

MISSISSIPPI PUBLIC DEFENDER TASK FORCE



2016 REPORT TO THE MISSISSIPPI LEGISLATURE

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December 12, 2016

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JOSIAH D. COLEMAN
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DAWN H. BEAM
JUSTICES

HUBBARD T. SAUNDERS, IV
COURT ADMINISTRATOR
AND COUNSEL

The Honorable Tate Reeves
Distinguished Members of the Senate
The Honorable Phillip Gunn
Distinguished Members of the House
The Capitol
Jackson, Mississippi

Dear Friends:

The Mississippi Public Defender Task Force was created in HB 602, 2015 Legislative Session, and is codified as §25-32-71. The Act took effect on passage and stands repealed July 1, 2018, providing the Task Force just over three years to complete its work.

The Act requires the Task Force report to the Legislature each year. As reported previously the Task Force believed that without a data based assessment of indigent defense caseloads and a more detailed evaluation of defense services across the state, the three duties of the Task Force could not be achieved.

The evaluation, being conducted by the Sixth Amendment Center with funding from the United States Department of Justice, will be completed by January 2017. It is anticipated that the report will be presented to the Task Force in February. This report will guide the further work of the Task Force.

The Office of State Public Defender was charged by the Task Force with collecting and presenting a caseload assessment. In the coming weeks the Task Force will meet to discuss the attached report from OSPD.

This study flows from the recommendations made in *Mississippi Indigent Defense Data Project: Recommendations for the Mississippi Public Defender Task Force*, included in the 2015 Task Force Report. The six recommendations from that report and the progress made toward each recommendation also are attached as part of this report.

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On behalf of the Task Force I wish to express appreciation for the action taken by the 2016 Legislature in passing SB 2314 which will enhance the data collection capacity of OSPD and lead to a more efficient means of evaluating our indigent defense systems in the future.

Respectfully submitted,

A handwritten signature in cursive script that reads "Jim Kitchens". The signature is written in dark ink and is positioned above the typed name and title.

Justice James W. Kitchens, Chairman
Mississippi Public Defender Task Force

Enabling legislation

§ 25-32-71. Creation of task force; members; officer; adoption of rules; reimbursement of expenses; duties [Repealed effective July 1, 2018]

(1) There is created the Mississippi Public Defender Task Force which shall be composed of thirteen (13) members as follows:

- (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.

(2) At its first meeting, the task force shall elect a chairman and vice chairman from its membership and shall adopt rules for transacting its business and keeping records. Members of the task force shall receive a per diem in the amount provided in Section 25-3-69 for each day engaged in the business of the task force. Members of the task force other than the legislative members shall receive reimbursement for travel expenses incurred while engaged in official business of the task force in accordance with Section 25-3-41 and the legislative members of the

task force shall receive the expense allowance provided for in Section 5-1-47.

(3) The duties of the task force shall be to:

(a) Make a comprehensive study of the needs by circuit court districts for state-supported indigent defense counsel to examine existing public defender programs, including indigent defense provided in the youth courts. Reports shall be provided to the Legislature each year at least one (1) month before the convening of the regular session.

(b) Examine and study approaches taken by other states in the implementation and costs of state-supported indigent criminal and delinquency cases.

(c) To study the relationship between presiding circuit and youth court judges and the appointment of criminal and delinquency indigent defense counsel.

(4) This section shall stand repealed on July 1, 2018.

HISTORY: SOURCES: Laws, 2015, ch. 424, § 2, eff from and after passage (approved March 29, 2015).

Task Force Membership

Demetrice Williams (President, Mississippi Defenders Association)

Hal Kittrell (President, Mississippi Prosecutors Association)

Ta'Shia Gordon (Administrative Office of Courts Director)

Justice James W. Kitchens (Mississippi Supreme Court)

Judge Prentiss Harrell (Conference of Circuit Judges)

Jerrolyn Owens (Office of the Attorney General)

Tony Sandrige (Mississippi Association of Supervisors)

Jennie Eichelberger (Mississippi Bar)

Tanisha Gates (Magnolia Bar Association)

Chairman Hob Bryan (Senate Judiciary Committee, Division B)

Chairman Eugene S. Clarke (Senate Appropriations Committee)

Chairman Mark Baker (House Judiciary En Banc Committee)

Chairman John Reed (House Appropriations Committee)

Indigent Defense Data Project Recommendations and Progress

At the request of the Task Force Chair, the National Legal Aid and Defender Association studied the indigent defense data collection and analysis capacity in Mississippi and reported their recommendations in *Mississippi Indigent Defense Data Project: Recommendations for the Mississippi Public Defender Task Force*. The full report was included in the 2015 Task Force Report. Below are the six recommendations with the progress made towards developing defense data capacity in Mississippi.

Recommendation 1: To facilitate uniform, statewide collection of indigent defense data in the short term, the Administrative Office of the Courts should add a check box on its Notice of Criminal Disposition Form to indicate in every criminal and juvenile delinquency case whether indigent defense counsel was appointed. This simple, no-cost mechanism will provide an immediate start to collecting critical data on indigent defense practice statewide. Over the long term, this information can be collected via the statewide Mississippi Electronic Courts (MEC) system.

The 2016 Legislature passed SB 2314 amending Miss Code §9-1-46 to require clerks to include in the data collection and reporting whether counsel was appointed and requiring the reporting of all data to OSPD.

Recommendation 2: The Mississippi legislature should enact legislation authorizing the Office of the State Public Defender to collect indigent defense data from counties. The legislation should direct counties to supply this information on an annual basis to the OSPD. The OSPD should be responsible for identifying which data points are required and then implementing a statewide mechanism to collect accurate data using standardized case definitions.

SB 2314 gives OSPD the needed authority to collect data. After meetings with AOC and review of data they are receiving from clerks particularly with the enhanced reporting implemented in HB 585 (2014) it was determined that with the addition of indigence the data points being collected are satisfactory.

Recommendation 3: The OSPD should hire a staff member who is experienced in both qualitative and quantitative analysis to oversee the data collection effort. In the short term, this research analyst staff member can spearhead a pilot project to collect and analyze indigent defense data from a sample of counties. In the long term, this person would oversee a refined process to collect indigent defense data from every county (and, ideally, eventually from every municipal and justice court) on an annual basis for a complete picture of indigent defense resources.

OSPD has included in its FY 2018 budget request a data specialist position.

Recommendation 4: The state legislature will need to provide adequate information technology (IT) resources to the OSPD to support design and automation of indigent defense data collection and analysis. Continuous investment from the state legislature into IT capacity will be necessary to operationalize data assessment, similar to what is done for prosecutors. District attorneys are provided with a case-tracking system and receive training and support for its use through the Attorney General's Office. There is no analogous resource for attorneys who take indigent defendant appointments. No training, software or hardware is supplied to courts or defenders to enter and track data uniformly.

OSPD has included in its FY 2018 budget request funding and a plan to begin a defender data collection project. Through the Training Division OSPD has begun introducing local defenders to data collection needs and practices.

Recommendation 5: There is a need for an OSPD-led education campaign that reaches all parties responsible for collecting or tracking indigent defense data, including providers, court clerks, court administrators, and county representatives. The campaign will include information on why it is important to collect data and should be followed by training on how data should be collected and reported. The net result will be a burgeoning culture of data collection and use that over time greatly improves resource allocation and understanding by multiple justice system stakeholders.

The State Defender is on the agenda for the January Circuit Clerk training to present on the importance of data collection and reporting.

Recommendation 6: To identify and demonstrate the sort of data that should be collected and the process required to do so, the OSPD should undertake a data collection pilot project using the methodology spelled out in Chapter 4 of this report.

After studying the data collection project proposed and consulting with NLADA, the Sixth Amendment Center which is conducting on-site evaluations around the state, and the AOC it was determined that OSPD attempting a pilot project would not be the most productive use of resources. This decision was based primarily on two factors: the Sixth Amendment Center evaluation would likely include a clear picture of how data collection and the local level could be enhanced and the data available from AOC, supplemented by public defenders and circuit clerks, would provide a basis to get an overview of caseloads statewide.



**ASSESSMENT OF CASELOADS IN
STATE AND LOCAL INDIGENT
DEFENSE SYSTEMS IN
MISSISSIPPI**

December 2016

ACKNOWLEDGEMENTS

The State Defender would like to express appreciation to the following people who helped direct and guide this effort as well as providing vital information to inform the final product.

Justice Jim Kitchens, chair of the Public Defender Task Force, and the entire Task Force for their direction regarding the need for caseload data and what they wanted to see to help guide their decision making as we move forward.

The National Legal Aid and Defender Association for their assistance in organizing the data based questions from the Task Force and providing clear recommendations for the short-term and long-term needs regarding a comprehensive indigent defense data project.

Kevin Lackey, director of the Administrative Office of the Courts, for his efforts to bring together the key members of his staff to work with us in identifying the available data and then compiling and providing this data.

Joseph Branson, a student intern majoring in Economics at Duke University and graduate of Madison Central High School. Joseph broke down and assimilated data and spent hours in telephone surveys of Circuit Clerks to ascertain reliable indigence rate estimates. And thanks to Ed Sivac for recruiting and guiding Joseph and Duke for providing the support for the internship.

The over 50 Circuit Clerks and staff who took time away from their other duties to answer all of Joseph's questions and follow-up questions.

Demetrice Williams, President of the Mississippi Public Defender Association, the MPDA Board of Directors and the many county-level public defenders who participated in surveys; answered our many questions; reviewed the first draft of this report and offered advice and suggestions.

WHY ASSESS CASELOADS?

The constitutions of the United States and of the State of Mississippi mandate that any person facing a criminal charge has the assistance of counsel and if financially unable to secure counsel to have counsel provided at public expense. The courts are authorized to appoint counsel in any case pursuant to *Miss. Code* § 99-15-15 or a board of supervisors may establish a public defender office in their county. *Miss. Code* § 25-32-1. These statutory provisions are the exclusive authority for counties to provide indigent defense services in Mississippi. The legislature has also created offices to provide representation in appeals and death penalty cases at trial and state post-conviction. *Miss. Code* §§ 99-18-1, 99-39-101, 99-40-1.

The purpose of establishing these offices is to provide the constitutionally mandated service in the most cost-effective manner. The cost efficiency and effectiveness of defender offices are recognized in both practice and empirical study.¹ Of Mississippi's 82 counties only 14 rely exclusively on an assigned counsel model. These counties comprise 7.8% of the state's population; 6.2% of total reported cases; and over 10% of spending.² *The State of the Right to Counsel in Mississippi, Report & Recommendations*, Mississippi, Office of the State Public Defender, September 2014.

All local systems operate with little oversight and no standards. In this environment no public official can say with any confidence that we are providing this essential governmental function in

¹ For a study of Mississippi practice see: *Economic Losses and the Public System of Indigent Defense*, Brooking and Fox, June 2003 (available at <http://www.ospd.ms.gov/Task%20Force/Economic%20Losses%20and%20the%20Public%20System%20of%20Indigent%20Defense.pdf>). For more recent studies see *Improving Indigent Defense: Evaluation of the Harris County Public Defender*, Council of State Governments Justice Center, September 2013 (available at <http://harriscountypublicdefender.org/wp-content/uploads/2013/10/JCHCPDFinalReport.pdf>); *Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes and Costs*, Public Policy Research Institute at Texas A&M, October 2012 (available at <http://tidc.texas.gov/media/18620/wichitapdstudy101212.pdf>).

² “The Federal Public Defender is central to the government's obligations under the Sixth Amendment, handling approximately 75% of all indigent defenses. Judges, prosecutors, and defenders are in agreement that the high overall quality of representation provided by the federal defenders offices helps ensure speedy, just resolution of criminal cases. Quality representation not only promotes the rule of law and safeguards constitutional rights, it also saves money by reducing pre-trial and post-trial incarceration costs. It has been suggested that the judiciary may be able to save money by reducing the percentage of cases going to the public defender by assigning those cases to Criminal Justice Act panel attorneys. While we are grateful for the work of CJA panel attorneys to complement the work of the federal public defenders, we are deeply concerned about the capacity of the CJA panels to handle increased caseloads. In addition, shifting the workload to CJA panel attorneys is not cost effective, as CJA panel attorneys are consistently more costly than federal defenders.” August 5, 2013, letter from U.S. Senators Chris Coons (D-Del.) and Jeff Sessions (R-Ala.), chair and ranking member of the Senate Judiciary Subcommittee on Bankruptcy and the Courts, to the Honorable William B. Traxler, Jr., Chair, Executive Committee of the Judicial Conference of the United States regarding funding of the Office of Defender Services.

the most cost effective manner.³ Moreover, where cost is low, there is no assurance that it is not at the expense of adequate representation. Inadequate representation both increases imprisonment rates with a human and fiscal cost and also raises ethical concerns for the attorneys in the system. *Securing Reasonable Caseloads, Ethics and Law in Public Defense*, Lefstein, ABA SCLAD, www.indigentdefense.org; ABA Ethics Opinion 06-441.

The Public Defender Task Force, created to study the needs of public defender programs at the local level, cannot begin an assessment of existing systems without objective standards on which to compare. *Minutes, Mississippi Public Defender Task Force, July 27, 2015*. The Task Force Chair requested the National Legal Aid & Defender Association to provide technical assistance to the Task Force. NLADA produced a report in December 2015. *MISSISSIPPI INDIGENT DEFENSE PROJECT: Recommendations for the Mississippi Public Defender Task Force*. These recommendations and additional technical support from NLADA and others guided OSPD's efforts in compiling this assessment.

We now propose a first step in rectifying the problems associated with data collection and reporting within the indigent defense systems and facilitating a comprehensive study of existing systems by utilizing objective caseload standards for indigent defense offices at the state and county level to formulate an assessment of needs.⁴

Relevant Mississippi Code Sections on Public Defense and questions raised:

§ 25-32-1. Establishment of office by board of supervisors

Should the board of supervisors of any county or the boards of supervisors of two (2) or more counties in the same circuit court district determine by order spread upon their minutes that the county or counties have a sufficient number of indigent defendant cases to establish an office of public defender, the board of supervisors or boards of supervisors are authorized and empowered, in their discretion, to establish the office, provide office space, personnel and funding for the office, and to perform any and all functions necessary for the efficient operation of such an office to the end that adequate legal defense for indigent persons accused of crime shall be provided at every critical stage of their cases as an alternative to court appointed counsel. Said order shall specify whether the public defender shall be fulltime or part-time.

§ 25-32-3. Circuit judge shall appoint public defender for county; assistant public defender

(2) Assistant public defenders may be authorized by the board of supervisors, or boards of

³ In Governor Bryant's Executive Budget Recommendation for FY 2018 he observed in a section on Reorganizing Government that in many areas our government is "woefully fragmented;" a "model of inefficiency." All these "fiefdoms" are designed for a "feudal society" not an "effective 21st Century government." EBR at page 7. This observation characterizes our public defender "system" precisely.

⁴ This assessment is limited to felony level matters in keeping with the Task Force's incremental approach to reform recommendations.

supervisors if two (2) or more counties are acting jointly. The public defender shall appoint all assistant public defenders. Such assistant public defenders may be compensated in such an amount as may be authorized by the respective board of supervisors; provided, however, that in no case may such assistant public defenders receive compensation in an amount greater than that received by the public defender.

HOW DOES A BOARD DETERMINE THAT THERE ARE A SUFFICIENT NUMBER OF CASES TO ESTABLISH AN OFFICE OF PUBLIC DEFENDER IF IT DOESN'T HAVE AN OBJECTIVE CASELOAD STANDARD?

HOW DOES IT DETERMINE HOW MANY ASSISTANT PUBLIC DEFENDERS, IF ANY, ARE NEEDED?

§ 25-32-71. Creation of task force; members; officer; adoption of rules; reimbursement of expenses; duties

(3) The duties of the task force shall be to:

(a) Make a comprehensive study of the needs by circuit court districts for state-supported indigent defense counsel; to examine existing public defender programs, including indigent defense provided in the youth courts.

HOW DOES THE TASK FORCE ACCESS "NEEDS"?

§ 99-18-1. Office of State Public Defender created; personnel; funding sources; qualifications, duties, removal of state defender

(5) The Office of State Public Defender shall be responsible for the administration, budget and finances of the Divisions of Capital Defense Counsel, Indigent Appeals and Public Defender Training, which shall be divisions of the Office of State Public Defender.

(7) The State Defender shall coordinate the collection and dissemination of statistical data and make such reports as are required of the divisions, develop plans and proposals for further development of a statewide public defender system in coordination with the Mississippi Public Defenders Task Force and to act as spokesperson for all matters relating to indigent defense representation.

TO FACILITATE THE WORK OF THE STATE DEFENDER AND THE PUBLIC DEFENDER TASK FORCE AS WELL AS ENSURE COUNTY SUPERVISORS ARE COMPLYING WITH THE CONSTITUTIONAL MANDATES IN A COST EFFICIENT MANNER, CASELOAD STANDARDS MUST BE SET.

To establish the most reliable caseload standards for Mississippi a comprehensive assessment of Mississippi practice in light of accepted performance standards for Mississippi would be ideal.