

# THE RIGHT TO COUNSEL IN MISSISSIPPI

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## EVALUATION OF ADULT FELONY TRIAL LEVEL INDIGENT DEFENSE SERVICES



MARCH 2018



SIXTH  
AMENDMENT  
CENTER

The Right to Counsel in Mississippi: Evaluation of Adult Felony Trial Level  
Indigent Defense Services  
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SIXTH AMENDMENT CENTER  
P.O. Box 15556  
Boston, MA 02215  
[www.sixthamendment.org](http://www.sixthamendment.org)

#### PREPARED BY

The Sixth Amendment Center (6AC) 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 to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding at all critical stages of a case.

For this evaluation, the 6AC worked in partnership with the Defender Initiative of the Seattle University School of Law (SUSL). 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.

#### DISCLAIMER

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# EXECUTIVE SUMMARY

Preeminent in the Bill of Rights is the idea that no one's liberty, life, or property can ever be taken away in our criminal justice systems without the process being fair. Since the adoption of the Sixth Amendment to our federal Constitution, the U.S. Supreme Court has clarified that every indigent person who is accused in any federal or state court of a crime for which they could potentially lose their liberty must receive effective assistance of counsel at all critical stages of their case.

At the request of the Mississippi Public Defender Task Force, the Sixth Amendment Center, in partnership with the Defender Initiative at Seattle University School of Law, evaluated adult felony trial level indigent defense services throughout Mississippi. The Task Force selected ten counties as a representative sample of Mississippi's diversity in population size, geographic location, rural and suburban and urban centers, and types of indigent defense representation delivery systems used. Those counties were: Adams, Clarke, DeSoto, Forrest, George, Harrison, Hinds, Leflore, Lowndes, and Pearl River.

Chapter I (pages 3 – 9) presents background information and sets out the criteria used in this assessment. Hallmarks of a structurally sound indigent defense system include the early appointment of qualified and trained attorneys, with sufficient time and resources to provide effective representation, under independent supervision. In *United States v. Cronin*, the U.S. Supreme Court explains that, if any of these systemic factors are absent, a court should presume that attorneys working within that system are presumptively providing ineffective assistance of counsel. As detailed in the report, Mississippi's local governments do not uniformly ensure these hallmarks are met.

**FINDING #1: The State of Mississippi has no method to ensure that its local governments are fulfilling the state's constitutional obligation to provide effective assistance of counsel to the indigent accused in felony cases in its trial courts.**

Chapter II (pages 10 – 17) examines the State of Mississippi's responsibility to ensure effective assistance of counsel. Providing the Sixth Amendment right to effective counsel is a state obligation under the due process clause of the Fourteenth Amendment. Nonetheless, Mississippi has made its counties and cities responsible for providing trial level Sixth Amendment services in all but capital cases.

When a state chooses to place this responsibility on its local governments, then the state must guarantee that the local governments are not only capable of providing

adequate representation, but also that they are in fact doing so. The State of Mississippi has no method of ensuring that its local governments meet the state's constitutional obligations and, except in capital cases, has not established any statewide standards for the provision of Sixth Amendment right to counsel services in its trial courts. The absence of institutionalized statewide oversight does not necessarily mean that all right to counsel services are constitutionally inadequate. It does mean that the State of Mississippi simply does not know whether its services meet the requirements of the Sixth Amendment.

Chapter III (pages 18 – 28) explains the structural framework of Mississippi's indigent defense systems at the local level. The legislature requires that counsel be provided either through a public defender office or through appointment of individual private attorneys. Whichever system is used, the circuit court judges presiding in a county select the attorneys who represent indigent people charged with felonies, within the budget allotted by the county board of supervisors.

In those counties that have established a public defender office, the circuit or senior circuit judge selects an attorney to serve as the full-time or part-time public defender. Only seven of Mississippi's 82 counties have established public defender offices, including Forrest, Harrison, Hinds, and Pearl River which were studied closely for this evaluation.

Where the county board of supervisors does not establish a public defender office or when the public defender office has a conflict of interest, the circuit court judge appoints an individual attorney to represent an indigent defendant charged with a felony. The attorney is paid out of the county's general fund. The court may approve compensation in whatever manner (hourly rate or fixed fee) and at whatever amount the appointed attorney is willing to accept, but the maximum amount that an attorney can be paid for a single felony case is \$1,000.00 plus reimbursement of actual expenses.

Only 12 counties in the state, including Leflore, provide representation to indigent felony defendants exclusively through appointed private attorneys who are paid an hourly rate. The remaining 63 counties, including Adams, Clarke, DeSoto, George, and Lowndes, provide the right to counsel through appointed private attorneys who are paid a fixed fee to represent an unlimited number of indigent felony defendants.

**FINDING #2: The State of Mississippi does not ensure the independence of the defense function from undue judicial interference in the selection and compensation of felony indigent defense attorneys.**

Chapter IV (pages 29 – 44) assesses the ten counties selected by the Task Force against the constitutional obligation to ensure the independence of the defense function. Far from ensuring that independence, the State of Mississippi statutorily imposes undue judicial interference with the right to counsel for indigent defendants. It does so in two primary ways: by requiring judges to hand-select the attorneys who are paid to provide representation to indigent defendants, rendering the defense attorneys beholden to the judge for their livelihood; and by allowing judges to enter into payment agreements with indigent defense attorneys that create a conflict of interest between the defense attorney's financial self-interest and the criminal case interests of the indigent defendants whom they are appointed to represent.

Attorneys in judicially controlled indigent defense systems often, consciously or unconsciously, follow or adjust to the needs of each judge in each court, rather than focus on providing constitutionally effective services for each and every defendant. Fearing the loss of their job if they displease the judge who hires them, defense attorneys bring into their calculations what they think they need to do to stay in the judge's favor. When public defense attorneys take into consideration what must be done to please the judge in order to get their next appointment or hold on to their contract, by definition they are not advocating solely in the interests of the client, as is their ethical duty.

In counties with a public defender office, the judges are supposed to choose the public defender from a list of attorneys recommended by the local bar association, but in the counties studied for this report, there was no indication that judges follow this direction. The designated public defender is statutorily authorized to choose the assistant public defenders, but in only two of the four public defender offices evaluated in this study does the public defender select the assistant public defenders independently of the judges. Thus, even where the legislature has attempted to impose a degree of independence from the judges in selecting attorneys to represent the indigent accused, this is rarely occurring in practice.

In counties where private attorneys are appointed, the circuit court judges by and large decide how much money the attorneys will be paid to represent indigent felony defendants.

Where judges choose to pay attorneys an hourly rate, because an attorney cannot be paid more than \$1,000 in a single defendant's case, the number of hours an attorney will devote to each indigent defendant's case is determined by the hourly rate of pay set by the judges. For example, if the judges set pay at the relatively high rate of \$100 per hour, the attorney cannot be paid for any more than 10 hours of work in a single case, no matter how many hours a client's legal interests require. If the attorney devotes even a single minute more than 10 hours, he is donating his time for free to represent the indigent defendant.

Once the attorney reaches the number of hours for which he can be paid, a capped hourly rate creates an incentive 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 motion hearings or a trial, or preparing a sentencing memorandum. Additionally, because an attorney can earn up to \$1,000 for each appointed case, it is in the attorney's own financial interest to accept as many appointed cases as possible without regard to the attorney's ability to provide effective assistance of counsel to each individual indigent defendant. In eight of the 10 counties studied closely in this evaluation, some or all of the attorneys appointed to represent indigent felony defendants are paid capped hourly rates that create a conflict of interest between the attorney's own financial interest and the legal interests of the indigent defendants whom he is appointed to represent.

Where judges choose to pay attorneys a fixed fee, the attorney is responsible for representing an unlimited number of indigent felony defendants in return for a certain amount of money. Because an attorney is paid exactly the same amount no matter how few or how many cases he is appointed to handle, and no matter how few or how many hours he devotes to each 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 is paid \$24,000 a year to represent indigent felony defendants, and if his indigent felony cases take up all of his available working hours, then that attorney cannot earn more than \$24,000 in a year. On the other hand, if this attorney devotes only half of his working hours to his 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 fixed 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. It also incentivizes the attorney to favor the legal interests of his paying clients or other employment over the legal interests of the indigent defendants he is appointed to represent.

The situation is worse yet if the attorney is not reimbursed for overhead and case-related expenses. In our example, this means any resources devoted to an indigent defendant will come out of the attorney's \$24,000 compensation. This creates a disincentive for the attorney to, for example, hire an investigator or experts, accept toll calls from a client in the jail, or incur any overhead costs that benefit indigent defendants (even such as secretarial time, legal research capability online or through books, or malpractice insurance), without regard to whether the resources are necessary to provide effective representation.

Fixed fees create a conflict of interest between the attorney's own financial interest and the legal interests of the indigent defendants whom he is appointed to represent, and also create a conflict between the legal interests of an attorney's paying clients and those of his indigent clients. Yet throughout Mississippi, this is the method predominantly used to pay the private attorneys who are appointed to represent indigent felony defendants.

**FINDING #3: Outside of death eligible cases, there are no standards or oversight in Mississippi to ensure that felony indigent defense attorneys have the necessary qualifications, skill, experience, and training to match the complexity of the cases they are assigned.**

Chapter V (pages 45 – 52) assesses the qualifications of and the training provided to felony indigent defense attorneys. 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 graduate enters the legal profession automatically knowing how to effectively handle a felony criminal case. Yet, Mississippi does not require any particular procedures for selecting the attorneys who provide representation to indigent defendants and does not mandate that they have any particular qualifications for being assigned to any cases (except death penalty cases). In other words, even an attorney newly graduated from law school and having just passed the bar examination can be assigned to represent an indigent defendant in the most serious of non-capital felony cases where the defendant faces life in prison if convicted.

Mississippi also does not require that attorneys appointed to represent indigent felony defendants receive any on-going training in criminal defense representation. These attorneys are subject only to the general requirement applicable to all Mississippi lawyers of completing twelve hours of continuing legal education each year, with one of the hours devoted to ethics or professionalism.

In the absence of any mandatory requirements, circuit judges decide what if any qualifications the attorneys who provide representation to indigent felony defendants have. Throughout the ten counties studied closely in this evaluation, attorneys just out of law school, or with no criminal experience at all, are selected by the judges to represent indigent defendants in the full range of felony cases from the least to most serious. Once selected, the attorneys are not required to have any on-going training, and only one of the representative jurisdictions provides for its attorneys to receive criminal defense training. None of the counties have any regular process for removing an ineffective attorney.



**FINDING #4: Throughout the State of Mississippi, indigent defendants charged with felony offenses are denied the right to counsel at the critical pretrial stage between arrest and arraignment following indictment, a period that is commonly at least a few months and occasionally as long as a year or more.**

Chapter VI (pages 53 – 81) explains how Mississippi fails to provide the assistance of counsel to indigent felony defendants during the lengthy period between arrest and arraignment following grand jury indictment – what many in Mississippi describe as defendants falling into a “black hole.” The U.S. Supreme Court explains in *Cronic* that the actual denial of counsel at any critical stage of a case is so likely to prejudice the accused that “no amount of showing of want of prejudice would cure it.”

In 2008, the Court explained in *Rothgery v. Gillespie County* that the Sixth Amendment right to counsel attaches when “formal judicial proceedings have begun.” 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.” For all defendants, the commencement of prosecution, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” signals the beginning of formal judicial proceedings.

When a person is suspected of a felony offense in Mississippi, he will be arrested. Every person arrested on a felony charge in Mississippi has a right to an initial appearance before a judge within 48 hours, unless the defendant has been indicted by a grand jury or is released from custody prior to the initial appearance occurring. In 1986, the Mississippi Supreme Court made clear in *Page v. State* that the right to counsel attaches at the time this initial appearance is required to take place. And the U.S. Supreme Court declared in *Rothgery* that “[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’” of a case. Among other events defined as critical stages is the pre-trial period between this first appearance before a judge and the beginning of trial.

A defendant who is arrested for a felony and who has not been indicted by a grand jury is entitled to have a preliminary hearing. The preliminary hearing is a critical stage in a criminal case at which the indigent defendant has a right to counsel. Only a very small percentage of indigent defendants who are arrested on a felony in Mississippi ever have a preliminary hearing, because as a practical matter, the scheduling of a preliminary hearing is treated as a triggering mechanism to have some attorney present in court to represent an in-custody felony defendant for the limited purpose of securing a bond reduction. In all ten of the studied counties, felony defendants are almost always offered and accept a bond reduction in exchange for waiving their right to preliminary hearing.



For the small number of indigent felony defendants who actually have a preliminary hearing, in only two of the ten counties will the attorney who represents an indigent felony defendant at a preliminary hearing conduct any investigation to prepare for the hearing. Indigent felony defendants usually meet their preliminary hearing attorney for the first time at the courthouse on the day of the hearing for a brief 5 to 10-minute conversation. In most of the studied counties, the attorney appointed to represent an indigent felony defendant at a preliminary hearing is not, other than through coincidence, the attorney who will represent the defendant following any indictment subsequently returned by a grand jury.

Once a preliminary hearing is either waived or held, an indigent felony defendant in the ten closely studied counties is not represented by any lawyer until arraignment in circuit court after a grand jury indictment. The Mississippi Constitution requires that felony prosecutions be instituted by a grand jury indictment. A large amount of time can pass between an indigent felony defendant being arrested and/or bound over and a grand jury returning an indictment, and Mississippi law does not impose any limits on the amount of time that can take. On average, the delay between arrest and grand jury indictment in the ten studied counties ranges from two months to over a year.

As the Supreme Court said in *Cronic*, “the adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate.’” Yet the greatest majority by far of indigent felony defendants in Mississippi never have an attorney working on their behalf prior to their arraignment in circuit court. Instead, during the entire period between a felony arrest and the arraignment on indictment, indigent felony defendants fall into a “black hole” in which they are not represented by an attorney.

**FINDING #5: The State of Mississippi does not ensure that felony indigent defense attorneys have sufficient time and necessary resources, including investigators and social work services, to provide effective representation.**

Chapter VII (pages 82 – 98) considers the time and resources that public defense attorneys dedicate to their defendants. The Supreme Court in *Powell v. Alabama* noted that impeding the time available for counsel to consult with the client and prepare an adequate defense “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.” Insufficient time is, therefore, a marker of constructive denial of counsel. Further, the lack of adequate time may itself be caused by any number of things, including but not limited to excessive workloads or to contractual arrangements that create negative fiscal incentives for lawyers to dispose of cases quickly.

The U.S. Supreme Court further explained in *Cronic* that “[t]he right to the effective assistance of counsel” means the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.” 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.” If a defense attorney is either incapable of or barred from challenging the state’s case because of a structural impediment in the indigent defense system – “if the process loses its character as a confrontation between adversaries” – a constructive denial of counsel occurs. For an attorney to provide effective assistance of counsel to an indigent felony defendant, the attorney must have sufficient resources and time.

National standards explain that every defense attorney has a duty to independently investigate the facts of a client’s case. An attorney may have to call witnesses identified and questioned during this investigation to testify at trial, and the attorney must be prepared to controvert the witness’s testimony if they say something different on the stand. Because the attorney cannot testify, the attorney must always have an investigator present during witness interviews, so that the investigator can testify at trial if needed. Yet in almost all cases except murders, indigent felony defense attorneys in the studied counties never hire investigators and have no time to investigate cases themselves. The widespread failure across Mississippi to conduct an independent defense investigation on behalf of indigent felony defendants undermines the ability of appointed counsel to provide effective representation. It calls into question the integrity of the criminal justice system itself.

Attorneys who represent indigent felony defendants do not have access to or use other support services, such as social workers, paralegals, or – in many counties – even secretaries. Social work assistance can be critical to an attorney’s ability to provide effective assistance of counsel, both to obtain pre-trial release and to advocate for appropriate sentences.

**FINDING #6: Felony indigent defense attorneys in Mississippi consistently carry excessive caseloads that prevent the rendering of effective representation.**

National standards agree that, for a lawyer to provide effective assistance of counsel, the lawyer’s workload must be controlled. The National Advisory Commission on Criminal Justice Standards and Goals (“NAC”) created national caseload standards for defense attorneys as part of an initiative funded by the U.S. Department of Justice. NAC Standard 13.12 prescribes an absolute maximum numerical caseload limit of 150 felonies per attorney per year. 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). American Bar Association standards state that these national caseload standards established by the NAC should "in no event" be exceeded.

For a number of reasons involving lack of sufficient data collection, it is not possible to know the exact caseloads handled by indigent felony defense attorneys in Mississippi. First, no one is responsible at the state level for tracking the caseloads of the indigent defense attorneys. Second, while the Administrative Office of Courts data is a good beginning point, it does not currently capture the number of open indigent felony cases in each county and does not identify the attorney appointed in a given case. Third, in the sample counties, either no one is responsible for tracking the public defense lawyers' caseloads or the demands on their time, or the deficiency of their database undercuts supervisors' ability to do it. Fourth, while the clerk of court in each county can produce a list of the cases indicted for each term of court and the attorney of record in each case, these lists do not show whether an attorney is appearing in his private capacity or as appointed counsel. Fifth, even in the most sophisticated public defender office system, the data systems used do not produce accurate information about the attorneys' caseloads. Finally, in all but full-time public defender office systems, the indigent defense attorneys have private caseloads, accept appointments in other courts, and/or hold other employment, and there is no requirement for them to track what percentage of their time they actually devote to the representation of indigent felony defendants in a given county.

Without comprehensive caseload data, this report cannot measure the workloads of Mississippi's indigent defense attorneys. Based solely on the indigent defense attorneys' own descriptions of the number of indigent felony cases they handle, the percentage of their work hours devoted to those cases, and the other types and amounts of work they do, the majority of indigent defense attorneys in the ten sample counties have workloads significantly in excess of those allowed by the NAC national caseload standards.

Mississippi has exposure to being sued over its provision of indigent defense services. Between 2009 and 2017, courts in six other states have allowed civil class action lawsuits to go forward, where the plaintiffs allege that indigent criminal defendants are being systemically denied their right to counsel based on the same criteria used in this assessment. In each of these cases, the courts have concluded that indigent defendants do not have to wait until their individual criminal cases are concluded and then prove that they received ineffective assistance of counsel. Instead, the courts have held that indigent defendants may seek to vindicate their right to counsel before it is denied to them in the first place. Chapter VIII (pages 99 – 107) details these cases in the hope of educating Mississippi policymakers about how to avoid systemic litigation.

The final Chapter IX (pages 108 – 117) sets out recommendations.

**RECOMMENDATION #1: The Mississippi Legislature should enact legislation enabling the state to meet its Fourteenth Amendment obligation of ensuring Sixth Amendment services meet the parameters of effective indigent defense systems, as described in *United States v. Cronic*.**

Mississippi's own criminal justice policymakers are in the best position to craft a legislative solution that guarantees the effective right to counsel is provided to every indigent defendant in every courtroom in the state, in a way that accommodates the unique procedures and substantive law of the state, is fiscally responsible, and protects public safety; all toward the end of assuring that Mississippi's criminal justice systems produce fair, impartial, accurate, timely, and just outcomes. The Mississippi Public Defender Task Force should recommend legislation to ensure effective state oversight of indigent defense services, including:

- A state-level entity to promulgate standards that define how effective indigent defense services are to be provided, including at minimum: attorney qualification standards; attorney performance guidelines; attorney supervision protocols; time sufficiency standards; continuity of services standards whereby the same attorney provides representation from appointment through disposition; client communication protocols; and data collection standards.
- An entity to train criminal justice system actors about the requirements of the standards, so that they are implemented effectively and efficiently. While the standards must be the same statewide, implementation should allow for variations that accommodate local circumstances.
- A state-level entity to monitor and enforce compliance with standards throughout the courtrooms of the state.

**RECOMMENDATION #2: The Mississippi Office of the State Public Defender, along with any government body tasked with developing indigent defense standards, should work with parallel law enforcement, prosecution, judicial, and corrections bodies at the state and local level to:**

- i. **Determine effective, efficient, and fiscally responsible methods to track every individual case from commission of the offense through dismissal or completion of sentence;**
- ii. **Evaluate existing criminal justice processes and make systemic recommendations to ensure that counsel is provided to indigent defendants at every critical stage of a case after the right to counsel has attached; and**

**iii. Recommend statutory changes to decrease the overall need for right to counsel services through increased diversion and reclassification to make certain violations ineligible for incarceration.**

A systemic lack of accountability pervades not only Mississippi's indigent defense systems, but its broader criminal justice system as well. Defense attorneys statewide generally believe there is a lack of accountability for problems within the system. The defense attorneys do not coordinate with each other to advocate for improved processes and, in their own words, get "pushed around" by judges, law enforcement, and prosecutors as a result. The judges hold no power over the clerks of court, because clerks are elected, do not work for the judges, and sometimes have antagonistic relationships with them.

Criminal justice stakeholders and policymakers should come together to address this lack of accountability and the problems that have arisen in its wake. The answer to every government problem cannot be to simply increase spending. And, simply increasing funding for indigent defense would do nothing to alleviate the systemic pressures caused by intertwining aspects of law enforcement, prosecution, defense, and adjudication.

One area of discussion needs to be how best to decrease the need for indigent defense attorneys in the first place. The constitutional right to counsel attaches only to those criminal and delinquency cases where the defendant faces loss of liberty. A concerted effort focused on (i) increasing diversion out of the criminal justice system entirely for appropriate offenses and offenders and (ii) reclassifying appropriate petty and/or regulatory offenses to non-jailable violations are just two methods that should be considered.

**RECOMMENDATION #3: Through legislation or court rule, the State of Mississippi should ban payment agreements that cause conflicts of interest between the indigent defense attorney's financial self-interest and the legal interests of the indigent defendant.**

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“Equally as powerful as the State’s efficiency interest is the idea that the defendant should at the trial level be given a realistic and meaningful opportunity in fact to assert and enjoy all rights secured to him by the Constitution and laws.”

– Read v. State, 430 So. 2d 832, 841 (Miss. 1983)

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# CHAPTER I

## INTRODUCTION

### THE SIXTH AMENDMENT RIGHT TO COUNSEL

The adversarial system of justice is rooted in the very fabric of our nation. Once Americans threw off the shackles of tyranny in the Revolution, they created a Bill of Rights. All people, they guaranteed, are free to express unpopular opinions, or choose one's own religion, or take up arms to protect one's home and family, without fear of retaliation from the government.

Preeminent in the Bill of Rights is the idea that no one's life, property, or liberty can ever be taken away in our criminal justice systems without the process being fair. A jury made up of everyday citizens, protection against self-incrimination, and the right to have a lawyer advocating on one's behalf are all American ideas of justice enshrined in the first ten amendments to the United States Constitution and ratified by the states in 1791.

Over the ensuing 225-plus years, the U.S. Supreme Court has clarified that the Sixth Amendment requires effective assistance of counsel be provided, at all critical stages of a case in which the defendant may potentially lose their liberty, to all indigent people who are accused in all federal and state courts.<sup>1</sup>

### THE RIGHT TO COUNSEL IN MISSISSIPPI

Article 3, section 26 of the Mississippi Constitution establishes the due process rights guaranteed in criminal trials.

In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all

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<sup>1</sup> Gideon v. Wainwright, 372 U.S. 335 (1963) (felonies); Argersinger v. Hamlin, 307 U.S. 25 (1972) (misdemeanors); Alabama v. Shelton, 505 U.S. 654 (2002) (misdemeanors with suspended sentences); Douglas v. California, 372 U.S. 353 (1963) (direct appeals); Halbert v. Michigan, 545 U.S. 605 (2005) (appeals challenging sentence imposed following guilty plea where sentence not agreed to in advance); *see also In re Gault*, 387 U.S. 1 (1967) (children in delinquency proceedings facing loss of liberty).

prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself . . . .<sup>2</sup>

Mississippi's statutes require that "any person . . . arrested and charged with a felony, a misdemeanor or an act of delinquency" be afforded the opportunity to sign an affidavit of indigency and be represented by a public defender office or court-appointed attorney.<sup>3</sup> The Rules of Criminal Procedure ensure "[a]n indigent defendant shall be entitled to have an attorney appointed in any criminal proceeding which may result in loss of liberty."<sup>4</sup> An indigent person accused of crime is entitled to have "representation available at every critical stage of the proceedings against him where a substantial right may be affected,"<sup>5</sup> at both trial and appeal.<sup>6</sup>

Indigent representation in misdemeanor and delinquency cases is beyond the scope of this report, but Mississippi does guarantee a right to counsel for the indigent accused in these types of cases. For misdemeanors, while one statute limits provision of counsel to only those facing "confinement for ninety (90) days or more,"<sup>7</sup> another statute declares that "[n]o person determined to be an indigent . . . shall be imprisoned as a result of a misdemeanor conviction unless he was represented by the public defender or waived the right to counsel."<sup>8</sup> Children in Mississippi are guaranteed representation by counsel in delinquency proceedings.<sup>9</sup> Mississippi also provides a right to counsel in several ways that the U.S. Supreme Court has not yet held the federal Constitution to require.<sup>10</sup>

<sup>2</sup> MISS. CONST. art. 3, § 26.

<sup>3</sup> MISS. CODE ANN. §§ 25-32-9(1), 25-32-13, 99-15-15 (2017); *see also* MISS. R. CRIM. P. 7.3.

<sup>4</sup> MISS. R. CRIM. P. 7.1(b).

<sup>5</sup> MISS. CODE ANN. §§ 25-32-9(2), 99-15-15 (2017).

<sup>6</sup> *Jones v. State*, 355 So.2d 89, 91 (Miss. 1978) ("An accused is not only entitled to counsel at trial, but he is entitled to counsel on appeal from a conviction on the merits. If he is an indigent and unable to afford an attorney, then he is entitled to a court-appointed attorney at trial and on appeal. On the other hand, if he is able to afford an attorney at trial but subsequently is reduced to the status of an indigent, then he is entitled to have a court-appointed attorney to represent him on appeal.").

<sup>7</sup> MISS. CODE ANN. § 99-15-15 (2017).

<sup>8</sup> MISS. CODE ANN. § 25-32-9(1) (2017). The Rules of Criminal Procedure, enacted in 2017, further clarify that the right to counsel is to extend to all persons facing incarceration as a penalty for crime. MISS. R. CRIM. P. 7.1(b).

<sup>9</sup> MISS. CODE ANN. § 43-21-201 (2017).

<sup>10</sup> In criminal matters, indigent defendants must receive appointed counsel throughout the post-conviction proceedings in any case with a death sentence and in other post-conviction cases may receive appointed counsel for any evidentiary hearing. MISS. CODE ANN. §§ 99-39-23(1), 99-39-23(9) (2017). Indigent parents, guardians, and children may receive appointed counsel in youth court proceedings, including abuse, neglect, and termination of parental rights cases. MISS. CODE ANN. §§ 43-21-201, 93-15-113(b) (2017). A minor seeking to bypass parental consent for an abortion may receive appointed counsel. MISS. CODE ANN. § 41-41-55(2) (2017). People facing involuntary mental health commitments receive public counsel at various stages of the proceedings. MISS. CODE ANN. §§ 41-21-67(3), 41-21-83, 41-21-102(8) (2017).

## MISSISSIPPI'S COURTS WITH FELONY JURISDICTION

Mississippi's right to counsel is implemented in its courts. There is one state Supreme Court with nine justices who sit as the court of last resort.<sup>11</sup> There is one Court of Appeals with ten judges who hear those appellate cases assigned by the Supreme Court.<sup>12</sup>

In each of Mississippi's 82 counties, there can be four types of courts involved in felony<sup>13</sup> criminal prosecutions, and each of the courts may have one or more judges. In every county there is a circuit court that exercises jurisdiction over felonies after indictment by a grand jury.<sup>14</sup> In 21 counties there is also a county court that may or may not exercise some jurisdiction over felonies.<sup>15</sup> Every county has a justice court that has jurisdiction initially over all criminal arrests arising within the geographical boundaries of the county but outside of any city that has a municipal court judge.<sup>16</sup> All

<sup>11</sup> See generally MISS. CONST. art. 6, §§ 144-150; MISS. CODE ANN. §§ 9-3-1 *et seq.* (2017).

<sup>12</sup> See generally MISS. CODE ANN. §§ 9-4-1 *et seq.* (2017); MISS. R. APP. P. 16.

<sup>13</sup> Misdemeanor prosecutions typically occur only in municipal and justice courts, though a county court where one exists has concurrent jurisdiction over misdemeanors as well. See generally MISS. CONST. art. 6, § 171 (2017) (justice courts); MISS. CODE ANN. §§ 9-9-21 (2017) (county courts), § 21-23-7(1) (2017) (municipal courts). Juvenile delinquency proceedings, along with abuse and neglect cases, are handled in "Youth Court," which is part of the county court in those 21 counties that have them and otherwise the chancery court. See generally MISS. CODE ANN. §§ 43-21-101 *et seq.* (2017); see also *Trial Courts*, STATE OF MISS. JUDICIARY, [https://courts.ms.gov/Newsite2/trialcourts/tc\\_aboutthecourts.php](https://courts.ms.gov/Newsite2/trialcourts/tc_aboutthecourts.php) (last visited Dec. 15, 2017).

<sup>14</sup> See generally MISS. CONST. art. 6, §§ 152-158; MISS. CODE ANN. §§ 9-7-1 *et seq.* (2017). Mississippi has 22 circuit court districts with a total of 57 judges. *Trial Courts*, STATE OF MISS. JUDICIARY, [https://courts.ms.gov/Newsite2/trialcourts/tc\\_aboutthecourts.php](https://courts.ms.gov/Newsite2/trialcourts/tc_aboutthecourts.php) (last visited Dec. 15, 2017). All circuits except the 7<sup>th</sup> District (Hinds County) and the 18<sup>th</sup> District (Jones County) are made up of multiple counties. *Circuit Court*, STATE OF MISS. JUDICIARY, <https://courts.ms.gov/Newsite2/trialcourts/circuitcourt/circuitcourt.php> (last visited Dec. 15, 2017). Circuit courts have general criminal jurisdiction over all matters that are not "exclusively cognizable before some other court." MISS. CODE ANN. § 9-7-81 (2017); see also MISS. CONST. art. 6, § 156. The costs of criminal court prosecutions are funded by the counties, MISS. CONST. art. 14, § 261, however some circuit court operations are funded by the state, including office facilities, supplies, equipment, and support staff. MISS. CODE ANN. § 9-1-36 (2017).

<sup>15</sup> See generally MISS. CODE ANN. §§ 9-9-1 *et seq.* (2017). See also *Trial Courts*, STATE OF MISS. JUDICIARY, [https://courts.ms.gov/Newsite2/trialcourts/tc\\_aboutthecourts.php](https://courts.ms.gov/Newsite2/trialcourts/tc_aboutthecourts.php) (last visited Dec. 15, 2017). The following counties have a county court: Adams, Bolivar, Coahoma, DeSoto, Forrest, Harrison, Hinds, Jackson, Jones, Lamar, Lauderdale, Lee, Leflore, Lowndes, Madison, Pearl River, Pike, Rankin, Warren, Washington, and Yazoo. *Id.* County courts have criminal jurisdiction "concurrent with the justice court" and additionally as assigned by the circuit court. MISS. CODE ANN. §§ 9-9-21; 9-9-27; 9-9-35 (2017). Counties are primarily responsible for funding the operations of the county courts. MISS. CODE ANN. §§ 9-9-3; 9-9-11 (2017).

<sup>16</sup> See generally MISS. CONST. art. 6, § 171; MISS. CODE ANN. §§ 9-11-2 *et seq.* (2017). There are 82 justice courts with a total of 197 judges. *Trial Courts*, STATE OF MISS. JUDICIARY, [https://courts.ms.gov/Newsite2/trialcourts/tc\\_aboutthecourts.php](https://courts.ms.gov/Newsite2/trialcourts/tc_aboutthecourts.php) (last visited Dec. 15, 2017). Justice courts have criminal jurisdiction "concurrent with the circuit court of the county over all crimes occurring in the county whereof the punishment prescribed does not extend beyond a fine and imprisonment in the county jail." MISS. CODE ANN. § 99-33-1(2) (2017); see also MISS. CONST. art. 6, § 171. Counties are responsible for funding the operations of the justice courts. MISS. CODE ANN. § 9-11-5 (2017). Justice court judges are

municipalities have a municipal court that has jurisdiction initially over all criminal arrests arising within the geographical boundaries of the municipality,<sup>17</sup> however municipalities with a population of less than 10,000 are not required to appoint a judge or prosecutor for their municipal court,<sup>18</sup> in effect ceding authority to the county's justice court.

The Mississippi Supreme Court has authority to make rules governing the practice and procedure for trials and appeals in all lower courts.<sup>19</sup> During the course of this evaluation, the Mississippi Supreme Court for the first time promulgated rules of criminal procedure that apply uniformly in all trial courts, taking effect July 1, 2017.<sup>20</sup>

## THIS EVALUATION

In 2015, the Mississippi Public Defender Task Force ("Task Force")<sup>21</sup> requested the Sixth Amendment Center, in partnership with the Defender Initiative at Seattle

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required only to have a high school diploma. MISS. CONST. art 6, § 171.

<sup>17</sup> See generally MISS. CODE ANN. §§ 21-23-1 *et seq.* (2017). Mississippi has 237 municipal courts, each of which has one or more judges. *Trial Courts*, STATE OF MISS. JUDICIARY, [https://courts.ms.gov/Newsite2/trialcourts/tc\\_aboutthecourts.php](https://courts.ms.gov/Newsite2/trialcourts/tc_aboutthecourts.php) (last visited Dec. 15, 2017). Municipal judges have criminal jurisdiction over "municipal ordinances and state misdemeanor laws" and "as a committing court in all felonies committed within the municipality, and [with] power to bind over the accused to the grand jury or to appear before the proper court having jurisdiction to try the same, and to set the amount of bail or refuse bail and commit the accused to jail in cases not bailable," and to "conduct preliminary hearings in all violations of the criminal laws of this state occurring within the municipality, and any person arrested for a violation of law within the municipality may be brought before him for initial appearance." MISS. CODE ANN. § 21-23-7(1) (2017). Municipalities are responsible for funding the operations of their municipal court. MISS. CODE ANN. § 21-23-3 (2017). Proceedings in municipal courts are not recorded, MISS. CODE ANN. § 21-23-7 (2017), but litigants may provide their own reporters. MISS. CODE ANN. § 9-13-32 (2017); MISS. R. CRIM. P. 1.10.

<sup>18</sup> MISS. CODE ANN. § 21-23-5 (2017). In municipalities with a population of less than 20,000 that choose to appoint a judge to their municipal court, that municipal judge is not required to be an attorney. MISS. CODE ANN. § 21-23-5 (2017).

<sup>19</sup> MISS. CODE ANN. § 9-3-61 (2017).

<sup>20</sup> MISS. R. CRIM. P. Prior to July 1, 2017, the circuit and county courts operated under the *Uniform Rules of Circuit and County Court Practice* (eff. May 1, 1995), while the justice courts were governed by the *Uniform Rules of Procedure for Justice Court* (eff. May 1, 1995), and the procedures in the municipal courts were created by statute, MISS. CODE ANN. § 21-23-7 (2017).

<sup>21</sup> The Task Force is a legislative study group created to study indigent defense programs in circuit court and examine approaches taken by other states in implementing right to counsel services. MISS. CODE ANN. § 25-32-71 (2017). The Task Force has thirteen members: "(a) The President of the Mississippi Public Defender Association, or his designee; (b) The President of the Mississippi Prosecutors Association, or his designee; (c) A representative of the Administrative Office of Courts; (d) A representative of the Mississippi Supreme Court; (e) A representative of the Conference of Circuit Judges; (f) A representative of the Mississippi Attorney General's Office; (g) A representative of the Mississippi Association of Supervisors; (h) A representative of The Mississippi Bar; (i) A representative of the Magnolia Bar Association; (j) The Chairman of the Senate Judiciary Committee, Division B, or his designee; (k) The Chairman of the Senate Appropriations Committee, or his designee; (l) The Chairman of the House Judiciary En Banc Committee, or his designee; (m) The Chairman of the House Appropriations Committee, or his designee." *Id.*

University School of Law, to evaluate adult felony trial level indigent defense services across the state of Mississippi.

Limitations of time and resources prevent almost any evaluation from considering every court, indigent defense system, and service provider in the state. Thus, the Task Force selected ten counties as a representative sample of Mississippi's diversity in population size, geographic location, rural and suburban and urban centers, and types of indigent defense representation delivery systems used. The ten counties chosen for this study are Adams, Clarke, DeSoto, Forrest, George, Harrison, Hinds, Leflore, Lowndes, and Pearl River.<sup>22</sup> (See map, next page.)

The in-depth evaluation of the ten representative jurisdictions was carried out through three primary components.

**Data collection.** Basic information about how a jurisdiction provides right to counsel services is often available in a variety of documents. Relevant hard copy and electronic information, including copies of indigent defense contracts, policies, and procedures, was obtained at the local level and analyzed.

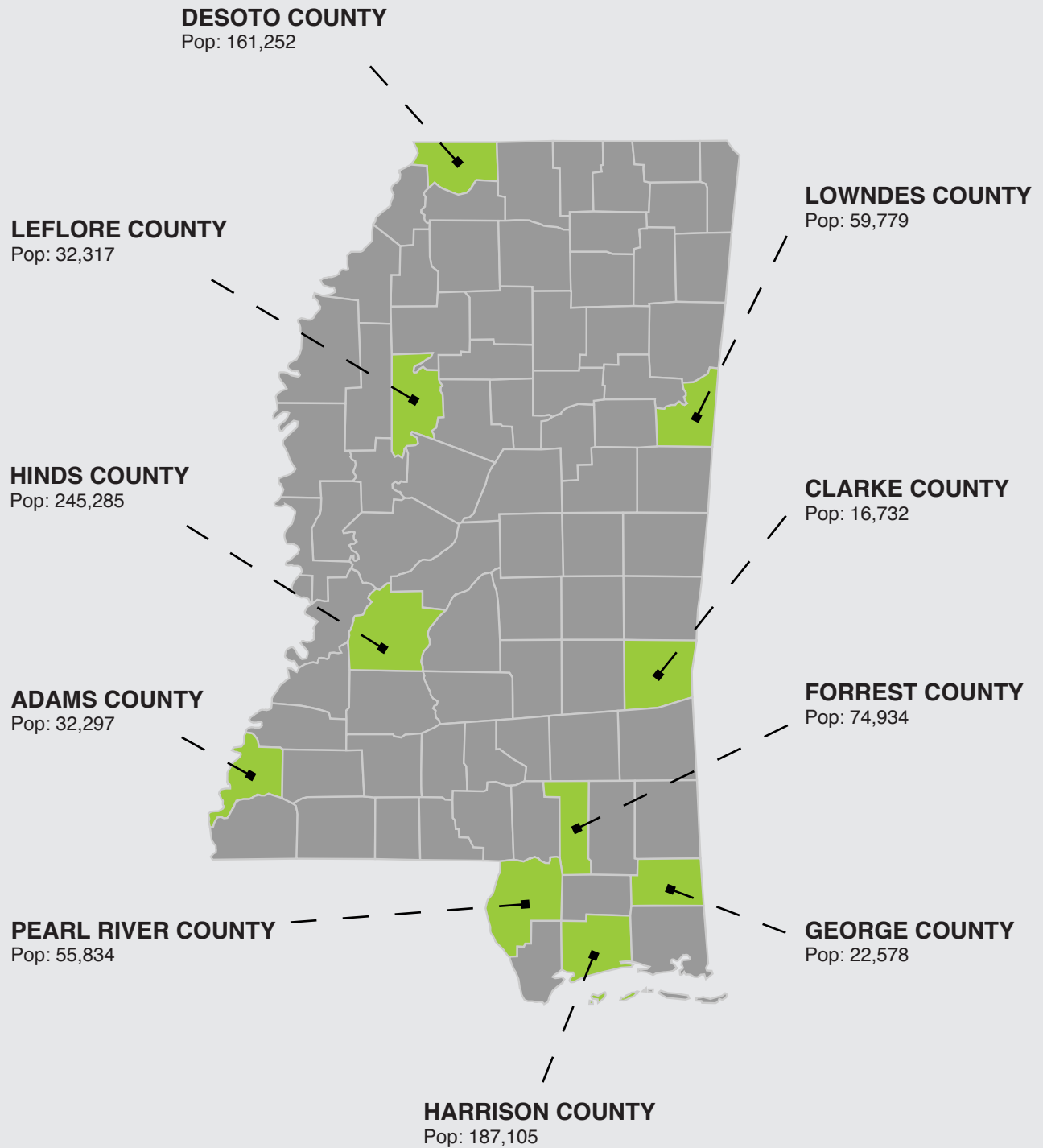
**Court observations.** Evaluating how right to counsel services work in any jurisdiction requires an understanding of the interactions among at least three critical processes: (a) the process an individual defendant experiences as the case advances from arrest through disposition; (b) the process the defense attorney experiences while representing each defendant at the various stages of a case; and (c) the substantive laws and procedural rules that govern the justice system in which indigent representation is provided. In each sample county, courtroom observations were conducted to clarify these processes.<sup>23</sup>

**Interviews.** No individual component of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect all of the others. Because of this, interviews were conducted with a broad cross-section of stakeholders during each site visit. In addition to speaking with indigent defense attorneys, interviews were conducted with county officials, court clerks, trial court judges and magistrates, prosecutors, and law enforcement. State-level agency staff members were also interviewed.

<sup>22</sup> Site visits were conducted in: Harrison County (Sept. 2015); Leflore County (May 2016); Forrest County and Hinds County (July 2016); Pearl River County (Aug. 2016); Adams County and Clarke County (Sept. 2016); DeSoto County and George County (Oct. 2016); and Lowndes County (Nov.-Dec. 2016).

<sup>23</sup> Court observations were conducted in a total of 28 representative trial courts – municipal, justice, county, and circuit – across the ten sample counties: Adams (2); DeSoto (7); Forrest (2); George (1); Harrison (2); Hinds (4); Leflore (3); Lowndes (3); and Pearl River (3). Clarke County's Circuit Court was not in session at the time of the site visit, however court observations were conducted in nearby Lauderdale County which is in the same judicial district and involves the same judges, prosecutors, and defense attorneys.

# STATEWIDE SAMPLE OF COUNTIES





## UNDERSTANDING CRONIC THROUGH THE AMERICAN BAR ASSOCIATION'S TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Adopted by the ABA House of Delegates in 2002, the ABA *Ten Principles*<sup>a</sup> 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 parameters 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 and training of attorneys (Principles 6, 9, and 10). Throughout this report, the *Ten Principles* are cited as a shorthand reference for the full *Cronic* analysis.

<sup>a</sup> TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, (AM. BAR ASS’N 2002), *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lscslaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lscslaid_def_tenprinciplesbooklet.authcheckdam.pdf).

## ASSESSMENT CRITERIA

Two principal U.S. Supreme Court cases, decided on the same day, together describe the tests used to determine the constitutional effectiveness of right to counsel services. *United States v. Cronin*<sup>24</sup> and *Strickland v. Washington*<sup>25</sup> together describe a continuum of representation. *Strickland* is used after a criminal case is final to determine retrospectively whether the lawyer provided effective assistance of counsel; it sets out a two-pronged test of whether the appointed lawyer’s actions were unreasonable and prejudiced the outcome of the case. *Cronic* 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 *Cronic* include the early appointment of qualified and trained attorneys with 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. This report evaluates Mississippi’s adult felony trial level indigent defense system(s) against these criteria.

<sup>24</sup> 466 U.S. 648 (1984).

<sup>25</sup> 466 U.S. 668 (1984).

# CHAPTER II

## STATE OVERSIGHT OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

Providing the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.<sup>26</sup> Although the U.S. Supreme Court has never directly considered whether it is unconstitutional for a state to delegate this responsibility to its counties and cities, if a state chooses to place this responsibility on its local governments, then the state must guarantee that the local governments are not only capable of providing adequate representation, but that they are in fact doing so.<sup>27</sup>

The State of Mississippi has made its counties and cities responsible for providing non-capital trial level Sixth Amendment services.<sup>28</sup> Throughout Mississippi, the county boards of supervisors and the circuit court judges oversee and fund the provision of felony representation at the trial level. The circuit court judges presiding in the county select the attorneys who will provide felony trial level representation to indigent people, within the budget allotted by the county board of supervisors. The result is a patchwork of systems in which the jurisdictions most in need of indigent defense services are often the ones least able to afford them.

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<sup>26</sup> Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

<sup>27</sup> Cf. Robertson v. Jackson, 972 F.2d 529, 533 (4th Cir. 1992) (holding that, 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) (holding that, 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), *available at* [http://nvcourts.gov/AOC/Committees\\_and\\_Commissions/Indigent\\_Defense/Documents/Miscellaneous/Letter\\_White\\_Paper\\_Regarding\\_the\\_Delegation\\_of\\_Indigent\\_Defense\\_Duties\\_to\\_the\\_Counties/](http://nvcourts.gov/AOC/Committees_and_Commissions/Indigent_Defense/Documents/Miscellaneous/Letter_White_Paper_Regarding_the_Delegation_of_Indigent_Defense_Duties_to_the_Counties/) (“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.’”).

<sup>28</sup> MISS. CONST. art 14, § 261 (“The expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun . . .”); MISS. CODE ANN. §§ 25-32-1 *et seq.* (2017) (counties), 21-17-7, 21-23-1 *et seq.* (2017) (municipalities). Mississippi is one of only four states that do not contribute any funding for non-capital trial level services; the other states are Nebraska, Pennsylvania, and South Dakota.

The State of Mississippi has no method of ensuring that its local governments meet the state's constitutional obligations and, except in capital cases,<sup>29</sup> has not established any statewide standards for the provision of Sixth Amendment right to counsel services in its trial courts. Of course, the lack of uniform standards and state oversight of indigent defense services is not by itself outcome-determinative. That is, the absence of institutionalized statewide oversight does not necessarily mean that all right to counsel services are constitutionally inadequate. What it does mean is that the State of Mississippi simply does not know whether its services meet the federal requirements.

**FINDING #1: The State of Mississippi has no method to ensure that its local governments are fulfilling the state's constitutional obligation to provide effective assistance of counsel to the indigent accused in felony cases in its trial courts.**

## OFFICE OF STATE PUBLIC DEFENDER

In 2011, the Mississippi legislature created the state-funded Office of State Public Defender (OSPD) as the only state-level agency involved in the provision of Sixth Amendment indigent defense services.<sup>30</sup> The OSPD provides four services: a) direct representation of and/or assistance to the indigent accused in death eligible trials and appeals; b) direct representation of indigent parents and guardians in abuse, neglect, and termination of parental rights proceedings at trial and appeal; c) direct appeals in felony indigent defense cases; and d) training of public defense attorneys throughout the state.<sup>31</sup> Although OSPD is statutorily required to “coordinate the collection and dissemination of statistical data . . . [and to] develop plans and proposals for further development of a statewide public defender system in coordination with the Mississippi Public Defenders Task Force,”<sup>32</sup> it has no authority over the provision of non-capital trial level services.

<sup>29</sup> MISS. R. PROF. CONDUCT 7.4.

<sup>30</sup> 2011 Miss. Laws. SB2563 (codified at MISS. CODE ANN. §§ 99-18-1 *et seq.*). The only other state-level agency with responsibility for providing representation to indigent people is the Office of Capital Post-Conviction Counsel, *see* MISS. CODE ANN. §§ 99-39-103 (2017), but the Supreme Court has not held that representation in post-conviction cases is required under the Sixth and Fourteenth Amendments.

<sup>31</sup> MISS. CODE ANN. §§ 99-18-1, -13 (2017). In 2016, the duties of the OSPD were expanded to add direct representation of indigent parents and guardians in abuse, neglect, and termination of parental rights proceedings at trial and appeal. 2016 Miss. Laws HB772 (codified at MISS. CODE ANN. §§ 43-21-201 and 99-18-13).

<sup>32</sup> MISS. CODE ANN. § 99-18-1(7) (2017).

## TRIAL DATA REPORTED TO ADMINISTRATIVE OFFICE OF COURTS

Beginning in 2014, the clerks of all circuit, justice, and municipal courts are required to report information about misdemeanor and felony cases to the Administrative Office of Courts,<sup>33</sup> including “the date on which the criminal charges were filed, charge code and name of indicted offenses, count number of indicted offenses, the disposition of the charges, date disposed, date sentenced, charge code and name of sentenced offenses, and sentence length.”<sup>34</sup> Effective July 1, 2016, the clerks must also report in each case whether counsel was appointed.<sup>35</sup> The reports are due twice each year, by June 30 and December 31.<sup>36</sup> After receiving the data from the trial courts, the Administrative Office of Courts provides electronic copies on August 1 of each year to the OSPD and others.<sup>37</sup>

Collecting this misdemeanor and felony data from the trial courts is a good beginning point for the state’s ability to exercise oversight of the provision of the right to counsel in trial courts. However, the courts are not required to report whether a defendant was facing incarceration and thus entitled to appointment of counsel if indigent, whether a defendant was determined to be indigent, and whether a defendant requested or waived his right to appointed counsel. In the absence of that information, it is impossible for the state to determine whether trial courts are denying the right to counsel to defendants who are entitled to receive public counsel under federal and state law. There is no requirement for the courts to report pending criminal cases for which there was no “event” or “disposition” during the reporting period. Additionally, like any system in its infancy, the data as provided by the trial courts thus far is inconsistently reported and incapable of being compared from county to county.<sup>38</sup>

<sup>33</sup> 2014 Miss. Laws ch. 457 § 6 (codified at Miss. CODE ANN. § 9-1-46).

<sup>34</sup> Miss. CODE ANN. § 9-1-46 (2015) (prior to 2016 amendment).

<sup>35</sup> 2016 Miss. Laws ch. 487 § 1 (codified at Miss. CODE ANN. §9-1-46(1)(a)).

<sup>36</sup> Miss. CODE ANN. § 9-1-46(3) (2017).

<sup>37</sup> *Id.*

<sup>38</sup> In the course of this evaluation, the Sixth Amendment Center obtained the available data from the Administrative Office of Courts for the ten sample counties for the partial year 2014, the full year 2015, and for 2016 through July 13 when the data was produced to 6AC. The only information from these reports that appeared to be comparable from county to county is the number of cases (comprising a larger number of counts) that had an “event” or “disposition” during the reporting period. Further, it appeared that some cases were reported more than once because they had more than one event and/or disposition during a single reporting year; for example, if a defendant pled guilty and was placed on probation, then later had a probation revocation hearing or a dismissal of the charges after successfully completing probation.

## COUNTIES AND MUNICIPALITIES WITH THE GREATEST DEMAND FOR INDIGENT DEFENSE SERVICES ARE LEAST ABLE TO PROVIDE THEM

As previously noted, Mississippi has made its local governments responsible for the provision and costs of all representation of indigent people in non-capital felonies at the trial court level.<sup>39</sup> County boards of supervisors and municipal governing authorities are responsible for establishing the budget and providing the funds necessary to fulfill all of their jurisdiction's responsibilities, but they are limited in the sources of revenue available to them to meet these fiscal needs.

Mississippi's counties and municipalities, like those of many other states, are created by state law<sup>40</sup> and are treated in the first instance as a local arm of the state that can only act with the express permission of the state's Constitution or the state legislature.<sup>41</sup> The legislature adopted limited "Home Rule" provisions that give counties and municipalities the power to act with respect to county and municipal affairs in areas where the legislature has not acted and so long as they do not conflict with state law.<sup>42</sup> The Home Rule provisos, though, expressly prohibit counties and municipalities from issuing bonds of any kind and from levying or increasing taxes other than as authorized by state statute.<sup>43</sup>

The primary source of revenue over which counties and municipalities have control is *ad valorem* property taxes.<sup>44</sup> Yet factors that cause property values to be low and limit a local government's property tax revenue – such as high unemployment, high poverty rates, limited household incomes, and limited education – are often the exact same circumstances that lead to an increased need for right to counsel services. In high poverty areas, a larger percentage of people accused of crime will be indigent and qualify for public defense services. Further, these counties and municipalities with high levels of poverty have to spend more on other social services, such as uninsured medical treatment or housing assistance, leaving less money available for protecting people's rights under the Sixth Amendment.

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<sup>39</sup> MISS. CONST. art. 14, § 261 ("The expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun . . ."); MISS. CODE ANN. §§ 25-32-1 et seq. (2017) (counties), 21-17-7, 21-23-1 *et seq.* (2017) (municipalities).

<sup>40</sup> MISS. CONST. art. 4, §§ 80, 88; art. 5, §§ 135-139; art. 14, §§ 259, 260, 271.

<sup>41</sup> This is a principle of state supremacy over local governments often referred to as "Dillon's Rule."

<sup>42</sup> MISS. CODE ANN. §§ 19-3-40 (2017) (counties), 21-17-5 (2017) (municipalities).

<sup>43</sup> MISS. CODE ANN. §§ 19-3-40(3) (2017) (counties), 21-17-5(2) (2017) (municipalities).

<sup>44</sup> CENTER FOR GOV'T & CMTY. DEV., MISS. STATE UNIV., COUNTY GOVERNMENT IN MISSISSIPPI 88 (Sumner Davis & Janet P. Baird eds., 5th ed. 2015); CENTER FOR GOV'T & CMTY. DEV., MISS. STATE UNIV., MUNICIPAL GOVERNMENT IN MISSISSIPPI 139 (Sumner Davis & Patrick Miller eds., 6th ed. 2017).

At the statewide level, Mississippi has the highest poverty rate in the nation and the highest percentage of residents earning less than 125% of the poverty threshold.<sup>45</sup> Mississippi's residents are below the national average in rates of high school graduation, higher education, employment, household income, and health insurance coverage.<sup>46</sup> As of 2015, Mississippi's average rate of youths ages 16-24 who are not in school or working was 4.4 percentage points higher than the national average.<sup>47</sup> These figures indicate broad struggles that confront policymakers in Mississippi, but when the focus is turned to the county level, the struggles of particular jurisdictions become even more apparent.

Nationwide, 15.1% of people lived below the poverty line in 2016,<sup>48</sup> but eight of the ten counties studied for this report had poverty rates of 19% or greater.<sup>49</sup> While the poverty rates in Adams, Forrest, and Hinds counties exceeded 25%,<sup>50</sup> over 40% of all people in Leflore County lived below the poverty line.<sup>51</sup>

The situation is even worse for children in Mississippi. The national childhood poverty rate in 2016 was 21.2%.<sup>52</sup> At that same time, over half of all children in Adams and Leflore counties lived in poverty, as well as 28% or more of all children in Clarke, Forrest, Harrison, Hinds, Lowndes, and Pearl River counties.<sup>53</sup>

<sup>45</sup> ALEMAYEHU BISHAW & CRAIG BENSON, POVERTY: 2015 AND 2016, at 3, 9 (2017), *available at* <https://www.census.gov/content/dam/Census/library/publications/2017/acs/acsbr16-01.pdf>.

<sup>46</sup> Search of U.S. CENSUS BUREAU, AMERICAN FACTFINDER, SELECTED Population Profile in the United States – 2016 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES (ID S0201) (Dec. 15, 2017), <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (in “Topics,” select “Dataset,” then select “2016 ACS 1-year estimates;” in “Geographies,” add to your selections both “United States” and “Mississippi;” from the available files, select “Selected Population Profile in the United States” (ID S0201)).

<sup>47</sup> CENTER FOR AMERICAN PROGRESS, STATE OF THE STATES REPORT 2015, at 13, 14 (2015) *available at* <https://cdn.americanprogress.org/wp-content/uploads/2016/02/23080039/StateofStates-fullreport2.pdf> (last visited Dec. 15, 2017).

<sup>48</sup> Search of U.S. CENSUS BUREAU, AMERICAN FACTFINDER, SELECTED HOUSING CHARACTERISTICS – 2012-2016 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES (ID DP03) (Dec. 15, 2017), <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (in “Topics,” select “People,” then select “Poverty,” then select “Poverty;” in “Geographies,” add to your selections “United States” and each of the ten counties evaluated; from the available files, select “Selected Economic Characteristics” (ID DP03) and “2016”).

<sup>49</sup> *Id.* Adams: 30.4%; Clarke: 19.2%; DeSoto: 10.0%; Forrest: 27.3%; George: 17.9%; Harrison: 21.0%; Hinds: 25.5%; Leflore: 40.4%; Lowndes: 21.9%; Pearl River: 20.3%.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Adams: 52.3%; Clarke: 28.6%; DeSoto: 13.0%; Forrest: 35.5%; George: 23.2%; Harrison: 32.5%; Hinds: 37.5%; Leflore: 54.9%; Lowndes: 31.5%; Pearl River: 28.7%.



Median household income nationwide was \$55,322 in 2016.<sup>54</sup> But in Adams County the median household income was just \$31,283, and in Leflore County it was less than half of the national median at only \$25,356.<sup>55</sup> In fact, in nine of the ten counties studied, the median household income was less than the national median, with six of those counties trailing by \$14,000 per year or more.<sup>56</sup>

Nine of the ten counties studied closely for this evaluation had a 2016 unemployment rate higher than the national average.<sup>57</sup> In four of those counties the rate was more than fifty percent higher.<sup>58</sup>

Only one of the ten sample counties had a high school graduation rate that met or exceeded the national average in 2016.<sup>59</sup> In Leflore County the rate was nearly ten percentage points below the national average, and in both Adams and Clarke counties the rate was at least six percentage points below the national average.<sup>60</sup>

In half of the ten sample counties in this evaluation, a lesser percentage of people owned their own homes in 2016 than did so nationally,<sup>61</sup> and for homeowners in all ten counties the median value of owner-occupied homes was significantly less than the 2016 national median.<sup>62</sup> In Adams, Clarke, and Leflore counties, the median value of an owner-occupied home was less than half of the national median value.<sup>63</sup> In Forrest

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* Adams - \$31,283; Clarke - \$36,441; DeSoto - \$60,111; Forrest - \$37,017; George - \$47,313; Harrison - \$43,095; Hinds - \$38,773; Leflore - \$25,356; Lowndes - \$41,219; Pearl River - \$41,598.

<sup>57</sup> *Id.* The 2016 national average unemployment rate for the civilian (non-military) labor force aged 16 and over was 7.4%; Adams – 10.1%; Clarke – 10.6%; DeSoto – 6.7%; Forrest – 12.5%; George – 8.8%; Harrison – 9.6%; Hinds – 10.5%; Leflore – 13.1%; Lowndes – 11.5%; Pearl River – 11.3%.

<sup>58</sup> *Id.*

<sup>59</sup> Search of U.S. CENSUS BUREAU, AMERICAN FACTFINDER, SELECTED HOUSING CHARACTERISTICS – 2012-2016 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES (ID S1501) (Dec. 15, 2017), <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (in “Topics,” select “People,” then select “Education,” then select “Educational Attainment;” in “Geographies,” add to your selections “United States” and each of the ten counties evaluated; from the available files, select “Educational Attainment” (ID S1501) and “2016”). National – 87.0%; Adams – 80.8%; Clarke – 80.2%; DeSoto – 89.2%; Forrest – 86.2%; George – 80.3%; Harrison – 86.4%; Hinds – 86.3%; Leflore – 77.5%; Lowndes – 84.1%; Pearl River – 83.6%.

<sup>60</sup> *Id.*

<sup>61</sup> Search of U.S. CENSUS BUREAU, AMERICAN FACTFINDER, SELECTED HOUSING CHARACTERISTICS – 2012-2016 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES (ID DP04) (Dec. 15, 2017), <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (in “Topics,” select “Dataset,” then select “2016 ACS 5-year estimates;” in “Geographies,” add to your selections “United States” and each of the ten counties evaluated; from the available files, select “Selected Housing Characteristics” (ID DP04) and “2016”). National – 63.6%; Adams – 63.6%; Clarke – 82.3%; DeSoto – 72.9%; Forrest – 54.6%; George – 85.9%; Harrison – 56.0%; Hinds – 59.2%; Leflore – 50.6%; Lowndes – 61.2%; Pearl River – 76.8%.

<sup>62</sup> *Id.* National - \$184,700; Adams - \$89,400; Clarke – \$68,200; DeSoto – \$155,000; Forrest – \$111,300; George - \$97,700; Harrison - \$138,400; Hinds - \$107,300; Leflore - \$73,600; Lowndes - \$118,800; Pearl River - \$120,300.

<sup>63</sup> *Id.*



County, the rate of home ownership was 9% lower than the national average, while in Leflore County it was 13% lower.<sup>64</sup>

These economic indicators for Mississippi counties almost without exception occur against a backdrop of higher crime than that seen nationally.<sup>65</sup> The Federal Bureau of Investigation collects and compiles crime statistics from across the country, though not all law enforcement agencies report this information to the F.B.I. The table on page 17 shows the rates of crime, in 2014 and calculated per 100,000 inhabitants, nationally and in the sample counties to the extent that the F.B.I. shows any law enforcement agency within those counties as having reported information.<sup>66</sup> Rates shown in red are higher than the national average and for the most part are dramatically higher.

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<sup>64</sup> *Id.*

<sup>65</sup> *Compare 2014 Crime in the United States*, U.S. Dep't of Justice, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1> (last visited Dec. 15, 2017) with Search of U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTING STATISTICS, CRIME – LOCAL LEVEL – ONE YEAR OF DATA (Dec. 15, 2017), <https://www.ucrdatatool.gov/Search/Crime/Local/OneYearofData.cfm> (from the drop-down list, select “Mississippi;” in the left box, select all available agencies; in the middle box, select “Violent crime rates” and “Property crime rates;” in the right box, select “2014;” click “Get Table”).

<sup>66</sup> The F.B.I. does not show any law enforcement agency reporting UCR crime statistics in 2014 for Clarke, George, and Lowndes counties and does not show crime rates for Leflore County because the Greenwood Police Department only reported data for ten months in the year. *See* Search of U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTING STATISTICS, CRIME – LOCAL LEVEL – ONE YEAR OF DATA (Dec. 15, 2017), <https://www.ucrdatatool.gov/Search/Crime/Local/OneYearofData.cfm> (from the drop-down list, select “Mississippi;” in the left box, select all available agencies; in the middle box, select “Violent crime rates” and “Property crime rates;” in the right box, select “2014;” click “Get Table”). For Adams County, the F.B.I. shows only reports from the Natchez Police Department. *Id.* For DeSoto County, the F.B.I. shows only reports from the Horn Lake Police Department, the Olive Branch Police Department, and the Southaven Police Department. *Id.* For Forrest County, the F.B.I. shows only reports from the Hattiesburg Police Department and the Petal Police Department. *Id.* For Harrison County, the F.B.I. shows only reports from the Biloxi Police Department, the Gulfport Police Department, the Long Beach Police Department, and the Harrison County Sheriff's Department. *Id.* For Hinds County, the F.B.I. shows only reports from Byram, the Jackson Police Department, and the Hinds County Sheriff's Department. *Id.* For Pearl River County, the F.B.I. shows only reports from the Picayune Police Department. *Id.*

	Nat'l	Adams	DeSoto	Forrest	Harrison	Hinds	Pearl River
Murder & manslaughter	4.5	25.9	20.8	25.0	15.0	35.4	0
Rape	36.6	19.4	32.7	23.0	123.9	76.5	92.7
Robbery	102.2	116.5	160.3	95.6	328.7	499.1	176.1
Aggravated assault	232.5	252.5	425.2	73.0	292.6	416.4	417.0
Burglary	542.5	861.1	1,556.0	1,206.6	3,064.9	2,108.1	1,195.3
Theft (non-vehicle)	1,837.3	5,910.9	5,694.3	5,101.1	9,484.6	5,058.3	3,715.7
Motor vehicle theft	216.2	142.4	284.0	212.3	519.2	808.6	222.4

Requiring counties and municipalities to take on the financial burden of providing indigent defense services is unwise at best given these conditions, particularly because the state legislature and state supreme court establish the laws and procedures that the local governments must pay to enforce, prosecute, defend, and adjudicate. Mississippi's local governments rely on their local economies as their primary source of revenue, yet their financial resources are heavily depleted by the need to provide welfare and assistance to their residents. As a result, local governments understandably try to limit expenditures wherever possible, and when it comes to indigent defense, they tend to seek out the least expensive option without regard to the minimum constitutional requirements needed to ensure effective representation to each and every indigent defendant.

# CHAPTER III

## MISSISSIPPI'S SYSTEMS FOR PROVIDING THE RIGHT TO COUNSEL TO INDIGENT ADULTS CHARGED WITH FELONIES

Every state in the nation has created some sort of system for providing an attorney to represent an indigent defendant charged with a felony. Attorneys provide representation to indigent people within the structures of these systems. In *United States v. Cronic*,<sup>67</sup> the U.S. Supreme Court explains that deficiencies in these systems can make any lawyer – even the best attorney – perform in a non-adversarial way that results in a “constructive”<sup>68</sup> denial of the right to counsel.

The *Cronic* Court explains that, when a lawyer provides representation within an indigent defense system that constructively denies the right to counsel, the lawyer is presumptively ineffective. 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 the Seventh Circuit Court of Appeals noted over 30 years ago in *Wahlberg v. Israel*,<sup>69</sup> “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.’”<sup>70</sup> (*See infra* Chapter VIII, discussing systemic litigation throughout the country.)

The first step, then, in evaluating adult felony indigent defense representation in Mississippi is to understand the structural framework of its indigent defense systems. Throughout Mississippi, the county boards of supervisors and the circuit court judges are responsible for the provision of felony representation to indigent defendants at the trial level. The circuit court judges presiding in the county select the attorneys

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<sup>67</sup> 466 U.S. 648 (1984).

<sup>68</sup> *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 *Cronic*, 466 U.S. 648)).

<sup>69</sup> 766 F.2d 1071 (7th Cir. 1985).

<sup>70</sup> *Id.* at 1076.

who represent indigent people charged with felonies, within the budget allotted by the county board of supervisors. The legislature requires that counsel be provided either through a public defender office or through appointment of individual attorneys.<sup>71</sup>

## PUBLIC DEFENDER OFFICE SYSTEMS

County boards of supervisors may, but are not required to, establish a county funded public defender office to represent indigent people.<sup>72</sup> In those counties that have established a public defender office,<sup>73</sup> the circuit court judges “shall appoint the public defender” to represent any person arrested for a felony who is indigent and does not waive their right to counsel.<sup>74</sup>

The circuit or senior circuit judge selects an attorney to serve as the full-time or part-time public defender for a four-year term coinciding with that of the circuit’s district attorney, and the public defender is responsible for hiring assistant public defenders if the county authorizes them.<sup>75</sup> The county is required to provide “office space, secretarial assistance, and all reasonable expenses of operating the office, at least equal to or more than the county prosecuting attorney, or the district attorney if the public defender represents the entire circuit court district” and must pay the “compensation and expenses of the public defender’s office.”<sup>76</sup> The county board of supervisors sets the compensation that is paid to the public defender<sup>77</sup> and any assistant public defenders,<sup>78</sup> but the county is prohibited from reducing or diminishing “[t]he compensation, administrative staff, office space and secretarial assistance” during the four-year term of the public defender, though the county may increase funds for these items.<sup>79</sup>

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<sup>71</sup> MISS. CODE ANN. §§ 25-32-1 (2017) (designating the office of public defender “as an alternative to court appointed counsel”), 99-15-15 (2017) (court appointed counsel).

<sup>72</sup> MISS. CODE ANN. § 25-32-1 (2017).

<sup>73</sup> Only seven of Mississippi’s 82 counties (just over 8.5%) are known to operate a public defender office: Forrest, Harrison, Hinds, Jackson, Lamar, Pearl River, and Washington. *See* MISS. OFFICE OF STATE PUBLIC DEFENDER, ASSESMENT [sic] OF CASELOADS IN STATE AND LOCAL INDIGENT DEFENSE SYSTEMS IN MISSISSIPPI in MISS. PUBLIC DEFENDER TASKFORCE 2016 REPORT TO THE LEGISLATURE 1, 9 (2016), *available at* <http://www.ospd.ms.gov/Task%20Force/Mississippi%20Public%20Defender%20Task%20Force%202016%20Report.pdf> (last visited Dec. 20, 2017) ) [hereinafter OSPD ASSESSMENT]; MISS. OFFICE OF STATE PUBLIC DEFENDER, FELONY LEVEL PUBLIC DEFENDERS (December 2016) (on file with the Sixth Amendment Center).

<sup>74</sup> MISS. CODE ANN. § 25-32-9(1) (2017).

<sup>75</sup> MISS. CODE ANN. § 25-32-3 (2017).

<sup>76</sup> MISS. CODE ANN. § 25-32-7 (2017).

<sup>77</sup> MISS. CODE ANN. § 25-32-5 (2017).

<sup>78</sup> MISS. CODE ANN. § 25-32-3 (2017).

<sup>79</sup> MISS. CODE ANN. § 25-32-17 (2017).

A full-time public defender or assistant public defender cannot represent private clients.<sup>80</sup> A part-time public defender or assistant public defender, though, is allowed to represent private clients and is prohibited only from prosecuting criminal cases.<sup>81</sup>

Of the ten counties studied closely for this evaluation, four provide counsel to indigent felony defendants through a public defender office, as follow.

*Forrest County – public defender office (full-time)*

The board of supervisors has established a public defender office and, effective October 1, 2016,<sup>82</sup> specified that the public defender shall be full-time.

The circuit court judges jointly select the full-time public defender. The public defender is paid a salary of \$85,176 per year. The public defender, with approval of the circuit court judges, makes the hiring decisions within the office. The board of supervisors has authorized three full-time assistant public defenders. Each of the assistant public defenders is paid a salary of \$70,000 per year. The public defender office is appointed to represent all indigent felony defendants with whom there is no conflict.

The board of supervisors provides office space for the public defenders and an investigator and a secretary. In compliance with state law,<sup>83</sup> the four full-time public defender office attorneys do not maintain private law practices and work exclusively from the Forrest County Public Defender Office on behalf of appointed clients.

Forrest County does not have a policy about providing counsel in the event that the (now full-time) public defender office has a conflict. The public defender believes the office attorneys will not be allowed to withdraw from representing any of the indigent defendants in a multi-defendant case and plans to use a “Chinese Wall” procedure to shield each attorney from having access to the cases of the other office attorneys.

Prior to October 2016, the public defender office, and each of the four attorneys employed within it, was “part-time.” In assessing conflicts of interest, the circuit court judges treated the four part-time public defender office attorneys as separate entities, and so if any one attorney in the office had a conflict, another attorney in the office would handle the case. Only if all four attorneys within the office were conflicted, or when it was necessary to provide more than four attorneys in a single case, would the judges appoint a private attorney. At the time of the site visit, there was a pending case with 14 codefendants, many of whom were indigent. The public defender office attorneys each choose the indigent defendant to represent whom they consider most

<sup>80</sup> MISS. CODE ANN. § 25-32-5 (2017).

<sup>81</sup> *Id.*

<sup>82</sup> See *Forrest County, Mississippi Fact Sheet and Board Order*, Agenda Item No. 76 (July 6, 2016) (on file with the Sixth Amendment Center).

<sup>83</sup> MISS. CODE ANN. § 25-32-5 (2017).

culpable, often advising the judge on the charges they believe each defendant will likely face if indicted. The judge appoints a private attorney to represent each of the remaining indigent codefendants. According to one judge, the private conflict attorneys “put what they want to” on their bills – the judge does not set a certain hourly rate or fixed fee in conflict cases, though if he finds a bill to be too high, he is unlikely to appoint that conflict attorney again.

*Harrison County – public defender office (full-time)*

The board of supervisors has established a public defender office and specified that the public defender shall be full-time.

The circuit court judges jointly select the full-time public defender. The public defender makes the hiring decisions within the office. The board of supervisors has authorized eight full-time assistant public defenders, one of whom is designated as the “deputy public defender.” The assistants are paid a range of salaries depending on experience and length of employment, with a starting salary of \$55,000 per year up to a maximum of \$90,000 per year. All of the public defender office attorneys receive county health insurance and retirement benefits. The public defender office is appointed to represent all indigent felony defendants with whom there is no conflict.

The public defender office has one full-time investigator and three full-time administrative assistants. The board of supervisors provides office space for the public defenders in a county building that also houses other county functions. There is a reception area, and each of the attorneys and the investigator has their own office within the space. They have copiers, computers, and internet access, though their data storage is on the District Attorney’s server. They also have a phone line that allows for toll-free calls from the county jail.

In compliance with state law,<sup>84</sup> the nine full-time public defender office attorneys do not maintain private law practices and work exclusively from the Harrison County Public Defender Office on behalf of appointed clients.

In the event that the public defender office has a conflict, the circuit court judges appoint private attorneys who are paid a fixed fee of \$500 per case for cases that resolve by plea and \$50 per hour for cases that go to trial.

*Hinds County – public defender office (full-time)*

The board of supervisors has established a public defender office and specified that the public defender shall be full-time.

The senior circuit court judge selects the full-time public defender. The public defender is paid a salary of \$130,040 per year. The public defender makes the hiring decisions

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<sup>84</sup> *Id.*

within the office. The board of supervisors has authorized 12 full-time assistant public defenders, one of whom is designated within the office as the “deputy public defender.” The assistants are paid a range of salaries depending on experience and length of employment, with a starting salary of \$50,000 per year up to a maximum of \$80,000 per year. All of the public defender office attorneys receive county health insurance and retirement benefits. The public defender office is appointed to represent all indigent felony defendants with whom there is no conflict.

The public defender office has one office manager, four secretaries, and two investigators. The board of supervisors provides a separate building for the public defender office near the courthouse. Each of the attorneys and the office manager has their own office. The county provides four cars: two for attorneys to use when visiting the jail or out-of-custody clients, and the other two for the investigators. The budget includes funds for fuel for the county cars and for attorneys’ bar dues.

In compliance with state law,<sup>85</sup> the 13 full-time public defender office attorneys do not maintain private law practices and work exclusively from the Hinds County Public Defender Office on behalf of appointed clients.

In the event that the public defender office has a conflict, the circuit court judges appoint private attorneys and pay them a \$60 hourly rate.

*Pearl River County – public defender office (full-time)*

The board of supervisors has established a public defender office. At the time of our visit, the office included a combination of part-time and full-time defenders. In 2017, all the defenders became full-time.

The senior circuit court judge selects the full-time public defender, with the advice and consent of all the circuit and county court judges, for a four-year term coinciding with that of the district attorney.<sup>86</sup> The full-time public defender is paid a salary of \$75,000 per year. The board of supervisors has authorized two assistant public defenders. The senior circuit court judge selects the assistant public defenders, with the advice and consent of all the circuit and county court judges, for the same four-year term as the public defender. One assistant public defender is full-time and is paid a salary of \$75,000 per year. The other assistant public defender was part-time and was paid a

<sup>85</sup> *Id.*

<sup>86</sup> At the time of the site visit in August 2016, there were three part-time attorneys: one part-time public defender and two part-time assistants. *See* Order Appointing Public Defender, *In re* Appointment of Public Defenders (Miss. Cir. Ct. Pearl River County, filed Dec. 28, 2015) (appointing one part-time assistant Jan. 1, 2016 – Dec. 31, 2019) (on file with the Sixth Amendment Center); Order Re-Appointing Public Defenders, *In re* Re-Appointment of Public Defenders (Miss. Cir. Ct. Pearl River County, filed Dec. 28, 2015) (appointing one part-time public defender and one part-time assistant Jan. 1, 2016 – Dec. 31, 2019) (on file with the Sixth Amendment Center). In November 2016, one of the part-time assistants left the system and was replaced with a full-time assistant. In 2017, the chief defender became full-time as well.



salary of \$55,000 per year. All of the public defender office attorneys receive county health insurance and retirement benefits. The public defender office is appointed to represent all indigent felony defendants with whom there is no conflict.

The board of supervisors provides office space for the public defenders on the third floor of the county courthouse, with access to the county law library and online LexisNexis research availability, and a part-time secretary who is paid \$17,000 per year to serve subpoenas and assist with phone calls to clients and witnesses.

There is no longer a part-time public defender, but the former part-time assistant public defender maintained a private law office, where he was allowed to engage in all other employment he desired (other than serving as a prosecutor)<sup>87</sup> and to handle as many private cases as he wished. In compliance with state law,<sup>88</sup> the full-time assistant public defender does not maintain a private law practice and works exclusively from the Pearl River public defender office on behalf of appointed clients.

In assessing conflicts of interest, the circuit court judges treat the three public defender office attorneys as separate entities, and so they believe that, if any one attorney in the office has a conflict, another attorney in the office can handle the case. Only if all three attorneys within the office are conflicted, or if more than three attorneys are required in a single case, will the judges appoint a private attorney and pay them an hourly rate.

## APPOINTED COUNSEL SYSTEMS

Where the county board of supervisors does not establish a public defender office<sup>89</sup> or when the public defender office has a conflict or additional counsel is needed,<sup>90</sup> the circuit court judge appoints an individual attorney to represent an indigent defendant charged with a felony.<sup>91</sup> The attorney is paid and reimbursed for expenses out of the general fund of the county where the prosecution commenced.<sup>92</sup> The court may approve compensation in whatever manner (hourly rate or fixed fee) and at whatever amount the appointed attorney is willing to accept, but the maximum amount that an attorney can be paid for a single felony case is \$1,000.00 plus reimbursement of actual expenses.<sup>93</sup> The circuit court judges select the attorney(s) whom they appoint.

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<sup>87</sup> MISS. CODE ANN. § 25-32-5 (2017).

<sup>88</sup> *Id.*

<sup>89</sup> MISS. CODE ANN. § 25-32-1 (2017) (designating the office of public defender “as an alternative to court appointed counsel”).

<sup>90</sup> MISS. CODE ANN. § 25-32-13 (2017) (conflict and additional counsel in county with public defender office).

<sup>91</sup> MISS. CODE ANN. § 99-15-15 (2017).

<sup>92</sup> MISS. CONST. art 14, § 261 (“The expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun . . .”); MISS. CODE ANN. §§ 99-15-17, -21 (2017) (governing compensation and reimbursement of appointed counsel).

<sup>93</sup> MISS. CODE ANN. § 99-15-17 (2017); *see also* *Wilson v. State*, 574 So.2d 1338, 1341 (Miss. 1990)

**Appointed counsel hourly rate systems<sup>94</sup>**

Of the ten counties studied closely for this evaluation, only one county provides counsel to indigent felony defendants exclusively through appointed private attorneys who are paid an hourly rate, as follows.

*Leflore County – appointed counsel (hourly rate)*

The senior circuit court judge selects the private attorneys who are appointed to represent indigent felony defendants.

Twelve attorneys are each paid \$50 per hour for legal work, but in compliance with the state statute the fees are capped at \$1,000 per case.<sup>95</sup> The attorneys are also paid for overhead in the amount of \$32-\$42 per hour, for the full actual number of hours they devote to each case. At the end of a case, attorneys submit an invoice to the court for approval and payment by the county.

The 12 attorneys work out of their own private law offices and are responsible for providing all overhead necessary to represent the defendants to whom they are appointed. The attorneys are allowed to engage in all other employment they desire and to handle as many private cases as they wish.

It is highly unlikely that all 12 attorneys will have a conflict with a given defendant or that it will be necessary to appoint more than 12 attorneys in a single case, but should that occur, the senior circuit court judge would simply select additional private attorneys as needed and pay them an hourly rate.

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(interpreting § 99-15-17 to mean that \$1,000 maximum fee serves as an honorarium for appointed counsel, and that counsel should additionally be reimbursed for “actual expenses” incurred in the costs of representation).

<sup>94</sup> Twelve Mississippi counties are believed to pay hourly rates to private attorneys as the only method of providing trial level felony representation to indigent defendants: Amite, Franklin, Issaquena, Jefferson, Leflore, Sharkey, Stone, Tallahatchie, Walthall, Warren, Wilkinson, and Yalobusha. *See* OSPD ASSESSMENT, *supra* note 73 at 1, 9; MISS. OFFICE OF STATE PUBLIC DEFENDER, FELONY LEVEL PUBLIC DEFENDERS (December 2016) (on file with the Sixth Amendment Center).

<sup>95</sup> MISS. CODE ANN. § 99-15-17 (2017).

**Appointed counsel fixed fee systems<sup>96</sup>**

Of the ten counties studied closely for this evaluation, five provide the right to counsel through appointed private attorneys who are paid a fixed fee to represent an unlimited number of indigent felony defendants, as follow.

*Adams County – appointed counsel (fixed fee)*

The circuit court judges jointly select the private attorneys who are appointed to represent indigent felony defendants. The board of supervisors allocates \$270,000 per year to the senior circuit court judge’s budget, out of which the appointed attorneys and any other indigent defense expenses are paid.

Ten private attorneys are each paid \$2,000 per month, with no reimbursement for overhead or case-related expenses. Each month, the senior circuit court judge issues an order for each of the attorneys to be paid – there is no contract guaranteeing that any attorney will continue to be appointed or paid in the ensuing months. Six of the ten private attorneys are appointed to represent an unlimited number of indigent felony cases arising in justice court, while four other private attorneys are appointed to represent an unlimited number of indigent felony cases arising in municipal court.

The ten attorneys work out of their own private law offices and are responsible for providing all overhead necessary to represent the defendant to whom they are appointed. The attorneys are allowed to engage in all other employment they desire and to handle as many private cases as they wish.

It is highly unlikely that all ten attorneys will have a conflict with a given defendant or that it will be necessary to appoint more than ten attorneys in a single case. Should that occur, though, the senior circuit court judge would appoint private attorneys and pay them an hourly rate out of the circuit court budget. The court has approximately \$30,000 per year in its indigent defense budget, beyond the monthly compensation paid to the fixed fee private attorneys.

*Clarke County – appointed counsel (fixed fee)*

The circuit court judges jointly select the private attorneys whom they appoint to represent indigent defendants charged with felonies and negotiate the terms of their

<sup>96</sup> In the remaining 63 Mississippi counties, circuit court judges have fixed fee agreements with private attorneys to represent an unlimited number of indigent felony defendants: Adams, Alcorn, Attala, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Choctaw, Claiborne, Clarke, Clay, Coahoma, Copiah, Covington, DeSoto, George, Greene, Grenada, Hancock, Holmes, Humphreys, Itawamba, Jasper, Jefferson Davis, Jones, Kemper, Lafayette, Lauderdale, Lawrence, Leake, Lee, Lincoln, Lowndes, Madison, Marion, Marshall, Monroe, Montgomery, Neshoba, Newton, Noxubee, Oktibbeha, Panola, Perry, Pike, Pontotoc, Prentiss, Quitman, Rankin, Scott, Simpson, Smith, Sunflower, Tate, Tippah, Tishomingo, Tunica, Union, Wayne, Webster, Winston, and Yazoo. *See* OSPD ASSESSMENT, *supra* note 73 at 1, 9; MISS. OFFICE OF STATE PUBLIC DEFENDER, FELONY LEVEL PUBLIC DEFENDERS (December 2016) (on file with Sixth Amendment Center). Most of these counties colloquially refer to their indigent defense system as a “part-time public defender office,” but in fact these are appointed counsel fixed fee systems.

compensation. The board of supervisors enters into a written contract with each private attorney selected by the circuit court judges<sup>97</sup> and allocates the funding necessary for fulfillment of the contract terms, though the circuit court judges can rescind the contract at will after a 30-day notice to the attorney.<sup>98</sup>

Two attorneys are each paid \$24,000 a year to represent an unlimited number of indigent defendants charged with felony offenses.<sup>99</sup> The attorneys are contractually entitled to be reimbursed for travel expenses for any case tried outside of the county and for copy and motion costs if they handle an appeal,<sup>100</sup> after the itemized expenses are submitted to and approved by the circuit court judge. However, there are no funds allocated in the Clarke County budget's public defense line item for these expenses.<sup>101</sup>

The attorneys work out of their own private law offices and are responsible for providing all overhead necessary to represent the defendants to whom they are appointed. The attorneys are allowed to engage in all other employment they desire and to handle as many private cases as they wish.

In the event that both of the appointed counsel fixed fee private attorneys have a conflict, or when more than two attorneys must be appointed in a single case, the circuit court judges maintain a list of private attorneys who are available to be appointed on a case-by-case basis. When appointed, the private conflict attorneys are paid an hourly rate, subject to the statutory maximum compensation of \$1,000.00 for a single felony case plus reimbursement of actual expenses.<sup>102</sup>

*DeSoto County – appointed counsel (fixed fee)*

The circuit court judges jointly select each year the private attorneys whom they appoint to represent indigent defendants charged with felonies. The board of supervisors allocates funding annually for the provision of indigent defense services. The circuit court judges determine the number of attorneys needed and set the amount to be paid to the attorneys based on the allocated funding.

Six private attorneys are each paid \$55,762.20 per year, plus county retirement benefits, to represent an unlimited number of indigent defendants charged with felony

<sup>97</sup> See, e.g., Agreement between Clarke County Board of Supervisors and Kathryn McNair (Jan. 5, 2016) (on file with the Sixth Amendment Center).

<sup>98</sup> *Id.* The board of supervisors may similarly dismiss any attorney at will after a 30-days notice to the attorney and the circuit court judges. The attorney can withdraw from the contract at will after a 30-day notice to the judges given prior to the beginning of the Clarke County Circuit Court Term.

<sup>99</sup> *Id.* ¶¶ 1, 2.

<sup>100</sup> *Id.* ¶ 3.

<sup>101</sup> See CLARKE COUNTY BOARD OF SUPERVISORS FINAL BUDGET FOR YEAR ENDING SEPTEMBER 30, 2015 (on file with the Sixth Amendment Center); CLARKE COUNTY BOARD OF SUPERVISORS FINAL BUDGET FOR YEAR ENDING SEPTEMBER 30, 2016 (on file with the Sixth Amendment Center). It is possible that expense reimbursements to appointed indigent defense attorneys are made from the budget of the circuit court.

<sup>102</sup> MISS. CODE ANN. § 99-15-17 (2017).

offenses, but with the representation commencing after arraignment in the circuit court on grand jury indictment. The compensation is intended to represent \$500 per month for overhead expense reimbursement, with the balance as a fee for the attorney.<sup>103</sup>

The attorneys work out of their own private law offices and are responsible for providing all overhead necessary to represent the defendants to whom they are appointed. The attorneys are allowed to engage in all other employment they desire and to handle as many private cases as they wish.

In the unlikely event that the six appointed counsel fixed fee private attorneys have a conflict or when more than six attorneys must be appointed in a single case, the circuit court judges appoint private attorneys on a case-by-case basis and pay them an hourly rate.

*George County – appointed counsel (fixed fee)*

The senior circuit court judge selects the private attorney who is appointed to represent indigent felony defendants. A single attorney is paid \$36,000 per year, in exchange for which he represents an unlimited number of indigent felony defendants. The attorney works out of his own private law office and is responsible for providing all overhead necessary to represent the defendants to whom he is appointed. The attorney is allowed to engage in all other employment he desires and to handle as many private cases as he wishes.

In the event that the one appointed counsel fixed fee private attorney has a conflict or when more than one attorney must be appointed in a single case, the circuit court judges maintain a list of private attorneys who are available to be appointed on a case-by-case basis. When appointed, the private conflict attorneys are paid an hourly rate, subject to the statutory maximum compensation of \$1,000.00 for a single felony case plus reimbursement of actual expenses.<sup>104</sup>

*Lowndes County – appointed counsel (fixed fee)*

The circuit court judges jointly select each year the private attorneys whom they appoint to represent indigent defendants charged with felonies. The board of supervisors allocates funding annually for the provision of indigent defense services. The circuit court judges determine the number of attorneys needed based on caseloads and set the amount to be paid to the attorneys based on the allocated funding.

The circuit court judges enter an order each year designating the attorneys to be appointed, though the judges can rescind or modify the order at any time. The order

<sup>103</sup> The overhead and attorney fees were merged into a single amount after an IRS audit classified defenders as independent contractors because they received reimbursement for overhead. As independent contractors, they could not be considered county employees and therefore would not have been eligible to be included in the county retirement plan.

<sup>104</sup> See MISS. CODE ANN. § 99-15-17 (2017).

does not include the terms of compensation. By oral agreement, five private attorneys are each paid \$37,728 per year, plus county health insurance and retirement benefits, to handle an unlimited number of non-capital felonies. The five private attorneys are also appointed to capital cases, but they are compensated additionally at an hourly rate of \$125 per hour for these cases.

The board of supervisors provides two small offices at the courthouse, adjacent to a large waiting room, available to the five private attorneys to share for meeting with appointed clients. The county-provided space has two computers, a copy machine, filing cabinets, two desks in one office, and a small conference table with chairs in the other office. Because the county provides these facilities, the private attorneys do not receive any reimbursement for overhead expenses, even though they primarily work on behalf of their appointed clients out of their private law offices where they pay for all overhead.

The five attorneys each maintain their own private law offices and are allowed to engage in all other employment they desire and to handle as many private cases as they wish.

In the rare event that these five attorneys have a conflict or when more than five attorneys must be appointed in a single case, the circuit court judges appoint private attorneys from other nearby counties on a case-by-case basis.

# CHAPTER IV

## INDEPENDENCE OF THE DEFENSE FUNCTION

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“As he stands before the bar of justice, the indicted defendant often has few friends. The one person in the world, upon whose judgment and advice, skill and experience, loyalty and integrity that defendant must be able to rely, is his lawyer. This is as it should be.”

– Sanders v. State, 440 So. 2d 278, 286 (Miss. 1983)

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In *United States v. Cronic*,<sup>105</sup> the U.S. Supreme Court pointed to the case of the so-called “Scottsboro Boys” – *Powell v. Alabama*<sup>106</sup> – as representative of the constructive denial of the right to counsel.<sup>107</sup> Perhaps the most noted critique of the Scottsboro Boys’ defense was that it lacked independence from the judge presiding over the case. 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 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.<sup>108</sup>

In *Strickland*, 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

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<sup>105</sup> 466 U.S. 648 (1984).

<sup>106</sup> 287 U.S. 45 (1932).

<sup>107</sup> *Cronic*, 466 U.S. at 659-60 (“[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.”).

<sup>108</sup> *Powell*, 287 U.S. at 61.



independent decisions about how to conduct the defense.”<sup>109</sup> Reflecting this command, the first of the American Bar Association’s *Ten Principles of a Public Defense Delivery System* requires that the public defense function, including the defense attorneys it provides, must be “independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”<sup>110</sup> Of course judges never select the retained attorney for a defendant with the resources to hire counsel, and so judges should not be selecting the attorney who will represent an indigent defendant.

Each and every defendant has a right to effective representation that is free from conflicts of interest.<sup>111</sup> As the U.S. Supreme Court stated in *Glasser v. United States*,<sup>112</sup> “‘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.”<sup>113</sup>

Because unconflicted “[l]oyalty is an essential element in the lawyer’s relationship to a client,”<sup>114</sup> Mississippi’s *Rules of Professional Conduct* direct that “[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests.”<sup>115</sup> “[L]oyalty to a client is . . . impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.”<sup>116</sup> Attorneys appointed to represent indigent defendants 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, indigent defense attorneys should not be in a position of weighing their own financial interests against the legal needs of their appointed clients.

All lawyers have an ethical duty of loyalty to their clients. But for the appointed lawyer representing the criminally accused, loyalty is not a question of aspiration or ethics alone; it is a constitutional imperative foundational to the fairness of the entire criminal process. The State of Mississippi, therefore, has a constitutional obligation to ensure

<sup>109</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>110</sup> TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM § 1 cmt. (AM. BAR ASS’N 2002), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) [hereinafter TEN PRINCIPLES].

<sup>111</sup> *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).

<sup>112</sup> 315 U.S. 60 (1942).

<sup>113</sup> *Id.* at 70.

<sup>114</sup> MISS. R. PROF. CONDUCT 1.7 cmt.

<sup>115</sup> MISS. R. PROF. CONDUCT 1.7.

<sup>116</sup> MISS. R. PROF. CONDUCT 1.7 cmt.

the lawyers who provide Sixth Amendment services are not subjected to conflicts that interfere with their ability to render effective representation to each defendant.

**FINDING #2: The State of Mississippi does not ensure the independence of the defense function from undue judicial interference in the selection and compensation of felony indigent defense attorneys.**

Far from ensuring the independence of the defense function, the State of Mississippi statutorily imposes undue judicial interference with the right to counsel for indigent defendants. It does so in two primary ways: by requiring judges to hand-select the attorneys who are paid to provide representation to indigent defendants, rendering the defense attorneys beholden to the judge for their livelihood; and by allowing judges to enter into payment agreements with indigent defense attorneys that create a conflict of interest between the defense attorney's financial self-interest and the criminal case interests of the indigent defendants whom they are appointed to represent.

## JUDGES CHOOSE THE ATTORNEYS WHO ARE PAID TO PROVIDE REPRESENTATION TO INDIGENT DEFENDANTS

Mississippi statutes require that attorneys representing indigent people charged with felonies be provided either through a public defender office or through appointment of individual attorneys,<sup>117</sup> and in both systems the circuit court judges hand-select the attorneys.<sup>118</sup>

Attorneys in judicially controlled indigent defense systems often, consciously or unconsciously, follow or adjust to the needs of each judge in each court, rather than focusing on providing constitutionally effective services for each and every defendant. They internalize the informal practices and policies needed to continue their employment. Fearing the loss of their job if they displease the judge who hires them, defense attorneys bring into their calculations what they think they need to do to stay in the judge's favor. And so, it does not take a judge to say out loud: "Do not file motions in my courtroom."<sup>119</sup>

<sup>117</sup> MISS. CODE ANN. §§ 25-32-1 (2017) (office of public defender "as an alternative to court appointed counsel"), 99-15-15 (2017) (court appointed counsel).

<sup>118</sup> MISS. CODE ANN. §§ 25-32-3, 99-15-15 (2017).

<sup>119</sup> Of course, most judges do not consciously intend to improperly control the defense of the indigent. But like attorneys, judges have personal interests that can subconsciously creep into their decision-making, resulting in inappropriate interference with the provision of right to counsel services. For example, a study commissioned by the State Bar of Texas reports that "[n]early four in ten (39.5 percent) judges indicate that their peers occasionally appoint an attorney because he or she is a friend, while roughly one-third of judges sometimes consider whether the attorney is a political supporter (35.1 percent) or has contributed to their campaign (30.3 percent)." ALLAN K. BUTCHER & MICHAEL K. MOORE, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS (STATE BAR OF TEXAS 2000).

## UNDUE JUDICIAL INTERFERENCE

The experiences of the appointed counsel who are hand-chosen by the judges in one of the sample counties serve to illustrate how the legal interests of indigent defendants are subjugated to the desires of judges and the fear of attorneys that they will lose their jobs.

“You can’t make waves” in court, report the appointed attorneys, because the judges will not look favorably on those perceived as pushing too hard for their clients. The appointed attorneys have come to expect that the judges will not grant funds to indigent defendants for experts or investigators, even in capital cases. “You’d get laughed out of court” for requesting an investigator. One attorney has “learned to make do” and has not asked for an investigator in nearly two years of taking appointed cases. Another attorney has not asked for an investigator in the past five years, after having motions to obtain an investigator denied at least four times in a row. Having been consistently denied experts for years, one attorney no longer requests them at all. Among all the indigent defense cases handled by the numerous appointed attorneys, the defense only requests experts in one or two cases each year. And still the attorneys report, indigent defendants never receive expert witnesses, even when the state uses experts against them. The judges “make you conform or the client suffers.”

One judge confirms the sway that judges hold over the appointed counsel in this county: “Our system is ‘good ol’ boy.” You don’t rock the boat. You go along to get along.” The judge also disparagingly said: “some defenders are lazy, some are incompetent, some are both.”

When public defense attorneys take into consideration what must be done to please the judge in order to get their next appointment or hold on to their contract, by definition they are not advocating solely in the interests of the client, as is their ethical duty.

### *Adams County – appointed counsel*

The circuit court judges jointly select the ten private attorneys who are appointed to represent indigent felony defendants. Attorneys notify the judges of their desire to serve as appointed counsel and then wait in line for an opening. The judges fill any available opening for appointed counsel by choosing the next attorney in line based on the order in which they applied.

### *Clarke County – appointed counsel*

The circuit court judges jointly select the two private attorneys whom they appoint to represent indigent defendants charged with felonies. For the most part, attorneys who want to be considered put their own names forward for consideration by contacting the circuit court administrator. In at least one

case, however, an assistant district attorney contacted an attorney to ask if the attorney wanted the available fixed fee appointment. The judges most often select the appointed counsel attorneys from among those attorneys who have previously been appointed to conflict cases.

*DeSoto County – appointed counsel*

The circuit court judges jointly select the six private attorneys whom they appoint to represent indigent defendants charged with felonies. As one attorney explained, “We work at the pleasure of the judge.” Job openings are advertised locally and the court often receives many applications for a single position when one opens.

*George County – appointed counsel*

The senior circuit court judge selects the one private attorney who is appointed to represent indigent felony defendants.

*Leflore County – appointed counsel.*

The senior circuit court judge selects the 12 private attorneys who are appointed to represent indigent felony defendants. Attorneys notify the judge’s office of their desire to serve as appointed counsel and then wait for an opening.

*Lowndes County – appointed counsel*

The circuit court judges jointly select the five private attorneys whom they appoint to represent indigent defendants charged with felonies. Around November of each year, the judges send a letter to every member of the local bar association inviting them to apply to represent indigent defendants. Most often the agreements with the existing appointed counsel are simply renewed each year, rendering any application process mostly a formality. Some attorneys report being directly requested by a judge to accept an appointed counsel position, without having previously applied. One judge said that with the appointed counsel “you’ve got the best on two counts: you’ve got a lawyer paid for you; and you’ve got a lawyer who knows what I’m gonna do.” A prosecutor explained that indigent felony defendants who want to plead guilty are likely better off with appointed counsel than with privately retained counsel, but if a defendant is seeking to be found not guilty, he needs a privately retained attorney who “will not worry about getting the next case.”

In a public defender office, the judges are supposed to choose the public defender from a list of attorneys recommended by the local bar association,<sup>120</sup> but in the counties studied for this report, there was no indication that judges follow this direction. The designated public defender is statutorily authorized to choose the assistant public

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<sup>120</sup> MISS. CODE ANN. § 25-32-3(1) (2017).

defenders,<sup>121</sup> but in only two of the four public defender offices evaluated in this study does the public defender select the assistant public defenders independently of the judges. Thus even where the legislature has attempted to impose a degree of independence from the judges in selecting attorneys to represent the indigent accused, this is rarely occurring in practice.

*Forrest County – public defender office*

The circuit court judges jointly select the full-time public defender. The public defender, with input from the circuit court judges, hires the three assistant public defenders and support staff.

*Harrison County – public defender office*

The circuit court judges jointly select the full-time public defender. The public defender hires the seven assistant public defenders and the support staff.

*Hinds County – public defender office*

The circuit court judges jointly select the full-time public defender. The public defender hires the 12 assistant public defenders and the support staff.

*Pearl River County – public defender office*

The senior circuit court judge selects the full-time public defender and the two assistant public defenders, with the advice and consent of all of the circuit and county court judges.

## JUDGES CREATE PAYMENT AGREEMENTS WITH INDIGENT DEFENSE ATTORNEYS PITTING LAWYERS' INTERESTS AGAINST CLIENTS'

While Mississippi's county boards of supervisors set the budgets and provide the funding for felony indigent defense systems, it is the circuit court judges who advise those boards about the amount of funding needed. The financial resources necessary for effective representation fall into three categories: law office overhead;<sup>122</sup> case-

<sup>121</sup> MISS. CODE ANN. § 25-32-3(2) (2017).

<sup>122</sup> For an attorney to simply be available to represent clients each day, there are certain expenses that must be paid. These include at least: 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. All of these expenses, commonly referred to as "overhead," must be incurred before a lawyer represents a single client. "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 ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (Mar. 2013), and overhead tends to be a higher percentage of gross receipts as a law office gets smaller. 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

related expenses;<sup>123</sup> and the take-home pay<sup>124</sup> of the lawyer.<sup>125</sup> The circuit court judges by and large decide how much money will be paid to private attorneys to represent indigent felony defendants,<sup>126</sup> what if any case-related expenses will be reimbursed, and the extent to which attorneys will be reimbursed for the overhead at their private law offices where they provide representation to their appointed clients. The judges also decide the manner of compensation, using either an hourly rate or a fixed fee.

### **Judges choosing to pay indigent defense attorneys by hourly rates**

In an hourly rate compensation scheme, the attorney is paid for each hour of legal work on a case, but the maximum amount that an attorney can be paid for a single felony case is \$1,000.00.<sup>127</sup> The Mississippi Supreme Court has determined that attorneys who are paid an hourly rate are also entitled to be reimbursed for their “actual expenses,” including both overhead and case-related costs.<sup>128</sup>

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percent in smaller law offices).

<sup>123</sup> Once an attorney is designated to represent a specific client in a specific case, there are additional expenses that must be paid. These are the 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 expenses; other cases costing quite a lot. The expenses that are necessary, though, must be paid for in every client’s case.

<sup>124</sup> All national standards mandate that attorneys must receive just compensation when they are appointed to represent indigent defendants. STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, § 5-2.4 cmt. (AM. BAR ASS’N 3d ed. 1992) [hereinafter ABA STANDARDS – PROVIDING DEFENSE SERVICES] (lawyers should not be required to provide *pro bono* legal services). *See, e.g.,* DeLisio v. Alaska Superior Court, 740 P.2d 437, 443 (Alaska 1987) (holding that the state constitution prevents an attorney from being forced to represent an indigent defendant for less than the compensation received by the average competent attorney operating on the open market); McNabb v. Osmundson, 315 N.W.2d 9, 16 (Iowa 1982) (holding that attorneys cannot constitutionally be compelled to represent indigent defendants without compensation); State *ex rel.* Stephan v. Smith, 747 P.2d 816, 242 Kan. 336, 360-370 (Kan. 1987) (reviewing case law extensively and concluding that the state is obligated to pay appointed counsel fair compensation); Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. 1972) (requiring attorneys to represent indigent defendants for no compensation constitutes a substantial deprivation of property without just compensation); Kovarik v. County of Banner, 224 N.W.2d 761, 764-66 (Neb. 1975) (holding that attorneys appointed by the courts are entitled to reasonable compensation); State *ex rel.* Scott v. Roper, 688 S.W.2d 757, 769 (Mo. 1985) (holding that courts lack power to appoint counsel without compensation).

<sup>125</sup> *See, e.g.,* TEN PRINCIPLES, *supra* note 110, § 8 cmt. (“Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . separately fund expert, investigative, and other litigation support services.”).

<sup>126</sup> Private attorneys are appointed to represent all indigent felony defendants in Mississippi wherever the county board of supervisors does not establish a public defender office, MISS. CODE ANN. §§ 25-32-1, 99-15-15 (2017), and when the public defender office has a conflict or additional counsel is needed, MISS. CODE ANN. § 25-32-13 (2017).

<sup>127</sup> MISS. CODE ANN. § 99-15-17 (2017).

<sup>128</sup> Wilson v. State, 574 So.2d 1338 (Miss. 1990). The court interpreted MISS. CODE ANN. § 99-15-17 to allow indigent defense attorneys to be reimbursed for their “actual expenses” in representing



Because an attorney cannot be paid more than \$1,000 in a single defendant's case, the number of hours an attorney will devote to each indigent defendant's case is determined by the hourly rate of pay set by the judges. For example, if the judges set pay at the relatively high rate of \$100 per hour, the attorney cannot be paid for any more than 10 hours of work in a single case, no matter how many hours a client's legal interests require. If the attorney devotes even a single minute more than 10 hours, he is donating his time for free to represent the indigent defendant.

Once the attorney reaches the number of hours for which he can be paid, a capped hourly rate creates an incentive 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. Additionally, because an attorney can earn up to \$1,000 for each appointed case, it is in the attorney's own financial interest to accept as many appointed cases as possible without regard to the attorney's ability to provide effective assistance of counsel to each individual indigent defendant.

Capped hourly rates create a conflict of interest between the attorney's own financial interest and the legal interests of the indigent defendants whom he is appointed to represent. This is the situation observed in most of the ten counties studied closely in this evaluation, where at least some attorneys appointed to represent indigent felony defendants are paid an hourly rate, and so by state statute they are subject to the statutory maximum compensation of \$1,000.00 for a single felony case plus reimbursement of actual expenses.<sup>129</sup>

*Adams County (capped hourly rate for conflict counsel)*

In the highly unlikely event that all ten fixed fee attorneys have a conflict with a given defendant or it is necessary to appoint more than ten attorneys in a single case, the senior circuit court judge would appoint private attorneys and pay them an hourly rate out of the circuit court budget.<sup>130</sup> Some people suggested that defenders plead the majority of their cases due to the low compensation.

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an indigent defendant, thus avoiding a taking of property. *Id.* at 1340-41. The court defined "actual expenses" to include "all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case," *Id.* at 1340, or what is commonly referred to as overhead. A 1988 survey conducted by the Mississippi State Bar showed overhead costs at that time to be \$34.86 per hour. 35 *Mississippi Lawyer*, No. 5, at 45 (March-April 1989). Based on other information, the court "create[d] a rebuttable presumption that a court appointed attorney's actual overhead . . . [is] \$25.00 per hour," but that amount can be increased on proof by the lawyer that it is more, or reduced on proof by the prosecutor that it is less. *Wilson*, 574 So.2d at 1340-41. Regarding case-related expenses, the court said: "Specific expenses must be approved by the court before the attorney incurs the expenses. Court approved expenses include such items as the cost of an investigator, the cost of an expert witness, and a trip to interview witnesses. This list is not intended to be all-inclusive." *Id.* at 1341.

<sup>129</sup> MISS. CODE ANN. § 99-15-17 (2017).

<sup>130</sup> The judges report that defenders taking these cases always bill \$1,000 for the case, and \$25 per hour for overhead.



*Clarke County (capped hourly rate for conflict counsel)*

In the event that both of the fixed fee attorneys have a conflict, or when more than two attorneys must be appointed in a single case, the circuit court judges maintain a list of private attorneys who are available to be appointed on a case-by-case basis. When appointed, the private conflict attorneys are paid an hourly rate.

*DeSoto County (capped hourly rate for conflict counsel)*

In the unlikely event that all six fixed fee attorneys have a conflict with a given defendant or it is necessary to appoint more than six attorneys in a single case, the circuit court judges appoint private attorneys on a case-by-case basis and pay them an hourly rate.

*George County (capped hourly rate for conflict counsel)*

In the event that the one fixed fee attorney has a conflict or when more than one attorney must be appointed in a single case, the circuit court judges appoint private attorneys on a case-by-case basis and pay them an hourly rate.

*Harrison County (capped hourly rate for conflict counsel in cases that go to trial)*

When the public defender office has a conflict, the circuit court judges appoint private attorneys who are paid \$50 per hour for cases that go to trial (but they are paid a fixed fee of \$500 per case for cases that resolve by plea). At \$50 per hour, an attorney cannot be paid for more than 20 hours of work on a single case, no matter how much time is necessary to effectively represent the indigent defendant. Worse yet, because of the alternate fixed fee payment of \$500 for cases that resolve by plea, the attorney has every personal financial incentive to convince a client to plead guilty as quickly as possible, and certainly before the attorney has invested more than ten hours in a case. If the defendant pleads guilty when the attorney has only devoted one hour to the case, then the attorney has earned an effective \$500 per hour rate of pay; at two hours, \$250/hour; at three hours, \$166.67/hour; etc. It is only once the attorney has invested more than ten hours in a case that the attorney earns less per hour through the \$500 fixed fee for cases that resolve by plea than at the \$50 hourly rate for cases that go to trial.

*Hinds County (capped hourly rate for conflict counsel)*

When the public defender office has a conflict, the circuit court judges appoint private attorneys and pay them a \$60 hourly rate. At \$60 per hour, an attorney cannot be paid for more than 16.67 hours of work on a single case, no matter how much time is necessary to effectively represent the indigent defendant.

*Leflore County (capped hourly rate for appointed counsel and conflict counsel)*

Twelve private attorneys are each paid \$50 per hour for legal work in each indigent felony case to which they are appointed. In the highly unlikely event that all twelve hourly rate attorneys have a conflict with a given defendant or that it is necessary to appoint more than 12 attorneys in a single case, the senior circuit court judge would simply select additional private attorneys as needed and pay them the same hourly rate. At \$50 per hour, an attorney cannot be paid for more than 20 hours of work on a single case, no matter how much time is necessary to effectively represent the indigent defendant.

*Pearl River County (capped hourly rate for conflict counsel)*

If all three attorneys within the public defender office are personally conflicted, or if more than three attorneys are required in a single case, the judges appoint a private attorney and pay them an hourly rate. The hourly rate varies by attorney, because the rate paid includes a portion for overhead.

**Judges choosing to pay indigent defense attorneys by fixed fees**

In a fixed fee compensation scheme, the attorney is responsible for representing an unlimited number of indigent felony defendants in return for a certain amount of money that does not change no matter how many or how few cases the attorney is appointed to. There is no guarantee of overhead reimbursement for attorneys who are paid a fixed fee. The new rules of criminal procedure that took effect July 1, 2017 do ensure that an appointed attorney is entitled to be reimbursed for necessary case-related expenses for the defense of an indigent client, so long as those expenses are approved by the court.<sup>131</sup>

Because an attorney is paid exactly the same amount no matter how few or how many cases he is appointed to handle and no matter how few or how many hours he devotes to each 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 is paid \$24,000 a year to represent indigent felony defendants, and if his indigent felony 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 this attorney devotes only half of his working hours to his 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 fixed fee creates an incentive 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. It also incentivizes the attorney to favor the legal interests of his paying clients or other employment over the legal interests of the indigent defendants he is appointed to represent.

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<sup>131</sup> MISS. R. CRIM. P. 7.3(i).

The situation is worse yet if the attorney is not reimbursed for overhead and case-related expenses. In our example, this means any resources devoted to an indigent defendant will come out of the attorney's \$24,000 compensation. This creates a disincentive for the attorney to hire an investigator or experts or to, for example, accept toll calls from the jail, in the case of an indigent defendant, or to incur any overhead costs that benefit indigent defendants (even such as secretarial time, legal research capability through books or online, or malpractice insurance), without regard to whether the resources are necessary to provide effective representation.

Fixed fees create a conflict of interest between the attorney's own financial interest and the legal interests of the indigent defendants whom he is appointed to represent and also create a conflict between the legal interests of an attorney's paying clients and those of his indigent clients. This is the situation observed in six of the ten counties studied closely in this evaluation.

*Adams County (fixed fee for appointed counsel)*

Ten private attorneys are each paid \$2,000 per month – a total of \$24,000 each year – to represent an unlimited number of indigent felony defendants. The ten attorneys work out of their own private law offices and are responsible for providing all overhead and case-related expenses necessary to represent all of the felony indigent defendants to whom they are appointed; they are not reimbursed by the county for overhead or case-related expenses. Meanwhile though, the attorneys are allowed to engage in all other employment they desire and to handle as many private cases as they wish.

The attorneys observe that the compensation “is not terrible for attorneys who are fresh out of law school,” but those with a few years of experience earn much more from their private clients. One of the attorneys has an advertising brochure for his private law office that lists six practice areas, with immigration, corporate, real estate, divorce, and business litigation all coming ahead of criminal defense on the list. All of the attorneys find it difficult to keep practicing law while they are responsible for paying all overhead costs such as secretarial assistance and office rent.

Adams County has used a fixed fee compensation system for decades. The county used to pay private attorneys a fixed fee of \$200 pre-indictment per case plus \$500 if the grand jury returned an indictment. This was later raised to a single fixed fee per case of \$1,000 for representation from appointment to final disposition. As costs of indigent defense representation rose, the compensation structure was changed to a fixed monthly fee in an effort to reduce the county's costs.

*Clarke County (fixed fee for appointed counsel)*

Two private attorneys are each paid \$24,000 a year to represent an unlimited number of indigent defendants charged with felony offenses.<sup>132</sup> The attorneys are contractually entitled to be reimbursed for travel expenses for any case tried outside of the county and for copy and motion costs if they handle an appeal,<sup>133</sup> after the itemized expenses are submitted to and approved by the circuit court judge. However there is nothing budgeted for these expenses by Clarke County under the public defense line item,<sup>134</sup> and neither of the two attorneys ever request expense reimbursements in any event. The attorneys work out of their own private law offices and are responsible for providing all other overhead and case-related expenses necessary to represent all of the felony indigent defendants to whom they are appointed; they are not reimbursed by the county for these expenses.

The attorneys are allowed to engage in all other employment they desire and to handle as many private cases as they wish. To make ends meet, one of the attorneys (in addition to representing indigent felony defendants in Clarke County) is also: a fixed fee appointed counsel for an unlimited number of indigent felony defendants in a second county; accepts case-by-case felony conflict appointments in a third county; accepts case-by-case felony appointments in a fourth county; and practices personal injury and domestic law for private clients. The other attorney does not have a secretary or any support staff, but in addition to Clarke County felony indigent defense work: accepts case-by-case felony appointments in a second county; and takes family law, youth court, and criminal cases in private practice, admittedly increasing the private caseload to increase income.

The deputies at the Clarke County jail firmly report that the fixed fee attorneys “never come here” to the jail to meet with in-custody indigent felony defendants, and the two appointed private attorneys do not accept the toll calls from the jail. One of the attorneys “has never requested an investigator” on behalf of an indigent felony defendant, instead personally doing what little investigation might be done, but “If I am scared to go to a dangerous neighborhood on my own to take a photograph or talk to a witness, I will have the client do it and send it to me. If the client does not do it, it means they are

<sup>132</sup> See, e.g., Agreement between Clarke County Board of Supervisors and Kathryn McNair ¶¶ 1, 2 (Jan. 5, 2016) (on file with the Sixth Amendment Center).

<sup>133</sup> *Id.* ¶ 3.

<sup>134</sup> CLARKE COUNTY BOARD OF SUPERVISORS FINAL BUDGET FOR YEAR ENDING SEPTEMBER 30, 2015 (on file with the Sixth Amendment Center); CLARKE COUNTY BOARD OF SUPERVISORS FINAL BUDGET FOR YEAR ENDING SEPTEMBER 30, 2016 (on file with the Sixth Amendment Center). It is possible that these very limited expense reimbursements are made from the budget of the circuit court.

not interested in defending their case.” One of the attorneys has *never* had a trial in Clarke County, and sheriff’s deputies report that “there have probably been five felony trials in the past ten years” that are mostly conducted by retained attorneys.

*DeSoto County (fixed fee for appointed counsel)*

Six private attorneys are each paid \$55,762.20 per year, plus county retirement benefits, to represent an unlimited number of indigent defendants charged with felony offenses, but with representation commencing only after arraignment in the circuit court on grand jury indictment. The fixed fee appointed attorneys say they “do everything they can to settle cases” and the system results in “mass plea bargaining” due to the volume of cases and limited time the attorneys devote to the felony indigent defense cases they handle. Although attorneys are appointed at a defendant’s arraignment, the attorney is unlikely to be present when that occurs, and “it is common” that defendants may not meet their appointed attorney until the day they appear in court to enter a guilty plea.

The compensation paid to the fixed fee attorneys is intended to represent \$500 per month for overhead expense reimbursement, with the balance as a fee for the attorney. The attorneys work out of their own private law offices and are responsible for providing all overhead necessary to represent the defendants to whom they are appointed. One attorney reports that the \$500/month overhead reimbursement does not even cover half of his secretary’s salary, let alone case-related expenses of indigent defense clients. Another attorney believes he loses nearly \$50,000 each year given the overhead costs and case-related expenses of representing indigent felony defendants.

The attorneys are allowed to engage in all other employment they desire and to handle as many private cases as they wish. One attorney who had previously been a fixed fee appointed attorney for the county said he spent about 50% of his time on private cases from which he earned approximately 80% of his income. Another current fixed fee attorney regularly travels to nearly a dozen other counties handling private cases, and is the indigent defense attorney in a municipal court, all on top of representing an unlimited number of DeSoto County indigent felony defendants.

*George County (fixed fee for appointed counsel)*

A single private attorney is paid \$36,000 per year, in exchange for which he represents an unlimited number of indigent felony defendants. The attorney works out of his own private law office and is responsible for providing all overhead necessary to represent the defendants to whom he is appointed. He pays an office assistant \$600 per month for part-time help. The attorney’s

private office is about a 45-minute drive away from George County, so his felony indigent defense clients have no practical way of meeting with him other than at court settings.

In his own words, this attorney is “not big” on going to the jail to visit in-custody clients. In addition to representing an unlimited number of felony indigent defendants, this attorney: is paid a fixed fee to represent an unlimited number of misdemeanor indigent defendants in the justice court; has a \$30,000 per year fixed fee agreement to represent indigent conflict felony defendants in Jackson County; accepts case-by-case felony indigent appointments in two other counties in the circuit and a number of counties outside the circuit; and spends about 20% of his time on privately retained transactional and personal injury cases. Though hailed as a hero by all, he is plainly overextended, which explains why he reported that “damn, sometimes I get beat down.”

*Harrison County (fixed fee for conflict counsel in cases resulting in guilty plea)*

When the public defender office has a conflict, the circuit court judges appoint private attorneys who are paid a fixed fee of \$500 per case for cases that resolve by plea (but \$50 per hour for cases that go to trial, subject to the statutory cap of \$1,000 for a single felony case).

This creates perverse financial incentives for the attorney to compel the client to plead guilty quickly, because the attorney will earn the full \$500 fixed fee just as soon as he can convince a client to do so. If the defendant pleads guilty when the attorney has only devoted one hour to the case, then the attorney has earned an effective \$500 per hour rate of pay. But the attorney’s compensation decreases with each additional hour he devotes to the case – at two hours he earns \$250/hour; at three hours he earns \$166.67/hour; etc. For the tenth hour that the attorney devotes to a case that resolves by plea, he earns \$50/hour (which is the same as the hourly rate for cases that go to trial).

The conflict attorney’s personal financial incentives shift dramatically the moment he must devote more than ten hours to an indigent defendant’s case. At that point, it is in the attorney’s financial interest to take the case to trial as quickly as possible and to stop trying to obtain for a defendant the best possible terms under which he could plead guilty, no matter the desires of the defendant. This is because it is only by trying the case that the attorney can earn any more money than the \$500 fixed fee for a case that resolves by guilty plea. Beyond ten hours in a case, if a defendant pleads guilty, the attorney makes less and less money for each hour he devotes to the case *and* makes less per hour than he would if the case went to trial. At 11 hours, the attorney earns \$45.45/hour;



## CONFLICTS OF INTEREST IN MISSISSIPPI'S CRIMINAL JUSTICE SYSTEMS

Throughout Mississippi, it is possible for attorneys to serve as defense counsel to indigent people in one court and prosecutor in another, or as defender in one court and judge in another, all at the same time.

For example, an attorney who takes conflict indigent felony defense cases in one county also works as a prosecuting attorney in a neighboring circuit. Public defenders and assistant public defenders employed in public defender offices are prohibited from engaging in “the prosecution of criminal matters,” MISS. CODE ANN. § 25-32-5 (2017), but this is a private attorney who is appointed in conflict of interest cases. Because he does not work in a public defender office, he is not prohibited from working as a prosecutor.

In another example, a felony indigent defense attorney also serves as a municipal judge within the same county. Circuit court judges are prohibited from practicing law, but judges serving municipal and justice courts are not. MISS. CODE ANN. § 9-1-25 (2017).

In one of the counties with a fixed fee appointed counsel system, one of the appointed counsel attorneys: 1) is appointed to represent an unlimited number of indigent felony defendants; 2) serves as in-house counsel for a casino; 3) is a pro tem judge in a municipal court; and 4) has a private personal injury practice.

at 12 hours, \$41.67/hour; at 13 hours, \$38.46/hour; and if during the twentieth hour the defendant chooses to plead guilty, the attorney earns only \$25 per hour.

### *Lowndes County (fixed fee for appointed counsel)*

Five private attorneys are each paid \$37,728 per year, plus county health insurance and retirement benefits, to represent an unlimited number of non-capital felony defendants. One of these attorneys says he rarely does research in indigent defense cases, and when research is needed he just “calls one of [his] criminal defense lawyer buddies.” Because the county provides two small offices at the courthouse, with two computers, a copy machine, and filing cabinets, for the use of the five appointed counsel attorneys, these attorneys do not receive any reimbursement for overhead expenses, even though they primarily work on behalf of their appointed clients out of their private law offices where they pay for all overhead. The five attorneys are allowed to engage in all other employment they desire and to handle as many private cases as they wish. One of the attorneys reports that 60% of his work is privately



retained cases, while another reports that privately retained cases are 70 to 80% of her work. Another of the attorneys supplements income by serving as a municipal court judge.

# CHAPTER V

## PROVIDING QUALIFIED & TRAINED ATTORNEYS

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 graduate enters the legal profession automatically knowing how to effectively handle a felony criminal case. As the American Bar Association explained more than 20 years ago:

Criminal 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.<sup>135</sup>

National standards declare that an attorney's ability to provide effective representation to indigent defendants depends on his familiarity with the "substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction."<sup>136</sup>

Rule 1.1 of the Mississippi *Rules of Professional Conduct* requires all lawyers to be "competent" in carrying out their duties to clients.<sup>137</sup> Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to do them. Failure to adhere to the state's *Rules of Professional Conduct* may result in disciplinary action against the attorney, up to and including the loss of the attorney's license to practice law.<sup>138</sup>

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<sup>135</sup> ABA STANDARDS – PROVIDING DEFENSE SERVICES, *supra* note 124, § 5-1.5 cmt.

<sup>136</sup> PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 1.2(a) (NAT'L LEGAL AID & DEFENDER ASS'N 1995) [hereinafter NLADA PERFORMANCE GUIDELINES].

<sup>137</sup> MISS. R. PROF. CONDUCT 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

<sup>138</sup> MISS. R. PROF. CONDUCT 8.4(a) ("It is professional misconduct for a lawyer to: (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . ."); MISS. R. DISCIPLINE, Grounds for Discipline ("Acts or omissions by an attorney, individually or in concert with any other persons, which violate . . . the Code of Professional Responsibility . . . shall constitute misconduct and shall be grounds for discipline . . .").

The Mississippi *Rules of Professional Conduct* recognize that ongoing training is necessary for attorneys to maintain their familiarity with criminal law and procedure, as well as their competence to provide effective representation.<sup>139</sup> Similarly, all national standards, including those of the National Advisory Commission on Criminal Justice Standards and Goals,<sup>140</sup> require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program,<sup>141</sup> at which attorney attendance is compulsory, in order to maintain competence from year to year.

Training must be tailored to the types and levels of cases for which an attorney is appointed to provide representation to indigent defendants. If, for example, the lawyer has not received training on the latest forensic sciences and case law related to drugs, then the state should ensure that lawyer is not assigned to drug-related cases. If an indigent defense attorney does not have the “knowledge and experience to offer quality representation to a defendant in a particular matter,” then the attorney is obligated to refuse the appointment at the outset.<sup>142</sup> Ongoing training, therefore, is an active part of the job of being an attorney for the indigent accused.

<sup>139</sup> MISS. R. PROF. CONDUCT 1.1, cmt. (“To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.”).

<sup>140</sup> Building upon 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 (DOJ/LEAA) appointed the National Advisory Commission (NAC) 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 COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, c.13 (The Defense) (1973) [hereinafter NAC STANDARDS].

<sup>141</sup> NAC STANDARDS, *supra* note 140, § 13.16 (1973) (“The training of public defenders and assigned counsel panel members should be systematic and comprehensive.”).

<sup>142</sup> *Id.*; see also NLADA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, *supra* note 136, § 1.2(b) (“Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation”); *id.* § 1.3(a) (“Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that they have available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.”). The requirement of lawyers to decline or withdraw from cases, rather than provide incompetent representation, is reflected in MISS. R. PROF. CONDUCT 1.16(a)(1).

**FINDING #3: Outside of death eligible cases,<sup>143</sup> there are no standards or oversight in Mississippi to ensure that felony indigent defense attorneys have the necessary qualifications, skill, experience, and training to match the complexity of the cases they are assigned.**

Beyond the general requirement of competency, Mississippi does not require any particular procedures for selecting the attorneys who provide representation to indigent defendants and does not mandate that they have any particular qualifications for being assigned to any cases except death penalty cases.<sup>144</sup> In other words, even an attorney newly graduated from law school and having just passed the bar examination can be assigned to represent an indigent defendant in the most serious of felony cases where the defendant faces life in prison if convicted.

The OSPD has developed guidelines for public defenders taking felony cases in Mississippi,<sup>145</sup> but these guidelines are advisory only and judges are not required to follow them in appointing counsel to represent indigent felony defendants. These guidelines provide insight into what *should* be required of every attorney whom judges select to provide the Sixth Amendment right to counsel. As an example, Guideline 1.2 sets out the basic qualifications attorneys should have prior to assuming felony representation:

- a. To provide competent, quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction, including changes and developments in the law. Counsel must maintain research capabilities necessary for presentation of relevant issues to the court. Counsel should participate in skills training and education programs in order to maintain and enhance skills;
- b. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept more serious and complex criminal cases only after having had experience or training in less complex criminal matters. When appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel;

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<sup>143</sup> MISS. R. PROF. CONDUCT 7.4.

<sup>144</sup> MISS. R. PROF. CONDUCT 7.4.

<sup>145</sup> PERFORMANCE STANDARDS FOR THE DEFENSE OF FELONY CASES IN THE COURTS OF MISSISSIPPI, in MISS. PUBLIC DEFENDER TASKFORCE 2016 REPORT TO THE LEGISLATURE (MISS. OFFICE OF THE STATE PUBLIC DEFENDER 2016), *available at* <http://www.ospd.ms.gov/Task%20Force/Mississippi%20Public%20Defender%20Task%20Force%202016%20Report.pdf> (last visited Dec. 20, 2017).

- c. If representing a client with mental illness or a developmental disability, counsel should become familiar with the symptoms of the client's mental impairment and those symptoms' potential impact on the client's culpability in the case and potential use as a mitigating factor during sentencing. Counsel also should be familiar with the side effects of any medication the client may be taking to treat the client's mental impairment and the impact those side effects may have on the client's culpability in the case or use as a mitigating factor during sentencing; and,
- d. To provide competent, quality representation in post-trial proceedings, counsel must be familiar with the Rules of Appellate Procedure.<sup>146</sup>

Mississippi also does not require that attorneys appointed to represent indigent felony defendants receive any on-going training in criminal defense representation. These attorneys are subject only to the general requirement that all lawyers complete twelve hours of continuing legal education each year, with one of the hours devoted to ethics or professionalism.<sup>147</sup>

In the absence of any mandatory requirements, judges decide what if any qualifications the attorneys who provide representation to indigent felony defendants have.

Throughout the ten counties studied closely in this evaluation, attorneys just out of law school, or with no criminal experience at all, are selected by the judges to represent indigent defendants in the full range of felony cases from the least to most serious. Once selected, the attorneys are not required to have any on-going training, and only one of the representative jurisdictions provides for its attorneys to receive criminal defense training. None of the counties have any regular process for removing an ineffective attorney.

#### *Adams County*

The judges do not require any certain qualifications for the attorneys they select as appointed counsel, though the judges would like attorneys to have at least some criminal and trial experience. When an opening for appointed counsel is available, the judges fill it with the next attorney in line based on the order in which attorneys notified the judges of their desire to be appointed.

Two defenders began their careers as civil practitioners, becoming public defenders when the circuit judges ordered them to appear in court and appointed criminal cases to them. Neither had any significant criminal law experience or training to handle criminal cases when they were first appointed. One defender, asked how he taught himself criminal law, he said that he found ten files and studied them and the motions filed in them. He read books, learned procedure, and found sample pleadings in other files to help create his own.

<sup>146</sup> *Id.*

<sup>147</sup> MISS. R. MANDATORY CLE 3.

Another defender was a personal injury lawyer when, nearly a decade ago, a circuit judge called him to court and said, “I want you to meet your new client.” He told the judge he knew nothing about criminal law, and the judge replied, “you have five months to find out,” that time being what it would require to handle that case. “I took it as a challenge,” the defender said. Another defender was given an aggravated assault case set for trial within one week of getting the appointment – his first as a public defender.

Once selected as appointed counsel, attorneys are rarely if ever removed for poor performance.<sup>148</sup>

#### *Clarke County*

The judges do not require any certain qualifications for the attorneys they select as appointed counsel. The circuit court advertises openings for the appointed counsel positions. For the most part, private attorneys put their own names forward for consideration. On occasion, an attorney who has served as an assistant district attorney or as a law clerk to the judges is invited to an appointed position. The judges interview some number of the applicants and select the new attorney.

#### *DeSoto County*

The defenders in DeSoto County are among the most experienced criminal attorneys in the region. They all collaborate with and support each other, building a strong team of attorneys.<sup>149</sup> New public defenders in DeSoto are subjected to “baptism by fire”; they are just put into the rotation of public defenders without any formal training or orientation process. The other defenders do their best to guide new attorneys along. One defender began taking appointments in youth court before becoming a circuit defender; he had nearly three years of experience prior to becoming a public defender. When another public defender left to focus on private practice, his replacement received all his open case files. This former defender still consults with his successor on those cases, and plans to until they are all resolved.

#### *Forrest County*

The judges do not require any certain qualifications for the attorney they select as the public defender. Similarly, the judges and the public defender do not

<sup>148</sup> For example, one judge receives complaints from incarcerated defendants “at least once a month” about their attorneys failing to visit them in jail. Some defendants claim that they do not meet their attorneys at all prior to indictment. “Some defenders are lazy, some are incompetent, some are both,” the judge said; “our [public defender] system is ‘good old boy’. You don’t rock the boat. You go along to get along.” One judge reassigns at least a couple of cases every year because attorneys fail to keep up with clients.

<sup>149</sup> One defender opined that the county was lucky that it was able to retain such experienced attorneys for indigent defense, given the low pay.

have any certain qualifications for the attorneys they select as assistant public defenders. In both instances, though, they seek to hire attorneys with criminal and trial experience. One current defender began by taking conflict cases, and got to know the local attorneys through the monthly sign-in sessions in circuit court. When a position opened up, she applied and was hired. The newest attorney in the public defender office began with the office in February 2016. This attorney graduated from Old Miss Law School in 2014 and immediately established a family law private practice before beginning to take criminal cases on a conflict basis.

#### *George County*

The judges do not require any certain qualifications for the attorney they select as appointed counsel, but they seek to appoint an attorney with criminal and trial experience. The current appointed counsel attorney was previously a law clerk in the circuit court, an assistant district attorney, and a board attorney prior to entering private practice. In private practice, he took appointed criminal cases on a conflict basis from nearby counties.

#### *Hinds County*

Attorneys who are newly hired as assistant public defenders begin in the “pre-indictment unit,” which handles felony cases from a defendant’s initial appearance until the case is bound over to the grand jury.<sup>150</sup> From there, attorneys move up in order of longevity in the office to represent defendants after indictment, as positions open up because an attorney leaves the office or is re-assigned to a different judge’s court.

All of the attorneys in the office had at least some experience with criminal law prior to entering the office. The Chief Defender and Deputy Chief each had decades of experience in prosecuting and defending criminal cases. Other attorneys came to the office after time spent in other public defender offices, prosecutorial roles, and private practices focusing on criminal defense

One assistant public defender with only two years of legal experience was appointed to four capital cases simultaneously. This attorney took no courses in clinical or trial practice during law school and received no formal training after law school (beyond attending the required CLE hours each year). He had been

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<sup>150</sup> The pre-indictment unit only represents defendants whose cases arise out of the Jackson Municipal Court or the Hinds County Justice Court. Indigent defendants whose cases arise out of other municipal courts in the county are not represented until they are arraigned in circuit court after indictment. If a felony defendant had his initial appearance in one of the other municipal courts *and* demands a preliminary hearing, the preliminary hearing will be in the county court and the pre-indictment unit attorneys will represent the defendant for the limited purpose of that hearing.



at the public defender office for about ten months and had only been second-chair at one trial when he was assigned these capital cases, in addition to a full caseload of non-capital felonies.

The public defender office has sent several of its assistant public defenders to the Gideon's Promise training program with a grant from the OSPD. The program provides training specifically for indigent defense attorneys and then provides them with on-going support for a number of years after attendance.

#### *Leflore County*

The senior circuit court judge does not require any certain qualifications for the attorneys he selects as appointed counsel. In choosing from among the attorneys who have indicated their desire to be appointed counsel, the judge may ask an attorney some background questions, but there is no formal interview process. If an attorney with limited experience is selected to serve as appointed counsel, the senior circuit court judge tries to initially assign that attorney to lesser felonies and less complex cases, until with the advice of the other judges he feels confident that the attorney can handle more complicated matters. For the most part though, the twelve appointed counsel attorneys are actually assigned to individual cases on a purely rotational basis, with each attorney receiving roughly the same number of cases each year. The exception is that homicide cases are often assigned to one of the more experienced attorneys, with a lesser-experienced attorney assigned as additional counsel.

Some of the more seasoned attorneys on the assigned counsel list offer to informally mentor the newer attorneys. They frequently provide advice and guidance, and offer to second-chair cases that might go to trial. But there is no formal or structured training program for attorneys taking appointed cases in Leflore County, either at the outset of their careers or on an ongoing basis.

#### *Lowndes County*

The judges do not require any certain qualifications for the attorneys they select as appointed counsel each year. Most of the current defenders had at least some experience in criminal law prior to becoming public defenders. Of the five current appointed counsel attorneys, one came directly from serving as an assistant district attorney and also is currently a municipal court judge, while another was a law clerk to the circuit court judges. One who had no prior criminal experience previously worked as a circuit court staff attorney, and knew "the procedural stuff"; this defender has also consulted with the other attorneys in his firm and the other public defenders in the county with issue-specific questions.

*Pearl River County*

The judges do not require any certain qualifications for the attorneys they select as the public defender and assistant public defenders. The judges seek attorneys with at least some criminal or trial experience or both, and they tend toward hiring attorneys with whom they have previously worked – and whom they trusted – in the court system.

# CHAPTER VI

## EARLY APPOINTMENT & CONTINUOUS REPRESENTATION

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“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.”

— *Powell v. Alabama*, 287 U.S. 45 (1932)

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The U.S. Supreme Court explains in *United States v. Cronin*<sup>151</sup> that the actual denial of counsel at any critical stage of a case is so likely to prejudice the accused that “no amount of showing of want of prejudice would cure it.”<sup>152</sup> In 2008, the United States Supreme Court reaffirmed in *Rothgery v. Gillespie County*<sup>153</sup> that the right to counsel attaches when “formal judicial proceedings have begun.”<sup>154</sup> 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,”<sup>155</sup> without regard to whether a prosecutor is aware of the arrest.<sup>156</sup> For all defendants, the commencement of prosecution, “whether by

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<sup>151</sup> 466 U.S. 648 (1984).

<sup>152</sup> *Id.* at 658-59 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

<sup>153</sup> 554 U.S. 191 (2008).

<sup>154</sup> *Id.* at 211; *see also* *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

<sup>155</sup> *Rothgery*, 554 U.S. at 213.

<sup>156</sup> *Id.* at 194.

way of formal charge, preliminary hearing, indictment, information, or arraignment,” signals the beginning of formal judicial proceedings.<sup>157</sup>

Over 30 years ago, the Mississippi Supreme Court held that the state constitutional right to counsel attaches at the commencement of prosecution, which is defined by statute as “the issuance of a warrant or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit.”<sup>158</sup> Two years later, the court clarified that the Mississippi right to counsel attaches “once proceedings against a defendant reach the accusatory stage.”<sup>159</sup> Importantly, the court makes clear:

It would be totally irrational to suggest that one “bound over” to await the action of the next grand jury had not been accused. Similarly, . . . [i]f it has not already attached, the right to counsel is surely available to the accused at the time the Initial Appearance . . . *ought to have been held*, the “initial appearance”, of course, being that of the accused before a judicial officer “without unnecessary delay” following arrest.<sup>160</sup>

In *Rothgery*, the Court plainly declared that “[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’” of a case.<sup>161</sup> Over the decades, the Supreme Court has inch-by-inch delineated many case events as being critical stages requiring counsel, although it has never purported to have capped the list of events that may fall into this category.<sup>162</sup> Among other events that are definitely critical stages is the pre-trial period between arraignment and the beginning of trial.<sup>163</sup>

The “arraignment” in the previous sentence is, in Mississippi, the “initial appearance” that follows an arrest, because the U.S. Supreme Court has “flatly rejected the distinction between initial arraignment and arraignment on the indictment.”<sup>164</sup>

<sup>157</sup> *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).

<sup>158</sup> *Cannaday v. State*, 455 So.2d 713, 722 (Miss. 1984) (citing MISS. CODE ANN. § 99-1-7).

<sup>159</sup> *Page v. State*, 495 So.2d 436, 439 (Miss. 1986).

<sup>160</sup> *Id.* at 439.

<sup>161</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008).

<sup>162</sup> The critical stages in a case are the moments when the defendant has to make important choices; when “counsel would help the accused ‘in coping with legal problems or . . . meeting his adversary.’” *Id.* at 212 n.16 (quoting *United States v. Ash*, 413 U.S. 300, 312-13 (1973)). None of these proceedings 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)).

<sup>163</sup> *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *Powell v. Alabama*, 387 U.S. 45, 57 (1932).

<sup>164</sup> *Rothgery*, 554 U.S. at 202 (explicating the holding in *Michigan v. Jackson*, 475 U.S. 625 (1986)).

The conclusion was driven by the same considerations the Court had endorsed in *Brewer*: by the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial. And that is just as true when the proceeding comes before the indictment (in the case of the initial arraignment on a formal complaint) as when it comes after it (at an arraignment on an indictment.)<sup>165</sup>

Thus the Sixth Amendment requires that, from the moment of the initial appearance forward, an indigent defendant in Mississippi has the right to receive the effective assistance of counsel during the pre-trial period between the initial appearance and the beginning of trial, unless he has made an informed and intelligent waiver of that right.<sup>166</sup> Indeed, the Mississippi Supreme Court was decades ahead of many other states in correctly interpreting U.S. Supreme Court case law on this issue.

**FINDING #4: Throughout the State of Mississippi, indigent defendants charged with felony offenses are denied the right to counsel at the critical pretrial stage between arrest and arraignment following indictment, a period that is commonly at least a few months and occasionally as long as a year or more.**

The denial of counsel to felony indigent defendants until after arraignment following grand jury indictment violates the basic tenets of the Sixth Amendment, as the Mississippi Supreme Court recognized over thirty years ago:

The accused's right to counsel, once that right has attached, is a broad guarantee that the accused "need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."<sup>167</sup>

The process of a felony case through the trial courts of a given county depends on the type of courts that exist in the county, the law enforcement agency that makes the

<sup>165</sup> *Rothgery*, 554 U.S. at 202.

<sup>166</sup> A federal court expressly so held in July 2017, stating: "absent a valid waiver, counsel must be provided for indigent defendants prior to indictment, at or promptly after the first judicial proceeding, to preserve an indigent arrestee's right to a preliminary hearing and meaningful representation at all critical stages before trial. . . . Delaying the appointment of counsel to indigent defendants until after a grand jury indictment in Mississippi . . . impermissibly risks creating a dual system of justice wherein only arrestees who can afford counsel have meaningful access to the pretrial process, including preliminary and bail hearings, case investigation, and plea negotiation." *Burks v. Scott County*, No. 3-14-cv-00745 at 3-4 (S.D. Miss. June 27, 2017), *available at* <https://www.aclu.org/legal-document/burks-et-al-v-scott-county-mississippi-order>.

<sup>167</sup> *Cannaday v. State*, 455 So. 2d 713 (Miss 1984) (quoting *United States v. Wade*, 388 U.S. 218, 226 (1967)).

arrest, and to some extent on the structure of the system the county uses to provide representation to indigent people in felony cases.

## INITIAL APPEARANCE

When a person is suspected of a felony offense in Mississippi, he will be arrested.<sup>168</sup> As one judge explains it, on a felony the defendant at a minimum “must be photographed and printed.” Every person who is arrested on a felony charge in Mississippi has a right to an initial appearance before a judge within forty-eight hours of arrest, unless the defendant has been indicted by a grand jury or is released from custody prior to the initial appearance taking place.<sup>169</sup>

Either a municipal court or a justice court conducts the initial appearance depending on the county and law enforcement agency making the arrest. The defendant, the arresting or investigating officer, the judge, and sometimes the judge’s clerk are present for the initial appearance. Neither a prosecutor nor a defense attorney is required to be present at or participate in a felony initial appearance.

During the initial appearance, the court does three things in each defendant’s case: (1) advises the defendant of his rights, including his right to have counsel appointed and his right to have a preliminary hearing; (2) informs the defendant of the charge that forms the basis for his arrest, and if the defendant so desires reads the formal charge to the defendant; and (3) sets the amount and conditions of bond upon which the defendant can be released pending indictment.<sup>170</sup> On a felony arrest, the defendant does not enter a plea at the initial appearance.

With only a few minor exceptions, as follow, indigent felony defendants are not represented by an attorney during the initial appearance in any of the ten sample counties.<sup>171</sup>

<sup>168</sup> MISS. CODE ANN. § 99-3-18 (2017).

<sup>169</sup> MISS. CODE ANN. §§ 99-3-17 (2017) (all arrests), 99-3-18 (2017) (misdemeanor arrest); MISS. R. CRIM. P. 5.1, 5.2(a); MISS. R. CRIM. P. 5.2(c) (“In all cases where the defendant is released from custody, or has been indicted by a grand jury, the defendant shall not be entitled to an initial appearance.”).

<sup>170</sup> MISS. R. CRIM. P. 5.2.

<sup>171</sup> *Adams County*. Indigent felony defendants are never represented by an attorney during their initial appearance. Felony initial appearances are conducted by the Natchez Municipal Court and the Adams County Justice Court, in the judge’s chambers, within 48 hours of arrest.

*Clarke County*. Indigent felony defendants are never represented by an attorney during their initial appearance. There is some confusion within the criminal justice community about whether defendants arrested on felony charges are ever taken to a municipal court for initial appearance. The consensus seems to be that nearly all felony initial appearances are conducted by the Clarke County Justice Court. However, one person who serves as the municipal judge in two municipalities reports having personally conducted a felony initial appearance, and the justice court clerk believes the justice court conducts initial appearances only on felony arrests made by the sheriff’s department.

The sheriff’s department calls the justice court judge within 48 hours of the arrest to advise that an arrest has been made, and either the judge will go to the jail to conduct the hearing or a sheriff’s deputy

## THE ABSENCE OF ADVOCACY FOR PRE-TRIAL RELEASE

A person arrested in Mississippi for any offense other than capital murder is entitled to be released on bail, unless they have been previously convicted of a felony punishable by 20 years or more in prison.<sup>a</sup> The Mississippi Supreme Court, through the *Rules of Criminal Procedure*, clarifies the purpose of bail:

Any defendant charged with an offense bailable as a matter of right shall be released pending or during trial on the defendant's personal recognizance or on an appearance bond unless the court before which the charge is filed or pending determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large.<sup>b</sup>

The only legitimate purposes, then, of imposing conditions for pretrial release are to: (1) ensure the defendant will appear for court; and (2) protect public safety. But even in crafting conditions for these purposes, a court "shall impose the least onerous condition(s) . . . that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large."<sup>c</sup> The Mississippi Supreme Court further directs that the court setting conditions of pretrial release must consider the circumstances of the charged offense and the individual characteristics of the indigent defendant.

The judge who presides over the initial appearance determines the conditions under which an indigent felony defendant can be released from jail pretrial and sets the amount of any bail the court finds necessary for the defendant to post.

Judges can only make pre-trial release determinations based on the evidence put before them. When an indigent defendant appears without a lawyer, there is no one who can present evidence to show that the 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.

<sup>a</sup> MISS. CONST. art. 3, § 29.

<sup>b</sup> MISS. R. CRIM. P. 8.2(a).

<sup>c</sup> *Id.*



*DeSoto County*

Indigent felony defendants whose initial appearances occur during non-court hours, or during a court session at which the limited jurisdiction court's misdemeanor indigent defense attorney is not present, are not represented by an attorney during their initial appearance.

Felony initial appearances are conducted in the DeSoto County Justice Court and in five municipal courts: Hernando, Horn Lake, Olive Branch, Southaven, and Walls. Each of these six limited jurisdiction courts has an attorney under contract to provide representation to indigent misdemeanor defendants in the respective court. In all six courts, if the court's misdemeanor indigent defense attorney happens to coincidentally be present during a felony initial appearance,<sup>172</sup> that misdemeanor indigent defense attorney advocates on behalf of felony defendants (without regard to indigency) about conditions of pre-trial release.

*Forrest County*

Indigent felony defendants whose initial appearances occur in the Forrest County Justice Court or Petal Municipal Court, or in the Hattiesburg Municipal Court during non-court hours, are not represented by an attorney during their initial appearance.

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will transport the defendant to the courthouse. On a felony arrest the defendant does not enter a plea at the initial appearance, but on a misdemeanor arrest the defendant is called on to enter a plea of guilty or not guilty at initial appearance. This can be confusing, because some defendants are arrested on both misdemeanors and felonies arising out of a single course of conduct.

*George County.* Indigent felony defendants are never represented by an attorney during their initial appearance. Felony initial appearances are conducted by either the Lucedale Municipal Court or the George County Justice Court, in the judge's chambers, within 48 hours of arrest.

*Leflore County.* Indigent felony defendants are never represented by an attorney during their initial appearance. All felony initial appearances are conducted by the Greenwood Municipal Court, most often in the judge's chambers or law office, at whatever hour the judge is available; they rarely occur in the courtroom during the municipal court's weekly scheduled court date.

*Lowndes County.* Indigent felony defendants are never represented by an attorney during their initial appearance. Felony initial appearances are conducted by either the Columbus Municipal Court or the Lowndes County Justice Court, usually in chambers, although judges sometimes conduct initial appearances telephonically. The judges are working on getting CCTV technology for initial appearances, to cut down on the risk and expense of prisoner transport.

<sup>172</sup> It is basically the luck of the draw as to whether a justice or municipal indigent defense attorney is present during the initial appearance for a felony defendant. For example, the justice court is in session every business day, but only about half of the court sessions are criminal, and the justice court indigent defense attorney is present at only about half of those criminal court sessions.

Since the Forrest County Public Defender Office became a full-time office in October 2016,<sup>173</sup> the public defender office is present during those felony initial appearances in the Hattiesburg Municipal Court that happen to take place while the court is in session. The public defender meets with felony defendants and advocates on their behalf for conditions of pretrial release.

In justice court, the county prosecutor and the justice court's contract misdemeanor indigent defense attorney are coincidentally present during any felony initial appearances that are conducted while the justice court is in session, though neither of these attorneys has any responsibility for felony initial appearances. If the justice court judge so requests, the justice court's misdemeanor indigent defense attorney will counsel with a felony defendant briefly during the initial appearance, but only as a friend of the court.

#### *Hinds County*

The Hinds County Public Defender Office has a "pre-indictment unit" of three attorneys. These three attorneys take turns, one attorney each week, appearing for all felony initial appearances, without regard to whether a defendant is indigent, conducted in the Jackson Municipal Court, the Raymond Municipal Court, and the Hinds County Court, which conducts initial appearances and preliminary hearings normally falling under its jurisdiction, as well as for a handful of small municipalities in the county. The public defender office pre-indictment unit attorney meets with each defendant for three to five minutes to prepare a bail argument prior to the defendant being called before the judge.

#### *Pearl River County*

All felony initial appearances are conducted by either the Picayune Municipal Court or the Pearl River County Justice Court within forty-eight to seventy-two hours of arrest. Rarely is a defender present for an indigent defendant's initial hearing to argue on behalf of the defendant in connection with the conditions of pretrial release.<sup>174</sup>

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<sup>173</sup> Until October 2016, the Forrest County Public Defender Office did not have an attorney present at felony initial appearances in Hattiesburg Municipal Court. The City of Hattiesburg has an attorney who is hired to represent indigent misdemeanor defendants, but not to represent indigent felony defendants. Nonetheless, the misdemeanor indigent defense attorney met before initial appearances with every jailed defendant – including those arrested on felonies – and explained to them the process about to take place and, for indigent defendants arrested on felonies, that they would in the future be represented by the Forrest County Public Defender Office if they were indigent.

<sup>174</sup> This occurs whenever the defender is in court to hold or waive a preliminary hearing, and the defendant's initial appearance is held during regular court hours because the defendant had only been arrested in the day or two prior to the court session.

## PRELIMINARY HEARING

A defendant who is arrested for a felony and who has not been indicted by a grand jury is entitled to have a preliminary hearing,<sup>175</sup> at which the judge “determine[s] whether there is probable cause to believe that an offense has been committed and [that] the defendant committed it.”<sup>176</sup> For a defendant who is in jail when his preliminary hearing occurs, the judge also revisits the conditions of pre-trial release and can reduce a previously set bond.<sup>177</sup> The preliminary hearing is a critical stage in a criminal case at which the indigent defendant has a right to counsel.<sup>178</sup> The defendant may waive his right to have a preliminary hearing “in open court or by written waiver, signed by the defendant and defendant’s counsel” if he has an attorney.<sup>179</sup>

At the time this evaluation was being conducted, municipal and justice court judges in many of the sample counties believed and advised felony defendants that they were only entitled to a preliminary hearing for so long as they had not bonded out of jail. For a defendant who requested a preliminary hearing, if he bonded out of jail before the hearing actually took place, this was treated as a waiver of the right to a preliminary hearing.<sup>180</sup> Of greater concern, many indigent felony defendants were given the impression that they could *only* have a bond reduced or set *if* they waived their right to a preliminary hearing. For example, the “Initial Appearance” form that one court reads and provides a copy of to each defendant says, in part: “(5) . . . If you choose to waive your preliminary hearing, bond will be set, where proper; . . .”<sup>181</sup>

Only a very small percentage of defendants who are arrested on a felony ever have a preliminary hearing. Defendants who are able to bond out of jail before their initial

<sup>175</sup> MISS. R. CRIM. P. 6.2(a)(1).

<sup>176</sup> *Mayfield v. State*, 612 So.2d 1120, 1129 (Miss. 1992) (quoting *Avery v. State*, 555 So.2d 1039, 1046 (Miss. 1990) (C.J., Lee, dissenting in part)); *see also* MISS. R. CRIM. P. 6.2(a).

<sup>177</sup> MISS. R. CRIM. P. 6.2(a).

<sup>178</sup> *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 is bailable’”).

<sup>179</sup> MISS. R. CRIM. P. 6.1(b).

<sup>180</sup> Uniform Rule of Circuit and County Court Practice 6.03(5) – which governed practice for felony cases prior to the July 2017 adoption of the Mississippi Rules of Criminal Procedure – states that the lower court judge is responsible for informing the defendant “the defendant has the right to demand a preliminary hearing while the defendant remains in custody.” While the right to demand a hearing while in custody is expressly stated, there was no provision expressly stating defendants had a right to a preliminary hearing if they bonded out, and the historical practice in most counties was that defendants who bonded out no longer had such a right. The new Mississippi Rules of Criminal Procedure make clear that defendants retain the right to a preliminary hearing regardless whether they bond out after the initial appearance. MISS. R. CRIM. P. 6.01(a)(1) (“A defendant who has been charged with a felony is entitled to a preliminary hearing upon request. But a defendant who has been indicted by a grand jury is not entitled to a preliminary hearing.”).

<sup>181</sup> *See* Initial Appearance form, Clarke County Justice Court (on file with the Sixth Amendment Center).

## SHIFTING THE COST OF A FELONY CASE FROM A CITY TO A COUNTY

Municipal courts have financial incentives to quickly either obtain a waiver of the right to preliminary hearing or hold the preliminary hearing, because that transfers jurisdiction of the case and the defendant from the municipality to the county, along with the cost of pre-trial detention for defendants who are not released pre-trial. Justice courts do not have any such incentive to hold a preliminary hearing quickly, because the county is responsible for the cost of pre-trial detention both before and after a defendant is bound over to await indictment.

appearance rarely, if ever, request a preliminary hearing, even in those counties where judges allow out-of-custody defendants to have a preliminary hearing. Defendants who are not able to bond out of jail immediately after the initial appearance may request and have a preliminary hearing scheduled, but in all ten of the counties studied closely for this evaluation, felony defendants are almost always offered and accept a bond reduction in exchange for waiving their right to preliminary hearing, which results in the defendants automatically being bound over to await action of a grand jury.

As a practical matter, the scheduling of a preliminary hearing is treated as a triggering mechanism to have some attorney present in court to represent an in-custody felony defendant for the limited purpose of securing a bond reduction. In some of the studied counties, the attorney appointed to represent an indigent felony defendant at a preliminary hearing is not, other than through coincidence, the attorney who will represent the defendant on any indictment subsequently returned by a grand jury. In only two of the ten counties will the attorney who represents an indigent felony defendant at a preliminary hearing conduct any investigation to prepare for the hearing. Indigent felony defendants usually meet their preliminary hearing attorney for the first time at, or at most a few days before, the hearing for a brief five to ten minute conversation. On average, preliminary hearings take place one to four weeks after the initial appearance, although in one county, Pearl River, defendants sometimes wait up to 90 days to have a preliminary hearing.

### *Adams County*

Defendants who are able to bond out very rarely request a preliminary hearing, though the judges will allow them to have a preliminary hearing if they request it. For an indigent defendant (in- or out-of-custody) who requests a preliminary hearing, one of the appointed counsel attorneys will be assigned to represent the defendant for the preliminary hearing. The attorney will attempt to resolve the case as a misdemeanor if possible, or – failing that – reach an agreement with the prosecutor to reduce the defendant's bond in exchange for the defendant waiving the preliminary hearing. In fact, this is less a transaction with the

prosecutors and more one with the judges, because for many years there has been an “understanding” that the judge will reduce a defendant’s bond – by an amount ranging from \$500 up to half of the previously set bond – if the defendant waives the preliminary hearing.

*Clarke County*

Nearly all indigent felony defendants bond out following their initial appearance and sign a waiver of their right to a preliminary hearing.

*DeSoto County*

Preliminary hearings are rare throughout DeSoto County, but there is some variation among the different municipalities in the rate of defendants receiving preliminary hearings. If a defendant has a preliminary hearing, he will be represented by the municipal or justice defender for that hearing alone.

*Forrest County*

The public defender office represents indigent defendants at all preliminary hearings.<sup>182</sup> The preliminary hearing is usually set to take place within a few days, and at most a week and a half, after the initial appearance. As a practical matter, though, few preliminary hearings actually occur. Instead, the public defender office attorney typically contacts the appropriate prosecutor (the county attorney in justice court; the municipal prosecutor in municipal court) after the initial appearance and negotiates an agreement about the amount of bond a defendant can make in exchange for waiving the defendant’s right to a preliminary hearing. “If a defendant will waive the preliminary hearing, the judges will automatically slash the bond in half.”

*George County*

The public defender automatically requests preliminary hearings for each defendant.<sup>183</sup> A “fair number” of defendants who bond out following arrest request preliminary hearings, and all who request a preliminary hearing receive a hearing date. The municipal judge estimates that about twelve to twenty felony cases are scheduled for each monthly court date, but only one or two of these actually result in a full preliminary hearing. Much more frequently,

<sup>182</sup> The public defender office attorneys do not appear in Petal Municipal Court at all, and they only appear for preliminary hearings in Forrest County Justice Court.

<sup>183</sup> A municipal judge would like to eliminate the automatic request for a preliminary hearing, instead requiring the public defender to request them in writing for each case. Very few cases are ever dismissed for lack of probable cause, so the judge thinks the preliminary hearings are not necessary in some cases. The defender himself agrees that almost no cases are dismissed at preliminary hearings, and they are “mostly a waste of time.” However, in many cases, “it helps to have others review me” by invoking their right to the preliminary hearing and requiring the judge to find probable cause.

defendants obtain a bond reduction and end up waiving the preliminary hearing, after consulting with the public defender. The defender says this is the “number one tool used at preliminary hearings.”

#### *Harrison County*

Indigent felony arrestees have a public defender office attorney appointed for the limited purpose of conducting preliminary hearings, which are rare. Defenders can negotiate bail, contest probable cause, and in some cases help a client obtain a quick plea deal prior to indictment. Following the preliminary hearing date, the office informally withdraws from representation and the client will not see a public defender again until the arraignment on the indictment.

#### *Hinds County*

For indigent felony defendants who have not bonded out of jail, the public defender office pre-indictment unit attorneys begin investigating their cases to prepare for preliminary hearing, frequently interviewing witnesses and conducting field investigation. If an agreement can be reached with the prosecutor and judge before the preliminary hearing actually takes place, many indigent defendants agree to waive the preliminary hearing in exchange for a bond reduction sufficient to allow them to get out of jail. For those preliminary hearings that go forward, the public defender office pre-indictment unit attorneys routinely cross-examine police witnesses and even sometimes call alibi witnesses. When attempting to have a defendant’s bond reduced, the public defender office attorneys often call character witnesses to testify to the defendant’s community and family ties. The defense attorneys receive limited electronic discovery at preliminary hearings, including the police report and any other affidavits already entered into the file.<sup>184</sup> All information the public defender office pre-indictment attorneys obtain prior to and during the preliminary hearing is put into the case file that will be transferred to the post-indictment attorney, once that attorney is assigned.

#### *Leflore County*

Individuals who do not bond out following the initial appearance remain in jail, sometimes up to a month before they appear before a judge for the preliminary hearing in their case. For defendants who do not bond out, their attorney typically moves to reduce bond at the preliminary hearing and the defense attorney, prosecutor, and police work together to figure out an appropriate reduction, which is almost always approved. When defendants have preliminary hearings in municipal court, the municipal defender will be

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<sup>184</sup> Discovery is made available to defense counsel through the court’s electronic case filing system. Neither the county attorney nor the arresting agency provide any written or hard copies of discovery. We were repeatedly told that criminal histories are not always ready by the time of preliminary hearings. The arresting agency ultimately maintains custody of each case file until the files are prepared for indictment and turned over to the District Attorney.



appointed for that purpose.<sup>185</sup> In justice court, one of the circuit defenders will represent the defendant at the preliminary hearing.

#### *Lowndes County*

Very few felony defendants ever have preliminary hearings. Only defendants who do not bond out are even eligible for such hearings, and many of those defendants ultimately waive the hearing in exchange for a bond reduction. Only in very rare instances have defense attorneys even requested preliminary hearings for defendants who have bonded out. Indigent defendants in both Lowndes County justice court and Columbus municipal court who invoke their right to counsel are sent to the circuit clerk to request appointed counsel, and directed to re-appear in the lower court after that request.<sup>186</sup> Most defendants ultimately choose to proceed without a lawyer, and receive no appointment until they are arraigned on an indictment. Defenders estimate that they conduct about ten to fifteen preliminary hearings every year combined, almost all of which occur in municipal court.

#### *Pearl River County*

Public defender office attorneys are not notified of appointments to represent indigent defendants until just before preliminary hearings, usually after a defendant has been in jail for a few weeks. The public defender office will represent defendants who have preliminary hearings. Very few defendants ever have preliminary hearings; most waive the hearings and receive a bond reduction.

If a defendant waives his preliminary hearing, he is bound over to await action of the grand jury. If a defendant has a preliminary hearing and the judge finds probable cause, then he “bind[s] the defendant over to await action of the grand jury.”<sup>187</sup> If a defendant has a preliminary hearing and the judge finds there is no probable cause, then the defendant must be released from custody, although the prosecutor is free to present the charges to a grand jury in an effort to obtain an indictment of the defendant.<sup>188</sup>

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<sup>185</sup> At the time of our visit, the municipal defender was also on the assigned counsel list for circuit court.

<sup>186</sup> A law enforcement officer brings the paperwork from municipal court to circuit court. Some judges know that the circuit court almost never appoints counsel to indigent defendants in justice court prior to indictment, but they do not inform defendants of this when they send them to request counsel.

<sup>187</sup> MISS. R. CRIM. P. 6.2(f).

<sup>188</sup> MISS. R. CRIM. P. 6.2(g).



## AWAITING GRAND JURY ACTION

The Mississippi Constitution requires that felony prosecutions be instituted by a grand jury indictment.<sup>189</sup> A felony defendant who is represented by counsel may voluntarily waive indictment,<sup>190</sup> but a defendant who does not have an attorney has no choice but to wait on a grand jury's decision.

A large amount of time can pass between an indigent felony defendant being arrested and/or bound over and a grand jury returning an indictment, and Mississippi law does not impose any limits on the amount of time that can take.<sup>191</sup> The district attorney in the circuit is responsible for presenting felony cases to the grand jury<sup>192</sup> and decides when to do so. A grand jury is *always available* in every county,<sup>193</sup> but how frequently a district attorney chooses to present cases to a grand jury is entirely within his discretion and varies greatly from county to county.

A felony defendant who is arrested just after a district attorney has presented cases to a grand jury will have to wait until at least the next grand jury presentation to have his case considered. In a county like Clarke or George, where a district attorney only makes grand jury presentations twice a year, this means an indigent felony defendant will wait at least six months after his arrest before he can be indicted, arraigned, and receive an attorney. Worse yet, the district attorney typically will not present a case to a grand jury until law enforcement's investigation is complete, which can result

<sup>189</sup> MISS. CONST. art 3, § 27. There are limited constitutional exceptions for felonies that are not relevant to this evaluation. The Mississippi Constitution also requires a grand jury indictment for prosecution of misdemeanors, but the legislature is authorized to and has allowed for misdemeanors to be prosecuted by affidavit. *Id.* (“[B]ut the legislature, in cases not punishable by death or imprisonment in the penitentiary, may dispense with the inquest of the grand jury.”); MISS. CODE ANN. § 9-9-27 (2017) (“[P]rosecutions by affidavit are hereby authorized in misdemeanor cases under the same procedure as if indictments had been returned in the circuit court and same had been transferred to the county court.”).

<sup>190</sup> MISS. CONST. art. 3, § 27.

<sup>191</sup> There is no limit on the amount of time a prosecutor has to initiate prosecution for a large number of felonies in Mississippi, but he always has at least two years after a crime occurs to commence the prosecution, MISS. CODE ANN. § 99-1-5 (2017), and binding the defendant over to await the grand jury constitutes the commencement of prosecution, MISS. CODE ANN. § 99-1-7 (2017). For a defendant who eventually asserts his constitutional right to a speedy trial, the Mississippi Supreme Court has held that a delay of eight months between arrest and trial is presumptively prejudicial, *Smith v. State*, 550 So.2d 406, 408 (Miss. 1989), but as pointed out by the dissent in *Johnson v. State*, 68 So.2d 1239, 1247-60 (2011) (Dickinson, P.J., dissenting), this rarely means that a defendant will prevail on a speedy trial claim. More to the point, though, and especially for those defendants who eventually receive a “no true bill” from a grand jury, there is simply nothing in Mississippi law that requires the prosecutor to move expeditiously toward this eventual result.

<sup>192</sup> MISS. CODE ANN. § 25-31-11(1) (2017) (“It shall be the duty of the district attorney to represent the state in all matters coming before the grand juries of the counties within his district.”); MISS. CODE ANN. § 25-31-13 (2017) (“The district attorney shall attend the deliberations of the grand jury whenever he may be required by the grand jury, and shall give the necessary information as to the law governing each case, in order that the same may be presented in the manner required by law.”).

<sup>193</sup> MISS. CODE ANN. § 13-5-39 (2017) (a grand jury “shall continue to serve from term to term until the next grand jury is impeached, and it may return indictments to any term of court”).

## ALTERNATIVE TO GRAND JURY INDICTMENT

Many states throughout the country do not require a grand jury indictment to institute prosecution for non-capital felonies.<sup>a</sup> In these states, a prosecutor reviews the arrest, the file of the law enforcement agency making the arrest, and any further investigation conducted after the arrest, and determines whether to prosecute the defendant. To initiate prosecution, the prosecutor files a charging document known as an “information,” which takes the place of a grand jury indictment. As a double-check against prosecutorial overreach, defendants usually have the right to have a judge determine whether there is probable cause for the prosecution to go forward.

Prosecutor offices in jurisdictions that allow institution of prosecution in this way typically have one or more attorneys in the office whose primary role is to review arrests and make a charging decision as quickly as possible. The delay between arrest and institution of prosecution is often much shorter than in jurisdictions that require grand jury indictment.

<sup>a</sup> See, e.g., NAT’L CTR. FOR STATE CTS., 4.1B GRAND JURIES: COMPOSITION AND FUNCTIONS (CONT’D), STATE COURT ORGANIZATION (S. Strickland et al. eds., June 30, 2017), <http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document%5CBM173>. Grand jury indictment is required in 18 jurisdictions: Alaska, Delaware, District of Columbia, Georgia, Kentucky, Maryland, Michigan, Mississippi, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Utah, and Virginia. Grand jury indictment is not required in 23 jurisdictions: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Missouri, Nevada, New Hampshire, North Dakota, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin.

in a case not going to the first grand jury after arrest but instead waiting for the next one – with the indigent felony defendant waiting perhaps as long as 12 months after arrest before receiving an attorney. This problem is not limited to smaller or more rural counties. In 2016, the *Clarion-Ledger* investigated lengthy delays between arrest and indictment in Hinds County and found that nearly twenty percent of prisoners in Hinds County jails had not been indicted three months after their arrests.<sup>194</sup>

<sup>194</sup> Mollie Bryant, *Jailed Without Trial*, CLARION-LEDGER (Oct. 29, 2016), available at <http://www.clarionledger.com/story/news/2016/10/29/jailed-without-trial/92777706/>.

In the ten counties studied closely for this evaluation, the frequency with which district attorneys present felony cases to grand juries and the delays that indigent felony defendants experience in awaiting grand jury action, and therefore in waiting to receive an attorney, are as follow:

*Adams County*

The district attorney presents felony cases to a grand jury once every two months (six times each year), for approximately two days (total of 12 days per year). If an in-custody defendant has not been indicted by the end of the court term during which he was arrested, the circuit court judges will release him from jail (but he may still be indicted by a grand jury). The grand jury usually indicts defendants within two to three months after preliminary hearing or waiver.

*Clarke County*

The district attorney presents felony cases to a grand jury once every six months (two times each year), for approximately one or two days (total of two to four days per year). Nearly all of the cases of defendants arrested since the previous grand jury are typically considered, so a defendant usually does not wait longer than six months between arrest and grand jury.

*DeSoto County*

The district attorney presents felony cases to a grand jury once every month (12 times each year), for approximately one to two days (total of 12 to 24 days per year). Defendants typically wait anywhere from two to six months between arrest and a decision by the grand jury.

*Forrest County*

The district attorney presents felony cases to a grand jury once every month (12 times each year), for approximately one day (total of 12 days per year). The district attorney often does not receive case files from law enforcement until four to eight weeks after a defendant is arrested, and the least complicated cases are then presented to the grand jury within another three to four weeks. It may be six to ten weeks before prosecutors present cases involving the drug lab to a grand jury, and up to four to six months for very complicated cases. On occasion it can take over a year following arrest for a case to be presented to the grand jury, and when this occurs it is almost always due to the law enforcement agency's delay in providing the file to the district attorney or to the Mississippi crime lab's delay in processing evidence.

*George County*

The district attorney presents felony cases to a grand jury once every six months (two times each year), for approximately one to three days (total of two

to six days per year). Cases are typically presented to the sitting or subsequent grand jury after the time of arrest, and the grand jury usually reaches a decision in a case within two to three months from arrest.

#### *Harrison County*

The district attorney presents felony cases to a grand jury once every week for Gulfport District 1 (52 times each year) and once every two to three weeks for Biloxi District 2 (17 to 25 times each year). The grand jury process can take eight months to a year. After a preliminary hearing, defendants wait on average six to nine months for a grand jury. A list of defendants who have been indicted is usually generated once a week.

#### *Hinds County*

The district attorney presents felony cases to a grand jury once every week (52 times each year). It typically takes from two to sixth months following arrest for prosecutors to present a case to grand jury, but it can take up to a year. Drug cases take longest to reach the grand jury due to backlogs in the Mississippi crime lab.

#### *Leflore County*

The district attorney presents felony cases to a grand jury once every three months (four times each year), for approximately two to three days (total of eight to 12 days per year). The district attorney tells grand jurors to try to find proof of guilt beyond a reasonable doubt, just as if they were serving on a trial jury, and that causes grand juries to often ask for additional law enforcement investigation and slows obtaining a result from the grand jury. Prosecutors report that it can take from three to ten months between preliminary hearing and grand jury, while defense attorneys estimate several months to a year.

#### *Lowndes County*

The district attorney presents felony cases to a grand jury once every three months (four times each year), for approximately two to five days (total of eight to 20 days per year). The majority of defendants are indicted within three months of a preliminary hearing, but more complicated cases can take longer.

#### *Pearl River County*

The district attorney presents felony cases to a grand jury once every six months (two times each year). The prosecutor presents all cases for which he has received a law enforcement file up to about three weeks before the grand jury session. If a law enforcement agency turns in a file too late, the case will have to wait another six months until the next grand jury. Prosecutors present almost all cases to a grand jury within six to seven months of the preliminary hearing.

Once a case is bound over to the grand jury, the circuit court technically takes jurisdiction over the case. But circuit courts play essentially no role until a case is indicted and the defendant is brought in for arraignment. Throughout the state, there exists considerable confusion regarding where and how to file motions on behalf of felony defendants whose cases have been bound over but not yet indicted.

Some attorneys report that they sometimes file habeas corpus motions on behalf of in-custody indigent defendants who are bound over awaiting grand jury for extended periods. For example, Forrest County defenders reported filing a few habeas motions in the past few years, but district attorneys then expedite the presentation of those cases to grand juries, mooted the petitions. In Leflore County, an attorney reported that he had filed two habeas corpus petitions when his clients were held more than a year prior to indictment, both of which resulted in his client's release. Attorneys in Lowndes and Hinds counties also reported filing habeas corpus petitions, leading to bond review hearings or prosecutors speeding up the grand jury process.

#### ACTUAL DENIAL OF COUNSEL DURING THE PRE-TRIAL PERIOD FROM INITIATION OF PROSECUTION THROUGH ARRAIGNMENT ON THE INDICTMENT

As the U.S. Supreme Court has said, “the adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate.’”<sup>195</sup> Yet the greatest majority by far of indigent felony defendants in Mississippi never have an attorney working on their behalf prior to their arraignment in circuit court on a grand jury felony indictment.<sup>196</sup> Instead, during the entire period between a felony arrest and the arraignment on indictment, indigent felony defendants fall into a “black hole”<sup>197</sup> in which they are not represented by an attorney.

Even in those rare instances where an attorney is both formally appointed to represent an indigent felony defendant prior to arraignment *and* aware of the appointment, the attorneys simply do not do any work on the case before the arraignment. The words of

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<sup>195</sup> United States v. Cronin, 466 U.S. 648, 656 (1984) (quoting Anders v. California, 386 U.S. 738, 743 (1967)).

<sup>196</sup> The very small percentage of indigent felony defendants who do not waive their preliminary hearing may have one brief conversation with a lawyer at or shortly before the preliminary hearing, *see supra* pp. 60-64, but that preliminary hearing lawyer is not always the same attorney who will represent the defendant after indictment, and even more rarely will any lawyer do any work on an indigent felony case between it being bound over for grand jury and arraignment on the indictment.

<sup>197</sup> This terminology is that of judges, defense attorneys, and even prosecutors across the state. Many used this exact description, while others alluded to it.

one felony indigent defense attorney sum up the sentiments: “I kind of have an iron-clad rule. When they get indicted, that’s when I swing into action. If they’ve just been arrested, I’m not going to do anything.”

*Adams County*

Indigent defendants who do not bond out of jail will be represented by a public defender for the preliminary hearing, and in certain minor cases the defender might help negotiate a plea to a misdemeanor prior to the grand jury taking action. Defendants who bond out prior to indictment will not have any attorney working on their case until they are indicted.

*Clarke County*

There is no actual mechanism in place to inform an indigent defendant – detained or not – who has been appointed to represent him, prior to arraignment on a grand jury indictment. Similarly, there is no actual mechanism in place, prior to grand jury indictment, to inform the defense attorneys that they have been appointed to represent an indigent defendant. “We might be appointed prior to arraignment, but nine times out of ten we won’t know it.” In Clarke County, the indigent defense attorneys will rarely ever be appointed prior to arraignment on the indictment, and even when appointed before arraignment the attorneys will do absolutely nothing on an indigent defendant’s behalf during this time period.

*DeSoto County*

Felony defenders are not appointed to a case until the defendant is arraigned on the indictment. Appointed counsel are not always present at the arraignment, and might receive notification of their appointments a few days after arraignments. In two municipalities, the current municipal defenders are also felony defenders, so defendants may have met their felony attorney at the preliminary hearing date, but in practically no cases do defenders work between preliminary hearings and indictment.

*Forrest County*

The Forrest County public defender office uses a horizontal representation model. One defender represents clients at initial appearances and preliminary hearings in the Hattiesburg municipal court and the justice court. Following the preliminary hearing, the case is transferred within the office to one of the other attorneys, but those attorneys do not work on cases until a client is indicted.

In Forrest County, every person arrested on a felony who is out of custody while awaiting grand jury action must appear in person at the circuit court on the first Friday of every month between 7:00am and 10:00am to “sign in.” This “monthly sign-in” is off the record, and is attended by the public defender



# A SIMPLIFIED EXPLANATION OF HOW INDIGENT FELONY DEFENDANTS IN MISSISSIPPI ARE DENIED THE RIGHT TO COUNSEL BETWEEN ARREST AND ARRAIGNMENT FOLLOWING INDICTMENT

Every person arrested on a felony charge has the right to an initial appearance before a judge within 48 hours of arrest.<sup>a</sup> At the initial appearance, the judge advises the defendant of the charge(s) upon which they have been arrested and of their rights, including their right to an attorney if indigent, and sets the conditions under which the defendant can be released from jail, *i.e.*, bail.<sup>b</sup>

- If an indigent felony defendant gets out of jail before the initial appearance takes place, they will not have an initial appearance and they will not be represented by a lawyer until they are arraigned in circuit court after a grand jury indictment.
- If an indigent felony defendant is still in jail when the initial appearance takes place, other than in a very small number of courts,<sup>c</sup> the defendant will not be represented by a lawyer during the initial appearance, no attorney will advocate on behalf of the defendant about conditions of pretrial release, and the defendant will not be represented by a lawyer until he is arraigned in circuit court after a grand jury indictment.

Every person arrested on a felony charge<sup>d</sup> has the right to a preliminary hearing at which a judge decides whether there is probable cause to believe the charged felony has been committed and that the defendant committed it. Preliminary hearings are typically scheduled to occur within one to four weeks after the initial appearance.

- If an indigent felony defendant gets out of jail before the preliminary hearing takes place, other than in extremely rare circumstances,<sup>e</sup> he will not have a preliminary hearing and they will not be represented by a lawyer until he is arraigned in circuit court after a grand jury indictment.

- If an indigent felony defendant is still in jail when the preliminary hearing is scheduled to take place, some defense attorney<sup>f</sup> will represent the defendant solely for the purpose of the preliminary hearing. In almost all cases, the defense attorney will negotiate with the prosecutor to reduce the defendant's bail in exchange for the defendant waiving the preliminary hearing. The defendant will not have a preliminary hearing and from that point forward will not be represented by any lawyer until he is arraigned in circuit court after a grand jury indictment.
- For all indigent felony defendants both in- and out-of-custody, once a preliminary hearing is either waived or held, the defendant will not be represented by any lawyer until he is arraigned in circuit court after a grand jury indictment.

Every felony prosecution must be commenced by grand jury indictment, and indigent felony defendants cannot waive indictment because they are not represented by counsel. The delay between arrest and grand jury indictment ranges *on average* from two months to over a year,<sup>g</sup> and during this time an indigent felony defendant is not represented by any lawyer.

<sup>a</sup> Unless indicted by a grand jury.

<sup>b</sup> Unless the defendant is constitutionally or statutorily precluded from being released pre-trial.

<sup>c</sup> See *supra* pp. 56-59.

<sup>d</sup> Unless indicted by a grand jury.

<sup>e</sup> See *supra* pp. 60-64.

<sup>f</sup> Unless by coincidence, this is not the attorney who will be appointed to represent the defendant after indictment.

<sup>g</sup> See *supra* pp. 65-69.



office attorneys, the court administrator, and sheriff's office personnel. This is an opportunity for all defendants and attorneys to catch up on their cases, and for the judges to ensure that defendants are represented by counsel; if counsel has not yet been appointed at the sign-in, the circuit judge will appoint one. The DAs are often looking for cases that can be sent to diversion.<sup>198</sup> In addition to this sign-in, one day each month all the public defenders and judges go to the county jail to conduct a similar group meeting.

#### *George County*

The defender usually does not have time to do much work on a case before it is indicted; indeed, he has had a few cases ultimately dismissed by the grand jury after having conducted extensive investigation prior to the case being presented. When defendants cannot bond out prior to indictment, the defender sometimes tries to negotiate with the District Attorney, or motion the circuit court for a bond reduction.

#### *Harrison County*

If a defendant makes bail while awaiting indictment, he is considered no longer indigent, and the public defender's office sends him a letter notifying him their representation has ended.<sup>199</sup> After the preliminary hearing, the defenders conduct no work on cases until the arraignment on the indictment.

#### *Hinds County*

Indigent felony defendants who bond out of jail before having a preliminary hearing will not have any attorney work on their case until after they are indicted. Even for those defendants who have preliminary hearings, after the hearing, the defenders conduct no work on cases until the arraignment on the indictment. In 2012, the senior circuit judge in Hinds County ordered the district attorney to secure an indictment for incarcerated defendants within 90 days of their case being bound over, or show cause why the person should still be detained. Under the same order, the sheriff must report to the circuit court and district attorney the numbers of people in jail awaiting indictment every month.<sup>200</sup> However, it appears that compliance with the order has waned, with little in the way of enforcement or sanctions from the court.<sup>201</sup> The district

<sup>198</sup> The sign-in also offers an opportunity for the sheriff to serve warrants and capias orders; defendants who do not bond out are served in jail.

<sup>199</sup> If the defendant is later indicted, the public defender's office can be re-appointed if the court finds the defendant to be indigent, though he may not receive the same attorney.

<sup>200</sup> See Order of Procedure for Bond Review of Unindicted Detainees, In Re: Persons Arrested, Charged with a Felony and Detained in Jail in Excess of 90 Days Without Issuance of Indictments, No. 766-156 (Sept. 24, 2013) (on file with the Sixth Amendment Center).

<sup>201</sup> Bryant, *supra* note 194 ("The order required the Hinds County Sheriff's Department to provide Green and the district attorney with a list of inmates who had spent more than 90 days in jail without an indictment. It's not clear if they still receive this list, and Smith and Green's answers suggest that it's been months at least since they last received it.").

attorneys report that the order was revoked,<sup>202</sup> after problems beyond the prosecutors' control kept causing delays in the indictment process.<sup>203</sup> Public defender office attorneys report that, shortly after the judge issued the order, the district attorney got in the habit of expediting indictments right after the sheriff submitted the reports, to avoid having to release defendants who were in jail longer than 90 days.<sup>204</sup>

#### *Leflore County*

If a defendant is determined indigent at the initial appearance, the clerk of the court sends a form to the clerk for the senior circuit judge. The circuit court then appoints one of the assigned counsel for the preliminary hearing date if the defendant has not bonded out. For these defendants, counsel will be notified within two to three days of the initial appearance by fax, email, or physical mail, with an order containing the name of the client, the charges against him/her, and the date of the preliminary hearing.<sup>205</sup> Defendants learn who their lawyer is when their appointed counsel reach out to them; in most cases, this happens a few days before a defendant's preliminary hearing date. Following the preliminary hearing date, the defenders conduct no work on cases until the arraignment on the indictment.<sup>206</sup> The court does not notify defenders when defendants they might have represented in justice court for a preliminary hearing are indicted, until defenders appear in court for the arraignments.

#### *Lowndes County*

Indigent defendants in Lowndes County may be lucky to get a total of two months of attorney work in a given case. Essentially all of this work is conducted following indictment, after the attorney requests and receives discovery. Some attorneys do not even request discovery until the end of a term, and may not receive it for another month after that. In many cases, five months or more may pass from the time someone is arrested until an attorney first even sees discovery in their case, precluding crucial investigations.

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<sup>202</sup> The judge who issued the order affirms that it has not been revoked, and the sheriff is still required to report concerning the number of pre-trial detainees.

<sup>203</sup> For example, defendants would be bound over by the county or municipal court, but the DA says they would never receive a case file from law enforcement, and would not learn that some individuals were incarcerated until running the reports, or until the public defender would file motions for habeas corpus or bond review.

<sup>204</sup> The new *Rules of Criminal Procedure* require jails to provide circuit judges with a list of all bail-eligible defendants who have been incarcerated over ninety days, at least one week prior to the beginning of each circuit court term. MISS. R. CRIM. P. 8.5(c).

<sup>205</sup> However, one attorney stated that she is usually not appointed to a case until weeks or months after someone requests counsel, often receiving the notice of appointment shortly before the preliminary hearing.

<sup>206</sup> As in many other counties, the defenders reported that the only cases they ever investigate prior to indictment are very serious charges, primarily capital cases.

*Pearl River County*

No investigation is conducted following preliminary hearings, because defenders already have overwhelming caseloads of indicted clients. Only in very serious cases will an attorney investigate anything prior to indictment. A defender reports that defense lawyers have “almost no work to do” between preliminary hearings and indictments, so they focus their efforts on cases where defendants have already been indicted. The senior circuit judge has directed the newer public defenders, who are full-time, that he expects they will continue to work on cases between the preliminary hearing and indictment.

## ACTUAL APPOINTMENT OF THE ATTORNEY WHO DEFENDS THE INDIGENT DEFENDANT AFTER GRAND JURY INDICTMENT

At the initial appearance, the justice/municipal judge advises the defendant of the right to counsel if indigent. In some counties, the lower court judge does not determine whether the felony defendant is indigent and does not actually appoint an attorney.<sup>207</sup> In other counties, lower court judges may consider the indigency affidavit directly and determine whether a defendant is indigent and entitled to appointed counsel, and appoint an attorney or defender office.<sup>208</sup>

Typically, an arrestee fills out an affidavit of indigency and request for appointment of counsel at the jail; that form is sent to the lower court and/or circuit court clerk. If an indigent felony defendant is released from jail before completing the form, he will not apply for or receive an appointed attorney until arraignment in circuit court after indictment.

In a county with a public defender office, the public defender office is generally responsible for representing the defendant unless the circuit court determines the defendant is not indigent. How and when that public defender office assigns the case to a particular attorney varies from county to county.

In a county that does not have a public defender office, upon the circuit court receiving the form or the defendant appearing in court for the arraignment on the indictment, the clerk or judges at some point determine whether the defendant is indigent. If the circuit court decides the defendant is indigent, the circuit court appoints a specific attorney,

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<sup>207</sup> If a defendant does not bond out, the judge will either appoint an attorney for the preliminary hearing, or ask the justice/municipal defender to represent the arrestee for that limited purpose.

<sup>208</sup> In these counties, the circuit court will re-assess a defendant’s indigency at the arraignment on the indictment.

but how and when they appoint that attorney, or notify him of the appointment, or the attorney begins working, or the defendant learns of the appointment, varies from county to county.

*Adams County*

People who are arrested without a warrant are brought before a municipal or justice court judge within forty-eight hours of arrest. Those arrested on Friday night have a provisional bond set by Monday morning. These defendants would make an appearance before the municipal or justice judge, who reads the defendant his rights and the charges, sets bond, appoints an attorney, and sets a preliminary hearing date. The attorney appointed will be one of the circuit defenders assigned to that court. The circuit court defenders report that they dispose of a substantial number of cases in the lower courts as misdemeanors.

*Clarke County*

The actual mechanism for a detained indigent defendant to request and receive appointed counsel occurs at the jail. The jail administrator keeps track of all defendants detained at the Clarke County jail and encourages potentially indigent defendants to complete the paperwork to request an attorney. Once a defendant completes the form requesting an attorney, the jail administrator sends that paperwork to the 10th Circuit Court Administrator. The 10th Circuit Court Administrator designates the specific attorney who will represent the defendant – theoretically alternating between the two appointed counsel, or choosing a conflict private attorney where there is a conflict; presents the paperwork to a circuit court judge to sign; and sends the granted Petition & Order to the Clarke County clerk of court. The Clarke County clerk of court puts the paperwork in a folder that she keeps in her desk, in alphabetical order, for all defendants who have been arrested but not yet presented to a grand jury. The process for out-of-custody defendants to request appointed counsel is similar – they fill out the same form – but the request is entered at the courthouse in circuit court when they are arraigned.

*DeSoto County*

Appointed counsel are not formally appointed to cases until a defendant is arraigned on the indictment. Circuit judges directly appoint defenders to indigent defendants at the arraignment; three defenders work in each judge's courtroom, taking cases in rotation. Appointed counsel are not always physically present at the arraignment, and might receive notification of their appointments a few days after arraignments. In two municipalities, the current municipal defender is also a felony defender, so defendants may have met their felony attorney at the preliminary hearing date.

*Forrest County*

The municipal judge in Hattiesburg and the justice court judges appoint the Forrest County public defender office to indigent defendants. The Petal Municipal Courts faxes to the public defender officer paperwork for each defendant who receives appointed counsel at initial appearance.<sup>209</sup> This appointment to the office continues through disposition, but the defendant will have at least two different attorneys represent her – one for initial appearance and preliminary hearing, and another after indictment. Even though the office is appointed on paper, the defenders do not work on cases between the time someone is bound over and the arraignment. At arraignment, the attorney who will ultimately represent the defendant in circuit court takes over.

*George County*

For cases arising in justice court, the justice court notifies the justice court defender of indigent arrestees who have not bonded out and are therefore scheduled for a preliminary hearing. This is currently the same and only attorney appointed to represent indigent felony defendants in circuit court from arraignment through disposition. That public defender determines whether defendants are indigent and entitled to appointed counsel; he will represent indigent defendants at their preliminary hearings. For cases arising in municipal court, and for defendants who bond out prior to indictment, the felony appointed counsel will be appointed at the arraignment on the indictment. The public defender in George County is present in the courtroom during arraignments. If a defendant has not already met the public defender from the preliminary hearing date in justice court, this is the first time a defendant will meet the public defender.

*Harrison County*

The public defender office is appointed in municipal or justice court to indigent defendants.<sup>210</sup> An attorney from the office represents each incarcerated indigent defendant for the preliminary hearing or waiver thereof. If a defendant makes bail while awaiting indictment, he is considered no longer indigent, and the public defender's office sends him a letter notifying him their representation has ended.<sup>211</sup> After the preliminary hearing, the defenders conduct no work on

<sup>209</sup> This includes: an "Order" indicating that the initial appearance occurred, the rights of which the defendant was advised, the charge of arrest, and the amount of the bond set if any; and an "Order of Appointment of Public Defender" notifying the public defender office of the appointment and the defendant's name, docket number, and charge of arrest. See Order of Appointment of Public Defender, Petal Municipal Court (on file with the Sixth Amendment Center).

<sup>210</sup> Judges ask only three questions to determine whether a defendant is indigent: whether the defendant's family could assist him in obtaining a lawyer; whether the defendant had any assets he could sell in order to hire a lawyer; and whether there was any other way for the defendant to obtain counsel (*pro bono*, credit, etc.). When defendants answer in the negative to each of the questions, the judges appoint the public defender office.

<sup>211</sup> If the defendant is later indicted, the public defender's office can be re-appointed if the court finds

cases until the arraignment on the indictment. At arraignment, the office is re-appointed by the circuit court, or newly appointed if a defendant did not have a preliminary hearing, and resumes representation. Defendants will likely but not always have the same attorney following indictment as represented them at the preliminary hearing date.

#### *Hinds County*

The public defender office is appointed and appears for a defendant's initial appearance or preliminary hearing depending on the municipality, but the attorney(s) who handle these lower court appearances will not represent the defendant in circuit court.<sup>212</sup> At the arraignment on the indictment, a new attorney will take over a case from within the office and represent the defendant through disposition. Defenders are assigned in small teams to specific courtrooms, and will receive all felony cases arising in that judge's court, absent a conflict of interest.

#### *Leflore County*

When someone is arrested on a felony charge, the arresting agency provides them with a questionnaire, which arrestees fill out if they wish to be represented by an attorney; this is the first time defendants are advised of their right to appointed counsel. The questionnaire also serves as a defendant's first formal request for counsel, which will be verified when the defendant has his or her initial appearance before the judge. Defendants who are unemployed and request counsel in municipal court will have the municipal defender appointed for the preliminary hearing date. Justice court uses no set criteria for determining indigence, but will consider the defendant's responses to the questionnaire. At arraignment, if a defendant is indigent and counsel has not yet been appointed by arraignment, the circuit judge will appoint counsel. The same appointed counsel who represented a defendant at his preliminary hearing date will continue on a case following indictment unless the defender determines that he has a conflict of interest relating to that client.

#### *Lowndes County*

Only a few defendants facing very serious charges will have counsel formally appointed prior to indictment.<sup>213</sup> Most indigent defendants receive appointed counsel only following indictment in Lowndes County. Defendants must

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the defendant to be indigent, though he may not receive the same attorney.

<sup>212</sup> In determining indigency, the county and municipal court judges ask questions about a defendant's employment; assets, including income from business ventures, bank accounts, property, and stocks; and dependent family members. Even if an individual does not specifically request a public defender, the judges offer the office's services.

<sup>213</sup> In Columbus Municipal Court, the judges ask defendants about their financial situations to determine whether they are eligible for appointed counsel. The municipal judges ask about employment, income, government benefits, and any property or assets the defendant may have.



request counsel at arraignment.<sup>214</sup> Once counsel is appointed, they will likely meet and confer with the client for a few minutes in court on the arraignment date.

#### *Pearl River County*

If a defendant had a preliminary hearing in justice court, the county court clerk will enter a notation on the paperwork prepared for the arraignment, indicating who represented the defendant at the preliminary hearing; absent a conflict of interest, the county judge will appoint the same defender. But one defender reports that “many” clients who she represents at preliminary hearings are assigned to a different attorney following arraignment. “It would be easier if we kept the same defendants we had at preliminary hearings.” The defenders have an informal arrangement amongst themselves to re-assign cases where the lawyer was switched between preliminary hearing and arraignment.

At the time of our visit, only a few defendants facing very serious charges would have counsel appointed prior to indictment. Normally, the circuit court formally appoints counsel to indigent defendants only following indictment.<sup>215</sup> As Pearl River County has hired more full-time defenders, the defenders are now expected to represent defendants at preliminary hearings as well, and continue to work on cases beyond the preliminary hearing.

## ARRAIGNMENT IN CIRCUIT COURT AFTER INDICTMENT

A defendant’s first appearance before a circuit (or county) court judge is at the arraignment on the indictment.<sup>216</sup> During the arraignment, the judge informs the defendant of the charges, conducts an indigency determination for any defendant who does not have an attorney, and appoints an indigent defense attorney for defendants who are found to be indigent. Additionally, the court must conduct a bond review hearing for any defendant who is in jail.<sup>217</sup>

<sup>214</sup> The judges appoint counsel to all defendants who request it, relying on the defenders to notify the court if a defendant appears able to afford private counsel; “we sort of go on the honor system.” Judges report conducting three or four hearings every year to re-assess a defendant’s indigency.

<sup>215</sup> To determine indigency, arrestees are provided a form when they are arrested. They fill out this form and turn it in to the judge at their initial appearance. The municipal/justice judge asks questions about arrestees’ financial information, employment, assets (and whether they are owned or financed, as well as the value), and whether someone is disabled, receiving benefits, or has a bank account. If an arrestee requests an attorney, one is typically appointed. In circuit court, the process is very similar. In the indigency colloquy, the judge asks each defendant: 1) whether he is employed; 2) what are his wages; 3) how many hours per week he works; 4) whether he owns a home or vehicle; and 5) the value of any property he owns. Most of the defendants who state they cannot afford an attorney are deemed indigent and have counsel appointed to represent them.

<sup>216</sup> Defendants in Pearl River County are arraigned in county court; defendants in all other counties studied for this report are arraigned in circuit court.

<sup>217</sup> MISS. R. CRIM. P. 15.1.



*Adams County*

After indictment, the defendant will be arraigned in circuit court. At arraignment, the circuit court sets the case schedule, including pretrial hearings for discovery compliance and motions, as well as a trial date. If a defendant is indigent and counsel has not yet been appointed by arraignment, the circuit judge will appoint counsel.

*Clarke County*

The contract public defense attorneys take turns being present at the circuit court when felony arraignments occur. For any defendants who appear without counsel and request appointed counsel, the 10th Circuit Court Administrator designates the specific attorney who will represent each arraigned indigent defendant by alternating between the two contract defense attorneys, back and forth for every other defendant. At arraignment, the court will also set a “plea or continuance date” and a trial date, and may consider a defendant’s bond.

*DeSoto County*

Defenders are appointed to indigent defendants<sup>218</sup> at arraignment, but are not necessarily present in the courtroom for the arraignment. Defendants receive contact information for their appointed attorneys, and the onus is on defendants to reach out to the attorneys. One defender said it is common that defenders might not meet their clients until the day they appear in court to enter a guilty plea. Defenders motion for discovery at or a few days after arraignment.

*Forrest County*

At arraignment, if a defendant does not have counsel representing him, the circuit court judge asks “can you afford a lawyer” and generally appoints the public defender office to represent every client who answers “no.”<sup>219</sup> For defendants who are in custody at the time of their arraignment, the circuit court judge considers the present bond and either keeps it the same or changes it based on what he considers to be appropriate. The circuit court judge also sets an omnibus hearing date and a trial date. Defenders request discovery from the District Attorney immediately following arraignment.

*George County*

The public defender in George County is present in the courtroom during arraignments. If a defendant has not already met the public defender from the preliminary hearing date in justice court, this is the first time a defendant will meet the public defender. Discovery is produced automatically, but not

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<sup>218</sup> In determining a defendant’s eligibility for appointed counsel, the circuit court considers whether a defendant made bond, and how much.

<sup>219</sup> According to a circuit court judge.

necessarily on the day of the arraignment. At arraignment, the court will also set a pre-trial conference date and a trial date, and may consider a defendant's bond.

#### *Harrison County*

At arraignment, the office is either appointed or re-appointed by the circuit court to a client's case (depending on whether the client had a preliminary hearing and whether he was represented by the public defender office). Arraignment is the point at which public defenders really begin to work on almost all cases in Harrison County. At arraignment, the court will also set a pre-trial conference date and a trial date, and may consider a defendant's bond.

#### *Hinds County*

Following indictment, defendants are arraigned in circuit court, where the circuit judge sets a date for hearing motions, a date by which a defendant must accept a plea, and a trial date. Trial dates are never set for the same circuit term as the arraignment, giving the attorneys at least a few months to prepare. At arraignment, defenders typically file motions for discovery and make oral motions for bond reduction (or to have bond set in a capital case).

#### *Leflore County*

After indictment, the defendant will be arraigned in circuit court. At arraignment, the circuit court sets the case schedule, including pretrial hearings for discovery compliance and motions, as well as a trial date. If a defendant is indigent and counsel has not yet been appointed by arraignment, the circuit judge will appoint counsel.

#### *Lowndes County*

Defendants served with indictments will be arraigned during the next circuit court term.<sup>220</sup> At arraignment, bond is set and a trial date is announced, usually within the following circuit term. All bonded-out defendants arraigned in previous terms are required to sign in at the court the first day of each term, as well as twice each day for three consecutive days leading up to their trial date.<sup>221</sup> Some attorneys do not even request discovery until the end of a term, and may not receive it for another month after that. In many cases, five months or more may pass from the time someone is arrested until an attorney first even sees discovery in their case.

<sup>220</sup> Most defendants waive a reading of their indictment at arraignment, after briefly consulting with counsel. "We don't really have any long meetings [with clients] that day; the purpose is to just arraign [defendants] and set their bond," according to one defender.

<sup>221</sup> The trial date is ostensibly the only date set on the calendar for each case during term, but not every case is necessarily expected to go to trial. Each of the judges also holds a motions day one week before they sit for the term.

*Pearl River County*

Defendants are arraigned in county court. The judge begins by stating each defendant's name and charge, then asks whether defendants have an attorney. If defendants do not have an attorney by the time of their arraignment, the judge asks whether they will hire one. If the defendant indicates that they cannot hire an attorney, the judge asks questions about their financial situation to determine whether they are eligible for appointed counsel. At arraignment, the court will also set a pre-trial conference date and a trial date, and may consider a defendant's bond.

# CHAPTER VII

## SUFFICIENT TIME & RESOURCES

The Court in *Powell v. Alabama*<sup>222</sup> 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. Having been assigned unqualified counsel, the Scottsboro Boys’ trials proceeded immediately that same day.<sup>223</sup> 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.”<sup>224</sup> Insufficient time is, therefore, a marker of constructive denial of counsel. Further, the inadequate time may itself be caused by any number of things, including but not limited to excessive workload or contractual arrangements that create negative fiscal incentives for lawyers to dispose of cases quickly.

The U.S. Supreme Court further 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.”<sup>225</sup> 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.”<sup>226</sup> If a defense 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”<sup>227</sup> – a constructive denial of counsel occurs.

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<sup>222</sup> 287 U.S. 45 (1932).

<sup>223</sup> Over the course of the next three days, four separate all-white juries, trying the defendants in groups of two or three at a time, found all nine of the Scottsboro Boys guilty, and all but one was sentenced to death. The youngest—only 13 years old—was instead sentenced to life in prison.

<sup>224</sup> *Powell*, 287 U.S. at 56-59.

<sup>225</sup> *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.”).

<sup>226</sup> *Id.* at 657 (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

<sup>227</sup> *Id.* at 656-57.

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 case. Even in the simplest felony 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 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).<sup>228</sup>

One state Supreme Court observed over twenty years 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.”<sup>229</sup>

More than two decades ago, Mississippi's Supreme Court underscored the importance of pretrial investigation and preparation as essential components of effective representation in criminal cases. In *Triplett v. State*,<sup>230</sup> the Mississippi Supreme Court laid out the fundamental requirements of effective defense representation.

<sup>228</sup> See generally NLADA PERFORMANCE GUIDELINES, *supra* note 136.

<sup>229</sup> *State v. Wigley*, 624 So.2d 425, 428 (La. 1993).

<sup>230</sup> 666 So.2d 1356 (Miss. 1995).

Basic defense in this case required complete investigation to ascertain every material fact about this case, favorable and unfavorable. It required familiarity with the scene, and the setting. It required through his own resources and process of the court learning the names of, and interviewing every possible eyewitness, and getting statements from each. It required prior to trial learning all information held by the state available to the defense through pre-trial discovery motions.<sup>231</sup>

The court affirmed that all people accused of crime in Mississippi have a right to “a reasonable defense in court with the effective assistance of counsel.”<sup>232</sup> For an attorney to provide effective assistance of counsel to an indigent felony defendant, the attorney must have sufficient resources and time.

**FINDING #5: The State of Mississippi does not ensure that felony indigent defense attorneys have sufficient time and necessary resources, including investigators and social work services, to provide effective representation.**

In many counties, the first time most indigent felony defendants will meet the attorneys who will represent them is at the arraignment on the indictment. About two to three weeks later, the court will conduct a “plea/settlement” date; by this time, the defense attorney has (under normal circumstances) received discovery and a plea offer from the prosecutor. Despite this being at best the indigent defendant’s second opportunity to consult with his appointed attorney, the defendant is expected to either plead guilty at this court appearance or request a continuance if he intends to have a trial.

*Adams County*

Defendants who do not bond out by the preliminary hearing date will at least meet with a circuit defender – likely the one who will represent the client through disposition – at the preliminary hearing date, at which point the defense can review the case file in court. Following the preliminary hearing, the defendant will not meet the attorney again until the arraignment on the indictment, at which point the defense receives discovery from the district attorney.

*Clarke County*

The two contract defenders alternate appearances in court for arraignment days, and are each appointed to every other case. Therefore, a defendant has about a 50/50 chance of meeting her attorney at arraignment. By the “plea/settlement”

<sup>231</sup> *Id.* at 1361.

<sup>232</sup> *Id.* at 1363 (citing *Littlejohn v. State*, 593 So.2d 20, 22 (Miss. 1992)).

date, the defendant will meet her attorney, who will have received discovery. One defender estimated that about ten percent of indigent clients plead guilty at this stage.

#### *DeSoto County*

Circuit defenders are not formally appointed to cases until a defendant is arraigned on the indictment. Defenders are not always present at the arraignment. Defendants receive contact information for their appointed attorneys, and the onus is on defendants to reach out to the attorneys. One defender said it is common that defenders might not meet their clients until the day they appear in court to enter a guilty plea (at the plea/settlement date).

#### *Forrest County*

The public defender office is already appointed to a case at the initial appearance. The case is transferred within the office following the preliminary hearing. At arraignment following indictment, if a defendant does not have counsel representing him, one circuit court judge asks “can you afford a lawyer” and generally appoints the public defender office to represent every client who answers “no.” Defenders submit discovery requests to the district attorney following arraignment, which are fulfilled within a few days.

#### *George County*

The public defender in George County is present in the courtroom during arraignments. If a defendant has not already met the public defender from the preliminary hearing date in Justice Court, this is the first time a defendant will meet the public defender. The defender receives discovery at or a few days after arraignment.

#### *Harrison County*

The circuit court appoints the public defender office to represent indigent felony defendants at arraignment. Defenders are usually present in the courtroom for the arraignment. Defenders request discovery at arraignment, but do not receive it until a few weeks or even months later. Discovery is delivered electronically and stored on the district attorney’s servers.

#### *Hinds County*

Following indictment, defendants are arraigned in circuit court, where the circuit judge sets a date for hearing motions, a date by which a defendant must accept a plea, and a trial date. Trial dates are never set for the same circuit term as the arraignment, giving the attorneys at least a few months to prepare. At arraignment, defenders typically file motions for discovery.



Indigent defendants whose cases arose in Jackson Municipal Court will have been represented by a public defender office attorney at their initial appearance and preliminary hearing. At the arraignment on indictment, these defendants, along with all other indigent felony defendants in the county whose cases arose in a different lower court, will meet a new defender who will represent them through to disposition of their case. The public defenders or their administrative assistants file a motion for discovery in every case and send a copy of the motion to the district attorney's office.<sup>233</sup> Following indictment, paper discovery often is provided within a matter of days, and is emailed to the defense attorneys. The DA's initial packet contains police reports, lineups and criminal histories<sup>234</sup> but no interviews.

#### *Leflore County*

Indigent defendants who had preliminary hearings or appeared in court at that date and waived the hearing will have been represented by one of the assigned counsel serving circuit court. Circuit court formally appoints counsel at arraignment on the indictment, and defendants meet their counsel at that time. Defenders request discovery that day and discovery comes in following the arraignment within a "matter of days," and sometimes on the same day if the attorney goes to the DA's office and asks for copies of the file.

#### *Lowndes County*

Most indigent defendants receive appointed counsel only following indictment in Lowndes County. Defendants must request counsel at arraignment; the judges appoint counsel to all defendants who request it, relying on the defenders to notify the court if a defendant appears able to afford private counsel.<sup>235</sup> Once counsel is appointed, they will likely meet and confer with the client for a few minutes in court on the arraignment date. Indigent defendants in Lowndes County may be lucky to get a total of two months of attorney work in a given case. Essentially all of this work is conducted following indictment, after the attorney requests and receives discovery. Some attorneys do not even request discovery until the end of a term, and may not receive it for another month after that. In many cases, five months or more may pass from the time someone is arrested until an attorney first even sees discovery in their case, precluding crucial investigations.

#### *Pearl River County*

Felony defendants in Pearl River County are arraigned in county court, once per month. Public defenders are present in the courtroom for these arraignments. Defendants are told the name of their attorney, their next court

<sup>233</sup> A secretary automatically files discovery motions for attorneys when she creates a new file for the defendant, and once she receives discovery she gives the file to the attorney.

<sup>234</sup> Colloquially referred to as NCIC (National Crime Information Center) sheets.

<sup>235</sup> Judges report having three or four hearings every year to re-assess a defendant's indigence.

date (which is a pretrial hearing set for no more than about two months out), and the name of the judge before whom they will appear. At arraignment, defendants must sign an order requiring them to meet with their defenders as a condition of their remaining free on bond. The court could revoke a defendant's bond for failure to meet with his attorney.<sup>236</sup> Defenders request discovery at arraignment and receive it "immediately" – usually that same day – typically in electronic format.

The American Bar Association's *Criminal Justice Standards for the Defense Function* explains that every defense attorney has a duty to independently investigate the facts of his client's case.

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.<sup>237</sup>

Further, an attorney may have to call witnesses identified and questioned during this investigation to testify at trial and must be prepared to controvert their testimony if they say something different on the stand. Because the attorney cannot testify, the attorney must always have an investigator present during the interviewing of witnesses, so that the investigator can testify at trial if needed.

In almost all cases except murders, indigent felony defense attorney never hire investigators and have no time to investigate cases themselves.

#### *Adams County*

Defenders mostly do not request investigators from the court, expecting that they will not receive funding and fearful of advocating too zealously for their clients. Very few if any of the defenders have investigators on staff or retainer,

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<sup>236</sup> Whether an attorney would admit to his client not contacting him became a point of discussion in our conversations with some judges. Attorneys have an ethical obligation to represent their clients' best interests, *see* MISS. CODE PROF'L CONDUCT § 1.3 cmt. ("A lawyer should act with commitment and dedication to the interests of the client."), which might prevent attorneys from admitting to the court that a client has not contacted them. The judges recognized the dilemma for attorneys but believe the bond requirement ultimately does more good than harm, as it encourages defendants to make and keep appointments with their attorneys. In our conversations with defense attorneys, we learned that at least one defender informed the court when a client failed to meet with his lawyer.

<sup>237</sup> ABA STANDARDS – PROVIDING DEFENSE SERVICES, *supra* note 124, § 4-4.1.

and none use paralegals or law clerks for this purpose either. Nearly all case investigation is conducted by the attorneys.

#### *Clarke County*

Defenders' contracts do not provide compensation for investigators, so defenders must request them from the court. However, requests for investigators are very rare, and defenders investigate cases themselves for the most part.

#### *DeSoto County*

Defenders must motion the court for investigators, but rarely do so – one defender has had no more than two motions for investigative assistance approved in the past five years. Defenders just investigate cases themselves, but due to their caseloads cannot investigate cases prior to indictment.

#### *Forrest County*

Whatever defense investigation is performed in indigent defense cases is done by the attorneys themselves, or by the staff investigator, or both together. But the defenders report that “our caseload is so heavy that the idea of investigating is foreign to us.” There is one full-time investigator on staff at the public defender office. The staff investigator has no formal investigation training, no gun, and no badge, and is rarely sent to conduct field interviews or investigations. The investigator: serves subpoenas; visits all public defender clients in jail prior to the initial appearance, within 48-72 hours of arrest; occasionally interviews victims; and sometimes inspects crime scenes along with attorneys. The only other way to obtain an investigator for the defense would be to file a motion asking the circuit court judge to authorize funds, but the defenders do not request additional investigation funds.

#### *George County*

The defender has one part-time assistant/investigator, whom he pays out of his own compensation. This assistant does not conduct any client interviews. To receive other investigative assistance, the defender would need to petition the court for funds. The defender very rarely does so, maybe in one case every two years. The court has not declined any of this defender's requests for investigation funds.

#### *Harrison County*

The Harrison County public defender office has a full-time staff investigator. The investigator interviews clients and witnesses, serves subpoenas, and reviews crime scenes and evidence. However, he does not begin to work on cases until after a client is indicted. Attorneys also all perform some degree of investigation themselves in their cases.

*Hinds County*

The Hinds County public defender office has two full-time staff investigators. Both investigators are former MDOC probation officers. Attorneys make frequent use of investigators to serve subpoenas, interview witnesses and victims, and visit crime scenes.

*Leflore County*

In non-capital cases, assigned counsel almost never use investigators. The attorneys almost never request funds for investigators. Some assigned counsel reported that they limit their requests based on how they believe the judge would respond.

*Lowndes County*

Public defenders all conduct their own investigations. Defenders very rarely ask for investigators from the court, even in capital cases, believing that the court will deny the requests. A defender says that the court has denied investigator funds so many times, “I just gave up.” Defenders motion in open court for funds for experts and investigators. The district attorney is present for these hearings. When defenders request either expert witnesses or investigators, they must provide to the judge the reason, relevance, and hourly rate of the proposed investigator/expert, as well as an estimate of the total cost. One judge says the court is looking for a “particularized need” for funding for investigators, which defenders cannot always demonstrate.

*Pearl River County*

Public defenders have to motion the court for experts or investigators; these costs are not included in the compensation paid to attorneys. Defenders request investigators in no more than a handful of cases every year, and the court readily grants such requests. While the District Attorney has multiple investigators on staff, defenders must motion the court and show the relevance of the investigator in order to receive funds. “The playing field is not level at all; the prosecutors can pick and choose, but for serious cases, we don’t have a goddamn chance.”<sup>238</sup>

The widespread failure across Mississippi to conduct independent defense investigations on behalf of indigent felony defendants undermines the ability of appointed counsel to provide effective representation. It calls into question the integrity of the criminal justice system itself.

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<sup>238</sup> Per a public defender.

In *Payton v. State*,<sup>239</sup> a defendant was convicted at trial but successfully petitioned for post-conviction relief based on his attorney's ineffective assistance. His attorney failed to conduct even basic investigation, beyond a single visit to the scene of the alleged crime.<sup>240</sup> The attorney interviewed no potential witnesses, including some who the defendant claimed could substantially impeach the testimony of the complaining witness, on whose testimony the case hinged. The court found that Payton's counsel was ineffective because the attorney did not properly investigate the case, resulting in "a total breakdown of the adversarial system."<sup>241</sup>

Attorneys who represent indigent felony defendants do not have access to or use other support services, such as social workers, paralegals, or—in many counties—even investigators. Social work assistance can be critical to an attorney's ability to provide effective assistance of counsel both to obtain pre-trial release and to advocate for appropriate sentences.

#### *Adams County*

The county does not compensate defenders for any support staff. Any assistants they would like to hire – paralegals, social workers, investigators, or secretaries – would come directly from the defenders' pockets. Defenders mostly do not have investigators, social workers, or paralegals. Only a few defenders have secretaries, the salaries for which are generated by the defenders' private work. Indigent defendants have essentially no support staff assisting the attorneys on their cases.

#### *Clarke County*

At least one of the defenders has no support staff available to assist in investigations, administration, or case preparation.

#### *DeSoto County*

Some defenders work in small law offices, which provide varying levels of support to their public defense work. One defender hardly uses his staff for appointed cases, while another said public defense is the top priority for some of the assistants in the office. Defenders have occasionally used law students to assist with research and investigation.

#### *Forrest County*

The public defender office has a full-time office manager/assistant. This is the only support staff, aside from the one investigator, available to the attorneys.

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<sup>239</sup> 708 So.2d 559 (Miss. 1998).

<sup>240</sup> *Id.* at 562 ("Even after nearly two years of delay between the time of arrest and trial, Payton's attorney failed to conduct a scintilla of discovery other than to go to the crime scene one time and request the State to turn over its discovery.").

<sup>241</sup> *Id.* at 563.

*George County*

The defender has one part-time assistant/investigator, whom he pays out of his own compensation. This assistant does not conduct any client interviews.

*Harrison County*

The Harrison County public defender office has three support staff who perform administrative and paralegal responsibilities, and an investigator. Support staff also maintain a case management system that tracks attorney caseloads.

*Hinds County*

The Hinds County public defender office has four administrative assistants, two investigators, and one additional support staff, responsible for scanning documents. The administrative assistants prepare and maintain internal case files, and often file motions for attorneys. The office also has a handful of unpaid law school interns during the summer and sometimes during the school year. The interns assist primarily in legal research and investigations, but also get the opportunity to make bail arguments for some defendants in municipal court. Hinds County provides Westlaw Access for legal research.

*Leflore and Lowndes Counties*

Neither county compensates defenders for any support staff. Any assistants defense attorneys would like to hire – paralegals, social workers, investigators, or secretaries – would come directly from the defenders’ pockets. Defenders mostly do not have investigators, social workers, or paralegals. Only a few defenders have secretaries, the salaries for which are generated by the defenders’ private work. Indigent defendants have essentially no support staff assisting the attorneys on their cases.

*Pearl River County*

The “chief” defender receives funds from the county for a part-time assistant, who serves the office of public defender. This is the only support staff available to the public defender office attorneys. The assistant makes phone calls to clients and witnesses, and serves subpoenas. The office has a copy machine and printer. The county also provides free access to the county law library.

**FINDING #6: Felony indigent defense attorneys in Mississippi consistently carry excessive caseloads that prevent the rendering of effective representation.**

National standards, as summarized by the ABA, agree that “[d]efense counsel’s workload [must be] controlled to permit the rendering of quality representation.”<sup>242</sup> Workload includes the cases an attorney is appointed to handle within a given system (*i.e.*, caseload), but it also includes the cases an attorney takes on privately, public defense cases to which the attorney is appointed by other jurisdictions, and other professional obligations such as obtaining and providing training and supervision.<sup>243</sup> In addition to considering the raw number of cases of each type that an attorney handles, all national standards agree that the lawyer’s workload must take into consideration “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.”<sup>244</sup>

The National Advisory Commission on Criminal Justice Standards and Goals (“NAC”) created the first national defender caseload standards as part of an initiative funded by the U.S. Department of Justice.<sup>245</sup> NAC Standard 13.12 prescribes absolute maximum numerical caseload limits of:

<sup>242</sup> TEN PRINCIPLES, *supra* note 110, § 5.

<sup>243</sup> TEN PRINCIPLES, *supra* note 110, § 5 cmt.

<sup>244</sup> Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, (W.D. Wash. Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006) (“Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.”).

<sup>245</sup> Building upon 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 (DOJ/LEAA) appointed the National Advisory Commission (NAC) 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 COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, c.13 (The Defense) (1973).



- 150 felonies per attorney per year;
- 400 misdemeanors per attorney per year;
- 200 juvenile delinquencies per attorney per year;
- 200 mental health per attorney per year; or
- 25 appeals per attorney per year.<sup>246</sup>

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 caseload limits also assume that the lawyer does not have any other duties, such as management or supervisory responsibilities.

The standards further contemplate that a full contingent of support staff – including paralegals, investigators, social workers, and secretaries – is available to defenders.<sup>247</sup> As noted, defenders in most of the counties in Mississippi studied for this report have no investigators, paralegals, or social workers on staff, and only a few even have secretaries. Even where public defender offices exist, those offices do not maintain the support staff attorneys need to work most effectively. That support staff includes one supervisor for every ten attorneys; one investigator for every three attorneys;<sup>248</sup> one paralegal for every four felony attorneys;<sup>249</sup> and one secretary for every four felony attorneys.<sup>250</sup> The lack of assistance for discovery review, client meetings, and investigations exacerbates the amount of time it takes attorneys to adequately prepare for cases.

Finally, 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

<sup>246</sup> NAC STANDARDS, *supra* note 140, § 13.12.

<sup>247</sup> GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (NAT’L STUDY COMM’N ON DEFENSE SERVS. 1976), *available at* [http://www.nlada.net/sites/default/files/nsc\\_guidelinesforlegaldefensesystems\\_1976.pdf](http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf) [hereinafter NSC GUIDELINES] (“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.”).

<sup>248</sup> NSC GUIDELINES, *supra* note 247, § 4.1 (“Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.”).

<sup>249</sup> *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE PUB. NO. NCJ185632, KEEPING DEFENDER WORKLOADS MANAGEABLE 10 (2001), *available at* <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

<sup>250</sup> *Id.*

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."<sup>251</sup>

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 compliance with national caseload standards. It is these NAC caseload maximums to which national standards refer when they say that "in no event" should national caseload standards be exceeded.

The NAC caseload limits were established and remain as absolute maximums. Yet policymakers in many states have since recognized the need to set localized workload standards that take into account additional demands made on defense attorneys in each case (such as the travel distance between the court and the local jail, or the prosecution's charging practices, or increased complexity of forensic sciences and criminal justice technology). Demands of this type increase the amount of time, beyond that contemplated by the NAC standards, that is necessary for the lawyer to provide effective representation. 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.<sup>252</sup>

Felony indigent defense caseloads across Mississippi vary dramatically, based on estimates by the individual attorneys in the ten sample jurisdictions. It is not possible to know what caseloads the attorneys are carrying for a number of reasons involving the lack of sufficient data collection. First, no one is responsible at the state level for tracking the caseloads of the indigent defense attorneys. Second, though the AOC data is a good beginning point, as explained *supra* Chapter II, it does not currently even allow for a determination of the open indigent felony cases in each county and does not identify the attorney appointed in each case. Third, no one is responsible in any of the sample counties for tracking the caseloads of the indigent defense attorneys. Fourth, while the clerk of court in each county can produce a list of the cases indicted for each term of court and the attorney of record in each case, these lists do not show whether an attorney is appearing in his private capacity or as appointed counsel. Fifth, even in the most sophisticated public defender office system, the data system used does not produce accurate information about the attorneys' caseloads. Finally, in all but full-time public defender office systems, the indigent defense attorneys have private

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<sup>251</sup> Statement of Interest of the United States, *Wilbur v. City of Mount Vernon* 9 (W.D. Wash. Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, *available at* <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>.

<sup>252</sup> *See, e.g.,* AMERICAN COUNSEL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007), *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_train\\_caseloads\\_standards\\_ethics\\_opinions\\_combined.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_caseloads_standards_ethics_opinions_combined.authcheckdam.pdf) ("In many jurisdictions, caseload limits should be lower than the NAC standards.").

caseloads, accept appointments in other courts, and/or hold other employment, so it is impossible to determine what percentage of their time they actually devote to the representation of indigent felony defendants in the sample county.

Without comprehensive caseload data, this report cannot measure public defenders' workloads. Instead, the following analysis will offer a comparison of defenders' *self-estimated* caseloads to the NAC standards. These figures should not be relied upon to assess workloads in these counties or any other county in Mississippi. They are offered simply to illustrate how the attorneys perceive their total workload. The calculations are based on attorney's reported estimated caseload numbers, compared to an estimate of their time spent on public defense work in that jurisdiction.<sup>253</sup>

#### *Adams County*

Defenders offered varying estimates of their indigent felony caseloads, ranging from about 33% to 175% of the NAC Standards. None of the attorneys work exclusively as public defenders in Adams County.<sup>254</sup>

#### *Clarke County*

One of the attorneys, in addition to Clarke County indigent felony cases, also accepts indigent felony cases from a few other jurisdictions. This attorney's estimated annual average caseload of indigent felony cases for the past five years is nearly three times the NAC Standards.

#### *DeSoto County*

Each of the six defenders are part-time, and take private cases in addition to their public defense work. Considering the relative time each defender estimates spending on public defense in DeSoto County, four handle indigent felony caseloads that are estimated to be at least 92% of the NAC Standards, and one attorney estimates that his caseload is three times greater than the NAC Standards.

#### *Forrest County*

Each of the four attorneys works full-time as a public defender, but because the office uses horizontal representation, the NAC Standards cannot be directly applied, even to caseload estimates. However, if the office used vertical

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<sup>253</sup> For example, if an attorney works exclusively in a jurisdiction and receives only 150 felony appointments per year, he would have the maximum allowable caseload under NAC standards. And a defender who spends roughly 50% of her time working on public defense cases in a given county, and takes 75 cases from that county in a year, would have the maximum allowable caseload under NAC standards.

<sup>254</sup> This figure does not include work on capital cases, which the NAC Standards do not incorporate. At least two different defenders in Adams County had at least one open capital case at the time of our visit.

# APPLYING THE NAC NATIONAL CASELOAD STANDARDS TO MISSISSIPPI INDIGENT DEFENSE ATTORNEYS

One Mississippi attorney is paid a fixed fee to be appointed to represent an unlimited number of indigent felony defendants in a county. She estimates that she is appointed to represent 20 to 40 felony defendants each year, including two capital cases. She also has a fixed fee agreement to represent an unlimited number of indigent misdemeanor defendants in the local municipal court, and she estimates that she is appointed to represent 20 to 30 misdemeanor defendants each month, or roughly 240 to 360 misdemeanors per year. Between these two fee agreements, this attorney is paid a little over \$50,000 per year. To make ends meet, she also maintains a small private practice. And on top of her legal work, she is studying in a postgraduate program.

The attorney estimates that she devotes three out of five workdays each week – 60% of her available time – to her public defense work,

with the other two days consumed by her private legal practice and her education. With that amount of time, under the NAC national caseload standards, she should be handling an absolute maximum of 240 misdemeanors in a year,<sup>a</sup> or an absolute maximum of 90 felonies in a year,<sup>b</sup> *but not both*.

In fact, though, this attorney is handling 240 to 360 misdemeanors *plus* 20 to 40 felonies each year, in only 60% of her available working hours. Under the best of circumstances, she is carrying a caseload that is 122% of the NAC Standards.<sup>c</sup> And if her higher estimates are more accurate, her caseload is 194% of the NAC Standards<sup>d</sup> – meaning her existing caseload should actually be cut almost in half.

<sup>a</sup> NAC misdemeanor standard of 400 cases x 60% available time = 240 misdemeanors.

<sup>b</sup> NAC felony standard of 150 cases x 60% available time = 90 felonies.

<sup>c</sup> At 60% time availability (240 misdemeanors = 100% NAC standards) + (20 felonies = 22% NAC standards) = 122% NAC Standards.

<sup>d</sup> At 60% time availability (360 misdemeanors = 150% NAC standards) + (40 felonies = 44% NAC standards) = 194% NAC Standards.

representation and cases were distributed evenly, the attorneys would all handle an estimated indigent felony caseload that is at or above the NAC Standards' absolute maximum.<sup>255</sup>

#### *George County*

The public defender works in multiple courts and counties, and maintains a small private practice. The defender's estimated indigent felony caseload appears to be about double the NAC Standards.<sup>256</sup>

#### *Harrison County*

It is estimated that all of the full-time defenders in Harrison County regularly carry caseloads that exceed NAC Standards, some by a substantial margin. For example, from 2009–2014, four different defenders averaged a combined opened and carry-over caseload of 246 felonies (164%); 239 felonies (159%); 251 felonies (167%); and 240 felonies (160%).

#### *Hinds County*

All twelve of the Hinds County defenders are full-time public defenders, but some only work on cases prior to indictment and others only work on cases following indictment.<sup>257</sup> Because the office uses horizontal representation, the NAC Standards cannot be directly applied, even to caseload estimates. However, if the office used vertical representation and cases were distributed evenly, the attorneys would each be working very near the NAC Standards' limit.<sup>258</sup>

#### *Leflore County*

Because nearly all defenders take private cases, and work in other courts and industries, none devote all of their time to indigent defense in Leflore County. Three defenders estimated that their public defense work in Leflore exceeds the NAC Standards, by a range of 17% to 73% higher.<sup>259</sup>

<sup>255</sup> Defenders reported an average of 157.5 cases per attorney, when the office was part-time and employed a vertical representation model.

<sup>256</sup> This figure does not include work on capital cases, which the NAC Standards do not incorporate. The public defender in George County had an open capital case at the time of our visit.

<sup>257</sup> Hinds County maintains general statistics on the number of cases in the office, but cannot identify a total number of appointments in a given time period for a specific defender.

<sup>258</sup> The Hinds County public defender office's case management system shows 893 cases from January to July 2016. If the office received cases at this rate through the rest of the year, it would have been appointed to 1,530 cases. Divided evenly among eleven practicing attorneys, this would be an average caseload of 139 felonies for the year. OSPD has recommended that Hinds County public defender office should move to a vertical representation model. *See* OSPD ASSESSMENT, *supra* note 73, at 10. This would provide better representation to clients, likely reduce the average attorney caseload, and allow younger attorneys to receive more supervision from more senior attorneys. Even if it does not lower attorney caseloads, switching to a vertical representation model would at least achieve the other two purposes without increasing the caseload.

<sup>259</sup> This figure does not include work on capital cases, which the NAC Standards do not incorporate.

*Lowndes County*

All defenders take private cases and cases in other courts, or work in other industries. One defender estimates that his caseload exceeds NAC Standards by about 10%. Each of the other defenders estimate they handle caseloads that are at least three-quarters of the NAC Standards.<sup>260</sup>

*Pearl River County*

All three public defender office attorneys are estimated to handle caseloads that that fall within the NAC Standards. However, the attorney estimates appear low, because the assignments they collectively report reflect only about 45% of indicted cases in Pearl River County. If defenders were assigned to 80% of indicted cases, each of their caseloads would exceed the NAC Standards; the former part-time defender would have exceeded the Standards by up to 50%.

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At least two different defenders in Leflore County had two or more open capital cases at the time of our visit.

<sup>260</sup> These figures do not include work on capital cases, which the NAC Standards do not incorporate. At least three different defenders in Lowndes County had at least one open capital case at the time of our visit.

# CHAPTER VIII

## AVOIDING SYSTEMIC LITIGATION

Mississippi has exposure to being sued over its provision of indigent defense services. Between 2009 and 2017, courts in six other states have allowed civil class action lawsuits to go forward, where the plaintiffs allege that indigent criminal defendants are being systemically denied their right to counsel based on the *Cronic* criteria. In each of these cases, the courts have concluded that indigent defendants do not have to wait until their individual criminal cases are concluded and then prove that they received ineffective assistance of counsel. Instead, the courts have held that indigent defendants may seek to vindicate their right to counsel before it is denied to them in the first place.

### 1. **Duncan v. Michigan**<sup>261</sup> (2009)

The national and state American Civil Liberties Union (ACLU), along with two law firms, filed a class action lawsuit in February 2007 on behalf of all current and future indigent defendants charged with felonies in three Michigan counties, suing the counties as well as the State of Michigan.<sup>262</sup> The complaint alleged that the state had done “nothing to ensure that any county has the funding or the policies, programs, guidelines, and other essential resources in place to enable the attorneys it hires to provide constitutionally adequate legal representation.”<sup>263</sup> Though the three counties were the focus of the complaint, the ACLU acknowledged that the types of harms suffered by indigent defendants were “by no means limited or unique” to just the three named counties.

The state and counties made a wide variety of claims in a lengthy effort to get the suit dismissed, including lack of standing, governmental immunity, and separation of powers. The trial court denied the state and counties’ motion, and the governments appealed. In a detailed 53-page ruling, the Michigan Court of Appeals affirmed the trial court’s decision that the case could go forward, stating:

We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities,

<sup>261</sup> *Duncan v. Michigan*, 774 N.W.2d 89 (2009).

<sup>262</sup> Complaint, *Duncan v. Michigan*, No. 07-000242-CZ (Mich. Cir. Ct. filed Feb. 22, 2007), available at <https://www.clearinghouse.net/chDocs/public/PD-MI-0003-0001.pdf>.

<sup>263</sup> *Id.* at 3.



either intentionally or neglectfully. If not by the courts, then by whom? . . . [C]oncerns about costs and fiscal impact, concerns regarding which governmental entity or entities should bear the costs, and concerns about which governmental body or bodies should operate an indigent defense system cannot be allowed to trump constitutional compliance, despite any visceral reaction to the contrary.<sup>264</sup>

The Michigan Supreme Court affirmed as well.<sup>265</sup> After more than six years of litigation, the Michigan legislature passed comprehensive reform legislation in July 2013, and the ACLU dismissed the lawsuit as moot. The statutory changes created the Michigan Indigent Defense Commission, a state agency with authority to promulgate and enforce right to counsel standards across the state.

## 2. *Hurrell-Harring v. New York*<sup>266</sup> (2010)

In 2007, the New York Civil Liberties Union Foundation (NYCLU) and a private law firm filed a class action lawsuit on behalf of all indigent criminal defendants in five counties who were being or would be represented by publicly provided attorneys, suing the state and the five counties.<sup>267</sup> The suit argued that public defense counsel did not “have the resources and the tools” necessary to provide the meaningful and effective assistance of counsel required by the constitution, in part because the state had “abdicated its responsibility” and left the counties with the responsibility “to establish, fund and administer their own public defense programs.”<sup>268</sup> As a result, according to the lawsuit, many public defense providers failed to:

[P]rovide representation for indigent defendants at all critical stages of the criminal justice process, especially arraignments where bail determinations are made; meet or consult with clients prior to critical stages in their criminal proceedings; investigate adequately the charges against their clients or obtain investigators who can assist with case preparation and testify at trial; employ and consult with experts when necessary; file necessary pre-trial motions; or provide meaningful representation at trial and at sentencing.<sup>269</sup>

As the complaint explained, “the failings in [the five sued counties] and the types of harms suffered by the named plaintiffs [were] by no means limited or unique” to those

<sup>264</sup> *Duncan*, 774 N.W.2d at 98.

<sup>265</sup> *Duncan v. Michigan*, 780 N.W.2d 843 (Mich. 2010), *vacated*, No. 139345-7(108)(109) (July 16, 2010), *and reinstated*, No. 139345-7(113) (Nov. 30, 2010).

<sup>266</sup> *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010).

<sup>267</sup> Class Action Complaint, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct. Albany Cty., filed Nov. 8, 2007), *available at* <https://www.clearinghouse.net/chDocs/public/PD-NY-0002-0001.pdf>.

<sup>268</sup> *Id.* at 4.

<sup>269</sup> *Id.* at 4-5.

counties, but were instead statewide problems.<sup>270</sup> The trial court denied a motion to dismiss the lawsuit, but an intermediate court granted the dismissal.

In 2010, the New York Court of Appeals<sup>271</sup> reinstated the lawsuit.<sup>272</sup> The court found that the complaint alleged claims of both outright denial of the right to counsel and constructive denial of counsel where attorneys were appointed in name only but were unavailable to assist their clients, thus “stat[ing] cognizable Sixth Amendment claims.”

These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.

Similarly, while variously interpretable, the numerous allegations to the effect that counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients’ behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients, may be reasonably understood to allege non-representation rather than ineffective representation. Actual representation assumes a certain basic representational relationship. . . . It is very basic that “if no actual ‘Assistance’ for’ the accused’s ‘defence’ is provided, then the constitutional guarantee has been violated. . . .”

. . . .

Collateral preconviction claims seeking prospective relief for absolute, core denials of the right to the assistance of counsel cannot be understood to be incompatible with *Strickland*. These are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged. The basic unadorned question presented by such claims where as here the defendant-claimants are poor, is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel’s performance was inadequate or prejudicial.<sup>273</sup>

Quoting *Strickland*, the court went on to note that “[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.”<sup>274</sup> The court held that the allegations contained in the class action lawsuit “state claims falling precisely within this described category. . . . Given the simplicity and autonomy of a claim for non-representation, as opposed to one truly involving the adequacy of an attorney’s performance, there is no reason . . . why such a claim can not or should not be brought without the context of a completed prosecution.”<sup>275</sup> Further, the court observed: “the right that plaintiffs would enforce – that of a poor person accused of a crime to have

<sup>270</sup> *Id.* at 5.

<sup>271</sup> The Court of Appeals is the highest court in New York.

<sup>272</sup> *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010).

<sup>273</sup> *Id.* at 224-25.

<sup>274</sup> *Id.* at 225.

<sup>275</sup> *Id.* at 225-26.

counsel provided for his or her defense – is the very same right that *Gideon* has already commanded the States to honor as a matter of fundamental constitutional necessity. There is no argument that what was justiciable in *Gideon* is now beyond the power of a court to decide.”<sup>276</sup>

After seven years of litigation, the lawsuit settled by agreement in October 2014<sup>277</sup> and was approved by the trial court on March 11, 2015. Under the settlement, the state was required to: (1) pay 100% of the cost for indigent representation in the five named counties; (2) ensure that all indigent defendants are represented by counsel at their arraignment; (3) establish and implement caseload standards for all attorneys; and (4) assure the availability of adequate support services and resources. In 2017, the state agreed to extend the settlement to apply to all counties.

### 3. Heckman v. Williamson County, Texas<sup>278</sup> (2012)

Five indigent defendants facing misdemeanor charges in Texas that could lead to up to a year’s incarceration brought a civil class action lawsuit in 2006 claiming they had been or would be denied their right to counsel. The complaint alleged that the county failed to “inform accused persons of crime of their right to counsel,” provided “inaccurate and misleading information about the right to appointed counsel in order to discourage requests for counsel,” encouraged defendants “to waive their right to counsel and speak directly to prosecutors,” and threatened defendants who asserted the right to counsel with financial sanctions, while delaying or denying appointment of counsel to individuals who were “eligible for court-appointed counsel under Texas and federal law.”<sup>279</sup> The indigent defendants sued the county and several of its judges, seeking injunctive and declaratory relief to stop the violations of their right to counsel and of the rights of all similarly situated indigent misdemeanor defendants. The trial court denied a motion to dismiss the lawsuit, but a court of appeals reversed and granted the dismissal.

On review in 2012, the Texas Supreme Court reinstated the lawsuit.<sup>280</sup> First, the court held that the indigent defendants had standing to bring their claims in a civil lawsuit because they had pled facts demonstrating that they were being denied their right to counsel, that the denial of their right to counsel was fairly traceable to the county and its judges, and that the requested relief would remedy the denial. By the time the Texas high court considered the case, all of the named individuals had been appointed counsel and all of their criminal cases had ended. The court did not find the case to be

<sup>276</sup> *Id.* at 227.

<sup>277</sup> See Stipulation and Order of Settlement, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct. Albany Cty., filed Oct. 21, 2014), available at [https://www.nyclu.org/sites/default/files/releases/10.21.14\\_hurrellharring\\_settlement.PDF](https://www.nyclu.org/sites/default/files/releases/10.21.14_hurrellharring_settlement.PDF).

<sup>278</sup> No. 10-0671 (Tex. June 8, 2012).

<sup>279</sup> Plaintiff’s Second Amended Class Action Petition at 2-3, *Heckman v. Williamson County*, No. 10-0671 (Tex. filed July 21, 2006) (on file with the Sixth Amendment Center).

<sup>280</sup> *Heckman v. Williamson County*, No. 10-0671 (Tex. June 8, 2012).

moot however, because the denial of the right to counsel was “inherently transitory” – that is, it is of short duration and it was likely that other people would also be denied their right to counsel. Importantly, the court said:

The U.S. Supreme Court has described the right to counsel as ‘indispensable to the fair administration of our adversary system of criminal justice.’ In the words of one learned commentator, ‘[t]here is no more important protection provided by the Constitution to an accused than the right to counsel.’ Like all participants in our judicial system, and indeed all members of our society, we take seriously an allegation that any person or entity is systematically depriving others of such a fundamental right.<sup>281</sup>

The Texas Supreme Court remanded the case back to the trial court to determine whether changes in the practices of appointing counsel in Williamson County guaranteed that future indigent misdemeanor defendants would not be deprived of their right to counsel. The lawsuit subsequently settled in 2013 when Williamson County agreed to put in place procedures ensuring defendants will not be encouraged to waive the right to counsel or communicate with prosecutors prior to the court ruling on their requests for appointed counsel.<sup>282</sup> The committing magistrate must report all requests for counsel to the county court of law within twenty-four hours, and provide every defendant with written information on how to contact the indigent defense office to obtain information about their request for counsel. Attorneys representing defendants must now be provided with a defendant’s contact information so that the attorney may make every reasonable effort to contact the defendant no later than the end of the first working day after the date the attorney is appointed.

#### 4. **Phillips v. California**<sup>283</sup> (2016)

Represented by various branches of the ACLU and a private law firm, in 2015, a Fresno County attorney, a family member of two indigent defendants, and a former indigent defendant filed a class action lawsuit against the state and county seeking to protect the right to counsel of all indigent persons charged with crimes in the county.<sup>284</sup> The complaint alleged that the state is responsible for providing indigent defendants with meaningful and effective assistance of counsel, but that “California has delegated its constitutional duty to run indigent defense systems to individual counties” and does not provide any oversight to ensure those county systems actually provide

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<sup>281</sup> *Id.*

<sup>282</sup> See Joint Motion to Dismiss, *Heckman v. Williamson County*, No. 06-453-C277 (Tex. 277th J.D.C. filed Jan. 14, 2013), available at <http://sixthamendment.org/wp-content/uploads/2013/01/Joint-Motion-to-Dismiss-Heckman-et-al-v.-Williamson-County-et-al-.pdf>.

<sup>283</sup> No. 15-CE-CG-02201 (Cal. Super. Ct. Apr. 13, 2016), available at [https://www.aclu.org/sites/default/files/field\\_document/phillipsvcalifrulinginstatemotiondismiss.pdf](https://www.aclu.org/sites/default/files/field_document/phillipsvcalifrulinginstatemotiondismiss.pdf).

<sup>284</sup> Verified Petition, *Phillips v. California*, No. 15-CE-CG-02201 (Cal. Super. Ct. filed July 14, 2015), available at [https://www.aclu.org/sites/default/files/field\\_document/file\\_stamped\\_phillips\\_v\\_state\\_of\\_california\\_complaint.pdf](https://www.aclu.org/sites/default/files/field_document/file_stamped_phillips_v_state_of_california_complaint.pdf).

constitutionally required representation.<sup>285</sup> In particular, because the state requires the counties to bear the cost of providing representation to indigent people and at the same time “places strict limits on the ability of cities and counties to raise revenue, . . . indigent defense services vary widely across the state, and some counties with the highest percentages of indigent defendants—like Fresno County—also have the lowest levels of per capita funding due to an impoverished tax base.”<sup>286</sup> The lack of oversight and funding, according to the lawsuit, has resulted in a severe shortage of attorneys and support to provide representation to the poor, meaning that attorneys do not “have adequate time and resources to meet with and counsel their clients, investigate, conduct legal research, file and litigate appropriate motions, and take cases to trial when their clients wish to contest the charges.”<sup>287</sup>

In denying a motion to dismiss, the trial court declared that “[t]he State cannot disclaim its constitutional responsibilities merely because it has delegated such responsibilities to its municipalities . . . [n]or can the State evade its constitutional obligation by passing statutes. . . . The State remains responsible, even if it delegated this responsibility to political subdivisions.”<sup>288</sup> Then, the court held that “[s]ystemic violations of the right to counsel can be remedied through prospective relief,” noting that the lawsuit does not challenge individual convictions, but instead “claim[s] that the State systematically deprives Fresno County indigent defendants of the right to counsel,” and that “mere token appointment of counsel does not satisfy the Sixth Amendment.”<sup>289</sup> Therefore, “plaintiffs need not plead and prove the elements of ineffective assistance as to specific individuals in order to state a cause of action” for prospective relief.<sup>290</sup>

### 5. *Kuren v. Luzerne County, Pennsylvania*<sup>291</sup> (2016)

In 2012, the chief public defender for Luzerne County and three indigent defendants facing incarceration in criminal prosecutions but who were denied representation by the public defender office filed a class action lawsuit against the county.<sup>292</sup> The complaint alleged that the county “failed to allocate sufficient resources to provide constitutionally adequate representation for indigent adult criminal defendants . . . resulting in the provision of sub-constitutional representation to many indigent

<sup>285</sup> *Id.* at 6.

<sup>286</sup> *Id.* at 6-7.

<sup>287</sup> *Id.* at 10-11.

<sup>288</sup> *Phillips v. California*, No. 15-CE-CG-02201, at 3-4 (Cal. Super. Ct. Apr. 13, 2016), *available at* [https://www.aclu.org/sites/default/files/field\\_document/phillipsvcalifrulinginstatemotiondismiss.pdf](https://www.aclu.org/sites/default/files/field_document/phillipsvcalifrulinginstatemotiondismiss.pdf).

<sup>289</sup> *Id.* at 4-5.

<sup>290</sup> *Id.* at 6.

<sup>291</sup> 146 A.3d 715 (Pa. 2016), *available at* <http://www.pacourts.us/assets/opinions/Supreme/out/J-47A-2016mo%20-%2010282709712025453.pdf?cb=1>.

<sup>292</sup> Class Action Complaint, *Flora v. Luzerne County*, No 04517 (Pa. Ct. Com. Pl. filed Apr. 10, 2012), *available at* <https://www.clearinghouse.net/chDocs/public/PD-PA-0002-0001.pdf>, *appealed sub nom.* *Kuren v. Luzerne County*, 146 A.3d 715 (Pa. 2016).

criminal defendants and the complete deprivation of representation to many others.”<sup>293</sup> In particular, lack of funding by the county meant there were not enough attorneys to represent everyone who was entitled to public counsel. And for those who did receive an attorney, that attorney did not always have knowledge of the relevant law, was not always provided in a timely fashion and was not always present at all critical stages of a case, was often unable to investigate the facts, frequently failed to consult with clients to ensure the ability to make informed decisions, and was often unable to provide representation with reasonable diligence and promptness. The lawsuit asked the court to compel the county to provide adequate funding. After the trial court dismissed the case and an intermediate court affirmed that dismissal, the case went to the Pennsylvania Supreme Court on appeal.

In 2016, Pennsylvania’s high court reversed the dismissal and ruled that indigent defendants have the right to prospectively challenge “systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender’s office,”<sup>294</sup> at the outset of a case before having to suffer from denial of counsel. The court said it was “obvious” that “the mere existence of a public defender’s office and the assignment of attorneys by that office” was not sufficient to satisfy the right to counsel, because “[i]t is the defense itself, not the lawyers as such, that animates *Gideon*’s mandate.”<sup>295</sup> If the appointed lawyers cannot provide a defense, “the promise of the Sixth Amendment is broken.” The court observed that “*Strickland* does not limit claims asserting *Sixth Amendment* violations to the post-conviction context,” and it found that the *Strickland* test of ineffective assistance of counsel should be used by courts in evaluating post-conviction claims, but that “[a]pplying the *Strickland* test to the category of claims at bar would be illogical.”<sup>296</sup> Prospective relief “is available, because the denial of the right to counsel, whether actual, or as here, constructive, poses a significant, and tangible threat to the fairness of criminal trials, and to the reliability of the entire criminal justice system.”<sup>297</sup> The court concluded:

The right to counsel is the lifeblood of our system of criminal justice, and nothing in our legal tradition or precedents requires a person seeking to vindicate that right to wait until he or she has been convicted and sentenced. To so hold would undermine the essentiality of the right during the pretrial process. It would render irrelevant all deprivations of the right at the earliest stages of a criminal process so long as they do not clearly affect the substantive outcome of a trial. If the right to counsel is to mean what the Supreme Court has consistently said it means, this view

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<sup>293</sup> *Id.* at 1-2.

<sup>294</sup> *Kuren v. Luzerne County*, 146 A.3d 715, 718 (Pa. 2016), available at <http://www.pacourts.us/assets/opinions/Supreme/out/J-47A-2016mo%20-%2010282709712025453.pdf?cb=1>.

<sup>295</sup> *Id.* at 735.

<sup>296</sup> *Id.* at 746.

<sup>297</sup> *Id.* at 744.



cannot prevail. A person has the same right to counsel at a preliminary hearing as he or she does at a sentencing hearing. It would confound logic to hold that the person can only seek redress for the latter stages of the criminal process.<sup>298</sup>

## 6. **Tucker v. Idaho**<sup>299</sup> (2017)

In 2015, the ACLU of Idaho and a private law firm filed a complaint on behalf of four indigent people who were each assigned a public defender but nonetheless were not receiving actual representation at various critical stages of their cases.<sup>300</sup> The complaint, suing the state and its Public Defense Commission, alleged that Idaho's indigent defense systems lacked structural safeguards to protect the independence of defenders, made widespread use of flat-fee contracts, had extraordinarily high attorney caseloads, and lacked standards, training, and supervision, among other things. The complaint stated:

Despite amendments to Idaho's public-defender statutes that were passed in 2014 through a bill enacted as the "Idaho Public Defense Act," the current, patchwork public-defense arrangement in Idaho remains riddled with constitutional deficiencies and fails, at all stages of the prosecution and adjudication processes, to ensure adequate representation for indigent defendants in both criminal and juvenile proceedings in Idaho.<sup>301</sup>

The class action sought declaratory and injunctive relief on behalf of all indigent persons charged with an offense that carries jail time, and who cannot afford an attorney and the necessary expenses of a defense, to remedy the state's systemic failure to provide effective legal representation. The trial court dismissed the lawsuit and the plaintiffs appealed to the Idaho Supreme Court.

On April 28, 2017, the Idaho Supreme Court reinstated the lawsuit against the state and the PDC and remanded the case back to the trial court.<sup>302</sup> The court found that indigent defendants "suffered ascertainable injuries by being actually and constructively denied counsel at critical stages of the prosecution, which they allege are the result of deficiencies in Idaho's public defense system."<sup>303</sup> The alleged injuries are "fairly traceable" to the state and the public defense commission, since the state "has ultimate responsibility to ensure that the public defense system passes

<sup>298</sup> *Id.* at 747.

<sup>299</sup> No. 43922 (Idaho, Apr. 28, 2017), *available at* <https://isc.idaho.gov/opinions/43922.pdf>.

<sup>300</sup> Class Action Complaint, *Tucker v. Idaho*, No. CV-OC-2015-1024 (Idaho 4th J.D.C. filed June 17, 2015), *available at* [https://www.aclu.org/sites/default/files/field\\_document/acluidahopubdefensecomplaintfilestamp-sm.pdf](https://www.aclu.org/sites/default/files/field_document/acluidahopubdefensecomplaintfilestamp-sm.pdf).

<sup>301</sup> *Id.* at 7-8.

<sup>302</sup> *Tucker v. Idaho*, No. 43922 (Idaho Apr. 28, 2017), *available at* <https://isc.idaho.gov/opinions/43922.pdf>.

<sup>303</sup> *Id.* at 18.



constitutional muster.”<sup>304</sup> The court also found that the public defense commission is responsible for, among other things, promulgating rules governing training, caseload, and workload requirements for public defenders that would bind the counties. The courts, according to the opinion, are capable of providing relief to address the injuries alleged in the lawsuit. “[T]he State has the power—and indeed the responsibility—to ensure public defense is constitutionally adequate. . . . Given that the counties have no practical ability to effect statewide change, the State must implement the remedy.”<sup>305</sup> And, particularly under the expanded authority and duty given to the public defense commission by 2016 legislation, “the PDC can promulgate rules to ensure public defense is constitutionally adequate and, moreover, can intervene at the county level.”<sup>306</sup> Lastly, the court held that the “requested relief does not implicate the separation of powers doctrine. The right to counsel . . . is not entrusted to a particular branch of government.”<sup>307</sup>

Importantly, the court explained that the two-pronged ineffective assistance of counsel test of *Strickland* “is inapplicable when systemic deficiencies in the provision of public defense are at issue. The issues raised in this case do not implicate *Strickland*.”<sup>308</sup> Instead, the claims “alleged systemic, statewide deficiencies plaguing Idaho’s public defense system. Appellants seek to vindicate their fundamental right to constitutionally adequate public defense at the State’s expense,” as required by the federal and state constitutions.<sup>309</sup> “They have not asked for any relief in their individual criminal cases. Rather, they seek to effect systemic reform.”<sup>310</sup> Therefore, the lower court wrongly applied the *Strickland v. Washington* standard to the lawsuit, because *Strickland* is inapplicable when systemic deficiencies in the provision of public defense are at issue. Instead, the court held the appropriate standard is that of *United States v. Cronin*: “[a] criminal defendant who is entitled to counsel but goes unrepresented at a critical stage of prosecution suffers an actual denial of counsel and is entitled to a presumption of prejudice.”<sup>311</sup>

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<sup>304</sup> *Id.* at 9.

<sup>305</sup> *Id.* at 15.

<sup>306</sup> *Id.* at 16.

<sup>307</sup> *Id.* at 21.

<sup>308</sup> *Id.* at 7.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

# CHAPTER IX

## RECOMMENDATIONS

**RECOMMENDATION #1: The Mississippi Legislature should enact legislation enabling the state to meet its Fourteenth Amendment obligation of ensuring Sixth Amendment services meet the parameters of effective indigent defense systems as described in *United States v. Cronic*.**

Mississippi's own criminal justice policymakers are in the best position to craft a legislative solution that guarantees the effective right to counsel is provided to every indigent defendant in every courtroom in the state, in a way that accommodates the unique procedures and substantive law of the state, is fiscally responsible, and protects public safety; all toward the end of assuring that Mississippi's criminal justice systems produce fair, impartial, accurate, timely, and just outcomes. The Mississippi Public Defender Task Force should recommend legislation to ensure state oversight of indigent defense services required under the federal and state constitutions through statewide standards. This discussion is offered to help inform what is generally required for a state to effectively oversee indigent defense services.

### PROMULGATING STANDARDS

First, some state-level entity must promulgate standards that define how effective indigent defense services are to be provided. As described in *Cronic*, an effective indigent defense system is one that, at minimum, provides for the early appointment of qualified and trained attorneys with sufficient time and resources to provide competent representation under independent supervision. For an example of strong and comprehensive standards, Mississippi could look to its neighbor and develop standards consistent with those of the Louisiana Public Defender Board (LPDB), including at minimum:

- Attorney qualification standards;<sup>312</sup>
- Attorney performance guidelines;<sup>313</sup>
- Attorney supervision protocols;<sup>314</sup>
- Time sufficiency standards;<sup>315</sup>
- Continuity of services standards whereby the same attorney provides representation from appointment through disposition;<sup>316</sup>
- Client communication protocols;<sup>317</sup> and,
- Data collection standards.<sup>318</sup>

<sup>312</sup> LA. REV. STAT. § 15:148(B)(2) (2016) (“Creating mandatory qualification standards for public defenders that ensure that the public defender services are provided by competent counsel. Those standards shall ensure that public defenders are qualified to handle specific case types which shall take into consideration the level of education and experience that is necessary to competently handle certain cases and case types such as juvenile delinquency, capital, appellate, and other case types in order to provide effective assistance of counsel. Qualification standards shall include all of the following: (a) The specific training programs that must be completed to qualify for each type of case. (b) The number of years the public defender has spent in the practice of law in good standing with the Louisiana State Bar Association.”).

<sup>313</sup> LA. REV. STAT. § 15:148(B)(1)(e) (2016) (“Performance of public defenders in all assigned public defense cases. The board shall adopt general standards and guidelines that alert defense counsel to courses of action that may be necessary, advisable, or appropriate to a competent defense including performance standards in the nature of job descriptions.”); LA. REV. STAT. § 15:148(B)(10) (2016) (“Creating separate performance standards and guidelines for attorney performance in capital case representation, juvenile delinquency, appellate, and any other subspecialties of criminal defense practice as well as children in need of care cases determined to be feasible, practicable, and appropriate by the board.”).

<sup>314</sup> LA. REV. STAT. § 15:148(B)(1)(d) (2016) (“Performance supervision protocols. The board shall adopt standards and guidelines to ensure that all defense attorneys providing public defender services undergo periodic review of their work against the performance standards and guidelines in a fair and consistent manner throughout the state, including creating a uniform evaluation protocol.”).

<sup>315</sup> LA. REV. STAT. § 15:148(B)(1)(a) (2016) (“Manageable public defender workloads that permit the rendering of competent representation through an empirically based case weighting system that does not count all cases of similar case type equally but rather denotes the actual amount of attorney effort needed to bring a specific case to an appropriate disposition. In determining an appropriate workload monitoring system, the board shall take into consideration all of the following: (i) The variations in public defense practices and procedures in rural, urban, and suburban jurisdictions; (ii) Factors such as prosecutorial and judicial processing practices, trial rates, sentencing practices, attorney experience, extent and quality of supervision, and availability of investigative, social worker, and support staff; (iii) Client enhancers specific to each client such as the presence of mental illness.”).

<sup>316</sup> LA. REV. STAT. § 15:148(B)(1)(b) (2016) (“Continuity of representation. The board shall adopt standards and guidelines which ensure that each district devises a plan to provide that, to the extent feasible and practicable, the same attorney handles a case from appointment contact through completion at the district level in all cases.”).

<sup>317</sup> LA. REV. STAT. § 15:148(B)(1)(c) (2016) (“Documentation of communication. The board shall adopt standards and guidelines to ensure that defense attorneys providing public defender services provide documentation of communications with clients regarding the frequency of attorney client communications as required by rules adopted by the board.”).

<sup>318</sup> LA. REV. STAT. § 15:148(B)(11) (2016) (“Ensuring data, including workload, is collected and maintained in a uniform and timely manner throughout the state to allow the board sound data to support resource needs.”).

## IMPLEMENTING STANDARDS

Second, some entity must train criminal justice system actors about the requirements of the standards, so that they are implemented effectively and efficiently. While the standards must be the same statewide, implementation should allow for variations that accommodate local circumstances. For example, attorneys must have “sufficient time and resources” to provide effective representation, and so attorney workloads must be monitored and controlled. In a local jurisdiction with a heavy and fast-moving docket, a larger number of attorneys will be required than in jurisdictions with lighter dockets. Where jurisdictions are more affluent and can provide greater resources to assist the attorneys, then an attorney may be able to handle each individual case in less time. In comparison, attorneys need more time to effectively handle each case when they have fewer resources to assist them and must carry out each task personally. Training and implementation can be the responsibility of a state entity alone, of local jurisdictions alone, or a combination of state and local entities working together.

## MONITORING AND ENFORCING STANDARDS

Finally, some state-level entity must monitor and enforce compliance with standards throughout the courtrooms of the state.

### **Oversight through a single state-level entity**

Many states have a single state-level entity that is responsible for overseeing indigent defense services (though as will be later explained, there is no *requirement* that all aspects of oversight be within a single entity). The mechanics of how these state-level entities are structured, funded, and operate vary considerably. Three examples are offered for reference:

#### **Unified state system**

Montana created its statewide indigent defense commission in 2005.<sup>319</sup> In designing its system, the state struggled with how to pay for 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.

In effect, all new requirements of Montana’s public defense system are 100% state funded. 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 imposed by the state’s standards. It also makes it easier for the state

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<sup>319</sup> Montana Public Defender Act, 2005 Mont. Laws ch. 449 (codified as amended at MONT. CODE ANN. §§ 47-1-101 *et seq.* (2015)).

to enforce standards, because everything is under the auspices of the state commission and it is incumbent on the commission to argue at the legislature for adequate resources to meet standards through the normal state budgeting process.

### **State funded grants to local indigent defense systems to meet uniform statewide standards**

In Michigan, counties are required to annually spend no less on the provision of right to counsel services than the average of their spending in the three fiscal years preceding the adoption of the Michigan Indigent Defense Commission Act.<sup>320</sup> Any new monies to meet standards above and beyond that required local spending amount are the responsibility of the state.

As the MIDC promulgates and approves each new standard, each of Michigan's counties submit a plan for how they intend to meet the new standard and what they believe it will cost them to do so. For example, if the MIDC requires counties to implement continuous representation by the same attorney first 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 state standard. As MIDC approves each county plan, the additional costs get factored into a statewide plan presented by MIDC to the governor and legislature during budget negotiations. Whenever county compliance with state standards requires additional funding, the state is the responsible party.

If a local unit of government fails to meet state 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.

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<sup>320</sup> Michigan Indigent Defense Commission Act, 2013 Mich. Pub. Acts 93 (codified at MICH. COMP. LAWS §§ 780.981 *et seq.* (2015)).

### **Local government choice of state or local indigent defense system, with penalties for non-compliance with state standards**

In 2014, the Idaho legislature created the Idaho State Public Defender Commission (“SPDC”) within the Department of Self-Governing Agencies,<sup>321</sup> 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*.<sup>322</sup>

Counties can receive state grants through the SPDC to meet state standards, though they must comply with the standards without regard to whether they seek state funding.<sup>323</sup> 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.<sup>324</sup> 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.”<sup>325</sup>

## OVERSIGHT THROUGH MULTIPLE STATE LEVEL ENTITIES

Although it is *usually* the case that states have a single state-level entity overseeing the provision of indigent defense services, it is not the case that states *must* do so. Dividing responsibility among one or more state-level entities *and* local jurisdictions would be in keeping with Mississippi’s decentralized approach to justice and can be accomplished in compliance with national standards for the provision of indigent defense services.

Promulgating statewide standards could readily be accomplished by reconfiguring, and making permanent, the Mississippi Public Defender Task Force. The Task Force has worked cooperatively for years in a non-adversarial manner, so it is well positioned to continue forward with improving Mississippi’s right to counsel systems with a few modifications to meet national standards for independence. While many states have seen push back against indigent defense standards because they were perceived as coming from defense-only organizations, Mississippi could have widespread acceptance of and support for statewide standards, through following a different model.

<sup>321</sup> Idaho Public Defense Act, 2014 Idaho Sess. Laws H0542 (codified as amended at IDAHO CODE §§ 19-848 *et seq.* (2015)).

<sup>322</sup> IDAHO CODE § 19-850(a)(vii) (2015).

<sup>323</sup> IDAHO CODE § 19-862A (2015).

<sup>324</sup> IDAHO CODE § 19-862A(11) (2015).

<sup>325</sup> IDAHO CODE § 19-862A(12) (2015).

The first of the ABA *Principles* requires that the public defense function, including the selection, funding, and payment of defense counsel, be “independent.” Commentary on *Principle 1* states that the defense function must be insulated from outside political or judicial interference by a board or commission appointed from diverse authorities, so that no one branch of government can exert more control over the system than any others.

Footnotes then refer to National Study Commission on Defense Services’ (NSC) *Guidelines for Legal Defense Systems in the United States* (1976). The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10 (The Defender Commission)* 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. Commission members should be selected under the following criteria: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director. (a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics. (b) No single branch of government should have a majority of votes on the Commission. (c) Organizations concerned with the problems of the client community should be represented on the Commission. (d) A majority of the Commission should consist of practicing attorneys.

In practice, states with statewide indigent defense commissions generally give equal appointments to the executive, legislative and judicial branches of government. To fill out the remainder of appointments, states often give one or two appointments to the state bar association. States have also found that giving appointments to the deans of accredited law schools creates nexuses that help the indigent defense commission (for example, law schools can help with standards drafting, training facilities, etc.). Additionally, many states have tried to have a voice of the community predominantly impacted by the criminal justice system represented on the commission (for example, the African American Bar in Louisiana or Native American interests in Montana).



Examples of indigent defense commission appointments from other states include:

- *Montana*: The Montana Public Defender Commission (MPDC) is an 11-member public defender commission. Appointments by: the Supreme Court (2 appointees); the President of the State Bar (3); the President of the Senate (1); the Speaker of the House (1); and the Governor (4 appointments, but they must be nominated from organizations representing: (a) indigent persons, (b) Native American interests, (c) people with mental illness, and (d) people with addictions).<sup>326</sup>
- *North Carolina*: The North Carolina Office of Indigent Defense Services (IDS) is an independent 13-member commission appointed by: Chief Justice (1 appointee, current or retired judge); Governor (1 – non-attorney); President Pro Tempore of the Senate (1 attorney); Speaker of the House of Representatives (1 attorney); North Carolina Public Defenders Association (1 attorney); North Carolina State Bar (1 attorney); North Carolina Bar Association (1 attorney); North Carolina Academy of Trial Lawyers (1 attorney); North Carolina Association of Black Lawyers (1 attorney); North Carolina Association of Women Lawyers (1 attorney); and the IDS Commission itself (3, one non-attorney, one judge, and one Native American).<sup>327</sup>

NSC Guideline 2.10 (*The Defender Commission*) continues on to state that the “Commission should not include judges, prosecutors or law enforcement officials.” 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. These prohibitions are only on *sitting* judges, defenders and prosecutors. States often find former judges, defenders and law enforcement officials to make very good commission members.

Because the Office of the State Public Defender is an existing state organization, and in particular because it is charged with training all indigent defense attorneys in the state, vesting responsibility for implementation, monitoring, and enforcing standards with this state-level agency would be most efficient. That said, Mississippi could certainly create more localized bodies to share in this role with the OSPD, in keeping with the decentralized system of other aspects of criminal justice in the state.

Creating a circuit defender position in each of Mississippi’s twenty-two districts would allow for those circuit defenders to determine the most effective and efficient way to implement statewide standards based on the particular circumstances of each circuit. For example, it might be that circuit defenders in two or three neighboring districts determine that combining their resources to create a regional public defender office would be the most efficient use of limited resources. In another area of the

<sup>326</sup> MONT. CODE ANN. § 2-15-1028(2)(a-g) (2017).

<sup>327</sup> N.C. GEN. STAT. § 7A-498.4 (b)(1-11) (2016).

state, the circuit defender may find the best answer to be having a small number of private attorneys who handle all indigent defense cases within that circuit. Elsewhere, the circuit defender may determine that it is best to rely on a combination of public defenders for certain counties or courts within the circuit and to rely on private assigned counsel attorneys in others.

The local presence of circuit defenders provides comfort to judges, prosecutors, and defendants alike in knowing there is someone local to call if a problem arises, such as an attorney failing to appear in the courtroom (rather than calling a central organization in Jackson). A local circuit defender will thoroughly understand the unique characteristics of their circuit and be able to respond quickly. OSPD would train the 22 circuit defenders, and they in turn would ensure that Task Force standards are implemented locally. Future changes to the provision of indigent defense services in each circuit, when and if needed, would be informed by the experiences of the circuit defenders. Creating circuit defender offices of course cannot occur without some cost, and that cost should be borne by the state.

**RECOMMENDATION #2: The Mississippi Office of the State Public Defender, along with any government body tasked with developing indigent defense standards, should work with parallel law enforcement, prosecution, judicial, and corrections bodies at the state and local level to:**

- i. Determine effective, efficient, and fiscally responsible methods to track every individual case from commission of the offense through dismissal or completion of sentence;**
- ii. Evaluate existing criminal justice processes and make systemic recommendations to ensure that counsel is provided to indigent defendants at every critical stage of a case after the right to counsel has attached; and**
- iii. Recommend statutory changes to decrease the overall need for right to counsel services through increased diversion and reclassification of non-jailable violations.**

Defense attorneys statewide generally believe there is a lack of accountability for problems within the system, such as failure to notify the defense attorney or the jail when a case is dismissed or resolved by *nolle prosequi*. When prosecutors have information that they fail to provide to the defense, indigent defense attorneys say “all future deals go down the drain” if they report this to the court. The defense attorneys do not coordinate with each other to advocate for improved processes and, in their own words, get “pushed around” by judges, law enforcement, and prosecutors as a result. The judges cannot order the clerks of court to do anything, because clerks are elected, do not work for the judges, and sometimes have antagonistic relationships with them.

This lack of accountability is systemic; pervading not only Mississippi's indigent defense systems, but its entire criminal justice system. Criminal justice stakeholders and policymakers should come together to address all of these concerns.

One area of discussion needs to be how best to decrease the need for public defense attorneys in the first place. The answer to every government problem cannot be to simply increase government spending. The Sixth Amendment right to counsel attaches only to those cases where there is a potential loss of liberty in criminal and delinquency proceedings. There is a due process right to counsel in civil commitment cases and on a case by case basis in other cases involving loss of liberty, a role often filled by public defenders as well. A concerted effort focused on: (i) increasing diversion out of the criminal justice system entirely for appropriate offenses and offenders; and (ii) reclassifying appropriate petty and/or regulatory offenses to non-jailable violations are just two methods that should be considered.

**RECOMMENDATION #3: Through legislation or court rule, the State of Mississippi should ban payment agreements that cause conflicts of interest between the indigent defense attorney's financial self-interest and the legal interests of the indigent defendant.**

Here are four examples of how states have banned payment agreements that create financial incentives or disincentives to attorneys from providing effective representation:

- *Idaho*: County commissioners may provide representation by contracting with a defense attorney “provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney.”<sup>328</sup>
- *Michigan*: The Michigan Indigent Defense Commission is statutorily barred from approving local indigent defense plans that provide “[e]conomic disincentives or incentives that impair defense counsel’s ability to provide effective representation.”<sup>329</sup>
- *Nevada*: Announcing that the “competent representation of indigents is vital to our system of justice,” the Nevada Supreme Court through its court rules banned the use of flat fee contracts that fail to provide for the costs of investigation and expert witnesses and required that contracts must allow for extra fees in extraordinary cases.<sup>330</sup>

<sup>328</sup> IDAHO CODE § 19-859 (2015).

<sup>329</sup> MICH. COMP. LAWS § 780-991(2)(b) (2016).

<sup>330</sup> Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Nev. July 23, 2015), available at <http://caseinfo.nvsupremecourt.us/document/view.do?csNameID=24756&csIID=24756&deLinkID=517007&>

- *Washington*: The Washington Rules of Professional Conduct decree that “[a] lawyer shall not: (1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm: (i) to bear the cost of providing conflict counsel; or (ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel.”<sup>331</sup>

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<sup>331</sup> WASH. R. PROF’L CONDUCT 1.8(m)(1).

