTIONS (rev'd Jan. 12, 2018); OFFICE OF COURT ADMINISTRATION, OFFICIAL CONSTITUTIONAL COUNTY COURT MONTHLY REPORT INSTRUCTIONS (rev'd Jan. 12, 2018); OFFICE OF COURT ADMINISTRATION, OFFICIAL STATUTORY COUNTY COURT MONTHLY REPORT INSTRUCTIONS (rev'd Jan. 12, 2018).

For trial level criminal cases, each court clerk reports the number of cases that were, during the month:

- pending at the beginning;
- returned to active status;
- a probation in which a motion to revoke was filed;
- newly filed;
- moved to inactive status; and
- disposed.

The case numbers are reported separately for felonies and for misdemeanors (and also for some subcategories of each).

For all cases that were disposed during the month, the clerks additionally report the number of those that were: dismissals; deferred adjudications; acquittals, by court trial or by jury trial; convictions, by guilty plea or by court trial or by jury trial; and for revocation proceedings, whether revoked or continued. For the disposed cases that resulted in conviction during the month, the clerks additionally report the number of those in which the defendant was sentenced to: prison; state jail; local jail; probation/ community supervision; shock probation; fine only; and other.

The court clerks also report two items about the right to counsel:

- the number of cases disposed during the month with retained counsel at the time of disposition; and
- the number of cases in which counsel was appointed during the month (but without regard to the status of the case; if counsel had already been appointed when the case was filed, then the case is reported as counsel being appointed during the month of filing).

Each trial level court clerk reports similar information for civil, family, and juvenile cases. The court clerks at the appellate level report similar information for direct appeals and discretionary review, segregated by civil and criminal.

Most court clerks submit the monthly activity reports by entering the information electronically into the OCA's "Court Activity Reporting and Directory System" (CARD), although a clerk can request a waiver from OCA to submit a paper form instead.²⁴¹ Court clerks can and do amend previously reported information, as the OCA instructions tell court clerks to submit an amended report if they need to make changes to information for previous months and warning: "You should never adjust the current month's figures in an attempt to 'fix' the information for previous months."²⁴²

²⁴¹ See OFFICE OF COURT ADMINISTRATION, OFFICIAL DISTRICT COURT MONTHLY REPORT INSTRUCTIONS 2 (rev'd Jan. 12, 2018); OFFICE OF COURT ADMINISTRATION, OFFICIAL CONSTITUTIONAL COUNTY COURT MONTHLY REPORT INSTRUCTIONS 2 (rev'd Jan. 12, 2018); OFFICE OF COURT ADMINISTRATION, OFFICIAL STATUTORY COUNTY COURT MONTHLY REPORT INSTRUCTIONS 2 (rev'd Jan. 12, 2018).

²⁴² See OFFICE OF COURT ADMINISTRATION, OFFICIAL DISTRICT COURT MONTHLY REPORT INSTRUCTIONS 2 (rev'd Jan. 12, 2018); OFFICE OF COURT ADMINISTRATION, OFFICIAL CONSTITUTIONAL COUNTY COURT

The OCA compiles all of the information submitted by all of the court clerks into the *Annual Statistical Report for the Texas Judiciary* and the *Annual Statistical Supplement* that are published for each fiscal year, covering the period of September 1 through August 31.²⁴³ Helpfully, the data reported by the court clerks is also available on the OCA's website, where it can be queried for any range of months, by county, and/or by type of court.²⁴⁴

Texas Indigent Defense Commission and county auditors

State law requires the county auditor in each county (or the person designated by the commissioners court if there is no county auditor) to submit annual reports to the Texas Indigent Defense Commission (TIDC), by November 1 of each year.²⁴⁵ County auditors report the required information for the preceding fiscal year, covering the period of October 1 through September 30.²⁴⁶ TIDC provides instructions to the county auditors about how to complete these reports, referred to as a county's "Indigent Defense Expenditure Report" (IDER).²⁴⁷

For each trial level court with criminal or juvenile jurisdiction in the county, the county auditor reports:

- the amounts paid for indigent cases (categorized by assigned counsel, managed assigned counsel, contract counsel, and public defender office) for attorney fees, investigation, expert witnesses, and other litigation expenses;
- the number of cases paid to all attorneys (categorized by assigned counsel, managed assigned counsel, and contract counsel) for indigent cases, plus the number of indigent cases that were disposed by a public defender office; and
- the name of each attorney (assigned counsel, managed assigned counsel, and contract counsel) who was paid for indigent cases and the number of cases paid

MONTHLY REPORT INSTRUCTIONS 2 (rev'd Jan. 12, 2018); OFFICE OF COURT ADMINISTRATION, OFFICIAL STATUTORY COUNTY COURT MONTHLY REPORT INSTRUCTIONS 2 (rev'd Jan. 12, 2018).

²⁴³ See *Annual Statistical Reports, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/annual-statistical-reports/>; *Annual Statistical Supplement, Annual Statistical Reports, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/annual-statistical-reports/>.

²⁴⁴ See *Court Activity Database, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/court-activity-database/>.

²⁴⁵ TEX. GOV'T CODE ANN. § 79.036(a-1), (e) (West 2017). See, e.g., TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 2 (Oct. 2018).

²⁴⁶ See TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 2 (Oct. 2018).

²⁴⁷ See, e.g., TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018 (Oct. 2018). TIDC provides a separate supplement for those counties that have a public defender office. See, e.g., TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018 – PUBLIC DEFENDER OFFICE SUPPLEMENT (Oct. 2018).

to that attorney and the total attorney fees paid to that attorney, plus the name of each public defender office attorney who disposed of indigent cases and the number of cases that attorney disposed.

All of the above information *except* the total attorney fees paid to non-public defender office attorneys is reported separately for: adult felony appeals (including capital & non-capital); adult misdemeanor appeals; juvenile appeals; adult capital murder trial level; adult non-capital felony trial level; adult misdemeanor trial level; and juvenile trial level. TIDC refers to the first two items in the list above as the “court portion of the report,” and TIDC refers to the third item in the list above as the “court attorney detail portion of the report.”²⁴⁸

For each private attorney paid for indigent cases, and for each public defender office attorney who disposed of indigent cases, the county additionally reports to TIDC: the percentage of time the attorney claimed to have spent handling adult indigent cases in the county, if any; and the percentage of time the attorney claimed to have spent handling juvenile indigent cases in the county, if any.

In counties that have a public defender office, the county auditor reports the county’s expenditures for the office for: attorney compensation, investigator compensation, mitigation specialist compensation, mental health professional compensation, and administrative support compensation (all allocated by case type); direct operating expenditures; and case related expenses (broken down by investigators, expert witnesses, and other direct litigation).

The county auditor also reports: the total amount, if any, paid by the county for administering the indigent defense system; and the total amount, if any, paid by the county for participating in any regional indigent defense program.

County auditors submit the annual IDER by entering the information electronically into the TIDC’s online portal.²⁴⁹ TIDC staff review each county’s IDER when it is submitted, conducting a “desk review” that “consist[s] of basic questions as to whether the expense reports make sense,” followed up by a call to the county if TIDC has questions. Once a county’s annual IDER is accepted by TIDC, the TIDC rarely ever allows a county to change the reported information.

²⁴⁸ See, e.g., TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 8 (Oct. 2018) (“Cases with multiple successive attorneys will be counted as one case for the court portion of the report and one case for each attorney on the court attorney detail portion of the report.”).

²⁴⁹ Grant and Plan Management Website, TEXAS INDIGENT DEFENSE COMMISSION, <https://tidc.tamu.edu/Default.asp>. See TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 13-15 (Oct. 2018).

The TIDC collects and publishes all of the information submitted by all of the counties on the TIDC website, where it can be viewed and sorted by TIDC fiscal year, by county, by court, and by attorney.²⁵⁰

Similarities and differences in OCA and TIDC data for criminal cases

The OCA and the TIDC gather different criminal justice data, from different sources, and they make differing uses of the information. Each agency publishes the data it collects statewide, and the publicly available data appears to provide some overlapping and sometimes conflicting information. Criminal justice stakeholders and policymakers cannot make effective and accurate decisions on the basis of information provided by the two agencies without understanding the similarities and differences in the data collected and disseminated. Those similarities and differences are not readily apparent.

The definition of a criminal case

The OCA and the TIDC use the same definition of a criminal case, “based on the number of defendants named in an indictment or information” and giving the same three examples:

1. If a single charging instrument names more than one defendant, each defendant counts as a case.
2. If a single defendant is named in more than one charging instrument, each charging instrument counts as a case.
3. If a single charging instrument contains more than one count, this is one case and it is reported based on the most serious offense alleged.²⁵¹

Which criminal cases are counted and by whom

The OCA and the TIDC count different criminal cases, and they count them at different points in the life of a case, attributing them to different courts. This is in large part because the agencies use the information to make different types of decisions.

The OCA counts *all* criminal cases as they move through the courts. Trial court clerks report the number of criminal cases that are in each of six particular statuses during the monthly reporting period: pending at the beginning; newly filed; motion to revoke probation filed; returned to active status; moved to inactive status; and disposed. Then

²⁵⁰ See *County ID Expenditures & Cases* tab, *Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/default.aspx>.

²⁵¹ See, e.g., OFFICE OF COURT ADMINISTRATION, OFFICIAL DISTRICT COURT MONTHLY REPORT INSTRUCTIONS 3 (rev’d Jan. 12, 2018); TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 7 (Oct. 2018).

for any criminal cases that are appealed, the appellate court clerks report the number of criminal appeals that during the monthly reporting period are filed and the number that are disposed.

The primary use made of the data gathered by the OCA is to know how many cases are pending in each court and how long the cases take from start to finish, known as the “clearance rate.” This allows the judiciary to determine, for example, how many judges and court personnel are needed in each jurisdiction. Because the focus is on the cases pending in each court, the clerk of court is in the best position to gather and report the information.

The TIDC counts *only* criminal and juvenile cases of indigent defendants. County auditors report the existence of indigent criminal and juvenile cases each time during the yearly reporting period that: a public defender office attorney disposes of a case at the trial level; a public defender office attorney disposes of a case at the appellate level; or a payment is made to an attorney for representing an indigent defendant at either the trial level or the appellate level. The county auditors attribute all of the cases, both at the trial level or on appeal, to the trial court out of which the case originates.

At least until 2014, the primary use made of the data gathered by the TIDC is to know how much each county is spending to provide the right to counsel to indigent people. This helps commissioners courts and judges to make budgeting decisions for indigent defense services. Because the focus is on each county’s indigent defense spending, the county auditor is in the best position to gather and report the information.

Since 2014, a secondary intended use to be made of data gathered by the TIDC is to know the number of attorneys necessary in each county to provide the right to counsel to indigent people. Fulfilling this purpose requires gathering very different information about the criminal and juvenile cases of indigent defendants, much of which may be unknown by or unavailable to the county auditor. (*See* chapter 9.)

When reporting occurs and for what period

The OCA and the TIDC require reporting of criminal justice data at different times and covering different time ranges.

The OCA requires each court clerk to file a monthly report by the 20th of each month, covering the period of the preceding month. Then OCA cumulates those monthly filings into an annual report covering the state’s fiscal year of September 1 through August 31. OCA makes available the data reported by the court clerks on OCA’s website, where it can be queried for any range of months, by county, and/or by type of court.²⁵² Even after each monthly report is filed and after the OCA’s annual report is

²⁵² *See Court Activity Database, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts>.

disseminated, court clerks can amend past monthly reports. As a result, a query run on the OCA website may produce different information from day to day.

The TIDC requires each county auditor to file an annual report by November 1 of each year, covering the TIDC's preceding fiscal year period of October 1 through September 30. TIDC staff conduct a desk review of each county's IDER when it is submitted and contact a county for clarification if the expenses do not make sense to TIDC staff. Once a county's annual IDER is accepted by TIDC, the TIDC rarely ever allows a county to change the reported information. TIDC makes available on its website the data reported by each county auditor and also the cumulated statewide data, where it can be viewed and sorted by TIDC fiscal year, by county, by court, and by attorney.²⁵³ Because counties operate on varying fiscal years, a county may not have completed its accounting and auditing processes at the time the county auditor submits the IDER report to TIDC, so the financial information for a county may not reflect its final accurate expenditures.

Any attempt to compare OCA data and TIDC data requires translating the OCA data into the TIDC fiscal year of October 1 through September 30. Meanwhile, OCA's reported data can change daily as amendments are made by court clerks, and TIDC's reported data remains unchanged even though it may have been inaccurate at the time it was reported by the county auditor.

Gaps and inconsistencies in indigent defense representation data

Despite the large amount of objective data gathered and disseminated by the OCA and the TIDC, there is critical data about the provision of the right to counsel in Texas that is not available. In some situations, no state agency is responsible for the information. In other situations, the data collected by either or both of the state agencies shows itself upon analysis to be unreliable. This leaves to counties and trial court judges the responsibility for recording, collecting, and disseminating this critical information, if it is to be available at all in making policy and funding decisions about providing the right to counsel in Texas' courts.

Criminal cases between arrest and institution of prosecution

No state agency accounts for whether all indigent defendants in criminal cases are being represented by appointed counsel during the time between when they are

gov/statistics/court-activity-database/.

²⁵³ See *County ID Expenditures & Cases* tab, *Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/default.aspx>.

arrested and when prosecution is instituted. (Chapter 6 explains in detail the criminal justice process in Armstrong County and in Potter County from commission of an offense through institution of prosecution.)

A person who is arrested must be taken before a magistrate within 48 hours of the arrest.²⁵⁴ At that proceeding before the magistrate, the defendant must be informed of the right to counsel and allowed to request appointed counsel if indigent.²⁵⁵ Once a defendant requests counsel and files the appropriate paperwork to do so, the request must be forwarded to a judge within 24 hours (if the magistrate does not have authority to appoint counsel).²⁵⁶ Within three working days of receiving the request (or one working day in counties with 250,000 or more population), the judge must determine whether the defendant is indigent and, if so, appoint an attorney to represent the defendant.²⁵⁷ In general (and there are of course exceptions), every indigent defendant who requests an appointed attorney at magistration should receive counsel within not more than nine calendar days following arrest (48 hours, plus 24 hours, plus three work days, plus the possibility of a three-day holiday weekend).

Prosecutors, though, decide whether and when to institute prosecution of a defendant. For jailable misdemeanors, prosecutors have up to two years from the date of commission of the offense to institute prosecution.²⁵⁸ Prosecutors have at least three years from the date of commission of any felony to institute prosecution, ranging up to ten years for many felonies and no limitations at all for certain felonies.²⁵⁹

The OCA does not require court clerks to report any information about criminal cases prior to institution of prosecution, when the case will be reported to OCA as newly filed. If an indigent defendant has been arrested, but the prosecutor has not yet instituted prosecution, there will be no record at all in the OCA data of the existence of that defendant.

The TIDC does not require county auditors to report any information about a criminal case until: it is disposed if handled by a public defender office; or an appointed attorney is paid.²⁶⁰ When an appointed attorney is paid in a criminal case is determined by the plan and schedule of fees adopted by the judges in each county with jurisdiction

²⁵⁴ TEX. CODE CRIM. PROC. ANN. arts. 14.06(a), 15.17(a) (West 2017); *see* TEX. CODE CRIM. PROC. ANN. art. 15.16 (West 2017).

²⁵⁵ TEX. CODE CRIM. PROC. ANN. art. 15.17(a), (g) (West 2017).

²⁵⁶ TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (West 2017).

²⁵⁷ TEX. CODE CRIM. PROC. ANN. arts. 1.051(c), (i), 26.04(c) (West 2017).

²⁵⁸ TEX. CODE CRIM. PROC. ANN. art. 12.02 (West 2017).

²⁵⁹ TEX. CODE CRIM. PROC. ANN. art. 12.01 (West 2017).

²⁶⁰ The rare exception is that TIDC requires county auditors to report capital murder cases at the trial level for any year during which any payment is made, even if the case is handled by a public defender office and is not disposed. *See, e.g.*, TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 7 (Oct. 2018).

over criminal cases,²⁶¹ and so the timing of payments over the life of a case varies from county to county. In counties where judges only allow attorneys to be paid once a case is disposed, for an indigent defendant who has been arrested but prosecution has not yet been instituted, there will be no record at all in the TIDC data of the existence of that indigent defendant until either the prosecutor formally dismisses the charge of arrest or the statute of limitations for instituting prosecution expires.

It is impossible to determine from the OCA data and the TIDC data whether indigent defendants are being represented by counsel during the period between arrest and institution of prosecution.

Pro se defendants

No state agency accounts for how many indigent defendants go unrepresented by counsel in criminal prosecutions at the trial level that carry the possibility of incarceration. (Chapter 6 explains in detail the process in Armstrong County and in Potter County for defendants to be advised of the right to counsel and make an election whether to retain counsel, request appointed counsel, or self-represent (known as a *pro se* defendant).)

The OCA data shows the number of new felony and jailable misdemeanor prosecutions that are instituted in each court, each month. At least once prosecution is instituted, if not before (as discussed in the preceding section), every defendant facing the possibility of incarceration in a criminal case is entitled to have an attorney represent them during every critical stage of the case, unless the defendant has made an informed and intelligent waiver of the right to counsel.²⁶² Once prosecution is instituted, the defendant is arraigned.²⁶³ At arraignment, any defendant not already represented by counsel must be informed of the right to counsel and allowed to request appointed counsel if indigent.²⁶⁴

A defendant may altogether waive the right to counsel and choose to self-represent.²⁶⁵ A defendant may be able to secure private representation (whether that attorney is hired or volunteers to represent the defendant). But if an indigent defendant does not waive the right to counsel and cannot secure private representation, a court must appoint counsel to represent that indigent defendant.²⁶⁶ At least following institution

²⁶¹ TEX. CODE CRIM. PROC. ANN. art. 26.05(b)-(c) (West 2017).

²⁶² *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

²⁶³ TEX. CODE CRIM. PROC. ANN. art. 26.01 (West 2017).

²⁶⁴ TEX. CODE CRIM. PROC. ANN. arts. 1.051, 26.04 (West 2017).

²⁶⁵ *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(f)-(h) (West 2017); *Faretta v. California*, 422 U.S. 802 (1975).

²⁶⁶ U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. *See* TEX. CODE CRIM. PROC. ANN. arts. 1.05, 1.051(c) (West 2017); *Halbert v. Michigan*, 545 U.S. 605 (2005); *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon*

of prosecution and arraignment, every defendant in a criminal case should either have private counsel, have appointed counsel, or be *pro se*.

The OCA requires the court clerks to “[r]eport the number of criminal cases in which an attorney was appointed by the court” and to do so “in the month in which the appointment was made,” noting that the case should be counted at the time prosecution is instituted if appointment was made previously.²⁶⁷ As explained in the preceding section, the TIDC does not require county auditors to report any information about a criminal case until: it is disposed if handled by a public defender office; or an appointed attorney is paid.²⁶⁸ Unless an attorney is paid or in cases handled by a public defender office the case is disposed, the TIDC data does not reflect that a criminal case even exists. Because OCA reports cases with appointed counsel at the time appointment is made, while TIDC reports cases with appointed counsel only when some attorney is paid or a public defender office disposes of it, the data from the two agencies about appointed counsel cannot be compared.

The OCA requires the court clerks to “[r]eport the number of cases in which the defendant had retained counsel at the time of the disposition of the case,”²⁶⁹ (but there is no way to know whether the OCA data had previously counted any of those same cases as having appointed counsel at an earlier point in the case, nor is there any way of knowing at what point in a case that retained counsel began representing the defendant). The OCA does not require court clerks to report the number of criminal cases that have retained counsel at the time prosecution is instituted or at any point prior to disposition. The TIDC does not receive any data about criminal cases with retained counsel.

The OCA does not require the court clerks to report the number of cases with a *pro se* defendant, either at institution of prosecution or at disposition. The TIDC does not receive any data about criminal cases with a *pro se* defendant.

v. Wainwright, 372 U.S. 335 (1963). Although delinquency representation is outside the scope of this study, we note that children accused of delinquent acts likewise have a right to counsel at public expense. *In re Gault*, 387 U.S. 1 (1967).

²⁶⁷ See OFFICE OF COURT ADMINISTRATION, OFFICIAL DISTRICT COURT MONTHLY REPORT INSTRUCTIONS 12-13 (rev’d Jan. 12, 2018); OFFICE OF COURT ADMINISTRATION, OFFICIAL CONSTITUTIONAL COUNTY COURT MONTHLY REPORT INSTRUCTIONS 12 (rev’d Jan. 12, 2018); OFFICE OF COURT ADMINISTRATION, OFFICIAL STATUTORY COUNTY COURT MONTHLY REPORT INSTRUCTIONS 21-22 (rev’d Jan. 12, 2018).

²⁶⁸ The rare exception is that TIDC requires county auditors to report capital murder cases at the trial level for any year during which any payment is made, even if the case is handled by a public defender office and is not disposed. See, e.g., TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 7 (Oct. 2018).

²⁶⁹ See OFFICE OF COURT ADMINISTRATION, OFFICIAL DISTRICT COURT MONTHLY REPORT INSTRUCTIONS 13 (rev’d Jan. 12, 2018); OFFICE OF COURT ADMINISTRATION, OFFICIAL CONSTITUTIONAL COUNTY COURT MONTHLY REPORT INSTRUCTIONS 13 (rev’d Jan. 12, 2018); OFFICE OF COURT ADMINISTRATION, OFFICIAL STATUTORY COUNTY COURT MONTHLY REPORT INSTRUCTIONS 22 (rev’d Jan. 12, 2018).

It is impossible to accurately determine from the OCA data and the TIDC data the number of defendants who are *pro se* in a criminal case in which they face possible incarceration, much less to determine how many of those *pro se* defendants are indigent.

The TIDC attempts to estimate the number of jailable misdemeanor cases in which a defendant is *pro se* at the time the case is disposed. (The TIDC does not make this estimate in felony cases because it believes the necessary data is inaccurate and/or incomplete.) The following methodology, used by TIDC, shows why the number of *pro se* defendants cannot be known and can only be poorly estimated.

TIDC begins its estimate by running a query of the OCA data for TIDC's fiscal year of October 1 through September 30, in order to match up the time frames of the OCA and TIDC data sets. First, TIDC uses the OCA data showing the number of jailable misdemeanor cases that are disposed in each court, each month. From that, TIDC subtracts the OCA data showing how many jailable misdemeanor cases had retained counsel at the time of disposition. The remaining cases should be only defendants who either had appointed counsel when their cases were disposed or were *pro se* when their cases were disposed, but the OCA does not require court clerks to report whether defendants were represented by appointed counsel or were *pro se* at the time of disposition of a case.

To estimate the number of defendants represented by appointed counsel at the time their cases were disposed, TIDC uses its own data. The TIDC requires county auditors to report whenever a public defender office attorney disposes of a case and whenever some attorney is paid for providing indigent representation. TIDC treats each case payment to an attorney as if it represents a disposed case. (The fact that an attorney is paid does not mean a case was disposed, because when and how frequently attorneys are paid is determined by the judges and varies from county to county.) So, TIDC uses the sum of the number of cases disposed by a public defender office and the number of case payments made to attorneys, as reported by the county auditors for the TIDC fiscal year of October 1 through September 30, as representing the number of cases disposed during that time period in which defendants were represented by appointed counsel.

TIDC estimates that starting with the OCA number of disposed cases, then subtracting the OCA number of cases with retained counsel, then subtracting the TIDC sum of the number of cases disposed by public defender offices and the number of case payments made to attorneys, should roughly approximate the number of defendants who are *pro se*. The result of TIDC's estimating process shows that in Armstrong County and in Potter County a large percentage of misdemeanor defendants are not represented by counsel (or the underlying data is unreliable, or the estimating methodology is unreliable).

Table: TIDC estimate of *pro se* misdemeanor defendants

		TIDC FY2014	TIDC FY2015	TIDC FY2016	TIDC FY2017	TIDC FY2018
Armstrong County	OCA reported misd cases disposed	70	58	29	19	30
	OCA reported retained counsel at disposition	52	46	18	13	21
	TIDC reported PD disposed + attorney paid	11	3	1	6	4
	estimated <i>pro se</i>	7	9	10	0	5
	% <i>pro se</i>	10.00%	15.52%	34.48%	0.00%	16.67%
Potter County	OCA reported misd cases disposed	3,122	2,808	2,793	2,116	2,407
	OCA reported retained counsel at disposition	454	381	383	120	2
	TIDC reported PD disposed + attorney paid	555	542	673	578	670
	estimated <i>pro se</i>	2,113	1,885	1,737	1,418	1,735
	% <i>pro se</i>	67.68%	67.13%	62.19%	67.01%	72.08%

Some might suggest that, to estimate the number of defendants represented by appointed counsel at the time their cases were disposed, the OCA data on the number of cases in which an attorney was appointed is a better measure. OCA reports this number for the month the appointment is made, and a case is not necessarily disposed during that same month. Nonetheless, over the course of a year's time, it is likely that a substantial portion of the cases reported by OCA as having an attorney appointed will also be reported by OCA as being disposed. Conducting the estimate by using solely OCA data means that all data comes from the same reporting sources (the court clerks) and that the data does not have to be reconfigured to a different range of dates (it consistently uses the OCA fiscal year of September 1 through August 31). The result of using TIDC's estimating process but relying solely on OCA data shows that in Armstrong County and in Potter County a large percentage of defendants – in misdemeanors and in felonies – are not represented by counsel (or the underlying data is unreliable, or the estimating methodology is unreliable).

Table: Estimate of *pro se* defendants, based solely on OCA data²⁷⁰

		OCA FY2014	OCA FY2015	OCA FY2016	OCA FY2017	OCA FY2018
Armstrong County Misdemeanors	OCA reported misd cases disposed	72	56	34	16	32
	OCA reported retained counsel at disposition	55	42	22	10	23
	OCA reported appointed counsel at filing or after	6	10	0	4	2
	estimated <i>pro se</i>	11	4	12	2	7
	% <i>pro se</i>	15.28%	7.14%	35.29%	12.50%	21.88%
Potter County Misdemeanors	OCA reported misd cases disposed	2,823	2,597	2,492	2,088	1,975
	OCA reported retained counsel at disposition	462	370	389	148	0
	OCA reported appointed counsel at filing or after	296	486	685	249	0
	estimated <i>pro se</i>	2,065	1,741	1,418	1,691	1,975
	% <i>pro se</i>	73.15%	67.04%	56.90%	80.99%	100.00%
Armstrong County Felonies	OCA reported fel cases disposed	10	12	11	22	7
	OCA reported retained counsel at disposition	7	8	0	9	0
	OCA reported appointed counsel at filing or after	3	3	4	14	6
	estimated <i>pro se</i>	0	1	7	-1	1
	% <i>pro se</i>	0.00%	8.33%	63.64%	-4.55%	14.29%
Potter County Felonies	OCA reported fel cases disposed	2,408	2,202	1,948	2,149	2,007
	OCA reported retained counsel at disposition	243	176	182	130	356
	OCA reported appointed counsel at filing or after	693	382	341	978	1,008
	estimated <i>pro se</i>	1,472	1,644	1,425	1,041	643
	% <i>pro se</i>	61.13%	74.66%	73.15%	48.44%	32.04%

How many indigent defense cases are there?

No state agency accounts for how many indigent defense cases there are each year in which Texas' courts and counties must be prepared to provide an attorney. (Chapter 6 explains in detail the criminal justice process in Armstrong County and in Potter County from commission of an offense through institution of prosecution, including when the right to counsel attaches at the trial level of a criminal case. Chapter 7 discusses how courts determine whether a defendant is indigent and entitled to appointed counsel.)

²⁷⁰ See *Court Activity Database, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/court-activity-database/>.

Every indigent defendant in every felony or jailable misdemeanor case in Texas faces possible incarceration,²⁷¹ and so is entitled to have an attorney represent them during every critical stage of that case, unless the defendant waives the right to counsel.²⁷²

The defendant's right to counsel attaches when "formal judicial proceedings have begun."²⁷³ Formal judicial proceedings begin in two ways: at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,"²⁷⁴ and whenever prosecution is commenced, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."²⁷⁵

From that moment forward, no critical stage in a criminal case can occur unless the defendant is represented by counsel or waives the right to counsel.²⁷⁶ Over the decades, the Supreme Court has inch-by-inch delineated many case events as being critical stages, although it has never purported to have capped the list of events that may fall into this category.²⁷⁷ Events that are definitely critical stages are: custodial interrogations both before and after commencement of prosecution;²⁷⁸ preliminary hearings prior to commencement of prosecution where "potential substantial prejudice to defendant[s'] rights inheres in the . . . confrontation";²⁷⁹ lineups and show-ups at or after commencement of prosecution;²⁸⁰ during plea negotiations and at the entry of a guilty plea;²⁸¹ arraignments;²⁸² during the pre-trial period between arraignment and

²⁷¹ TEX. PENAL CODE ANN. §§ 1.07(a)(23), 1.07(a)(31), 12.21, 12.22, 12.31, 12.32, 12.33, 12.34, 12.35 (West 2017).

²⁷² U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. *See* TEX. CODE CRIM. PROC. ANN. arts. 1.05, 1.051(c) (West 2017); *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008); *Halbert v. Michigan*, 545 U.S. 605 (2005); *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Although delinquency representation is outside the scope of this study, we note that children accused of delinquent acts likewise have a right to counsel at public expense. *In re Gault*, 387 U.S. 1 (1967).

²⁷³ *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). *See also* *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

²⁷⁴ *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008).

²⁷⁵ *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). *See also* *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

²⁷⁶ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

²⁷⁷ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 n.16 (2008) (quoting *United States v. Ash*, 413 U.S. 300, 312-13 (1973)) (noting that the critical stages in a case are the moments when the defendant has to make choices – when "counsel would help the accused 'in coping with legal problems or . . . meeting his adversary'").

²⁷⁸ *Brewer v. Williams*, 430 U.S. 387, 399 (1977); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964).

²⁷⁹ *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970).

²⁸⁰ *Moore v. Illinois*, 434 U.S. 220, 231 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972); *United States v. Wade*, 388 U.S. 218, 236-38 (1967).

²⁸¹ *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

²⁸² *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961).

the beginning of trial;²⁸³ trials;²⁸⁴ during sentencing;²⁸⁵ direct appeals as of right;²⁸⁶ probation revocation proceedings to some extent;²⁸⁷ and parole revocation proceedings to some extent.²⁸⁸

An indigent defendant can waive the right to counsel at any point,²⁸⁹ but government can never require the defendant to waive their right to counsel, and so the Texas courts and counties must be prepared to provide an appointed attorney to every indigent defendant in every felony and jailable misdemeanor.

As a result, there are two straight-forward questions that answer how many indigent defense cases there are each year in which Texas' courts and counties must be prepared to provide an attorney:

- how many defendants are arrested on felony or jailable misdemeanor charges?
- of those defendants, how many are indigent?

The OCA does not require court clerks to report any information about criminal cases at the point of arrest. If an indigent defendant has been arrested, but the prosecutor has not yet instituted prosecution, there will be no record at all in the OCA data of the existence of that defendant. The OCA data shows the number of new felony and jailable misdemeanor prosecutions that are instituted in each court, each month, reported by the court clerks as newly filed cases. So, once prosecution is instituted against a defendant, that defendant's case appears in the OCA data. But OCA does not require court clerks to report any information about whether defendants are indigent.

As explained previously, the TIDC does not require county auditors to report any information about a criminal case until: it is disposed if handled by a public defender office; or an appointed attorney is paid.²⁹⁰ Unless an attorney is paid or in cases handled by a public defender office the case is disposed, the TIDC data does not reflect that a criminal case and the defendant charged in it even exists.

²⁸³ *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *Powell v. Alabama*, 387 U.S. 45, 57 (1932).

²⁸⁴ *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972); *In re Gault*, 387 U.S. 1, 36-37 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

²⁸⁵ *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Mempa v. Rhay*, 389 U.S. 128, 134, 137 (1967).

²⁸⁶ *Halbert v. Michigan*, 545 U.S. 605, 621 (2005); *Douglas v. California*, 372 U.S. 353, 357 (1963).

²⁸⁷ *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

²⁸⁸ *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); *cf. Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (leaving open the question “whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent”).

²⁸⁹ *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(f)-(h) (West 2017); *Faretta v. California*, 422 U.S. 802 (1975) (holding that a defendant may exercise the Sixth Amendment right of self-representation so long as there is a knowing, voluntary, and intelligent waiver of the right to counsel).

²⁹⁰ The rare exception is that TIDC requires county auditors to report capital murder cases at the trial level for any year during which any payment is made, even if the case is handled by a public defender office and is not disposed. *See, e.g.*, TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 7 (Oct. 2018).

Of course, every case ever reported to TIDC does involve a defendant who was determined by a court to be indigent and entitled to appointed counsel, so it might appear at first blush that the TIDC data reflects the number of criminal cases in which indigent defendants are entitled to appointed counsel. It does not, for two reasons. First, TIDC does not require court auditors to report the number of defendants whom courts determined to be indigent but then for whom counsel was never appointed *despite* the defendant being entitled to appointed counsel, if this occurs. (This is the problem that TIDC identified as occurring in Potter County in 2009.²⁹¹ See discussion of TIDC monitoring in Potter County at pages 47-50.) Second, TIDC does not require county auditors to report the number of indigent defense *cases*, but instead requires county auditors to report whenever some attorney is paid for providing indigent representation and whenever a public defender office attorney disposes of a case. As explained previously, when an appointed attorney is paid in a criminal case is determined by the plan and schedule of fees adopted by the judges in each county with jurisdiction over criminal cases,²⁹² and so the timing of payments over the life of a case varies from county to county. There can be multiple payments made to appointed attorneys in a single case, and each of those payments can result in the same criminal case being counted again with each payment made during the annual reporting period or during a different reporting period. Meanwhile (in counties that do not use a public defender office), if for any reason a payment is never made to an appointed attorney for a particular indigent defendant's case, the TIDC data will never reflect the existence of that criminal case or of the indigent defendant charged in it.

It is impossible to determine from the OCA data and the TIDC data how many indigent defense cases there are each year in which Texas' courts and counties must be prepared to provide an attorney.

²⁹¹ TEXAS TASK FORCE ON INDIGENT DEFENSE, POTTER COUNTY POLICY MONITORING FOLLOW-UP VISIT, MAY 11-12, 2009, at 1 of 8 (June 2009).

²⁹² TEX. CODE CRIM. PROC. ANN. art. 26.05(b)-(c) (West 2017).

CHAPTER 4

THE RIGHT TO COUNSEL IN ARMSTRONG COUNTY

Armstrong County is 909 square miles of almost entirely agricultural land, where 1,892 people live as of 2018.²⁹³ That works out to roughly two people per square mile on average. The only incorporated community in Armstrong County is the county seat of Claude. Residents of Claude make up 65% of the entire Armstrong County population.²⁹⁴

State Highway 287 serves as the main road through downtown Claude, as the speed limit lowers from 70 to 35 miles per hour and then rises back up again a few blocks on. All of Armstrong County's elected officials work out of the county courthouse that anchors the center of town or at the county jail just across and down the street from the courthouse.



Despite its rural nature and sparse population, Armstrong County has all of the same criminal justice responsibilities as its urban neighbor Potter County. There are just many fewer people and greatly less resources available to fulfill those responsibilities in Armstrong County. This chapter highlights some of the unique circumstances and challenges faced by Armstrong County in providing the right to counsel to indigent adult defendants at trial in criminal cases. (Chapters 5 through 9 explain in detail the laws and procedures that govern the right to counsel in both Armstrong and Potter.)

The personnel and costs of the criminal justice system

There are only three judicial officers in the Armstrong County justice system – one district court judge, one county judge, and one justice of the peace. Of the three judicial officers, only the district court judge is a lawyer.²⁹⁵ The county judge has held

²⁹³ See *Quickfacts: Armstrong County, Texas*, UNITED STATE CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/armstrongcountytexas/PST045218>.

²⁹⁴ See *Community Facts: Claude, Texas*, American FactFinder, UNITED STATE CENSUS BUREAU, [https://factfinder.census.gov/bkmk/cf/1.0/en/place/Claude city, Texas/ALL](https://factfinder.census.gov/bkmk/cf/1.0/en/place/Claude%20city,%20Texas/ALL).

²⁹⁵ All district court judges must be licensed attorneys for at least four years and live in the judicial district for the two years preceding & during office. TEX. CONST. art. V, § 7.

that position for 30 years, after graduating high school, serving a tour in the Marine Corps, and returning back to his hometown to work on the still-active family ranch.²⁹⁶ The justice of the peace has been in office since the election in October 2013, and she has a bachelor's degree in general studies with an emphasis in education and social work.²⁹⁷

The judge of the 47th District Court is jointly elected by the voters of Armstrong, Potter, and Randall counties²⁹⁸ and exercises district court jurisdiction in all three counties.²⁹⁹ All felony cases in Armstrong County are heard in the 47th District Court.³⁰⁰ During three separate weeks each year, the district court judge comes from Amarillo to Armstrong County, bringing with him his court clerk, court reporter, and court bailiff.³⁰¹ At all other times, there are not any district court personnel physically present in Armstrong County and there is not any judicial officer present in the county who is a lawyer. Armstrong County shares the cost of the district court's personnel with Potter and Randall counties,³⁰² for which it spent \$1,234.92 during calendar year 2017.³⁰³

The judge of the Armstrong County Court is elected by the voters of Armstrong County³⁰⁴ and exercises all county level court jurisdiction in the county.³⁰⁵ The county

²⁹⁶ County judges are not required to be attorneys, but must “be well informed in the law of the State.” TEX. CONST. art. V, § 15.

²⁹⁷ Justices of the peace are not required to be attorneys, and in fact there are no qualifications established for a person to be elected justice of the peace, but they can be removed from office for “incompetency” if they fail to complete an 80-hour course about justice of the peace duties in their first year in office and then a 20-hour course each year thereafter. TEX. GOV'T CODE ANN. § 27.005 (West 2017).

²⁹⁸ TEX. CONST. art. V, § 7; TEX. GOV'T CODE ANN. § 24.149 (West 2017).

²⁹⁹ TEX. CONST. art. V, § 8; TEX. GOV'T CODE ANN. § 24.007(a) (West 2017). In addition to criminal cases, this jurisdiction includes supervisory control over the commissioners court, civil jurisdiction where the amount in controversy is over \$500 as well as other specific types of civil cases, and juvenile matters. TEX. CONST. art. V, § 8; TEX. CODE CRIM. PROC. ANN. arts. 4.01, 4.05, 4.17 (West 2017); TEX. GOV'T CODE ANN. §§ 23.001, 24.007, 24.008, 24.020 (West 2017).

³⁰⁰ TEX. GOV'T CODE ANN. § 24.149 (West 2017).

³⁰¹ See, e.g., 2019 Calendar for the 47th District Court (showing “Armstrong County Trial Weeks” as Jan. 28 through Feb. 1; Apr. 29 through May 2; and Sept. 30 through Oct. 4).

³⁰² The legislature sets and pays the compensation of district court judges through the biennial appropriations act. TEX. CONST. art. V, § 1-a(1); TEX. GOV'T CODE ANN. § 659.011 (West 2017); see TEX. GOV'T CODE ANN. § 659.012 (West 2017). The commissioners courts of the counties making up a judicial district are responsible for funding the personnel, facilities, and operations of the district court. See, e.g., TEX. GOV'T CODE ANN. §§ 24.605(b), 24.954 (West 2017); TEX. LOCAL GOV'T CODE ANN. §§ 151.001 through 151.004, 151.901, 152.001, 291.001, 291.002 (West 2017). The legislature may allocate funding through the biennial appropriations act to defray the cost to counties for the district courts. TEX. GOV'T CODE ANN. § 21.008 (West 2017).

³⁰³ “Actual Exper YEAR - 2017,” Armstrong County 2019 Proposed Budget, p. 6 (Oct. 3, 2018) (made up of four line-items: district judge salary \$0; district judge secretary \$283.92; district judge court reporter \$591; and 47th district travel \$360).

³⁰⁴ TEX. CONST. art. V, §§ 15, 16, 30; TEX. GOV'T CODE ANN. § 21.009(3) (West 2017).

³⁰⁵ TEX. GOV'T CODE ANN. § 21.009(1) (West 2017). See TEX. CONST. art. V, § 15.

judge, his court coordinator, and the county court clerk are all permanently located in the courthouse in Claude. Jailable misdemeanors in Armstrong County (other than misdemeanors involving official misconduct) are heard in the county court.³⁰⁶ In addition to judicial responsibilities, the county judge has county government administrative functions.³⁰⁷ The county judge is also the presiding officer of the county's commissioners court, which is responsible for the executive and legislative power over all county business,³⁰⁸ and he is also the county's budget officer.³⁰⁹ During calendar year 2017, Armstrong County spent \$74,183.69 for the judicial functions of the county court.³¹⁰

The Armstrong County justice of the peace is elected by the voters of Armstrong County.³¹¹ The district court judge and the county judge have designated the justice of the peace to serve as the magistrate who presides over magistration proceedings in all criminal cases in the county, both felony and misdemeanor.³¹² In calendar year 2017, Armstrong County spent \$72,377.42 for the full cost of the justice of the peace court personnel and operations.³¹³

The voters of Armstrong County and Potter County jointly elect the district attorney for the 47th judicial district,³¹⁴ whose office prosecutes all criminal cases in the district court in Armstrong County (and in Potter County) and also in the county court in Armstrong County.³¹⁵ The district attorney's office is physically located in Amarillo where all of the employees work on a daily basis – no one from the district attorney's office is permanently present in Armstrong County. The state pays the district

³⁰⁶ TEX. CODE CRIM. PROC. ANN. art. 4.07 (West 2017); TEX. PENAL CODE ANN. §§ 12.03, 12.21, 12.22, 12.23 (West 2017).

³⁰⁷ TEX. CONST. art. V, § 16.

³⁰⁸ TEX. CONST. art. V, § 18(b); TEX. LOCAL GOV'T CODE ANN. § 81.001 (West 2017).

³⁰⁹ TEX. LOCAL GOV'T CODE ANN. §§ 111.001, 111.002 (West 2017).

³¹⁰ "Actual Exper YEAR - 2017," Armstrong County 2019 Proposed Budget, pp. 5-6 (Oct. 3, 2018). "[I]f at least 40 percent of the functions that the judge performs are judicial functions," then the *state* must pay the county judge, as a salary supplement, at least 18% of a district court judge's salary. TEX. GOV'T CODE ANN. § 26.006 (West 2017). *See also* TEX. GOV'T CODE ANN. § 26.007 (West 2017).

³¹¹ Every Texas county is required by the state's constitution to establish some number of between one and eight justice of the peace precincts; the number of precincts required is based on the county's population. TEX. CONST. art. V, § 18(a). In Texas counties with a population less than 150,000 and where there are not any cities with 18,000 or more inhabitants, one justice of the peace is elected to each precinct. *Id.*

³¹² There is not, to anyone's recollection, a written order by the judges designating the justice of the peace to preside over magistration proceedings. It has been done this way in Armstrong County (and in Potter County) for a long time.

³¹³ "Actual Exper YEAR - 2017," Armstrong County 2019 Proposed Budget, p. 5 (Oct. 3, 2018). The Armstrong County commissioners court is responsible for funding the personnel, facilities, and operations of the justice of the peace court. TEX. GOV'T CODE ANN. §§ 25.0010, 27.051 (West 2017); TEX. LOCAL GOV'T CODE ANN. §§ 151.001 through 151.004, 151.901, 152.001, 152.011 through 152.013, 291.001, 291.002 (West 2017).

³¹⁴ TEX. GOV'T CODE ANN. § 43.127 (West 2017).

³¹⁵ TEX. CODE CRIM. PROC. ANN. art. 2.01 (West 2017); TEX. GOV'T CODE ANN. § 43.127 (West 2017).

attorney's compensation,³¹⁶ and the Potter County commissioners court decides on and pays the number and compensation of personnel in the district attorney's office.³¹⁷ Of the 20 attorneys (including the elected DA) in the district attorney's office, one assistant district attorney handles the office's entire Armstrong County caseload of both felony and misdemeanor offenses; she estimates that approximately 10% of her professional hours are devoted to Armstrong County cases. She is only physically present in Armstrong County when the district court or county court conduct criminal proceedings there. Of the district attorney office's 20 non-attorneys, one investigator and one secretary are assigned to work on cases in the 47th District Court, including those arising in Armstrong County. For the part-time services of one assistant district attorney, one investigator, and one secretary, in calendar year 2017 Armstrong County paid \$4,460.88 – a figure that reportedly has not changed significantly in approximately 20 years.³¹⁸

There are no municipal police departments in Armstrong County, so the Armstrong County Sheriff's Department is responsible for all law enforcement duties, aided by two Texas Department of Public Safety troopers who patrol the stretch of highway 287 that passes through the county. The Armstrong County Sheriff's Department also operates the Armstrong County jail. Since November 2018, the entirety of the sheriff's office consists of the elected sheriff, the chief deputy, one deputy, one jail administrator who doubles as a dispatcher, and four dispatchers.³¹⁹ A small two-story building houses the sheriff's office and the jail. The sheriff's office and dispatch desk are on the first floor, along with a utility closet that holds the videoconferencing equipment used for magistration proceedings. A single room on the second floor has the capacity to house eight detainees. Only the sheriff, chief deputy, and jail administrator are trained in jail administration, so one of them must be present in the building whenever anyone is detained in the jail. Given the sparsity of arrests in Armstrong County, there are many days when the jail is not occupied. Armstrong County spent \$482,768.15 in total during calendar year 2017 for all law enforcement and jail costs.³²⁰

³¹⁶ TEX. GOV'T CODE ANN. § 46.003(a) (West 2017). The commissioners courts can supplement the state salary paid to a district attorney. TEX. GOV'T CODE ANN. § 46.003(b) (West 2017).

³¹⁷ TEX. GOV'T CODE ANN. § 43.127(d)-(e) (West 2017). The commissioners courts are responsible for funding the personnel, facilities, and operations of the district attorney's office. TEX. GOV'T CODE ANN. §§ 41.102, 41.106, 41.107 (West 2017). The state must provide at least \$22,500 per year to "help defray the salaries and expenses" of each district attorney's office. TEX. GOV'T CODE ANN. § 46.004 (West 2017).

³¹⁸ "Actual Exper YEAR - 2017," Armstrong County 2019 Proposed Budget, p. 6 (Oct. 3, 2018) (made up of three line-items: district attorney salary \$3,432.96; district attorney secretary salary \$997.92; and assistant district attorney travel \$30.00).

³¹⁹ Of the four dispatcher positions, as of September 2019, three of the dispatchers are full-time and one is in training. Once the dispatcher in training completes that training, their position will be full-time, but one of the three current full-time dispatchers will be leaving that employment.

³²⁰ "Actual Exper YEAR - 2017," Armstrong County 2019 Proposed Budget, pp. 7-8 (Oct. 3, 2018) (made up of four cost-categories: DPS \$869.39; sheriff department \$254,390.02; jail housing & booking \$214,703.74; and indigent health care \$12,805.00).

Finally, Armstrong County is responsible for funding the costs of appointed counsel and necessary expenses of the defense at both trial and appeal for all criminal and juvenile cases originating in the county.³²¹ In calendar year 2017, Armstrong County appears to have actually spent \$7,529.30 on indigent defense services.³²² It is difficult to reconcile this with Armstrong County having reported in its “Indigent Defense Expenditure Report” to TIDC that it spent a total of \$14,430 for indigent defense services during TIDC fiscal year 2017 (Oct. 1, 2016 through Sept. 30, 2017).³²³ Armstrong County’s report to TIDC for FY2017 carries the caveat, for both the district court and the county court, that: “The financial figures are estimates or are for some other reason unreliable.”³²⁴

County revenues & expenditures

Armstrong County policymakers describe their county as “very poor.” Sources of revenue available to Armstrong County include property taxes (a/k/a *ad valorem* tax; by far the largest source), sales taxes, franchise fees, bond issuance, and transfers from state or federal government. But Texas counties are prohibited from levying property taxes of more than 80 cents on \$100 property valuation, except with voter approval they can levy an additional 14 cents for maintenance of public roads.³²⁵ Most of the land surrounding the city of Claude, the county’s sole incorporated community, is reportedly “agricultural tax property” that generates little revenue for the county.

Armstrong County operates on a financial calendar year, from January 1 through December 31. The most recent year for which final revenues and expenditures are

³²¹ See, e.g., TEX. CODE CRIM. PROC. ANN. art. 26.05(f) (West 2017).

³²² “Actual Exper YEAR - 2017,” Armstrong County 2019 Proposed Budget, pp. 3, 6 (Oct. 3, 2018) (made up of four line-items: West TX Capital Defense/Lubbock \$1,000.00; court appointed attorney \$6,250.00; court appointed reporter \$294.50; and indigent appeals -\$15.20).

³²³ *Armstrong County Expenditure Report Summary – Fiscal Year 2017, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2017>.

Table: Armstrong County IDER to TIDC for FY2017 - Reported Indigent Defense Costs

		atty fees	expenses			total cost
			investigation	expert	litigation	
47th District Court atty fees & exp	adult non-capital felony trial	\$8,400	\$0	\$0	\$0	\$8,400
Armstrong County Court atty fees & exp	adult misd. trial	\$3,580	\$0	\$0	\$0	\$3,580
Armstrong County Court atty fees & exp	juvenile appeal	\$1,450	\$0	\$0	\$0	\$1,450
total attorney fees & expenses						\$13,430
county administrative costs						\$0
capital defense RPDO						\$1,000
total indigent defense costs						\$14,430

³²⁴ *Armstrong County Expenditure Report Summary – Fiscal Year 2017, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2017>.

³²⁵ TEX. CONST. art. XIII, § 9.

available is 2017. In calendar year 2017, Armstrong County had the following amounts of revenue from all sources:³²⁶

Table: Armstrong County Calendar Year 2017 Actual Revenues

General Fund		
taxes	\$904,592.07	
licensing	\$118,561.03	
fees of office	\$284,051.53	
state court costs	\$19,458.72	
civil fees	\$1,084.29	
"PILT"	\$102,000.00	
other government units	\$146,072.44	
other sources	\$38,231.98	
total county general fund revenues	\$1,614,052.06	
total county dedicated funds revenues	\$583,603.97	
TOTAL COUNTY ALL FUNDS REVENUES		\$2,197,656.03

It is always difficult to say exactly what the cost is for any county to operate its criminal justice system. In Armstrong County, the courthouse building and the sheriff's office building house all governmental functions; not just those of the justice systems. The judges and court personnel and many court expenses in Armstrong County are attributable to both the criminal justice system and the civil justice system. Even those costs that clearly serve only a criminal justice purpose in Armstrong County – such as the prosecution and indigent defense – are not grouped together in the county's budget. This is not a shortcoming of Armstrong County government; rather, it is typical of nearly every city and county across the country, where criminal justice spending is dispersed across the general fund departments responsible for it and where income and expenses related to criminal justice often also appear in dedicated funds.³²⁷

Below is a table that displays a ballpark estimate of Armstrong County's spending on criminal justice. All dollar amounts reflect the Armstrong County budget. The table includes in "General Fund – crim justice system" all items that have a criminal justice purpose, or both a civil justice and criminal justice purpose that cannot be

³²⁶ "Actual Exper YEAR - 2017," Armstrong County 2019 Proposed Budget, pp. 1-2, 9, 26 (Oct. 3, 2018).

³²⁷ A not insignificant portion of Armstrong County's calendar year 2017 income and expenses for the criminal justice system is in dedicated funds, rather than in the general fund. *See* "Actual Exper YEAR - 2017," Armstrong County 2019 Proposed Budget (Oct. 3, 2018). This includes, in alphabetical order:

Dedicated Fund	Income	Expense	Source
Commissary [Fund]	\$294.20	\$0.00	<i>Id.</i> at p. 22.
County Records Management Fund	\$5,649.87	\$15,742.86	<i>Id.</i> at p. 13.
Courthouse Security [Fund]	\$8,647.41	\$297.12	<i>Id.</i> at p. 16.
District Records Management Fund	\$878.56	\$0.00	<i>Id.</i> at p. 14.
Jail Restoration [Fund]	\$0.00	\$2,949.56	<i>Id.</i> at p. 19.
Justice Court Technology Fund	\$7,857.36	\$11,614.59	<i>Id.</i> at p. 17.
Sheriff Seizure [Fund]	\$7,670.96	\$2,000.00	<i>Id.</i> at p. 21.
Task Force Indigent Defense [Fund]	\$6,013.00	\$0.00	<i>Id.</i> at p. 24.
TOTAL	\$37,011.36	\$32,604.13	

disaggregated. Any budget item not clearly related to criminal justice is included in the non-itemized total of “General Fund – other than crim justice system.” With the preceding qualifications, in calendar year 2017, Armstrong County had the following amounts of expenditures for its criminal justice system:³²⁸

Table: Armstrong County Calendar Year 2017 Actual Expenditures

General Fund - crim justice system		
district court		\$1,234.92
district judge salary	\$0.00	
district judge secretary	\$283.92	
district judge court reporter	\$591.00	
47th district travel	\$360.00	
county court (judicial system)		\$74,183.69
county/district clerk		\$107,235.13
justice of the peace court		\$72,377.42
court expenses, generally		\$7,305.36
mental commitments - other med exams	\$988.48	
interpreter	\$0.00	
citations & subpoenas	\$0.00	
payroll tax	\$405.96	
law books	\$5,861.63	
9th judicial administration	\$49.29	
district & county jury		\$702.00
prosecution		\$4,460.88
district attorney salary	\$3,432.96	
district attorney secretary salary	\$997.92	
assistant district attorney travel	\$30.00	
indigent defense		\$7,529.30
West TX Capital Defense/Lubbock	\$1,000.00	
court appointed attorney	\$6,250.00	
court appointed reporter	\$294.50	
indigent appeals	(\$15.20)	
DPS		\$869.39
sheriff department		\$254,390.02
jail housing & booking		\$214,703.74
indigent health care		\$12,805.00
supervision - adult probation		\$0.00
juvenile services		\$32.40
courthouse maintenance		\$46,352.95
courthouse operations		\$9,503.80
total county general fund crim justice system expenditures		\$813,686.00
General Fund - other than crim justice system		\$592,600.02
total county general fund expenditures		\$1,406,286.02
total county dedicated funds expenditures		\$482,894.96
TOTAL COUNTY ALL FUNDS EXPENDITURES		\$1,889,180.98

As can be seen from the revenue and expenditure tables above, Armstrong County’s spending on criminal justice is roughly \$813,686, or 58% of its total general fund

³²⁸ “Actual Exper YEAR - 2017,” Armstrong County 2019 Proposed Budget, pp. 3-9, 26 (Oct. 3, 2018).

expenditures of \$1,406,286. At the time of this evaluation, Armstrong County was actively looking for ways to reduce county spending. One possibility under discussion is whether to close its eight-bed jail and instead contract for its pretrial detention needs with neighboring counties.³²⁹ While the county might realize an immediate fiscal savings from closing the jail,³³⁰ county officials are being careful to consider what unintended consequences might result.

The existing Armstrong County jail building (also housing the sheriff's office) is more than 50 years old. According to county officials, the building is grandfathered in and excused from compliance with many modern building codes and public safety regulations for jails. Should the county cease jail operations at the building, officials worry the county would not be permitted in the future to use the building as a jail if they needed to and would have to instead construct an entirely new jail facility at a significant but unknown cost.

Housing Armstrong County detainees in any other county will place those detainees further away from the Armstrong County courthouse. So, the county would incur transportation costs every time a defendant must appear in court.

Both Potter County and Randall County have made clear that there is no room in their jails for Armstrong County detainees. In considering where they might house detainees if the jail were closed, Armstrong County has looked to the counties of the neighboring 100th Judicial District (Carson County to the north; Childress, Collingsworth, Donley, and Hall counties to the east) as possibilities. Some local stakeholders worry that any interlocal agreement between Armstrong County and counties in the 100th Judicial District might be viewed by the Texas legislature as an indication that Armstrong County itself should be moved into the 100th Judicial District, and therefore out of the 47th Judicial District.

Armstrong County officials believe the county benefits greatly by its proximity to Amarillo and its inclusion in the 47th Judicial District. If the county were moved out of the 47th Judicial District, it would lose its current district judge and judicial staff and district attorney's office, all of whom county officials view as "top quality." Even more worrisome is the possibility of the county losing access to the small but reliable group of Amarillo criminal defense lawyers who provide almost all indigent defense representation in the courts of Armstrong County.

³²⁹ See Destiny Richards, *Committee created to discuss Armstrong County Jail*, KFDD NEWSCHANNEL 10 (May 13, 2019).

³³⁰ County officials estimate that the current cost of having a jail in Armstrong County is roughly \$700 per day, including jail housing & booking plus compensation for sheriff personnel to be present at the jail when it is occupied. In calendar year 2017, Armstrong County spent \$214,703.74 for jail housing and booking alone – \$588.23 per day, before paying any sheriff's personnel to be present to administer the jail. "0419 Jail Housing & Booking - Actual Expense YEAR - 2017," Armstrong County 2019 Proposed Budget, p. 8 (Oct. 3, 2018).

The lack of attorneys

The 47th District Court judge and the Armstrong County Court judge are responsible under Texas law for adopting the Armstrong County plan for providing counsel to indigent defendants in criminal cases.³³¹ As explained in chapter 2, they have joined with the judges of Potter and Randall counties to adopt a single plan used in all three counties.³³² The judges of Armstrong County could, if they so desired, adopt a separate plan.

Pursuant to the plan, in all criminal cases (other than the first defendant in a capital murder trial),³³³ the right to counsel for indigent defendants is provided entirely by individual private attorneys who are appointed on a case-by-case basis.³³⁴ This is a problem in Armstrong County, because as of September 2019 the State Bar of Texas shows there are only two licensed attorneys who have their primary practice location in Armstrong County.³³⁵ Of those two attorneys, Richard Morris, is deceased, and Lendon Ray is not on the approved list of attorneys who are available to be appointed in Armstrong County.

As of February 7, 2019, there were only eight attorneys qualified and selected by the judges as available to be appointed to represent indigent adults in criminal cases in Armstrong County (*see* list at page 94). None of the eight attorneys live in or maintain a law office in Armstrong County. Seven of them drive in from Amarillo and one from Canyon. By and large, these attorneys indicate they would rather not take appointed cases in Armstrong County, but they do so either as a contribution to the community or because the judges have asked them to. These attorneys are presently willing to make the 30- to 45-minute drive to Claude on the rare occasions it is necessary for them appear in court there, but the judges are fearful of losing any of these attorneys from the appointment list.

³³¹ TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2017).

³³² Armstrong, Potter and Randall District Court and County Court Plan (adopted Oct. 6, 2011 and subsequently amended).

³³³ Although the joint plan does not mention it, Armstrong County participates in the Regional Public Defender Office for Capital Cases (RPDO) program that provides representation in the first instance to indigent defendants in death penalty cases. *See* discussion of capital cases at pages 83-91.

³³⁴ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.A. (adopted Oct. 6, 2011 and subsequently amended) (“The Judges hearing criminal cases shall establish attorney appointment lists . . .”). The Plan also refers to using the Caprock Regional Public Defender in Armstrong County cases, *id.* at ¶¶ II.A.v., III.C., V.C., but it has been several years since the Armstrong County judges chose to no longer participate in the Caprock Regional Public Defender program.

³³⁵ *Find a Lawyer*, STATE BAR OF TEXAS, https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&Template=/CustomSource/MemberDirectory/Result_form_client.cfm.

Ensuring effective assistance of counsel to every indigent defendant at all critical stages of a criminal case

(See chapter 6 for a full discussion of the criminal justice process from commission of an offense through arraignment and chapter 7 for a full discussion of the criminal justice process from arraignment through disposition of the case.)

Arrest & magistration

Every person alleged to have committed any felony or jailable misdemeanor in Armstrong County is arrested; no one is issued a citation to appear. Armstrong County has only a small number of arrests each year, although the exact numbers have not been provided. All stakeholders report that most felony arrests are drug charges arising from traffic stops of non-residents travelling State Highway 287 between the Dallas-Fort Worth area and New Mexico or Colorado.

In compliance with state law and the judges' indigent defense plan, within 48 hours of an arrest, the defendant appears by videoconference for magistration by the justice of the peace, who has been designated to serve as the magistrate in all felony and jailable misdemeanor cases.³³⁶ If for any reason the justice of the peace is unavailable, she has her clerk of court preside in her stead. Because there are so few arrests of any type, it is usually only a single defendant who requires magistration on a given day, and magistration proceedings are only necessary roughly 20 to 40 times a year. From the vantage of the arrested defendant, the two most important things occurring during magistration are having the opportunity to request an appointed attorney and for the magistrate to set bond which might allow the defendant to get out of jail.³³⁷

No arrests occurred in Armstrong County during the site work portion of this evaluation. As a result, the Sixth Amendment Center was not able to directly observe magistration proceedings in the county, and all information about what occurs during those proceedings was gleaned through interviews of criminal justice stakeholders.

During magistration proceedings, the defendant is physically located in the downstairs utility closet at the sheriff's office, handcuffed to a metal bench in front of the

³³⁶ TEX. CODE CRIM. PROC. ANN. arts. 14.06(a), 15.17(a) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.A.i. (adopted Oct. 6, 2011 and subsequently amended). See TEX. CODE CRIM. PROC. ANN. art. 15.16 (West 2017). There is not, to anyone's recollection, a written order by the judges designating the justice of the peace to preside over magistration proceedings. It has been done this way in Armstrong County (and in Potter County) for a long time.

³³⁷ See TEX. CODE CRIM. PROC. ANN. art. 15.17(a), (g) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B. (adopted Oct. 6, 2011 and subsequently amended).

videoconferencing equipment. The magistrate is physically located at the Armstrong County Courthouse, about a block up the road from the sheriff's office. The only other person participating in the magistration proceeding is the sheriff's office employee on duty that day, who provides the defendant with the one-page English-language version of the "Magistrate Warning" form that the magistrate will read to the defendant,³³⁸ and who also assists the defendant in completing the "Affidavit of Indigence" paperwork to request appointed counsel if the defendant desires to do so.³³⁹

Once the videoconferencing equipment is turned on, the magistrate does three, and sometimes four, things: informs the defendant of the accusation and any supporting affidavits; informs the defendant of constitutional rights including the right to appointed counsel if indigent, allowing the defendant to request appointed counsel if they desire; sets bail amounts and conditions for the defendant "if allowed by law";³⁴⁰ and for any defendant who was arrested without a warrant, determines based on written documents filed by the arresting officer whether there is probable cause to believe that the alleged offense occurred and that the defendant committed it.³⁴¹

After the magistration proceeding is concluded, the sheriff personnel transmit the defendant's signed "Magistrate Warning" form to the magistrate to add her signature to the document. On the "Magistrate Warning" form, the magistrate must also "record the following:

1. The date and time the accused was arrested and the date and time when he/she was brought before the magistrate.
2. Whether the magistrate informed the accused of the right to request appointment of counsel and asked the accused whether he/she wants to request counsel.
3. Whether the accused requested appointment of counsel."³⁴²

³³⁸ The version of this form used in Armstrong County is not provided in Spanish, even though the version of the form contained in the published plan documents is a two-page document with the first page in English and the second page in Spanish. See "Magistrate's Warning," in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Magistrate's Warning Form.docx (adopted Oct. 6, 2011 and subsequently amended); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.v.-vi., viii. (adopted Oct. 6, 2011 and subsequently amended).

³³⁹ See "Affidavit of Indigence," in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (adopted Oct. 6, 2011 and subsequently amended); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.ii.5., I.B.vi., viii., x., II.C.ii., IV.A.v. (adopted Oct. 6, 2011 and subsequently amended).

³⁴⁰ See TEX. CODE CRIM. PROC. ANN. art. 15.17(a), (g) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B. (adopted Oct. 6, 2011 and subsequently amended).

³⁴¹ See TEX. CODE CRIM. PROC. ANN. art. 17.033(a)-(d) (West 2017); County of Riverside v. McLaughlin, 500 U.S. 44 (1991); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.A.ii., I.B.iii. (adopted Oct. 6, 2011 and subsequently amended).

³⁴² See TEX. CODE CRIM. PROC. ANN. art. 15.17(e) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B.v. (adopted Oct. 6, 2011 and subsequently amended).

If the defendant did *not* request appointed counsel during magistration, the magistrate sends the defendant's "Magistrate Warning" form to the lone Armstrong County court clerk who serves as both the district court clerk (for felony charges) and the county court clerk (for misdemeanor charges), "to be put into the case file."³⁴³

If the defendant requested appointed counsel during magistration, the sheriff personnel also transmit the defendant's signed "Affidavit of Indigence" to the magistrate. Within 24 hours the magistrate sends the defendant's "Magistrate Warning" form and the defendant's "Affidavit of Indigence": on felony arrests, to the judge of the 47th Judicial District Court; on misdemeanor arrests, to the judge of the Armstrong County Court; and if a defendant was arrested on both a felony and a misdemeanor, the paperwork goes to both judges.³⁴⁴

Institution of prosecution & arraignment

After magistration proceedings, the next step is for the prosecutor to decide whether and on what charges to prosecute a defendant. All prosecutions in Armstrong County of both felonies and jailable misdemeanors are handled by one assistant district attorney (in the office of the District Attorney for the 47th Judicial District),³⁴⁵ assisted by one investigator and one secretary.

If the prosecutor decides she will not accept the case to be prosecuted, then the defendant is released from jail and/or bond obligations and the case ends. In Armstrong County cases involving in-custody defendants, the prosecutor attempts to make any declination decision quickly so the county does not continue to incur the cost of jailing a defendant who will not be prosecuted.

For Armstrong County felonies, the prosecutor takes each case to grand jury within 90 days of the defendant's arrest for in-custody defendants and within 120 days of the defendant's arrest for out of custody defendants. All felony cases are allotted to the 47th District Court. The district court comes to Armstrong County during three weeks each year,³⁴⁶ and arraignment on a felony is typically set for the next week during which the district court is present in the county after the indictment is returned.

³⁴³ Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B.ix. (adopted Oct. 6, 2011 and subsequently amended).

³⁴⁴ TEX. CODE CRIM. PROC. ANN. arts. 15.17(a), 26.04(b)(1) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.vi., viii., IV.A.vi. (adopted Oct. 6, 2011 and subsequently amended).

³⁴⁵ Most of her duties on Armstrong County cases can be performed from her office in Amarillo, but she comes to Armstrong County whenever the district court or the county court conduct criminal proceedings in the county.

³⁴⁶ See, e.g., 2019 Calendar for the 47th District Court (showing "Armstrong County Trial Weeks" as Jan. 28 through Feb. 1; Apr. 29 through May 2; and Sept. 30 through Oct. 4).

For Armstrong County jailable misdemeanors, the prosecutor files an information within two to four weeks of the defendant's arrest. All jailable misdemeanor cases are allotted to the Armstrong County Court; except for any defendant charged with both a jailable misdemeanor and a felony arising out of the same arrest, by agreement between the judges the jailable misdemeanor is filed and heard along with the felony in the 47th District Court.³⁴⁷ The Armstrong County Court holds criminal court one day each month, on the third Tuesday. Arraignment on a jailable misdemeanor is set for the next Armstrong County Court criminal date after prosecution is instituted.

From arraignment to disposition of the case

After arraignment, all pretrial proceedings in Armstrong County felony cases – known as docket calls – are actually conducted at the Potter County courthouse in Amarillo. Any indigent defendant in an Armstrong County felony case must find a way to get the 30 miles to the Potter County courthouse for each docket call; only a trial will be conducted in Armstrong County, generally the week following the final docket call.

After arraignment, the county judge holds docket calls for jailable misdemeanors one day each month, on the third Tuesday, when defendants can plead guilty or their cases can be set for trial. On the very rare occasion that a misdemeanor trial occurs, it will never be scheduled during the summer or winter because the courthouse is too hot or too cold.

³⁴⁷ The judge of the 47th District Court has been cross-assigned to the Armstrong County Court, allowing him to preside over any cases in the Armstrong County Court. Order of Assignment by the Presiding Judge (Tex. 9th Admin. Jud. Reg. Jan. 1, 2019).

CHAPTER 5

ATTORNEY QUALIFICATIONS, TRAINING, AND SUPERVISION

In *Powell v. Alabama* – the case the U.S. Supreme Court points to in *United States v. Cronic* as representative of the constructive denial of the right to counsel³⁴⁸ – the judge overseeing the Scottsboro Boys’ Alabama trial appointed as defense counsel a real estate lawyer from Chattanooga, Tennessee, who was not licensed in Alabama and was admittedly unfamiliar with the state’s rules of criminal procedure.³⁴⁹ The *Powell* Court concluded that defendants require the “guiding hand” of counsel;³⁵⁰ that is, the attorneys a government provides to represent indigent defendants must be qualified and trained to help those defendants advocate for their stated legal interests.

As explained in chapter 2, state law requires the judges who have jurisdiction over criminal cases in each county to adopt by local rule “countywide procedures” for the provision of counsel to indigent defendants at trial and appeal for crimes punishable by incarceration,³⁵¹ referred to by TIDC as a county’s “plan.” The joint plan adopted by the judges of Armstrong, Potter, and Randall counties uses the default method of a public appointment list to provide counsel to represent indigent defendants in criminal

³⁴⁸ *United States v. Cronic*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”)

³⁴⁹ *Powell v. Alabama*, 287 U.S. 45, 53-56 (1932). A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

³⁵⁰ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

³⁵¹ TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2017). Nonetheless, the Potter County Court judge does not participate in adopting the plan for the provision of indigent defense nor in any other aspect of the provision of indigent defense representation in Potter County.

cases.³⁵² Although the joint plan does not mention it,³⁵³ Armstrong and Potter counties both participate in the Regional Public Defender Office for Capital Cases program that provides representation in the first instance to indigent defendants in death penalty cases. Other than for the first defendant in a death penalty case, the right to counsel for indigent defendants in Armstrong County and in Potter County is provided entirely by individual private attorneys.

Selecting qualified attorneys to represent indigent defendants

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no law school graduate enters the legal profession automatically knowing how to be a criminal defense lawyer.³⁵⁴ Specialties must be developed. Just as one would not go to a dermatologist for heart surgery, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently. For these reasons, national standards require that each attorney must have the qualifications, training, and experience necessary for each specific type of case to which they are appointed.³⁵⁵

Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to perform them. As national standards explain, an attorney's ability to provide effective representation in a criminal case depends on his familiarity with the "substantive criminal law and the law of criminal procedure

³⁵² Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.A. (adopted Oct. 6, 2011 and subsequently amended) ("The Judges hearing criminal cases shall establish attorney appointment lists . . ."). Unless the judges choose another statutorily authorized method, by default "[a] court shall appoint an attorney from a public appointment list using a system of rotation . . ." TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2017).

³⁵³ State law requires that, by November 1 of every odd-numbered year, the judges of each county: must provide to the TIDC a copy of all of the rules, forms, plans, proposals, and contracts that together make up the procedures used in the county to provide appointed counsel to indigent defendants; and must notify TIDC of any revisions made to previously submitted information or verify that there have been no changes. TEX. GOV'T CODE ANN. § 79.036(a)-(d) (West 2017).

³⁵⁴ Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 915 (2001-2002) ("[B]ecause legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.").

³⁵⁵ See, e.g., AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 6 (2002) ("Defense counsel's ability, training, and experience match the complexity of the case."). The commentary explains further that: "Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation." AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 6 cmt. (2002).

and its application in the particular jurisdiction.”³⁵⁶ The American Bar Association observed more than 25 years ago that “[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.”³⁵⁷

Death penalty cases

Texas has the death penalty as an available punishment for capital felonies,³⁵⁸ which are murders that involve any one of several specified circumstances.³⁵⁹ Even in cases that meet the definition of a capital felony, the decision whether to seek the death penalty is in the discretion of the prosecutor.³⁶⁰

If a prosecutor does not seek the death penalty in a capital felony, then a sentence of life imprisonment will be imposed following any conviction,³⁶¹ and the laws and rules that govern the provision of counsel in these non-death penalty capital felonies are the same as for all other felonies and misdemeanors. If a prosecutor does seek the death penalty in a capital felony case, the local rule that the judges adopt for providing counsel to represent indigent defendants must comply with some special statutory provisions.³⁶²

Although any given Texas county may not have a death penalty case in a given year, or ever, it is always possible for a capital felony to occur in any county and for the prosecutor to decide to seek the death penalty in that case. As a result, the district court judges in each county must include in the county’s plan the rules under which those judges will provide the two attorneys required to represent each indigent defendant in

³⁵⁶ NATIONAL LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, guideline 1.2(a) (1995).

³⁵⁷ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, § 5-1.5 & cmt. (3d ed. 1992).

³⁵⁸ TEX. PENAL CODE ANN. § 12.31(a) (West 2017) (“An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment . . . for life without parole or by death.”).

³⁵⁹ TEX. PENAL CODE ANN. § 19.03 (West 2017).

³⁶⁰ TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2017).

³⁶¹ TEX. CODE CRIM. PROC. ANN. art. 37.071(1) (West 2017); TEX. PENAL CODE ANN. § 12.31(a) (West 2017) (“An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for: (1) life, if the individual committed the offense when younger than 18 years of age; or (2) life without parole, if the individual committed the offense when 18 years of age or older.”).

³⁶² TEX. CODE CRIM. PROC. ANN. art. 26.04(b)(4) (West 2017). *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 (West 2017) (appointment of counsel in habeas corpus proceedings involving death sentence); TEX. CODE CRIM. PROC. ANN. art. 26.052 (West 2017) (procedures for appointment and payment of attorneys appointed in death penalty cases); TEX. GOV’T CODE ANN. § 79.034(c) (West 2017) (TIDC qualification standards for attorneys appointed in death penalty cases, if any).

a case where the prosecutor seeks the death penalty.³⁶³ State law requires that attorneys appointed to represent defendants in death penalty cases must either be employed in a public defender office (and meet the requirements of that office's guidelines) or meet the qualifications of and be selected by the local selection committee in the administrative judicial region in which the county is located.³⁶⁴

Regional Public Defender for Capital Cases

Although the joint plan does not mention it, Armstrong and Potter counties both participate in the Regional Public Defender Office for Capital Cases program that provides representation in the first instance to indigent defendants in death penalty cases.³⁶⁵

Texas counties are responsible for all costs of indigent defense representation in death penalty cases at both trial and direct appeal (including an application for a writ of certiorari to the United States Supreme Court for any defendant sentenced to death).³⁶⁶ When they occur, death penalty cases can dramatically affect county budgets.³⁶⁷ This is in large part because they are so much more costly than other criminal prosecutions,

³⁶³ TEX. CODE CRIM. PROC. ANN. arts. 26.04(a), (b)(4), 26.052(e) (West 2017).

³⁶⁴ TEX. CODE CRIM. PROC. ANN. art. 26.052(b) (West 2017) (“If a county is served by a public defender’s office, trial counsel . . . may be appointed as provided by the guidelines established by the public defender’s office. In all other cases in which the death penalty is sought, counsel shall be appointed as provided by this article.”).

³⁶⁵ Interlocal Agreement (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas); Interlocal Agreement (Mar. 24, 2008) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Potter County, Texas).

³⁶⁶ TEX. CODE CRIM. PROC. ANN. art. 26.052(b), (i), (l) (West 2017). Though the federal Constitution does not require it, Texas statutorily guarantees appointed counsel to indigent defendants in state habeas corpus proceedings in death penalty cases. TEX. CODE CRIM. PROC. ANN. art. 11.071 (West 2017). The state level Office of Capital and Forensic Writs is responsible for representing all death-sentenced defendants in state habeas corpus proceedings, without regard to whether they are indigent and presuming the office is not otherwise prohibited from providing the representation. TEX. CODE CRIM. PROC. ANN. art. 11.071(2) (West 2017); TEX. GOV’T CODE ANN. § 78.054 (West 2017). *See* OFFICE OF CAPITAL AND FORENSIC WRITS, <http://www.ocfw.texas.gov>. If the Office of Capital and Forensic Writs cannot represent the defendant for any reason, the convicting court appoints counsel from the list of qualified death penalty attorneys. TEX. CODE CRIM. PROC. ANN. art. 11.071(2)(f) (West 2017); TEX. GOV’T CODE ANN. § 78.056 (West 2017). The state funds the Office of Capital and Forensic Writs and also reimburses counties up to \$25,000 per case for expenses and any attorney fees in a death penalty habeas corpus case, but the county out of which the death penalty case originated is responsible for any additional amounts. TEX. CODE CRIM. PROC. ANN. art. 11.071(2A) (West 2017).

³⁶⁷ *See* TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, JUDGMENT AND JUSTICE: AN EVALUATION OF THE TEXAS REGIONAL PUBLIC DEFENDER FOR CAPITAL CASES 2 (June 2013) (“Capital murder cases can create significant financial challenges in small jurisdictions. With the costs of defense in death-penalty cases commonly exceeding \$100,000, many of these low-population jurisdictions lack a sufficient tax base to easily pay for comprehensive defense services.”).

but also because a county cannot plan in advance for when or whether it will have a death penalty case.³⁶⁸

The Regional Public Defender Office for Capital Cases (RPDO) was established to provide what some have referred to as “murder insurance”³⁶⁹ for Texas counties with populations less than 300,000.³⁷⁰ A county that participates in the RPDO program pays an annual assessment to the RPDO.³⁷¹ In exchange for that annual payment, if an indigent defendant is charged with capital murder in the county and the prosecutor seeks the death penalty (and assuming the RPDO does not have “a conflict of interest among defendants or a legal liability for [RPDO] to accept appointment”),³⁷² the RPDO provides a capital defense team of two attorneys, one investigator, and one mitigation specialist to represent that indigent defendant at trial at no additional cost to the county,³⁷³ though the county must pay any other case related expenses of that defendant.³⁷⁴

The qualifications necessary for an attorney to be employed by the RPDO are determined by the RPDO’s own guidelines, as are all guidelines and standards with which a RPDO attorney must comply in representing an indigent defendant against

³⁶⁸ See TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, INDIGENT DEFENSE SPENDING AND COST CONTAINMENT IN TEXAS 55 (Dec. 2018) (“Capital death cases present an unpredictable and costly challenge for rural Texas jurisdictions. When an indigent defendant is accused of a capital murder felony, small and mid-sized counties, which may have indigent defense operating budgets in the tens of thousands of dollars, are responsible for legal defense costs that can stretch upwards of \$1 million.”).

³⁶⁹ See Maria Sprow, *Murder Insurance*, COUNTY MAGAZINE 19-22 (Sept./Oct. 2008).

³⁷⁰ See TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, JUDGMENT AND JUSTICE: AN EVALUATION OF THE TEXAS REGIONAL PUBLIC DEFENDER FOR CAPITAL CASES, at 1, 11 (June 2013).

³⁷¹ See, e.g., Interlocal Agreement, ¶ 1.01 (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas). The assessment each county is required to pay is referred to as its “participatory costs,” calculated by RPDO by: estimating the total cost of the program’s services to all participating counties plus “a fund balance for emergency situations;” reducing that by the funds TIDC provides through discretionary grant funds; then dividing the remainder among all participating counties based on a formula that takes into account “the population of the county as a percentage of” all participating counties and the county’s “average number of capital murder cases filed between 2003 and 2013 as a percentage of” all participating counties. *Id.* RPDO provides a fiscal analysis to participating counties on a quarterly and annual basis, and each county’s costs of participating can change if all of RPDO’s funds are anticipated to be expended. *Id.* at ¶ 1.04.

The most recent round of contracts is for a two-year period (Oct. 1, 2019 through Sept. 30, 2020) with a one-year automatic renewal unless terminated by either party (ending Sept. 30, 2021). *Id.* at ¶ 1.01. Any county can voluntarily withdraw from the program with 180 calendar days’ notice to RPDO. *Id.* at ¶ 2.09.

³⁷² See, e.g., Interlocal Agreement, ¶ 1.02 (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas).

³⁷³ See, e.g., Interlocal Agreement, ¶¶ 1.03, 1.07 (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas).

³⁷⁴ See, e.g., Interlocal Agreement, ¶¶ 1.06, 1.08 (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas).

whom the death penalty is sought at trial.³⁷⁵ The district court judges in Armstrong County and in Potter County are statutorily allowed to presume that RPDO's requirements are adequate to provide effective assistance of counsel to indigent defendants in death penalty cases.³⁷⁶

Ninth Administrative Judicial Region public appointment list

If RPDO has “a conflict of interest among defendants or a legal liability for [RPDO] to accept appointment,” the district court judges must appoint an attorney other than from the RPDO, and the county pays all attorney fees and case related expenses in the representation of the indigent defendant against whom the death penalty is sought.³⁷⁷ State law requires that individual private attorneys (those not employed by a public defender office) who are available to represent indigent defendants against whom the death penalty is sought must be selected by and according to the qualifications established by the administrative judicial region's local selection committee.³⁷⁸ Armstrong and Potter counties are both located within the Ninth Administrative Judicial Region.³⁷⁹

In the Ninth Administrative Judicial Region, attorneys who desire to be appointed to represent indigent defendants against whom the death penalty is sought apply to the local selection committee, indicating whether they are applying for appointment as lead trial counsel, second chair trial counsel, and/or appellate counsel.³⁸⁰ As part of the application, the attorney: attests to meeting the required qualifications; provides verification by the State Bar of their completed CLE for the past three years; and provides the names and contact information of “at least 2 judges who have presided

³⁷⁵ See, e.g., Interlocal Agreement, ¶ 1.03 (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas).

³⁷⁶ TEX. CODE CRIM. PROC. ANN. art. 26.052(b) (West 2017) (“If a county is served by a public defender's office, trial counsel . . . may be appointed as provided by the guidelines established by the public defender's office. In all other cases in which the death penalty is sought, counsel shall be appointed as provided by this article.”). See TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, JUDGMENT AND JUSTICE: AN EVALUATION OF THE TEXAS REGIONAL PUBLIC DEFENDER FOR CAPITAL CASES 23 (June 2013) (“Importantly, counties that join the RPDO are immediately in conformance with all of the jurisdiction-level quality control procedures advocated by the” State Bar of Texas’ *Guidelines and Standards for Texas Capital Counsel*.); STATE BAR OF TEXAS, GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL (Apr. 21, 2006).

³⁷⁷ See, e.g., Interlocal Agreement, ¶ 1.02 (undated, but 2019) (between Lubbock County, Texas through the Regional Public Defender for Capital Cases, and Armstrong County, Texas).

³⁷⁸ TEX. CODE CRIM. PROC. ANN. art. 26.052 (West 2017). TIDC refers to this as the “death penalty plan” for each administrative judicial region and provides a link on the TIDC website to the website of the Texas Judicial Branch that then links to each of the administrative judicial region websites where the plans are actually available. See *Administrative Judicial Regions*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/organizations/policy-funding/administrative-judicial-regions.aspx>.

³⁷⁹ TEX. GOV'T CODE ANN. § 74.042(j) (West 2017).

³⁸⁰ See TEX. NINTH ADMIN. JUD. REG., APPLICATION TO BE MAINTAINED ON THE LIST OF ATTORNEYS QUALIFIED FOR APPOINTMENT IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT, <http://www.txcourts.gov/media/1439356/application.pdf>.

over a felony jury trial in which [the attorney] represented the defendant at trial or on appeal, and at least 2 defense attorneys who are familiar with [the attorney's] legal skills.”³⁸¹

To be eligible for placement on the Ninth Administrative Judicial Region's list of attorneys available to be appointed at the trial level of a death penalty case, every attorney must be a member of the State Bar of Texas and meet the following qualification requirements.³⁸²

	Lead Counsel	Second Chair
generally	“exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases”	
practice experience	5 years criminal law	
trial experience	lead or second chair in trial to verdict of one death penalty case; and lead counsel in trial to verdict of significant number of felony trials, at least one of which was a homicide; and use of and challenge to mental health or forensic expert witnesses; and investigating and presenting mitigating evidence at the penalty phase of a death penalty trial	lead or second chair in significant number of felony trials
CLE or training	30 hours CLE or training in past 3 years in criminal defense and defense in death penalty cases, with at least 20 hours specific to defense of Texas death penalty cases	30 hours CLE or training in past 3 years in criminal defense and defense in death penalty cases, with at least 10 hours specific to defense of Texas death penalty cases
knowledge	during past 5 years, demonstrated “legal knowledge and skill necessary to provide representation in capital felonies . . . with appropriate thoroughness and preparation”	
references	“letters from three Texas District Court or Appellate Judges attesting to the applicant's demonstrated ability to effectively represent clients”	

³⁸¹ TEX. NINTH ADMIN. JUD. REG., APPLICATION TO BE MAINTAINED ON THE LIST OF ATTORNEYS QUALIFIED FOR APPOINTMENT IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT, <http://www.txcourts.gov/media/1439356/application.pdf>.

³⁸² TEX. NINTH ADMIN. JUD. REG., STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE, at 2-3 of 7 (lead counsel) and 3-4 of 7 (second chair) (Dec. 3, 2017), <http://www.txcourts.gov/media/1439359/plan.pdf>.

	Lead Counsel	Second Chair
absence of IAC	"have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case unless the Local Selection Committee determines by a majority vote that the conduct underlying the finding of ineffective assistance no longer accurately reflects the applicant's ability to provide effective representation"	

Attorneys' applications for inclusion on the list are submitted and acted upon on a rolling basis.³⁸³ The local selection committee evaluates original applications and applications for retention and approves, by majority vote of the committee members, the attorneys whom the committee decides: meet the objective qualification requirements; are "actually competent to adequately handle death penalty cases"; and "exhibit proficiency and commitment to providing quality representation to defendants in capital cases."³⁸⁴ Once added to the list of attorneys available to be appointed to represent indigent defendants who face the death penalty, attorneys must apply in December of every odd-numbered year to remain on the list³⁸⁵ and must affirm that they continue to meet the qualification requirements and provide verification by the State Bar of their completed CLE for the past three years.³⁸⁶

The Ninth Administrative Judicial Region publishes the list of attorneys who are approved by the local selection committee as available for appointment to represent indigent defendants in death penalty cases.³⁸⁷ In the Ninth Administrative Judicial Region and thus in Armstrong County and in Potter County, at the time of this report there are not any attorneys approved to be appointed as lead counsel and only two

³⁸³ TEX. NINTH ADMIN. JUD. REG., STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE, at 2 of 7 (Dec. 3, 2017), <http://www.txcourts.gov/media/1439359/plan.pdf>.

³⁸⁴ TEX. NINTH ADMIN. JUD. REG., STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE, at 5-6 of 7 (Dec. 3, 2017), <http://www.txcourts.gov/media/1439359/plan.pdf>.

³⁸⁵ TEX. NINTH ADMIN. JUD. REG., STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE, at 2 of 7 (Dec. 3, 2017), <http://www.txcourts.gov/media/1439359/plan.pdf>.

³⁸⁶ See TEX. NINTH ADMIN. JUD. REG., APPLICATION TO BE MAINTAINED ON THE LIST OF ATTORNEYS QUALIFIED FOR APPOINTMENT IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT, <http://www.txcourts.gov/media/1439355/reapplication.pdf>.

³⁸⁷ TEX. NINTH ADMIN. JUD. REG., DEATH PENALTY APPROVED ATTORNEYS LIST (Jan. 31, 2018), <http://www.txcourts.gov/media/1440452/listattysdeathpenaltycases2018.pdf>.

attorneys are approved to be appointed as second chair (Laurie L. Key with an office address in Lubbock, and Dale A. Rabe, Jr. with an office address in Childress).³⁸⁸

Lack of qualified attorneys to represent indigent defendants facing the death penalty at trial in Armstrong County and Potter County

The joint plan adopted by the judges of Armstrong, Potter, and Randall counties confirms that attorneys available for appointment to represent indigent defendants facing the death penalty in Armstrong County or Potter County must be on the list of attorneys approved by the local selection committee of the Ninth Administrative Judicial Region.³⁸⁹ Additionally, the plan requires the attorneys to be approved by the majority of the district court judges who hear criminal cases (the single district court judge in Armstrong County; the five district court judges exercising criminal jurisdiction in Potter County).³⁹⁰ Oddly, as of March 29, 2019, the list of attorneys whom the Potter County district court judges showed as approved for appointment to represent indigent defendants facing the death penalty at trial included one attorney available for both lead counsel and second chair (Joe Marr Wilson) and two additional attorneys available for second chair only (T.D. Hammons and Van Williamson) – none of whom are on the Ninth Administrative Judicial Region list and therefore cannot be appointed according to the district judges' own plan. As of February 7, 2019, the Armstrong County district court judge showed that no attorneys had been approved for appointment to represent indigent defendants facing the death penalty at trial.

All of this means there are not any attorneys available to represent indigent defendants who face the death penalty at trial in Armstrong County or Potter County and whom for whatever reason are not represented by the RPDO. The judges opine that, if faced with this situation, they would need to identify attorneys who are on the list approved by one of the other 10 administrative judicial regions in Texas and then have those attorneys approved by the Ninth Administrative Judicial Region's local selection committee, all before actually appointing counsel to represent an indigent defendant who is facing the death penalty.

³⁸⁸ TEX. NINTH ADMIN. JUD. REG., DEATH PENALTY APPROVED ATTORNEYS LIST (Jan. 31, 2018), <http://www.txcourts.gov/media/1440452/listattysdeathpenaltycases2018.pdf>.

³⁸⁹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.A.iv. (adopted Oct. 6, 2011 and subsequently amended).

³⁹⁰ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.B.ii. (adopted Oct. 6, 2011 and subsequently amended).

By agreement between the judges, effective January 1, 2019, the 47th District Court does not handle any felony cases in Randall County, and the 181st District Court does not handle any felony cases in Potter and Armstrong counties. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). The 47th District Court and 181st District Court judges retained their jurisdiction over cases, while trading duties with each other by agreement. Accordingly, the judges believe they both retain the authority to vote on which attorneys are added to the capital case appointments lists in both Potter County and Randall County.

This is not a merely abstract possibility in Potter County.³⁹¹ There is nothing that sets a particular point in a capital case at which a prosecutor must firmly decide whether to seek the death penalty, at least until trial commences. Until such time as prosecutors say they are not seeking the death penalty, indigent defendants are entitled to death penalty qualified counsel.³⁹² From September 1, 2014 through August 31, 2018, the Office of Court Administration reports a total of 13 trial level capital cases in Potter County – nine of those cases were newly filed in 2018.³⁹³ Between October 1, 2013 and September 30, 2018, the TIDC reports that Potter County paid five appointed private attorneys for representing indigent defendants at the trial level of capital cases.³⁹⁴ As of September 30, 2018, TIDC does not reflect Potter County making any payments to appointed private attorneys for trial level capital cases during FY2018.³⁹⁵

The nine capital cases that OCA reports as filed in Potter County during OCA's fiscal year 2018 all relate to a single defendant charged in multiple capital murder for remuneration cases and four co-defendants charged in various of those capital murders. The primary defendant retained counsel and non-death penalty qualified counsel were appointed to represent the other four codefendants. On August 23, 2019, the district attorney for the 47th judicial district gave formal notice of his intent to seek the death

³⁹¹ Armstrong County has not had any death penalty trials from Sept. 1, 2007 through at least Aug. 19, 2019. *See Jury Charges & Sentences in Capital Cases, Statistics & Other Data*, TEXAS JUDICIAL BRANCH. For FY2014 through FY2018, Armstrong County reported to TIDC that it did not dispose of any death penalty cases and did not pay any private attorneys in death penalty cases. *See Armstrong County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2018>; *Armstrong Attorney Caseload Report, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx?cid=6&fy=2018>.

³⁹² TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (West 2017).

³⁹³ *See Court Activity Database, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/court-activity-database/>. Two capital murder cases were pending at the beginning of the year and were disposed in FY2014; one capital murder case was filed and disposed in FY2015; one capital murder case was filed in FY2015 and disposed in FY2016; and nine capital murder cases were filed in FY2018 and were still pending at the end of the year. *Id.*

³⁹⁴ During TIDC's fiscal year 2014, the 108th District Court authorized a total of five payments: three attorneys (Wayne Barfield, Steven Denny, and Justin Kyle Rippey) were each paid once; and one attorney (Selden B. Hale) was paid twice. *Potter County Expenditure Report Summary – Fiscal Year 2014, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=188&fy=2014>; *Potter Attorney Caseload Report – Fiscal Year 2014, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx?cid=188&fy=2014>.

During TIDC's fiscal year 2015, the 47th District Court authorized a total of two payments: two attorneys (John C. Bennett and Steven Denny) were each paid once. *Potter County Expenditure Report Summary – Fiscal Year 2015, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=188&fy=2015>; *Potter Attorney Caseload Report – Fiscal Year 2015, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx?cid=188&fy=2015>.

³⁹⁵ *Potter County Expenditure Report Summary – Fiscal Year 2018, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=188&fy=2018>.

penalty against one of the four co-defendants, and on August 27, 2019, the judge ordered the withdrawal of the non-death penalty qualified attorney and the appointment of the Regional Public Defender Office to represent that co-defendant. The district attorney has not formally announced whether he will or will not seek the death penalty against the primary defendant (who is presently serving a federal sentence) or against the other three co-defendants.

Misdemeanor and non-capital felony cases

In counties like Armstrong and Potter that use a public appointment list of private attorneys to represent indigent defendants in misdemeanor and non-capital felony cases, state law requires the judges having jurisdiction over those cases to “establish” the list of attorneys available to be appointed and to “specify the objective qualifications necessary for an attorney to be included on the list.”³⁹⁶ The attorneys on the list must meet any qualification requirements established by the TIDC.³⁹⁷ The only qualification standard the TIDC has adopted is a requirement that attorneys appointed to represent indigent defendants in criminal cases must complete six hours of continuing legal education (CLE) related to criminal law during each 12-month period or be certified in criminal law by the Texas Board of Legal Specialization;³⁹⁸ but if no attorney meets this CLE requirement at the time an attorney must actually be appointed in a case, then TIDC allows that “another attorney may be appointed.”³⁹⁹

The joint plan adopted by the judges of Armstrong, Potter, and Randall counties establishes the necessary qualifications and the procedures by which private attorneys are selected to be on the public appointment list of attorneys available to represent indigent defendants at the trial level in misdemeanor and non-capital felony cases.⁴⁰⁰ For Armstrong County and Potter County, the plan actually establishes eight separate lists – attorneys available in Armstrong County and attorneys available in Potter County, and then within each county there is one list for misdemeanors, one list for state jail felonies and third degree felonies, one list for second degree felonies and first degree felonies, and one list for capital cases.⁴⁰¹ The qualifications attorneys must meet are the same in both counties,⁴⁰² but the judges who select the attorneys are different in each county and also different depending on whether the case is a misdemeanor or a felony.⁴⁰³

³⁹⁶ TEX. CODE CRIM. PROC. ANN. art. 26.04(d), (e) (West 2017).

³⁹⁷ TEX. CODE CRIM. PROC. ANN. art. 26.04(d)(3) (West 2017).

³⁹⁸ TEX. ADMIN. CODE tit. 1, § 174.1 (2017). *See generally* TEX. ADMIN. CODE tit. 1, § 174.1 et seq. (2017).

³⁹⁹ TEX. ADMIN. CODE tit. 1, § 174.4 (2017).

⁴⁰⁰ Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ III.A.i.-iii., B. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁰¹ Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ III.A.i.-iv. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁰² Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ III.A.i.-iv. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁰³ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.B. (adopted Oct. 6, 2011

Attorneys who desire to be appointed to represent indigent defendants in Armstrong County or in Potter County complete a written application,⁴⁰⁴ indicating each type of criminal case to which they seek appointment, and submit the application to the local administrative district judge in the appropriate county.⁴⁰⁵ As part of the application, attorneys provide information about their licensing and continuing legal education they have obtained, years of experience in criminal law and trial experience, language fluency, and any professional disciplinary actions or findings of ineffective assistance of counsel against them.⁴⁰⁶

To be eligible for placement on the various Armstrong County or Potter County lists of attorneys available to be appointed to represent indigent defendants at the trial level of criminal cases, every attorney must be a licensed practicing attorney in good standing with the State Bar of Texas and meet the following qualification requirements:⁴⁰⁷

	Misdemeanor	State Jail & Third Degree Felonies	Second Degree & First Degree Felonies
generally	office capable of receiving email, fax, and phone calls; and ability to produce typed motions and orders		
practice experience	1 year criminal law		4 years criminal law
trial experience	lead counsel in jury trial to verdict of one criminal case	either: 1st or 2nd chair in jury trial to verdict of one felony case; or 1st chair in jury trial to verdict of criminal case in which incarceration was a possible sentence	1st or 2nd chair in jury trial to verdict of two felony cases

and subsequently amended).

⁴⁰⁴ “Attorney Application for Appointment,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Attorney Application for Appointment.docx (adopted Oct. 6, 2011 and subsequently amended).

⁴⁰⁵ In Armstrong County, the judge of the 47th District Court is the only district court judge in the county, and therefore he is the local administrative district judge. In Potter County, the local administrative district judge is elected to that position by majority vote of the five district court judges in the county. *See* TEX. GOV’T CODE ANN. § 74.091 (West 2017). At the time of the Sixth Amendment Center site visits to Potter County, the judge of the 251st District Court was the local administrative district judge. Effective September 2019, the judge of the 108th District Court is the Potter County local administrative district judge.

⁴⁰⁶ “Attorney Application for Appointment,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Attorney Application for Appointment.docx (adopted Oct. 6, 2011 and subsequently amended).

⁴⁰⁷ Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ III.A.i.-iii. (adopted Oct. 6, 2011 and subsequently amended).

	Misdemeanor	State Jail & Third Degree Felonies	Second Degree & First Degree Felonies
knowledge	has read and is familiar with the <i>State Bar Performance Guidelines for Non-Capital Criminal Defense</i>		
absence of public disciplinary action	"not have been the recipient of any public disciplinary action by the State Bar of Texas or any other attorney licensing authority of any state or the United States" within one year		

Attorneys' applications for inclusion on the various lists are submitted and acted upon on a rolling basis. As applications are received, the local administrative district judge in the relevant county distributes the applications to the judges who have authority over the type of case for which the attorney seeks to be available for appointment.⁴⁰⁸

	Armstrong County	Potter County
Misdemeanors	Armstrong County Court Judge	Potter County Court at Law No. 1 Judge Potter County Court at Law No. 2 Judge
Non-capital felonies	47th District Court Judge	47th District Court Judge 108th District Court Judge 181st District Court Judge 251st District Court Judge 320th District Court Judge

The relevant judges evaluate and select, by majority vote where more than one judge is involved, the attorneys deemed appropriate to be added to each list for which an attorney has applied. Beyond the objective qualification requirements, the judges select attorneys for the lists based on the judges' subjective opinions of an attorney's character and reputation. It is possible for an attorney who meets the mandatory qualifications to be rejected because a majority of judges hold a negative opinion of the attorney. It is also possible for an attorney to be selected for one or more lists where the judges approve of the attorney but simultaneously rejected for other lists because the relevant judges hold a differing view of the attorney's character and reputation. For example, one attorney was recently removed from the lists in Armstrong County, while remaining on the lists in Potter County.

⁴⁰⁸ Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ III.A., B. (adopted Oct. 6, 2011 and subsequently amended).

In Potter County, effective January 1, 2019, criminal cases are no longer allotted to the constitutional county court. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). The Potter County Court judge does not participate in selecting attorneys to provide representation to indigent defendants nor in any other aspect of the provision of indigent defense representation in Potter County.

By agreement between the judges, effective January 1, 2019, the 47th District Court does not handle any felony cases in Randall County, and the 181st District Court does not handle any felony cases in Potter and Armstrong counties. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). The 47th District Court and 181st District Court judges retained their jurisdiction over cases, while trading duties with each other by agreement. Accordingly, the judges believe they both retain the authority to vote on which attorneys are added to the felony case appointments lists in both Potter County and Randall County.

Once added to a list, an attorney must: complete six hours of continuing legal education in criminal law and procedure each year, and provide a certification of verification to the court administration office by January 31 for the preceding calendar year;⁴⁰⁹ by October 15 of each year, submit through the TIDC online portal a statement of the percentage of the attorney’s practice time devoted to criminal and juvenile appointments received in the county;⁴¹⁰ and promptly notify the court administration office “in writing, of any matter that would disqualify the attorney by law, regulation, or rule . . . from receiving appointments to represent indigent defendants.”⁴¹¹ The court administration office receives the annual certification forms submitted by attorneys, but they are not reviewed or verified by the judges or court staff; rather, the certification forms “go in a drawer.”

Because applications are submitted and approved on a rolling basis, the attorneys who are available to be appointed in each type of criminal case in each county can change on a daily basis. As an attorney is added or subtracted from each list, the court coordinators for the relevant courts enter that attorney’s name into the case management system used by those courts. The case management systems do not provide any way of recalling historical data about which attorney was on a given list on any date in the past. Instead, it is only possible for the courts to generate the names of the attorneys who are on their lists on the date a request is made for that information.

As of February 7, 2019, the following attorneys were approved by the judges in Armstrong County as available to be appointed to represent indigent defendants at the trial level in misdemeanor and non-capital felony criminal cases:

Armstrong County	F1 & F2	F3 & StJail	Misd
Barfield, Wayne Brooks	F1 & F2	F3 & StJail	Misd
Carey, Darrell R.	F1 & F2	F3 & StJail	
Denny, Steven Michael	F1 & F2	F3 & StJail	Misd
Hammons, Troy Don	F1 & F2	F3 & StJail	Misd
Hathaway, Diana	F1 & F2	F3 & StJail	Misd
Henderson, Jeffrey Todd	F1 & F2	F3 & StJail	Misd
McKibben, Dallas E.		F3 & StJail	
Williamson, L. Van	F1 & F2	F3 & StJail	Misd

⁴⁰⁹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.A.i.3. (adopted Oct. 6, 2011 and subsequently amended); “Attorney Annual Compliance Certification for Criminal Appointments,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Amended Attorney Compliance Certification for Criminal Appointments.docx (adopted Oct. 6, 2011 and subsequently amended).

⁴¹⁰ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.A.i.11. (adopted Oct. 6, 2011 and subsequently amended).

⁴¹¹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.A.i.9. (adopted Oct. 6, 2011 and subsequently amended).

As of March 27, 2019, the following attorneys were approved by the judges in Potter County as available to be appointed to represent indigent defendants at the trial level in misdemeanor and non-capital felony criminal cases:

Potter County	F1 & F2	F3 & StJail	Misd
Abbott, James L.			Misd
Barfield, Wayne Brooks	F1 & F2	F3 & StJail	Misd
Batson, Joseph D.		F3 & StJail	Misd
Blackwell, Troy Andrew			Misd
Carey, Darrell R.	F1 & F2	F3 & StJail	Misd
Christie, Donna K.		F3 & StJail	Misd
Coppedge, Lewis			Misd
Cross, Janis Alexander			Misd
Denny, Steven Michael	F1 & F2	F3 & StJail	Misd
Dodson, Cathy	F1 & F2	F3 & StJail	Misd
Frausto, Titiana D.			Misd
Grammer, Claire Hamker	F1 & F2	F3 & StJail	Misd
Hales, Grayson Cade		F3 & StJail	Misd
Hammons, Troy Don	F1 & F2	F3 & StJail	Misd
Haney, Kerry Brian			Misd
Harwood, George N.	F1 & F2	F3 & StJail	Misd
Hathaway, Diana			Misd
Hatter, Quenton Todd	F1 & F2	F3 & StJail	Misd
Henderson, Jeffrey Todd	F1 & F2	F3 & StJail	Misd
Herrmann, Paul			Misd
Hill, Jeffrey Alan	F1 & F2	F3 & StJail	Misd
Huckabay, Brent Cole		F3 & StJail	Misd
Jackson, Joel Ben			Misd
Johnston, James B.	F1 & F2	F3 & StJail	
McCoy, Dianna Lee	F1 & F2	F3 & StJail	Misd
McKibben, Dallas E.		F3 & StJail	
McLaughlin, Jerry D.		F3 & StJail	Misd
Morales, Jerry Elijah		F3 & StJail	Misd
Mulanax, Maurita Erin			Misd
Murphy, James Ethan		F3 & StJail	Misd
Netardus, Hillary S.		F3 & StJail	Misd
Nevarez, Nicholas			Misd
Pirtle, Cody Michael		F3 & StJail	
Ray, Lendon Edward	F1 & F2	F3 & StJail	Misd
Talley, John D.	F1 & F2	F3 & StJail	
Tidmore, Travis Lee	F1 & F2	F3 & StJail	Misd
Turman, Ryan Lee		F3 & StJail	Misd
Walker, Misty Lynn	F1 & F2	F3 & StJail	Misd
Warner, Michael A.	F1 & F2	F3 & StJail	Misd
Watkins, John Michael		F3 & StJail	Misd
Williamson, L. Van	F1 & F2	F3 & StJail	Misd
Wilson, Joe Marr	F1 & F2	F3 & StJail	Misd
Wooldridge, James Edd	F1 & F2	F3 & StJail	

In theory, the only attorneys who should ever be appointed to represent an indigent defendant at the trial level of a criminal case are those attorneys who applied to be appointed in the county and for the type of case in which the defendant is charged. In reality though, as is explained in chapter 7, an attorney may be appointed to represent a defendant in a county or a type of case for which the attorney has not applied.

Training appointed counsel

To ensure that attorneys continue to be competent from year to year to handle the cases to which they are appointed, national standards require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program,⁴¹² at which attorney attendance is compulsory.⁴¹³ Training must be tailored to the types and levels of cases for which the attorney is appointed.⁴¹⁴ For example, an attorney who is appointed in drug-related cases must be trained in the latest forensic sciences and case law related to drugs. Ongoing training, therefore, is an active part of the job of being an indigent defense attorney.

Every attorney in Texas is required to complete 15 hours of continuing legal education during each 12-month period, of which at least three hours must be in ethics or professional responsibility.⁴¹⁵ TIDC requires that attorneys appointed to represent indigent defendants in criminal cases must complete six of those 15 CLE hours annually in courses related to criminal law (or be certified in criminal law by the Texas Board of Legal Specialization).⁴¹⁶ The joint plan adopted by the judges of Armstrong,

⁴¹² NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), Standard 13.16 (1973) (“The training of public defenders and assigned counsel panel members should be systematic and comprehensive.”). *See also* AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard 4-1.12(b) (4th ed.) (“In addition to knowledge of substantive legal doctrine and courtroom procedures, a core training curriculum for criminal defense counsel should seek to address: investigation, negotiation and litigation skills; knowledge of the development, use, and testing of forensic evidence; available sentencing structures including non-conviction and non-imprisonment alternatives and collateral consequences; professional responsibility, civility, and a commitment to professionalism; relevant office, court, and prosecution policies and procedures and their proper application; appreciation of diversity and elimination of improper bias; and available technology and the ability to use it.”).

⁴¹³ *See* AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 (2002) (“Defense counsel is provided with and required to attend continuing legal education”). The commentary explains: “Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.” AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 cmt. (2002).

⁴¹⁴ *See* AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard 4-1.12(c) (4th ed.) (“Counsel defending in specialized subject areas should receive training in those specialized areas.”).

⁴¹⁵ TEX. STATE BAR RULES art. XII, § 6.A-B (June 2018).

⁴¹⁶ TEX. ADMIN. CODE tit. 1, § 174.1 (2017). *See generally* TEX. ADMIN. CODE tit. 1, § 174.1 *et seq.*

Potter, and Randall counties requires every attorney approved by the judges as available for appointment in criminal cases to complete six hours of continuing legal education in criminal law and procedure each year, and provide a certification of verification to the court administration office by January 31 for the preceding calendar year.⁴¹⁷

As mentioned, the court administration office receives the annual certification forms submitted by attorneys, but they are not reviewed or verified by the judges or court staff; the certification forms “go in a drawer.” The private attorneys who represent indigent defendants in criminal cases in Armstrong County or in Potter County must obtain and pay for their own continuing legal education.

Supervising appointed counsel

Attorneys who were once well-qualified and well-trained can, for any number of reasons, lose their competence to handle criminal cases over time, and indigent defendants do not get to choose which attorney is appointed to represent them. For these reasons, national standards require that all attorneys who are appointed to represent indigent defendants must be “supervised and systematically reviewed” to ensure that they continue to provide effective assistance of counsel to each and every indigent defendant.⁴¹⁸ Implicit within supervision is that the supervisor has authority to ensure an attorney is no longer appointed if they are no longer competent.

State law requires that the procedures adopted by the judges of the county must “ensure that each attorney appointed from a public appointment list . . . perform the attorney’s duty owed to the defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics.”⁴¹⁹ The joint plan adopted by the judges of Armstrong, Potter, and Randall counties contains an itemized list of “Duties of Appointed Counsel”⁴²⁰ and provides that “[t]he judges will monitor attorney performance on a continuing basis to assure the competency of attorneys on the list.”⁴²¹ Despite these provisions in the plan, there is no meaningful oversight or supervision of

(2017).

⁴¹⁷ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.A.i.3. (adopted Oct. 6, 2011 and subsequently amended); “Attorney Annual Compliance Certification for Criminal Appointments,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Amended Attorney Compliance Certification for Criminal Appointments.docx (adopted Oct. 6, 2011 and subsequently amended).

⁴¹⁸ See AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 10 (2002).

⁴¹⁹ TEX. CODE CRIM. PROC. ANN. art. 26.04(b)(5) (West 2017).

⁴²⁰ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.F. (adopted Oct. 6, 2011 and subsequently amended).

⁴²¹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.D. (adopted Oct. 6, 2011 and subsequently amended).

the attorneys who provide representation to indigent defendants in Armstrong County and Potter County.

Once attorneys are approved for placement on the public appointment lists, they remain on those lists unless removed by the judges.⁴²² The joint plan expressly provides that “[a]n attorney may be removed or suspended, as appropriate, from one or more appointment lists by a majority vote of the judges.”⁴²³ Yet, the judges do not conduct any regular review of the attorneys, and the judges report that they remove lawyers from the public appointment lists only in the most “egregious” circumstances.

⁴²² If an attorney is removed from an appointment list for any reason other than failure to complete required CLE hours, in order to be reinstated the attorney “must apply through the original application process.” Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.E.ii. (adopted Oct. 6, 2011 and subsequently amended).

⁴²³ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.D. (adopted Oct. 6, 2011 and subsequently amended).

CHAPTER 6

EARLY APPOINTMENT OF COUNSEL & CONTINUOUS REPRESENTATION – ACTUAL DENIAL OF THE RIGHT TO COUNSEL

“Most obvious[ly],” as the U.S. Supreme Court said in *Cronic*, each state is responsible for ensuring that every indigent defendant who faces possible loss of liberty in a criminal case is actually represented by an attorney at every critical stage of the proceeding.⁴²⁴ All felonies and Class A and Class B misdemeanors are punishable in Texas by incarceration,⁴²⁵ so every adult charged with any of those crimes, and who cannot afford to hire their own attorney, is entitled under the Sixth and Fourteenth Amendments to have counsel provided at public expense at trial and on direct appeal.⁴²⁶

In 2008, the U.S. Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun.”⁴²⁷ For a person who is arrested, the beginning of formal judicial proceedings is at “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,”⁴²⁸ without regard to whether a prosecutor is aware of the arrest.⁴²⁹ For all defendants, both in and out of custody, the beginning of formal judicial proceedings is signaled when prosecution is commenced, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”⁴³⁰

⁴²⁴ United States v. Cronic, 466 U.S. 648, 659 (1984).

⁴²⁵ TEX. PENAL CODE ANN. §§ 1.07(a)(23), 1.07(a)(31), 12.21, 12.22, 12.31, 12.32, 12.33, 12.34, 12.35 (West 2017).

⁴²⁶ Halbert v. Michigan, 545 U.S. 605 (2005); Alabama v. Shelton, 505 U.S. 654 (2002); Argersinger v. Hamlin, 407 U.S. 25 (1972); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963). Although delinquency representation is outside the scope of this study, we note that children accused of delinquent acts likewise have a right to counsel at public expense. *In re Gault*, 387 U.S. 1 (1967).

⁴²⁷ Rothgery v. Gillespie County, 554 U.S. 191, 211 (2008). See also Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986); Brewer v. Williams, 430 U.S. 387, 388-89 (1977).

⁴²⁸ Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008).

⁴²⁹ Rothgery v. Gillespie County, 554 U.S. 191, 194 (2008).

⁴³⁰ Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). See also Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986).

The Court in *Rothgery* carefully explains that the question of whether the right to counsel has attached is distinct from the question of whether a particular proceeding is a “critical stage” at which counsel must be present as a participant.⁴³¹ In other words, according to the Court, the Constitution does not necessarily require that defense counsel be present at the moment the right to counsel attaches, but from that moment forward, no critical stage in a criminal or juvenile delinquency case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.⁴³² When an indigent defendant is actually deprived of counsel at a critical stage, the U.S. Supreme Court says that is unfair.⁴³³

This chapter explains the criminal justice process in Armstrong County and in Potter County from commission of an offense through arraignment, focusing on those events that trigger attachment of the right to counsel and whether counsel is provided to indigent defendants. The next chapter discusses the critical stages of criminal cases at which counsel must be present and provide effective assistance of counsel to indigent defendants.

Citation/summons or arrest

An adult who is alleged to have committed any crime in Texas most often will be arrested, with⁴³⁴ or without⁴³⁵ a warrant. For certain Class A or B misdemeanors if the person resides in the county where the offense occurred, law enforcement officers can issue a citation to appear in court instead of arresting an adult.⁴³⁶ A magistrate can issue a summons rather than an arrest warrant in any type of case.⁴³⁷

The accused is always arrested in Armstrong County, and that was also true in Potter County until at least the summer of 2019. Around June of 2019, the Potter County Attorney’s office reports that it began educating Amarillo Police Department officers about the option to cite and release defendants accused of some Class A and B misdemeanors, instead of arresting them. The county attorney office’s intention, it says, is to focus initially on marijuana cases and later expand the use of citations

⁴³¹ *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008).

⁴³² *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

⁴³³ *United States v. Cronin*, 466 U.S. 648, 659 (1984).

⁴³⁴ TEX. CODE CRIM. PROC. ANN. art. 15.03(a)-(b) (West 2017).

⁴³⁵ TEX. CODE CRIM. PROC. ANN. arts. 14.01, 14.03 (West 2017).

⁴³⁶ TEX. CODE CRIM. PROC. ANN. art. 14.06(c)-(d) (West 2017). The misdemeanors are: possession of 4 oz. or less of marijuana; possession of 4 oz or less of marijuana-like substances; criminal mischief involving loss of \$100 to less than \$750; graffiti involving loss of \$100 to less than \$2,500; theft of value of \$100 to less than \$750; theft of services of value of \$100 to less than \$750; contraband in a correction facility committed by an employee or volunteer; and driving while license invalid. *Id.* Law enforcement can issue a citation instead of making an arrest for any Class C misdemeanor, though there are special rules for public intoxication. TEX. CODE CRIM. PROC. ANN. arts. 14.031(a), 14.06(b) (West 2017).

⁴³⁷ TEX. CODE CRIM. PROC. ANN. art. 15.03(a)-(b) (West 2017).

to other of the statutorily allowed misdemeanors, while also involving other law enforcement agencies such as the Potter County Sheriff's Department.

Limitations of this evaluation for Armstrong County

Armstrong County has only a small number of criminal cases each year. No arrests occurred in Armstrong County during the site work portion of this evaluation. As a result, the Sixth Amendment Center was not able to directly observe magistration proceedings in the county. All information about what occurs in Armstrong County prior to arraignment was gleaned through interviews of criminal justice stakeholders and is related in chapter 4.

Magistration, generally

The next formal step in a criminal case in Texas is referred to as “magistration.”⁴³⁸ State law and the indigent defense plan in Armstrong and Potter counties require that a defendant who is arrested must be taken before a magistrate “without unnecessary delay, but not later than 48 hours after” the arrest.⁴³⁹ The same proceeding would occur for a person who appears before a magistrate in response to a citation,⁴⁴⁰ although practically speaking there simply are no out of custody defendants at time of magistration in either Armstrong County or Potter County.⁴⁴¹

Magistration is the proceeding in Texas at which a criminal defendant appears for the first time in court before a judicial officer and that triggers attachment of the right to counsel under *Rothgery v. Gillespie County* and earlier U.S. Supreme Court caselaw.⁴⁴² It is possible for a person who is arrested to be released on a bail bond before magistration occurs for that person, particularly for misdemeanors;⁴⁴³ for these defendants, the right to counsel will attach if and when they are arraigned.⁴⁴⁴ (See discussion of arraignment at pages 113-114.)

⁴³⁸ TEX. CODE CRIM. PROC. ANN. art. 15.17 (West 2017).

⁴³⁹ TEX. CODE CRIM. PROC. ANN. arts. 14.06(a), 15.17(a) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.A.i. (adopted Oct. 6, 2011 and subsequently amended). See TEX. CODE CRIM. PROC. ANN. art. 15.16 (West 2017).

⁴⁴⁰ TEX. CODE CRIM. PROC. ANN. art. 15.17(g) (West 2017).

⁴⁴¹ If law enforcement in Potter County begins to issue citations in certain misdemeanor cases, rather than making arrests, the county attorney's office intends that those defendants' first appearance before a judge will be for arraignment rather than for magistration.

⁴⁴² *Rothgery v. Gillespie County*, 554 U.S. 191, 194, 213 (2008); *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). See also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

⁴⁴³ TEX. CODE CRIM. PROC. ANN. arts. 17.05, 17.20 through 17.22 (West 2017).

⁴⁴⁴ TEX. CODE CRIM. PROC. ANN. art. 1.051(j) (West 2017) (“if an indigent defendant is released from custody prior to the appointment of counsel . . . , appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first”).

There are not any prosecutors or defense attorneys present at any magistration proceedings in Armstrong and Potter counties. As explained in *Rothgery*, it is not necessary that an attorney be present during magistration proceedings, but following magistration, no critical stage in a criminal case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.⁴⁴⁵

The judicial officer who presides over magistration is referred to as the “magistrate.”⁴⁴⁶ Within each county, the district court judges (for felony prosecutions) and the county level court judges (for jailable misdemeanor prosecutions) decide which judicial officers will serve as magistrate over magistration proceedings.⁴⁴⁷ As explained in chapter 1, in both Armstrong and Potter counties, the judges have designated justices of the peace to fulfill the magistrate function, and all of the designated justices of the peace are non-lawyers.⁴⁴⁸ All four of Potter County’s justices of the peace are designated to serve as magistrates over magistration proceedings in all criminal cases in the county. In practice, only one of the Potter County justices handles all weekday magistration proceedings day-in and day-out, but the other three justices rotate with him to handle magistration duties on weekends and holidays. The sole Armstrong County justice of the peace is designated to serve as the magistrate over magistration proceedings in all criminal cases in the county, which occur infrequently. When magistration is required in Armstrong County and the justice of the peace is unavailable for any reason, she has her clerk of court preside over magistration in her stead.

State law allows magistration to be conducted in person or by videoconference.⁴⁴⁹ In both Armstrong and Potter counties, magistration for in-custody defendants is conducted by videoconference, with the defendant physically located at the jail while the magistrate and necessary court personnel are physically located at the courthouse. If out of custody magistration were ever necessary in either county, the defendant would appear in person before the magistrate in the courtroom.

⁴⁴⁵ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008). No critical stage can occur unless counsel is present or has been waived because, as the Supreme Court has noted, “the right to be represented by counsel is by far the most pervasive for it affects [an accused person’s] ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 654 (1984) (citing Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

⁴⁴⁶ TEX. CODE CRIM. PROC. ANN. art. 15.17 (West 2017).

⁴⁴⁷ See TEX. CODE CRIM. PROC. ANN. art. 2.09 (West 2017) (listing judges who are magistrates); TEX. CODE CRIM. PROC. ANN. art. 4.05 (West 2017) (providing district courts have jurisdiction over felonies); TEX. CODE CRIM. PROC. ANN. art. 4.07 (West 2017) (providing statutory county courts have jurisdiction over jailable misdemeanors); TEX. GOV’T CODE ANN. §§ 25.003, 26.045 (West 2017) (providing county courts & statutory county courts have jurisdiction over jailable misdemeanors).

⁴⁴⁸ There is not, to anyone’s recollection, a written order by the judges designating the justices of the peace to preside over magistration proceedings. It has been done this way in Armstrong County and Potter County for a long time.

⁴⁴⁹ TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (West 2017).

Broadly, state law requires the judicial officer at magistration to do three things: inform the defendant of the accusation and any supporting affidavits; inform the defendant of constitutional rights including the right to appointed counsel if indigent, and allow the defendant to request appointment of counsel if they so desire; and admit the defendant to bail “if allowed by law.”⁴⁵⁰ The joint indigent defense plan adopted by the judges of Armstrong, Potter, and Randall counties tracks the statutory language almost word-for-word in describing what must occur at magistration.⁴⁵¹

As a practical matter, one additional thing occurs in Armstrong and Potter counties during magistration for defendants who were arrested without a warrant. The United States Supreme Court held in *County of Riverside v. McLaughlin* that a judge must make a probable cause determination within 48 clock hours of a warrantless arrest or the government risks being held responsible for an illegal detention.⁴⁵² For a warrantless misdemeanor arrest, Texas law requires that a defendant “must be released on bond, in an amount not to exceed \$5,000, not later than the 24th hour after the person’s arrest” if a magistrate has not made a probable cause determination, and the defendant must be released on a personal bond if they are unable to post a money or surety bond.⁴⁵³ For a warrantless felony arrest in Texas, a defendant “must be released on bond, in an amount not to exceed \$10,000, not later than the 48th hour after the person’s arrest” if a magistrate has not made a probable cause determination, and the defendant must be released on a personal bond if they are unable to post a money or surety bond.⁴⁵⁴ For both misdemeanors and felonies, state law allows a defendant’s release to be postponed on request of a prosecutor for not more than 72 hours after arrest,⁴⁵⁵ and for a person who was taken directly to a medical facility the 24/48 hour time limits do not begin to run until the person is released from the medical facility.⁴⁵⁶ To effectuate these probable cause requirements for warrantless arrests, the joint plan adopted by the judges of Armstrong, Potter, and Randall counties requires the magistrate, during magistration, to determine whether “there is probable cause to believe the person committed the offense.”⁴⁵⁷ The magistrate makes this determination without any input from the defendant and on the basis of forms completed and filed by the arresting officer at the time the defendant was booked into the jail.⁴⁵⁸

⁴⁵⁰ TEX. CODE CRIM. PROC. ANN. art. 15.17(a), (g) (West 2017).

⁴⁵¹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁵² 500 U.S. 44 (1991).

⁴⁵³ TEX. CODE CRIM. PROC. ANN. art. 17.033(a) (West 2017).

⁴⁵⁴ TEX. CODE CRIM. PROC. ANN. art. 17.033(b) (West 2017).

⁴⁵⁵ TEX. CODE CRIM. PROC. ANN. art. 17.033(c) (West 2017).

⁴⁵⁶ TEX. CODE CRIM. PROC. ANN. art. 17.033(d) (West 2017).

⁴⁵⁷ Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B.iii. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁵⁸ Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.A.ii. (adopted Oct. 6, 2011 and subsequently amended).

The right to appointed counsel if indigent

Both state law and the indigent defense plan in Armstrong and Potter counties require the magistrate to inform the defendant of the right to counsel and allow the defendant to request appointed counsel if they so desire.⁴⁵⁹ The judges' plan includes a "Magistrate's Warning" form⁴⁶⁰ on which the magistrate must "record the following:

1. The date and time the accused was arrested and the date and time when he/she was brought before the magistrate.
2. Whether the magistrate informed the accused of the right to request appointment of counsel and asked the accused whether he/she wants to request counsel.
3. Whether the accused requested appointment of counsel."⁴⁶¹

To request appointed counsel, state law requires a defendant to complete a written questionnaire under oath or respond to an oral examination under oath or both regarding his financial resources,⁴⁶² and the court must ask the defendant "to sign under oath a statement" that:

On this ____ day of _____, 20__, I have been advised by the (name of the court) Court of my right to representation by counsel in connection with the charge pending against me. I am without means to employ counsel of my own choosing and I hereby request the court to appoint counsel for me.⁴⁶³

As required by both state law and the judges' indigent defense plan, the magistrate must ensure that a defendant receives the forms to request appointed counsel and

⁴⁵⁹ TEX. CODE CRIM. PROC. ANN. art. 15.17(a), (g) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.ii.2.-4. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁶⁰ "Magistrate's Warning," in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Magistrate's Warning Form.docx (adopted Oct. 6, 2011 and subsequently amended). Armstrong County uses this form at magistration *except* there is no page in Spanish and two small additions have been made at the bottom of the page for "bond info" and "mental health info;" a different form also exists in Armstrong County that is substantively different in content and is not provided in Spanish, although it is unclear as to by whom this form may be used. Potter County uses this form at magistration (at least by the one justice of the peace who conducts all weekday magistration) *except* there is no page in Spanish and a second page has been added with blanks to provide bond and bond conditions information for up to six charges.

⁴⁶¹ TEX. CODE CRIM. PROC. ANN. art. 15.17(e) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B.v. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁶² TEX. CODE CRIM. PROC. ANN. art. 26.04(n) (West 2017). The written or oral statements made by a defendant in requesting appointment of counsel "may not be used for any purpose, except to determine the defendant's indigency or to impeach the direct testimony of the defendant. This subsection does not prohibit prosecution of the Defendant under Chapter 37, Penal Code [which criminalizes perjury and false statements]." TEX. CODE CRIM. PROC. ANN. art. 26.04(q) (West 2017).

⁴⁶³ TEX. CODE CRIM. PROC. ANN. art. 26.04(o) (West 2017).

receives “reasonable assistance” to complete the forms.⁴⁶⁴ The judges’ plan includes two different versions⁴⁶⁵ of the form defendants are required to complete to request appointment of counsel.⁴⁶⁶

- The “Financial Information for Request for Court Appointed Attorney”⁴⁶⁷ is used at Potter County in-custody magistration where it is completed in electronic form into the Potter County Sheriff’s Office computers with jail personnel assisting defendants, but it is not used at Potter County misdemeanor arraignments, and it is unclear whether it is used at Potter County felony arraignments.
- The “Affidavit of Indigence”⁴⁶⁸ is used at Potter County misdemeanor arraignments where it is completed in paper form with Potter County Attorney personnel assisting defendants, but it is not used at Potter County magistration, and it is unclear whether it is used at Potter County felony arraignments. This form is used in some, but not all, situations in Armstrong County; while a slightly modified version, containing a section at the bottom for the judge to name the attorney who is appointed, is used in some situations in Armstrong County.

If a defendant does *not* request appointed counsel at magistration, the magistrate sends the defendant’s “Magistrate Warning” form “to the clerk to be put into the case file.”⁴⁶⁹

⁴⁶⁴ TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B.ii.5. (adopted Oct. 6, 2011 and subsequently amended). The judges’ plan also says: “If a defendant wishes to request counsel prior to the initial appearance, the forms required to request counsel may be obtained at the Texas Indigent Defense Commission’s website at <http://tidc.tamu.edu/public.net/> or from: the court coordinator of the court in which the case is pending. The defendant may submit these forms to the court coordinator of the court in which the case is pending.” Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.A.v. (adopted Oct. 6, 2011 and subsequently amended). It is unclear how any accused person would ever be aware of the existence of this information.

⁴⁶⁵ One version is “Financial Information for Request for Court Appointed Attorney,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court 2011 Request for Court Appointed Attorney (Potter).doc (adopted Oct. 6, 2011 and subsequently amended). The second version is “Affidavit of Indigence,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (adopted Oct. 6, 2011 and subsequently amended).

⁴⁶⁶ See Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.ii.5., I.B.vi., viii., x., II.C.ii., IV.A.v. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁶⁷ “Financial Information for Request for Court Appointed Attorney,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court 2011 Request for Court Appointed Attorney (Potter).doc (adopted Oct. 6, 2011 and subsequently amended).

⁴⁶⁸ “Affidavit of Indigence,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (adopted Oct. 6, 2011 and subsequently amended).

⁴⁶⁹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B.ix. (adopted Oct. 6, 2011

For these defendants, whether indigent or not, nothing further will happen regarding the charge against the defendant unless and until prosecution is instituted against the defendant and the defendant is arraigned. (*See* discussion of institution of prosecution & arraignment at pages 111-114).

If a defendant does request appointed counsel at magistration, within 24 hours, the magistrate must send the defendant's "Magistrate Warning" form and completed paperwork requesting appointment of counsel to "the proper appointing authority."⁴⁷⁰ For these defendants, a judge must determine whether they are indigent and, if so, appoint an attorney, all within three working days of the defendant's request for counsel.⁴⁷¹ (*See* discussion of appointing counsel at pages 126-133). In general (and there are of course exceptions), every indigent defendant who requests an appointed attorney at magistration should receive counsel within not more than nine calendar days following arrest (48 hours, plus 24 hours, plus three work days, plus the possibility of a three-day holiday weekend). Meanwhile, as will be explained, nothing further will happen regarding the charge against these defendants unless and until prosecution is instituted against the defendant and the defendant is arraigned. (*See* discussion of institution of prosecution & arraignment at pages 111-114.)

Potter County in-custody magistration

In-custody magistration is held daily in Potter County for both felony and misdemeanor defendants. Because defendants appear by videoconference from the jail, the first person who interacts with a defendant during the magistration process is *not* the justice of the peace; instead, employees of the Potter County sheriff's department meet with each defendant before turning on the videoconferencing equipment. This initial interaction between sheriff's department personnel and in-custody defendants sets in motion a chain of events that impedes the free exercise of the right to counsel for many indigent defendants in misdemeanor cases in Potter County. (*See* discussion of Potter County "plea court" at pages 115-121.)

Before the videoconferencing equipment is turned on and as each defendant is escorted into the room at the Potter County jail, the sheriff's deputy asks their name, retrieves a "Magistrate's Warning" form⁴⁷² with the defendant's name prefilled at the top,

and subsequently amended).

⁴⁷⁰ TEX. CODE CRIM. PROC. ANN. arts. 15.17(a), 26.04(b)(1) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.vi., viii., IV.A.vi. (adopted Oct. 6, 2011 and subsequently amended). The justices of the peace who serve as magistrates in Armstrong County and Potter County are not authorized by the judges to appoint counsel. Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.A.vi. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁷¹ TEX. CODE CRIM. PROC. ANN. arts. 1.051(c),(i), 26.04(c) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.A.i. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁷² The version of this form used in Potter County is not provided in Spanish, even though the version of the form contained in the published plan documents is a two-page document with the first page in

and says: “Sign on the yellow line. The judge will explain it to you momentarily.” The prefilled “Magistrate’s Warning” forms are provided to defendants in English. The deputy does not ask whether defendants can read the English language or at all. Some defendants look at the document before signing and returning it to the deputy, but most sign it without reading it. The “Magistrate’s Warning” form is signed by each defendant *before* the magistrate has actually advised the defendant of the rights and information contained in the warning, even though the document serves as the defendant’s acknowledgement of and often their waiver of important rights.⁴⁷³

The sheriff’s deputy asks each defendant whether the defendant intends to hire counsel, request court appointed counsel, or represent themselves.

The deputy tells felony defendants they are “not allowed” to represent themselves.⁴⁷⁴ If a felony defendant tells the deputy they plan on representing themselves, the deputy presses them to apply for appointed counsel: “You’re not going to be allowed to represent yourself in a felony case.” If they do not intend to hire private counsel, the deputy instructs them to request court appointed counsel.

By contrast, the deputy encourages misdemeanor defendants to represent themselves. “You have three choices,” the deputy explained to one defendant accused of a Class A misdemeanor. “You can hire an attorney, request a court appointed lawyer, or represent yourself.” The defendant responded that she would represent herself. “Smart move for right now,” the deputy replied. “When you get to court, you will be given the opportunity to talk to a prosecutor. Remember, if at any time you want a court appointed attorney – if you do not like the offer from the prosecutor, or you want to talk it over with an attorney – you can always have a court appointed attorney if you qualify [financially].” Another defendant was accused of two Class B misdemeanor charges. The deputy asked: “Do you want to apply for a court appointed attorney, hire one, or go ahead and represent yourself? You do not have to have an attorney for a Class B misdemeanor. You can get yourself into plea court, hear what the prosecutor has to offer in plea court, and then get a lawyer later if you want.”

English and the second page in Spanish. See “Magistrate’s Warning,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Magistrate’s Warning Form.docx (adopted Oct. 6, 2011 and subsequently amended); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.v.-vi., viii. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁷³ See “Magistrate’s Warning,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Magistrate’s Warning Form.docx (adopted Oct. 6, 2011 and subsequently amended).

⁴⁷⁴ This is a misstatement of the law. See TEX. CODE CRIM. PROC. ANN. art. 1.051(f)-(h) (West 2017) (authorizing criminal defendant to waive the right to counsel); *Faretta v. California*, 422 U.S. 802 (1975) (holding that a defendant may exercise the Sixth Amendment right of self-representation so long as there is a knowing, voluntary, and intelligent waiver of the right to counsel).

At the same time that jail staff ask defendants their intentions about representation, they also ask *every* defendant to provide information relating to their personal and family finances, employment, housing, and dependents. Defendants are not told the purpose of the questions, nor the significance of their answers. Instead, the deputy simply begins asking questions – for example, “How much do you spend a week on groceries?” – and defendants respond with some sort of estimate. Potter County jail staff type each defendant’s answers into the jail’s computer system, completing a Microsoft Word template that jail staff call the “attorney form,” but that is in fact the “Financial Information for Request for Court Appointed Attorney” used to request appointed counsel.⁴⁷⁵

For those defendants who tell the deputy they want an appointed attorney, the sheriff’s deputy prints the completed “attorney form” from the jail computer and instructs the defendant to sign the document. Jail staff do not ask whether defendants are able to read the English language and do not review the language on the form with defendants to ensure they understand the text provided. The form the defendant is signing says:

I have been advised by the Court of my right to representation by counsel and the kind of charge pending against me. I hereby swear or affirm the above information is true and correct. I certify that I am without means to employ counsel of my own choosing and I request the Court to appoint an attorney to represent me in the above cause.⁴⁷⁶

The deputy does not inform defendants that, by signing the document, they are swearing to the accuracy of the financial information contained in the form. As one judge notes, the average person would struggle to accurately answer questions about their budget and spending without being able to refer to bank statements or other financial records. As a result, a judge said, the process inevitably yields inaccurate information: “We do a very poor job of understanding people’s real qualifications to receive appointed counsel.” When the deputy instructs defendants to sign the completed form, most appear to do so with only a cursory review of the form (if they read the form at all).

⁴⁷⁵ “Financial Information for Request for Court Appointed Attorney,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court 2011 Request for Court Appointed Attorney (Potter).doc (adopted Oct. 6, 2011 and subsequently amended). The version of the form used by the Potter County Sheriff’s Office is one of two different versions contained in the plan adopted by the judges of Armstrong, Potter, and Randall counties. At misdemeanor arraignments in Potter County, the judges instead use the “Affidavit of Indigence” version of the form. “Affidavit of Indigence,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (adopted Oct. 6, 2011 and subsequently amended).

⁴⁷⁶ “Financial Information for Request for Court Appointed Attorney,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court 2011 Request for Court Appointed Attorney (Potter).doc (adopted Oct. 6, 2011 and subsequently amended).

After the deputy has interviewed each defendant, and after each defendant has signed the “Magistrate’s Warning” form and if requesting appointed counsel the “Financial Information for Request for Court Appointed Attorney,” the deputy alerts the magistrate by phone that the jail is ready to begin. Then the deputy turns on the videoconferencing equipment.

Once the videoconferencing equipment is turned on, the magistrate appearing by video reads to all of the defendants as a group the rights contained in the “Magistrate’s Warning” form, including:

You have the right to retain counsel; . . . You have the right to request appointment of counsel if you cannot afford counsel; If you wish to request appointment of counsel, you must complete a financial questionnaire and affidavit to document your inability to hire counsel. That questionnaire and affidavit are available to you at any time from the jail and during business hours from the court. If you require assistance to fill out the questionnaire and affidavit, that assistance will be provided to you upon request.⁴⁷⁷

Then the magistrate individually asks each defendant their intention about legal representation. “Before I continue, do you plan on hiring an attorney, or do you need a court appointed attorney?” Each defendant indicates whether they plan on hiring an attorney, want to request appointed counsel, or want to represent themselves for now – almost always according to the instruction they received from the sheriff’s deputy. When the magistrate has completed this question with all of the defendants present for magistration that day, the videoconferencing equipment is turned off.

After the magistration proceeding is concluded, the Potter County sheriff’s office scans the defendants’ signed forms into the sheriff’s office computer. Then, the sheriff personnel transmit all of the defendants’ signed “Magistrate Warning” forms to the magistrate to sign. On the “Magistrate Warning” form for each defendant, the magistrate must note: the date and time of the defendant’s arrest; the date and time of the defendant’s magistration; and whether the defendant requested appointed counsel during magistration.⁴⁷⁸

If a defendant did *not* request appointed counsel during magistration, the magistrate sends the defendant’s “Magistrate Warning” form, “to be put into the case file,” to:

⁴⁷⁷ “Magistrate’s Warning,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Magistrate’s Warning Form.docx (adopted Oct. 6, 2011 and subsequently amended); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.v.-vi., viii. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁷⁸ See TEX. CODE CRIM. PROC. ANN. art. 15.17(e) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B.v. (adopted Oct. 6, 2011 and subsequently amended).

the Potter County district court clerk for all defendants arrested on a felony; the Potter County county court clerk for all defendants arrested on a misdemeanor; and both court clerks if a defendant was arrested on both a felony and a misdemeanor.⁴⁷⁹

For those defendants who requested appointed counsel during magistration, the sheriff personnel also transmit the defendants' signed "Financial Information for Request for Court Appointed Attorney" to the magistrate. Within 24 hours, the magistrate sends the defendant's "Magistrate Warning" form and the defendant's "Financial Information for Request for Court Appointed Attorney": on felony arrests, to one of four district courts for Potter County (they rotate responsibility every three months);⁴⁸⁰ on misdemeanor arrests, to one of the two Potter County county courts at law (they rotate responsibility every month);⁴⁸¹ and if a defendant was arrested on both a felony and a misdemeanor, the paperwork goes to both a district court and a county court at law.⁴⁸²

⁴⁷⁹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B.ix. (adopted Oct. 6, 2011 and subsequently amended).

⁴⁸⁰ There are five district courts in Potter County. By agreement between the judges, effective January 1, 2019, the 47th District Court does not handle any felony cases in Randall County, and the 181st District Court does not handle any felony cases in Potter and Armstrong counties. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). Since January 1, 2019, the judge of the 47th District Court takes the Potter County quarterly rotations of both the 47th District Court and the 181st District Court, causing the 47th District Court judge in Potter County to serve during two of every five rotations, while the judges of the 108th District Court, 251st District Court, and 320th District Court each serve one of every five rotations.

⁴⁸¹ Although the constitutional county court in Potter County has statutory jurisdiction over jailable misdemeanors, effective January 1, 2019, criminal cases are no longer allotted to the constitutional county court. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). The Potter County Court judge does not participate in appointing attorneys to represent indigent defendants nor in any other aspect of the provision of indigent defense representation in Potter County.

⁴⁸² TEX. CODE CRIM. PROC. ANN. arts. 15.17(a), 26.04(b)(1) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ I.B.vi., viii., IV.A.vi. (adopted Oct. 6, 2011 and subsequently amended). The justices of the peace who serve as magistrates in Armstrong County and Potter County are not authorized by the judges to appoint counsel. Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.A.vi. (adopted Oct. 6, 2011 and subsequently amended).

This differs from what is stated in the judges' published plan. The published plan says the "appointing authority" in Potter County is: Judge Pamela Sirmon for misdemeanor cases in which no case has been filed in the trial court; Judge Doug Woodburn for felony cases in which no case has been filed in the trial court; and the trial court judge for all cases that have been filed in the trial court. Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.A.vi. (adopted Oct. 6, 2011 and subsequently amended).

In 2008 and 2009, TIDC found that when misdemeanor defendants requested appointed counsel at magistration in Potter County, those requests were not always being transmitted within 24 hours of arrest to the person with authority to actually appoint counsel. As a result, some defendants were wrongfully brought to misdemeanor arraignment as *pro se* defendants, despite having already requested counsel. (See discussion of TIDC monitoring of Potter County at pages 47-51.) Because of the ransomware attack on Potter County's computer systems (see discussion at pages 20-22), the Sixth Amendment Center was unable to confirm whether this failing exists in Potter County's indigent defense system in 2019.

Institution of prosecution & arraignment

After magistration proceedings, the next step in a criminal case is for the prosecutor to decide whether and on what charges to prosecute a defendant. As explained in chapter 1, the district attorney for the 47th judicial district is responsible for all felony prosecutions in both Potter County and Armstrong County, and is also responsible for all jailable misdemeanor prosecutions in Armstrong County. In Potter County, the county attorney prosecutes jailable misdemeanors.

If the prosecutor formally declines to prosecute a defendant, then the defendant is released from jail and/or bond obligations and the case ends. In both Armstrong County and Potter County, regarding in-custody defendants, the prosecutors attempt to make any declination decision quickly so that the counties do not needlessly incur pre-trial detention costs for defendants who will not be prosecuted.

If the prosecutor intends to institute prosecution against a defendant, the prosecutor makes decisions about how quickly this must occur based on whether the charge is a misdemeanor or a felony and on whether the defendant has been released from custody or remains in jail. Prosecutors have at least three years from the date of commission of any felony to institute prosecution, ranging up to ten years for many felonies and no limitations at all for certain felonies.⁴⁸³ For jailable misdemeanors, prosecutors have up to two years from the date of commission of the offense to institute prosecution.⁴⁸⁴ But if the defendant is in custody while awaiting the prosecutor's charging decision, that defendant "must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial . . . within" 90 days for a felony, 30 days for a Class A misdemeanor, or 15 days for a Class B misdemeanor.⁴⁸⁵ In Armstrong County and Potter County, prosecutors intend to make a charging decision for all in-custody defendants within these shorter time frames, to avoid the defendant being released from jail pending prosecution.

Felony prosecutions

All felony prosecutions must be commenced by grand jury indictment (unless the defendant waives the right to indictment).⁴⁸⁶

⁴⁸³ TEX. CODE CRIM. PROC. ANN. art. 12.01 (West 2017).

⁴⁸⁴ TEX. CODE CRIM. PROC. ANN. art. 12.02 (West 2017).

⁴⁸⁵ TEX. CODE CRIM. PROC. ANN. art. 17.151 (West 2017).

⁴⁸⁶ TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. arts. 1.05, 1.141 (West 2017). An "indictment" is a written statement returned by a grand jury. TEX. CONST. art. V, § 12(b); TEX. CODE CRIM. PROC. ANN. art. 21.01 (West 2017).

Until the prosecutor obtains an indictment against a defendant who has been arrested on a felony, that defendant has the right to demand and have an examining trial.⁴⁸⁷ An examining trial is a hearing conducted by a magistrate, at which the magistrate judge determines on the basis of the evidence presented whether there is probable cause to believe that an offense has been committed and that the defendant committed it.⁴⁸⁸ For a defendant who is in jail when his examining trial occurs, the magistrate can also set bail or alter the terms of a previously set bail.⁴⁸⁹ The examining trial is a critical stage in a criminal case at which the indigent defendant has a right to counsel.⁴⁹⁰

Examining trials quite simply never take place in Armstrong County or in Potter County. Defendants who are not represented by an attorney prior to indictment do not file a motion for an examining trial. If an attorney files a motion for an examining trial, as soon as they do so the prosecutor presents the case to grand jury to obtain an indictment before the examining trial can actually occur.

A felony indictment is filed with the district court clerk of court in the county in which the prosecution will proceed.⁴⁹¹ In Armstrong County, all felony cases are allotted to the 47th District Court. In Potter County, each felony case is allotted to one of the five district courts, but any cases allotted to the 181st District Court are actually heard by the 47th District Court.⁴⁹²

Misdemeanor prosecutions

To commence prosecution in aailable misdemeanor, the prosecutor files either an information or an affidavit in the court.⁴⁹³ An “information” is a written statement filed by a prosecutor,⁴⁹⁴ and it must be supported by a sworn affidavit that is called a complaint.⁴⁹⁵

⁴⁸⁷ TEX. CODE CRIM. PROC. ANN. art. 16.01 (West 2017).

⁴⁸⁸ TEX. CODE CRIM. PROC. ANN. arts. 16.01 through 16.17 (West 2017).

⁴⁸⁹ TEX. CODE CRIM. PROC. ANN. arts. 16.01, 16.17 (West 2017); *see* TEX. CODE CRIM. PROC. ANN. art. 17.05 (West 2017).

⁴⁹⁰ *Rothgery v. Gillespie County*, 554 U.S. 191, 202 (2008) (explaining *Coleman v. Alabama*, 399 U.S.1, 8 (1970), as saying that the “right to counsel applies at preindictment preliminary hearing at which the ‘sole purposes . . . are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury, and, if so, to fix bail if the offense isailable’”). *See* TEX. CODE CRIM. PROC. ANN. art. 16.01 (West 2017).

⁴⁹¹ TEX. CODE CRIM. PROC. ANN. arts. 20.21, 20.22, 21.011 (West 2017).

⁴⁹² Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019).

⁴⁹³ TEX. CONST. art. V, § 17.

⁴⁹⁴ TEX. CONST. art. V, § 12(b); TEX. CODE CRIM. PROC. ANN. art. 21.20 (West 2017).

⁴⁹⁵ TEX. CODE CRIM. PROC. ANN. art. 21.22 (West 2017). *See* TEX. CODE CRIM. PROC. ANN. arts. 2.04, 2.05, 15.04 (West 2017).

The charging instrument in a misdemeanor case is filed with the county court clerk of court in the county in which the prosecution will proceed.⁴⁹⁶ In Armstrong County, all jailable misdemeanor cases are allotted to the Armstrong County Court. In Potter County, each jailable misdemeanor case is allotted to one of the two county courts at law.⁴⁹⁷

Arraignment

Once prosecution is commenced, the defendant is arraigned.⁴⁹⁸ For Potter County felony cases, the district court to which the case was allotted conducts the arraignment, with the 47th District Court conducting arraignments for all cases allotted to both the 47th District Court and the 181st District Court.⁴⁹⁹ The two county court at law judges in Potter County rotate responsibility monthly for conducting all arraignments scheduled in either of those courts during that period.⁵⁰⁰ In Armstrong County, the judge of the 47th District Court conducts all felony arraignments, and the judge of the Armstrong County Court conducts all misdemeanor arraignments. In both counties, prosecutors are present during arraignments, but defense attorneys are not present.

If the defendant is represented by counsel, either retained or appointed, the attorney can file a waiver of arraignment on behalf of the defendant, and neither the defendant nor the attorney has to appear in court at the arraignment.⁵⁰¹ As a result, most defendants who appear at arraignments in Armstrong County and in Potter County are those who are not represented by an attorney (or where an appointed attorney failed to tell the defendant it was unnecessary to appear – *see* discussion at pages 133-135).

At arraignment, under both state law and the Armstrong and Potter counties' indigent defense plan, any defendant who is not already represented by counsel must be informed of the right to counsel and allowed to request appointed counsel if indigent.⁵⁰² In both counties, the process established by the judges' indigent defense

⁴⁹⁶ TEX. CODE CRIM. PROC. ANN. art. 21.011 (West 2017).

⁴⁹⁷ Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019).

⁴⁹⁸ TEX. CODE CRIM. PROC. ANN. art. 26.01 (West 2017).

⁴⁹⁹ By agreement between the judges, effective January 1, 2019, the 47th District Court does not handle any felony cases in Randall County, and the 181st District Court does not handle any felony cases in Potter and Armstrong counties. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019).

⁵⁰⁰ Although the constitutional county court in Potter County has statutory jurisdiction over jailable misdemeanors, effective January 1, 2019, criminal cases are no longer allotted to the constitutional county court. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). The Potter County Court judge does not participate in conducting arraignments for jailable misdemeanors nor in any other aspect of the provision of indigent defense representation in Potter County.

⁵⁰¹ TEX. CODE CRIM. PROC. ANN. art. 26.011 (West 2017).

⁵⁰² TEX. CODE CRIM. PROC. ANN. arts. 1.051, 26.04 (West 2017); Armstrong, Potter and Randall District

plan for defendants to request appointed counsel is the same as during magistration, as described at pages 101-103.

At arraignment, the defendant is required to enter a plea to the charge,⁵⁰³ and the defendant can plead not guilty or guilty.⁵⁰⁴ Arraignment is a critical stage in a criminal case, during which the indigent defendant has the right to counsel and for that attorney to be present as an active participant in the proceedings.⁵⁰⁵ Plea negotiations and the entry of a guilty plea are also critical stages of a criminal case, during which the defendant has the right to “effective assistance of competent counsel.”⁵⁰⁶ For an indigent defendant, plea negotiations and the entry of a guilty plea cannot legally happen unless counsel is present on behalf of the defendant or the defendant has knowingly, voluntarily, and intelligently waived the right to counsel.⁵⁰⁷

Waiving the right to counsel, or *pro se* defendants

As explained in the preceding section, nearly all of the defendants who appear at arraignment in Armstrong County and in Potter County are not represented by counsel. At the arraignment, that unrepresented defendant can: notify the judge that they intend to obtain their own private attorney; request that the judge appoint counsel; or waive the right to counsel and choose to self-represent.

Under both state law and the indigent defense plan in Armstrong and Potter counties, when any defendant appears without counsel in an adversary judicial proceeding, the court “may not direct or encourage the defendant to communicate with” the prosecutor, unless and until the court advises the defendant of the right to counsel *and* the defendant has the opportunity to request counsel *and* that request is either denied or the defendant waives the right to counsel.⁵⁰⁸ Under both state law and the indigent defense plan in Armstrong and Potter counties, at least beginning at arraignment, if not earlier, a prosecutor “may not initiate or encourage an attempt” to have an unrepresented defendant waive the right to counsel and “may not communicate with” a defendant who has requested appointed counsel unless and until that request has been denied or the defendant waives the right to counsel.⁵⁰⁹ In other words, a defendant must waive

Court and County Court Plan, ¶¶ IV.A.i., ii., IV.B. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁰³ TEX. CODE CRIM. PROC. ANN. arts. 26.02, 26.11 (West 2017).

⁵⁰⁴ TEX. CODE CRIM. PROC. ANN. arts. 26.12, 26.13 (West 2017).

⁵⁰⁵ *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961). *See* TEX. CODE CRIM. PROC. ANN. art. 1.051 (West 2017).

⁵⁰⁶ *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

⁵⁰⁷ TEX. CODE CRIM. PROC. ANN. art. 1.051(f)-(h) (West 2017); *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

⁵⁰⁸ TEX. CODE CRIM. PROC. ANN. art. 1.051(f-2) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ IV.B.i.-ii. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁰⁹ TEX. CODE CRIM. PROC. ANN. art. 1.051(f-1) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.B.iii. (adopted Oct. 6, 2011 and subsequently amended).

the right to counsel *before* a prosecutor can speak to the defendant, and neither the judge nor the prosecutor can legally encourage an unrepresented defendant to do so.

A defendant has a Sixth Amendment right to self-represent, but a judge must determine that the defendant's choice to waive the right to counsel and represent themselves is made knowingly, voluntarily, and intelligently.⁵¹⁰ To effectuate this choice, both state law and the indigent defense plan in Armstrong and Potter counties require the judge to warn any defendant intending to go to trial of “the dangers and disadvantages of self-representation” and defendants, both those intending to plead and those intending to go to trial, must sign a written waiver of the right to counsel.⁵¹¹ The judges' plan contains the “Waiver of Right to Counsel” form that defendants are intended to sign in Armstrong and Potter counties.⁵¹² It is only after the judge accepts the defendant's waiver of the right to counsel that a prosecutor may speak to the defendant.

Potter County's misdemeanor arraignments, or “plea court”

Generally, the Potter County Attorney's office institutes prosecution on jailable misdemeanor cases within one or two weeks of the defendant's arrest. Once the charging document is filed, the county clerk randomly allots the case to one of the two county courts at law.⁵¹³ The next step is arraignment, or what the sheriff's deputy previously described to misdemeanor defendants at magistration as “plea court.” The county court at law judges rotate responsibility each month for presiding over misdemeanor arraignments.⁵¹⁴ Arraignments for out of custody defendants are referred to locally as “walk-in arraignments.” Arraignments for in-custody defendants are referred to locally as “video arraignments.”

⁵¹⁰ *Faretta v. California*, 422 U.S. 802 (1975).

⁵¹¹ TEX. CODE CRIM. PROC. ANN. art. 1.051(f)-(h) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.C. (adopted Oct. 6, 2011 and subsequently amended).

⁵¹² “Waiver of Right to Counsel,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents –Armstrong Potter Randall District and County Court Waiver of Counsel.docx (adopted Oct. 6, 2011 and subsequently amended). In Potter County, the judge of County Court at Law #2 (who presides over misdemeanors) is instead planning to use a two-page densely packed document entitled “Admonishments Regarding Self-Representation.”

⁵¹³ *See* Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019).

⁵¹⁴ Although the constitutional county court in Potter County has statutory jurisdiction over jailable misdemeanors, effective January 1, 2019, criminal cases are no longer allotted to the constitutional county court. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). The Potter County Court judge does not participate in conducting arraignments for jailable misdemeanors nor in any other aspect of the provision of indigent defense representation in Potter County.

As explained previously, attorneys can waive formal arraignment, and then neither the represented defendant nor their attorney appears in court at arraignment.⁵¹⁵ As a result, the judges and prosecutors expect that the only defendants who appear at misdemeanor arraignment are those who are *not* represented by an attorney. There are no indigent defense attorneys present at misdemeanor arraignments in Potter County.

Potter County misdemeanor arraignments are tailored toward unrepresented defendants resolving their cases that day by entering a guilty plea. As one judge explains, there are four usual outcomes at arraignments:

1. The defendant signs the waiver of right to counsel form, talks to the prosecutor, and accepts the plea offer. The defendant enters a guilty plea that day.
2. The defendant signs the waiver of right to counsel form and talks to the prosecutor, but rejects the plea offer or otherwise reconsiders having waived the right to counsel. The defendant fills out the application form for court appointed counsel. The judge reviews the form for indigency that day, and counsel is appointed shortly thereafter. The case is scheduled for a docket call in approximately two weeks' time before the judge to whom the case was allotted.
3. The defendant rejects the opportunity to talk to a prosecutor and fills out the application form for court appointed counsel. The judge reviews the form for indigency that day, and counsel is appointed shortly thereafter. The case is scheduled for a docket call in approximately two weeks' time before the judge to whom the case was allotted.
4. The defendant rejects the opportunity to talk to a prosecutor and wants time to retain counsel. The case is scheduled for a docket call in approximately two weeks' time before the judge to whom the case was allotted.

In short, all unrepresented misdemeanor defendants either plead guilty at arraignment, secure by hiring or appointment an attorney to represent them, or return unrepresented to court in two weeks for docket call. At that docket call, the exact same process that occurs at arraignment is repeated; again, giving unrepresented defendants the choice of negotiating a guilty plea with the prosecutor, securing by hiring or appointment an attorney to represent them, or returning unrepresented to court in another four weeks for trial.

Walk-in arraignments for out of custody defendants. As defendants arrive at the courtroom, an investigator from the county attorney's office greets each defendant at the door and tells them to "check in" with a woman standing at the podium in the center of the courtroom. The woman is employed by the county attorney's office, and she asks the defendant for their name, then hands them a "Waiver of Right to Counsel"

⁵¹⁵ See TEX. CODE CRIM. PROC. ANN. art. 26.011 (West 2017).

form.⁵¹⁶ She instructs the defendants to fill in their first and last name and date of birth on the form and take a seat.

At 9:00 a.m., the judge enters the courtroom, takes the bench, and addresses the unrepresented defendants in the courtroom as a group. He says:

- Each defendant has been accused of a criminal offense and has certain rights, including the right to counsel.
- Each defendant can hire a private attorney, can seek to have an attorney appointed by the court if “financially unable to afford one,” or can represent themselves.
- “If you decide to represent yourself, I’ll need you to fill out a waiver form. Sitting in the jury box, we have the state’s prosecutors,” who cannot ethically speak with unrepresented defendants who have not waived their right to counsel. “Each of you has been handed a Waiver of the Right to Counsel form. In order to meet with the prosecutor, you will need to fill that out and hand it in.”
- “If you think you are guilty and you want to plead guilty and negotiate with the prosecution, you can go ahead and listen to their plea offer. If you do so, you’re at a disadvantage.” The prosecutors represent the government and not the accused.⁵¹⁷
- “If there’s no bargain in it for you, you don’t have to accept their offer.” Defendants can apply for court appointed counsel even after meeting with the prosecutor.
- “However, if you think you’re innocent, you should not [meet with the prosecutor].”
- There are other consequences to entering into a plea bargain, including waiving the right to trial and the right to appeal. There could be immigration consequences for non-citizens who plead guilty. There could be other consequences depending on the charge, such as the loss of a firearm, loss of professional licenses, and enhancements if charged with future crimes.

The judge asks whether anyone has any questions about what he has just said. No one speaks or raises a hand. “Okay then,” the judge says. The judge leaves the courtroom.

⁵¹⁶ See “Waiver of Right to Counsel,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents –Armstrong Potter Randall District and County Court Waiver of Counsel.docx (adopted Oct. 6, 2011 and subsequently amended). The content of the waiver of right to counsel form actually provided to misdemeanor defendants in Potter County depends on which judge is conducting arraignments. The waiver of the right to counsel form contained in the published plan documents is a one-page document containing seven simple sentences, but the judge of County Court at Law #2 instead uses a two-page densely packed document entitled “Admonishments Regarding Self-Representation.”

⁵¹⁷ The judge later chided himself: “I forgot the most important part! I didn’t admonish them that whatever they say to the prosecutor [during negotiations] can be used against them.”

Potter County walk-in arraignment for out of custody misdemeanor defendants

Misdemeanor arraignments for out of custody defendants in Potter County are referred to as “walk-in arraignment.” Walk-in arraignments are held on Mondays at 9:00 a.m. The court coordinator for the county courts at law schedules the date for an out of custody defendant’s arraignment to ensure the defendant will receive notice a minimum of seven days in advance (allowing time for the defendant to, for example, request time off from work, arrange for travel, child care, etc.). With the arraignment scheduled, the county attorney’s office sends a letter to the defendant to appear in court on that date. Out of custody defendants appear in person on the fourth floor of the Old Courthouse in downtown Amarillo. Approximately 11 county attorney’s office staff are present in the courtroom (three investigators, two administrative assistants, one domestic violence victims’ advocate, and five prosecuting attorneys seated in the jury box). There are not any defense attorneys present.

One of the county attorney’s investigators stands and announces to the unrepresented defendants: “If you don’t want to talk to the prosecutor, hold up your paper and I’ll come collect them. If you want to hear the prosecutor’s offer, I need you to sign the form.” The unrepresented defendants who opt to meet with the prosecutor sign the “Waiver of Right to Counsel” form⁵¹⁸ and hand it to the county attorney’s investigator, who places it on a table in the center of the courtroom. The unrepresented defendants who opt against meeting with the prosecutor are told by the county attorney’s investigator to see a second investigator who assists them to apply for court appointed counsel if they wish, and then to see the county attorney’s office administrative assistants to receive notice of their next court date in two weeks.

Each of the five prosecuting attorneys in the courtroom, one-by-one, takes the next signed “Waiver of Right to Counsel” from the table, calls the defendant’s name, and takes the unrepresented defendant outside the courtroom to negotiate. When the prosecutor and the unrepresented defendant are done talking, they return to the courtroom, and the prosecutor tells the county attorney’s office administrative assistants whether the defendant accepts or rejects the plea offer. The unrepresented defendants who reject the plea offer are given notice of their next court date in two weeks by the county attorney’s office administrative assistants, and are assisted to apply for court appointed counsel if they wish by one of the county attorney’s investigators.

⁵¹⁸ See “Waiver of Right to Counsel,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents –Armstrong Potter Randall District and County Court Waiver of Counsel.docx (adopted Oct. 6, 2011 and subsequently amended). The content of the waiver of right to counsel form actually provided to misdemeanor defendants in Potter County may depend on which judge is conducting arraignments. The waiver of the right to counsel form contained in the published plan documents is a one-page document containing seven simple sentences, but the judge of County Court at Law #2 is considering instead using a two-page densely packed document entitled “Admonishments Regarding Self-Representation.”

The unrepresented defendants who accept the prosecutor's plea offer sit in the courtroom and wait to enter their guilty plea before the judge to whom their case has been allotted. The judges in both courts do not begin taking guilty pleas until all arraignment plea negotiations are completed, which often requires defendants to wait an hour or more.

Video arraignments for in-custody defendants. The Potter County sheriff's personnel bring defendants into the videoconferencing room. Once all defendants are present, the deputy turns on the videoconferencing equipment.

The judge addresses the unrepresented in-custody defendants as a group. He says:

- “You are here for the arraignment in your cases. This is an opportunity for you to hear a little more about the charges against you, and see what we can do to move your cases along.”
- “Each of you are charged with a Class A or B misdemeanor.” A Class A misdemeanor carries a potential punishment of up to one year in jail and/or a \$4,000 fine, and a Class B misdemeanor carries up to 180 days in jail and/or a \$2,000 fine.
- “You will have the opportunity to visit with the prosecutor. Before doing so, you have some decisions to make.”
- Each defendant has the right to counsel, and each defendant can apply for court appointed counsel.
- “If you decide you do want to talk to the county attorney, you will need to sign a waiver of counsel form. If you decide to talk to the prosecutor, it's an opportunity to hear more about the charges in your case, maybe resolve the case more quickly, and maybe even get out of jail today.”
- “If you are not represented by an attorney, you may not know all of the consequences of pleading guilty. Also, an attorney may know of defenses to the charges that can be asserted in your case.”

The judge leaves the room. The prosecutor slides his chair over to the videoconferencing monitor.

One-by-one, the prosecutor talks individually with each unrepresented defendant (though the conversation can be heard by jail personnel present in the videoconferencing room). For example:

- A man accused of Class B misdemeanor theft has been in jail for 11 days. The prosecutor offers a “three for one” plea to 60 days, requiring the defendant to serve nine more days in jail. “If you accept the offer, and serve nine more days, you will have theft on your record. Having heard all this, do you want to accept the offer or do you want to talk to a court appointed attorney?” The defendant accepts the plea offer.

Potter County video arraignment for in-custody misdemeanor defendants

Misdemeanor arraignments for in-custody defendants in Potter County are referred to as “video arraignment.” Video arraignments are held on Tuesdays and Thursdays at 1:30 p.m. Every defendant who is in custody when formal charges are instituted is scheduled for arraignment on the next video arraignment date – e.g., if charges are filed on Wednesday, the defendant’s arraignment is on Thursday; if charges are filed on Friday, the defendant’s arraignment is on Tuesday. Jail staff bring to the videoconferencing room all misdemeanor defendants against whom prosecution has been initiated except those for whom an attorney has filed a waiver of arraignment. The in-custody defendants are physically located at the jail and interact with the judge by videoconference. The county court at law judge is physically located in the commissioners court hearing room in the Old Courthouse. A single assistant county prosecutor sits next to the judge at the hearing room table. There are not any defense attorneys present.

- One defendant is charged with stealing beer from a convenience store. The prosecutor offers a plea to time served, warning that a guilty plea will constitute the man’s second misdemeanor theft conviction and that a third misdemeanor offense will be enhanced to a felony charge. The man denies having a prior theft conviction, but wants to accept the plea offer of time served so that he can get out of jail. The prosecutor asks if he “stipulates” to the prior theft conviction, and the defendant says “yes.”
- Another defendant has multiple misdemeanor charges, including methamphetamine offenses. The prosecutor offers the defendant a plea requiring six more days in jail and a \$200 fine plus previously unpaid court costs. The extremely agitated defendant denies some of the charged offenses. The prosecutor suggests that he ask for an appointed attorney, but the defendant erupts and claims the lawyer appointed to represent him previously did “nothing for me!” The defendant takes the plea offer.
- A defendant has a separate currently pending felony case, in which he is represented by a court appointed lawyer. The defendant is unrepresented on the present misdemeanor case but wants to accept the plea offer, because his appointed lawyer in the felony case advised him to accept the plea offer made on the felony. The prosecutor explains that pleading guilty to the misdemeanor case today may adversely affect the plea offer in the felony case. Eventually, the prosecutor persuades the defendant to ask for court appointed counsel.
- A man accused of Class A misdemeanor evading arrest has been in jail for 13 days. The prosecutor offers a “three for one” plea to 60 days, requiring the defendant to serve seven more days in jail. The defendant accepts the plea offer. The prosecutor reviews information on his computer and says, “I see that you are also being held on a felony and that you have court appointed counsel on that charge. Are you sure you don’t want to talk to your court appointed attorney?” The defendant declines: “I’ll just go ahead and sit out the seven days.”

- Another man is accused of a probation violation in a Class A misdemeanor. The prosecutor reads the allegations aloud to the defendant and explains that the defendant can admit “true” to some, all, or none of the allegations. “I admit to all of these, but I would like to speak to an attorney,” the defendant says. The prosecutor interrupts, saying, “Well don’t admit anything to me, because I represent the state. So, anything you say to me can and will be used against you.” The defendant asks more questions, and the prosecutor answers them, until finally the defendant asks: “What gets me out of jail the quickest?”

After each defendant meets with the prosecutor, then the sheriff’s office personnel print the appropriate documents for each defendant to sign. If the defendant rejects the prosecutor’s plea offer and wants to request appointed counsel, the jail prints and the defendant signs the form to request appointed counsel.⁵¹⁹ If the defendant accepts the prosecutor’s plea offer, the jail prints and the defendant signs the “Waiver of Right to Counsel” form.⁵²⁰

The prosecutor calls the judge back into the room. The unrepresented in-custody defendants who accept the prosecutor’s plea offer waive their right to plead before the allotted court and enter their guilty plea before whichever judge is conducting the arraignments that day.

The problem of unrepresented defendants in Armstrong and Potter counties

The number of defendants for whom Armstrong County and Potter County have historically provided an appointed attorney may not show the true picture of indigent defendants who are entitled to receive public counsel. As explained in chapter 3, no state agency accounts for whether indigent defendants in criminal cases are represented by appointed counsel during the time between when they are arrested and when prosecution is instituted. Further, no state agency accounts for how many indigent defendants go unrepresented by counsel entirely – *pro se* defendants – in criminal

⁵¹⁹ This may be either the “Affidavit of Indigence” or the “Financial Information for Request for Court Appointed Attorney.” It is unclear which form is used at video arraignments. See “Affidavit of Indigence,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (adopted Oct. 6, 2011 and subsequently amended); “Financial Information for Request for Court Appointed Attorney,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court 2011 Request for Court Appointed Attorney (Potter).doc (adopted Oct. 6, 2011 and subsequently amended).

⁵²⁰ See “Waiver of Right to Counsel,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Waiver of Counsel.docx (adopted Oct. 6, 2011 and subsequently amended). As of September 9, 2019, the county attorney’s office is changing this procedure so that the jailers will have the in-custody defendants sign the “Waiver of Right to Counsel” form either as they first enter the videoconferencing room or after the judge admonishes them, but before they meet with the prosecutor.

prosecutions at the trial level that carry the possibility of incarceration. In other words, it falls to the judges in Armstrong County and Potter County to keep track of each arrested defendant and ensure that, if indigent and facing possible loss of liberty if convicted, they are not denied the right to counsel.

Yet the judges of Armstrong County and Potter County do not keep track of defendants between magistration and institution of prosecution. Pursuant to the judges' indigent defense plan, the "Magistrate Warning" form for a defendant who does not request appointment of counsel at magistration goes directly from the magistrate into a clerk of court file,⁵²¹ and the judges do not examine or take any action on those forms. The judges do not determine whether these defendants are indigent. If an indigent defendant does not request appointment of counsel at magistration, that defendant falls off the radar unless and until prosecution is instituted against the defendant and the defendant appears for arraignment.

Worse yet, if an unrepresented defendant is cajoled into meeting with a prosecutor at arraignment to discuss a possible plea bargain, and to do so must sign a written waiver of the right to counsel, this is effectively a denial of the right to counsel because the waiver is not voluntary. Pursuant to the judges' indigent defense plan, no judge ever determines whether that defendant is indigent.

The comparison shown in the tables below illustrates the problem. In any jurisdiction, there are typically more arrests than prosecutions, because prosecutors may determine not to prosecute some charges for which arrests are made. Nonetheless, every person who is prosecuted in Armstrong County and in Potter County is also arrested, so in the absence of information about the actual number of arrests, the data about how many prosecutions occur at least shows that number *or more* of defendants were arrested. As explained in chapter 3, there are problems with attempting to compare OCA data and TIDC data. Still, the tables highlight serious concerns about whether all indigent defendants are receiving the right to counsel.

Armstrong County. The Office of Court Administration reports the following numbers of misdemeanor and felony prosecutions instituted in Armstrong County during OCA fiscal years (September through August) 2014 through 2018,⁵²² while the Texas Indigent Defense Commission reports the following number of case payments made to appointed attorneys in misdemeanor and felony cases in Armstrong County during TIDC fiscal years (October through September) 2014 through 2018:⁵²³

⁵²¹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ I.B.ix. (adopted Oct. 6, 2011 and subsequently amended).

⁵²² *Court Activity Database, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/court-activity-database/>.

⁵²³ *Armstrong County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2018>.

ARMSTRONG COUNTY	OCA FY2014	OCA FY2015	OCA FY2016	OCA FY2017	OCA FY2018
OCA reported felony prosecutions instituted	14	10	17	8	16
OCA reported misdemeanor prosecutions instituted	24	8	18	13	25
OCA reported total prosecutions instituted	38	18	35	21	41
	TIDC FY2014	TIDC FY2015	TIDC FY2016	TIDC FY2017	TIDC FY2018
TIDC reported non-capital felony trial – attorney paid	5	8	5	11	9
TIDC reported misdemeanor trial – attorney paid	2AC + 9PD	3	1	6	2
TIDC reported total – attorney paid	16	11	6	21	13

For example, in Armstrong County in 2018, there were 25 misdemeanor prosecutions instituted, yet there were only 2 cases in which attorneys were paid for representing indigent defendants in misdemeanor cases. To the extent that the OCA data and TIDC data are comparable, this leaves approximately 23 misdemeanor cases unaccounted for – 23 misdemeanor defendants who may have been able to hire an attorney, but it is also possible that they were indigent and entitled to appointed counsel unless they knowingly, voluntarily, and intelligently waived that right.

Potter County. The Office of Court Administration reports the following numbers of misdemeanor and felony prosecutions instituted in Potter County during OCA fiscal years (September through August) 2014 through 2018,⁵²⁴ while the Texas Indigent Defense Commission reports the following number of case payments to appointed attorneys in misdemeanor and non-capital felony cases in Potter County during TIDC fiscal years (October through September) 2014 through 2018:⁵²⁵

POTTER COUNTY	OCA FY2014	OCA FY2015	OCA FY2016	OCA FY2017	OCA FY2018
OCA reported felony prosecutions instituted	1,740	1,427	1,532	1,723	1,745
OCA reported misdemeanor prosecutions instituted	1,971	2,653	2,229	2,124	2,124
OCA reported total prosecutions instituted	3,711	4,080	3,761	3,847	3,869
	TIDC FY2014	TIDC FY2015	TIDC FY2016	TIDC FY2017	TIDC FY2018
TIDC reported non-capital felony trial – attorney paid	2,130	1,992	1,947	2,069	1,891
TIDC reported misdemeanor trial – attorney paid	555	542	673	578	670
TIDC reported total – attorney paid	2,685	2,534	2,620	2,647	2,561

⁵²⁴ *Court Activity Database, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/court-activity-database/>.

⁵²⁵ *Potter County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=188&fy=2018>.

For example, in Potter County in 2018, there were 2,124 misdemeanor prosecutions instituted, yet there were only 670 cases in which attorneys were paid for representing indigent defendants in misdemeanor cases. To the extent that the OCA data and TIDC data are comparable, this leaves approximately 1,454 misdemeanor cases unaccounted for – 1,454 misdemeanor defendants who may have been able to hire an attorney, but it is also possible that they were indigent and entitled to appointed counsel unless they knowingly, voluntarily, and intelligently waived that right.

CHAPTER 7

EARLY APPOINTMENT OF COUNSEL & CONTINUOUS REPRESENTATION – CONSTRUCTIVE DENIAL OF THE RIGHT TO COUNSEL

Each state is responsible for ensuring that, where an attorney is appointed to represent an indigent defendant, that appointed attorney is able to provide effective representation. Attorneys provide representation to indigent people within the structures of the system a state creates. In *United States v. Cronin*, the U.S. Supreme Court explains that deficiencies in indigent defense systems can make any lawyer – even the best attorney – perform in a non-adversarial way that results in a constructive denial of the right to counsel.⁵²⁶

The Court explains further in *Cronin* that, when a lawyer provides representation within an indigent defense system that constructively denies the right to counsel, the lawyer is presumptively ineffective.⁵²⁷ When a system is determined to be constructively deficient, the government bears the burden of overcoming that presumption. The government may argue that the defense lawyer in a specific case will not be ineffective despite the structural impediments in the system, but it is the government's burden to prove this. As a federal court of appeals noted over 30 years ago, “if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] is lifted. It is not right that the state should be able to say, ‘sure we impeded your defense – now prove it made a difference.’”⁵²⁸

⁵²⁶ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”); *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”) (citing *United States v. Cronin*, 466 U.S. 648 (1984)).

⁵²⁷ *United States v. Cronin*, 466 U.S. 648, 657-62 (1984).

⁵²⁸ *Walberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir. 1985).

This chapter explains the representation provided to indigent defendants in criminal cases in Armstrong County and in Potter County, beginning with counsel being appointed and through disposition of a case.

Appointing counsel

When any Texas defendant charged with a felony or jailable misdemeanor requests appointed counsel – no matter whether that request is made at magistration or at arraignment or at some other point – the next step is for a judge “or the judges’ designee” to determine whether the defendant is indigent and, if so, appoint counsel.⁵²⁹ In counties like Armstrong and Potter with a population less than 250,000, indigency must be determined and the attorney must be appointed within three working days (“Monday through Friday, excluding official state holidays”) of the court receiving the defendant’s request.⁵³⁰

The judges’ indigent defense plan designates the judges who are to determine indigency and appoint counsel in Armstrong County and in Potter County.⁵³¹ Armstrong County follows the plan provisions, but Potter County does not. As actually implemented in Armstrong County and in Potter County, the person designated by the judges to determine indigency and appoint counsel is:

Armstrong County

- for misdemeanors, whether a case has been filed or not, the judge of the Armstrong County Court;
- for felonies, whether a case has been filed or not, the judge of the 47th District Court.

⁵²⁹ TEX. CODE CRIM. PROC. ANN. arts. 1.051(b)-(c), 26.04(b)(1), (c) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.A.i. (adopted Oct. 6, 2011 and subsequently amended).

⁵³⁰ TEX. CODE CRIM. PROC. ANN. art. 1.051(c)(1), (i) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ II.C.iii., IV.A.i. (adopted Oct. 6, 2011 and subsequently amended).

⁵³¹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ IV.A.vi. (adopted Oct. 6, 2011 and subsequently amended). The plan says:

1. If no case has been filed in the trial court, the appointing authority for misdemeanors is: Judge Pamela Sirmon - Potter County; Judge James Anderson - Randall County; Judge Hugh Reed - Armstrong County.
2. If no case has been filed in the trial court, the appointing authority for felonies is: Judge Dan Schaap - Armstrong County; Judge Doug Woodburn - Potter County; Judge Dan Schaap - Randall County.
3. If the case has been filed in the trial court, the appointing authority is: the judge presiding in the trial court in which the case is filed.

Id.

Potter County

- for misdemeanors, whether a case has been filed or not, the two Potter County county court at law judges rotate responsibility monthly;⁵³²
- for felonies prior to indictment, four of the five Potter County district court judges rotate responsibility every three months; for felonies following indictment, the Potter County district court judge allotted the case by the district court clerk.⁵³³

In Potter County, and in felony cases in Armstrong County, it is the court coordinator for each judge who receives the request for appointment of counsel, determines the defendant's indigency status, and designates the specific attorney to represent the indigent defendant; then the judge signs the order prepared by the court coordinator. In misdemeanor cases in Armstrong County, the county judge (and not his court coordinator) receives the request for appointment of counsel, determines the defendant's indigency status, and designates the specific attorney to represent the indigent defendant.

Determining who is indigent

State law requires that the procedures adopted by a county's judges for appointing counsel "must include procedures and financial standards for determining whether a defendant is indigent" and must treat defendants equally regardless of whether the defendant is in or out of custody.⁵³⁴ Factors a court is expressly allowed by state law to consider in determining indigency are: amount & source of income; spousal income available to the defendant; value of assets & owned property; outstanding debts & necessary expenses; and number & ages of dependents.⁵³⁵ A court is prohibited by state law from considering "whether the defendant has posted or is capable of posting bail,

⁵³² Although the constitutional county court in Potter County has statutory jurisdiction over jailable misdemeanors, effective January 1, 2019, criminal cases are no longer allotted to the constitutional county court. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). The Potter County Court judge does not participate in appointing attorneys to represent indigent defendants nor in any other aspect of the provision of indigent defense representation in Potter County.

⁵³³ There are five district courts in Potter County. By agreement between the judges, effective January 1, 2019, the 47th District Court does not handle any felony cases in Randall County, and the 181st District Court does not handle any felony cases in Potter and Armstrong counties. Joint Order Regarding Division and Allocation of Criminal Law, Family Law and Civil Law Cases, at 1 (Tex. Potter County, eff. Jan. 1, 2019). Since January 1, 2019, the judge of the 47th District Court takes the Potter County quarterly rotations of both the 47th District Court and the 181st District Court, causing the 47th District Court judge in Potter County to serve during two of every five rotations, while the judges of the 108th District Court, 251st District Court, and 320th District Court each serve one of every five rotations. The judge of the 47th District Court also appoints counsel in all cases allotted to both the 47th District Court and the 181st District Court.

⁵³⁴ TEX. CODE CRIM. PROC. ANN. art. 26.04(l) (West 2017).

⁵³⁵ TEX. CODE CRIM. PROC. ANN. art. 26.04(m) (West 2017).

except to the extent that it reflects the defendant’s financial circumstances” that the court is expressly allowed to consider.⁵³⁶

Both state law and the judges’ indigent defense plan define “indigent” as “a person who is not financially able to employ counsel.”⁵³⁷ Both state law and the judges’ plan allow the judges to require that a defendant complete a written questionnaire under oath or respond to an oral examination under oath or both regarding his financial resources.⁵³⁸ The judges’ plan also provides that a judge can “order a court official to verify financial information provided.”⁵³⁹

In Potter County, the determination of whether a defendant is indigent is always made on the basis of the “Financial Information for Request for Court Appointed Attorney”⁵⁴⁰ submitted by defendants at magistration or on the basis of the “Affidavit of Indigence”⁵⁴¹ submitted by defendants at misdemeanor arraignments (it is unclear which of these, or some other, form is used at Potter County felony arraignments). In Armstrong County, the determination of whether a defendant is indigent is always made on the basis of the “Affidavit of Indigence”⁵⁴² submitted by defendants at magistration. Court officials in both counties do not take any steps to verify the information provided by defendants in these forms.

The judges’ plan presumes a defendant is indigent under any of three circumstances:

- the defendant is serving a sentence in a correctional facility, or the defendant resides in or is the subject of a proceeding to admit him to a public mental health facility;

⁵³⁶ TEX. CODE CRIM. PROC. ANN. art. 26.04(m) (West 2017).

⁵³⁷ TEX. CODE CRIM. PROC. ANN. art. 1.051(b) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.A.i. (adopted Oct. 6, 2011 and subsequently amended).

⁵³⁸ TEX. CODE CRIM. PROC. ANN. art. 26.04(n) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.C.i. (adopted Oct. 6, 2011 and subsequently amended). The written or oral statements made by a defendant in requesting appointment of counsel “may not be used for any purpose, except to determine the defendant’s indigency or to impeach the direct testimony of the defendant. This subsection does not prohibit prosecution of the Defendant under Chapter 37, Penal Code [which criminalizes perjury and false statements].” TEX. CODE CRIM. PROC. ANN. art. 26.04(q) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.C.ii. (adopted Oct. 6, 2011 and subsequently amended).

⁵³⁹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.C.i. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁴⁰ “Financial Information for Request for Court Appointed Attorney,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court 2011 Request for Court Appointed Attorney (Potter).doc (adopted Oct. 6, 2011 and subsequently amended).

⁵⁴¹ “Affidavit of Indigence,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (adopted Oct. 6, 2011 and subsequently amended).

⁵⁴² “Affidavit of Indigence,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (adopted Oct. 6, 2011 and subsequently amended).

- the defendant or defendant’s dependents “are eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing”; or
- the defendant’s net household income is not more than 125% of the federal poverty guidelines.⁵⁴³

Some court coordinators find every defendant indigent, without regard to whether the defendant meets the standards set out in the judges’ plan. Pointing to the volume of forms they receive whenever their judge is serving as the appointing authority (on average 10 per day, and upwards of 30 applications in a single day), these court coordinators say there is simply not time to review the information contained in the forms. In the view of these court coordinators, “they [the defendants] are just going to have to pay it back [the cost of their defense], anyway,” so the county is not harmed by a non-indigent defendant receiving court appointed counsel. (See discussion of recouping the cost of indigent defense services from indigent defendants at pages 140-143.)

Other court coordinators strictly apply the 125% federal poverty guideline threshold as a cut-off, finding any defendant whose net household income exceeds this to be not indigent, and therefore not entitled to appointed counsel. This method of determining whether a defendant is indigent violates the judges’ plan, which states that defendants who are not presumed indigent “shall nevertheless be considered indigent if the accused is unable to retain private counsel without substantial hardship to the accused or the accused’s dependents.”⁵⁴⁴ As a result, some indigent defendants in Armstrong County and Potter County may be denied their right to counsel.

Appointing the individual attorney to represent each individual defendant

In counties like Armstrong and Potter that use a public appointment list, state law requires that the procedures adopted by a county’s judges:

shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys’ names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in

⁵⁴³ Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.B.i. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁴⁴ Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.B.ii. (adopted Oct. 6, 2011 and subsequently amended). In addition to the financial condition of the defendant, determining substantial hardship requires consideration of “the nature of the criminal charge(s), anticipated complexity of the defense, [and] the estimated cost of obtaining competent private legal representation for the matter(s) charged.” *Id.*

the order in which the attorney's name appears on the list shall remain next in order on the list.⁵⁴⁵

The judges' plan provides that the judge first determines which appointment list to use "based on the accusations against the defendant."⁵⁴⁶ As explained in chapter 5, the plan actually establishes eight separate lists for Armstrong County and Potter County – attorneys available in Armstrong County, and attorneys available in Potter County – then within each county, there is one list for misdemeanors, one list for state jail felonies and third degree felonies, one list for second degree felonies and first degree felonies, and one list for capital cases.⁵⁴⁷

After identifying the correct list from which to appoint counsel to represent the defendant, the judges' plan provides that the judge "will appoint the attorney whose name is first on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order."⁵⁴⁸ The judges' plan expressly defines as good cause for appointing out of order that "[t]he defendant has an attorney already appointed on a prior pending or concluded matter. The same attorney will be appointed to the new matter, unless the attorney is not on the list for the type of offense involved in the current case."⁵⁴⁹

In Potter County, one district court judge's court coordinator developed the workflow process for choosing the attorney to appoint in each felony case, and the other district court judges' court coordinators generally follow the same procedure. With two new judges elected to Potter County's county courts at law, in January 2019 that district court coordinator trained the two new county court coordinators in Potter County and intends that they follow the same process, although there is no guarantee that they do so. There are three different scenarios for designating the attorney to be appointed in Potter County, depending on: whether the defendant is charged with only a felony or only a misdemeanor; or the defendant is charged with both a felony and a misdemeanor.

⁵⁴⁵ TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2017).

⁵⁴⁶ Armstrong, Potter and Randall District Court and County Court Plan, ¶ V.A. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁴⁷ Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ III.A.i.-iv. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁴⁸ Armstrong, Potter and Randall District Court and County Court Plan, ¶ V.A. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁴⁹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ V.A.ii. (adopted Oct. 6, 2011 and subsequently amended). As required by state law, it is also good cause to appoint counsel out of order if the defendant does not speak English and an attorney who speaks the defendant's language is on the appropriate list. TEX. CODE CRIM. PROC. ANN. art. 26.04(c) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ V.A.i., iii. (adopted Oct. 6, 2011 and subsequently amended).

Defendant charged with only a felony or only a misdemeanor. When an indigent defendant is charged with only felonies, a court coordinator in district court designates the attorney. When an indigent defendant is charged with only misdemeanors, a court coordinator in a county court at law designates the attorney. Both court coordinators theoretically follow the same process.

First, the court coordinator determines whether the defendant has any other open criminal case in any of Armstrong, Potter, or Randall counties.

If the defendant has an open case (or is on probation that could be revoked because of the new case):

- the court coordinator automatically designates the same attorney *if* that attorney from the open case is on any of the three counties' lists as qualified for the level of charge in the new case. For example, if the new case is a first or second degree felony, the attorney from the open case will only be appointed in the new case if the attorney is qualified to handle a first or second degree felony.
- if the attorney in the open case is not qualified for the level of charge in the new case, the court coordinator asks the attorney in the open case to withdraw so that a single attorney can be appointed to represent the defendant in both the new case and the open case. The computer assigns the next attorney on the appropriate Potter County list (first & second degree felony; third degree & state jail felony; or misdemeanor) based on the most serious level of charge in all of the defendant's cases.

If the defendant does not have any open cases, the computer assigns the next attorney on the appropriate Potter County list (first & second degree felony; third degree & state jail felony; or misdemeanor) based on the most serious level of charge in the new case.

Defendant charged with both a felony and a misdemeanor. When an indigent defendant is charged with both a felony and a misdemeanor, a court coordinator in district court designates the attorney on the felony, and a court coordinator in the county court at law designates the attorney on the misdemeanor. Both court coordinators theoretically follow the same process described above. Two different outcomes can result, depending on whether the district court or the county court at law makes the first appointment of counsel.

If counsel is appointed in the felony case first, because an attorney on any of the felony lists is by definition qualified to handle misdemeanors, the court coordinator in the county court at law usually appoints the same attorney to the misdemeanor case, even if that attorney is not on any county's misdemeanor list. In this scenario, the defendant is represented by the same attorney in both the felony and the misdemeanor case.

If counsel is appointed in the misdemeanor case first, the court coordinator in the district court will only appoint that same attorney if the attorney is qualified for the level of felony with which the defendant is charged. If the attorney appointed in the misdemeanor case is not qualified to be appointed in the felony case, the computer assigns the next attorney on the appropriate Potter County list (first & second degree felony; or third degree & state jail felony) based on the most serious level of charge in the felony case. In this scenario, the defendant may be represented by different attorneys on the felony case and the misdemeanor case.

Conflicts. The court coordinator in the appointing court notifies the attorney when they have been appointed to represent an indigent defendant. The judges' plan requires each attorney to "[n]otify the court within 72 hours of the receipt of appointment."⁵⁵⁰ If the attorney determines they have a conflict that prevents them from representing the defendant, the attorney files a motion to withdraw.⁵⁵¹ The computer assigns the next attorney on the appropriate Potter County list (first & second degree felony; third degree & state jail felony; or misdemeanor) to represent that defendant.

Effects of the Armstrong and Potter counties' process for appointing counsel

State law requires that the plan adopted by the judges must "ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory."⁵⁵² The judges explain that they presume having the computer designate the next attorney from the appropriate list will result in an even distribution of cases among the lawyers on each list. This would be true, if that were the manner in which the attorney is designated in every case.

Instead, the first step in designating the attorney in any case gives priority to an attorney who has already been appointed. With each successive new case appointment, it becomes less and less likely that an attorney newly added to a list will ever be appointed, and it becomes increasingly more and more likely that attorneys who have been on the list the longest will be appointed in an increasingly greater percentage of the new cases.

The practice of appointing the same attorney to any new case also denies attorneys the choice about in which counties and case types they are appointed. As explained in chapter 5, the judges' plan requires attorneys to designate each type of criminal case to which they seek appointment and submit the application to the local administrative

⁵⁵⁰ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.F.i. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁵¹ See TEX. CODE CRIM. PROC. ANN. art. 26.04(j)(2) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.F.i. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁵² TEX. CODE CRIM. PROC. ANN. art. 26.04(b)(6) (West 2017).

judge in the county in which they seek to be appointed.⁵⁵³ Yet under the process actually followed in at least Potter County, attorneys are sometimes appointed to Potter County cases even when they have not indicated any desire to handle Potter County cases. Similarly, attorneys are sometimes appointed to Potter County misdemeanors, even though they have indicated their desire to be appointed only in felony cases.

The judges' plan defines the need to appoint the same attorney as "good cause" for appointing an attorney out of order.⁵⁵⁴ It certainly benefits a defendant who has more than one case to be represented by the same attorney in all of those cases. But it is definitely to the financial benefit of the county, as is explained in chapter 8.

Pretrial proceedings

Once an attorney is appointed to represent an indigent defendant, the attorney is required by both state law and the judges' plan to represent the defendant until the case is disposed or the attorney is allowed by the court to withdraw.⁵⁵⁵ While representing each indigent defendant, both state law and the judges' plan require that each attorney fulfill the "duty owed to the defendant" in the manner required by the judges' plan, the Texas Code of Criminal Procedure, and "applicable rules of ethics."⁵⁵⁶

Client contact

The court coordinators notify an attorney of being appointed to represent a defendant, but it is up to the attorney to notify the defendant; otherwise the defendant has no way of knowing that an attorney has been appointed to represent him or of knowing the identity of his attorney. Both state law and the judges' indigent defense plan require appointed attorneys to "make every reasonable effort" to contact the defendant by the end of the first working day after the date on which the attorney is appointed and "to interview the defendant as soon as practicable after the attorney is appointed."⁵⁵⁷ Following this initial interview, the lawyer must "keep the client informed of the status of the case" and "[a]dvice the client" about all aspects of the case and related matters so that the defendant can make appropriate decisions.⁵⁵⁸

⁵⁵³ "Attorney Application for Appointment," in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Attorney Application for Appointment.docx (adopted Oct. 6, 2011 and subsequently amended).

⁵⁵⁴ Armstrong, Potter and Randall District Court and County Court Plan, ¶ V.A.ii. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁵⁵ TEX. CODE CRIM. PROC. ANN. art. 26.04(j)(2) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.F.i. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁵⁶ TEX. CODE CRIM. PROC. ANN. art. 26.04(b)(5) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.F.xi. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁵⁷ TEX. CODE CRIM. PROC. ANN. art. 26.04(j)(1) (West 2017).

⁵⁵⁸ Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ III.F.ix.-x. (adopted Oct. 6, 2011 and subsequently amended).

Most appointed attorneys in Armstrong and Potter counties “contact” the defendants whom they are appointed to represent by “sending a letter” notifying the defendant that they have been appointed. This lets the defendant know the identity of their attorney and how to contact the attorney, but it does not allow the defendant to recognize that attorney by sight or to tell the attorney things the defendant believes to be important.

A defendant who is out of custody can attempt to schedule an appointment to meet in person with the appointed attorney, but in-custody defendants are wholly dependent on the attorney to establish communication. The Armstrong County sheriff’s department reports that, in the past three years, only one defendant has been visited by counsel in jail and that was by a privately retained attorney – not a single appointed attorney has visited their client in the Armstrong County jail.

In Potter County, the jail uses a phone system that only allows defendant to make collect calls, and the price of accepting those calls is high. For this reason, appointed attorneys rarely if ever accept phone calls from their in-custody clients; if the attorney wants to communicate with an in-custody defendant, the attorney calls the jail and the jail will bring the defendant to the telephone.

Attorneys appointed in both Armstrong and Potter counties widely acknowledge – and there is near universal agreement by judges, prosecutors, jailers, and community leaders – that they do not visit their in-custody clients in jail. Likewise, many attorneys do not meet with out of custody clients either. Instead, most appointed attorneys meet with the defendants they are appointed to represent, both in-custody and out of custody, only at the courthouse before or after scheduled court proceedings.

Several attorneys say there is “no point” in meeting with the client until there is “something to talk about” – i.e., until the defense counsel has received discovery from the prosecution. Others suggest that the more experienced the lawyer is, the less need there is to meet with the defendant. Some lawyers attribute their failure to meet with appointed clients to the flat fee compensation structure, claiming they would meet with clients more frequently if they were paid hourly. “You’re only getting paid \$400 or \$500” for handling a misdemeanor case, so “how often are you going to meet with your client?” Still others say they just do not have enough time to meet with defendants: “I’m in court every single day. It’s hard to find time to visit my clients.”

Whatever the lawyers’ reasons for not talking with appointed clients outside of the courthouse, in many instances they also fail to meet with clients at scheduled court proceedings or do so only very late in the course of the defendant’s case. For example, during one day’s plea negotiation conferences involving out of custody defendants charged with felonies in a Potter County district court:

- One lawyer introduced himself to an indigent defendant who was charged with aggravated sexual assault of a child and, after informing the defendant of having been appointed to represent him, the lawyer asked the defendant how to pronounce his name.
- One indigent defendant said “the last time I was here at 9:00 a.m. and sat here until 3:00 p.m. when I asked the lady in the office about my case and she told me that my lawyer had already left.” Later that same day, after waiting over three hours, the defendant still had not heard from his attorney. Finally, the bailiff provided the defendant with his attorney’s name and told him that, as with the prior court appearance, the lawyer had already left court for the day.
- Three other indigent defendants had never spoken to their lawyers. “All I know is his name.”

One judge explained that the very reason he implemented mandatory plea negotiation conferences was to compel appointed attorneys “to actually meet with their clients.”

Similarly, at a docket call involving out of custody defendants charged with misdemeanors in a Potter County county court at law, 11 indigent defendants appeared in court that day saying they knew they had received an appointed attorney but had not heard from or been able to reach that attorney (each was represented by a different appointed attorney). Each defendant appeared in court that day because they were told by their bondsman that they were required to do so. In each instance, the court coordinator advised the defendant that it had been unnecessary for them to appear in court and they were “free to go.” Setting to one side whatever life arrangements these 11 indigent defendants had to make in order to come to court (missing work, missing school, arranging child care, arranging transportation, etc.), they each spent approximately an hour needlessly waiting in court that morning because their appointed lawyer failed to communicate with them.

Reducing bail

Every person who is arrested in Texas, except for a capital offense when the proof is evident, is theoretically entitled to be released on bail,⁵⁵⁹ although there are several exceptions to this.⁵⁶⁰ The amount of bail cannot be excessive,⁵⁶¹ and in setting the amount of bail for each defendant in each case where bail is allowed, the judge is guided by the statutory requirements that:

1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
2. The power to require bail is not to be so used as to make it an instrument of oppression.

⁵⁵⁹ TEX. CONST. art. I, § 11; TEX. CODE CRIM. PROC. ANN. art. 1.07 (West 2017).

⁵⁶⁰ TEX. CONST. art. I, §§ 11a, 11b, 11c.

⁵⁶¹ TEX. CONST. art. I, § 13.

3. The nature of the offense and the circumstances under which it was committed are to be considered.
4. The ability to make bail is to be regarded, and proof may be taken upon this point.
5. The future safety of a victim of the alleged offense and the community shall be considered.⁵⁶²

Yet as explained in chapter 6, a defendant's bail is set either at the time a warrant is issued, or at magistration, or at arraignment. There is no attorney appointed, much less present, to represent an indigent defendant when bail is set. And judges can only make pre-trial release determinations based on the evidence put before them. Until an attorney is appointed, there is no one to present evidence showing that an indigent defendant is not a threat to public safety and should be released pending trial, or that the defendant has ties to the community such that he will most assuredly appear at all court proceedings, or that the defendant does not have any resources with which to pay bail money.⁵⁶³

For these reasons, the Texas State Bar *Performance Guidelines for Non-Capital Criminal Defense Representation* require that “[w]hen appropriate, counsel has an obligation to attempt to secure the prompt pretrial release of the client under the conditions most favorable to the client.”⁵⁶⁴ The same requirement is imposed on appointed counsel by national standards.⁵⁶⁵

An appointed attorney can seek to have a defendant's bail reviewed in several ways.⁵⁶⁶ At any time after a defendant is arrested, an attorney can ask a magistrate to review all of the available evidence in considering whether bail should be reduced.⁵⁶⁷ In most types of cases, the magistrate can release a defendant on a personal bond – the defendant's promise to appear in court to answer the accusation, but without having to provide security – but for certain serious felonies “only the court before whom the

⁵⁶² TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2017).

⁵⁶³ As Texas Supreme Court Chief Justice Hecht said in his 2019 state of the judiciary address to the legislature, today more than three-fourths of the statewide jail population are defendants awaiting trial. “Most of those detained are non-violent, unlikely to re-offend, and posing no risk of flight. Many are held because they’re too poor to make bail. Though presumed innocent and no risk to public safety, they remain in jail, losing jobs and families, . . . [T]axpayers must foot the bill . . . Besides the costs, detaining someone solely because he’s poor is against the law. It violates fundamental constitutional rights. In 21st-century Texas, it ought to be unthinkable.” CHIEF JUSTICE NATHAN L. HECHT, THE STATE OF THE JUDICIARY IN TEXAS, at 7 of 11 (Feb. 6, 2019).

⁵⁶⁴ STATE BAR OF TEXAS, PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION § 2.1 (adopted Jan. 28, 2011).

⁵⁶⁵ See, e.g., NATIONAL LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, guideline 2.1 (1995).

⁵⁶⁶ TEX. CODE CRIM. PROC. ANN. art. 17.05 (West 2017).

⁵⁶⁷ TEX. CODE CRIM. PROC. ANN. art. 17.33 (West 2017).

case is pending” may release the defendant on personal bond.⁵⁶⁸ An attorney can file a writ of habeas corpus on behalf of the defendant to have bail modified⁵⁶⁹ (to the district court presiding over a felony;⁵⁷⁰ to a county level judge in a misdemeanor⁵⁷¹).

Appointed counsel in Armstrong and Potter counties rarely attempt to secure pretrial release of their indigent clients who are in custody. One judge went so far as to declare that lawyers “never” file motions for reduced bail. Appointed attorneys concede that they do not prepare and argue motions to reconsider bail on behalf of appointed clients, even though they do so for their retained clients.⁵⁷² “We don’t argue bail because we don’t get paid for that.”

Independent defense investigation & use of experts

State law requires that counties provide funding for the reasonable and necessary expenses of an indigent defendant’s case, “including expenses for investigation and for mental health and other experts,”⁵⁷³ and the indigent defense plan adopted by judges must provide for these necessities.⁵⁷⁴ The judges’ indigent defense plan for Armstrong and Potter counties requires every appointed attorney in every case to investigate the facts and prepare and argue reasonable factual defenses to the charge against the defendant.⁵⁷⁵

The U.S. Supreme Court has determined that the failure to conduct adequate investigation can be grounds for a finding of ineffective assistance of counsel.⁵⁷⁶ As national standards explain, it is crucial that an investigator be available to assist the attorney with interviewing witnesses, else “the attorney may be placed in the untenable position of either taking the stand to challenge the witnesses’ credibility if their testimony conflicts with statements previously given or withdrawing from the case.”⁵⁷⁷ The U.S. Supreme Court has also held, for example, that an indigent defendant is entitled to the assistance of a psychiatrist at public expense to assert an insanity

⁵⁶⁸ TEX. CODE CRIM. PROC. ANN. art. 17.03 (West 2017).

⁵⁶⁹ TEX. CODE CRIM. PROC. ANN. art. 11.64 (West 2017); *see* TEX. CODE CRIM. PROC. ANN. arts. 11.44 through 11.46, 17.05 (West 2017).

⁵⁷⁰ TEX. CODE CRIM. PROC. ANN. art. 11.08 (West 2017).

⁵⁷¹ TEX. CODE CRIM. PROC. ANN. art. 11.09 (West 2017).

⁵⁷² STATE BAR OF TEXAS, PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION § 1.3(F) (adopted January 28, 2011) (prohibiting preferential treatment of retained clients over appointed clients).

⁵⁷³ TEX. CODE CRIM. PROC. ANN. art. 26.05(d), (f) (West 2017).

⁵⁷⁴ TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2017).

⁵⁷⁵ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.F.iv. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁷⁶ *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

⁵⁷⁷ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992).

defense.⁵⁷⁸ In 2017, the U.S. Supreme Court again affirmed the right of an indigent defendant to have the assistance of an expert to examine the defendant and assist in evaluation, preparation, and presentation of the defense, whenever that defendant's mental condition is in question and is relevant to the outcome of the case.⁵⁷⁹ The Texas State Bar *Performance Guidelines for Non-Capital Criminal Defense Representation* require every lawyer in every case to “consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate” and “to secure the assistance of experts when it is necessary or appropriate” to do so.⁵⁸⁰

Despite these requirements, according to judges in Armstrong and Potter counties, court appointed lawyers “never” use investigators in misdemeanor cases and rarely do so in felony cases. One lawyer who has been on the court appointed counsel list for 10 years says he has used an investigator in only four cases. A different lawyer says she has “never” used an investigator in her 10 years on the Potter County list. One judge openly questioned whether the defense bar in Potter County and Armstrong County in general is “educated enough to qualify an expert or cross the state’s experts.” Many appointed attorneys say they will enlist an investigator only once they are convinced a case likely will go to trial. And appointed counsel in Armstrong and Potter counties are not suggesting that they are personally conducting factual investigations in their appointed cases or even considering whether to consult with experts.

Appointed attorneys offer varying reasons for the failure to conduct investigations and to contract investigators and experts on behalf of indigent defendants. They say:

- it is difficult to find competent investigators and experts in the Amarillo area;
- they fear that asking a judge to provide funding for investigators or experts will irritate the judge who approves the attorneys’ appointments and compensation;
- they worry about disclosing case-related information to the judge overseeing the case, in order to have the judge provide funding for an investigator or an expert;
- the courts will not authorize sufficient funding to hire an investigator, and it takes too much of the attorney’s time to get approval from the judges to hire an investigator; and/or
- in some instances, judges interfere in the defense by choosing the investigator or expert whom they will allow the attorney to use in a case.

But what they do not say in explanation for the failures is that they determined, after professional consideration, that it was unnecessary to investigate or hire an investigator or hire an expert.

⁵⁷⁸ Ake v. Oklahoma, 470 U.S. 68 (1985).

⁵⁷⁹ McWilliams v. Dunn, 582 U.S. ___, No. 16-5294 (June 19, 2017).

⁵⁸⁰ STATE BAR OF TEXAS, PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION § 4.1(B)(9) (adopted January 28, 2011).

Armstrong County⁵⁸¹ and Potter County⁵⁸² each reported to the TIDC that they expended the following amounts for investigation and experts in adult criminal trial level cases, including capital murder cases, during FY2014 through FY2018:

		ARMSTRONG COUNTY			POTTER COUNTY		
		# attorney case payments	investigative expenses	expert witness fees	# attorney case payments	investigative expenses	expert witness fees
FY2014	capital trial	--			5		\$3,379
	non-capital felony trial	5			2,130	\$5,565	
	misdemeanor trial	11	\$350		555	\$429	
	total criminal trial	16	\$350	\$0	2,690	\$5,994	\$3,379
FY2015	capital trial	--			2		
	non-capital felony trial	8			1,992	\$21,898	
	misdemeanor trial	3			542		
	total criminal trial	11	\$0	\$0	2,536	\$21,898	
FY2016	capital trial	--			--		
	non-capital felony trial	5			1,947	\$12,956	\$20,625
	misdemeanor trial	1			673		\$1,400
	total criminal trial	6	\$0	\$0	2,620	\$12,956	\$22,025
FY2017	capital trial	--			--		
	non-capital felony trial	11			2,069	\$10,007	
	misdemeanor trial	6			578		
	total criminal trial	17	\$0	\$0	2,647	\$10,007	\$0
FY2018	capital trial	--			--		
	non-capital felony trial	9			1,891	\$7,649	\$2,500
	misdemeanor trial	2			670		
	total criminal trial	11	\$0	\$0	2,561	\$7,649	\$2,500

As the table shows, in five years and 61 payments to appointed counsel, Armstrong County appointed attorneys have only used \$350 worth of investigative services and \$0 expert assistance in the defense of their indigent clients. In Potter County, over five years and 3,018 payments to appointed counsel in misdemeanor cases, appointed attorneys have only used \$429 in investigative services and \$1,400 in expert assistance. Aside from capital murder cases, appointed attorneys paid to represent indigent felony defendants in Potter County did not use any expert assistance in three out of five years. The lack of investigation and use of experts by appointed attorneys on behalf of indigent defendants in Armstrong and Potter counties is stark.

⁵⁸¹ *Armstrong County Expenditure Report Summary, Indigent Defense Data for Texas, TEXAS INDIGENT DEFENSE COMMISSION*, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2018>.

⁵⁸² *Potter County Expenditure Report Summary, Indigent Defense Data for Texas, TEXAS INDIGENT DEFENSE COMMISSION*, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=188&fy=2018>.

Making indigent defendants pay for the cost of their defense

As explained at pages 127-129, the indigency determination for every defendant in Armstrong and Potter counties is made solely on the basis of the written paperwork a defendant is required by the judges' plan to submit in order to request counsel – either the “Financial Information for Request for Court Appointed Attorney”⁵⁸³ or the “Affidavit of Indigence”⁵⁸⁴ depending on which version of the form is in use in the county and the stage of the proceeding. Judges could, but do not, require defendants to provide additional information either in writing or orally.⁵⁸⁵ Thus there is no warning by any magistrate or judge, at the time a defendant requests appointed counsel, of any possibility that the defendant may be required to reimburse the county for the cost of his indigent defense representation.

Both state law and the judges' indigent defense plan define “indigent” as “a person who is not financially able to employ counsel”⁵⁸⁶ and provide that “[a] defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occur.”⁵⁸⁷ An allegation of a material change in the defendant's circumstances can be raised by the defendant, the appointed defense attorney, or the prosecutor,⁵⁸⁸ but according to the judges' plan, the presumption that the defendant is indigent can only be rebutted by evidence of a material change in or additional information about the defendant's financial circumstances that demonstrate the defendant “does not meet any of the standards for indigence contained in” the judges'

⁵⁸³ “Financial Information for Request for Court Appointed Attorney,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court 2011 Request for Court Appointed Attorney (Potter).doc (adopted Oct. 6, 2011 and subsequently amended).

⁵⁸⁴ “Affidavit of Indigence,” in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Affidavit of Indigence.doc (adopted Oct. 6, 2011 and subsequently amended).

⁵⁸⁵ See TEX. CODE CRIM. PROC. ANN. art. 26.04(n) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.C.i. (adopted Oct. 6, 2011 and subsequently amended). The written or oral statements made by a defendant in requesting appointment of counsel “may not be used for any purpose, except to determine the defendant's indigency or to impeach the direct testimony of the defendant. This subsection does not prohibit prosecution of the Defendant under Chapter 37, Penal Code [which criminalizes perjury and false statements].” TEX. CODE CRIM. PROC. ANN. art. 26.04(q) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.C.ii. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁸⁶ TEX. CODE CRIM. PROC. ANN. art. 1.051(b) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.A.i. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁸⁷ TEX. CODE CRIM. PROC. ANN. art. 26.04(p) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.C.iv. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁸⁸ TEX. CODE CRIM. PROC. ANN. art. 26.04(p) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.C.iv.1. (adopted Oct. 6, 2011 and subsequently amended).

plan.⁵⁸⁹ If, and only if, a judge determines on the basis of that evidence that a defendant “previously determined to be indigent” is “not indigent,” can that defendant be ordered to pay in whole or in part for the actual costs of the indigent defense representation provided to him.⁵⁹⁰

No state agency is required to collect or publish information about the number of defendants who received indigent defense services and were ordered by a court to repay the county for those services, nor of the amounts those previously indigent defendants were required to repay. The TIDC requires every county to report in its IDER each year “any funds deposited into the county’s accounts from reimbursement of court appointed fees collected by clerks or probation departments.”⁵⁹¹ The information reported by each county to TIDC appears on its IDER as “Total Amount Collected From Defendants Pre or Post Disposition,” and along with two other items carries a TIDC notation that “[t]hese figures are for information purposes only and are not included in the financial data below.”⁵⁹²

The following table shows the amounts reported by Armstrong County⁵⁹³ and Potter County⁵⁹⁴ to TIDC as having been collected during TIDC fiscal years 2014 through 2018 from defendants as reimbursement for the cost of the indigent representation they were provided. Armstrong County reported to TIDC having \$0 in collections from defendants during each of those years.⁵⁹⁵ However, Armstrong County’s own budget documents reflect that the county did collect revenue from indigent defendants in criminal cases as part of state court costs during calendar years 2014 through 2017,⁵⁹⁶

⁵⁸⁹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ II.C.iv.1. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁹⁰ TEX. CODE CRIM. PROC. ANN. art. 26.05(g) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ II.C.iv.2., v. (adopted Oct. 6, 2011 and subsequently amended).

⁵⁹¹ See TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 13 (Oct. 2018).

⁵⁹² See, e.g., *Armstrong County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2018>; *Potter County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=188&fy=2018>.

⁵⁹³ *Armstrong County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2018>.

⁵⁹⁴ *Potter County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=188&fy=2018>.

⁵⁹⁵ *Armstrong County Expenditure Report Summary, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=6&fy=2018>.

⁵⁹⁶ “0330 Rev. State Court Cost – 0119 Indigent Defence Criminal,” “Actual Exper YEAR – 2014,” Armstrong County 2016 Proposed Budget, p. 1 (Nov. 28, 2016); “0330 Rev. State Court Cost – 0119 Indigent Defence Criminal,” “Actual Exper YEAR – 2015,” Armstrong County 2016 Proposed Budget, p. 1 (Nov. 28, 2016); “0330 Rev. State Court Cost – 0119 Indigent Defence Criminal,” “Actual Exper

and those amounts are also shown in the table below; it is impossible to know for certain whether this represents reimbursement by defendants for indigent defense services received or some other court costs imposed on indigent defendants.

Table: Recoupment from Indigent Defendants FY2014 - FY2018

		FY2014	FY2015	FY2016	FY2017	FY2018
Armstrong County	total indigent defense costs	\$6,570	\$7,350	\$6,012	\$14,430	\$10,000
	collected from indigent defendants - IDER	\$0	\$0	\$0	\$0	\$0
	collected from indigent defendants - budget	\$507	\$459	\$356	\$438	
	collections as percentage of costs	8%	6%	6%	3%	
Potter County	total indigent defense costs	\$1,707,625	\$1,622,979	\$1,500,405	\$1,722,886	\$1,686,160
	collected from indigent defendants - IDER	\$292,634	\$314,881	\$237,486	\$203,645	\$222,109
	collections as percentage of costs	17%	19%	16%	12%	13%

Importantly, the amounts shown in the table above are the sums *actually collected* from defendants; presumably, the sums assessed against defendants each year are much greater. It is impossible to know the number of defendants represented by the sums collected or the number of defendants who were ordered to pay.

Clearly, though, defendants found to be indigent, and therefore presumptively indigent throughout the proceedings in their cases, are being ordered to reimburse the counties for the costs of the indigent defense services they receive. There is no indication in either Armstrong County or Potter County that any court is receiving evidence to show that these defendants are no longer indigent, prior to imposing these costs on them. The Texas Court of Criminal Appeals has directly spoken to this practice on at least three occasions.⁵⁹⁷

Following the 2008 financial crisis, Potter County courts as a matter of policy assess the costs of indigent defense representation against all indigent defendants as court costs at time of sentencing, if those defendants are not directly incarcerated by the sentence imposed. To effectuate this policy, both the Potter County Attorney's office for misdemeanor cases and the 47th Judicial District Attorney's office for felony cases include repayment of court appointed attorney fees as a condition of probation in the plea memorandum a defendant must sign to enter a plea agreement.⁵⁹⁸

The felony plea memorandum provides under the "Conditions of Probation" header a pre-filled checkbox indicating that the defendant agrees to "Court Costs and Court Appointed Attorney fees, if any."⁵⁹⁹

YEAR – 2016," Armstrong County 2018 Proposed Budget, p. 1 (Jan. 2, 2018); "0330 Rev. State Court Cost – 0119 Indigent Defence Criminal," "Actual Exper YEAR – 2017," Armstrong County 2018 Proposed Budget, p. 1 (Oct. 3, 2018).

⁵⁹⁷ *In re Daniel*, 396 S.W.3d 545 (Tex. Ct. Crim. App. 2013); *Armstrong v. State*, 340 S.W.3d 759 (Tex. Ct. Crim. App. 2011); *Mayer v. State*, 309 S.W.3d 552 (Tex. Ct. Crim. App. 2010).

⁵⁹⁸ See Potter County, Texas, County Court at Law Plea Memorandum; Potter County, Texas, District Court Plea Memorandum.

⁵⁹⁹ Potter County, Texas, District Court Plea Memorandum.

The misdemeanor plea memorandum contains a pre-filled checkmark next to the “Defendant’s Statement on Admonishments,” providing that by signing the memorandum the defendant agrees to the following:

I state that I understand that, as a term and condition of my plea bargain agreement with the State, should I have a court-appointed attorney, I may be required to reimburse Potter County for the cost of my court-appointed attorney **if** the Court determines that I **presently** have the ability to pay these court-appointed fees. If the Court makes such a finding I understand that by failing to assert my inability to pay these fees now or any time hereafter on appeal, I shall not be permitted to complain of same at a later time if or when my guilt is adjudicated or my probation is revoked.⁶⁰⁰

The amount the court will order the defendant to pay for court-appointed attorney fees is not stated on the plea memorandum at the time the defendant signs it. Judges do not make an individualized finding of the defendant’s present ability to pay at the time the defendant pleads guilty and is sentenced on the basis of the plea memorandum. The judges do not advise the defendant, at time of sentencing, of the amount of court costs imposed as reimbursement for indigent defense services – the cost is determined later by the dollar amount the judge approves as payment to the court appointed attorney. (See chapter 8.)

Some appointed attorneys are unaware that *every* indigent defendant is entitled to an evidentiary hearing on ability to pay before the court can order the defendant to repay the county for the costs of indigent defense services. No such hearing is ever conducted. Worse yet, appointed attorneys rarely even object to the imposition on their indigent clients of court costs for reimbursement of indigent defense services. One appointed attorney says he frequently asks the district attorney or the judge to waive imposition on indigent defendants of the cost of counsel “if there is a good argument for it.” Other appointed counsel explain that they never ask the court to waive the cost of counsel because it would seem as though they were waiving their own fees. In fact, one appointed lawyer in the past would request waiver of recoupment for his appointed clients, but he stopped doing so when a judge asked him in open court, “You mean, you will not be submitting a bill?” By equating the appointed attorney’s entitlement to be paid with the imposition of indigent defense service court costs on the indigent defendants whom the attorney is appointed to represent, the court creates a conflict of interest between lawyer and client.

⁶⁰⁰ Potter County, Texas, County Court at Law Plea Memorandum (emphasis original).

CHAPTER 8

SUFFICIENT RESOURCES & COMPENSATION

The U.S. Supreme Court explained in *Cronic* that “[t]he right to the effective assistance of counsel” means that the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.”⁶⁰¹ For this to occur, states must ensure that both the prosecution and the defense have the resources they need at the level their respective roles demand. “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”⁶⁰²

The resources necessary for the right to counsel of an indigent defendant are provided to the defendant through the appointed attorney. Yet if that attorney is either incapable of or barred from challenging the state’s case because of a structural impediment – “if the process loses its character as a confrontation between adversaries”⁶⁰³ – a constructive denial of counsel occurs. An attorney cannot effectively represent a client if the attorney’s own personal interests are likely to be at odds with the client’s case-related interests.⁶⁰⁴ For example, if an attorney’s take home pay is premised on the need to dispose of as many cases as possible and as quickly as possible, then a conflict of interest exists between the attorney and the indigent accused. In short, any indigent defense system that places the attorney’s personal financial wellbeing in direct competition with the stated legal interests of an indigent defendant creates a constructive denial of counsel.

As explained in chapter 2, the U.S. Constitution holds the State of Texas responsible for ensuring adequate funding for the right to counsel under the Sixth and Fourteenth

⁶⁰¹ United States v. *Cronic*, 466 U.S. 648, 656-57 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

⁶⁰² United States v. *Cronic*, 466 U.S. 648, 657 (1984) (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

⁶⁰³ United States v. *Cronic*, 466 U.S. 648, 656-57 (1984).

⁶⁰⁴ TEX. DISCIPLINARY R. PROF. CONDUCT T. 1.06(b) (“a lawyer shall not represent a person if the representation of that person . . . reasonably appears to be or become adversely limited by . . . the lawyer’s . . . own interests”).

Amendments.⁶⁰⁵ Nevertheless, Texas has delegated to counties the responsibility for providing all resources necessary for the effective representation of indigent defendants,⁶⁰⁶ and Texas has delegated to judges the responsibility to provide and oversee the indigent defense system.⁶⁰⁷ The Court in *Cronic* clearly advises that governmental action that infringes on a lawyer's independence to act in the stated interests of defendants causes a constructive denial of counsel.⁶⁰⁸ Accordingly, the State of Texas and both Potter County and Armstrong County have a constitutional obligation to provide the fiscal resources necessary for the representation of indigent defendants and to ensure the indigent defense system is free from financial conflicts that interfere with counsel's ability to render effective representation to each defendant.⁶⁰⁹

The fiscal resources necessary for effective representation

The American Bar Association's *Standards for Criminal Justice* explain that attorneys must have adequate resources and support staff (including secretarial, investigative, and expert services) and adequate facilities and equipment (such as computers, telephones, photocopying equipment, and office space to meet with clients) in order to render effective assistance of counsel.⁶¹⁰ To prevent financial conflicts of interests, all national standards require that: "Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses."⁶¹¹

⁶⁰⁵ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) ("[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. . . . [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

⁶⁰⁶ TEX. CODE CRIM. PROC. ANN. art. 26.05(f) (West 2017).

⁶⁰⁷ TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West 2017).

⁶⁰⁸ *United States v. Cronic*, 466 U.S. 648, 658-61 (1984).

⁶⁰⁹ *See, e.g., Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."); *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."); *Glasser v. United States*, 315 U.S. 60, 70 (1942) ("'[A]ssistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.").

⁶¹⁰ AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE — PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992).

⁶¹¹ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 cmt. (2002).

Therefore, an attorney needs at least three types of resources to effectively defend each client: law office overhead; case-related expenses; and fair lawyer compensation.

- *Law office overhead.* For an attorney to simply show up and be available to represent clients each day, the attorney must pay certain expenses. These include: office rent, furniture and equipment, computers and cellphones, telephone and internet and other utilities, office supplies including stationery, malpractice insurance, state licensing and bar dues, and legal research materials, plus the cost of staff such as a secretary or legal assistant. Attorneys must incur all of these expenses, commonly referred to as “overhead,” before representing a single client.⁶¹²
- *Case-related expenses.* Once an attorney is designated to represent a client in a given case, additional expenses inevitably arise. These are expenses that the attorney would not incur but for representing that client, and they include, for example: postage to communicate with the client and witnesses and the court system, long-distance and collect telephone charges, mileage and other travel costs to and from court and to conduct investigations, preparation of copies and exhibits, and costs incurred in obtaining discovery, along with the costs of hiring necessary investigators and experts in the case. These costs vary from case to case; some cases requiring very little in the way of expense, other cases costing quite a lot.
- *Fair lawyer compensation.* This is the attorney’s pay.

The government is responsible for providing the resources needed in each indigent defendant’s case. It can do so by providing a government paid-for building stocked with all the necessary supplies and equipment and a budget for investigation, experts, and support staff. Or it can do so by paying or repaying the appointed private attorneys for these expenses. What government *cannot do*, as has been held by state supreme courts all across the country, is place the burden of paying for the indigent defense system onto the appointed private attorneys.⁶¹³

⁶¹² “The 2012 Survey of Law Firm Economics by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses,” NATIONAL ASS’N OF CRIM. DEFENSE LAWYERS, *RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS* 8 (Mar. 2013), and overhead tends to be a higher percentage of gross receipts for smaller law offices. See ALM LEGAL INTELLIGENCE, 2012 SURVEY OF LAW FIRM ECONOMICS, Executive Summary at 4 (showing overhead ranging from 38.9 percent of receipts in the largest law firms to 47.2 percent in smaller law offices).

⁶¹³ See, e.g., *Wright v. Childree*, 972 So. 2d 771, 780-81 (Ala. 2006) (determining assigned counsel are entitled to a reasonable fee in addition to overhead expenses); *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987) (concluding that “requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole;” and that Alaska’s constitution “does not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden,” because

How case related needs, overhead, and attorney compensation are provided

Counties responsible for funding indigent defense services

State law requires the county in which a criminal prosecution is instituted to pay the cost of appointed counsel and all reasonable and necessary expenses of the defense at both trial and appeal.⁶¹⁴ As both the executive and legislative authority in the county, a county's commissioners court is the governmental body responsible for setting the county's budget including providing the funding that is necessary for the right to counsel.⁶¹⁵

As explained in chapter 2, the Armstrong County commissioners court and the Potter County commissioners court each set their county's annual indigent defense budget largely based on the total cost of the indigent defense expenditures approved by the judges in the prior year. The commissioners courts have little ability to scrutinize whatever level of indigent defense spending was approved by the judges in the past, because, as one county official noted, the county has "no way of knowing" whether a specific expense is "legitimate" or not so the county has "to take the judge's word for it." In rare circumstances, the county might ask a judge to verify an unusually large amount on a voucher approved for payment, asking, "Is this right?" But if the judge says, 'Yes,' then we pay it."

doing so would be taking "private property for a public purpose without just compensation"); *Kansas ex rel Stephan v. Smith*, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987) (the state "has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses"); *Louisiana v. Wigley*, 624 So.2d 425, 429 (La. 1993) (finding that "in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs"); *Wilson v. Mississippi*, 574 So.2d 1338, 1340 (Miss. 1990) (holding indigent defense attorneys are entitled to "reimbursement of actual expenses" including "all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case," in addition to a reasonable sum); *Oklahoma v. Lynch*, 796 P.2d 1150, 1161 (Okla. 1990) (finding that state government "has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses"); *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989) (finding that, because compensation rates did not cover attorney overhead, court appointed attorneys were forced to "involuntarily subsidize the State with out-of-pocket cash;" "[p]erhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial").

⁶¹⁴ TEX. CODE CRIM. PROC. ANN. arts. 26.05(f), 26.052(l) (West 2017).

⁶¹⁵ TEX. CONST. art. V, § 18(b); TEX. CODE CRIM. PROC. ANN. art. 26.05(a), (f) (West 2017); TEX. LOCAL GOV'T CODE ANN. §§ 111.003, 111.008, 111.068 (West 2017).

Because state law makes the criminal court judges in a county responsible for the provision of indigent defense, the commissioners courts in both Armstrong County and Potter County presume that the criminal court judges provide whatever fiscal oversight is necessary. Yet each criminal court judge acts independently of all the others in approving the costs of indigent criminal cases in that judge's court. Each of these judges is an independently elected government official with equally independent decision-making authority, or as one judge describes it, "each having their own fiefdoms." Despite the expectations of each county's commissioners court, the judges with criminal jurisdiction in each county do not individually or jointly conduct any fiscal analysis of spending on indigent defense, so no fiscal analysis ever occurs. As one judge concluded, the structure Texas law has established for governmental offices at the county level "is the worst system to handle these problems" of setting and overseeing criminal justice policy and spending.

Reasonable attorney's fee & the fee schedule

State law provides that attorneys (other than those employed in a public defender office) who are appointed to represent indigent defendants in criminal cases "shall be paid a reasonable attorney's fee" for all time spent in court and for "reasonable and necessary time spent out of court on the case."⁶¹⁶ The amount of the attorney's fee must be "based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel."⁶¹⁷

The joint plan adopted by the judges for Armstrong, Potter, and Randall counties states that "[c]ourt appointed counsel shall be compensated for all reasonable and appropriate services rendered in representing the accused," with "reasonable" compensation determined by the "time and effort expended" by the attorney.⁶¹⁸ The judges' plan does not make provision for considering the complexity of the case or the experience and ability of appointed counsel in determining what constitutes a reasonable fee.

State law also requires the judges trying criminal cases in each county to adopt a schedule of fees that states "reasonable fixed rates or minimum and maximum hourly rates" to be paid to appointed attorneys other than those employed in a public defender office.⁶¹⁹ In adopting the fee schedule, judges are required to "tak[e] into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates."⁶²⁰ The fee schedule must contain a form for the appointed attorney to itemize the services performed.⁶²¹

⁶¹⁶ TEX. CODE CRIM. PROC. ANN. arts. 26.05(a), 26.052(l) (West 2017).

⁶¹⁷ TEX. CODE CRIM. PROC. ANN. arts. 26.05(a), 26.052(l) (West 2017).

⁶¹⁸ Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.A. (adopted Oct. 6, 2011 and subsequently amended).

⁶¹⁹ TEX. CODE CRIM. PROC. ANN. arts. 26.05(b)-(c), 26.052(l) (West 2017).

⁶²⁰ TEX. CODE CRIM. PROC. ANN. arts. 26.05(c), 26.052(l) (West 2017).

⁶²¹ TEX. CODE CRIM. PROC. ANN. arts. 26.05(c), 26.052(l) (West 2017).

Armstrong, Potter and Randall Counties Texas Indigent Defendant Fee Schedule

Effective: September 1, 2017

Original matters*

\$100	No charge accepted
\$75-150/hour	Nolle Prosequi (for case/trial prep)
\$400-500	Misdemeanor/State Jail Plea
\$700	3rd Degree Felony Plea
\$1000	2nd Degree Felony Plea
\$1500	1st Degree Felony Plea
\$200	Each additional indictment
\$75-150/hour	Preparation for contested hearing
\$1000/day	Contested trial (or hourly at Court's discretion)
\$75-150/hour	Appeal

* Fees will be based on enhanced range of punishment if indictment contains enhancements; upward variance may be granted if supported by reasonable and necessary hours depending on seriousness of charges

Revocation matters*

\$400	Misdemeanor Plea
\$500	Felony Plea
\$75-150/hour	Contested hearing/preparation

* Upward variance may be granted if supported by reasonable and necessary hours depending on seriousness of charges

The judges' plan contains a fee schedule (shown above) establishing the rates of compensation for appointed counsel.⁶²² The judges' plan also provides the form appointed attorneys must use to request payment (shown on page 152).⁶²³

⁶²² "Indigent Defendant Fee Schedule, Effective: September 1, 2017," in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Attorney Fee Schedule.docx (adopted Oct. 6, 2011 and subsequently amended).

⁶²³ "Attorney Fee Voucher," in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Attorney Fee Voucher.doc (adopted Oct. 6, 2011 and subsequently amended).

Reasonable and necessary expenses

Both state law and the judges' plan provide that an appointed attorney (other than those employed in a public defender office) "shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts."⁶²⁴

Appointed attorneys may incur expenses with or without prior approval of the court,⁶²⁵ but the judges' plan provides that "[w]henever possible prior court approval should be obtained before expenses are incurred."⁶²⁶ Both state law and the judges' plan provide that, for expenses the appointed attorney incurs without approval, upon request by the appointed attorney for reimbursement, "the court shall order reimbursement of counsel for the expenses, if the expenses are reasonably necessary and reasonably incurred."⁶²⁷ Both state law and the judges' plan provide that, if the appointed attorney seeks prior approval from the court for advance payment of "expenses to investigate potential defenses," the attorney may file a pretrial *ex parte* confidential request,⁶²⁸ and if the judge denies the request "in whole or in part," he will state the reasons in writing, attach them to the confidential request, and file the request and denial in the record under seal.⁶²⁹

State law requires that, for investigation or expert expenses, the appointed attorney may designate, subject to the court's approval, whether payment should be made directly to a licensed private investigator or an expert or should be paid to the attorney.⁶³⁰ The judges' plan does not contain any such provision.

Payment procedures & the voucher process

State law and the judges' plan establish near identical procedures for the appointed attorneys in Armstrong and Potter counties to request payment and/or reimbursement for representation of indigent defendants:

⁶²⁴ TEX. CODE CRIM. PROC. ANN. arts. 26.05(d), 26.052(f)-(h) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.C.i. (adopted Oct. 6, 2011 and subsequently amended).

⁶²⁵ TEX. CODE CRIM. PROC. ANN. arts. 26.05(d), 26.052(f)-(h) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.C.i. (adopted Oct. 6, 2011 and subsequently amended).

⁶²⁶ Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.C.i. (adopted Oct. 6, 2011 and subsequently amended).

⁶²⁷ TEX. CODE CRIM. PROC. ANN. arts. 26.05(d), 26.052(h) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.C.iii. (adopted Oct. 6, 2011 and subsequently amended).

⁶²⁸ TEX. CODE CRIM. PROC. ANN. arts. 26.05(d), 26.052(f) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.C.ii.1. (adopted Oct. 6, 2011 and subsequently amended).

⁶²⁹ TEX. CODE CRIM. PROC. ANN. arts. 26.05(d), 26.052(g) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.C.ii.2. (adopted Oct. 6, 2011 and subsequently amended).

⁶³⁰ TEX. CODE CRIM. PROC. ANN. arts. 26.05(h), 26.052(l) (West 2017).

- The judges' plan provides a one-page "Attorney Fee Voucher" form,⁶³¹ which the appointed attorney completes and submits to the judge presiding over the case in which the attorney is appointed.⁶³² The "Attorney Fee Voucher" form is a fairly complex document, a copy of which is provided at page 152.
- If the judge does not approve the amount requested by the appointed attorney, the judge is required by state law and by the judges' plan to "make written findings stating the amount of payment that the judge . . . approves and each reason for approving an amount different from the requested amount."⁶³³
- An appointed attorney may appeal the judge's decision, or the lack of a decision within 60 days, to the presiding judge of the administrative judicial region.⁶³⁴
- No payment can be made until the judge approves it.⁶³⁵

After the judge approves some amount of payment on the attorney voucher, the judge forwards it to county government to make the approved payment to the appointed attorney.

Judicial discretion and attorney confusion

As the fee schedule is applied in Armstrong and Potter counties, appointed attorneys can only be certain of being paid a single flat fee in most cases, without regard to how much or how little time the attorney must devote to that case.

- In a case in which the prosecutor declines charges, the attorney can be certain of being paid a single flat fee of \$100, no matter how serious the charge at the time of arrest and without regard to how many hours the attorney devoted to the defense of that case.
- In a case that resolves by plea, the attorney can be certain of being paid a single flat fee, based on the seriousness of the charge, but without regard to how much or how little time the attorney devoted to the defense of that case:

\$400 - \$500	for a misdemeanor or a state jail felony
\$700	for a third degree felony
\$1,000	for a second degree felony

⁶³¹ "Attorney Fee Voucher," in Armstrong, Potter and Randall District Court and County Court Plan, at Plan Documents – Armstrong Potter Randall District and County Court Attorney Fee Voucher.doc (adopted Oct. 6, 2011 and subsequently amended).

⁶³² TEX. CODE CRIM. PROC. ANN. arts. 26.05(c), 26.052(l) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.B.i. (adopted Oct. 6, 2011 and subsequently amended).

⁶³³ TEX. CODE CRIM. PROC. ANN. arts. 26.05(c), 26.052(l) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.B.ii.1. (adopted Oct. 6, 2011 and subsequently amended).

⁶³⁴ TEX. CODE CRIM. PROC. ANN. arts. 26.05(c) (non-capital cases), 26.052(l) (capital cases) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.B.ii.2. (adopted Oct. 6, 2011 and subsequently amended).

⁶³⁵ TEX. CODE CRIM. PROC. ANN. arts. 26.05(c), 26.052(l) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶ VI.B.. (adopted Oct. 6, 2011 and subsequently amended).

1. Jurisdiction <input type="checkbox"/> District <input type="checkbox"/> County <input type="checkbox"/> County Court at Law Court #: _____		2. County <input type="checkbox"/> Potter <input type="checkbox"/> Randall <input type="checkbox"/> Armstrong		3. Cause Number (s)		4. Proceedings <input type="checkbox"/> Trial-Jury <input type="checkbox"/> Trial-Court <input type="checkbox"/> Plea-Open <input type="checkbox"/> Plea-Bargain <input type="checkbox"/> Other: _____	
5. Style: _____							
6. Case Type <input type="checkbox"/> Felony - SJ <input type="checkbox"/> Felony – 3 rd <input type="checkbox"/> Felony - 2 nd <input type="checkbox"/> Felony - 1 st <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Juvenile <input type="checkbox"/> Appeal <input type="checkbox"/> Capital Case <input type="checkbox"/> Family/CPS <input type="checkbox"/> Revocation – Felony <input type="checkbox"/> Revocation – Misdemeanor <input type="checkbox"/> No Charge Accepted <input type="checkbox"/> <i>Nolle Prosequi</i> (after trial prep) <input type="checkbox"/> Other _____							
7. Attorney (Full Name)				9. Attorney Address (Include Law Firm Name if Applicable)		10. Telephone	
8. State Bar Number		8a. Tax ID Number				11. Fax	
12. Pleas - Flat Fee – Court Dates (See attached schedule)						12a. Total Flat Fee	
						\$	
13.	Trial Services – Jury/Non-Jury			Hours	Dates	13a. Total In Court Comp	
	\$1000 per day Or \$75-\$150 hour		Total hours				
14.	Out of Court Services			Hours	Dates	14a. Total Out of Court Compensation.	
	Trial preparation						
	Rate per Hour \$75- \$150		Total hours				
15.	Investigator				Amount	15a. Total Investigator Expenses	
						\$	
16.	Expert Witness				Amount	16a. Total Expert Witness Expenses	
						\$	
17.	Other Litigation Expenses				Amount	17a. Total Other Litigation Expenses	
						\$	
18. Time Period of service Rendered: From _____ to _____ Date Date							
19. Additional Comments						20. Total Compensation and Expenses Claimed	
						\$	
21. Attorney Certification – I, the undersigned attorney, certify that the above information is true and correct and in accordance with the laws of the State of Texas. The compensation and expenses claimed were reasonable and necessary to provide effective assistance of counsel.							
<input type="checkbox"/> Final Payment <input type="checkbox"/> Partial Payment _____ <div style="text-align: center;">Signature</div>						Date: _____	
22. SIGNATURE OF PRESIDING JUDGE:						Amount Approved:	
Reason(s) for Denial or Variation							

\$1,500	for a first degree felony
plus \$200	for any equal or lesser degree companion case resolved by plea at the same time

That is the end of certainty provided to appointed attorneys by the fee schedule.

For cases that go to trial, no matter the seriousness of the charge, the fee schedule established by the judges' plan gives the judge discretion to pay an appointed attorney either: a flat daily rate of \$1,000 per day of trial, but without regard to how many hours the attorney devoted to the case prior to commencement of the trial; or an hourly rate of \$75 to \$150 per hour, but only for whatever number of hours the judge finds to be "reasonable and necessary."

For hours an appointed attorney devotes to a case that is *nolle pros'd* after institution of prosecution, the judges' plan gives the judge discretion to pay (or not pay) an hourly rate of \$75 to \$150 per hour for whatever number of hours the judge finds to be "reasonable and necessary."

For hours an appointed attorney devotes to preparation and presentation in contested hearings, no matter the manner in which the case is resolved, the judges' plan gives the judge discretion to pay (or not pay) an hourly rate of \$75 to \$150 per hour for whatever number of hours the judge finds to be "reasonable and necessary."

No matter the seriousness of the charge or the manner in which it resolved, the fee schedule always allows the judges to pay (or not pay) any appointed attorney in any case an "upward variance" – i.e., a greater amount of compensation than that provided by the fee schedule, so long as the judge finds that the hours devoted by the attorney to representation in the case were "reasonable and necessary."

In short, the private attorneys who are appointed to represent indigent defendants in criminal cases in Armstrong and Potter counties are entirely beholden to the judges for any compensation they might receive beyond the single flat fee paid for a declination of charges or a plea.

Appointed attorneys also do not have any option to decline lesser paying companion cases. As explained in chapter 7, pursuant to the judges' plan as implemented, if a defendant is prosecuted in a new case at a time that an appointed attorney is already representing that defendant, that same appointed attorney will also be appointed to represent the defendant in the new case (assuming the attorney is qualified under the plan to handle the new case). The appointed attorney cannot hope to be paid any more than \$200 in whichever case carries the lesser charge, even though a different appointed attorney would be paid a higher rate for the same new case.

The situation is made worse because, as the procedures for requesting payment are actually implemented in Armstrong and Potter counties, the appointed attorneys do not have any way of knowing why the judges approve, modify, or disapprove the attorneys' requests for payment. The attorneys appointed to represent indigent defendants in Armstrong and Potter counties do not receive any additional instructions about how to request payment of fees and reimbursement of expenses, beyond that provided in the fee schedule and the blank voucher form. Some appointed attorneys fill in a specific amount of attorney fee they are requesting, while other appointed attorneys leave it to the judge to determine the appropriate fee.

When the appointed attorneys do specify the amount of attorney fee they are requesting, the judges frequently approve a different amount. Sometimes judges do not provide any written reason for why they approved an amount different than that requested by the appointed attorney. Where judges do provide written reasons for approving a different amount than that requested, they do so with a brief hand-written note at the bottom of the voucher form, but the approved voucher is not provided to the appointed attorneys.

Generally, the private attorneys who are appointed to represent indigent defendants in Armstrong and Potter counties do not feel that they are fairly compensated. Several appointed lawyers complained that the judges regularly cut the number of billable hours submitted by attorneys for payment, often without providing any written explanation of the judge's reasons as is required under the indigent defense plan. Some judges agree that they routinely cut the bills submitted by attorneys. "I do it all the time," said one judge. The judge continued by way of example: "I don't understand how there's eight hours of work [out of court] in a drug case. What are you doing on that case that could possibly take eight hours?"

Judges are also inconsistent in their approval of case-related expenses incurred directly by court appointed lawyers. In most instances, the judges approve reimbursement to the appointed lawyer, but in those cases where the reimbursement request is denied, the judges do not provide an explanation – the expense simply is not included in the final payment approved on the voucher. When judges deny reimbursement of case-related expenses to appointed private attorneys, the attorneys bear the costs of these expenses which directly reduce their compensation for the case.

After approval by the judge, a copy of the approved voucher form is uploaded to an online portal, where appointed attorneys "can view and print documents" associated with their bar number until "[t]hirty days after the final judgement" of a given case, at which point access to the voucher files connected to that case "ends." It is not clear whether attorneys know how to access the vouchers via the online portal in order to read the judges' written reasons, nor how frequently they do so; county government does not track user log-in data.

CHAPTER 9

SUFFICIENT TIME & CASELOADS

The U.S. Supreme Court in *Powell v. Alabama* notes that the lack of “sufficient time” to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel.⁶³⁶ As one state supreme court observed over a quarter century ago, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent’s defense has increased considerably.”⁶³⁷

Impeding counsel’s time “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob,” the *Powell* Court explained.⁶³⁸ The lack of sufficient time may be caused by any number of things, including but not limited to payment arrangements that create financial incentives for lawyers to dispose of cases quickly rather than in the best interests of their clients, or excessive workload. Whatever the cause, insufficient time to prepare and present an effective defense for each indigent defendant is a marker of the constructive denial of counsel.

Caseloads & workloads of appointed private attorneys in Armstrong and Potter counties

No matter how complex or basic a case may seem at the outset, no matter how little or how much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of every client in every criminal case. Even in the simplest case, the attorney must, among other things:

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning

⁶³⁶ *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

⁶³⁷ *Louisiana v. Wigley*, 624 So.2d 425, 428 (La. 1993).

⁶³⁸ *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

about the defendant's background and life, interviewing both lay and expert witnesses, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;

- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution's motions;
- prepare for and appear at necessary pretrial hearings, wherein he must preserve his client's rights;
- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).⁶³⁹

The time an appointed attorney can devote to accomplishing each of these tasks in each defendant's case depends on the total amount of time the attorney has available for all professional endeavors and the total amount of work the attorney must accomplish in that available time. This discussion is often framed in terms of "caseloads" or "workloads."

How many appointed criminal cases does each attorney handle?

Caseload refers to the raw, quantifiable number of cases an attorney handles during a particular period of time. Thus, a lawyer's total annual indigent defense caseload is the count of all indigent defense cases in which the lawyer provided representation during a given year.

No one at the state or local level collects data on the number of indigent cases in which each appointed private attorney provides representation to indigent defendants during a given year. The only information about the indigent defense caseloads of Texas attorneys is derived through the counties' annual indigent defense expenditure reports (IDER) to TIDC.

As explained in chapter 3, TIDC instructs county auditors to report the existence of indigent criminal or juvenile cases each time during the yearly reporting period that:

⁶³⁹ See, e.g., STATE BAR OF TEXAS, PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION (adopted Jan. 28, 2011); NATIONAL LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

a public defender office attorney disposes of a case at the trial level; a public defender office attorney disposes of a case at the appellate level; or a payment is made to an attorney for representing an indigent defendant at either the trial level or the appellate level.⁶⁴⁰ In counties like Armstrong and Potter that use only a public appointment list to provide indigent defense services, this means the counties count each case payment made to any appointed private attorney.

The plan and schedule of fees adopted by the judges in each county with jurisdiction over criminal cases determines when an appointed attorney may be paid in each case,⁶⁴¹ and so the timing of payments over the life of an appointed case varies from county to county. In counties where judges only allow attorneys to be paid once a case is disposed, there will be no record at all in the TIDC data that an indigent defendant's case exists until that case is disposed, whether by the statute of limitations running out, by dismissal, by acquittal, or by conviction. In Armstrong County and Potter County, appointed attorneys are paid in most cases when their indigent client is convicted through a guilty plea, thereby disposing of the case; and this is when the counties report the fact of an appointed lawyer having handled the case, without regard to how long that attorney had been handling that case.

Under TIDC's method of having the county auditors report, if an attorney receives more than one payment in a single case, each of those payments may result in the same criminal case being counted again with each payment made during the annual reporting period or during a different reporting period. Meanwhile, if for any reason a payment is never made to an appointed attorney for a particular indigent defendant's case, the TIDC data will never reflect the existence of that criminal case or of the indigent defendant charged in it.

In short, the number of case payments made to the appointed private attorneys in Armstrong County and Potter County is not the same as the number of appointed cases they handle during a given year. Nonetheless, in the absence of any other information, the number of case payments made to each attorney offers some usefulness in understanding the possible number of appointed cases the attorneys handle.

There are few criminal cases in Armstrong County each year. During FY2018, only six attorneys were paid for representing indigent adult defendants in Armstrong County criminal cases at the trial level (all six were also separately paid for representing indigent adult defendants in Potter County criminal cases at the trial level). For TIDC fiscal year 2018, Armstrong County reported to TIDC the following numbers of case payments made to those six attorneys in any type of indigent case at either the trial or appellate level:⁶⁴²

⁶⁴⁰ See TEXAS INDIGENT DEFENSE COMMISSION, INDIGENT DEFENSE EXPENDITURE REPORT MANUAL FISCAL YEAR 2018, at 6 (Oct. 2018).

⁶⁴¹ TEX. CODE CRIM. PROC. ANN. art. 26.05(b)-(c) (West 2017).

⁶⁴² *Armstrong Attorney Caseload Report – Fiscal Year 2018, Indigent Defense Data for Texas*,

attorney	juvenile trial payments	capital trial payments	felony trial payments	misd. trial payments	juvenile appeal payments	felony appeal payments	misd. appeal payments	total payments
BROWN, CATHERINE E.			1					1
CAREY, DARRELL R.			1					1
DENNY, STEVEN MICHAEL			1					1
HAMMONS, TROY DON			4					4
HATHAWAY, DIANA				2				2
HENDERSON, JEFFREY TODD			2					2

By contrast, Potter County has a large criminal caseload and a correspondingly large number of indigent defense appointments each year. During FY2018, Potter County paid 55 attorneys for representing indigent adult defendants in criminal cases at the trial level. For TIDC fiscal year 2018, Potter County reported to TIDC the following numbers of case payments to those 55 attorneys in any type of indigent case at either the trial or appellate level:⁶⁴³

attorney	juvenile trial payments	capital trial payments	felony trial payments	misd. trial payments	juvenile appeal payments	felony appeal payments	misd. appeal payments	total payments
ABBOTT, JAMES L.			10	18				28
BARFIELD, WAYNE BROOKS			67	19		3		89
BATSON, JOSEPH D.			47	14				61
BLACKWELL, TROY ANDREW				9				9
BOREN, DENNIS RAY			2					2
BROWN, CATHERINE E.	7		111	21				139
CAREY, DARRELL R.	2		78	12			1	93
CHRISTIE, DONNA K.	2		25	12		2		41
CLARK, JAMES			25	7				32
COATS, ERIC S.			1			3		4
COPPEDGE, LEWIS			5	16				21
CROFFORD, GRETA RAPSTINE			2					2
CROSS, JANIS ALEXANDER				10				10
DENNY, STEVEN MICHAEL			67	17		4		88
EDWARDS, VAAVIA RUDD			7	3				10
FRAUSTO, TITIANA D.	2			14				16
HALES, GRAYSON CADE			32	16				48
HAMMONS, TROY DON	5		72	21				98
HANEY, KERRY BRIAN	1			14				15
HARWOOD, GEORGE N.	5		93	23				121
HATHAWAY, DIANA	1		5	15				21
HATTER, QUENTON TODD	2		80	25				107
HENDERSON, JEFFREY TODD	1		66	12				79
HERRMANN, PAUL				16				16
HILL, JEFFREY ALAN	11		88	35				134
HOUSLER, LEAH ELIZABETH				7				7
HUCKABAY, BRENT COLE	3		39	8				50
JACKSON, JOEL BEN	1		3	10				14

TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx?cid=6&fy=2018>.

⁶⁴³ *Potter Attorney Caseload Report – Fiscal Year 2018, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx?cid=188&fy=2018>.

attorney	juvenile trial payments	capital trial payments	felony trial payments	misd. trial payments	juvenile appeal payments	felony appeal payments	misd. appeal payments	total payments
JOHNSTON, JAMES B.			32	4		1		37
MARTINDALE, MATTHEW	2		23	27				52
MCCOY, DIANNA LEE	2		78	14				94
MCKIBBEN, DALLAS E.			36	4				40
MCLAUGHLIN, JERRY D.	2		32	11				45
MORALES, JERRY ELIJAH	5		41	19				65
MULANAX, MAURITA ERIN				9				9
NETARDUS, HILLARY S.						12		12
NEVAREZ, NICHOLAS				19				19
PALMER, APRIL	2			3				5
PIRTLE, CODY MICHAEL	2		35	10				47
QUACKENBUSH, JESSE L.			3					3
RAY, LENDON EDWARD			51	15				66
ROBINSON, CRISTAL DAWN				13				13
SMITH, LYNDIA			2					2
STEMPLE, DONALD DALE				1				1
TALLEY, JOHN D.	1		92	18				111
TERRY, JOHN EDWARD				1				1
TIDMORE, TRAVIS LEE			45	14				59
TURMAN, RYAN LEE	5		53	14				72
WALKER, MISTY LYNN			47	7				54
WARNER, MICHAEL A.			100	18				118
WATKINS, JOHN MICHAEL	10		58	17				85
WILLIAMSON, L. VAN			75	21				96
WILSON, JOE MARR	9		84	21				114
WOOLDRIDGE, JAMES EDD			79	4		1		84
ZAVALA, STACY	1			12				13

Other professional responsibilities of appointed private attorneys

While caseload can be a valuable component of understanding the amount of work a given attorney takes on, in a vacuum it is insufficient to describe the extent of the work that attorney must perform. Commentary to the *ABA Ten Principles* helps to clarify the importance of considering workload, as opposed to simply caseload, as a more robust measurement of an attorney's ability to adequately represent appointed clients.

Counsel's workload, *including appointed and other work*, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.⁶⁴⁴

⁶⁴⁴ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 cmt.

The ABA's *Criminal Justice Standards, Defense Function* also directly address appropriate workloads for attorneys and their relationship to providing effective representation. *Standard 4-1.8* directs that "[d]efense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations." The standard further clarifies that defense counsel should refuse new case appointments when those appointments would create a conflict of interest because the attorney would have insufficient time to dedicate to cases given the workload.

Thus, workload acts as a more descriptive, if less concrete, measure of the amount of time an attorney devotes to legal work. The concept of workload encompasses variations in types of cases, as well as the innumerable tasks and responsibilities that comprise effective representation. The U.S. Department of Justice has advised that "caseload limits are no replacement for a careful analysis of a public defender's *workload*, a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties."⁶⁴⁵

The appointed attorneys representing indigent defendants in Armstrong and Potter counties are private attorneys with private practices. In addition to their obligations to indigent clients in Armstrong and Potter counties' district and county courts, those lawyers can: represent indigent clients in the courts in other Texas counties; represent privately retained clients in criminal or civil cases in state or federal court; take indigent defense appointments in federal court; represent clients on a *pro bono* basis; teach school; get sick; go on vacation; and so forth. One needs to know all of this additional information about each of the appointed lawyers' other duties in order to accurately measure their workload.

TIDC practice time data for appointed private attorneys

To the extent a lawyer has private obligations in addition to the duties owed to the indigent defendants whom they are appointed to represent, the total time the attorney has available to meet their obligations to their appointed indigent clients is reduced in proportion. Accordingly, TIDC collects information regarding the practice time of lawyers appointed to adult criminal and juvenile delinquency cases throughout Texas.

(2002) (emphasis added).

⁶⁴⁵ Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, ECF No. 322 (W.D. Wash. filed Dec. 4, 2013) (italics original), <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>.

As explained in chapter 3, state law requires attorneys to report to each county in which they received appointed cases the percentage of their practice time that was devoted to the adult criminal cases to which they were appointed in that county and the percentage of their practice time that was devoted to the juvenile delinquency cases to which they were appointed in that county.⁶⁴⁶ Counties are then required by state law to report that information to TIDC.⁶⁴⁷ TIDC publishes on its website the information reported by each attorney each year, viewable on a statewide basis or county by county.⁶⁴⁸ Attorneys and counties were first required by state law to report this information in 2014.⁶⁴⁹ In theory, the TIDC's attorney practice time data should enable policymakers to assess whether attorneys did in fact have sufficient time to handle their indigent defense caseloads in the context of the attorneys' total workload obligations.

TIDC allows the judges in each county to specify the process by which attorneys report the information to the county, either by completing a form (paper or electronic) reporting directly to the county, or by reporting directly to the TIDC by entering information into an online portal.⁶⁵⁰ As a result, an attorney who receives appointed cases in more than one county may have to complete different reports in different ways for each county. TIDC does not require attorneys to keep track of the time they actually spend on appointed cases, does not require all attorneys to use the same method of calculating the percentage of time they devote to appointed cases, and does not require each attorney to use the same method of calculation in every county where they receive appointed cases.⁶⁵¹ In other words, the information each attorney reports may be nothing more than the lawyer's best guess.

⁶⁴⁶ TEX. CODE CRIM. PROC. ANN. art. 26.04(j)(4) (West 2017).

⁶⁴⁷ TEX. GOV'T CODE ANN. § 79.036(a-1) (West 2017).

⁶⁴⁸ *Attorney Practice Time Report, County ID Expenditures & Cases, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/AttorneyPracticeTime.aspx>.

⁶⁴⁹ Act effective Sept. 1, 2014, ch. 912, §§ 1, 6, 2013 Tex. Gen. Laws 2266, 2266, 2267-68 (codified at TEX. CODE CRIM. PROC. ANN. art. 26.04(j)(4) (West 2017); TEX. CODE CRIM. PROC. ANN. § 79.036(a-1) (West 2017)).

⁶⁵⁰ TEXAS INDIGENT DEFENSE COMMISSION, ATTORNEY REPORTING INSTRUCTIONS AND FORM 2 (Sept. 30, 2013).

⁶⁵¹ TEXAS INDIGENT DEFENSE COMMISSION, ATTORNEY REPORTING INSTRUCTIONS AND FORM 2 (Sept. 30, 2013). TIDC's instructions to attorneys state:

[A]ttorneys are not required to use any single methodology to complete the practice-time statement. . . .

. . .

Attorneys who keep time records for all or a portion of their caseload may use those records to calculate their practice-time percentages Time records will provide the most accurate method for calculating practice-time percentages.

Attorneys who do not keep time records may consider using a case-counting methodology to calculate practice-time percentages. This methodology involves looking at the number and types of cases in an attorney's total caseload, and calculating practice time percentages based on the number of cases in different case type categories. An attorney may keep track of the number and types of different cases the attorney handles during an entire fiscal year, or may choose to base the calculation on the number of cases the attorney has open at a specific point in time.

Id.

Despite the inherent unreliability of the attorney practice time data reported to TIDC, the data at least establishes how much of their time each private attorney *estimates* they devote to the number of *case payments* they receive from indigent defense appointments in Armstrong and Potter counties, and from all counties statewide.

Measuring whether attorneys have sufficient time to provide effective representation to each indigent defendant

As explained at the beginning of this chapter, lawyers owe every client certain fundamental duties in every case, and so national standards, as summarized by the American Bar Association, agree that “[d]efense counsel’s workload [must be] controlled to permit the rendering of quality representation.”⁶⁵²

The National Advisory Commission (NAC) caseload standards

The first national standards for caseloads of attorneys appointed to represent indigent defendants were established by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973, as part of an initiative funded by the U.S. Department of Justice.⁶⁵³ NAC *Standard 13.12* prescribes that a single attorney should not handle in a year any more than the absolute maximum numerical caseload of:

- 150 felonies; or
- 400 misdemeanors; or
- 200 juvenile delinquencies; or
- 200 mental health proceedings; or
- 25 appeals.⁶⁵⁴

⁶⁵² AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (2002).

⁶⁵³ Building on the work and findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function. NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense) (1973).

⁶⁵⁴ NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense), Standard 13.12 (1973). This means a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, counting both cases the lawyer had when the year began and cases assigned to the lawyer during that year, and including all of the lawyer’s cases (public, private, and pro bono). The NAC standards can be prorated for mixed caseloads. For example, an attorney could have a mixed caseload over the course of a given year of 75 felonies (50% of a maximum caseload) and 200 misdemeanors (50% of a maximum caseload) and be in

The NAC caseload limits assume the lawyer does not have any other duties, such as management or supervisory responsibilities, and the limits contemplate that a full contingent of support staff – including paralegals, investigators, social workers, and secretaries – is available to the defense attorney.⁶⁵⁵ National standards summarized in the *ABA Ten Principles of a Public Defense Delivery System* provide that a public defense system, in order to provide effective assistance of counsel, must control defense counsel's workload and cite to the NAC caseload limits with the admonition that under no circumstances should they be exceeded.⁶⁵⁶

The NAC caseload limits were established and remain as absolute maximums. Yet increased complexity in forensic sciences and criminal justice technology make correspondingly increased demands on the time attorneys must devote to each case in order to provide effective assistance of counsel. For example, the Public Policy Research Institute cautions:

Lower current caseload recommendations reflect a criminal law practice that has changed dramatically over the past 40-plus years. Factors driving higher attorney time include:

- Increased criminalization of minor offenses requires legal counsel for cases that once were simply deemed undesirable behavior or punished by fine;
- Tougher sentencing policies make some categories of cases more costly and time-consuming to defend (e.g., DWI, drug, and domestic violence charges);
- De-institutionalization of people with mental illness increase both case volume and time commitments required to defend complex cases;
- Growing prevalence of specialty courts create new dockets for public defenders to cover with cases that endure over a longer period of time;
- Use of forensics and experts increases responsibility of defense attorneys to understand and integrate technical and scientific considerations into the defense;
- Collateral consequences of conviction raise the stakes for defendants – especially in a state with a large immigrant population, many of whom may be undocumented.⁶⁵⁷

compliance with the NAC caseload standards.

⁶⁵⁵ See NATIONAL STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976) (“Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.”).

⁶⁵⁶ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 & cmt. (2002).

⁶⁵⁷ TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, GUIDELINES FOR INDIGENT DEFENSE CASELOADS

For these reasons, many criminal justice professionals argue that the caseloads permitted by the NAC standards are far too high and that the maximum caseloads allowed should be much lower.⁶⁵⁸

The Texas “Guidelines for Indigent Defense Caseloads”

Policymakers in many states have recognized the need to set localized standards. Localized standards are able to consider unique demands made on defense attorneys in each jurisdiction, such as the travel distance between the court and the local jail, or the prosecution’s charging practices. State law gives the Texas Indigent Defense Commission express authority to adopt standards for “ensuring appropriate appointed caseloads for counsel appointed to represent indigent defendants,”⁶⁵⁹ but TIDC has not done so⁶⁶⁰ other than to require that where counties use contracts those contracts must “set the maximum number of cases or workload each attorney may be required to handle pursuant to the contract.”⁶⁶¹

Instead, in 2013, the Texas legislature directed the TIDC to “conduct and publish a study for the purpose of determining guidelines for establishing a maximum allowable case for a criminal defense attorney that . . . allows the attorney to give each defendant the time and effort necessary to ensure effective representation.”⁶⁶² The TIDC elected to conduct a weighted caseload study, carried out by the Public Policy Research Institute at Texas A&M University. The study was conducted in three parts: first for trial level criminal defense with the results published in January 2015;⁶⁶³ followed by trial level juvenile representation in December 2016;⁶⁶⁴ and then appellate cases in December 2016.⁶⁶⁵ Collectively, the three reports are the *Guidelines for Indigent Defense Caseloads*, and they set limits on the annual indigent defense caseloads of a full-time attorney as:

[F]or the delivery of reasonably effective representation attorneys should carry an annual full-time equivalent caseload of no more than the following:

32-33 (Jan. 2015).

⁶⁵⁸ See, e.g., AMERICAN COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007) (“In many jurisdictions, caseload limits should be lower than the NAC standards.”).

⁶⁵⁹ TEX. GOV’T CODE ANN. § 79.034(a)(3) (West 2017).

⁶⁶⁰ See generally TEX. ADMIN. CODE tit. 1, § 174.1 *et seq.* (2017).

⁶⁶¹ TEX. ADMIN. CODE tit. 1, § 174.21 (2018).

⁶⁶² Act of June 14, 2013, ch. 912, § 8, 2013 Tex. Gen. Laws 2266, 2268 (eff. Sept. 1, 2013).

⁶⁶³ TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, GUIDELINES FOR INDIGENT DEFENSE CASELOADS (Jan. 2015).

⁶⁶⁴ TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, JUVENILE ADDENDUM: GUIDELINES FOR INDIGENT DEFENSE CASELOADS (Dec. 2016).

⁶⁶⁵ TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, APPELLATE ADDENDUM: GUIDELINES FOR INDIGENT DEFENSE CASELOADS (Dec. 2016).

- 236 Class B Misdemeanors
- 216 Class A Misdemeanors
- 174 State Jail Felonies
- 144 Third Degree Felonies
- 105 Second Degree Felonies
- 77 First Degree Felonies.⁶⁶⁶

[F]or the delivery of reasonably effective representation juvenile attorneys should carry an annual full-time equivalent caseload of no more than the following:

Attorney caseloads without investigator support:

- 210 CINS/misdemeanors,
- 108 non-determinate sentence/non-certification felonies, or
- 30 determinate sentence/certification felonies.

Attorney caseloads with investigator support:

- 230 CINS/misdemeanors,
- 127 non-determinate sentence/non-certification felonies, or
- 36 determinate sentence/certification felonies.⁶⁶⁷

[F]or the delivery of reasonably effective representation, appellate attorneys should carry an annual full-time equivalent caseload of no more than the following:

- 40 appeals with reporter's record of less than 100 pages,
- 30 appeals with reporter's record of 100 to 500 pages,
- 20 appeals with reporter's record of 500 to 1500 pages, or
- 14 appeals with reporter's record of more than 1500 pages.⁶⁶⁸

The Texas *Guidelines for Indigent Defense Caseloads* are not binding on the appointed attorneys in any county, unless the judges of the county have adopted them as mandatory in the judges' plan. The judges of Armstrong County and Potter County have not adopted the TIDC caseload guidelines.

Even if the Texas *Guidelines* were binding on appointed private attorneys in Armstrong County and Potter County, the limited information that TIDC collects and publishes about the number of cases for which appointed private attorneys were paid does not detail the type of case for which the attorney was paid at the level necessary to apply the Texas *Guidelines*. For example, the TIDC data shows if an attorney was paid for a trial level felony, but it does not indicate whether that trial level felony was a first degree, second degree, third degree, or state jail felony.

⁶⁶⁶ TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, GUIDELINES FOR INDIGENT DEFENSE CASELOADS 34 (Jan. 2015).

⁶⁶⁷ TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, JUVENILE ADDENDUM: GUIDELINES FOR INDIGENT DEFENSE CASELOADS 18 (Dec. 2016).

⁶⁶⁸ TEXAS A&M UNIV. PUBLIC POLICY RESEARCH INSTITUTE, APPELLATE ADDENDUM: GUIDELINES FOR INDIGENT DEFENSE CASELOADS 17 (Dec. 2016).

In 2015 and 2016, when the Texas *Guidelines* were published, the TIDC issued press releases disseminating the reports and summarizing the findings. TIDC said: “The Guidelines report recommends that for the delivery of reasonably effective representation, criminal defense attorneys should carry an annual full-time equivalent caseload of no more than 226 misdemeanors or 128 felonies . . . ,”⁶⁶⁹ and “[t]he Juvenile Addendum recommends that for the delivery of reasonably effective representation, defense attorneys should carry an annual full-time equivalent caseload of no more than 169 juvenile cases . . . [and] [t]he Appellate Addendum recommends that defense attorneys should handle no more than 31 appellate cases per year.”⁶⁷⁰ The TIDC did not explain how it derived the caseloads announced in its press releases from the caseload guidelines established in the reports.

Whatever the origins of the caseload limits announced by the TIDC in its press releases, and whatever the shortcomings of their derivation, it is at least possible to apply them to the TIDC data showing the number of *case payments* made to appointed attorneys for representing indigent defendants in Armstrong and Potter counties, and from all counties statewide.

Absence of standards, guidelines, and oversight in Armstrong & Potter counties

The judges in Armstrong and Potter counties have not adopted any caseload or workload limits for the appointed private attorneys who represent indigent defendants. Instead, the judges’ plan requires the appointed private attorneys to manage their own workload “to allow for the provision of quality representation and the execution of the responsibilities listed in these rules in every case.”⁶⁷¹ Although the indigent defense plan calls for appointed lawyers to manage their workload, there is no structural accountability to ensure that this obligation is met.⁶⁷²

⁶⁶⁹ Press Release, Texas Indigent Defense Commission, Commission Releases Caseload Guidelines for Court-Appointed Attorneys (Jan. 15, 2015), <http://www.tidc.texas.gov/resources/publications/news/press-releases/150115-press-release-weighted-caseload/>.

⁶⁷⁰ Press Release, Texas Indigent Defense Commission, TIDC Releases Caseload Guidelines for Court-Appointed Attorneys in Appellate and Juvenile cases (Dec. 13, 2016), <http://tidc.texas.gov/resources/publications/news/press-releases/161213pressrelease/>.

⁶⁷¹ Armstrong, Potter and Randall District Court and County Court Plan, ¶ III.F.xii. (adopted Oct. 6, 2011 and subsequently amended).

⁶⁷² The judges’ plan lists duties that appointed attorneys are required to perform and provides that the “judges will monitor attorney performance on a continuing basis to assure the competency of attorneys on the list.” Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ III.D., F. (adopted Oct. 6, 2011 and subsequently amended). See also TEX. CODE CRIM. PROC. ANN. art. 26.04(b) (5) (West 2017) (providing that, in a county that uses a public appointment list, the procedures adopted by the judges of the county must “ensure that each attorney appointed from a public appointment list . . . perform the attorney’s duty owed to the defendant in accordance with the adopted procedures, the requirements of this code, and applicable rules of ethics”).

The Texas *Disciplinary Rules of Professional Conduct*, applicable to all attorneys in Texas, require lawyers to decline to represent a client, or withdraw from representing that client, if the representation would cause the lawyer to violate the law or ethical rules.⁶⁷³ Under the rules, a lawyer “shall not” represent a client if the representation of that client “may be adversely limited by the lawyer’s . . . responsibilities to another client . . . or by the lawyer’s . . . own interests.”⁶⁷⁴ And the rules explain that “[a] lawyer’s workload should be controlled so that each matter can be handled with diligence and competence,”⁶⁷⁵ because “[a] lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence.”⁶⁷⁶ Thus, attorneys in Texas have the ethical duty to decline any appointment to represent an indigent defendant when, due to their existing workload obligations to other clients or due to their own financial interests, they would not be able to provide competent representation to the next appointed client.

Yet, the appointed private attorneys in Armstrong and Potter counties cannot decline appointment to individual cases when they are overloaded. If they experience excessive caseloads, the lawyers’ only option is to remove themselves from the public appointment lists altogether, and a lawyer who informs the judges that they wish to be removed from the public appointment lists even temporarily cannot be certain that the judges will permit the lawyer to rejoin the lists in the future. One appointed private attorney related the experience of a colleague who once refused an appointed case. The colleague told the court that he was too overworked to handle a case to which he had just been appointed and asked the court for a two-month pause in new court appointments in order to catch up. Instead of granting temporary relief, the court removed the colleague from all of the public appointment lists. After recounting this anecdote, the appointed private attorney explained that she has never asked for a pause in receiving new appointments in order to manage her caseload. The judges’ policy of prohibiting lawyers from declining individual cases creates a conflict between the lawyers’ financial interest in remaining on the public appointment lists to receive future appointments and the case related interests of each of their clients in receiving the effective assistance of counsel.

Moreover, the compensation structure, as explained in chapter 8, causes lawyers to have a financial incentive against limiting their own indigent defense workloads. The appointed private attorneys can be certain of being paid a single flat fee in every case

⁶⁷³ TEX. DISCIPLINARY R. PROF’L CONDUCT r. 1.15(a)(1). Commentary to this rule clarifies that the lawyer’s withdrawal from representation is “mandatory” “when the lawyer knows that the employment will result in a violation of a rule of professional conduct or other law.” *Id.* at cmt 2.

⁶⁷⁴ TEX. DISCIPLINARY R. PROF’L CONDUCT r. 1.06(b).

⁶⁷⁵ TEX. DISCIPLINARY R. PROF’L CONDUCT r. 1.01 cmt 6.

⁶⁷⁶ TEX. DISCIPLINARY R. PROF’L CONDUCT r. 1.01. The rule provides two exceptions: where the client gives “prior informed consent” to representation by incompetent counsel; or where the lawyer’s legal counsel is “reasonably required in an emergency” and limited to that emergency.

that is dismissed or resolved by a plea agreement, but any other possible payment is purely in the discretion of the judges. Because the flat fee paid to the appointed attorney is the same no matter how many or few hours the attorney devotes to the defense of that case, the lawyers can increase their earnings only by taking as many cases as possible and disposing of them as quickly as possible.

The judges in Armstrong County and Potter County do not monitor the number of appointments they make to each lawyer, and they do not monitor the lawyers' practice time data that is reported to the TIDC. Because no one monitors the attorneys' workloads, the judges have no way of knowing whether any given attorney's caseload or workload is excessive.

Workloads of private attorneys who are appointed to represent indigent defendants in Armstrong County and Potter County

The table on page 170 reflects the 55 attorneys who, in FY2018, were paid in Potter County, or in both Armstrong and Potter counties, for representing indigent adult defendants in criminal cases at the trial level. For each of those attorneys, the table shows the FY2018 reporting by all 254 Texas counties – statewide – to TIDC of the numbers of case payments made to each of those 55 attorneys for any type of indigent case at either the trial or appellate level.⁶⁷⁷ The table also shows for FY2018 the percentage of time that each attorney reported as devoting to the adult cases to which they were appointed and the percentage of time devoted to the juvenile cases to which they were appointed.⁶⁷⁸ Finally, both the NAC standards⁶⁷⁹ and the TIDC press release summary of the Texas *Guidelines*⁶⁸⁰ are applied to the number of cases paid and the practice time of each attorney. The table is sorted according to the application of the TIDC press release summary of the Texas *Guidelines*,⁶⁸¹ such that attorneys with

⁶⁷⁷ *Statewide Attorney Caseload Report – Fiscal Year 2018, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx>.

⁶⁷⁸ *Statewide Attorney Caseload Report – Fiscal Year 2018, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx>.

⁶⁷⁹ NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense), Standard 13.12 (1973).

⁶⁸⁰ Press Release, Texas Indigent Defense Commission, Commission Releases Caseload Guidelines for Court-Appointed Attorneys (Jan. 15, 2015), <http://www.tidc.texas.gov/resources/publications/news/press-releases/150115-press-release-weighted-caseload/>; Press Release, Texas Indigent Defense Commission, TIDC Releases Caseload Guidelines for Court-Appointed Attorneys in Appellate and Juvenile cases (Dec. 13, 2016), <http://tidc.texas.gov/resources/publications/news/press-releases/161213pressrelease/>.

⁶⁸¹ An attorney's total indigent defense caseload is calculated as a percentage of the Texas caseload guidelines (identified as "% Tex. gdln" in the table on page 170) by: (1) finding a weighted percentage for each case type (dividing the sum of all felonies assigned against the prescribed maximum of 128 felony cases per attorney per year under the Texas guidelines, and so forth for the remaining case types); and then (2) adding together each weighted percentage by case type to find the total percentage. Thus, an

the highest percentage under those caseload guidelines are at the top of the table and attorneys with the lowest percentage are at the bottom of the table.

As shown in the table on page 170, if all of the attorneys were working full-time on their indigent defense cases, eight attorneys in FY2018 carried statewide caseloads in excess of the NAC standards, and 14 attorneys carried statewide caseloads in excess of the summarized Texas guidelines. Stated differently, of the 55 attorneys accepting appointments in Armstrong and Potter counties' courts, more than 25% had indigent defense caseloads in FY2018 that were excessive under the summarized Texas guidelines, and this is before accounting for whether they devote 100% of their professional hours to their appointed cases.

The table also shows for FY2018 the percentage of time that each attorney reported as devoting to the adult cases to which they were appointed and the percentage of time devoted to the juvenile cases to which they were appointed.⁶⁸² Notably, according to TIDC's published data, 25 of the 55 attorneys did not report their attorney practice time for FY2018. Of the 25 who did not report their attorney practice time, four carried caseloads already in excess of 100% of the summarized Texas guidelines, even before adjusting according to their practice times. Of the remaining 30 lawyers who did report their practice time to TIDC, after adjusting their caseloads according to reported practice time, 14 attorneys carried caseloads exceeding the summarized Texas caseload guidelines.⁶⁸³ All told, at least 18 of the 55 attorneys who receive appointed cases in Armstrong and Potter counties lacked sufficient time to permit the rendering of minimally effective representation.

The workloads of certain lawyers are particularly troubling, as shown in the table.

- Attorney 25 was paid in 68 adult non-capital felonies, 19 misdemeanors, and three juvenile delinquencies in FY2018, or 63% of the summarized Texas caseload guidelines; however, the lawyer's reported practice time shows he only devoted 42% of his total hours that year to his indigent clients' cases. When accounting for the limited time available, Attorney 25's adjusted workload was 151% of the summarized Texas caseload guidelines.
- Attorney 01 had 231 felony cases paid in FY2018, or a felony caseload nearing twice that of the 128 felony cases allowed by the summarized Texas guidelines.

attorney appointed to 111 felonies, 21 misdemeanors, 7 juvenile delinquencies, and 0 appeals has a total caseload at 100.2 percent of the Texas caseload guidelines $((111/128) + (21/226) + (7/168) + (0/31) = 100.2\%)$.

⁶⁸² *Statewide Attorney Caseload Report – Fiscal Year 2018, Indigent Defense Data for Texas*, TEXAS INDIGENT DEFENSE COMMISSION, <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx>.

⁶⁸³ Each lawyer's adjusted caseload under the Texas caseload guidelines is calculated by dividing their percentage of Texas caseload guideline by the total percentage of practice time reported by the attorney for indigent defense appointments (adult & juvenile) in the county. Thus, a lawyer with a total practice time of 50% in all counties carrying a statewide indigent defense caseload at 22% of the Texas caseload guidelines has an adjusted caseload of 44% of the Texas caseload guidelines from appointments in that county $(22\% \text{ caseload} / 50\% \text{ total practice time} = 44\% \text{ adjusted caseload})$.

Table: FY2018 case payments to Armstrong & Potter counties' appointed private attorneys for all cases statewide and attorney practice time statement, analyzed against NAC & TIDC guidelines

	juvenile trial payments	capital trial payments	felony trial payments	misc. trial payments	juvenile appeal payments	felony appeal payments	misc. appeal payments	adult % time	juvenile % time	% NAC	adjusted % NAC	% Tex. gdl'n	adjusted % Tex. gdl'n
ATTORNEY 01	18		231	52				91%	2%	176%	189%	214%	230%
ATTORNEY 02	12	1	125	34	0	1	0	74%	2%	135%	178%	156%	206%
ATTORNEY 03	3		141	35		8		49%	5%	136%	252%	153%	284%
ATTORNEY 04	20	1	118	18		1	1	17%	1%	135%	747%	152%	844%
ATTORNEY 05	11		134	71				60%	10%	113%	161%	143%	204%
ATTORNEY 06	12		143	36				87%	3%	110%	123%	135%	150%
ATTORNEY 07	2		140	43						105%		130%	
ATTORNEY 08	11		135	31						103%		126%	
ATTORNEY 09			140	28						100%		122%	
ATTORNEY 10	4		129	31				80%		96%	120%	117%	146%
ATTORNEY 11			136	24						97%		117%	
ATTORNEY 12	7	0	124	26	0	0	0	84%		93%	110%	113%	134%
ATTORNEY 13	19		108	34				65%	10%	90%	120%	111%	148%
ATTORNEY 14	11		111	23				85%	5%	85%	95%	103%	115%
ATTORNEY 15			101	17		4		100%		88%	88%	99%	99%
ATTORNEY 16	16		97	29				55%	5%	80%	133%	98%	164%
ATTORNEY 17			113	7		2				85%		98%	
ATTORNEY 18	9		103	24				65%	5%	79%	113%	96%	138%
ATTORNEY 19	1	0	110	12	0	0	0	99%	1%	77%	77%	92%	92%
ATTORNEY 20			92	17		1				70%		83%	
ATTORNEY 21			94	15				89%		66%	75%	80%	90%
ATTORNEY 22	16		70	26				85%	15%	61%	61%	76%	76%
ATTORNEY 23	0	0	64	6	0	7	0	89%	1%	72%	80%	75%	84%
ATTORNEY 24	2		79	14				90%		57%	64%	69%	77%
ATTORNEY 25	3		68	19				40%	2%	52%	123%	63%	151%
ATTORNEY 26	5		48	38				79%	4%	44%	53%	57%	69%
ATTORNEY 27			55	31				70%		44%	63%	57%	81%
ATTORNEY 28	0	0	2	0	0	17	0			69%		56%	
ATTORNEY 29	8	0	51	17	0	1	0	44%	6%	46%	93%	55%	111%
ATTORNEY 30	2		56	17						43%		52%	
ATTORNEY 31	8		50	17						42%		51%	
ATTORNEY 32			57	5						39%		47%	
ATTORNEY 33	1		38	17						30%		38%	
ATTORNEY 34	2		25	12		2		30%	5%	29%	82%	32%	93%
ATTORNEY 35			15	23				50%		16%	32%	22%	44%
ATTORNEY 36			10	27				20%		13%	67%	20%	99%
ATTORNEY 37	7		3	22						11%		16%	
ATTORNEY 38	13			19						11%		16%	
ATTORNEY 39	1		2			4		60%		18%	30%	15%	25%
ATTORNEY 40	4			23						8%		13%	
ATTORNEY 41	1			27				20%	2%	7%	33%	13%	57%
ATTORNEY 42	7			18						8%		12%	
ATTORNEY 43			4	19				15%		7%	49%	12%	77%
ATTORNEY 44	7		8							9%		10%	
ATTORNEY 45	4			17						6%		10%	
ATTORNEY 46			8	5				15%		7%	44%	8%	56%
ATTORNEY 47				15						4%		7%	
ATTORNEY 48	1		5	3						5%		6%	
ATTORNEY 49				10						3%		4%	
ATTORNEY 50				9				10%		2%	23%	4%	40%
ATTORNEY 51			5							3%		4%	
ATTORNEY 52	2			3						2%		3%	
ATTORNEY 53			3							2%		2%	
ATTORNEY 54			2							1%		2%	
ATTORNEY 55				1						0%		0%	

But this same attorney was also paid in 18 juvenile cases and 52 misdemeanors. The lawyer reported devoting 91% of his total practice time across all counties to indigent adult criminal defense appointments and 2% to indigent juvenile defense appointments. Thus, Attorney 01 carried an indigent defense workload at 230% of the summarized Texas caseload guidelines after adjusting for his reported practice time.

- Finally, Attorney 04 was paid for a caseload at 152% of the summarized Texas caseload guidelines, but he spent only 18% of his time on that caseload. After accounting for the limited time available to his indigent clients, Attorney 04's adjusted workload was 844% of the summarized Texas caseload guidelines. Stated differently, this lawyer was carrying an indigent defense caseload in FY2018 that required *more than eight* full time attorneys under the summarized Texas caseload guidelines.

Dangers of excessive workloads

Where the government and the courts not only permit, but establish, compensation structures that encourage appointed lawyers to handle a limitless number of cases, the appointed lawyers' personal financial interests are placed in conflict with the clients' case-related interests. Excessive workloads cause the lawyers to proceed without sufficient time to adequately prepare for and zealously advocate on behalf of every client.

There is near universal agreement among stakeholders in Armstrong and Potter counties that increasing numbers of attorneys have removed themselves from the public appointment lists in recent years, citing excessive caseloads as a significant factor in their decision. In fact, during the course of our study, one attorney withdrew from the first degree and second degree felony list in Potter County because, during a single week in which he had a jury trial in neighboring Randall County, the lawyer received more than 15 new felony case assignments in Potter County – two of which were murder cases. The lawyer emphasized that he has a legal and ethical duty to contact each client within one day and could not comply even with that basic performance obligation when receiving so many new case assignments in rapid succession, let alone prepare the cases effectively. Another attorney no longer accepts appointments in Armstrong and Potter counties, and she explained that she could no longer rationalize the routine failure to fulfill her ethical duties to her appointed clients: "Under the current system I was committing malpractice. [The courts] made it impossible not to commit malpractice."

CHAPTER 10

FINDINGS & RECOMMENDATIONS

This report explains the Sixth Amendment right to counsel as it is provided to adults at the trial level in Armstrong County and Potter County. It is difficult, at best, to make recommendations for the improvement of indigent defense services in Armstrong County and Potter County, because so many of the problems described throughout this report are inherently tied to decisions made by the state. Even as the policymakers and criminal justice stakeholders in Armstrong and Potter counties try to effectively implement the Sixth Amendment right to counsel for indigent defendants, often they fall short because of a lack of oversight and funding from the state,⁶⁸⁴ over which they have no control. For so long, though, as the State of Texas makes county officials and trial court judges responsible for ensuring the effective right to counsel for indigent defendants, the trial court judges and county officials in Armstrong County and Potter County *are* responsible. As criminal justice system stakeholders in Armstrong County and Potter County reviewed this report in advance of its release, they have already begun to take steps as quickly as possible to cure many of the impediments to the provision of the right to counsel that are within their local control.

The findings and recommendations of this chapter address four broad aspects of the Sixth Amendment right to counsel:

- the State of Texas’ constitutional responsibility to fulfill the Sixth Amendment right to counsel (Finding 1; Recommendation A);
- the obligation of Armstrong County and Potter County judges and government officials to fulfill the Sixth Amendment right to counsel responsibilities that have been delegated to them by the state (Findings 2-5; Recommendation B);
- the complete denial of the Sixth Amendment right to counsel to some indigent defendants in Armstrong County and Potter County (Finding 6; Recommendation C); and
- court orders requiring indigent defendants to pay for the right to counsel guaranteed to them by the Sixth Amendment (Finding 7; Recommendation D).

⁶⁸⁴ The Sixth Amendment Center was not asked to evaluate Texas’ system of providing the right to counsel statewide, nor the role of the Texas Indigent Defense Commission within that system. The 6AC does not attempt to form recommendations regarding state policy based on an evaluation of just two of 254 counties (representing less than 1% of the state’s population). For example, just because TIDC has not promulgated indigent defense workload standards generally, and just because appointed lawyers handling cases in Armstrong and Potter counties have excessive caseloads, it cannot be concluded that there are necessarily excessive caseload problems elsewhere in Texas.

FINDING 1: The State of Texas delegates to local policymakers and judges most of its constitutional obligation to ensure the provision of effective right to counsel services in Armstrong County and Potter County, while failing to ensure that each and every indigent defendant has an attorney with the time, training, and resources to provide effective representation at every critical stage of a criminal case.

The U.S. Supreme Court held in *Gideon v. Wainwright* that providing and protecting the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is a constitutional obligation of the states – not local governments – under the due process clause of the Fourteenth Amendment.⁶⁸⁵ Every state in the nation must have a system for providing an attorney to represent each indigent defendant who is charged with a crime and facing the possible loss of their liberty, and attorneys provide representation to indigent people within the structures of the systems states create.

In *United States v. Cronin*, the U.S. Supreme Court explains that deficiencies in indigent defense systems can make any lawyer – even the best attorney – perform in a non-adversarial way that results in a constructive denial of the right to counsel.⁶⁸⁶ The Court explains further in *Cronin* that, when a lawyer provides representation within an indigent defense system that constructively denies the right to counsel, the lawyer is presumptively ineffective.⁶⁸⁷ When a system is determined to be constructively deficient, the government bears the burden of overcoming that presumption. The government may argue that the defense lawyer in a specific case will not be ineffective despite the structural impediments in the system, but it is the government’s burden

⁶⁸⁵ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

⁶⁸⁶ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”); *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”) (citing *United States v. Cronin*, 466 U.S. 648 (1984)).

⁶⁸⁷ *United States v. Cronin*, 466 U.S. 648, 657-62 (1984).

to prove this. As the Seventh Circuit Court of Appeals noted over 30 years ago in *Wahlberg v. Israel*, “if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] is lifted. It is not right that the state should be able to say, ‘sure we impeded your defense – now prove it made a difference.’”⁶⁸⁸

When a state chooses to delegate its right to counsel responsibilities to its counties and judges, the state must guarantee not only that those local governments and local officials are capable of providing effective representation but also that they are in fact doing so.⁶⁸⁹ Because the “responsibility to provide defense services rests with the state,” national standards unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”⁶⁹⁰

As stated in chapter 2, the Texas legislature requires TIDC to “develop policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal, and in postconviction proceedings.”⁶⁹¹ The authorizing statute includes a list of 12 separate types of substantive standards that the TIDC is expressly authorized to promulgate, along with a catchall provision for “other policies and standards for providing indigent defense services as determined by the commission to be appropriate.”⁶⁹² Despite this broad standard-making authority, the TIDC has adopted only three substantive standards: a requirement that a county’s procedures for appointing counsel include a method for defendants to obtain and submit forms requesting appointment of counsel “at any time after the initiation of adversary judicial proceedings;”⁶⁹³ a minimum continuing legal education requirement;⁶⁹⁴ and requirements for contract defender programs.⁶⁹⁵ TIDC has not promulgated standards for, among others:

⁶⁸⁸ *Walberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir. 1985).

⁶⁸⁹ *Cf. Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “‘ultimate responsibility’ . . . remains at the state level.”); *Osmunson v. Idaho*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); letter and white paper from American Civil Liberties Union Foundation et al to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”), http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

⁶⁹⁰ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 2 cmt. (2002).

⁶⁹¹ TEX. GOV’T CODE ANN. § 79.034 (West 2017).

⁶⁹² TEX. GOV’T CODE ANN. § 79.034(a) (West 2017).

⁶⁹³ TEX. ADMIN. CODE tit. 1, § 174.51 (2018).

⁶⁹⁴ TEX. ADMIN. CODE tit. 1, §§ 174.1 through 174.4 (2017).

⁶⁹⁵ TEX. ADMIN. CODE tit. 1, §§ 174.10 through 174.25 (2018).

- independence of the defense function from undue political and judicial interference;
- the qualifications, training, and supervision of appointed lawyers;
- early appointment of and continuous representation by a qualified lawyer;
- fair compensation of appointed counsel and provision for overhead and necessary case related expenses; and
- reasonable maximum caseloads (other than in contract systems).

Even were TIDC to adopt further standards, TIDC has extremely limited ability to monitor compliance with standards at the local level, because TIDC is currently authorized only 11 full-time people to ensure that each and every indigent defendant receives effective assistance of counsel in well over 900 trial courts spread across 254 counties. When TIDC attempts to monitor counties' policy and fiscal compliance, it does not have adequate resources to conduct qualitative assessments of the indigent defense services provided in those counties. And, if TIDC did promulgate standards and had the staffing to adequately monitor compliance, it lacks statutory authority to enforce those standards.

RECOMMENDATION A: Local Armstrong County and Potter County policymakers and stakeholders should advocate for the State of Texas to form a legislative committee to study how best to fulfill the state's Sixth and Fourteenth Amendment responsibilities to ensure that each indigent defendant who faces the possibility of incarceration in a criminal case receives effective assistance of counsel.

The Texas legislature is the proper forum for making decisions about the best way for the State of Texas to enforce the right to counsel. The Sixth Amendment Center provides the following information as an educational guide about ways in which other states have done so.

States have determined three ways in which a state can ensure that its Sixth Amendment obligations are fulfilled: a unified state system; assessing penalties on local governments for non-compliance; and providing state funding to local governments to enable compliance.

Unified state system. When Montana created its statewide indigent defense commission in 2005,⁶⁹⁶ the state determined it could best ensure uniformly effective assistance of counsel by administering indigent defense services at the state level. But the state struggled with how to pay for the improved services, including compliance with standards. After exploring many options, Montana elected to cap the amount that counties were required to spend on indigent defense at the amount they had spent during the immediate prior year. The state adjusted the matrix by which it provides

⁶⁹⁶ Montana Public Defender Act, 2005 Mont. Laws ch. 449.

funding to counties for all obligations, and essentially lowered the state's financial obligations to the counties by the capped amount.

In effect, Montana's public defense system became 100% state funded, though the state did not have to come up with the entire funding amount in the first year. This is a good deal for counties, because the counties are assured that their spending on indigent defense is never going to increase regardless of any future expansion of the right to counsel by the U.S. Supreme Court or increased responsibilities based on standards. And, it is easier to enforce standards statewide, because the delivery of all right to counsel services throughout Montana is under the auspices of the state commission and it is incumbent on the commission to argue for adequate resources to meet standards through the normal state budgeting process.

Penalties for non-compliance. In 2014, the Idaho legislature created the Idaho State Public Defender Commission (SPDC) within the Department of Self-Governing Agencies⁶⁹⁷ – under a constitutional provision in Idaho that means the commission, though technically in the executive branch, does not have to answer directly to the governor. The SPDC is empowered to promulgate standards consistent with *Cronic* and the *ABA Ten Principles*.⁶⁹⁸ Idaho's counties continue to administer and oversee the delivery of trial level indigent defense services at the local level.

Counties can apply to the SPDC for financial assistance in meeting state standards, though they must comply with the standards without regard to whether they seek state funding.⁶⁹⁹ The hammer to compel compliance with standards is significant. If the SPDC determines that a county “willfully and materially” fails to comply with state standards, and if the SPDC and county are unable to resolve the issue through mediation, the SPDC is authorized to step in and remedy the specific deficiencies, including by taking over all services and charging the county for the cost.⁷⁰⁰ If the county does not pay within 60 days, “the state treasurer shall immediately intercept any payments from sales tax moneys that would be distributed to the county,” the intercepted funds go to reimburse the commission, and the “intercept and transfer provisions shall operate by force of law.”⁷⁰¹

State funding to enable compliance. As in Idaho, Michigan counties remain responsible for administering and overseeing trial level indigent defense services. However, the Michigan legislature did something similar to Montana in terms of capping costs to counties. There, counties are required to annually spend no less than the average of the funding they spent in the three fiscal years preceding the adoption of

⁶⁹⁷ Idaho Public Defense Act, 2014 Idaho Sess. Laws H0542 (codified as amended at IDAHO CODE § 19-848 *et seq.* (2018)).

⁶⁹⁸ IDAHO CODE § 19-850(a)(vii) (2018).

⁶⁹⁹ IDAHO CODE § 19-862A (2018).

⁷⁰⁰ IDAHO CODE § 19-862A(11) (2018).

⁷⁰¹ IDAHO CODE § 19-862A(12) (2018).

the Michigan Indigent Defense Commission Act.⁷⁰² Any new monies to meet standards above and beyond that required local spending amount are the responsibility of the state.

As each new standard is promulgated and approved by the state, the Act requires each Michigan county to submit a plan for how it intends to meet the new standard. For example, if the MIDC requires counties to implement continuous representation by the same attorney appointed to represent a defendant, and if County A traditionally uses horizontal representation (i.e., one attorney handles the arraignment, a different lawyer handles preliminary hearings, a third attorney handles trial, etc.), then County A might submit a plan to MIDC stating that they need to hire additional attorneys at an additional cost of, say, \$500,000 to comply with the new standard. If MIDC then approves the county's plan, the additional costs get factored into a statewide plan presented to the governor and legislature during budget negotiations. So, if county compliance with state standards requires additional funding, the state is the responsible party.

However, if a local unit of government fails to meet MIDC standards, the MIDC is authorized to take over the administration of indigent criminal defense services for the local unit of government. As a disincentive for counties to purposefully fail to meet standards, the Act mandates that county government in jurisdictions taken over by MIDC will pay a percentage of the costs the MIDC determines are necessary to meet standards, *in addition* to the county's originally required local contribution – in the first year, the county will have to pay 10% of the state costs, increasing to 20% in year two of a state take-over, and 30% in year three.

FINDING 2: The system for providing the Sixth Amendment right to counsel to indigent defendants in Armstrong County and Potter County lacks independence from both the judicial and the political branches of county government. Every aspect of providing representation to indigent defendants who face incarceration in the counties is subject to undue interference by the trial court judges.

In *United States v. Cronin*, the U.S. Supreme Court pointed to the deficient representation received by the defendants known as the “Scottsboro Boys” in the case of *Powell v. Alabama* as exemplifying the constructive denial of the right to counsel.⁷⁰³ Perhaps the most noted critique of the Scottsboro Boys’ defense is that it lacked

⁷⁰² MICH. COMP. LAWS §§ 780.983(h), 780.993 (2017).

⁷⁰³ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”).

independence from governmental interference, specifically from the judge presiding over the case. Regarding judicial interference, the *Powell* Court observed that the right to counsel rejects the notion that a judge should direct the defense:

[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.⁷⁰⁴

In *Strickland v. Washington*, the U.S. Supreme Court declared that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”⁷⁰⁵

Other U.S. Supreme Court decisions confirm the constitutional requirement that defense counsel be independent of both the judicial and political arms of government. In the 1979 case of *Ferri v. Ackerman*, the Court stated that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.”⁷⁰⁶ Two years later, the Court observed in *Polk County v. Dodson* that a state has the “constitutional obligation to respect the professional independence of the public defenders whom it engages.”⁷⁰⁷ Commenting that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing the undivided interests of the client,” the Court notes in *Dodson* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”⁷⁰⁸

Despite this, under Texas law, the judges of each county are responsible for establishing “countywide procedures” for the provision of counsel to indigent defendants at trial and appeal for crimes punishable by incarceration.⁷⁰⁹ Thus, in implementing Texas’ statutory scheme, nearly every aspect of the provision of trial level right to counsel services is subject to undue judicial interference, because judges in Texas are required to:

- set the qualifications and training required of attorneys to be appointed in indigent defense cases;
- select the attorneys eligible to be appointed in criminal cases;

⁷⁰⁴ *Powell v. Alabama*, 287 U.S. 45, 61 (1932).

⁷⁰⁵ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

⁷⁰⁶ *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

⁷⁰⁷ *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981).

⁷⁰⁸ *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981).

⁷⁰⁹ TEX. CODE CRIM PROC. ANN. art. 26.04(a) (West 2017).

- directly choose the attorney who is appointed in each specific case;
- provide supervision over cases if supervision occurs;
- determine whether and when attorneys are removed from eligibility to be appointed in criminal cases;
- set the compensation paid to attorneys appointed to represent indigent defendants through funds allocated by the counties; and
- determine whether experts and investigators are allowed in each specific criminal case and set the compensation paid to experts and investigators in the criminal cases of indigent defendants.

Such statutorily required judicial interference opens the door for judges to unduly influence appointed attorneys. To be clear, it is not that Armstrong County and Potter County judges who oversee the indigent defense services are malicious or consciously trying to undermine the basic constitutional right to counsel in the ways described above. Instead, the judges there are working within a legal and financial construct that presents them with a series of impossible choices.

When public defense attorneys are provided through a system overseen by judges, the appointed attorneys inevitably bring into their calculations what they think they need to do to stay in favor with the judge who appoints and pays them, rather than solely advocating for the stated interests of the defendant they are appointed to represent as is their constitutional and ethical duty. Public defense attorneys in judicially controlled systems understand that their personal compensation along with the resources needed to properly defend an indigent person require the approval of the judges. So, it does not take a judge to say overtly, for example: “Do not file motions in my courtroom.” Fearing the loss of income that can result from displeasing the judge, appointed attorneys often take on more cases than they can ethically handle, triage their available working hours in favor of some clients but to the detriment of others, and agree to work without resources necessary to effective representation, thereby failing to meet the parameters of ethical representation owed to all clients – all issues that have been documented throughout this report. This demonstrates why independence of the defense function is required by all national standards and is the first of the *ABA Ten Principles*; because without independence, the other components necessary in an indigent defense system capable of ensuring effective assistance of counsel are unobtainable.

Over 75 years ago, the U.S. Supreme Court stated in *Glasser v. United States*, “‘assistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”⁷¹⁰ Effective assistance of counsel cannot be ensured in an indigent defense system that places appointed attorneys in a position where their own interests conflict with those of the defendants whom they

⁷¹⁰ *Glasser v. United States*, 315 U.S. 60, 70 (1942).

are appointed to represent. Appointed attorneys should not be impeded in advocating solely for the stated legal interests of their clients by concerns about staying in favor with the judge who hires them and should not be in a position of weighing their own financial interests against the legal needs of their appointed clients.

FINDING 3: Because the judges in Armstrong and Potter counties recognize the inherent conflict in supervising defense attorneys, there is no oversight of the attorneys appointed to represent indigent defendants in the two counties. The qualifications, training, and supervision required for appointed private attorneys in Armstrong County and Potter County are inadequate to ensure effective assistance of counsel to indigent defendants, and a significant number of those attorneys accept more appointed cases across Texas’ trial courts than national standards and the Texas *Guidelines for Indigent Defense Caseloads* say is acceptable.

Criminal justice stakeholders in Armstrong County and Potter County generally believe the minimum qualifications necessary for an attorney to be appointed to represent an indigent defendant in a criminal case are too low, characterizing the qualifications for misdemeanor cases as such a “*de minimis* standard” that eligibility is “almost automatic” and the felony qualifications as particularly insufficient. For example, an attorney just one year out of law school who hung out their shingle in a private practice and sat second chair in one felony jury trial can be appointed to represent, without any training or oversight, an indigent defendant in a third degree felony that carries a possible sentence of up to 10 years in prison.⁷¹¹ Yet the judges fear setting higher qualification requirements because they are so “desperate” for a sufficient number of lawyers to be available to represent indigent defendants.

Attorneys and judges alike agree that even the existing requirements are enforced unevenly, if at all. There is widespread agreement among criminal justice stakeholders in Armstrong and Potter counties that some portion of the appointed attorneys are not competent. One judge estimates that upwards of 75% of the lawyers on the first and second degree felony lists are not in compliance with the requirements of the indigent defense plan and yet no corrective action is taken. “I don’t think anyone is [providing oversight],” said one judge, continuing: “I don’t know if it makes a difference, but why have a plan at all if you’re not going to follow it.” Some appointed attorneys are dismayed or downright angry that there is no systemic remedy for ineffective representation. The absence of supervision of appointed attorneys in Armstrong and Potter counties means, as one lawyer said, that “no one is doing oversight.”

The judges of Armstrong County and Potter County acknowledge that both Texas law and the judges’ own indigent defense plan require them to supervise the appointed attorneys. Many of the judges believe it is inappropriate for judges to attempt to

⁷¹¹ See TEX. PENAL CODE ANN. § 12.34 (West 2017).

supervise appointed criminal defense attorneys. But were they to try, the judges say there is a limit to what can be observed from the bench and a further limit to a judge's ability to act upon their observations. One judge asked, rhetorically: "Am I supposed to halt the trial and hold a conference at the bench?"

Perhaps more importantly, though, the judges have little appetite for monitoring attorneys' compliance with performance obligations under the indigent defense plan, because the judges' interest in keeping dockets moving is directly affected by the number of attorneys who are available to accept court appointments. As one judge queried, "How would I make use of that information [that an attorney is failing to meet performance obligations], when our system is taxed already with few attorneys handling the most serious felonies?" Another judge said: "Having few attorneys available yields accepting lesser quality." As a result, the judges have no desire to remove lawyers from the lists due to poor performance, and knowing they will not act upon information gathered, the judges opt against monitoring the lawyers altogether.

Just as the judges do not monitor the effectiveness of representation provided by appointed private attorneys to indigent defendants, the judges are similarly unmotivated to monitor the workloads of those appointed private attorneys. As one judge explains, "I can't afford to tell someone on the first degree or second degree felony lists that they can't take the next appointment because they have too many cases. I need that lawyer here, taking this case!" Another judge points to the need for appointed private attorneys to be "proactive in self-evaluation of their abilities to handle caseloads" as "one of the weaknesses in our current plan," explaining that "[n]o one is monitoring the total caseloads of each individual counsel except those individuals who take it upon themselves to self-regulate."

Finally, no one at the state or local level gathers data to adequately monitor the workloads of the private appointed attorneys who represent indigent defendants in Armstrong County and Potter County. While a particular appointed private attorney may not receive too many cases in Armstrong County or in Potter County, the judges cannot know the number of indigent defendants that attorney is being appointed to represent in other counties, let alone the attorney's private caseload.

FINDING 4: The Armstrong County and Potter County plan for compensating appointed private attorneys and for providing necessary expenses in indigent defendants' cases – including investigators and experts – creates conflicts of interest between the financial interests of the appointed attorneys and the case related interests of the indigent defendants whom they are appointed to represent.

The compensation structure for Armstrong County and Potter County can be summarized as:

- The flat fees presumptively paid to appointed private attorneys are the same no matter how few or how many hours the attorney must devote to a case to provide effective assistance of counsel, and they are inadequately low to assure the attorney is paid a reasonable fee in addition to overhead costs.
- The only mechanism for appointed private attorneys to receive any compensation beyond the presumptive flat fee is entirely in the discretion of the judges who appoint and oversee those attorneys, rendering the attorneys beholden to the judges for their livelihood.
- Appointed private attorneys fail to request funding from judges for necessary case related expenses, such as investigators and experts, for fear of upsetting the judges who appoint them or of inviting judicial interference in the defense of their appointed clients.
- The compensation paid is inadequate to assure a sufficient number of attorneys are available to provide effective representation to all indigent defendants.
- The compensation plan causes attorneys to accept appointment in more cases than they can effectively handle and then attempt to dispose of those cases as quickly as possible, without regard to the guilt or innocence of the indigent defendant and without regard to the amount of time necessary to provide effective assistance of counsel to each indigent defendant.

Although the indigent defense plan in Armstrong and Potter counties calls for “reasonable” attorney compensation as determined by the “time and effort expended” by the attorney, payment of a presumptive flat fee per case does just the opposite. Because attorneys are presumptively paid exactly the same amount no matter how few or how many hours they devote to a defendant’s case, it is in the attorney’s own financial interest to spend as little time as possible on each individual defendant’s case. For example, if an attorney earns \$24,000 per year to represent indigent defendants in the various courts of Armstrong and Potter counties, and if the attorney’s indigent cases take up all of his available working hours, then this attorney cannot earn more than \$24,000 in a year. On the other hand, if the attorney devotes only half of his working hours to indigent clients, then he can spend the other half of his working year on more lucrative paying cases or other employment, thereby greatly increasing his annual income. A flat fee creates incentives for the attorney to rush a client to plead guilty without regard to the facts of the case, avoid conducting investigation or legal research, and avoid engaging in hearings or a trial. The attorney has incentive to favor the legal interests of paying clients or other employment over the legal interests of the indigent defendants he is appointed to represent.

The low compensation attorneys receive creates an incentive for attorneys to handle as many cases as possible and dispose of them as quickly as possible, so that they can earn enough money to support their legal practices and their personal lives. As one lawyer stated: “The only way to make money doing this work is by volume.”

FINDING 5: The combination of a lack of independence, no supervision, and inadequate attorney compensation means some indigent defendants who face the possibility of incarceration in Armstrong County and Potter County are constructively denied the right to counsel at critical stages of criminal cases, because the appointed private attorneys do not provide effective assistance of counsel.

For example:

- In some instances, judges appoint private attorneys to represent indigent defendants in Armstrong County or Potter County even though the attorneys have not applied to represent indigent defendants in those counties. Similarly, judges sometimes appoint private attorneys to represent indigent defendants in types of cases, such as misdemeanors, even though the attorneys have not applied to represent indigent defendants in those types of cases. In these situations, the judges are appointing these attorneys against their will.
- Although indigent defendants who request appointed counsel at magistration are appointed counsel within four business days of making that request, the appointed attorney rarely takes any steps in the defense of a case until after arraignment, other than filing a motion for an examining trial in a felony case.
- Appointed private attorneys frequently fail to seek pre-trial release of detained indigent defendants.
- Many appointed private attorneys fail to communicate with the indigent defendants whom they are appointed to represent and fail to provide those defendants with necessary information that will allow the defendant to make informed decisions; i.e., they often fail to meet with defendants who are detained pre-trial, do not accept phone calls from defendants who are detained pre-trial, leave the courthouse without communicating with both in-custody and out of custody defendants, and do not meet with either in-custody or out of custody defendants at any time other than immediately preceding or following the defendants' scheduled court appearances.
- After arraignment, indigent defendants charged with felonies in Armstrong County must travel to Potter County to participate in their own defense, in violation of their right to venue and impeding their ability to communicate with their appointed counsel.
- Many appointed private attorneys fail to conduct necessary independent investigation of the facts in the cases of the indigent defendants whom they are appointed to represent.

RECOMMENDATION B: The trial court judges responsible under Texas law for providing and overseeing the Sixth Amendment right to counsel of indigent defendants in Armstrong County and Potter County should establish a non-partisan independent commission to oversee all aspects of indigent defense services, in order to eliminate the dangers of possible undue interference by the

judicial and political branches of county government. The county commissioners courts responsible under Texas law for funding the right to counsel should fund the operations of the commission and the implementation of the methods and standards it adopts.

Because of the inherent conflicts associated with judicial oversight of right to counsel services, an independent commission should be established to administer indigent defense services in Armstrong and Potter counties. The commission should be authorized to determine the most effective methods of providing attorneys to represent indigent defendants, within the range of methods authorized by state law and the TIDC standards. The commission should be authorized to establish, implement, and enforce mandatory standards regarding the provision of the right to counsel, within the parameters set by state law and the TIDC standards.

Establishing a commission. The first of the *ABA Ten Principles* requires that the public defense function, including the selection, funding, and payment of defense counsel, be “independent.”⁷¹² Commentary to *Principle 1* states that the defense function must be insulated from outside political or judicial interference by a board or commission appointed by diverse authorities, so that no one branch of government can exert more control over the system than any others.⁷¹³ It is just such a commission that should be vested with the authority to oversee indigent defense services in Armstrong County and in Potter County. The judges of each county can establish a commission, or the judges of both counties can establish a joint commission. Alternatively, the judges can join together with judges in other panhandle counties to establish a regional commission.

The *Ten Principles* rely in part on the National Study Commission on Defense Services’ (NSC) *Guidelines for Legal Defense Systems in the United States* (1976).⁷¹⁴ The *Guidelines* were created in consultation with the United States Department of Justice under a Law Enforcement Assistance Administration grant. NSC *Guideline 2.10* states in part: “A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.”⁷¹⁵

⁷¹² AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (2002).

⁷¹³ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 cmt. (2002).

⁷¹⁴ NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976).

⁷¹⁵ NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976).

NSC *Guideline 2.10* provides that the members of the commission members should be selected according to the following criteria:

- (a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director. (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics; (c) No single branch of government should have a majority of votes on the Commission; (d) Organizations concerned with the problems of the client community should be represented on the Commission; [and] (e) A majority of the Commission should consist of practicing attorneys.”⁷¹⁶

In practice, jurisdictions with indigent defense commissions generally give an equal number of appointments to the executive, legislative, and judicial branches of government. To fill out the remainder of appointments, governments often give responsibility for one or two positions to the bar associations.

NSC *Guideline 2.10* states further that the commission should not include sitting judges, prosecutors, or law enforcement officials.⁷¹⁷ Many jurisdictions find *former* judges, prosecutors, and law enforcement officials to make very good commission members. Additionally, more and more states have found it a conflict to have any member that stands to benefit financially from the policies of the commission. This means that some states have banned attorneys who currently handle public cases from serving on such commissions, typically imposing a cleansing period before appointing a criminal defense attorney to serve on the commission.

Determining the methods of providing the right to counsel. State law allows any of five methods of providing counsel to represent indigent defendants in criminal cases: a public appointment list (often referred to as a “wheel”); an “alternative program”; direct appointment of an attorney in a felony case; a managed assigned counsel program; or a public defender office.⁷¹⁸ Each method of providing counsel is subject to specific statutory requirements.⁷¹⁹

Decisions about the most efficient and effective manner of providing counsel will necessarily require the local indigent defense commission to gather and analyze information about the number of indigent defendants entitled to request appointed

⁷¹⁶ NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976).

⁷¹⁷ NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976).

⁷¹⁸ TEX. CODE CRIM PROC. ANN. art. 26.04(a) (West 2017).

⁷¹⁹ Public appointment list, TEX. CODE CRIM PROC. ANN. art. 26.04(a), (b)(5), (d), (e) (West 2017); alternative program, TEX. CODE CRIM PROC. ANN. art. 26.04(g), (h) (West 2017); direct appointment, TEX. CODE CRIM PROC. ANN. art. 26.04(i) (West 2017); managed assigned counsel, TEX. CODE CRIM PROC. ANN. art. 26.047 (West 2017); and public defender office, TEX. CODE CRIM PROC. ANN. arts. 26.044, 26.045 (West 2017).

counsel and the number of attorneys necessary to provide effective representation to each indigent defendant. Generally speaking, a public defender office staffed by salaried government employees becomes more economical as the scale of representation increases. Indeed, national standards as summarized in ABA *Principle 2* require a public defender office in any jurisdiction where caseload is “sufficiently high.”⁷²⁰

Establishing, implementing, and enforcing standards. The local independent commission overseeing the provision of the right to counsel in Armstrong County and Potter County should establish, implement, and enforce mandatory standards for, at least:

- the criteria for and method of determining whether a defendant is indigent, such that all defendants are treated equally;
- the qualifications, training, and supervision required for appointed attorneys, sufficient to ensure the provision of effective assistance of counsel to indigent defendants, and training and supervision should be mandatory and provided through and funded by the commission;
- the procedures for appointing an attorney to represent each indigent defendant in each case, and if the commission establishes more than one method of providing indigent defense services, then the percentage and types of cases to be handled by the attorneys secured through each of those methods;
- the procedures for appointed attorneys to obtain funding for necessary case related expenses, including for investigators and experts, and the judge presiding over a case should not determine whether expenses are made available in that case;
- the compensation paid to and the procedures for paying appointed attorneys, ensuring that flat fees are eliminated, that appointed private attorneys are paid an hourly rate sufficient to provide a reasonable fee in addition to overhead and case related expenses, and that the hourly rate is re-evaluated annually and adjusted as needed to produce a sufficient number of attorneys to represent all indigent defendants who request appointed counsel;
- mandatory workload limits for all appointed attorneys, which should not exceed those allowed under either the NAC standards or the Texas guidelines; and
- performance duties of all appointed attorneys and oversight to ensure compliance.

The county commissioners who are responsible under Texas law for funding the Sixth Amendment right to counsel of indigent defendants in Armstrong County and Potter County must provide funding adequate for the operations of the commission and to implement and enforce commission standards and methods, to ensure effective assistance of counsel to each indigent defendant.

⁷²⁰ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 2 (2002).

FINDING 6: Some indigent defendants who face the possibility of incarceration in Armstrong County and Potter County are denied the right to counsel at critical stages of criminal cases. This problem is particularly egregious in Potter County where misdemeanor defendants face direct, overt pressure to forego exercise of their constitutional right to counsel and where more than 74% of all misdemeanor defendants in Potter County are estimated to be *pro se*.

The most glaring example of denial of the right to counsel occurs in Potter County misdemeanor cases, where sheriff's office personnel, county attorney's office personnel, and county court at law judges exert direct, overt pressure on indigent defendants to forego exercise of their constitutional right to counsel. As one Potter County official said, misdemeanor proceedings are by their nature "high-volume and high-pressure" and there is a general interest in "moving cases along." That, however, is exactly what the U.S. Supreme Court says the right to counsel is intended to protect against: "[T]he volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result."⁷²¹

Misdemeanors matter. For most people, our nation's misdemeanor courts are the place of initial contact with our criminal justice systems. Much of a citizenry's confidence in the courts as a whole – their faith in the state's ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as severe. Going to jail for even a few days may result in a person losing professional licenses, being excluded from public housing and student loan eligibility, or even being deported. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers' expense.

Perhaps no one truly favors Potter County's "plea court" system, and it was not established by conscious decision-making. Offering unrepresented defendants the opportunity to negotiate directly with prosecutors is a long-standing practice in the county that evolved over many decades. For example, one Potter County official recalled the misdemeanor process from the early 1980s: "I can remember [the arresting officers] would just bring the defendants straight to the county attorney's office" to negotiate plea deals.

The "plea court" practices in Potter County survive through inertia. The county attorney's office estimates that 25% of out of custody unrepresented defendants elect

⁷²¹ Argersinger v. Hamlin, 407 U.S. 25, 34 (1972).

to speak with a prosecutor at arraignment,⁷²² whereas “closer to 90%” of in-custody unrepresented defendants meet with prosecutors at arraignments.

Some senior prosecutors in the county attorney’s office are concerned that having unrepresented defendants meet directly with prosecutors is “fraught with perils” and likely produces unjust outcomes. For example, prosecutors in the county attorney’s office have broad discretion in both initial charging decisions and plea offers. Many of the assistant prosecutors are just beginning their legal careers, and due to the high volume of cases there is little time for training and supervising them. As a result, different prosecuting attorneys apply different standards. Senior prosecutors are concerned that untrained and inexperienced prosecutors occasionally make plea offers to jail time that should have been for pretrial diversion or, worse, that unrepresented defendants agree to plead guilty in cases that should never have been filed in the first place.

Prosecutors are uncomfortable negotiating with unrepresented defendants. “If I had my choice, there would be a defense lawyer here,” said one prosecutor, pointing to the room full of unrepresented defendants during arraignments. Another prosecutor equated his role at misdemeanor arraignments to that of a public defender office attorney: “Normally, a public defender would do what I’m doing right now – going through the offer, helping [defendants] understand where they are in their case, and advising them on what they want to do.”

The Potter County Attorney “wears two hats” and, at least in part for that reason, does not eliminate the policy of prosecutors negotiating with unrepresented defendants. On the one hand, the county attorney represents the county as prosecutor. In that position, the county attorney has the ethical “responsibility to see that justice is done, and not simply to be an advocate.”⁷²³ On the other hand, the Potter County Attorney serves as the county’s attorney, which includes a “financial duty to hold down the costs of indigent defense.” Some fear that ensuring the right to counsel to every indigent defendant charged with a misdemeanor could “create some serious fiscal problems for the county.”

⁷²² By comparison, during one of the walk-in arraignments observed by the Sixth Amendment Center, 18 out of approximately 30 unrepresented defendants in total (60%) opted to meet with prosecutors. Of those, five unrepresented defendants accepted the prosecutor’s plea offer.

⁷²³ TEX. DISCIPLINARY RULES OF PROF’L CONDUCT r. 3.09 cmt 1. As national standards explain, a prosecutor has the “specific obligation” not to “initiate or exploit any violation of a suspect’s right to counsel,” nor to “initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from unrepresented persons.” *See, e.g.,* American Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 486 (2019) (setting forth ethical obligations of prosecutors in negotiating plea bargains for misdemeanor offenses); American Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 454 at 3 n.10 (2009) (stating that a prosecutor’s interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done”) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); American Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 at 1 (2014) (same).

According to the Texas Office of Court Administration,⁷²⁴ over 1,500 misdemeanor defendants plead guilty each year on average in Potter County; that is nearly 65% on average of all misdemeanor cases.

	OCA FY2014	OCA FY2015	OCA FY2016	OCA FY2017	OCA FY2018	5-YR AVG
OCA reported misd cases disposed	2,823	2,597	2,492	2,088	1,975	2,395
OCA reported misd cases disposed by guilty plea	1,669	1,534	1,680	1,502	1,382	1,553
% misd cases disposed by guilty plea	59.12%	59.07%	67.42%	71.93%	69.97%	64.86%

An estimate relying on solely OCA data shows that on average over 74% of all misdemeanor defendants in Potter County are not represented by counsel.⁷²⁵

	OCA FY2014	OCA FY2015	OCA FY2016	OCA FY2017	OCA FY2018	5-YR AVG
OCA reported misd cases disposed	2,823	2,597	2,492	2,088	1,975	2,395
OCA reported retained counsel at disposition	462	370	389	148	0	274
OCA reported appt'd counsel at filing or after	296	486	685	249	0	343
estimated <i>pro se</i>	2,065	1,741	1,418	1,691	1,975	1,778
% <i>pro se</i>	73.15%	67.04%	56.90%	80.99%	100.00%	74.24%

It is impossible to know from the data collected by any state agency or by Potter County exactly how many of those defendants who plead guilty are also unrepresented by counsel, much less how many of those defendants are indigent.

Based on the only available data, on average, at least 39.10% of all 2,395 misdemeanor defendants plead guilty in Potter County each year without speaking to counsel.⁷²⁶ That is an average of 936 misdemeanor defendants each year who may be able to retain counsel and simply choose to represent themselves, but it is also possible that those 936 misdemeanor defendants are indigent and entitled to public counsel.

⁷²⁴ See *Court Activity Database, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/court-activity-database/>.

⁷²⁵ See *Court Activity Database, Statistics & Other Data*, TEXAS JUDICIAL BRANCH, <http://www.txcourts.gov/statistics/court-activity-database/>.

Alternatively, as explained in chapter 3, TIDC uses a combination of OCA data and TIDC data to estimate the number of *pro se* misdemeanor defendants. TIDC calculates that an average of 2,649 misdemeanor cases were disposed in Potter County each year during TIDC's (Oct. through Sept.) fiscal years 2014 through 2018. Of those 2,649 disposed misdemeanors cases, TIDC estimates that an average of 1,778 of the defendants in those cases were *pro se*, or 67%.

⁷²⁶ An average of 2,395 misdemeanor cases are disposed each year, equaling 100% of all cases. An average of 1,553 misdemeanor defendants plead guilty in those disposed cases each year, equaling 64.86% of all cases. An average of 1,778 misdemeanor defendants are estimated to be *pro se* in those disposed cases each year, equaling 74.24% of all cases. If 64.86 out of every 100 defendants plead guilty and 74.24 out of every 100 defendants are *pro se*, then at least 39.10 out of every 100 defendants are both *pro se* and plead guilty.

In addition to misdemeanor defendants in Potter County, other indigent defendants who face the possibility of incarceration in Armstrong County and Potter County are denied the right to counsel at critical stages of criminal cases:

- Under state law, all indigent defendants charged with Class C misdemeanors in justice of the peace courts and municipal courts are denied the right to counsel when facing up to three days in jail for contempt of court and when facing jail confinement for failure to pay fines & fees.
- At present, there are *no* attorneys qualified and available to be appointed to represent indigent defendants who face the death penalty at trial in a capital murder case in Armstrong County or Potter County and who for whatever reason are not represented by the Regional Public Defender Office for Capital Cases.
- Some indigent defendants charged with felonies or jailable misdemeanors may be denied the right to counsel when court coordinators in Armstrong County or Potter County find them to be not indigent because their net household income appears to exceed 125% of the federal poverty guidelines, but fail to determine whether the defendant is unable to retain private counsel without substantial hardship to the defendant or the defendant's dependents.

RECOMMENDATION C: To ensure that all waivers of the right to counsel are made knowingly, voluntarily, and intelligently, all Armstrong County and Potter County criminal justice system participants should follow state law and prohibit all communication between prosecutors & prosecution staff and unrepresented defendants, unless and until defendants have been informed of their right to appointed counsel by a judicial officer, a judge has conducted the legally required colloquy, and a defendant has executed a written waiver of the right to counsel. Law enforcement personnel should be prohibited from giving defendants advice about their right to counsel choices.

Under Texas law, when any defendant appears without counsel in an adversary judicial proceeding, the court “may not direct or encourage the defendant to communicate with” the prosecutor, unless and until the court advises the defendant of the right to counsel *and* the defendant has the opportunity to request counsel *and* that request is either denied or the defendant waives the right to counsel.⁷²⁷

Prosecutors who speak directly with defendants, on their own volition or at the suggestion of the judge, risk violating their ethical duties in addition to state law. As the report of the National Right to Counsel Committee, *Justice Denied*, notes: “Not only are such practices of doubtful ethical propriety, but they also undermine defendants’ right to counsel.”⁷²⁸ The National Right to Counsel Committee report notes further:

⁷²⁷ TEX. CODE CRIM PROC. ANN. art. 1.051(f-2) (West 2017).

⁷²⁸ NATIONAL RIGHT TO COUNSEL COMM’N, *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 88 (2009).

Beyond the court's role in making certain that a defendant's waiver of counsel is valid, prosecutors have a professional responsibility duty "not [to] give legal advice to an unrepresented person, other than the advice to secure counsel." Similarly, the ABA has recommended that prosecutors should refrain from negotiating with an accused who is unrepresented without a prior valid waiver of counsel. Prosecutors also are reproached by the ABA to ensure that the accused has been advised of the right to counsel, afforded an opportunity to obtain counsel, and not to seek to secure waivers of important pretrial rights from an accused who is unrepresented.⁷²⁹

FINDING 7: Indigent defendants are routinely required to repay Armstrong County and Potter County for the cost of the Sixth Amendment representation provided to them, despite having been determined by a court to be indigent and without any hearing (or evidence) to show that they have the financial ability to pay these costs.

State law defines "indigent" as "a person who is not financially able to employ counsel"⁷³⁰ and provides that "[a] defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occur."⁷³¹ An allegation of a material change in the defendant's circumstances can be raised by the defendant, the appointed defense attorney, or the prosecutor.⁷³² If, and only if, a judge determines on the basis of that evidence that a defendant "previously determined to be indigent" is "not indigent," can that defendant be ordered to pay in whole or in part for the actual costs of the indigent defense representation provided to him.⁷³³

The practice of the courts in Armstrong and Potter counties of ordering indigent defendants to repay the cost of their representation, without receiving evidence to show that these defendants are no longer indigent prior to imposing these costs on them, violates state law. The Texas Court of Criminal Appeals has directly spoken to this practice on at least three occasions.⁷³⁴

⁷²⁹ NATIONAL RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 88 (2009) (citing AMERICAN BAR ASS'N, MODEL RULES OF PROF. CONDUCT r. 4.3); AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION §§ 3-3.10(a), (c), 3-4.1(b) (3d ed. 1993).

⁷³⁰ TEX. CODE CRIM PROC. ANN. art. 1.051(b) (West 2017).

⁷³¹ TEX. CODE CRIM PROC. ANN. art. 26.04(p) (West 2017).

⁷³² TEX. CODE CRIM PROC. ANN. art. 26.04(p) (West 2017).

⁷³³ TEX. CODE CRIM PROC. ANN. art. 26.05(g) (West 2017); Armstrong, Potter and Randall District Court and County Court Plan, ¶¶ II.C.iv.2., v. (adopted Oct. 6, 2011 and subsequently amended).

⁷³⁴ *In re Daniel*, 396 S.W.3d 545 (Tex. Ct. Crim. App. 2013); *Armstrong v. State*, 340 S.W.3d 759 (Tex. Ct. Crim. App. 2011); *Mayer v. State*, 309 S.W.3d 552 (Tex. Ct. Crim. App. 2010).

In *Mayer v. State*, the Texas Court of Criminal Appeals held that, under article 26.05(g), “the defendant’s financial resources and ability to pay are explicit critical elements in the trial court’s determination of the propriety of ordering” the defendant to repay such costs.⁷³⁵ Moreover, the Court observed that, under article 26.04(p) of the Texas Code of Criminal Procedure, “[a] defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant’s financial circumstances occurs.”⁷³⁶ As such, a trial court’s failure to conduct “sufficient inquiry” into the financial status of a defendant, whom the trial court had previously determined to be indigent, constitutes grounds to delete an order to repay the county for the cost of court appointed counsel.⁷³⁷

Reaffirming its *Mayer* decision, the Court of Criminal Appeals held in *In re Daniel* that a district clerk had “no basis” under law to assess court appointed counsel fees that were “not predicated upon any findings whatsoever.”⁷³⁸ The *Daniel* case involved a felony defendant who was convicted and was assessed \$295.25 in court costs, but no attorney fees, as part of the trial court’s judgment. More than nine years later, the district clerk issued a “Bill of Cost” assessing the defendant \$7,945.00 for the cost of appointed counsel. The Court of Criminal Appeals stated: “In the apparent absence of an order from the trial court under Article 26.05(g) mandating the reimbursement of appointed attorney fees – not to mention the necessary finding that a previously indigent applicant has the present financial wherewithal to pay those appointed attorney fees – the District Clerk lacked any authority to assess attorney fees as part of the belated ‘Bill of Cost’”⁷³⁹

And in *Armstrong v. State*, the Court of Criminal Appeals held that the assessment of court appointed counsel fees as part of a certified bill of costs “need neither be orally pronounced nor incorporated by reference in the judgment to be effective.”⁷⁴⁰

RECOMMENDATION D: All judges in Armstrong County and in Potter County should cease ordering indigent defendants to pay the costs of their indigent defense representation unless and until defendants have been proven through evidence at a contradictory hearing to have the present ability to pay.

⁷³⁵ *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Ct. Crim. App. 2010).

⁷³⁶ *Mayer v. State*, 309 S.W.3d 552, 557 (Tex. Ct. Crim. App. 2010).

⁷³⁷ *Mayer v. State*, 309 S.W.3d 552, 555-57 (Tex. Ct. Crim. App. 2010) (affirming the Amarillo Court of Appeals’ judgment that “the trial court erred in ordering reimbursement of appointed attorney fees”).

⁷³⁸ *In re Daniel*, 396 S.W.3d 545, 548-49 (Tex. Ct. Crim. App. 2013).

⁷³⁹ *In re Daniel*, 396 S.W.3d 545, 549 (Tex. Ct. Crim. App. 2013).

⁷⁴⁰ *Armstrong v. State*, 340 S.W.3d 759, 766 (Tex. Ct. Crim. App. 2011).

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