

MISSISSIPPI PUBLIC DEFENDER TASK FORCE



2017 REPORT TO THE MISSISSIPPI LEGISLATURE

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SUPREME COURT OF MISSISSIPPI

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December 22, 2017

WILLIAM L. WALLER, JR.
CHIEF JUSTICE

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PRESIDING JUSTICES

LESLIE D. KING
JOSIAH D. COLEMAN
JAMES D. MAXWELL II
DAWN H. BEAM
ROBERT P. CHAMBERLIN
DAVID M. ISHEE
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

VIA HAND DELIVERY

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 The Act took effect on passage and stands repealed July 1, 2018, providing the Task Force just over three years to complete its work.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 addressed.

On our recommendation the Legislature amended data collection and reporting statutes. This has aided our work but implementation of this change has been slow. The evaluation, being conducted by the Sixth Amendment Center with funding from the United States Department of Justice, was not completed on time and this has delayed the work of the Task Force. This vital report will guide the further work of the Task Force.

The Task Force has before it a proposed reorganization plan submitted by the State Public Defender. With the anticipated report from the Sixth Amendment Center it is the consensus of the task Force that we can fully vet that proposal and submit to the 2019 Legislature comprehensive recommendations. We are scheduled to sunset June 30, 2018. We are making substantial progress toward our shared goals, and we humbly ask the 2018 Legislature to extend our mandate two years in order that we may conclude our work by June 30, 2020. Our 2017 report follows this letter.

Respectfully submitted,

A handwritten signature in cursive script that reads "James W. Kitchens".

Presiding 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

Presiding Justice James W. Kitchens (Mississippi Supreme Court) (Chair)

Demetrice Williams (Mississippi Defenders Association) (Vice Chair)

District Attorney Hal Kittrell (Mississippi Prosecutors Association)

Kevin Lackey (Administrative Office of Courts Director)

Judge Prentiss Harrell (Conference of Circuit Judges)

Jerrolyn Owens (Office of the Attorney General)

Steven Gray (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)

PUBLIC DEFENDER TASK FORCE MEETING

JANUARY 9, 2017

MINUTES

WELCOME – Justice Kitchens (Task Force Chairman, representing the Supreme Court) welcomed the group and impressed upon them the importance of the work they were asked to do. He then asked everyone to introduce themselves and tell who they were representing. Present were Jennie Eichelberger, Mississippi Bar; Ta'shia Gordon, AOC; Hal Kittrell, Prosecutor Association; Jerrolyn Owens, AG; Tanisha Gates, Magnolia Bar; Demetrice Williams, Public Defender Association. Absent were legislative members, representative of Supervisor Association and Circuit Judge Association. André de Gruy and Beau Rudder were present representing the Office of State Defender and David Carroll and Mike Tartaglia with the Sixth Amendment Center were present and Professor Bob Boruchowitz also with 6AC joined by telephone.

STATE DEFENDER REPORT – Justice Kitchen's asked the State Defender to provide a recap of the work of the PDTF and developments since last meeting. The Caseload Report utilizing AOC data from 2010-14 was discussed. The 2016 Legislative change on data collection, requiring AOC to begin collection of indigence status, was discussed. De Gruy mentioned his upcoming presentation to Circuit Clerk CE program sponsored by the Judicial College. A follow-up of the caseload assessment would be done with 2015-17 data as soon as available and resources allow. OSPD reported positive developments in Lamar and Pearl River County – each county is transitioning part-time defender positions to full-time positions. Also mentioned was a setback at OSPD – as a result of SB 2362 (2016 Regular Session) the Capital Conflicts program would be phased out leaving the counties to fund any new conflict death penalty cases.

SIXTH AMENDMENT CENTER UPDATE – David Carroll, director of the Sixth Amendment Center (6AC), was asked to provide an update on their progress. 6AC has visited 10 counties and received “outstanding cooperation” from county officials: judges, prosecutors, defense lawyers and sheriffs. They have begun the drafting process of the report they will be providing the PDTF. The report will describe the varied systems they observed and include an assessment of the quality of services being delivered.

Jail officials expressed a high level of concern about prolonged pretrial detentions. 6AC reports that judicial interference does not appear to be a prevailing issue. Public defenders not getting involved early in the case (often not until after indictment) and bail that defendants cannot make are significant factors.

Public defenders piecing together contracts with no caseload limitations were a serious concern. 6AC believes there will always be a need for involvement of the private bar however state [central] oversight is needed.

Although they were not asked to assess delivery of defense services in misdemeanor cases they raised concerns about their observations of “seriously deficient” representation of misdemeanor defendants, including proceedings without defense counsel present. 6AC recommends PDTF also look at misdemeanor representation.

Justice Kitchens: The adoption of the new Rules of Criminal Procedure should influence practice. Mr. Carroll reported that they had reviewed the Rules and agreed that they will be a significant improvement. But having the rules is only a starting point. There is a need for an entity at the state level to promulgate standards for indigent defense; to train to those standards; and evaluate the performance of local defenders to ensure standards are being met. Recent efforts in other states were provided as examples of the continued national movement. Utah and Idaho have many similarities to Mississippi and have established state oversight. These new systems anticipate state grants available to counties who cannot meet standards.

DA Kittrell: Based on observation and 9 month service as an acting public defender a standard for “indigence” is needed. Mr. Carroll agreed with the need for such a standard and pointed out they observed both extremes, everyone getting the public defender and cases being continued for no lawyer but judge not appointing because he felt person could afford counsel. DA Kittrell and Justice Kitchens discussed the problem of judges denying counsel because a person made bail or denying experts because counsel was retained. Justice Kitchens pointed out recent supreme court opinions on this issue. (e.g. *Levester Brown v. State*). All agreed that partial contributions from defendants were a good thing and the need for a flexible standard.

Justice Kitchens: Is ineffective assistance of counsel something 6AC is looking at? Mr. Carroll responded that while Professor Boruchowitz does look at that it is not a good measure because so many cases are pled.

Justice Kitchens: (returning to the point made earlier about defenders not getting on cases early) Some counties have different lawyers handling preliminary hearing and then they change lawyers at different stages. As a former prosecutor and defense attorney the earlier I could get in a case the better representation my client received, getting on in the beginning and staying on through verdict improves quality of representation. **DA Kittrell** agreed getting public defenders on the case earlier was essential and gave examples of how that benefits the prosecution in resolving some cases pre-indictment.

Justice Kitchens made specific request of DA Kittrell to continue on as a task force member after his term as president of Prosecutor Association ended and expressing his belief that continuity was important encouraged all members to remain with the task force.

6AC estimated completion date of substantive part of report is March.

NEXT MEETING DATE – It was decided that the next meeting would be scheduled as soon as possible after the preliminary report from 6AC was available. It was agreed that everyone needs an opportunity to review the findings before the meeting so a direction with specific recommendations could flow from the meeting.

PUBLIC DEFENDER TASK FORCE MEETING

August 24, 2017

MINUTES

WELCOME – Justice Kitchens (Task Force Chairman, representing the Supreme Court) welcomed the group and impressed upon them the importance of the work they were asked to do. He then asked everyone to introduce themselves and tell who they were representing. Present were Judge Prentis Harrell, Circuit Judge Association; Jennie Eichelberger, Mississippi Bar; Lisa Counts for Kevin Lackey, AOC; Hal Kittrell, Prosecutor Association; Jerrolyn Owens, AG; Tanisha Gates, Magnolia Bar; Demetrice Williams, Public Defender Association; Senator Hob Bryan; Steve Gray, Supervisor Association. Absent were Rep. Mark Baker and Rep. John Read and Senator Clarke. André de Gruy and Beau Rudder were present representing the Office of State Defender.

MINUTES OF JANUARY MEETING – reading of the minutes was waived, on motion and second minutes were approved.

SIXTH AMENDMENT CENTER UPDATE – [no one from the Sixth Amendment Center was present at the meeting] Justice Kitchens asked State Defender to update group on communication with Center. In January the Center reported an anticipated draft report by March. When that was not delivered contact was made with Mr. Carroll. He explained matters he was having to address but anticipated a report soon. In June after consultation with Chair we scheduled the August Task Force meeting and reached out to Mr. Carroll again. He advised that the field work on 10 counties (original plan called for only 8) had been completed and final drafting/editing was all that was needed. They were invited to attend the August meeting but were unable to attend and the draft report has not been provided.

STATE DEFENDER REPORT – Miss. Code § 99-18-1(7) mandates the State Defender “develop plans and proposals for further development of a statewide public defender system in coordination with the Mississippi Public Defenders Task Force” Pursuant to this mandate the State Defender presented a plan for discussion.

To address one of the specific tasks given by the Legislature OSPD provided research from the Sixth Amendment Center on the structure and funding of indigent defense in the 15 southeastern states. The primary deficiency in Mississippi compared to our neighbors is a lack of oversight. This is true even in the state funded offices as detailed in the Mississippi Auditor’s Performance Audit of the Capital Post-Conviction Office. Twelve of the 15 states have some sort of state-level entity that sets standards of service delivery, workloads and the like.

Justice Kitchens raised the question of funding source and expressed a preference for funding defense like we fund prosecution and courts – primarily state funding.

It was noted that 10 of the 15 states fund primarily with state dollars. Louisiana uses unreliable criminal assessments to fund its system – a method Mississippi abandoned in 2016. Mississippi, Texas and Georgia have primarily local funding but the other two have state-level oversight.

South Carolina has a 50/50 state/county system. The South Carolina statute was provided to members for consideration.

Senator Bryan raised concerns about the impact of lack of defenders at early stages causing a need for more jail space, citing Lee County plans to build a new jail.

Judge Harrell agreed with this as a problem and pointed to a study he did in his district. He wanted to move to a primarily full-time defender system across the district but because the jail-time savings are in the future he could not justify the upfront cost to his poorer counties. He and Justice Kitchens (from his experience as a DA during the reforms of that system) discussed the difficulty in having to organize the various boards of supervisors. Judge Harrell has implemented full-time offices in the counties that can afford it and along with the new Criminal Court Rules he has seen improvement on jail time. Judge Harrell and Justice Kitchens discussed at length problems facing judges attempting to organize at district level, including funding, data collection and conflict cases.

Addressing the conflict issue the need to always include participation by the private bar and part-time defenders was emphasized by the State Defender.

While South Carolina provided the best comparison for cost sharing Arkansas was presented as the best comparison for total cost. Arkansas is most similar to Mississippi in demographics including population, poverty, and crime rates. Arkansas has an oversight commission and primarily state funding. The annual cost of indigent defense including misdemeanor cases is about \$25,000,000. Roughly the amount Mississippi spends on District Attorneys.

Turning to the specifics of the OSPD plan: The Macarthur Justice Center at the University of Mississippi hosted an indigent defense meeting in June. At the meeting were law professors, activists, public defenders, legislators and a judge. Special guests were the president, immediate past-president and president elect of the National Association of Criminal Defense Lawyers, the preeminent criminal defense bar in the country. From the discussions of how to improve indigent defense delivery in Mississippi came a document – *7 Principles of Indigent Defense Delivery System in Mississippi*. This document was presented to the Task Force for consideration. The comprehensive OSPD plan was then presented and request was made that it be taken to constituent groups and any problems or concerns brought back to OSPD.

DA Hal Kittrell raised concern about moving forward without the report from the Sixth Amendment Center. He believes things are moving too fast. He wants to wait on the Sixth Amendment Center report and discuss that before moving forward.

Judge Harrell expressed understanding for DA's position but objected to further delay. He believes that everyone needs to review the plan and be prepared to make suggestions by November. "We need a public defender system."

NEXT MEETING DATE – Justice Kitchens indicated he would look for dates the conference room was available.

PUBLIC DEFENDER TASK FORCE MEETING

November 28, 2017

MINUTES - DRAFT

WELCOME – Justice Kitchens (Task Force Chairman, representing the Supreme Court) welcomed the group. He then asked everyone to introduce themselves and tell who they were representing. Present were Jennie Eichelberger, Mississippi Bar; Lisa Counts for Kevin Lackey, AOC; Hal Kittrell, Prosecutor Association; Jerrolyn Owens, AG; Tanisha Gates, Magnolia Bar; Demetrice Williams, Public Defender Association; Senator Hob Bryan; Steve Gray, Supervisor Association. Absent were circuit Judge Harrell, Rep. Mark Baker and Rep. John Read and Senator Clarke. André de Gruy and Beau Rudder were present representing the Office of State Defender. David Carroll of the Sixth Amendment Center was present in person and Professor Bob Boruchowitz, a consultant with the center, was present via Skype.

MINUTES OF AUGUST MEETING – reading of the minutes was waived, on motion and second minutes were approved.

SIXTH AMENDMENT CENTER UPDATE – Mr. Carroll began his remarks with an apology for the considerable delay in finalizing the report. He then recapped the methodology they have employed: they spent most of 2016 in association with the Seattle University School of Law conducting site visits in 10 counties around the state, doing court observations, interviews with criminal justice stakeholders, reviewing data, and just trying to get a sense of where your system of indigent defense is. The report is not yet complete from drafting and formatting perspective but he anticipates that will be completed soon. Substantively their findings are complete. Carroll was asked to present overview of their findings.

- They documented defenders wearing multiple hats in different counties so workload cannot be assessed;
- Most defenders are not keeping caseload data;
- The State of Mississippi has no permanent institutionalized oversight mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in noncapital cases in many of its trial courts;
- What's needed is some form of organization that can promulgate standards, oversee the implementation of those standards and enforce those standards. That is the basic parameters of your Fourteenth Amendment obligation that we need to address.

Carroll suggested use of the ABA 10 Principles of an Indigent defense Delivery System. He stated there are basically four things that make an effective system: (1) it must be independent so the defense functions; (2) the attorney skills must match the complexity of the case; (3) the lawyer must be appointed early enough to be effective; and (4) the lawyer must have sufficient time to be effective. He elaborated on the first principle: independence. It is never possible for a judge presiding over a case to fully assess the quality of the defense lawyer's representation. This is because the judge never, for example, reads the case file, question the defendant to his stated interests, follow the attorney to the crime scene, or sit in on witness interviews. This is not to say the judge cannot provide sound feedback to the quality of our representation, it's just that the judge's opinion of the courtroom experience cannot not be the *sole* determination of whether