



**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.<sup>1</sup> 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.<sup>2</sup> *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

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<sup>1</sup> 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>).

<sup>2</sup> “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.<sup>3</sup> 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 SCLAID, 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.<sup>4</sup>

### **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

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<sup>3</sup> 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 21<sup>st</sup> Century government." EBR at page 7. This observation characterizes our public defender "system" precisely.

<sup>4</sup> 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.

Texas in 2015 conducted such a study. The proposals below are therefore not ideal but considering the minimal constitutional standards for performance apply equally to all states, adapting standards from the most recent Texas Study to our structure is an excellent starting point. Because the Texas study did not include appellate practice or death penalty cases the DOJ produced *Compendium of Standards for Indigent Defense Systems, A Resource Guide for Practitioners and Policymakers*, December 2000, is used. Other standards relevant to death penalty cases are also utilized as well as study of available Mississippi data.

The definition of “case” used in all studies relied upon is consistent with the definition used by the Mississippi Administrative Office of Courts – the data source for evaluations of local systems. Generally, a single indictment or information is considered one case under the category of the most serious offense charged regardless of the number of “counts” in the charge.

### **CASELOAD/WORKLOAD ASSESSMENT FOR CAPITAL DEFENSE COUNSEL**

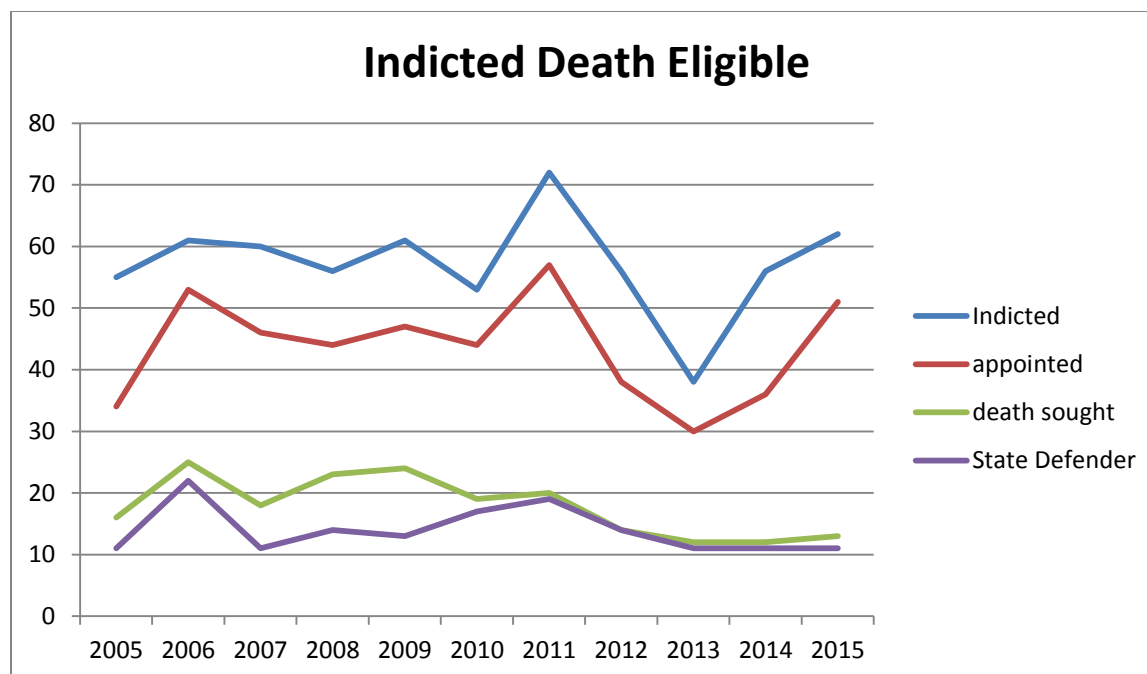
The Office of Capital Defense Counsel was established by the 2000 Legislature and began operation in July 2001. It became a division of the State Public Defender in 2011. The office was established to provide representation in indicted death penalty eligible cases and to provide representation in death penalty cases on direct appeal.

The office adopted internal caseload standards for trial of 3-5 cases per attorney per year assuming local co-counsel. This is based on generally accepted standards from across the country, compiled in the USDOJ Compendium of Standards for Indigent Defense Systems, and particularly the standards set in Arkansas. The standard for appeals is 2-3 appeals per attorney per year was based on a 1989 National Center for State Courts study. This is consistent with other jurisdictions as reported in *Lethally Deficient, Direct Appeals in Texas Death Penalty Cases*, Texas Defender Services 2016 at pages 25-26.

The office was initially authorized 4 attorneys and 5 support staff, 9 total employees. The office did not operate at full staffing until 2005. Staff increased to eleven (11) with addition of 1 attorney and 1 support person in 2010. As caseloads have declined and remained steady {CHART BELOW} staff has been reduced to 8, including 4 attorneys.

This standard has proven reliable over fifteen years as evidenced by the relative timeliness of dispositions and absence of any finding of ineffective assistance of counsel in over 250 cases handled by the office.

The office currently has 19 trial level cases and 5 appellate level cases, having opened 52 trial and 8 appeal cases in the past five years.



### **CASELOAD/WORKLOAD ASSESSMENT FOR MISSISSIPPI INDIGENT APPEALS**

The Office of Indigent Appeals, now a division of the State Defender, was established in 2005 and began operating in January 2007. The office was authorized to have 6 attorneys, roughly mirroring the Attorney General's Criminal Unit. The office increased staffing to 7 attorneys and has operated at this level since 2010. By comparison the AG's Criminal Unit now has 9 attorneys.

The last district to handle its indigent appellate caseload in the local system has now begun to send cases to Indigent Appeals. A review of the Supreme Court on-line docket, internal data and the AOC data indicates an average caseload of 120 cases per year. Four cases a year will need to be assigned to conflict counsel and the Appeals Clinic is expected to handle four cases per year, down from eight just a few years ago. Professor Broadhead attributes the decrease to decrease in students in the program resulting from increased clinical opportunities on campus.

HB 772 (2016 Regular Session) may increase the appellate caseload coming from Youth Court in both child protection and delinquency cases. IAD attorneys also assist in Training with appellate court case summaries and technical assistance to trial level defenders.

The office never adopted a caseload standard. Nearly all Standards found in the *Compendium* use the *National Advisory Commission* (1973) limit of 25 cases per year. As discussed in Lefstein, these numbers are not an accurate assessment of need. A more recent Missouri study which used the Delphi method established a caseload for fulltime appellate attorney at 18-22 cases per year. This difference demonstrates Lefstein's point. The NLADA formula for determining staffing

needs, also found in the *Compendium*, is a more accurate method of assessment in that it is weighted by factors like briefs filed, rehearing and cert petitions filed and transcript length.

Based on number of estimated cases, the length of transcripts, the type of cases handled and the frequency of cert petitions filed the unit total would be 145. The formula recommends twenty-two (22) work units per attorney or 6.6 FTE attorneys.

### **CASELOAD/WORKLOAD ASSESSMENT FOR MISSISSIPPI OFFICE OF CAPITAL POST-CONVICTION COUNSEL**

There are no universally accepted caseload standards for death penalty post-conviction defender offices. The 2003 ABA Guidelines, relied on by the Mississippi Office of Capital Post-Conviction Counsel (MOCPC) in requesting staffing for their office, cites to a 1998 study from Florida. The study set an average hours/case number at 3300 which translates to significantly less than one (1) new case per lawyer per year.

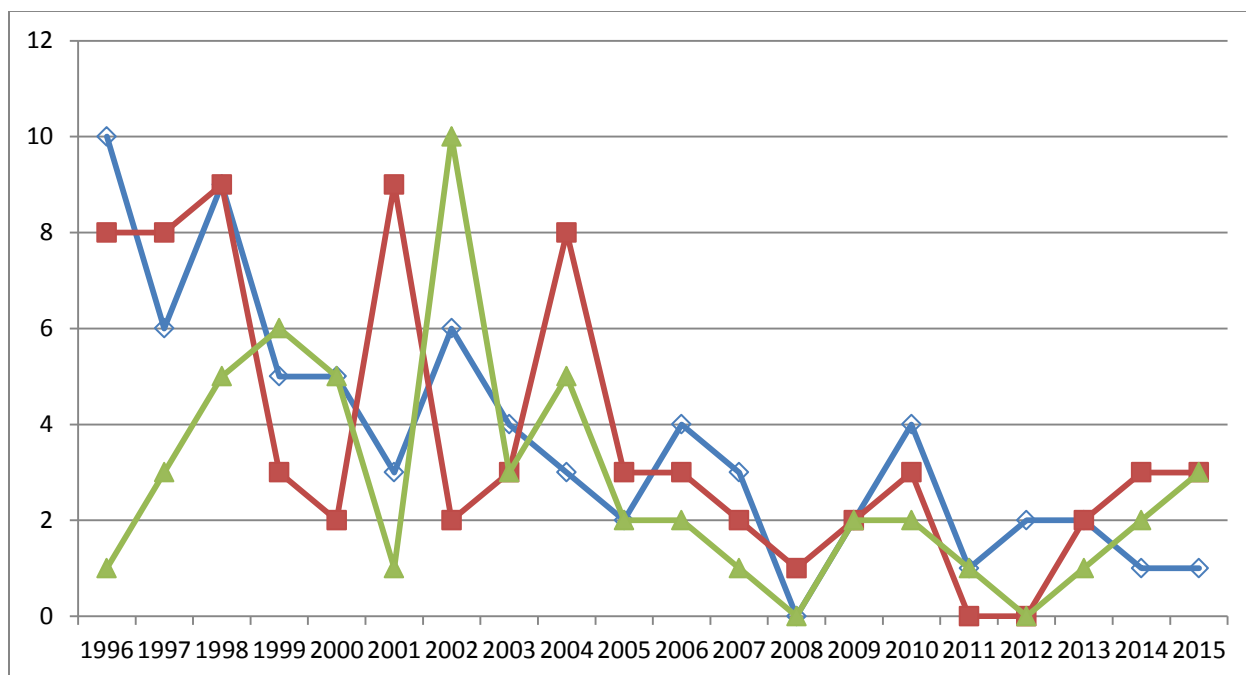
Various state caseload recommendations adopted prior to the ABA Guideline revision coincide with the standards for death penalty direct appeal standards adopted by the Center for State Courts. Clearly that standard is too low for post-conviction cases which are substantially more time consuming than a direct appeal just as the Florida study appears too high.

Time spent by private counsel in Mississippi death penalty post-conviction cases (based on fees approved and paid) since 2009 range from 1600 to 2000 hours. Using the NLADA unit based assessment method a range of 22 to 28 units per case or 1700 to 2100 hours per case is estimated. These estimates are further validated by the experience in Texas. In 2010 Texas created the Office of Capital Writs to handle state court death penalty post-conviction cases. Additional responsibilities were added in 2015 but the workload to staffing from 2010-15 are comparable with what should be expected in MOCPC. Based on information from the annual reports of the Texas Courts OCW maintained a 1:1 new case to lawyer ratio.

### **ASSESSING STAFFING NEED BASED ON CASE DATA**

The starting point for assessing staff level need is the anticipated caseload. The number of **new death sentences**, **death sentences affirmed** and **cases opened by MOCPC** have declined in the past decade from the prior decade and have remained low in recent years. {CHART BELOW} Since 2003, there have been no more than four new death sentences imposed in any year and a 10-year average of two new sentences imposed per year. Since 2005, there have been no more than three death sentences affirmed by the state supreme court in any year and a 10-year average of 1.9 death sentences affirmed per year. Accordingly MOCPC has opened no more than three new cases in any year since 2005. With four cases currently on direct appeal – two sentenced in 2013, one in 2014, and one in 2015 – it is anticipated that MOCPC will continue to open no more than three cases per year.





Using the caseload standard above, the proper attorney staffing at MOCPC to handle the future caseload would be three attorneys. However the current caseload must also be considered. At present the MOCPC has 17 open cases. This number is considerably higher than should be expected but results from ineffective representation under a previous administration. The courts responded to this failure by allowing second or successor motions to be filed. This increased the caseload of the MOCPC over the past several years. {Successor cases are not reflected in the chart above}

The current and projected caseload could require four fulltime attorneys with continued assistance from the private attorneys serving as co-counsel in a limited number of pending cases. Adequate support staff for a four lawyer death penalty post-conviction office would include an administrative assistant, paralegal, investigator and mitigation specialist. The total staff of MOCPC at present should be eight (8) with a possible reduction of one lawyer in the near future.

### **CASELOAD/WORKLOAD ASSESSMENT FOR FELONY REPRESENTATION BY LOCAL PUBLIC DEFENDERS**

The Texas study, *Guidelines for Indigent Defense Caseloads*, Texas A&M Public Research Institute, 2014, established trial level caseload standards based on type of case with different weights assigned to levels of misdemeanor and felony cases. Using the established standards for

the three felony level categories<sup>5</sup> Mississippi offenses can be similarly categorized and workloads assigned.<sup>6</sup>

Level 1 - maximum punishment of more than 20 years – 77 cases per lawyer per year (27 hours/case)

Level 2 – maximum punishment up to 20 years – 105 cases per lawyer per year (20 hours/case)

Level 3 – maximum punishment less than 20 years – 144 cases per lawyer per year (14 hours/case)

(Texas Guidelines at pages 14 and 34)

Texas Performance Standards adopted by their Public Defender Commission were used as a guide in setting Mississippi Standards accompanying this assessment. The time estimate per case assumes the attorney is meeting minimum performance standards and counsel is being assigned to the case in timely compliance with Mississippi Law.

Using AOC data from 2011-2014 an assessment of each counties average annual caseload was conducted. AOC data has known limitations that may cause an undercount of caseloads. The data only counts dispositions of cases reaching circuit court. There are felonies disposed of prior to circuit court that constitutionally require counsel services and some dispositions would be for a lower level charge than initially brought.

There is no AOC data on indigent status. To determine indigence rate a survey of every county circuit clerk was conducted. Fifty-two clerks responded. The state average was 80%. This is consistent with a Public Defender Task Force survey conducted in 2004 which included fewer responses. Estimates were made for non-responding counties using similarly situated counties based on population, geography, and district.<sup>7</sup>

The level of services and delivery systems currently provided in each county is based on *The State of the Right to Counsel in Mississippi, Report & Recommendations*, Mississippi Office of the State Public Defender, September 2014, updated with surveys of local public defenders and court personnel conducted in July and August 2016. There are 184 salaried and contract public defender positions including some contract-conflict positions in fulltime counties. Because some attorneys work in multiple jurisdictions the number of attorneys serving in these positions is only 167. Thirty-three are fulltime positions.<sup>8</sup>

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<sup>5</sup> Texas has a fourth felony level, “State Jail Felony” that does not correspond to any Mississippi felony punishment.

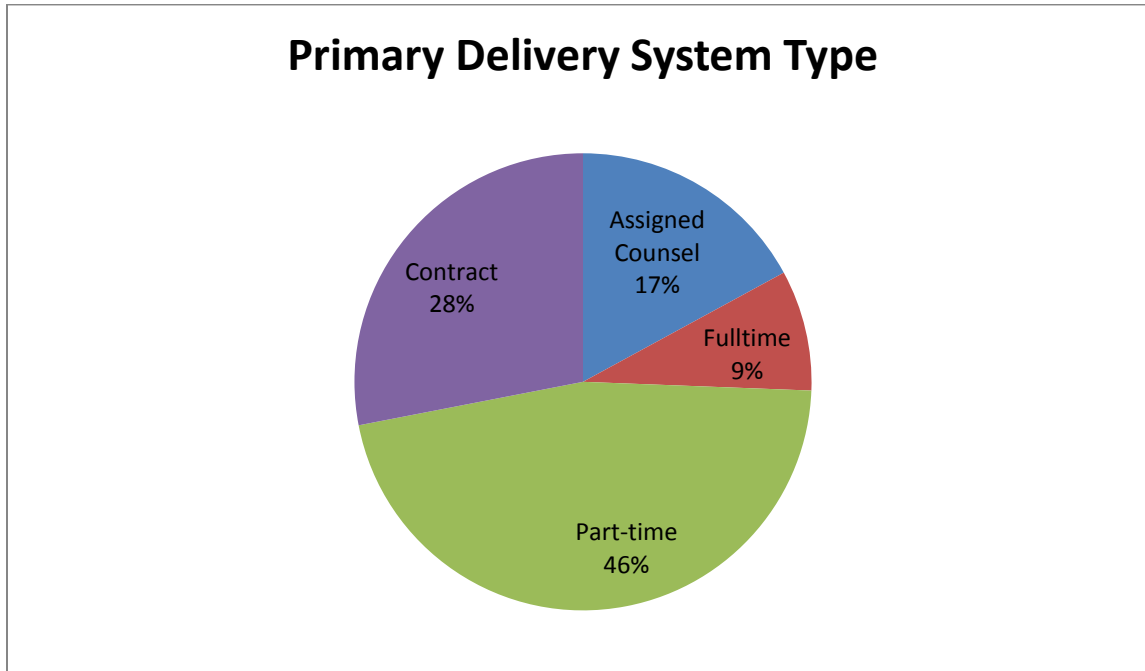
<sup>6</sup> Notwithstanding sentence range, violations of §41-29-139(b) are Level 2 and §41-29-139(c) are Level 3.

<sup>7</sup> Each of these data limitations will be reduced for future assessments based on legislative changes to data collection and reporting requirements in HB 585 (2014) and SB 2314 (2016).

<sup>8</sup> The part-time/contract positions do not have time expectations in employment agreements. Some public defenders report working far more than the State Personnel Board definition of part-time as twenty hours per week or eighty hours per months (20/80 rule). For purposes of this assessment the non-fulltime positions are considered half-time.

There are 14 “assigned counsel” counties and these are not assessed for caseload. As mentioned above these systems on average have a significantly higher cost per case. These counties account for 6.2% of total cases but 10.3% of expenditures. This finding is to be expected as the move to “regular public defender” delivery systems is driven in large part by cost savings. It is the opinion of OSPD that assigned counsel appointments should be limited to conflict cases to control cost and assure performance.

There are 68 counties utilizing some form of public defender system. With the addition of Forrest County on October 1, 2016, there are five fulltime offices with support staff including investigators. Lamar and Pearl River counties have recently hired full-time attorneys to serve as primary public defender with continued support from independent part-time attorneys. The full-time attorneys do not have investigators or other support staff. Thirty-eight use part-time attorneys as the primary public defender. Twenty-three use contract defenders. OSPD distinguishes between part-time and contract based on whether or not the attorney is in PERS.



OSPD determined a fulltime equivalent (FTE) need for each county by multiplying the hours needed per case by level and reducing for indigence rate. Conflict rates for the fulltime offices were calculated using data from Harrison and Washington Counties, the only counties that collected this data. Factoring for retained counsel and conflicts Harrison handles 67% of cases and Washington 69%.

The FTE need was then compared to the reported positions funded and counties characterized as:

1. “Within standard”;
2. “Moderately above standard”;
3. “Significantly above standard”; and
4. “In crisis.”

“Moderately above” indicates the county could come into compliance without adding additional staff. The most efficient way to come into compliance would be to use a “safety valve” procedure such as assigned counsel appointment when caseloads are approaching capacity. Counties “significantly above” standard would need to add one or more attorneys to meet need. Counties “in crisis” are at twice the standard per attorney or greater.

Forty (40) of the 68 counties are “within standard.”<sup>9</sup>

Hinds County which is assessed “within standards” also handles probation revocations which are not counted in this assessment and has a vacant attorney position that will not be filled in FY 2017. The criminal justice system in Hinds County was evaluated by an independent research firm on contract with the Attorney General. The BOTEC report raised concerns about the validity of data reported to the AOC by the circuit clerk. We have reviewed that study and like BOTEC cannot conclude additional staff is the answer. A shift to “vertical” representation, increase in salaries and overall systemic reforms seem to be the solution.

Forrest County has returned to a fulltime system with investigative and other support staff. This improvement, effective October 1, 2016, brings them “within standards”.

Fourteen counties are moderately above standard:

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<sup>9</sup> This study does not assess attorneys for adherence to performance standards or systemic issues such as representation prior to indictment. Counties are not assessed for compliance with statutory mandates such as early notification to public defender of new clients, provision of support staff, or factors like experience of counsel matched to complexity of case. Factors like staff turnover, often linked to low salaries, are not considered. Thus even some counties “within standards” may need additional support.

Alcorn	Leake	Oktibbeha
Chickasaw	Marion	Scott
Copiah	Monroe	Sunflower
George	Neshoba	Tate
Harrison	Newton	

The 8<sup>th</sup> District (Leake, Neshoba, Newton and Scott counties) have reorganized under a new senior judge. Scott County is in negotiations to settle a pending federal lawsuit alleging systemic right to counsel violations.<sup>10</sup> Final resolution of that matter and the change in administration may result in these four counties moving to “within standards.”

Sunflower County is placed in the “moderately above” category but may be “within standards” depending on the number of reported cases being “Parchman” cases. Cases arising at Parchman are prosecuted in Sunflower County but are handled by assigned counsel outside the regular public defender system.

Harrison County could be considered “within standards” if the office were allowed to declare conflicts based on caseload; it must also be noted that the office has only one investigator for eight attorneys. As a general rule an office should have one investigator for every three attorneys; this 1:3 ration is established in statute for District Attorney Offices. *Miss. Code* §§ 25-31-5 and 25-31-10.<sup>11</sup>

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<sup>10</sup> Scott is one of three counties brought to federal court over Sixth Amendment issues, Choctaw and Lauderdale counties have also faced scrutiny.

<sup>11</sup> Lack of investigator support is a problem across the state. There are only 8 fulltime defense investigators compared to forty-four (44) district attorney investigators. Moreover, there are no social workers serving in defender offices. Over 75% of people brought into the criminal justice system have a substance abuse disorder and over 20% have a serious mental illness. Competent representation requires attorneys be able to asses these issues and meet the needs of all of their clients.

Four counties are significantly above standard:

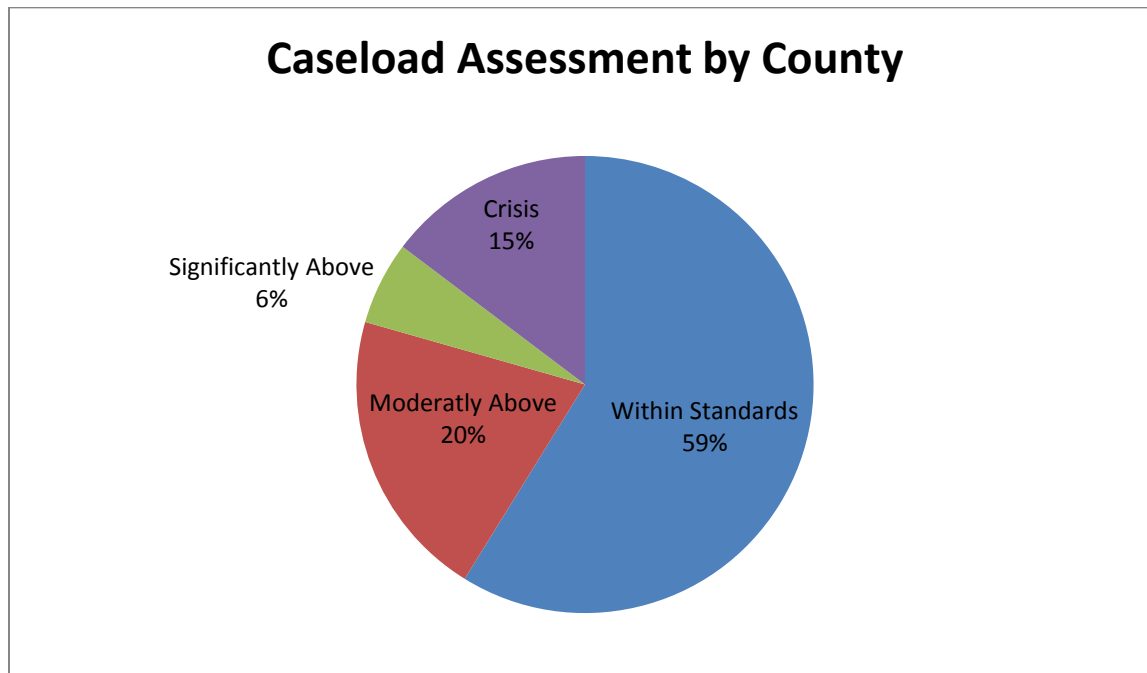
Jackson	Madison
Lafayette	Pike

Jackson County has added a full-time assistant public defender effective October 1, 2016. Like Hinds County, Jackson County provides representation in probation revocations. Even with the additional attorney they will probably remain in the “significantly above” category. Pike County is the only part-time system that has a staff investigator.

Ten Counties are in crisis:

DeSoto	Marshall	Rankin
Lee	Panola	Tishomingo
Lamar	Pearl River	
Lauderdale	Prentiss	

The 10 “crisis counties” handle 30.5% of the total state caseload; only 23% of Level 1 cases but 37% of Level 2 and 30% of Level 3. They have an indigence rate of 82% compared to the state average of 80%. Lamar and Pearl River counties have made progress with the hiring of a fulltime defender to replace a part-time position in each county.



## **CONCLUSIONS**

The structure of the state level programs with gubernatorial appointment of directors charged with hiring and supervision of staff and legislative oversight through the budget process assures accountability of these programs.

At the county level there is no uniformity. It appears indigent defense systems are functioning at about 90% of attorney need. Support staffs, particularly investigators are almost non-existent. While most counties are meeting need for attorneys, ten are operating at 50% of need or worse.

These disparities in caseloads indicate a need for caseload standards and a state level effort to ensure caseloads allow for the delivery of constitutionally effective representation while maintaining fiscal efficiency.