



Overview of Racial Disparity in the Criminal Justice System

Updated September 2018

Racial disparity in the criminal justice system is a serious social concern and not simply a Mississippi problem. *Racial Disparity in U.S. Imprisonment across States and over Time*, Enders, Pecorino, and Souto, Department of Economics, Finance and Legal Studies, University of Alabama, October 2017. The problem in Mississippi begins in the juvenile justice system. *An Assessment of Disproportionate Minority Contact in Mississippi's Juvenile Justice System*, Sheena K. Gardner, Ph.D., Social Science Research Center, Mississippi State University, March 2016. The juvenile system disparities impact the criminal justice system by increasing later involvement for youth as well as through the disparities in transfer cases observed by Gardner.

The Office of the State Public Defender is endeavoring to determine why racial disparities are present and make recommendations to remedy the problem. This update focuses on five areas: the indigent defense system; disparate sentencing in house burglary cases; life without parole sentences for non-violent offenders; Drug Court participation and Juvenile Justice.

We looked at Administrative Office of the Courts (AOC) disposition data and Department of Corrections (DOC) inmate data to get a picture of the current problem. We compared FY 2010-14 (pre-585) with FY 15-17.

	Dispositions % Black	Sentenced to Prison % Black	In Prison % Black
2010-14	56	60	65
2015-17	53	56	62

Just as seen by Enders, the disparity in Mississippi's prison is lessening. While this is a positive development, the higher rate of sentencing to prison compared to dispositions and higher rate in

prison compared to sentencing suggests Black defendants are more likely to go to prison and for longer time.

INDIGENT DEFENSE REFORM

Research indicates that pre-trial release decreases the likelihood of conviction¹ and if convicted the likelihood of prison and length of sentence are lessened.²

For public defender clients the interplay of retaining counsel and/or making bail is cyclical. Public defender clients are less likely to make bail and the inability to make bail increases the likely need of a public defender.

When you further consider that the majority of low-income Mississippians are Black and disproportionately do not own homes some causes of the racial disparity in the criminal justice system become apparent. Home ownership is significant because if a family of an arrestee owns a home the likelihood of making bail is compounded. Home ownership both shows “ties to community” and is itself a resource.

Statewide 80% of felony defendants cannot afford to hire an attorney. Nineteen of Mississippi’s 82 counties have indigence rates above 80% and nine (9) of those counties (47%) have a majority Black population. By comparison twenty-five (25) of our 82 counties have majority Black populations (30%). Only 16 of the 63 counties (25%) with average or below average indigence rate are majority Black. *Assessment of Caseloads in State and Local Indigent Defense Systems in Mississippi*, OSPD, December 2016.

For these reasons we believe looking at the indigent defense systems is the place to start but there are several other criminal justice issues that should be reviewed in the context of Racial Justice. We also believe that we cannot look at the Criminal Justice System without also looking at the Juvenile Justice system. A comprehensive review of indigent defense needs and recommendations for improvement are found at *The Right to Counsel in Mississippi: Evaluation of Felony Trial-Level Indigent Defense Services*, The Sixth Amendment Center, 2017, and the Final Report of the Mississippi Public Defender Taskforce, June 2018, <http://www.ospd.ms.gov/>.

“SIMPLE” HOUSE BURGLARY (97-17-23(1))

Mississippi has two types of House Burglary. Miss. Code § 97-17-23(1) and (2). Paragraph (1) burglary can be of an occupied or unoccupied house with or without a weapon and with or without any intent to do violence. Paragraph (2) is “home invasion” burglary involving actual or threatened violence. Prior to HB 585 (2014) the parole statute treated burglary cases differently

¹ *The Effects of Pre-Trial Detention on Conviction, Future Crime and Employment: Evidence from Randomly Assigned Judges*, Dobbie, Golden and Yang, July 2016.

² *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Lowenkamp, VanNostrand, and Holsinger, Nov. 2013, www.arnoldfoundation.org.

depending on whether or not the house was occupied. As a result people who broke into unoccupied homes were parole eligible after serving 25% of their sentence.

HB 585 increased the time in custody for burglary of a dwelling conviction by making it a per se violent offense with 50% minimum rather than parole eligibility at 25%.

The general purpose of the 50% Rule was to create more certainty in sentencing and lead to judges imposing less time to serve.

That hasn't happened with burglary. Both sentence length and time to serve have increased. With the 50% Rule factored in the time these people will serve in custody may increase by 1.8 years. [5.35 x 25% = 1.34 years compared to 6.3 x 50% = 3.15 years]

burglary of dwelling 97-17-23				
	average FY 10- 14	FY 15	FY 16	FY 17
average sentence length	12.3	13.39	14.2	15
average time to serve	5.35	6.28	6.28	6.53
# Black	576	496	374	326
# White	333	259	297	308
average to serve Black	5.43	6.96	6.82	6.91
average to serve White	5.14	4.87	5.57	6.2
Trials	9	8	18	12
found guilty	6	6	13	11
average sentence length	18	23	22	22
average time to serve	14	20	19	14.5*

The “trial penalty” disparity is even greater at 5 years. [14 x .25 = 3.5 years compared to 17.5 x 50% = 8.75 years]

From a Racial Justice perspective: post-585 a white person will serve 1.5 years more than white person pre-585. [5.58x 50% = 2.79 compared to 5.14 x .25% = 1.28 years]; a black person post-585 will serve more than 2 additional years than a black person pre-585. [6.9% x 50% = 3.45 years compared to 5.43 x 25% = 1.36 years]. Pre-585 the average black person was sentenced to

³ *Average is for 8 sentenced to a term of years; 3 people were sentenced to life as habitual offenders

SOURCE: AOC Disposition Report

serve about 6% more than the average white person. Post-585 the average black person has been sentenced to serve almost 24% more than the average white person.

Making all house burglaries *per se* violent also disqualified these offenders from a host of diversion programs. AOC disposition data for the years 2010-14 indicates an annual average of over 900 house burglary convictions a year. Approximately 150 people a year were being diverted to Drug Court (25); ISP (45); Pretrial and/or non-adjudication (70); RID (10). This represents over 16% of all house burglary convictions.

This needs to be corrected by amending § 97-3-2 to limit the list of *per se* violent crimes to paragraph (2) – home invasion burglaries – and allow violence findings in paragraph (1) burglaries. This policy is supported by the analysis and recommendations of the United States Sentencing Commission. *Amendment to Sentencing Guidelines*, January 8, 2016.

THREE STRIKES AND YOU'RE OUT ... FOREVER

Mississippi has two “three-strikes” sentencing provisions. Miss. Code §99-19-81 and §99-19-83. Prior to the passage of HB 585 in 2014 Section 81 mandated imposition of the maximum sentence and that the sentence imposed be served day-for-day. HB 585 empowered judges to revisit the sentence after the person had served 25% of the term if the offense was non-violent and authorized the judge, in her discretion, to grant parole eligibility. The 2018 Legislature passed and Governor signed HB 387 providing additional judicial discretion in section 81 cases by allowing judges to sentence to less than the maximum sentence. There are over 2100 people serving section 81 sentences and over 1300 are non-violent offenses.

Section 83 mandates a life without parole sentence. Section 83 applies to a person who has been convicted twice before if one of those priors is a crime of violence. However the new crime, the crime the person is being sentenced for, does not have to be a violent crime. In fact more than a quarter of the people serving life without parole sentences under section 83 are in prison for committing nonviolent offenses. These sentences do not fit the crime; they are disparate from any perspective.

Here we look at disparity in habitual-life sentencing from three perspectives: 1. disparity between offense and punishment, e.g., life for theft or simple possession of drugs⁴; 2. geographic disparity; 3. racial disparity.

⁴ One recognized justification for imprisonment is to “incapacitate” the offender or preventing the person from committing future crimes against the general public. But sentences can over-incapacitate. California led the way with “3 Strikes” laws and soon experienced a prison population crisis. Prop. 36 in 2012 rolled back there harsh 3 strikes provisions leading to early release for many. Those released have a much lower recidivism rate. *Locked In*, John Pfaff, 2017, at p. 193. As applied to sentencing for non-violent crimes mandatory life without parole raises 8th Amendment “cruel and unusual” punishment concerns, *Solem v. Helm*, 463 U.S. 277 (1983), and our broader state constitutional protections in Art. 3 §28 against “cruel or unusual” sentences. *Pressley v. State*, 474 So.2d 612 (Miss. 1985); *Clowers v. State*, 522 So.2d 762 (Miss. 1988).

MDOC reported in August 2018 that there were 358 people serving habitual-life sentences. Of those 358 people 267 (74.6%) are Black and 98 (27%) are on non-violent offenses. The non-violent population is 77.5% Black.

63 (18%) are 60 years old or older; 28 of these are non-violent.

58 sentenced post-585 - of those only 5 non-violent. 48 (82.7%) Black; all non-violent were Black.

44 sentenced 4 years pre-585 - of those 11 non-violent. 32 (72.7%) Black; 8 (72.7%) of non-violent Black.

Of 300 pre-585 93 (31%) non-violent. 219 (73% Black); 71 (76.3%) of non-violent Black.

Nearly 20% come from 2 counties – Hinds (33) and Harrison (37). This disparity also appears to be growing, 26% of those sentenced in last 8 years and almost 28% sentenced in the last 4 years are from these 2 counties. The rate of sentencing overtime in Harrison County appears steady. The rate of sentencing from Hinds is increasing and accounts for the 2 counties increase in share of sentences. Hinds accounts for about 17% of sentences from last 8 years and 25% of non-violent offenders sentenced in period.

TAKEAWAYS:

- imposition of habitual-life sentences is increasing – primarily in one county;
- there appears to be a racial disparity overall and in use against non-violent offenders and both appear to be increasing;
- BUT use against non-violent offenders appears to be decreasing.

Based on geographic and racial disparity in use of this extreme sanction against non-violent offenders §99-19-83 should be amended to require 3rd offense be crime of violence. The 98 people currently serving life without parole for a non-violent offense should be returned to the sentencing court for sentencing under §99-19-81.

DRUG COURT REFORM

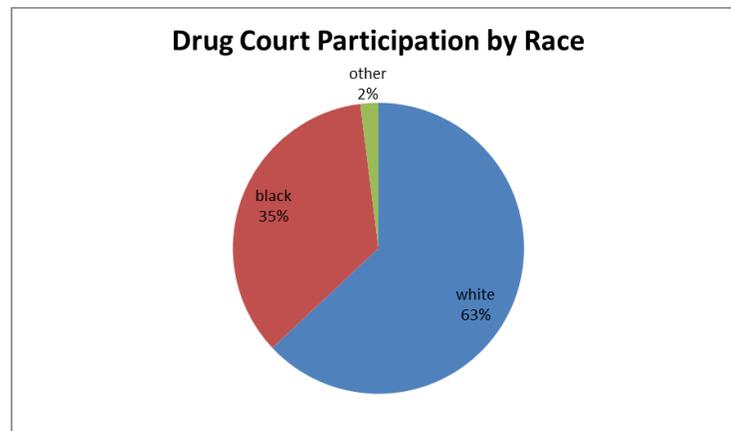
The Corrections and Criminal Justice Task Force in its 2013 *Final Report* recommended expanding drug courts:

Well-implemented drug courts can significantly reduce recidivism and the incidence of substance abuse. Over the last decade, Mississippi has developed an expansive drug court system and now has a drug court in every circuit. However, current law restricts many nonviolent offenders whose criminal activity is driven

by substance abuse/addiction and who would benefit from a highly-regimented drug program.

Recommendation: Broaden statutory criteria for drug court eligibility by eliminating the automatic disqualification for offenders convicted of a commercial drug offense or a driving under the influence offense, coupled with careful screening of all drug court eligible offenders prior to entering the drug court program.

In 2018 the HB585 Oversight Taskforce found these reforms had been mostly implemented but recognized three areas of continuing concern with the drug courts: 1. admission criteria may be too limited to reach all potential beneficiaries; 2. many who meet the current admission criteria do not have access because they are never screened; and 3. the racial demographics of the programs seem out of sync with the criminal justice involved population – 63% of Drug Court participants are white and 35% black.



There have been significant developments in Mississippi in the area of “problem-solving courts.” In HB585 the Legislature created Veteran’s Courts and more recently began laying the foundation for Mental Health Courts. The Oversight Taskforce recognized the need to look at the feasibility of Reentry Courts. These developments are supported by the research based findings of the original task force:

Research makes clear that effective community supervision integrates treatment with surveillance. Evidence-based drug and alcohol treatment programs can successfully lower recidivism among participants involved in the criminal justice system, and drug treatment in the community has been shown to reduce crime more than drug treatment in prison.

Final Report, December 2013, Mississippi Corrections and Criminal Justice Task Force at p. 10.

The Drug Court Commission should be reconstituted to reflect the broader mission of overseeing “Problem-Solving” Courts and eligibility should be expanded, for example by allowing simple house burglary defendants to participate, financial barriers eliminated and screening enhanced and monitored.

JUVENILE JUSTICE

Research by the Social Science Research Center at Mississippi State documents the disproportionate minority contact with the Youth Courts in Mississippi. *An Assessment of Disproportionate Minority Contact in Mississippi’s Juvenile Justice System*, Sheena K. Gardner, Ph.D., Social Science Research Center, Mississippi State University, March 2016. One area of particular concern is the disparity in the transfer process. And perhaps even more important here than in the adult system the guiding hand of legal counsel is essential but we fail to guarantee kids have lawyers when they need them. *Access Denied: A National Snapshot of States’ Failure to Protect Children’s Right to Counsel*, National Juvenile Defender Center, May 2017.

In delinquency matters Mississippi should provide counsel to all juveniles regardless of family financial resources at intake; prohibit waiver of counsel unless and until the child has consulted with a qualified juvenile defender and prohibit interrogation without counsel present. In addition original jurisdiction should be expanded and limits placed on transfers and the use of detention.

RECOMMENDATIONS

- Adopt Mississippi Public Defender Task Force proposal to create state funded district defender positions to provide oversight and accountability for the delivery of indigent defense services without increasing the burden on counties.
- Amending § 97-3-2 to limit the list of *per se* violent crimes to paragraph (2) – home invasion burglaries and reduce the maximum sentence for non-violent house burglaries to 15 years.
- Require the third offense be a violent crime for §99-19-83 sentencing and require resentencing of all sentenced to life under §99-19-83 for a non-violent offense.
- Reconstitute the Drug Court Commission and require Drug Courts to collect and report demographic data on applications and acceptance to Drug Court, require screening of all applicants and require fee waiver for indigent applicants.
- Guarantee counsel services to all children accused of delinquency, expand original jurisdiction of Youth Court to all children and limit transfers from Youth Court and use of detention in Youth Court to allegations involving violence.