

THE RIGHT TO COUNSEL IN MISSISSIPPI

EVALUATION OF ADULT FELONY TRIAL LEVEL INDIGENT DEFENSE SERVICES



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The Right to Counsel in Mississippi: Evaluation of Adult Felony Trial Level Indigent Defense Services

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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.

