

HEARING TEN

The Role of Public Defense

June 2, 2020

The following summary is intended to provide an overview and highlights of the testimony and discussion during the hearings. For a full and detailed account of the hearings, please refer to the [Commission website](#) and the audio recordings and transcripts located there.

The Role of Public Defense, June 2, 2020

First Panelist: *Geoffrey Burkhart, Executive Director, Texas Indigent Defense Commission (TIDC)*

Highlights:

- The Texas Indigent Defense Commission (TIDC) is a state entity that funds, oversees, and improves public defense throughout Texas, including public defender offices. I'd like to talk about three things today: Why Texas cares about public defense, what's wrong with public defense, and what this Commission can do to help.
- We care about public defense because it is integral to public safety: Public defenders help to lower recidivism. Criminal justice isn't the best place to deal with issues like mental health, homelessness, or substance abuse. Public defenders connect their clients with services for these issues, keeping them out of jail and keeping the public safe.
- Public defense is also integral to fairness. When a person's liberty is at stake, we need to get things right. By making sure we get it right, public defenders restore trust in the law, which is at a low point right now.
- Public defense saves taxpayers money on jail and prison beds and recidivism—thousands of dollars per case, even in misdemeanor cases.
- Only about half of American counties have a public defender office. In Texas, it's only 40 counties of 254, but in those 40 counties we see the results in supervision, case management, support services, training, quality assurance, and accountability. In other counties, we spend money but we don't know what we get in return. Cases are assigned ad hoc, often for a flat fee.
- TIDC has built a public defender office that takes death penalty cases in 185 counties. These counties opted in; it was not a state mandate.

Recommendations:

- Federally fund state-level public defense. Public defense is a federal mandate but has never been federally funded. The Commission should recommend that it be tied to accountability measures like data collection and building and improving public defender offices.
- Create a federal entity focused on public defense. This entity could collect data and provide funding, publications, presentations, training, and resources for and about public defense.
- Ensure there's a public defense partner at every table.

Second Panelist: *Douglas Wilson, Chief Public Defender, City of Aurora, Colorado*

Highlights:

- I'm also going to talk about three things today: the need for consistency and sufficiency in funding public defender systems, enforceable workload caps, and consistent and sufficient training to ensure we meet our constitutionally mandated representation requirements.
- Since *Gideon v. Wainwright* in 1963 and *Powell v. Alabama* in 1932, the U.S. Supreme Court has recognized that everyone is entitled to effective assistance of counsel if charged with a jailable criminal offense. We have developed a variety of delivery systems—public defenders at municipal, county, or state levels, managed assigned case counsel, low-bid contracts, court appointments. We don't have a federal mandate on how indigent defense should be funded and provided for; this has caused severe resource deficiencies in some areas.
- Document 1 attached to my written testimony, "The Ten Principles of the Public Defense Delivery System," states that there should be parity of resources and staffing between defense counsel and prosecution. There never has been, and yet you will never find a more dedicated and compassionate group. Attachment 2 is a public defender's letter about the work they have done during the pandemic, helping people stay out of jails and prisons.
- Research has clearly indicated that the caseload standards are insufficient. We're at a crisis level, and failure to address workloads is going to result in more convictions being overturned, slower movement of cases, and less effective assistance of counsel claims, leading to more people in overcrowded penal institutions.
- Our ability, training, and experience much match the complexity of the case. The practice of criminal defense has become significantly more complex—for example, we have to advise on immigration consequences. We have to know about DNA, capital jury selection, a multitude of new offenses, and the local nuances of each individual jurisdiction.

Recommendations:

- Look at a federally supported, standardized program ensuring parity of funding—perhaps the creation of an Office of Indigent Defense Improvement within the DOJ.
- Support a national workload study and standards to set caps on how many cases and how much work people within the public defense system can handle.
- Consider a federally supported and standardized training program to be offered to public defenders across the country.

Third Panelist: *Carlos Martinez, elected Public Defender, Miami-Dade County, Florida*

Highlights:

- My three topics are adequate funding of public defender offices; law enforcement working with public defender offices, particularly on community relations projects; and the creation and funding of an Indigent Defense Improvement Office within the DOJ.
- I became Chief Public Defender in 2009, during the recession. The budget for my office, which serves 2.7 million residents, had been slashed 14%, while the number of felony cases had increased 19%. Total new cases assigned to my office had risen to an all-time high of 113,000 cases; my attorneys could not even speak to all the clients they were assigned to represent, let alone investigate or prepare cases. We challenged our untenable situation in the Florida Supreme Court and won, but in the meantime, thousands of individuals were negatively impacted by our inability to provide adequate representation.

- Without extra funding, we needed help from outside organizations, one of which was local law enforcement. Our working relationship with our county and jail helped us eliminate wasteful driving time for our attorneys—we used our IT funding to install secure videoconferencing, with the full support of our corrections department. They also expanded the number of phone lines directly connected to our office and made calls there toll-free. Phone and video calls reduce case preparation time, complaints, and days spent in jail, leading to cost savings for the county.
- Since then, Miami-Dade County has closed three jails and not replaced them. Our efforts led to significant reductions in jail population, and the video conferencing equipment has enabled us to continue representing our clients during the pandemic.
- We have also worked with law enforcement on community projects. The Play It Smart program, based on a program NOBLE put together in the 90s, educates young people about their rights and responsibilities during law enforcement encounters. We also work on officer education, teaching at the police academy about the serious consequences of an arrest and involvement with the criminal and juvenile justice systems. And we work together with law enforcement on the Redemption Project to seal and expunge criminal records and restore civil rights.

Recommendations:

- Support adequate funding of public defender officers.
- Law enforcement should reach out to the local chief public defender to explore ways to improve the administration of justice and public relations.
- Create and fund a public defense assistance office within the DOJ, with grant funding authority that is not competing with law enforcement for funding. It could serve as a clearinghouse for best practices and lessons learned.

Fourth Panelist: *Carlos Martinez, Mark Stephens, former elected Public Defender, Knox County, Tennessee*

Highlights:

- My presentation is more on the micro level—I'd like to talk about a best practice called client-centered holistic representation, a model used in Knoxville for 16 years.
- Most people who are enjoying stability in life—familial support, job, housing, mental and physical health—don't commit much crime. People living in chaos and dysfunction can get to a place where engaging in criminal activity seems viable under the circumstances.
- A client's first arrest is an opportunity for them to recognize they need to make a change—they're ashamed and embarrassed their behavior has landed them in jail, and they're contemplating behavior modification, but don't know how to bring it about.
- That's where the public defender can come in. Public defenders have better relationships with their clients than other parts of the criminal justice system, and they can offer clients something other than the carrot-and-stick approaches used by judges, district attorneys, probation and parole officers. An interdisciplinary approach that includes a lawyer and a social worker empowers the client to gain control over their life.
- Knox County implemented this model in 2003; currently, Harvard University's Access to Justice Lab is conducting a random control trial to measure its success, so we'll soon have solid findings.

In 2012, however, we conducted an in-house study with a sample group of 1,000 clients: a high-risk group that worked with social workers, and who presented with histories of difficulty maintaining stability in the community following incarceration, failed attempts at treatment, employment, or community supervision; and a low-risk group of similarly-charged clients who had not engaged with social workers during their previous representation. This sample group was followed for three years.

- The study found that the high-risk clients incurred .81 fewer total misdemeanor arrests during the follow-up period, and especially type A misdemeanors, than the lower-risk group that did not have the benefit of social workers. If we assume a minimum of one day of jail for each arrest, that's a cost savings of, at minimum, \$64,650 in savings; if we assume maximum sentencing, it's a savings of \$23,506,000.

Recommendations:

- Consider creating a national public defender office within the DOJ to identify and study best practices such as the client-centered holistic representation model and replicate them throughout the country.

Question-and-Answer Session, June 2, 2020

Q: [Ashley Moody for Mr. Stephens]: As a former judge, I was amazed by the services offered by the public defender's office that didn't necessarily fall within their roles as attorneys—hours finding mental health resources, etc. Do you find that the savings in attorney time equates to the social worker salaries to assist?

A: [Stephens]: Our office is fortunate that the local government has made a significant financial contribution, in addition to the bulk of our funding which comes from the state. And we have found that the social workers' work on behalf of the clients goes directly to the county in the cost of folks not reoffending, not going to jail. And of course the reduction in recidivism is a public safety benefit—and when they do reoffend they reoffend on a less serious note than when they first came to the public defender's office. So the savings has justified the cost of the social workers and allowed us to expand our number of attorneys.

Q: [Ashley Moody, follow-up for Mr. Stephens]: Did your district have specialty diversionary courts, such as substance abuse, mental health, or veterans' courts? And did you find that social workers were helpful to clients completing the requirements of those diversionary courts?

A: [Stephens]: At the time we implemented the model we did not, but we do have a drug court and veterans' court now, and we worked with our local judges and community members to create the veterans' court. The model has opened up opportunities that wouldn't have existed otherwise.

Q: [Nancy Parr for Mr. Wilson and Mr. Burkhart]: When caseloads locally get too high for my public defender's office the judges just appoint outside counsel and they stop taking cases. Well, for prosecutors, we don't get to do that. So even though a caseload standards study might say we should only have so many cases, we're going to have more, and that could lead to ethical problems. Are you aware of successful workload studies that have turned into more funds for public defenders and for prosecutors, like, jointly? I would also like to hear about tying the money to accountability—I think that's hard to define, at least for prosecutors, because there are some people who think success is determined by number of convictions and that's not true. And for public defenders it's not a not guilty verdict all the time.

A: [Wilson]: I didn't mean to suggest I don't think prosecutors ever get their budgets cut. Let's talk about the State of Colorado—we're a state system, and prosecutors are local elected officials. We started doing workload studies in 1996—it's very simple math; we track time. And while the studies were never sufficient they were helpful and did get us funding. For our funding agency, which would be our state joint budget committee, we could show that for this type of case, and we had X number of those cases, it takes this many hours which equals this many lawyers. And the legislature appreciated that it was simple math. We don't always get what we ask for—there's such a diverse group of prosecutors across the state, metro areas and frontier counties that still have rustling. You don't have rustling in Denver. And that made it difficult to do a joint workload analysis. But you've got to get away from a caseload system and talk about workloads---and most jurisdictions don't do that. So I would welcome the opportunity for a nationwide standard for prosecutors, judges, and defense counsel about what a workload looks like, because until we figure that out we don't know how much funding is required to ensure everyone gets due process.

A: [Burkhart]: With workloads, we built new public defender offices in Texas with built-in workload standards; we have caseload limits in every office we build. There's a book by Norman Lefstein, dean of the University of Indiana Law School, called *Securing Reasonable Caseloads*, which talks about how there's been a tougher time getting workload limits for prosecutors. As to accountability, you're right that it can't be tied to dismissals, just like prosecutors' performance shouldn't be simply tied to convictions. Some of the metrics we talk about are caseloads, use of investigators, client visitation, communication with clients, stacking ratios, use of training, counsel at first appearance. Do you have a proper instrument in place to sort the people who have a right to counsel under the Sixth Amendment and qualify for an attorney from those who don't.

Q: [David Rausch for Mr. Martinez]: Can you expound on the measurable impacts of the Play It Smart program and the police academy trainings?

A: [Martinez]: The first time we did the officer training was probably close to 15 years ago with the school police; the chief asked me to really describe as much as possible the consequences of an arrest and conviction. At the same time, the school board had been contemplating changes to their zero-tolerance policies to try to reduce misdemeanor arrests at the schools. Since we first started having that discussion, in two years the arrest rate in the school system went from 2,200 to 800 a year. It's still a lot, but that was tangible evidence the officers were taking consequences into consideration, and it's an extra tool to recognize what discretion officers have. In the Miami-Dade Police Department, we've been doing training for four years; it's reached about 300 officers, or 10% of the department. We haven't measured results, but it does help the officers know that the public defender has a part in prevention.

What I found fascinating is that it was not my idea to train the officers—the chief saw a community training and invited me in. But the officers were able to find out not just the consequences, but what the legal reforms need to be, because the officers themselves recognized that some things have lifetime consequences that shouldn't. One of those things in Florida is that a criminal record stays with you forever. It's important for officers to see what the challenges are, some of the things they see in communities that they have no explanation for.