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. Cronic, 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 Cronic 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.

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**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.