



Texas Fair Defense Project

Benefits of a Public Defender Office

Increasing Accountability and Cost Effectiveness in
Harris County's Indigent Defense System

Austin, TX
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EXECUTIVE SUMMARY

Creation of a public defender office in Harris County is long overdue. Houston, the fourth largest city in the United States, is the only urban area among the nation's seventeen largest that lacks a publicly-funded agency dedicated to representing poor people accused of criminal offenses.¹ Harris County instead pays private attorneys approximately \$24 million to represent indigent defendants each year.² This figure has more than doubled since 2001 and includes \$2.5 million in state grant money.³ Despite this expense, Harris County's existing public defense delivery system provides virtually no oversight to ensure that private assigned counsel deliver quality representation and discharge their professional obligations to their clients. The current system absorbs an increasing amount of taxpayer dollars but fails to provide accountability.

This white paper argues that creation of a public defender office not only will enable

Harris County to more effectively evaluate the quality of publicly-funded legal services, but also is likely to improve the quality of those services. A public defender office will provide safeguards against excessive workloads, access to investigative and support staff resources that are comparable to those enjoyed by the prosecution, and training and peer support to new and experienced defenders alike. A public defender office also will provide an institutional resource within Harris County that can help judges and other officials identify and resolve systemic criminal justice problems, such as jail overcrowding, which burden both low-income defendants and other taxpayers. In addition, public defender offices offer a number of financial advantages such as budget stability, reduced administrative costs, increased cost effectiveness, and potential savings in other areas of the criminal justice system.

¹ See POPULATION DIVISION, U.S. CENSUS BUREAU, 2008 POPULATION ESTIMATES (2009), and CAROL DE FRANCIS ET AL., BUREAU JUST. STAT., DEP'T JUST., INDIGENT DEFENSE SERVICES IN LARGE COUNTIES 10 (1999), *available at* <http://www.ojp.gov/bjs/pub/pdf/idslc99.pdf>.

² TASK FORCE ON INDIGENT DEF., TEX. OFF. CT ADMIN., HARRIS COUNTY DATASHEET (2008), *available at* http://tfid.tamu.edu/Datasheet/Datasheet.asp?County_ID=101.

³*Id.*

BACKGROUND

The Sixth Amendment to the U.S. Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.”⁴ As a result, states must provide publicly-funded lawyers to defendants who are charged with jailable offenses and who are unable to afford representation.⁵

In Texas, local governments bear the financial burden of furnishing indigent defendants with counsel. Some supplemental state money is available to counties via the Task Force on Indigent Defense, which is dedicated to “improv[ing] the delivery of indigent defense services through fiscal assistance, accountability and professional support to State, local judicial, county and municipal officials.”⁶ The Texas Code of Criminal Procedure allows counties to design and implement their own indigent defense delivery systems as long as those systems meet certain minimum requirements.⁷ The vast majority of counties use either a public defender office or an assigned counsel system to deliver indigent defense services. Both of these models are included in the Texas Code of Criminal Procedure.⁸

The American Bar Association (ABA) urges jurisdictions to establish a public defender office wherever the caseload is sufficiently high to support a full-time defender’s salary.⁹ Despite

this recommendation, the vast majority of Texas counties use the assigned counsel system that is currently in use in Harris County. However, most of Texas’s larger jurisdictions, including Dallas, San Antonio, Austin, and El Paso, have established public defender offices with tremendous success.

Over the past year and a half, the Harris County Commissioners Court has taken steps to establish a public defender office. However, this initiative’s progress has been slow. Last fall, the Commissioners Court directed a study team to investigate the feasibility of a public defender office and design a plan for its implementation. In April 2009, the District Courts Subcommittee for the Public Defender Office Study Team issued a report proposing that the county create a public defender office to represent indigent defendants accused of state jail felonies in five of the County’s district courts. The Subcommittee also recommended that the public defender office represent indigent defendants in all probation revocation proceedings and non-capital appeals except those in which a conflict exists.¹⁰ The Harris County Commissioners Court has not yet acted on the study team’s recommendations or executed necessary changes to its indigent defense system. The Commissioners Court is scheduled to take up the public defender proposal at a mid-year budget meeting on September 29, 2009.

⁴ U.S. CONST. amend. VI.

⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁶ TASK FORCE ON INDIGENT DEF., TEX. OFF. CT ADMIN., 2008 ANN. REP. available at <http://www.courts.state.tx.us/tfid/pdf/FY08AnnualReportTFID.pdf> [hereinafter TASK FORCE 2008 ANN. REP.].

⁷ TEX. CODE CRIM. PROC. art 26.04.

⁸ See *id.* at art. 26.04(a), (f).

⁹ ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), PRINCIPLE 2, available at <http://www.abanet.org/legalservices/downloads.scliad/indigentdefense/tenprinciplesbooklet> [hereinafter ABA TEN PRINCIPLES].

¹⁰ HARRIS COUNTY DISTRICT CTS SUBCOMM., RECOMMENDATIONS TO THE PUBLIC DEFENDER OFFICE STUDY TEAM (Apr. 16, 2009).

A PUBLIC DEFENDER OFFICE WILL PROVIDE INSTITUTIONAL SAFEGUARDS THAT IMPROVE REPRESENTATION AND PUBLIC ACCOUNTABILITY

Public defender offices have a particularly strong track record in Texas. During the 2005 fiscal year, three counties—Kaufman, Val Verde, and Hidalgo—created public defender offices and each of these jurisdictions documented a significant increase in its criminal case dismissal rates by 2007.¹¹ In Kaufman County’s district court, this rate nearly doubled, rising from 14.88% in 2005 to 27.40% in 2007.¹² These dismissals are likely due in part to the advantages that public defender offices offer over assigned counsel systems, including the fact that they provide greater institutional support for criminal defense attorneys receiving public funds and allow those attorneys greater access to trial preparation resources. These advantages in turn increase the accuracy of the adversarial system.

An office’s dismissal rate is a significant factor that is related to attorney performance, but it is an incomplete metric. The caliber of criminal defense representation is difficult to quantify. Lawyers vary greatly in their effectiveness. Many attorneys in Harris County execute their duties admirably. However, Harris County’s assigned counsel system provides no assurances that indigent defense lawyers discharge their professional obligations to their clients, and allocates little access to trial preparation resources. In a preliminary report on Houston’s criminal justice system, the Justice Management Institute (JMI) cited indigent defense organization as one of the key issues afflicting court operations and warranting further investigation and development of an alternative process.¹³ Creation of a public defender office would enable Harris County to more effectively detect and address problems with the provision of defense representation as they arise.

¹¹ TASK FORCE 2008 ANN. REP., *supra* note 6, at 4.

¹² *Id.*

¹³ BARRY MAHONEY AND ELAINE NUGENT-BORAKOVE, JUST. MGMT. INST., HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT 11& 14 (June 2009) [hereinafter JMI Report].

Independence and Accountability

The ABA has repeatedly recommended that indigent defense delivery systems ensure that “[d]efense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards”¹⁴ and that defense counsel and their support staff are periodically reviewed for competence and efficiency. Perhaps the biggest shortcoming of Houston’s assigned counsel system is that it is difficult to make these assessments of private attorneys. Judges are solely responsible for maintaining lists of lawyers who are eligible for appointment, yet they have only one point of contact with attorneys—the courtroom—that encompasses a fraction of the duties entailed in preparing an adequate defense. Several aspects of representation, such as the timing or extent of attorney-client contact, efforts to obtain pretrial release for imprisoned defendants, the number of days elapsed before discovery is obtained, and the frequency and appropriateness of case settlements, occur behind closed doors.

Even if judges did possess full and complete information about defense counsel conduct, such oversight of one and only one of the parties before them would be improper. The ABA strongly recommends that public defense delivery systems remove defense attorney management from judges and other court officials in order to safeguard defense counsel’s independence.¹⁵ Indeed, one of JMI’s recommendations to the Harris County Commissioners Court is that it reconfigure the local indigent defense delivery system “to be independent of direct judicial control, with accountability and transparency in the delivery [and] utilization of these services.”¹⁶ A public defender office would enable the county to track

¹⁴ ABA TEN PRINCIPLES, *supra* note 9, at Principle 10.

¹⁵ *Id.* at Principle 1.

¹⁶ JMI Report, *supra* note 13, at 15.

attorney conduct while preserving defense counsel's independence. As a result, there will be a way to comprehensively measure attorney performance.

To provide a specific example, both the ABA¹⁷ and the National Legal Aid and Defender Association (NLADA)¹⁸ direct lawyers to keep their clients abreast of case developments and consult with clients regarding how to achieve the client's goals. In order to ensure that attorneys fulfill this requirement for adequate representation, the Texas Fair Defense Act requires that lawyers "make every reasonable effort to contact the defendant not later than the end of the first working day"¹⁹ after receiving an appointment. This early lawyer-client consultation enables attorneys to assess the case, learn client wishes and expectations, and determine whether further investigation or research is necessary in time for the attorney to take appropriate action. Yet in Harris County there is neither assurance that an appointed lawyer performs these functions nor a method for tracking the number of times she fails to do so.

Anecdotal evidence, which is the only evidence available regarding attorney performance under Harris County's current system, suggests that attorneys frequently fail to meet with their clients promptly and in advance of formal court proceedings. For example, the Texas Fair Defense Project conducted court observations in Harris County's Juvenile Court #315 and #313 on February 21st and March 4th of last year, respectively, and noted that many lawyers clearly had never met their clients before the clients' first court date.²⁰ Many of

these juvenile defendants were observed pleading guilty on the same date they first met their attorney.

Public defender offices in other jurisdictions have instituted monitoring programs that track an attorney's adherence to national and performance guidelines at every phase in a case's life cycle. For example, the San Diego County Public Defender monitors both the execution of discrete attorney responsibilities in every case and outcomes in cases handled by the office. The many factors tracked by the office include whether each attorney meets with clients prior to the first court appearance, whether attorneys obtain discovery within 48 hours of appointment, the average number of elapsed days between appointment and any negotiated settlement, the percentage of cases tried, and the number of hours of training attended by each attorney.²¹

Each of these factors is related to attorney performance, and all are currently unknown quantities in Harris County. The current assigned counsel system consists of hundreds of attorneys who operate independently from each other and without any meaningful review of their performance. Full accountability is only possible with a public defender office that would have the infrastructure to adequately track performance and case outcomes.

Caseload Controls

It is well-documented that many private appointed lawyers in Harris County are overloaded. The National Advisory Commission on Criminal Justice Standards and Goals (NAC) promulgated maximum caseload limits in 1973 that since have been adopted by the NLADA and referenced by the Texas Task Force on Indigent Defense as a benchmark for counties in their assignment of cases to attorneys representing indigent defendants. According to

¹⁷ MODEL RULES OF PROF'L CONDUCT R 1.4 (2009) ("a lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished . . . keep the client reasonably informed about the status of the matter . . . promptly comply with reasonable requests for information") [hereinafter ABA Model Rules].

¹⁸ PERFORMANCE GUIDELINES FOR CRIMINAL DEF. REPRESENTATION, 1.3(c) & 2.2 (b) (National Legal Aid and Defender Ass'n 2006) [hereinafter NLADA Perf. Guidelines].

¹⁹ TEX. CODE CRIM. PROC. art. 26.04(j)(1).

²⁰ This was indicated by the fact that the lawyers would call out client names, ask clients to identify themselves, and then introduce themselves to the clients. Memoranda from Dita Niyogi, Policy Analyst, on Harris County Juvenile Court

Observations to the Texas Fair Defense Project (Feb, 21 & Mar. 4, 2008) (on file with author).

²¹ Harry C. Coker, Public Defender, San Diego County, Presentation at Achieving Quality in Indigent Defense: Proposals, Prototypes and Policymakers, University of Houston Law Center (Sept. 4, 2008).

the NAC standards, an individual attorney working full-time should represent clients in no more than 150 non-capital felony,²² 400 misdemeanor, 200 juvenile, 200 mental health, or 25 appellate cases within a twelve-month period.²³ These guidelines set maximum caseloads for attorneys working in a single category of offense/case. For example, an attorney who specializes in felonies should handle no more than 150 cases and receive no other assignments. An attorney with a mixed caseload should receive appointments at a rate that is in proportion to the recommended caseload for each type of case.

This past May, KHOU-TV Channel 11 reported that all of Houston's top-earning appointed lawyers exceeded these national guidelines between 2003 and 2005. One attorney represented defendants in 177 felony cases in 2005, including six capital cases. Another attorney, whom Harris County paid \$1.9 million dollars over the last eight years, provided representation in 5 capital cases, 18 appeals, and 162 felony cases in 2006 alone. At one point he carried as many as 12 capital cases in a single year.²⁴ These figures are in excess of NAC guidelines, yet they represent the minimum number of cases in which each of these attorneys appeared as counsel. In addition to their appointed cases in Harris County, both lawyers were free to accept private clients as well as appointments in other jurisdictions.

²² Issued in the wake of the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), which invalidated existing death penalty statutes, the NAC guidelines were not designed to include capital cases in the suggested 150 felony cases assigned to an attorney. Some states have begun to set independent criteria for establishing capital attorney workload. For example, Indiana's Rules of Criminal Procedure direct courts to consider one death penalty case to be equivalent to 40 felony cases when assessing the appropriateness of an attorney's workload. IND. R. CRIM. PROC. R. 24(B)(3)(d), available at http://www.in.gov/judiciary/rules/criminal/index.html#_Toc202327723.

²³ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 43 (1973).

²⁴ Mark Greenblatt, 11 News Defenders, *Experts: Harris Co. taking risks with lawyer appointment system* (KHOU television broadcast May 19, 2009), transcript available at http://www.khou.com/news/local/stories/khou090518_tnt_defenders-harris-county-attorneys.16be0a99.html.

Attorneys vary in their work capacity and caseload numbers alone may not be sufficient to determine whether these lawyers furnished adequate counsel. However, handling such a high volume of cases hinders even the most dedicated and competent lawyer's ability to do her job and creates a systemic risk that overloaded lawyers will fail to provide effective representation.

In some instances, high caseloads may lead to the rendering of ineffective assistance of counsel, the conviction of innocent persons, or ethical violations on the part of attorneys. In 2006, the ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 06-0441, which states that lawyers who represent indigent criminal defendants should control their workload to a level that permits them to provide quality representation, abide by certain client decisions, exercise diligence, and communicate effectively on behalf of and with clients.²⁵ Although the opinion itself declines to provide a formula for determining whether a particular caseload is excessive, it directs attorneys to Principle 5 of *The Ten Principles of a Public Defense Delivery System*, which states that "[n]ational standards should in no event be exceeded"²⁶ and cites the NAC standards as a baseline consideration, in addition to such factors as the complexity of particular cases, for determining when an attorney's caseload is sufficiently high to raise ethical concerns.

Harris County recently announced plans to institute a monitoring system in order to track the number of cases to which individual attorneys are appointed,²⁷ yet this innovation is unlikely to fully correct Harris County's caseload problem because court appointments often comprise only a fraction of a private attorney's practice. Many criminal attorneys represent private clients on retainer, accept court

²⁵ ABA Comm. on Ethics and Prof'l Responsibility, Advisory Op. 06-044 (2006).

²⁶ ABA TEN PRINCIPLES, *supra* note 9, at Principle 5 & n. 19.

²⁷ Mark Greenblatt, 11 News Defenders, *Major Reforms to Hit Harris County Courts* (KHOU television broadcast Aug. 5, 2009), transcript available at http://www.khou.com/news/defenders/investigate/stories/khou090804_jj_mcschapdden-court-case-load-attorneys.aaa67d49.html.

appointments in other counties, and handle cases in other areas such as family law. Judges will not have information on these other categories of cases, and thus will have incomplete information about attorney workload even if they track all criminal case appointments in Harris County.

Public defender offices are not a panacea for excessive caseloads. Some public defender offices, such as the one currently operating in Dallas, have attorney caseloads well in excess of NAC standards. However, only a public defender office, which employs full-time attorneys who do not accept outside cases, will be able to meaningfully track, monitor, and assign cases to defense attorneys in a manner that is appropriate to their ability, experience, and fluctuating caseload capacity. Officials still must manage caseloads under any indigent defense system. Without a public defender office, they have no effective tools with which to do so.

Parity with the Prosecution

The ABA has long advocated for criminal justice systems to equally equip the prosecution and the defense to present their respective cases.²⁸ Whenever possible, both parties in the adversarial system should have access to support staff (e.g., paralegals, investigators), experts, training, and compensation. Yet the existing assigned counsel system allocates few resources to defense attorneys. Appointed attorneys must apply to the court for payment for their use of investigators or other experts in each individual case and must absorb the cost of other support personnel. In contrast, public defender offices are able to hire support staff and investigators, train new attorneys, allocate work between staff members, and implement strategies to retain institutional memory.

Investigators and Support Staff

The Harris County District Attorney's Office benefits from a \$56 million budget that includes

²⁸ ABA TEN PRINCIPLES, *supra* note 9, at Principle 8 ("there is parity between defense counsel and the prosecution with respect to resources").

funding for investigators, administrative assistants, case coordinators, and ready access to expert witnesses.²⁹ Comparable resources are necessary to present an adequate defense, especially in felony cases. Defense counsel have a duty to conduct an independent investigation of their client's guilt or innocence,³⁰ and as such must have access to investigators to collect evidence and interview witnesses, as well as experts to vet state witness work product. However, Harris County's existing Indigent Defense Plan contains several barriers to these resources.

Prosecutors enjoy ready access to experts, investigators, and interpreters, all of whom perform important functions in trial preparation. In contrast, defense attorneys do not have such professionals on staff and must apply to the court for approval of reasonable expenses incurred during the preparation of every case they handle.³¹

Other Texas counties have found that public defender offices improve defense attorney access to investigators. In 2006, the Public Policy Research Institute at Texas A & M University performed a study on the feasibility of creating public defender offices throughout the state.³² PPRI's analysis of district court cases statewide indicates that average investigation expenditures are more than two times higher for felony public defender cases than for felony cases handled by appointed counsel. During the years 2003, 2004, and 2005, public defenders on average spent

²⁹ Website, Office of the District Attorney of Harris County, <http://app.dao.hctx.net/OurOffice/JudgeLykos.aspx> (last visited Sept. 19, 2009).

³⁰ See ABA Model Rules, *supra* note 17, at R. 1.1 cmt. 6 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem"); and NLADA Perf. Guidelines, *supra* note 18, at 4.1(a) ("Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.").

³¹ TASK FORCE ON INDIGENT DEF., TEX. OFF. CT ADMIN., HARRIS COUNTY DATASHEET (2008), available at http://tfid.tamu.edu/Datasheet/Datasheet.asp?County_ID=101

³² Public Policy Research Institute, Evidence for the Feasibility of Public Defender Offices in Texas, 11 (2006), available at www.courts.state.tx.us/tfid/pdf/PD%20Feasibility_Final.pdf [hereinafter PPRI Study]

between \$38 and \$49 per case on felony investigations, whereas non-public defender investigations averaged only \$17 to \$18 per case.³³

A thorough investigation is a crucial aspect of trial preparation. Investigators aid in this process by retracing police activity, which may be outcome determinative and have dire consequences when not properly executed. For example, Clarence Brandley was convicted and sentenced to death in Montgomery County, Texas of the murder and rape of a sixteen-year-old high school volleyball player. Evidence submitted at trial only circumstantially connected him to the crime. One of the prosecution's main witnesses, the County Medical Examiner, testified that strangulation marks on the victim's neck were consistent with a belt found in Brandley's home. Eleven months after his conviction, a simple investigation by Brandley's appellate lawyers uncovered overwhelming evidence of his innocence, including a pubic hair that had disappeared from the prosecution's custody that matched neither the victim's nor Brandley's hair samples, eyewitness accounts that implicated other individuals, and a photo of Brandley that showed that he was not wearing the alleged murder weapon on the day of the victim's death.³⁴ Though Brandley was eventually exonerated of the charges against him, a more comprehensive investigation prior to his original trial would have prevented the state from incarcerating him for nine years for a crime that he did not commit and expending public dollars challenging his subsequent appeal and retrial.

Proactive Recruitment and Retention

Prosecutor offices offer entry-level positions as well as opportunities for advancement that enable them to recruit and develop young talent

³³ *Id.*

³⁴ See Ctr Wrongful Convictions, Clarence Brandley, *available at* <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/txBrandleySummary.html> (accessed Sept. 21, 2009); and The Justice Project, Clarence Brandley's Story, *available at* <http://www.thejusticeproject.org/profiles/clarence-brandleys-story/> (accessed Sept. 21, 2009).

and provide incentives for remaining with the agency. Assigned counsel systems do not provide comparable opportunities for defense counsel. Private attorneys work independently or in very small offices and do not work within an institutional structure that allows them to attract and mentor new lawyers. A public defender office would allow Harris County to draw recent law graduates to the field of criminal defense and systematically evaluate and address barriers to entry such as a lack of training, stable compensation, and benefits.

In addition to the recruitment of young lawyers, a public defender office could provide retention benefits for experienced attorneys, such as pension benefits, paid vacation time, and longevity pay, that currently are available to Texas prosecutors. Retaining experienced lawyers in-house would enable the office to staff them on the toughest cases and permit new attorneys to benefit from their professional advice through formal and informal mentoring.

Training and Institutional Memory

Public defender offices are able to share information among staff members and develop training materials and model pleadings, briefs, and motions that improve office efficiency by reducing the amount of time a single attorney must spend on a particular issue. These resources are particularly useful for young attorneys who often have to spend additional time learning the law that is applicable to their cases.

Further, with a "critical mass" of defense professionals working within a single office, continuing legal education (CLE) workshops may be held on relevant local issues. The ABA recommends that defense counsel "have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors."³⁵ Under the assigned counsel system, lawyers must pay for training out of their own pockets and are only required to attend a minimum number of CLE hours in criminal law. In contrast, many

³⁵ ABA TEN PRINCIPLES, *supra* note 9, at Principle 8.

public defender offices, including the New Mexico Public Defender and Philadelphia's Defender Association, hold mandatory training sessions that fulfill annual CLE requirements and bring new lawyers up to speed on local trial practice.³⁶ New Mexico also has instituted a structured mentoring program that provides a format for new attorneys to field questions to their more experienced colleagues.³⁷

Specialization

In addition to their structural advantages, public defender offices provide attorneys with the opportunity to specialize in certain areas of criminal law, which in turn enables them to provide a high level of representation at all phases of a case's life cycle. For example, the Bexar County Appellate Public Defender Office has been tremendously successful in improving both the timeliness and the quality of briefs filed before the Fourth Court of Appeals.

Bexar County is the largest area under the Fourth Court of Appeals' jurisdiction and makes up a substantial portion of the criminal appellate docket pending before the Court. Prior to the Appellate Defender Office's establishment in 2005, the Fourth Court of Appeals "raised concerns about the quality of appellate briefs being filed" in criminal cases.³⁸ Since opening its doors, the Appellate Defender Office has greatly improved the level of representation provided to indigent defendants in Bexar County. The Chief Judge of the Fourth Circuit of Appeals has noted that the office has significantly reduced the processing time for appellate cases and that "[t]he quality of the briefs is also better, with greater consistency in the writing."³⁹ As a result of these improvements, the Appellate Defender Office has expanded the scope of its representation to cover all but two of the 32 counties in the Fourth Court's Jurisdiction.⁴⁰

³⁶ See Website, Philadelphia Defender Association, History and Mission, <http://www.phila.gov/defender/> (last visited Sept. 21, 2009); and Website, New Mexico Public Defender Office, About Us, <http://www.pdd.state.nm.us/aboutus/overview.html> (last visited Sept. 19, 2009).

³⁷ See Website, New Mexico Public Defender Office, About Us, <http://www.pdd.state.nm.us/aboutus/overview.html> (last visited Sept. 19, 2009).

³⁸ THE SPANGENBERG GROUP ET. AL., AN EVALUATION OF BEXAR AND HIDALGO COUNTY PUBLIC DEFENDER OFFICES: A FINAL REPORT 6 (May 15, 2009), available at <http://www.courts.state.tx.us/tfid/pdf/Bexar%20&%20Hidalgo%20Final%20Report%205-27-09.pdf> [hereinafter Spangenberg Bexar County Report].

³⁹ *Id.* at 15

⁴⁰ Both of the counties that opted not to participate in this regional program did so because they have not had any criminal appeals in recent years. *Id.* at 14.

A PUBLIC DEFENDER OFFICE WILL SERVE AS AN INSTITUTIONAL RESOURCE IN THE CRIMINAL JUSTICE SYSTEM

Public defender offices have the capacity to take a leadership position on systemic criminal justice issues that otherwise would remain unaddressed or be only inadequately addressed due to a lack of complete information. Many public defender offices commission or produce studies on areas of concern, such as attorney workload, and use the data collected to advocate for improvements to the criminal justice system. Public defender offices also provide local officials with a point of contact for including the defense bar in efforts to seek collaborative solutions for problems within the criminal justice system. There is no similar point of contact in Harris County's current assigned counsel system, and no institution that can act on behalf of criminal defendants as a stakeholder in the administration of justice.

Among JMI's main recommendation to Harris County's Commissioners Court was that it create oversight mechanisms for assuring that resources are allocated appropriately across criminal justice agencies.⁴¹ A public defender office would provide valuable information to this process that is currently unavailable. For example, discussions of local efforts to address jail overcrowding, possibly through the adoption of new pretrial release policies that would avoid the need to pay for construction of a new jail while maintaining community safety, occur without a key stakeholder group—the defense—at the table.

A Necessary Perspective on Systemic Issues

Appointed attorneys are not strategically positioned to seek recourse for chronic problems within the criminal justice system. They are paid on an hourly basis for representation and thus often are unable to engage in activities that lie outside the scope of their representation of their clients. In contrast, defender offices have the personnel and infrastructure to allocate staff to

investigate and monitor trends that affect substantial numbers of low-income defendants.

For example, Harris County's criminal justice system would benefit from an institutional defender that could monitor indigent defense practices affecting defendants released on bond. Individual criminal defense lawyers, such as Mark Bennett and Rob Fickman, have reported the following illegal practices in some Harris County courts:

- Judges refusing appointed counsel to indigent people released on bail based solely on their ability to post bond;
- Judges threatening to jail people on bail for not hiring lawyers; and
- Judges jailing people on bail for not hiring lawyers.⁴²

Judges who engage in these practices violate state law whether they deny an application based on bond status,⁴³ threaten to revoke a defendant's bond because she asked for a lawyer,⁴⁴ or delay ruling on a request for counsel while repeatedly resetting cases in order to pressure indigent defendants to relinquish their constitutional right to appointed counsel.⁴⁵ However, the private defense bar generally does not have contact with defendants if an appointment is not made and thus would be unable to intervene. Even if a private lawyer learns of a specific incident in which an appointment was illegally denied, she would have to volunteer her services in order to remedy the problem. In contrast, a public defender's office would have the staff and resources to

⁴² See Revisiting the Problem of the Working Poor, Defending People: the Tao of Criminal Defense Lawyering, <http://bennettandbennett.com/blog/2009/04/revisiting-the-problem-of-the-working-poor.html>; and Rob Fickman, Op-Ed., Judges Must Act to End Jail Overflow, HOUSTON CHRON., Aug. 9, 2009 at A11-12.

⁴³ TEX. CODE CRIM. PROC. art. 26.04(m).

⁴⁴ *Id.* at 1.051(c).

⁴⁵ *Id.*

⁴¹ JMI Report, *supra* note 13, at 22.

remedy and draw attention to these and similar problems.

Expertise on Defendants with Specific Needs

As discussed in the previous section, public defender offices enable attorneys to concentrate on specific areas of criminal law and thus provide expert services at all stages of a case's procedural life. This increased capacity for specialization also allows public defender offices to cater to defendants who have special needs. Such expertise is particularly needed in Harris County, where many defendants have cognitive deficiencies or mental illnesses. JMI's study revealed that a significant fraction of the County's inmates, 25 percent (2,500 detainees), "have some type of mental health problem, as indicated by the fact that they are prescribed psychotropic medications,"⁴⁶ and that 90 percent of these mentally ill inmates were repeat offenders—"a reflection of frequent 're-cycling' of many of these persons."⁴⁷

The proposed public defender office could contain eventually hire staff members dedicated to this subgroup of inmates. Other Texas jurisdictions have implemented similar programs. Travis County has created a public defender office to deal specifically with this

population and Dallas and El Paso have established mental health units within their public defender offices. These units are poised to identify appropriate resources to help defendants with mental health problems better manage their illness and reduce the likelihood that they will re-offend in the future. Probation officers and other law enforcement officials are not as well situated to address this group's needs. Defense attorneys are able to have confidential conversations with their clients, which in turn opens channels of communication about clients' current and prior behavior and treatment.

In this respect, opening a public defender office would enable Harris County to improve the quality of services provided to mentally ill defendants and perhaps generate a cost savings for local taxpayers. Harris County currently is spending \$16.3 million to house up to 2,148 prisoners in other counties⁴⁸ over a 201-day period from August 11, 2009 to February 28, 2010. Even a marginal impact on the size of the of the number of mentally ill defendants in the jail population would free beds in the county jail, thus reducing the need to hold inmates in other jurisdictions and decreasing spending by up to hundreds of thousands of dollars. Such results would inevitably be more easily achieved with a defense professional contributing to policy decisions.

⁴⁶ JMI Report, *supra* note 13, at 3.

⁴⁷ *Id.*

⁴⁸ Vince Ryan, Harris County Attorney, Harris County's Response to U.S. Dep't Just., Civil R. Div. June 4, 2009 Civil Rights of Institutionalized Persons Act Findings Letter of: Harris County Jail, 145 & n. 352 (Aug. 24, 2009) [hereinafter Harris County Response to DOJ].

FINANCIAL ADVANTAGES OF A PUBLIC DEFENDER SYSTEM

Although creation of a public defender office will require an initial investment by local taxpayers related to procuring office space and equipment, state grant resources allocated by the Task Force on Indigent Defense may be available to offset this initial expense and help pay public defender salaries for several years. The Task Force currently awards discretionary grants for public defender offices that decrease incrementally over a four-year period (80% of the program's funds coming from the state in year 1, 60% in year 2, 40% in year 3, and 20% in year 4). This payment scheme defrays county expenses when they are likely to be highest and allows for an easy transition to a fully operational public defender system.

Research on existing public defender offices within Texas indicates that, once established, these offices do not significantly raise indigent defense spending and in fact generate savings in other areas of the criminal justice system. PPRI's study on the feasibility of public defender offices in Texas compared indigent defense expenditures in counties that operated public defender offices prior to passage of the Fair Defense Act in 2001—Colorado, Dallas, El Paso, Webb, and Wichita—to expenditures in the rest of the state. Its analysis found that public defender offices have three notable advantages over assigned counsel systems: budget predictability, decreased administrative costs, and increased cost effectiveness. Since the report's issuance, public defender offices also have been shown to reduce jail expenses in other Texas counties.

Financial Predictability

One major advantage of public defender offices is that they allow county governments to more accurately forecast their indigent defense expenses. Unlike appointed counsel, who bill the county on a case-by-case basis, public defender offices are able to reallocate staff according to changes in caseload and absorb fluctuations in the number of clients they

represent without affecting their bottom line. PPRI's feasibility study reveals evidence of this flexibility. Between 2003 and 2004, the number of misdemeanor appointments in Texas grew by 23%, yet public defender costs increased by only 7% during this time period.⁴⁹ This budgetary stability is clearly beneficial to county government officials who struggle to predict local indigent defense expenses and who often are required to accommodate unpredicted mid-year changes in indigent defense expenditures. Although indigent defense costs have been rising within Harris County at a steady rate over the past four years, this financial predictability would allow the County to "lock in" at a given rate and make appropriate adjustments in subsequent fiscal cycles.

Decreased Administrative Costs

A public defender office would "dramatically reduce the number of decisions judges have to make about attorney appointments, training and experience qualifications, caseload management, and fee vouchers,"⁵⁰ and thus generate a savings in the time and money spent by court officials to screen private attorneys seeking appointments, assign cases to appointed counsel, and review attorney invoices. Creation of a public defender office that is responsible for a significant proportion of the County's indigent defense needs eliminates the need for many of these judicial decisions in individual cases, which in turn translates into reduced administrative costs.

Cost Effectiveness

Despite having budgets that include expenses such as overhead, attorney and staff benefits, and office equipment, many public defender offices reduce the cost of indigent representation. PPRI's study found that the

⁴⁹ PPRI study, *supra* note 32, at 6.

⁵⁰ TASK FORCE ON INDIGENT DEF., TEX. OFF. CT ADMIN., BLUEPRINT FOR CREATING A PUBLIC DEFENDER OFFICE IN TEXAS 7 (2008) [hereinafter *Blueprint 2008*].

attorney costs per case were significantly lower with a public defender office than under an assigned counsel system. During the 2003 fiscal year, the aggregate cost of a case to which a public defender office was assigned was less than cases to which private counsel was appointed: Colorado (\$503 vs. \$547), Dallas (\$184 vs. \$347), El Paso (\$348 vs. \$363), Travis (\$355 vs. \$380), Wichita (\$308 vs. \$364).⁵¹

Reduced Jail Expenses

Establishment of a public defender office could substantially affect the Harris County jail population. Although Harris County has an efficient, front-end case processing system, defendants linger in jail for extended periods while their cases are pending.⁵² According to information compiled by the Texas Commission on Jail Standards, as of August 2009 more than half of Harris County's 10,000 inmates were pretrial detainees.⁵³

Public defender offices in other Texas jurisdictions have been able to substantially reduce their county jail populations by eliminating procedural roadblocks to case resolution, which in turn has decreased the number of defendants housed in county jails at any given time. For example, the Hidalgo County Public Defender Office reduced the average number of days between arrest and disposition of an imprisoned misdemeanor defendant's case from 15 to 11 days.⁵⁴

Similar results also have been achieved by the Kaufman County Public Defender Office and the Val Verde Regional Public Defender, which decreased the overall jail population in each of their jurisdictions. The Kaufman County Public Defender Office cleared a backlog of cases within its first year of operation and reduced the county's average jail population

from 306 to 246 inmates.⁵⁵ Val Verde experienced a similar drop in county jail prisoners. Eleven months after it opened, the regional jail population plummeted over 20% from 78 to 61 persons. The local sheriff specifically attributed this population reduction to the case efficiencies instituted by the Public Defender Office, which resolves cases at a faster rate than the private bar.⁵⁶

Implementation of similar reforms in Harris County could lead to a comparable decrease in its jail population. This past August, the Commissioners Court entered into agreements to transfer inmates to Newton (up to 872 prisoners), Bowie (up to 500 prisoners), Jefferson (up to 376 prisoners), and Dickens (up to 400 prisoners) Counties. Under the terms of these agreements, Harris County will pay approximately \$16.3 million to house up to a total of 2,148 prisoners from August 11, 2009 to February 28, 2010 (201 days).⁵⁷ The average paid each county per inmate varies between \$36 and \$40.85 per inmate per night. Reductions in pretrial detention therefore could generate a direct savings in dollars spent housing inmates in other jurisdictions.

In addition to reductions in pretrial detention rates, public defender offices also have reduced taxpayer spending on post-disposition detention. Under Texas law, individuals who are sentenced to a term of detention of less than 10 years may remain in county custody through final resolution of their appeal.⁵⁸ Bexar County's Appellate Defender Office has been successful in shrinking the number of post-conviction days individuals spend in county jail by expediting court proceedings and implementing filing deadlines that often are in advance of the 30-day

⁵¹ TASK FORCE ON INDIGENT DEF., TEX. OFF. CT ADMIN., BLUEPRINT FOR CREATING A PUBLIC DEFENDER OFFICE IN TEXAS APP. A (2005).

⁵² JMI Report, *supra* note 13, at 9.

⁵³ TEX. COMM'N JAIL STANDARDS, JAIL POPULATION REP. (Aug. 2009), *available at*

<http://www.tcjs.state.tx.us/docs/abrreprt.pdf>.

⁵⁴ Blueprint 2008, *supra* note 50, at 8.

⁵⁵ *Id.* at 34.

⁵⁶ *Id.* at 8.

⁵⁷ Harris County Response to DOJ, *supra* note 50, at 145-6 & n. 352 (citing Exhibits 1-5: interlocal agreements with Newton (\$6,358,610), Bowie (\$4,106,250), Jefferson (\$2,575,075) and Dickens County (\$3,285,000)).

⁵⁸ TEX. CODE CRIM. PROC. art. 42.09(3) ("If a defendant is convicted of a felony and sentenced to death, life, or a term of more than ten years in the Texas Department of Criminal Justice and he gives notice of appeal, he shall be transferred to the department on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals.")

time period allowed under the Rules of Appellate Procedure. These innovations have decreased the average time inmates spend in Bexar County custody after conviction from six months to 55 days.⁵⁹ As a result, inmates are transferred to the Texas Department of Criminal Justice (TDCJ) more quickly, where they are able to accrue good conduct time for an early release, and the County yielded a \$531,000, savings in incarceration costs between October 2007 and August 2008 alone.

Harris County clearly could benefit from a similar program. Currently, Harris County's jail holds 102 convicted felons who have been sentenced to a prison term of ten years or less

and are in county custody while awaiting final judgment in their appeal.⁶⁰ A substantial portion of this group—62 prisoners—has had appeals pending for six months or longer.⁶¹ Prompt transfer of these individuals to state custody would enable Harris County to free up much-needed bed space and eliminate some of the money currently spent housing inmates outside of the jurisdiction. For example, if the appellate division of the proposed public defender office is able to make a just ten percent decrease in post-conviction population—a decrease of 10 prisoners—Harris County would save at least \$10,800 per month in money paid to other jail systems.⁶²

⁵⁹ THE SPANGENBERG GROUP ET. AL., AN EVALUATION OF BEXAR AND HIDALGO COUNTY PUBLIC DEFENDER OFFICES: A FINAL REPORT 18-19 (May 15, 2009), available at <http://www.courts.state.tx.us/tfid/pdf/Bexar%20&%20Hidalgo%20Final%20Report%205-27-09.pdf>.

⁶⁰ Phone Interview with Sgt. Sharon Harper, Strategic Planning Division, Harris County Sheriff's Office (Sept. 22, 2009).

⁶¹ *Id.*

⁶² This figure was calculated using the minimum amount spent housing a prisoner in other jurisdictions, \$36 per night

CONCLUSION

A public defender office will offer a number of advantages over Harris County's current indigent defense delivery system. It will provide several institutional safeguards such as increased attorney accountability, caseload controls, and greater access to resources that place the defense on an equal footing with the prosecution. A public defender office also will be positioned to advocate for systemic solutions to problems that affect large numbers of indigent defendants and provide an institutional stakeholder perspective that is currently unrepresented in Harris County public policy discussions. Finally, a public defender office offers fiscal benefits including budget predictability and increased cost effectiveness, and also could defray criminal justice spending in other areas of the criminal justice system.