The State of the Right to Counsel in Mississippi

Report & Recommendations

October 2013

OVERVIEW

The right to effective assistance of counsel in Mississippi is unequivocal. Miss. Code Ann. § 25-32-9(1) requires that "any person . . . arrested and charged with a felony, a misdemeanor or an act of delinquency," shall be afforded the opportunity to sign an affidavit of indigency and be appointed a public defender. The indigent accused, furthermore, is statutorily entitled to have "representation available at *every critical stage of the proceedings against him* where a substantial right may be affected."[1] Sub-section (3) of the same statute goes on to make clear that the right to counsel extends to all courts of limited jurisdiction, noting 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."

In 1963, the United States Supreme Court made the funding of Sixth Amendment right to counsel services incumbent upon states through the Fourteenth Amendment.[2] Mississippi, however, is one of only eight states that do not contribute any money for non-capital, trial-level right to counsel services.[3] Instead, local government must shoulder the entire burden of providing public attorneys to the accused. Though it is not believed to be unconstitutional for a state to delegate such responsibilities to local government, in doing so a state must guarantee that local governments are not only able to provide such services, but that they are in fact doing so.

In 2011, the state legislature took initial steps toward state oversight of indigent defense services by establishing the Mississippi Office of the State Public Defender (OSPD). OSPD combined the previously existing state Office of Indigent Appeals and the Office of Capital Defense Counsel into one administrative unit. In addition to providing the direct client-representation services for which the two newly merged offices were previously responsible, the legislature also mandated that this new office examine the delivery of trial-level indigent defense services across the state. Specifically, the OSPD is 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."[4]

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1 Miss. Code Ann. § 25-32-9(2). (Emphasis added.)

2 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

3 The others are Arizona, California, Idaho, Michigan, Pennsylvania, South Dakota, and Utah. Mississippi will be one of just seven states that do not fund trial-level indigent defense services in the immediate future. In July 2013, Michigan Governor Rick Snyder (R) signed into law a comprehensive indigent defense reform bill that creates a statewide indigent defense commission to set and enforce standards for the state's 83 counties. The new legislation caps county spending at the average of the prior three years with all new money to meet standards coming from the state.

4 Miss. Code Ann. § 99-18-1.

This report details the results of OSPD's data collection efforts and recommends how best to advance the goal of having a coordinated, statewide public defender system.[5]

THE CURRENT STATE OF TRIAL-LEVEL SERVICES

OSPD began our work simply documenting how trial-level services are currently delivered at the circuit level. We did so by surveying judges, county executives, and public defense providers. Once the surveys were completed, OSPD compiled the responses into a map and data table that was disseminated back to criminal justice stakeholders for review.[6] Our goal in doing so was to get local policymakers and stakeholders to see their county in the context of other counties. If, for example, a county's indigent defense expenditure was low or high in comparison to similarly situated counties, it could cause the stakeholder to see if she either accounted for all sources of revenue, or double-counted one or more expenditures. Likewise, there were a few instances in which OSPD received conflicting answers from two individual stakeholders within a single county. For example, a circuit judge may have characterized the indigent defense delivery model differently than a county manager answering the same question. We believe our methodology allowed for the greatest accuracy and crosschecking.

On the following pages is a map and table denoting the type of system employed in each county to deliver right to counsel services, the amount of money reportedly expended in the last fiscal year, and the average indigent defense cost per capita by circuit (calculated as "reported expenditure" divided by "population").

OSPD identified six different types of delivery service models employed across the state. They are:

1. ***Assigned Counsel***: One or more private, non-salaried attorneys who are paid an hourly fee to work on indigent defense cases.

2. ***Salaried Public Defender Office***: An office of 3 or more full-time attorneys that are paid a salary with benefits and that are precluded from handling private cases (criminal or civil). Attorneys are considered county employees.

3. ***Salaried Public Defender (Part Time)***: One or more attorneys that are paid a part time salary with prorated benefits that may handle private cases in addition to their public defender work. Attorneys are considered county employees.

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[5] OSPD did not receive additional funding to complete our data collection and reporting tasks. We therefore sought and received assistance from the Sixth Amendment Center (6AC), a non-profit organization providing right to counsel technical assistance services. The 6AC assistance was begun under limited funding by the American Bar Association, Standing Committee on Legal Aid and Indigent Defendants and completed under a grant from the U.S. Department of Justice, Bureau of Justice Assistance.

[6] OSPD acknowledges the great cooperation in this endeavor from circuit judges, county administrators, and others.

4. ***Regional Contract Defender System***: Two or more counties banding together to provide indigent defense services on a regional basis with each county paying a proportional amount of the overall costs.

5. ***Contract Public Defender (Full Time)***: One or more private, non-salaried attorneys who receive no county benefits but that are precluded from handling private cases (criminal or civil). Attorneys are not considered county employees.

6. ***Contract Public Defender (Part Time)***: One or more private, non-salaried attorneys who receive no county benefits that may handle private cases (criminal or civil). Attorneys are not considered county employees.

   Respondents with either full-time or part-time contract systems were asked to further characterize those contracts under the following definitions:

   a. *Flat fee*: An unlimited number of cases for a single fee; attorney is responsible for any and all trial related expenses.

   b. *Limited Flat Fee*: A limited number of cases for a single fee; attorney is responsible for any and all trial related expenses.

   c. *Flat Fee + Expenses*: An unlimited number of cases for a single fee; attorney petitions court for funding for any and all trial related expenses.

   d. *Limited Flat Fee + Expenses*: A limited number of cases for a single fee; attorney petitions the court for funding for any and all trial related expenses.

Mississippi Defender Systems by County & Circuit

4th Judicial Circuit
(3 counties)
Rprt. Exp.: $1,105,649.86
Population: 112,904
Cost per Capita: $9.79

11th Judicial Circuit
(4 counties)
Rprt. Exp.: $474,920.10
Population: 79,297
Cost per Capita: $5.99

17th Judicial Circuit
(5 counties)
Rprt. Exp.: $713,789.10
Population: 252,901
Cost per Capita: $2.82

3rd Judicial Circuit
(7 counties)
Rprt. Exp.: $542,814.24
Population: 174,994
Cost per Capita: $3.10

1st Judicial Circuit
(7 counties)
Rprt. Exp.: $787,348.34
Population: 255,187
Cost per Capita: $3.09

21st Judicial Circuit
(3 counties)
Rprt. Exp.: $418,000.00
Population: 56,638
Cost per Capita: $7.38

5th Judicial Circuit
(7 counties)
Rprt. Exp.: $562,093.88
Population: 100,990
Cost per Capita: $5.57

20th Judicial Circuit
(2 counties)
Rprt. Exp.: $637,705.00
Population: 236,820
Cost per Capita: $2.69

16th Judicial Circuit
(4 counties)
Rprt. Exp.: $496,500.00
Population: 139,629
Cost per Capita: $3.56

9th Judicial Circuit
(3 counties)
Rprt. Exp.: $326,809.94
Population: 55,095
Cost per Capita: $5.93

8th Judicial Circuit
(4 counties)
Rprt. Exp.: $161,384.00
Population: 103,465
Cost per Capita: $1.56

7th Judicial Circuit
(1 county)
Rprt. Exp.: $1,437,080.73
Population: 245,285
Cost per Capita: $5.86

10th Judicial Circuit
(4 counties)
Rprt. Exp.: $389,358.45
Population: 128,196
Cost per Capita: $3.04

22nd Judicial Circuit
(3 counties)
Rprt. Exp.: $299,201.25
Population: 46,779
Cost per Capita: $6.40

13th Judicial Circuit
(1 county)
Rprt. Exp.: $187,766.48
Population: 67,761
Cost per Capita: $2.95

6th Judicial Circuit
(4 counties)
Rprt. Exp.: $402,840.00
Population: 63,424
Cost per Capita: $6.35

18th Judicial Circuit
(1 county)
Rprt. Exp.: $151,935.00
Population: 67,761
Cost per Capita: $2.24

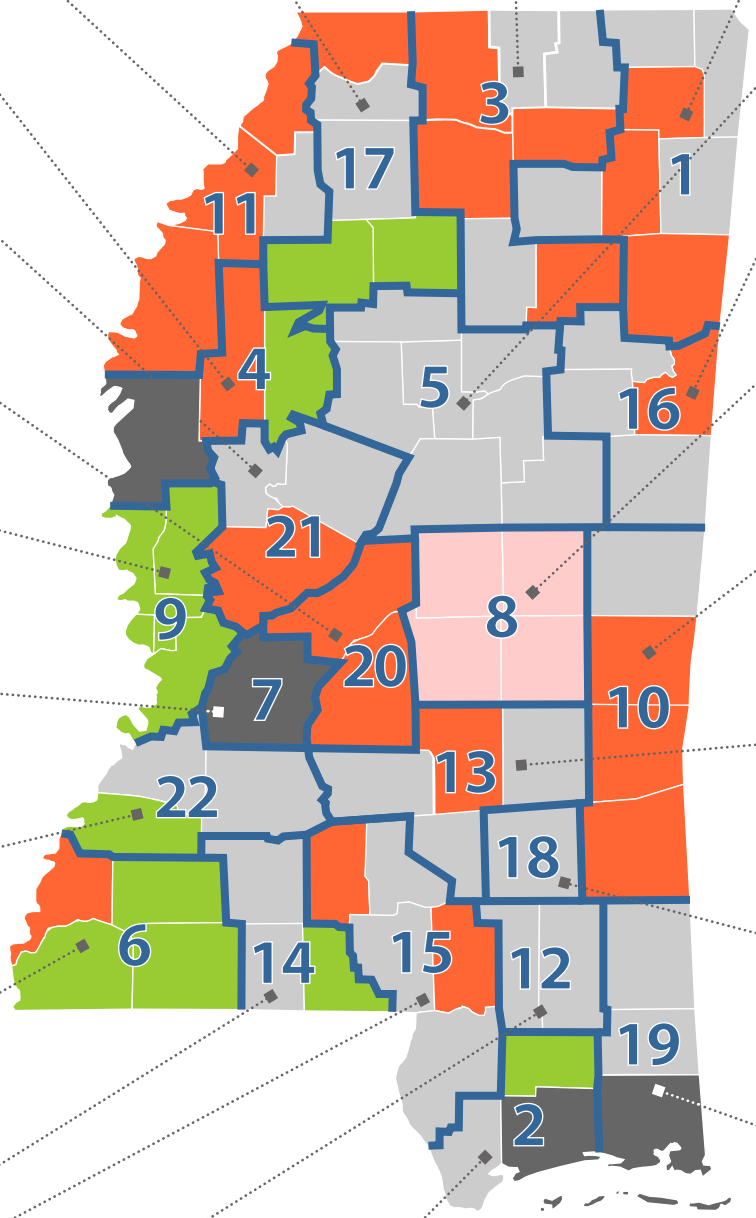
14th Judicial Circuit
(3 counties)
Rprt. Exp.: $491,684.00
Population: 90,716
Cost per Capita: $5.42

19th Judicial Circuit
(3 counties)
Rprt. Exp.: $791,154.00
Population: 176,646
Cost per Capita: $4.48

15th Judicial Circuit
(5 counties)
Rprt. Exp.: $710,134.09
Population: 163,996
Cost per Capita: $4.33

12th Judicial Circuit
(7 counties)
Rprt. Exp.: $151,935.00
Population: 87,184
Cost per Capita: $5.13

2nd Judicial Circuit
(3 counties)
Rprt. Exp.: $1,182,802.00
Population: 248,820
Cost per Capita: $4.75



LEGEND

- public defender (FT)
- public defender (PT)
- assigned counsel
- contract
- regional contract

Mississippi indigent Defense Costs Per Capita, by County

County	Pop. (2010)	Primary System	Reported Expenditure	Cost Per Capita
Adams	32,297	Contract	$264,000.00	$8.17
Alcorn	37,057	Public Defender (PT)	$187,125.00	$5.05
Amite	13,131	Assigned Counsel	$48,840.00	$3.72
Attala	19,564	Public Defender (PT)	$99,760.00	$5.10
Benton	8,729	Public Defender (PT)	$16,000.00	$1.83
Bolivar	34,145	Contract	$111,425.00	$3.26
Calhoun	14,962	Public Defender (PT)	$58,500.24	$3.91
Carroll	10,597	Public Defender (PT)	$29,587.20	$2.79
Chickasaw	17,392	Contract	$40,000.00	$2.30
Choctaw	8,547	Public Defender (PT)	$40,400.00	$4.73
Claiborne	9,604	Public Defender (PT)	$99,600.00	$10.37
Clarke	16,732	Contract	$48,000.00	$2.87
Clay	20,634	Public Defender (PT)	$81,005.00	$3.93
Coahoma	26,151	Contract	$224,042.10	$8.57
Copiah	29,449	Public Defender (PT)	$156,954.00	$5.33
Covington	19,568	Public Defender (PT)	$60,766.48	$3.11
DeSoto	161,252	Contract	$433,491.00	$2.69
Forrest	74,934	Public Defender (PT)	$421,387.00	$5.62
Franklin	8,118	Assigned Counsel	$50,000.00	$6.16
George	22,578	Public Defender (PT)	$45,000.00	$1.99
Greene	14,400	Public Defender (PT)	$36,800.00	$2.56
Grenada	21,906	Public Defender (PT)	$188,575.68	$8.61
Hancock	43,929	Public Defender (PT)	$101,880.00	$2.32
Harrison	187,105	Public Defender (FT)	$1,040,522.00	$5.56
Hinds	245,285	Public Defender (FT)	$1,437,080.73	$5.86
Holmes	19,198	Public Defender (PT)	$137,000.00	$7.14
Humphreys	9,375	Public Defender (PT)	$81,000.00	$8.64
Issaquena	1,406	Assigned Counsel	$1,600.00	$1.14
Itawamba	23,401	Public Defender (PT)	$69,645.06	$2.98
Jackson	139,668	Public Defender (FT)	$709,354.00	$5.08
Jasper	17,062	Public Defender (PT)	$26,000.00	$1.52
Jefferson	7,726	Assigned Counsel	$42,647.25	$5.52
Jefferson Davis	12,487	Public Defender (PT)	$123,000.00	$9.85
Jones	67,761	Public Defender (PT)	$151,935.00	$2.24
Kemper	10,456	Public Defender (PT)	$35,000.00	$3.35
Lafayette	47,351	Contract	$206,784.00	$4.37
Lamar	55,658	Contract	$110,000.00	$1.98
Lauderdale	80,261	Contract	$213,000.00	$2.65
Lawrence	12,929	Contract	$70,340.00	$5.44
Leake	23,805	Region Contract System	$20,728.03	$0.87
Lee	82,910	Contract	$176,678.32	$2.13

County	Pop. (2010)	Primary System	Reported Expenditure	Cost Per Capita
Leflore	32,317	Assigned Counsel	$355,640.00	$11.00
Lincoln	34,869	Public Defender (PT)	$152,984.00	$4.39
Lowndes	59,779	Contract	$251,982.00	$4.22
Madison	95,203	Contract	$355,215.00	$3.73
Marion	27,088	Public Defender (PT)	$171,794.09	$6.34
Marshall	37,144	Contract	$93,780.00	$2.52
Monroe	36,989	Contract	$115,000.00	$3.11
Montgomery	10,925	Public Defender (PT)	$51,297.00	$4.70
Neshoba	29,676	Region Contract System	$48,413.00	$1.63
Newton	21,720	Region Contract System	$51,328.97	$2.36
Noxubee	11,545	Public Defender (PT)	$31,114.00	$2.70
Oktibbeha	47,671	Public Defender (PT)	$132,399.00	$2.78
Panola	34,707	Public Defender (PT)	$96,777.36	$2.79
Pearl River	55,834	Public Defender (PT)	$235,000.00	$4.21
Perry	12,250	Public Defender (PT)	$25,600.00	$2.09
Pike	40,404	Public Defender (PT)	$308,700.00	$7.64
Pontotoc	29,957	Public Defender (PT)	$56,199.96	$1.88
Prentiss	25,276	Contract	$100,000.00	$3.96
Quitman	8,223	Public Defender (PT)	$38,800.00	$4.72
Rankin	141,617	Contract	$282,490.00	$1.99
Scott	28,264	Region Contract System	$40,914.00	$1.45
Sharkey	4,916	Assigned Counsel	$21,600.00	$4.39
Simpson	27,503	Public Defender (PT)	$85,000.00	$3.09
Smith	16,491	Contract	$42,000.00	$2.55
Stone	17,786	Assigned Counsel	$40,400.00	$2.27
Sunflower	29,450	Contract	$261,648.00	$8.88
Tallahatchie	15,378	Assigned Counsel	$55,000.00	$3.58
Tate	28,886	Public Defender (PT)	$103,520.74	$3.58
Tippah	22,232	Public Defender (PT)	$79,250.00	$3.56
Tishomingo	19,593	Public Defender (PT)	$82,700.00	$4.22
Tunica	10,778	Contract	$100,653.00	$9.34
Union	27,134	Contract	$48,500.00	$1.79
Walthall	15,443	Assigned Counsel	$30,000.00	$1.94
Warren	48,773	Assigned Counsel	$303,609.94	$6.22
Washington	51,137	Public Defender (FT)	$488,361.86	$9.55
Wayne	20,747	Contract	$93,358.45	$4.50
Webster	10,253	Public Defender (PT)	$70,708.00	$6.90
Wilkinson	9,878	Assigned Counsel	$40,000.00	$4.05
Winston	19,198	Public Defender (PT)	$81,766.00	$4.26
Yalobusha	12,678	Assigned Counsel	$25,000.00	$1.97
Yazoo	28,065	Contract	$200,000.00	$7.13
STATEWIDE	2,967,297		$12,743,957.46	$4.29

FINDING #1
THERE IS NO CONSISTENCY IN HOW INDIGENT DEFENSE SERVICES ARE DELIVERED THROUGHOUT MISSISSIPPI & FUNDING LEVELS VARY GREATLY AMONG COUNTIES

Unlike many states where municipal courts only hear local ordinance violations, Mississippi's 246 municipal courts adjudicate misdemeanors and hold preliminary hearings on felonies. This makes cities and towns a primary funder of right to counsel services.

Local governments, however, have significant revenue-raising restrictions placed on them by the state while being statutorily prohibited from deficit spending. There are three revenue sources available to local government: real estate taxes; fees for permits/services; and assessments on ordinance violations, traffic infractions and criminal convictions. But, because the state of Mississippi's low tax burden, local governments must rely more heavily on unpredictable revenue streams, such as court fees and assessments, to pay for their criminal justice priorities. It comes as no surprise then that there is wide inconsistency on indigent defense cost-per-capita spending across the state.

Additionally, the jurisdictions that are often most in need of indigent defense services are the ones that are least likely to be able to afford it. That is, in many instances, the same indicators of limited revenues – low property values, high unemployment, high poverty rates, limited household incomes, limited higher education, etc. – are often the exact same indicators of high crime. And those same counties have a greater need for broader social services, such as unemployment or housing assistance, meaning the amount of money to be dedicated to upholding the Sixth Amendment to the Constitution is further depleted.

Therefore it should not be surprising that OSPD found a lack of consistency in how services are delivered, as struggling counties resort to flat fee contracting in which an attorney is paid a single flat fee to take an unlimited number of cases. Attorneys working under fixed rate contracts are generally not reimbursed for overhead or for out-of-pocket case expenses, such as mileage, experts, or investigators. In short, the more work an attorney does on a case, the less money that attorney would make, giving attorneys a clear financial incentive to do as little work on their cases as possible. Contract defender services are the predominant delivery model in Mississippi (29.27%, or 24 of 82 counties).

The wide variation in indigent defense services extends to funding. Totaling all sources of indigent defense funding (local, county, and state), approximately $13,370,000 is expended on indigent defense annually in Mississippi, or a per-capita cost of $5.52. Subtracting the state costs for OSPD and focusing solely on trial-level services, local governments have an average cost per capita of $4.23. But this is just an average, with some counties spending over ten dollars per capita

(e.g., Claiborne, Leflore) and some spending less than two dollars per capita (e.g., Hancock, Issaquena, Lamar, Oktibbeha, Pontotoc, Rankin, and Union, among others).

OSPD spent considerable time trying to determine if particular delivery models produce more consistent cost per capita between counties. No such commonalities were found. This leads us to conclude that with no state agency authorized to set standards on how to deliver indigent defense services, local government are left entirely on their own to try to establish systems that meet constitutional adequacy. Some will be successful, but others will not.

Mississippi's Neighboring States

On first review of our own state data, OSPD found a lack of consistency in how services are delivered throughout the state and in the level at which those services are funded. However, we did not want to make findings or recommendations without further context as to what the survey information meant.

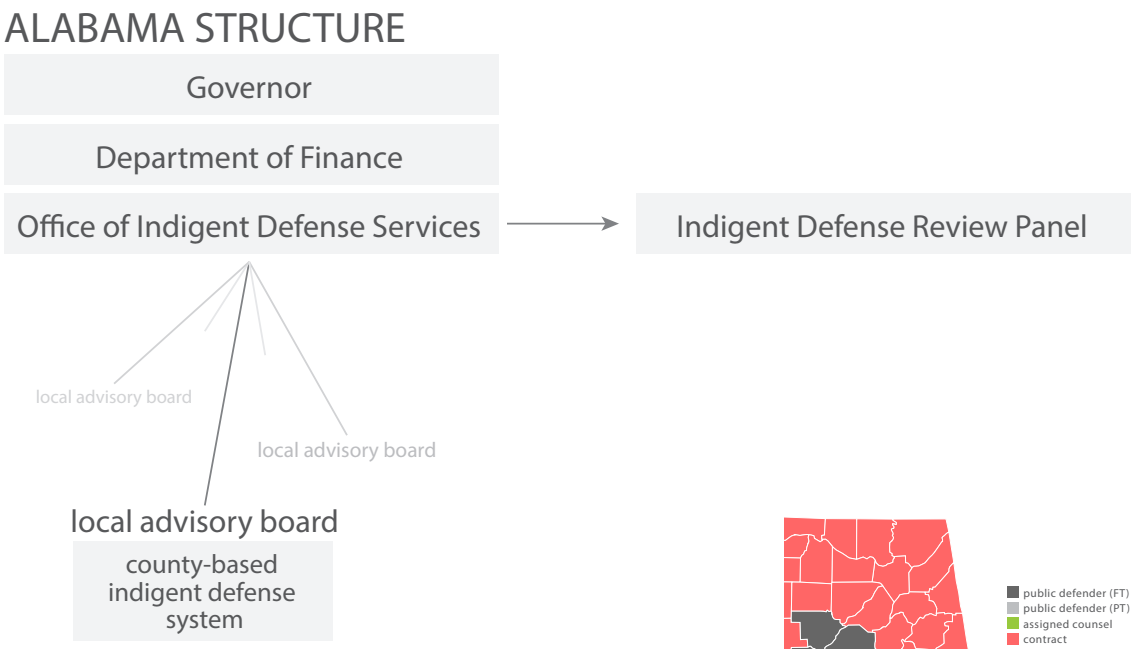
Finding the exercise of placing each Mississippi county in the context of all the other counties helpful, OSPD decided to conduct a similar exercise – this time placing Mississippi in context with other comparable states. Rather than compare Mississippi to states in the Northeast or the West Coast, we thought it advisable to simply compare how we deliver indigent defense services with our neighboring states: Alabama, Arkansas, Louisiana and Tennessee.

As you will see, Mississippi is the only state that lacks significant state government involvement in the administration and funding of trial-level indigent defense services. OSPD presents the following snapshots of indigent defense in our neighboring states to educate the reader and inform our recommendations.

Alabama

For much of Alabama's history, right to counsel services were provided locally, while the funding for those services was largely the responsibility of the state. To offset the cost to counties of providing counsel, money from a filing fee in civil court matters was collected in a central fund dedicated to indigent defense services. However, if the needs of the state's 67 counties exceeded the amount of dollars available in that fund, the state was statutorily responsible for funding the difference out of the state general fund. The state had no control over the methods used by the counties for providing those services, and thus it had no control over the way the counties used the state's funds.

This created a situation in which the counties and judges were not on the fiscal hook for the decisions they made. Traditionally, Alabama counties employed assigned counsel systems in which judges controlled appointments of individual lawyers to individual cases, and signed off on vouchers for attorneys who were paid at an hourly rate that were then sent to the state for payment. Critics charged that such a system encouraged judges to use assignments to reward lawyers



who contributed to their re-election campaigns. Whether true or not, state indigent defense expenditures grew at a rapid rate.[7]

In 2011, the Alabama legislature passed a bill that created a central Office of Indigent Defense Services (OIDS) to oversee how right to counsel services are provided throughout the state and bring more fiscal predictability to the system. OIDS is an executive branch agency under the Department of Finance. The Finance Director appoints the OIDS Director to a three-year term (termination for just cause only) from three names nominated by the Alabama State Bar, Board of Commissioners.

The Alabama legislature thought it important to keep some local input into how best to deliver services. Therefore, each judicial circuit is required to have a local indigent defense advisory board. The five-person advisory board is composed of: the presiding circuit court judge; the president of the local circuit bar association; and three lawyers selected by the circuit bar association commission (in multi-county circuits these appointments are made by the president of local county bar associations). Advisory boards must reflect the racial and gender diversity of the circuit.

OIDS-promulgated standards inform the local recommendations of the advisory board for each county's system. OIDS is statutorily obligated to set standards related to: fiscal responsibility and accountability; minimum attorney qualification, training and other standards by case type;

[7] See for example: Teske, Peter. "Indigent Defense Still Lucrative in Mobile County." Lagniappe. Issue 196. January 12, 2010. Available at: http://classic.lagniappemobile.com/article.asp?articleID=2993&sid=1.

caseload management; attorney performance standards; the independent, efficient and competent representation of conflict defendants; indigency and partial-indigency; and, recoupment; among others.

But, because OIDS is ultimately responsible for all contracting, payment of assigned counsel, and oversight of staffed public defenders, the director of OIDS has an important say over the decisions of the local advisory boards. First, if a local advisory board fails to recommend a delivery service model at all, then the OIDS director determines how to provide services in that county. If the OIDS director disagrees with the recommendation of the local advisory board, the Director can appeal the recommendation to a state Indigent Defense Review Panel.

The Indigent Defense Review Panel is a five-member body composed of appointees made by: the president of the Alabama State Bar (two appointees); the state's Association of Circuit Court Judges (one appointee); the Association of District Court Judges (one); and the president of the Alabama Lawyers Association (the state's African-American Bar). Appeals to the review board by OIDS may be either standards-based or based on fiscal concerns. The decision of the Review Panel is final.

Whereas some critics feared that OIDS would use its power to simply move to low-bid, flat fee contracts as a means of stemming the increase in spending, without care for quality of representation, the opposite appears to be happening with an increase in full-time public defenders across the state. Jefferson County (Birmingham) is the state's most populous county. In 2012, the county and OIDS elected to start the process of creating a public defender office, and in November 2012 the county hired its first chief defender. It is our understanding that the Jefferson County Public Defender is in the process of hiring some 35 assistant public defenders. Not to be outdone, Montgomery County announced on February 20, 2013 that it too would open a public defender office in the state's capital city in the coming year. All public defenders in Alabama are state employees.

In the first year of operations, the OIDS budget soared even higher than in previous years.[8] Such a spike was predicted as private assigned counsel attorneys rushed to turn in vouchers for payment while rules allowing them to bill extra for overhead costs and to be paid on several-months-old vouchers were still in place. With the advent of public defenders in the urban centers producing greater efficiencies, OIDS projects indigent defense expenditures that are more sustainable and predictable.

Arkansas

Prior to 1993, indigent defense services in the state of Arkansas were very similar to those currently employed in Mississippi. That is, indigent defense services were a county obligation and, in most instances, judges or county policymakers controlled how services were provided, which attorneys were appointed, and how much each were to be compensated.

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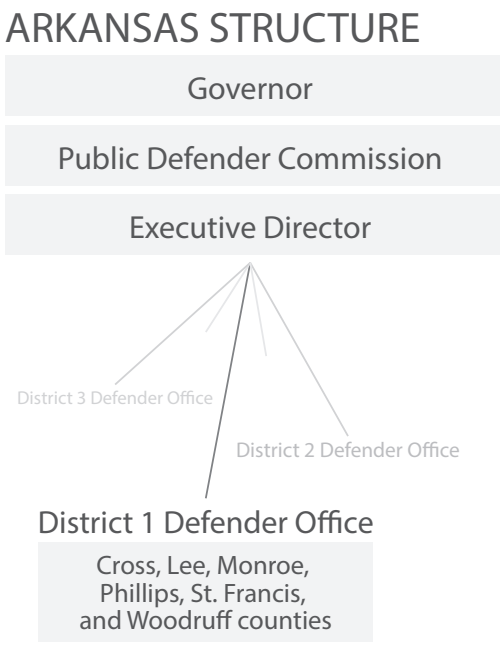
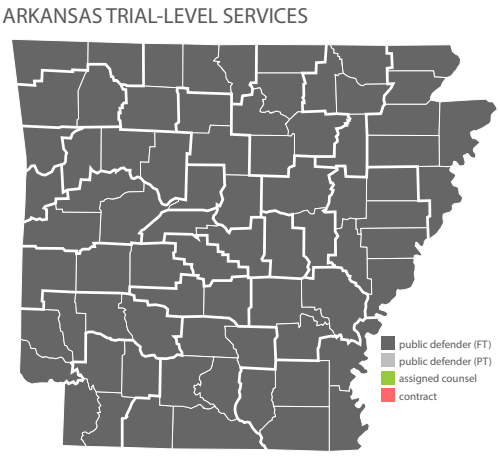
[8] See for example: Associated Press. "Alabama to spend less on indigent defense." Alabama.com. August 27, 2013: http://blog.al.com/wire/2013/08/alabama_spending_less_on_lawye.html.

In 1993, the Arkansas Supreme Court ruled that the funding of indigent defense services is a state, not a county, responsibility.[9] So in 1993, the legislature created the Arkansas Public Defender Commission, an Executive Branch agency. The Commission is composed of seven members, all appointed by the Governor. Commissioners are appointed to five-year terms. Four commissioners must be attorneys; one must be a county judge, and one a district judge.



In its initial year of operations, the Commission was charged with simply monitoring what the counties were actually doing in terms of the provision of right to counsel services. But by 1997 the Commission had fully converted the existing county-based system to an entirely state system. The Commission now has ultimate statutory authority to set standards and policies related to the delivery of indigent defense services, including the power to determine how best to deliver services throughout the state.



Arkansas has 23 judicial circuits (covering 75 counties). For the most part, the Commission established public defender offices in each, although they have determined that certain circuits require two or more offices. For example, Arkansas' second judicial circuit is composed of six counties. Rather than have a single office, the Commission authorized one office to serve four counties (Clay, Craighead, Greene, and Poinsett), a second office to serve Crittenden County, and a third to serve Mississippi County.

The authority to be flexible in how services are delivered extends to the Commission's oversight of conflict services. For the most part, the Commission sets standards for the qualification, training and performance of private attorneys paid under contract for conflict representation. However, the Commission has determined that enough conflicts exist in certain urban areas of the state to support conflict public defender offices. For example, the Northwest Conflict Office serves as a regional conflict office serving two counties (Madison and Washington counties), while another conflict office in Little Rock only serves Pulaski County.

Though the state is responsible for all payment of indigent defense services, counties are responsible for some limited physical plant costs including utilities and telecommunications for public

[9] *Independence County v. State*, 312 Ark. 472, 850 S.W.2d 842 (1993).

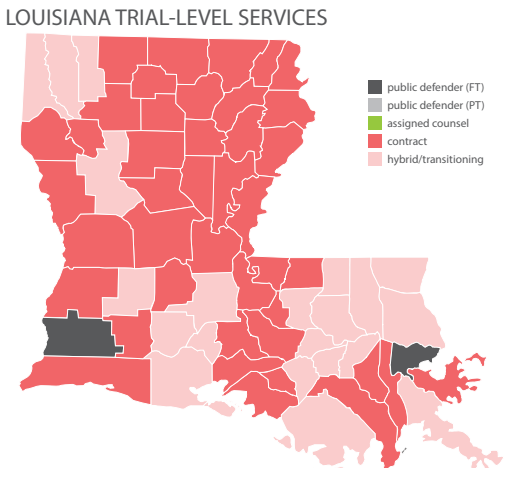
defender offices. Additionally, counties and municipalities can – if they so desire – contribute to an office to increase staff (though only the city of Little Rock has chosen to do so).

In addition to the trial-level offices, the Commission has a central office that houses a conflict capital office, appellate services and training unit. The Commission currently employs 225 attorneys.

Louisiana

Prior to comprehensive reform in 2007, local advisory boards controlled all decisions regarding the provision of indigent defense services in a judicial district. Unlike in Alabama, Louisiana's local advisory boards were appointed and controlled by the presiding judge in the district. This created a similar dynamic to pre-reform Alabama in which allegations of attorney appointments being made in exchange for re-election campaign contributions were a constant theme.[10]

To remedy this situation, the Louisiana Public Defender Act of 2007 abolished the local advisory boards in favor of a 15-person, statewide commission called the Louisiana Public Defender Board (LPDB). Like Alabama and Arkansas, LPDB is statutorily required to promulgate indigent defense standards. Statutes make clear that LPDB must promulgate standards related to reasonable caseloads, attorney qualifications, training, and performance (to name a few). Additionally, LPDB's central office provides statewide training. The office contracts with non-profit public defender agencies for appellate services, and capital conflict representation.



Though indigent defense is organized at the state level, trial-level services are still delivered with some local autonomy. Louisiana's 64 parishes (the equivalent to counties) are divided among 41 judicial districts. Each district has a person that is the "chief defender" of the district. This chief defender contracts with LPDB to run the local indigent defense system. Local services may be organized as an assigned counsel panel or provided by contract defenders or by staff public defenders. The decision on which delivery model to employ

[10] Undue judicial interference was the focus of several reports in Louisiana before the 2007 legislative reforms. They are compiled on the Louisiana Justice Coalition's website: http://www.lajusticecoalition.org/Louisiana's%20Public%20Defense%20System/State%20and%20District%20Studies.php.

ALTERNATIVE REVENUE SOURCES ARE NOT A STABLE SOURCE FOR INDIGENT DEFENSE FUNDING

As well-developed as the Louisiana system is, the state stands alone in the nation as the only with a statewide indigent defense system that relies to a large extent on locally generated, non-government general fund appropriations to fund the right to counsel. The majority of funding for trial-level services comes from a combination of fines and fees (e.g., bail bond revenue, criminal bond fees, revenue form forfeitures, and indigency screening fees, among others). The single greatest of these revenue generators for indigent defense in Louisiana is a special court cost ($45) assessed against every criminal defendant convicted after trial, pleads guilty or no contest, or who forfeits his or her bond for violation of a state statute or a local ordinance other than a parking ticket.[1] The result of this funding scheme is that a significant part of funding for trial-level representation in Louisiana comes from fees assessed on traffic tickets.

As one can imagine, a number of factors can dramatically impact the number of traffic tickets that can be written, assessed and collected in any local jurisdiction. Hurricanes Katrina and Rita alone wreaked havoc on indigent defense funding in New Orleans and Southwestern Louisiana, as law enforcement officials were appropriately focusing their efforts on public safety in the aftermath of the storms. The plummeting revenue did not, of course, correlate in any way with the actual need for indigent defense representation – as more and more people charged with crime found themselves without the means to hire private counsel.

And, it does not take a natural disaster to negatively impact right to counsel under such a funding scheme. In *State v. Peart*, 621 So.2d 780 (1993) — a case in which the Louisiana Supreme Court found a systemic presumption that indigent defendants do not receive sufficiently effective representation due primarily to the "unstable and unpredictable" funding mechanism — the court noted that "when the city of East Baton Rouge ran out of pre-printed traffic tickets in the first half of 1990, the indigent defender program's sole source of income was suspended while more tickets were being printed."

Even advancing technologies, like reliance on camera-generated tickets for running red lights or other advancements that can free up law enforcement personnel to more strategically focus limited resources on more pressing criminal justice matters, can have the unintended effect of decreasing indigent defense revenue. Reliance on such technologies under state law deprives most district public defender systems of the revenue they would have received through traditional traffic ticketing.

Moreover, LPDB cannot maximize whatever resources are generated locally in the most efficient way. LPDB is statutorily prohibited from pooling these local revenue streams, augmenting them with state funds, and disseminating them back to where resources are most needed in the state. Instead, all locally generated revenue stays in local judicial district's indigent defense fund — whether or not those funds are needed in that district. Because of this, some districts have reserve funds sitting in local bank accounts that are not needed.

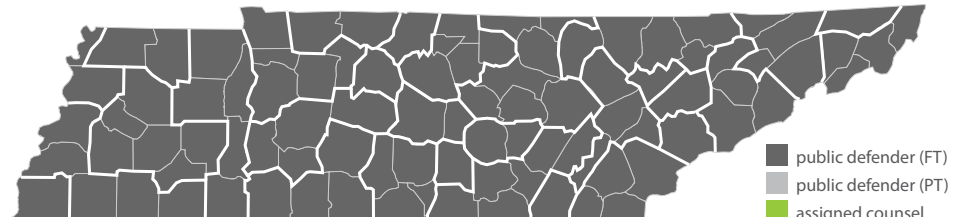
[1] La. R.S. 15 § 168 B(1): http://legis.la.gov/lss/lss.asp?doc=451960.

starts with the local chief defender. Though existing district public defenders originally appointed by the judicially controlled advisory boards were grandfathered to remain in the position of chief defender, LPDB retains the authority to appoint their replacements if they retire or otherwise change employment. Once replacements have been appointed, LPDB retains all authority about how services should be delivered (including regionalizing services if so desired).

LPDB has the statutory authority to not only promulgate standards but, importantly, to enforce them as well. And, the legislative reform of 2007 created LPDB ombudsmen who are required to evaluate services in each district on a regular basis. If services are found to be deficient, LPDB is authorized to remove the chief defender and remedy services under any model the Board sees fit.

Tennessee

In the immediate wake of the 1963 U.S. Supreme Court decision establishing the right to counsel, the state of Tennessee assumed the responsibility for paying for the majority of all indigent defense services in the various courts throughout the state's 31 judicial districts (encompassing 95 counties). The majority of state courts relied on private attorneys paid hourly to provide representation. That is, the local judges would appoint local attorneys, approve payment vouchers and forward them to the state Administrative Office of the Courts (AOC) to cut the attorneys' paychecks.

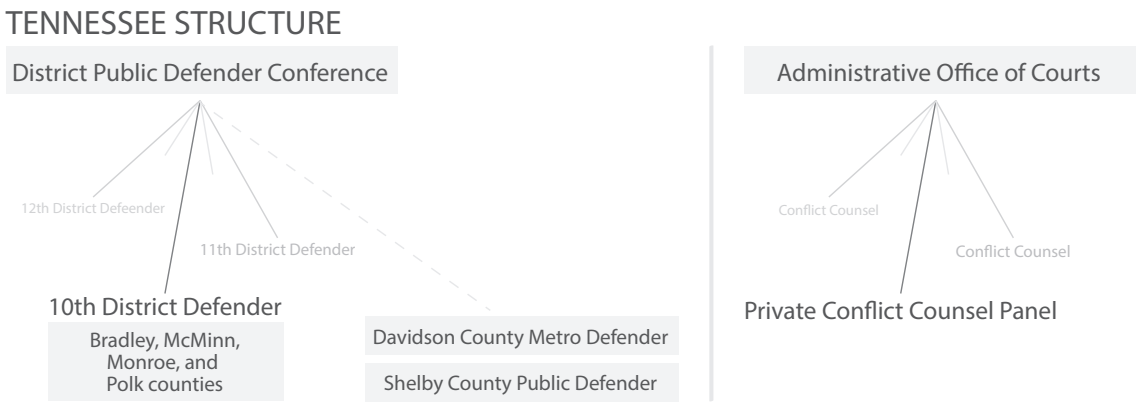


However, two counties had existing public defender offices prior to the 1963 decision: Shelby County (Memphis)[11] and Davidson County (Nashville).[12] Though the state of Tennessee assumed the primary responsibility for funding these offices with the Gideon decision, both Shelby County and Davidson County augmented the state money with local resources and the staffs of the two offices remained county employees.

In 1986, the state of Tennessee began expanding the public defender model through a series of pilot programs aimed at allowing the state to more effectively budget from year-to-year. The public defender expansion culminated in the creation of the Tennessee District Public Defender Conference (TDPDC) in 1989. TDPDC is essentially a state-funded umbrella organization that coordinates training, provides assistance, and disseminates state funding to each of the state's 31 judicial districts.

[11] In fact, the Shelby County Office of the Public (OPD) was one of the very first public defender offices in the United States (founded in 1917).

[12] In 1961, the Tennessee legislature passed an act at the urging of Nashville policy-makers authorizing the creation of the Metropolitan Public Defender Office (MPDO) in Davidson County. In August of 1962, the MPDO became one of the first offices in the country to be overseen by a popularly elected chief defender.



Following the Davidson County model, the chief defender in each district is locally elected to an 8-year term. Actually, that is a mischaracterization. All district defenders are elected to eight-year terms except for the Davidson County chief defender (who is elected every four years) and the Shelby County public defender (who is not elected at all). In Shelby County, the chief is appointed by and serves at the pleasure of the county mayor.

Under Tenn. Code Ann § 8-14-402, the 31 district defenders vote to elect the executive director of TDPDC to a four-year term by simple majority vote. It may be tempting to think of the TDPDC executive director as analogous to a statewide chief public defender in another state, but that would be incorrect. The TDPDC executive director carries out policies as determined by the district public defenders. To facilitate more efficient decision-making, the 31 district defenders annually elect an executive committee that runs the day-to-day operation of the Conference through the executive director. Similar to the election of the TDPDC executive director, the election of the executive committee and policy positions (including budget) are determined by majority vote of the district defenders. The executive director then presents and defends TDPDC's budget at the state level.

In TDPDC's formative years, a statutory framework was created for the existing public defender offices in Shelby and Davidson counties to establish a baseline commitment of state funding that would prospectively increase in future years at the same rate as the state funding increases given to TDPDC. Tenn. Code Ann § 8-14-210 requires that "in addition to the amount appropriated in 1992-93 or any subsequent year, the state shall pay to the county or metropolitan government an amount equal to the percentage of any general increases in appropriations for district public defenders."

Additionally, although the State of Tennessee funds prosecutors throughout the state (called "district attorney generals"), local jurisdictions may augment that state prosecution funding if they so choose. However, Tenn. Code Ann. § 16-2-518 requires that any "increase in local funding for positions or office expense for the district attorney general shall be accompanied by an increase in funding of seventy-five percent (75%) of the increase in funding to the office of the public defender in such district for the purpose of indigent criminal defense." Knox County (Knoxville) is one

of the few jurisdictions in the Tennessee that augments its state funding through the "75% rule." More than a quarter of the budget of the Knox County Community Law Office is local funding. The funding, in part, accounts for the office's reputation as a national model for the delivery of holistic representation and client-centered advocacy.

Tennessee Supreme Court Rule 13 establishes the rules for the appointment, qualification and payment of attorneys in those cases where the public defender has a conflict of interest. Tenn Sup. Crt. Rule 13(1)(e)(4)(A-D) directs the court to appoint the district public defender unless there is a conflict of interest or unless the district defender "makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards."

To handle conflict and overload representation, Tenn. Sup. Crt. Rule 13(1)(b) directs each trial court to "maintain a roster of attorneys from which appointments will be made." Although the court rule lists extensive qualifications for lead and co-counsel in capital cases, there are no qualification parameters set out for the trial-level representation of adults and juveniles in non-capital cases. In short, discretion is left to the local courts about which lawyers are or are not qualified.

The same court rule delineates how such attorneys will be compensated. Attorneys can bill the court $40 per hour for out-of-court case preparation and $50 per hour for in-court work, though total compensation cannot exceed pre-set limits (e.g., the maximum an attorney can bill for a juvenile delinquency case is $1,000). Though the local judge is responsible for approving the voucher – and for approving case-related expenses – the state Administrative Office of Courts (AOC) pays the attorney out of state funds.

FINDING #2
MISSISSIPPI IS OUT OF STEP WITH ITS NEIGHBORING STATES WHO HAVE RELIEVED LOCAL GOVERNMENTS FROM THE ADMINISTRATION AND FUNDING OF PUBLIC DEFENSE SERVICES

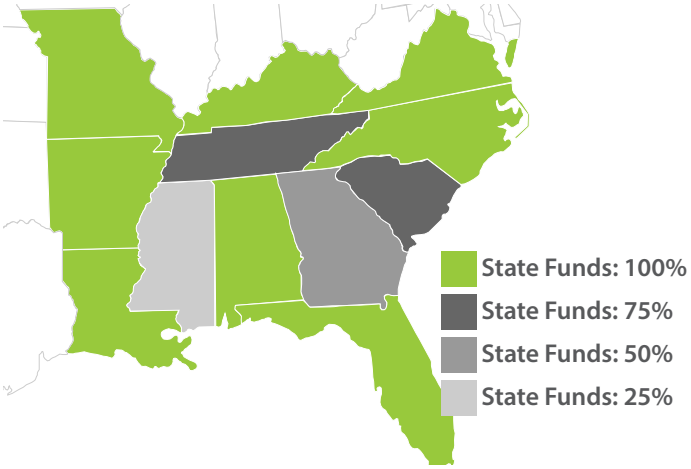
The lack of state oversight of public defense services is out of step with Mississippi's neighboring states. Indeed, OSPD looked to our neighboring states for an in-depth discussion of services. Had we cast our net wider, we would have found that the vast majority of Southern states have significant state involvement in indigent defense services:

STATE	COUNTY-FUNDING?	STATE OVERSIGHT OF TRIAL-LEVEL SERVICES?
Alabama	0%	Yes. Office of Indigent Defense Services
Arkansas	0%	Yes. Arkansas Public Defender Commission
Florida	0%	Yes. Florida Public Defender Association (Elected PDs)
Georgia	50%	Yes. Georgia Public Defender Standards Council
Kentucky	0%	Yes. Kentucky Department of Public Advocacy
Louisiana	0%	Yes. Louisiana Public Defender Board
Mississippi	77%	No. State money solely for OSPD functions
Missouri	0%	Yes. Missouri Public Defender Commission
North Carolina	0%	Yes. North Carolina Office of Indigent Defense Services
South Carolina	15%	Yes. South Carolina Public Defender Commission
Tennessee	11%	Yes. Elected Public Defender Conference
Virginia	0%	Yes. Virginia Public Defender Commission

In talking to indigent defense providers and policymakers in neighboring states, it became clear that the principle reason for moving to statewide oversight is that right to counsel jurisprudence is continually evolving. Counties either cannot keep up with those changes, or simply are not aware of the growing government responsibilities under the Sixth Amendment. (See sidebar next page.)

However, counties that do not keep up with Supreme Court case law put the state at risk of litigation. Indeed, leaving local government responsible for funding and administering indigent defense services puts Mississippi not in the same category as other southern states, but rather in the same category of northern states that are being sued for failure to ensure adequate representation. For example, the American Civil Liberties Union (ACLU) is currently engage in litigation in New York. They also sued the state of Michigan and three of its counties prior to that state reforming its system in 2013. Before then, the ACLU filed major, class-action lawsuits in Connecticut and Montana. And there is on-going litigation in Washington State.

STATE FUNDING IN SOUTHERN STATES



Making matters more urgent, the U.S. Department of Justice (DOJ) has begun to enforce the right to counsel itself. In our discussion of Tennessee, you will recall that there is still a small portion of representation – conflict representation – that continues the same problem that drove up costs in neighboring Alabama. That is, judges can appoint attorneys locally while the state is on the hook for all financial costs incurred. This opens up the process to accusations

WHY COUNTIES CANNOT BE EXPECT TO KEEP PACE WITH RIGHT TO COUNSEL JURISPRUDENCE

"Liberty" is the universal notion that every person should determine his or her own path to happiness free from undue government control. In fact, "liberty" is so central to the idea of American democracy that the framers of our Constitution created a Bill of Rights to protect personal liberty from the tyranny of big government. All people, they argued, should be free to express unpopular opinions or choose one's own religion or to take up arms to protect one's home and family without fear of retaliation from the state.

Preeminent in the Bill of Rights is the idea that government cannot take a person's liberty away without the process being fair. A jury made up of everyday citizens, protections 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.

And, because the right to counsel is an issue of "tyranny vs. liberty," the United States Supreme Court has been nothing but consistent on the right to counsel, regardless of whether or not the Court has been perceived at any one time as either liberal or conservative. So even though it was the Warren Court that first determined that states were responsible for appointing and funding the right to counsel in *Gideon*, it was the Roberts Court that most recently:

- extended the right to counsel to its earliest point in the adversarial process;[1]
- requires counsel to explain the collateral consequences of guilty pleas, including immigration consequences;[2] and,
- determined that an indigent defense attorney must be constitutionally "effective," not only to trials, but also to plea bargains as well.[3]

Because the right to counsel is at its core an American value that transcends the traditional divide of partisan politics, it is predicted that more and more will be required in years to come of the attorneys defending the accused, and of the systems in which those attorneys work.

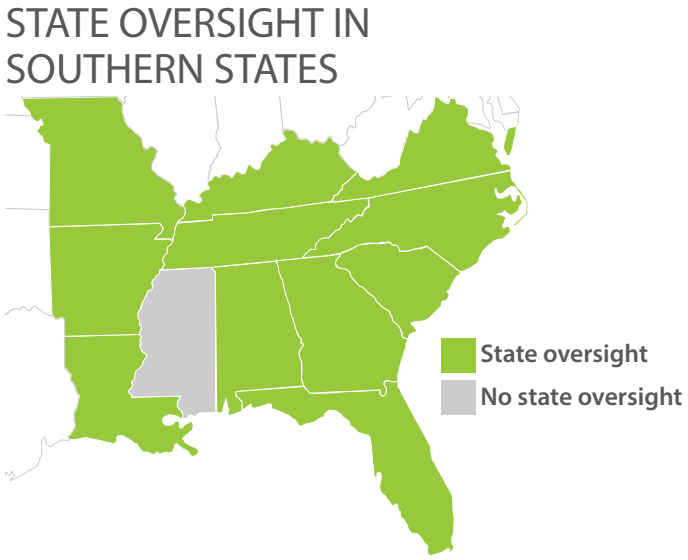
[1] *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).
[2] *Padilla v. Commonwealth of Kentucky*, 559 U.S. 356 (2010).
[3] Lafler v. Cooper, 566 U.S. ___ (2012) and Missouri v. Frye 566 U.S. ___ (2012).

of attorneys doing more to please the judge to get the next appointment than providing zealous advocacy solely to their clients, as is their ethical duty.[13]

On December 18, 2012, the U.S. Department of Justice announced an agreement with Shelby County (Memphis), Tennessee, to usher in major reforms to the method for representing children in delinquency proceedings, which had been previously run under the conflict system.[14] In

[13] On April 26, 2012, the U.S. Department of Justice, Civil Rights Division (DOJ-CRD) delivered a report, Investigation of the Shelby County Juvenile Court, to officials in Shelby County, Tennessee (Memphis) stating that the Juvenile Court of Memphis and Shelby County (JCMSC) "fails to ensure due process for all children appearing for delinquency proceedings," in direct violation of the U.S. Supreme Court's ruling in *In Re Gault*, 387 U.S. 1 (1967).
[14] *Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County*, available at: http://sixthamendment.org/wp-content/uploads/2012/12/DOJ-ShelbyAgreement.pdf.

a findings report, the DOJ determined that, when judges appoint and there is no outside mechanism to assure quality representation, a "juvenile defender must balance the duty of representing the child client with the inherent duty of loyalty to his or her employer."[15] Sweeping changes are afoot, including systemic safeguards such as independence, reasonable caseloads, attorney performance standards, and training for the juvenile defense function, among others.



Should the DOJ turn next to indigent defense in Mississippi, it could become very costly for the counties and state to try to defend a federal lawsuit. It should be noted that the DOJ is already in Mississippi, agreeing recently with Meridian, Mississippi on a "far-reaching plan to reform discipline practices, including suspensions, expulsions and school-based arrests that unlawfully channel black students out of their classrooms and, too often, into the criminal justice system."[16]

[15] A Statement of Interest submitted jointly by the U.S. Department of Justice, Civil Rights Division and the DOJ's Access to Justice Initiative on August 14, 2013, in the federal lawsuit *Wilbur v. City of Mount Vernon*, helps to further illuminate how active the Department of Justice is becoming in regards to indigent defense deficiencies. At the heart of the case is the issue of how excessive caseloads of public defense attorneys result in deficient representation under the Sixth Amendment to the U.S. Constitution. In its Statement of Interest, DOJ urged the court to consider that "caseload limits alone cannot keep public defenders from being overworked into ineffectiveness; two additional protections are required. First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement of 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 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." (Emphasis in original.)

[16] See: United States Department of Justice Press Release, "Court Approves Consent Decree to Prevent and Address Racial Discrimination in Student Discipline in Meridian, Miss.," May 30, 2013, at: http://www.justice.gov/opa/pr/2013/May/13-crt-634.html.

FINDING #3
COST EFFICIENCIES CAN BE HAD WITH THE CREATION OF PUBLIC DEFENDER OFFICES IN THOSE JURISDICITONS WHERE CASELOADS ARE HIGH ENOUGH TO SUPPORT SUCH AN OFFICE

A number of recent studies[17] conclude that public defenders – or staff government employees providing right to counsel services - are "more efficient," "provide more services," "meet with their clients more promptly," "engage in more assertive use of pretrial motions" and are more "cost-effective" than a system that appoints and pays private attorneys to assist the indigent accused on an hourly or contractual basis.

It may seem counter-intuitive because the upfront costs of creating a public defender office may appear cost-prohibitive at first. But just as Alabama has determined that cost-efficiencies can be had by expanding public defenders in more urban jurisdictions with higher caseloads, so too may Mississippi gain the same advantage so long as there are object standards by which to create such delivery systems.

RECOMMENDATION #1
MISSISSIPPI SHOULD ESTABLISH AN INDEPENDENT COMMISSION TO OVERSEE OSPD THAT IS AUTHORIZED TO PROMULGATE AND SET STANDARDS

Throughout this report, OSPD has noted instances in which judicial control of Sixth Amendment services are problematic. We also believe it to be unconstitutional. In 1981, the United States Supreme Court determined that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages."[18] Observing that "a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client," the Court concluded that a "public defender is not amenable to administrative direction in the same sense as other state employees."[19]

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[17] See for example: 1) Public Policy Research Institute at Texas A&M University. *Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes and Costs*. October 2012. Available at: http://www.txcourts.gov/tidc/pdf/WichitaPDOStudy101212.pdf; 2) Council of State Government's Justice Center. *Harris County Public Defender Preliminary Report on Operations and Outcomes*. October 2012. Available at: http://www.courts.state.tx.us/tidc/pdf/HCPDOPrelimReport101912.pdf; and, 3) United States Department of Justice, Bureau of Justice Statistics. *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Favorable Case Outcomes*. 2011. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474.

[18] *Polk County v. Dodson*, 454 U.S. 312 (1981).

[19] *Ibid*.

Independence of the defense function is especially necessary to prevent undue judicial interference. As far back as 1932, the U.S. Supreme Court has been on record in questioning the efficacy of judicial oversight and supervision of right to counsel services, asking: "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. 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."[20]

OSPD notes that – though it is not binding – the constitutional necessity for the public defender independence was acknowledged in Justice Sandra Day O'Conner's dissent in *Georgia v. McCollum*, 505 U.S. 42 (1992): "Moreover, we pointed out that the independence of defense attorneys from state control has a constitutional dimension. *Gideon v. Wainwright*, 372 U.S. 335 (1963), 'established the right of state criminal defendants to the guiding hand of counsel at every step in the proceeding against [them].' Implicit in this right 'is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." Justice O'Connor concluded, "the defense's freedom from state authority is not just empirically true, but it is a constitutionally mandated attribute of our adversarial system."

The best way to protect defender independence is to vest a single state entity with the power to promulgate standards and to oversee the administration of services at the local level. Mississippi should create the Mississippi Public Defender Board (MPDB) to set standards and then oversee OSPD to implement those standards. The most successful state indigent defense boards have multiple appointing authorities from all three branches of government, as well as the state bar, deans of accredited law schools, and other stakeholder interests.

For example, though Louisiana Public Defender Board (LPDB) is housed in the Executive Branch of government, yet LPDB members are appointed by a wide variety of appointing authorities:

1. The governor appoints two members and designates the chairman.
2. The chief justice of the Supreme Court of Louisiana appoints two members; one member must be a juvenile justice advocate; the other must be a retired judge with criminal law experience.
3. The president of the Senate and the speaker of the House of Representatives each appoint one member.
4. The governor appoints one member representing the Louisiana State University Paul M. Hebert Law Center who is an active employee, retired employee or has an academic association with the Paul M. Hebert Law Center.
5. The governor makes three more similar appointments from: Loyola University School of Law; Southern University Law Center; and Tulane University School of Law.
6. The president of the Louisiana State Bar Association appoints two members.
7. The president of the Louisiana Chapter of the Louis A. Martinet Society appoints one

[20] *Powell v. Alabama*, 287 U.S. 45 (1932).

member.[21]

8. The chairman of the Louisiana State Law Institute's Children Code Committee appoints one member.
9. The executive director of the Louisiana Interchurch Conference appoints one member.

Though Mississippi does not need a commission quite so large, OSPD recommends the following eleven-member commission to oversee all indigent defense services in the state: Governor (2 appointees), Chief Justice (2), Speaker of the House (1), President of the Senate (1), President of the State Bar Association (2), Dean of the University of Mississippi Law School (1), Dean of the Mississippi College of Law (1), and the President of the Magnolia Bar Association (1).

RECOMMENDATION #2
MISSISSIPPI SHOULD PLACE THE ULTIMATE AUTHORITY FOR CONTRACTING, PAYMENT AND ADMINISTRATION OF INDIGENT DEFENSE SERVICES WITH OSPD

There are a number of ways for Mississippi to move from a local government-based indigent defense system to one with state oversight and involvement. Mississippi could follow Arkansas' lead and invest OSPD with the authority to begin setting standards, documenting where standards are not being met, and then rolling out a circuit-based public defender system over the ensuing 2-4 years. Or, Mississippi could instead follow Alabama's lead and create local advisory boards to recommend delivery services to OSPD and also create a review board to decide on systems where the local advisory panel and OSPD disagree.

OSPD has reviewed many of these options and, instead, we think that the appropriate starting point is to create a circuit-public defender system with full-time programs in those circuits where the caseload is of such a quantity to support it, and part-time contract defenders in those circuits that do not. The circuit defenders can then document and report to OSPD how services are provided at the justice court level in their respective circuits, allowing OSPD to plan to bring that level of court into the state system down the road.

This plan would provide to immediate values to Mississippi, allowing the immediate expansion of cost-efficient public defender models and unifying how contracts are issued.

[21] This is Louisiana's African-American Bar.

RECOMMENDATION #3
MISSISSIPPI NEEDS TO BE A PARTNER IN THE FUNDING OF DEFENDER SERVICES AND THUS SHOULD SEEK WAYS TO DECREASE THE NEED FOR INDIGENT DEFENSE SERVICES, INCLUDING INCREASE USE OF DIVERSION AND RECLASSIFYING LOW-LEVEL, NON-VIOLENT CRIMES TO INFRACTIONS

The biggest question with OSPD's vision of the future, of course, is: who is going to pay for these changes? To be clear, although economies of scale will be obtained in implementing OSPD recommendations, it is important to note that Mississippi lags far behind our neighboring states when it comes to current indigent defense funding:

STATE	POPULATION	INDIGENT DEFENSE EXPENDITURE	COST PER CAPITA
Tennessee	6.456 million	$86.834 million	$13.45
Louisiana	4.602 million	$65.843 million	$14.31
Alabama	4.822 million	$50.000 million*	$10.37
Arkansas	2.949 million	$22.950 million	$7.78
Mississippi	2.985 million	$16.369 million	$5.48

(* Alabama's indigent defense cost rose to $65 million; we chose this more conservative estimate as it is what is expected to be expended in the current fiscal year.)

In order to prevent making the financial burden in the future too hard on either the counties or the states, OSPD recommends that counties' current spending levels be capped or directed to spend up to some state-defined average, and then all new monies be the responsibility of the state. Since the states of Alabama and Louisiana were already providing funding for indigent defense services before their most recent legislative reform packages, OSPD will mention one other state that used a similar approach to explain our thoughts.

When Montana created its statewide indigent defense system in 2005, the state struggled with how to pay for the improved services. After exploring many options, Montana elected to cap the indigent defense spending of counties at the rate of spending for the immediate prior year. The state then made an adjustment to the matrix of state funding obligations to counties, essentially offsetting the capped amount and lowering the state's financial obligations to the counties by that same amount. In effect, it became a 100% state funded system, though the state did not have to come up with the entire amount in year one. This was a good deal for counties, because the counties were assured that their spending on indigent defense was never going to increase regardless of any future expansion of the right to counsel by the U.S. Supreme Court. And, it was easier to enforce state standards because, from then onward, everything was under the obligation of the state commission and it was contingent on the commission to argue for adequate resources to meet standards through the normal state budgeting process.

Though much of the previous section dealt extensively with funding, the OSPD believes Mississippi needs to engage in a debate about how best to decrease the need for indigent defense services in the first place. When the right to counsel was expanded to include jailable misdemeanor offense, the U.S. Supreme Court suggested that states could deal with the anticipated costs by removing minor offense out of the formal criminal justice system.[22] This Supreme Court suggestion holds true for Mississippi today. State and local policymakers can, for instance, work together to increase the reliance on diversion that could remove juvenile and adult defendants out of the formal criminal justice system and get them help with potential drug or other dependencies. Similarly, lawmakers can change low-level, non-serious crimes to "citations" – in which the offender is given a ticket to pay a fine rather than being threatened with jail time thus triggering the constitutional right to counsel. By shrinking the size of the criminal justice system, Mississippi's funding requirements under the right to counsel would not be as great.

22 *Argersinger v. Hamlin*, 407 U.S. 25 (1972).