



JUSTICE FOR ALL

Texas appointed counsel to indigent defendants long before the landmark Gideon v. Wainwright decision. Today the state is at the forefront again through its successful grant-funded programs and new public defender offices.

BY PRESIDING JUDGE SHARON KELLER AND JIM BETHKE

WHO SAID THIS, AND WHEN? “THE RIGHT OF COUNSEL AND THE PROBLEM OF FURNISHING ATTORNEYS FOR INDIGENT DEFENDANTS IN CRIMINAL CASES IS PERHAPS THE GREATEST CHALLENGE FACING THE AMERICAN LEGAL PROFESSION TODAY.” The answer: the Hon. John F. Onion Jr., in 1965.¹ In 2013, the challenge still exists, but today Texas has a powerful tool in its indigent defense tool kit. The Fair Defense Act of 2001 changed the way that Texas does business, and people are beginning to notice.

Texas was well ahead of the game when the U.S. Supreme Court held in *Gideon v. Wainwright*² that indigent defendants have a right to appointed counsel. The earliest Texas

statute spelling out such a right in non-capital cases preceded *Gideon* by four years,³ but the practice of appointing counsel in felony cases had long existed.⁴ In requiring counsel in capital cases, Texas was ahead of the Supreme Court by at least 75 years.⁵ Showing its prescience again, the Texas Legislature required appointment of counsel in all cases where incarceration was possible⁶ seven years before the Supreme Court did so in *Argersinger v. Hamlin*.⁷

This foresightedness may have been a two-edged sword. Indigents in Texas had the benefit of appointed counsel years ahead of *Gideon*, but the early adoption of the practice may have contributed to the hodgepodge of procedures that existed until only recently. And with no state funding, Texas counties bore the full cost of indigent

defense. Texas was providing counsel, but it did so with no system, no state oversight, and not much in the way of accountability.

Then, in 2001, Sen. Rodney Ellis introduced the Fair Defense Act, Gov. Rick Perry signed it into law, and Texas began a new era in indigent defense.⁸ The commission⁹ that the bill created believes in collaboration and local control. This belief has been validated by many successful grant-funded programs, including new public defender offices.

Lubbock County received commission funding to form the Regional Capital Public Defender Office to serve counties in the Panhandle area. The office ensures quality legal representation while mitigating the dramatic cost of capital cases. The program's success has led to its expansion to 155 counties.¹⁰

Concern about low misdemeanor appointment rates in several counties in the Caprock region inspired the creation of the Caprock Regional Public Defender Office. Misdemeanor appointment rates in the 12 counties served by the office are rising steadily.¹¹

Until 2011, Harris County was the nation's largest urban jurisdiction with no public defender office. With the help of a commission grant, the county created the Harris County Public Defender's Office, which has juvenile, appellate, misdemeanor mental health, and felony trial divisions.¹²

Using grant funds, Bell County developed the Bell County Mental Health Indigent Defense Program. This program provides specialized representation and support services to indigent defendants with mental health issues.¹³

The commission's work extends far beyond public defender offices. Training events allow counties to learn from each other, commission-funded studies support innovation, and strategic planning meetings promote creative problem solving.

Large amounts of data are available on the commission website. County "data sheets" furnish snapshots of indigent defense programs and provide information such as cases added and indigent defense expenditures. Counties can easily submit, update, and compare plans.¹⁴

The commission also helps fund and coordinate the work of innocence projects at four public law schools. During the years that the commission has been involved, the innocence projects have achieved ten exonerations.

Exciting new projects funded by the commission are always in the works. In Comal County, for instance, defendants will soon be able to choose their lawyer from an approved list. And a mentoring component of the program will help new lawyers learn from their more experienced colleagues.

Now, a bonus question. Who said this, and when? "The public's perception of the judicial system is formed

by what it hears or reads about criminal law cases rather than civil law cases. Therefore, it behooves the bench and bar to provide adequate counsel and fairness to indigent defendants in criminal cases." The words are those of the Hon. John F. Onion Jr., speaking today. Forty-eight years later, the work continues. **TBJ**

NOTES

1. John F. Onion Jr., *A Texas Judge Looks at the Right to Counsel*, 28 Tex. B.J. 357 (1965). Judge Onion began his judicial service as a justice of the peace in Bexar County. Following a stint as an assistant district attorney, he became, at age 31, the youngest elected district judge in Texas. From 1967 to 1970, he served as an associate judge on the Texas Court of Criminal Appeals, and from 1971 to 1988, as presiding judge.
2. 372 U.S. 335 (1963).
3. Acts of June 1, 1959, 56th Leg., R.S., Ch. 484, § 1.
4. Onion, *supra* note 1, at 357-58.
5. Tex. Code Crim. Pro. art. 466 (O.C. 1857), recodified by Tex. Penal Code art. 494 (1925); *Powell v. Alabama*, 287 U.S. 45 (1932).
6. Tex. Code Crim. Pro. Ann. art. 26.04 (Vernon 1965).
7. 407 U.S. 25 (1972). The 1965 Code of Criminal Procedure, *supra* note 6, went into effect on Jan. 1, 1966. In November 1965, the Court of Criminal Appeals seems to have implicitly recognized a right to counsel in misdemeanor cases where imprisonment was a possibility when it reversed and remanded the conviction of an indigent defendant that was not advised of her right to counsel. *Braden v. State*, 395 S.W.2d 45 (1965).
8. Texas Fair Defense Act, 77th Leg., R.S., Ch. 906, § 1-22.
9. The Texas Indigent Defense Commission began life as the Texas Task Force on Indigent Defense.
10. Grant information available at tfid.tamu.edu/DGSGA/405.pdf.
11. Grant information available at tfid.tamu.edu/DGSGA/406.pdf.
12. Grant information available at tfid.tamu.edu/DGSGA/400.pdf. See also Fabelo, T., Reynolds, C., Tyler, J., *Harris County Public Defender Preliminary Report on Operations and Outcomes* (October 2012), courts.state.tx.us/tidc/pdf/HCPDOPrelimReport101912.pdf.
13. Grant information available at tfid.tamu.edu/DGSGA/383.pdf.
14. The public may visit the new TIDC data site at tidc.tamu.edu/public.net.



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