

# The Disparate Impact of an Under-funded, Patchwork Indigent Defense System on Mississippi's African Americans: The Civil Rights Case for Establishing a Statewide, Fully Funded Public Defender System

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## INTRODUCTION<sup>1</sup>

A fundamental principal of our nation's criminal justice system is that regardless of financial status, whether wealthy or destitute, every

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1. Portions of this Article were adapted from an *amicus curiae* brief filed in the Mississippi

accused person is entitled to the effective assistance of counsel.<sup>2</sup> Despite over a decade of calls for reform by state courts,<sup>3</sup> Mississippi is one of the few states that fail to meet its obligation to provide funding for attorneys representing the indigent criminally accused.<sup>4</sup> As a result, Mississippi's counties have shouldered the responsibility of paying court-appointed counsel without financial contribution from the state.<sup>5</sup> The state's eighty-two counties vary widely in wealth and resources.<sup>6</sup> Some counties are able to provide reasonably adequate funding for indigent defense services, and even feature full-time, fully staffed public defender offices. Others, however, have maintained under-funded, part-time, court-appointed counsel systems.<sup>7</sup> The re-

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Supreme Court by the NAACP Legal Defense and Educational Fund, Inc. (LDF) and 100 Black Men of Jackson, Inc., a Jackson, Mississippi-based civil rights organization, in support of Quitman County, Mississippi's appeal. Quitman County has been in litigation against the State of Mississippi since 1999 challenging the state's failure to fund indigent defense services. See *State v. Quitman County*, 807 So. 2d 401 (Miss. 2001). The county's lawsuit, which went to trial in April 2003, contended that the State of Mississippi had "improperly and unfairly shifted the state's obligation to provide and pay for representation of indigent defendants to the counties of Mississippi," and in doing so, had violated its duty under Article 3, Section 26 of the Mississippi Constitution and other provisions of state law to provide indigent defendants with the "effective assistance of counsel." Record on Appeal at 9, *Quitman County v. State*, No. 2003-SA-02658-SCT, 2005 Miss. LEXIS 438 (Miss. July 21, 2005). The Circuit Court found in favor of the state in November 2003, and the county appealed the case to the Supreme Court. On July 21, 2005, the Mississippi Supreme Court affirmed the Circuit Court's decision. *Quitman*, 2005 Miss. LEXIS 438.

2. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *Conn v. State*, 170 So. 2d 20, 22 (Miss. 1964).

3. "[T]he Legislature [should] address the problem of indigent representation on a state-wide basis, rather than thrust the burden on financially-strapped counties." *Mease v. State*, 583 So. 2d 1283, 1285 (Miss. 1991). "[W]e would encourage the Legislature to review the system and provide funds for the representation of indigent defendants in capital cases from State funds rather than county funds. Since the State funds the prosecution in these cases, why not the defense?" *Wilson v. State*, 574 So. 2d 1338, 1341 (Miss. 1990).

4. See NAACP LEGAL DEF. AND EDUC. FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 23 n.6 (2003) [hereinafter ASSEMBLY LINE JUSTICE], available at [http://www.naacpldf.org/content/pdf/ms\\_indigent/Assembly\\_Line\\_Justice.pdf](http://www.naacpldf.org/content/pdf/ms_indigent/Assembly_Line_Justice.pdf) (citing THE SPANGENBERG GROUP, REPORT FOR THE AMERICAN BAR ASSOCIATION INFORMATION PROGRAM (2000)).

5. See MISS. CODE ANN. §§ 25-32-7, 99-15-17 (2000). Mississippi does provide state funding for the defense of capital cases. See *id.* § 99-39-101(2001) (establishing the Office of Capital Defense Counsel).

6. For example, according to the United States Department of Agriculture, in 2002, DeSoto County had a poverty rate of 8.2%, while Sunflower County had a poverty rate of 37.6%. Even the wealthier counties, however, do not necessarily fund full-time public defender systems. For example, Hinds County, which has a full-time public defender system, had a poverty rate of 20.2%. Compare it with Harrison County, which had a poverty rate of 16.3% and still maintains a flat-fee assigned counsel system. See ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., 2002 COUNTY-LEVEL POVERTY RATES FOR MISSISSIPPI, <http://www.ers.usda.gov/Data/povertyrates> (follow "Mississippi" hyperlink) [hereinafter MISSISSIPPI POVERTY RATES].

7. For definitions of the various kinds of contracts that jurisdictions employ to provide indigent defense services, see THE SPANGENBERG GROUP, U.S. DEP'T OF JUSTICE, NCJ 181160,

sulting “patchwork” system of indigent defense practically ensures geographic disparities in the quality of counsel provided to poor Mississippians.<sup>8</sup> Alternatively, a defendant’s access to counsel or de-

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CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 4 (2000) [hereinafter INDIGENT DEFENSE SERVICES]. The report also discusses the risks of inadequate representation posed by a number of the types of contracts used. For example, Quitman County employs a part-time defender who works under a “fixed fee, all cases” system, in which the contract specifies the total amount paid to the contract attorneys, regardless of the number of cases they handle. See Brief for Appellant at 15, *Quitman County v. State*, No. 2003-SA-02658-SCT, 2005 Miss. LEXIS 438 (Miss. July 21, 2005) (“Quitman pays each public defender \$1,350 per month plus benefits. Their compensation does not vary depending on how many cases they have or how complex their cases are.”) [hereinafter Brief for Appellant, *Quitman*]. “Fixed fee, all cases” systems pose the greatest risk of inadequate representation because contract counsel have a financial incentive to spend as little time as possible disposing of their cases. The more time they spend, the less they earn per case. Even in Mississippi jurisdictions that employ a per-hour or per-case compensation scheme, incentive remains low for contract defenders (most of whom maintain private practices and supplement their incomes with government contracts) to spend much time on their indigent clients’ cases, especially because Mississippi imposes a statutory \$1,000 cap on fees payable to any attorney appointed to an indigent criminal defendant. See Miss. CODE ANN. § 99-15-17 (1991). See also Brief for the Appellant, *Quitman* at 15 (describing the trial testimony of three of *Quitman*’s contract public defenders that they liked their government contracts because they allowed them to supplement their incomes while still pursuing paying cases and other “extracurricular activities”).

Other terms describing the various kinds of attorneys appointed to indigent defendants are: (1) “Assigned counsel,” an attorney paid by the government to handle cases on a rotating-list system. The list of attorneys may be volunteers or may include all attorneys within a county; and (2) “Contract counsel,” discussed later in this article, an attorney paid a fixed rate by the government to handle indigent defense cases usually on a part-time basis. Both contract and assigned attorneys are allowed to maintain private legal practices. For more detailed definitions of the types of defense counsel, see CARL BROOKING & BLAKELY FOX, *ECONOMIC LOSSES AND THE PUBLIC SYSTEM OF INDIGENT DEFENSE: EMPIRICAL EVIDENCE ON PRE-SENTENCING BEHAVIOR FROM MISSISSIPPI* 5 (June 2003), available at [http://www.naacpldf.org/content/pdf/indigent/Mississippi\\_Economic\\_Study.pdf](http://www.naacpldf.org/content/pdf/indigent/Mississippi_Economic_Study.pdf).

8. See, e.g., Brief for Jimmy Redwine et al. as *Amici Curiae* Supporting Respondents, *State v. Quitman County*, 807 So. 2d 401 (Miss. 2001) (describing the cases of indigent defendants throughout the state whose cases were ill-handled by court-appointed counsel without the resources to investigate or provide meaningful advocacy); see *id.* at 4-5.

Acknowledging the myriad problems plaguing the State’s indigent defense services, this Court previously has urged the State to institute a state-wide public defender system to insure that defendants are represented by counsel at all stages of their criminal proceedings. In fact, this Court has recognized even in civil cases involving fundamental rights, the right to counsel is critical and well-established. And yet, at present, the State leaves unfulfilled the right to counsel in non-capital criminal cases. Report after report confirms that the right to counsel remains unfulfilled because of the State’s decision to relegate the entire responsibility of funding indigent defense services to the counties. The State’s refusal to contribute to indigent defense services harms poor criminal defendants every day by abrogating their basic constitutional right to adequate representation during criminal proceedings. The poor quality of representation afforded indigent defendants fosters the perception that justice is available only to the wealthy. At present, the entire responsibility for providing defense services to the poor belongs to each county, regardless of its ability to provide such services. In many counties, even when attorneys are available for appointment to indigent defendants, inadequate funding seriously hampers the lawyers’ efforts to provide effective assistance to their clients. Defense attorneys face staggering caseloads, inadequate compensation, insufficient staff and resources, and a lack of training and supervision. These inadequate defense systems are a predictable result of Mississippi’s unwillingness to financially support indigent defense services in every county across the State.

cent advocacy varies widely depending on the county in which he is charged. African Americans in Mississippi, as throughout the nation, are disproportionately among the poor and the criminally accused. Therefore, the state's failure to fund attorneys for the indigent accused acutely affects African Americans. The effects of the absence of meaningful advocacy for poor defendants reverberates widely and impacts African American families, neighborhoods, and communities.

This Article highlights the effect of the state's policies, by denying state provision of counsel for criminally accused indigent persons, upon African American Mississippians. Mississippi delegates responsibility to provide counsel for the criminally accused poor to the counties, irrespective of county resources. A statewide, full-time indigent defense system would significantly improve the quality of counsel available to all indigent defendants. The African American community particularly stands to benefit from that improvement in several important respects. Such a change would help to eliminate unjust advantages conferred upon prosecutors by the lack of adequate defense, and ameliorate the effects that race and poverty have in determining the outcome of criminal proceedings.

Part I examines the effect of Mississippi's current indigent defense system on its African American population. Part II of this Article focuses on how an improved indigent defense system would raise the quality of representation for African American indigent defendants to constitutional standards, and enhance the legitimacy and effectiveness of Mississippi's criminal justice system as a whole.

## I. MISSISSIPPI'S CURRENT, PATCHWORK SYSTEM OF INDIGENT DEFENSE SERVICES HAS A PARTICULARLY HARMFUL EFFECT ON AFRICAN AMERICAN MISSISSIPPIANS

### A. Concentrated Poverty Among Mississippi's African Americans Creates a Reliance Upon Publicly Funded Counsel.

The greatest share of the burden imposed by the absence of a properly funded indigent defense system in Mississippi is borne by the African American community. African Americans are, on average, in greater need of indigent defense services because they are more likely

to live in poverty than members of any other racial group.<sup>9</sup> An American Bar Association (ABA) Report that recommended full funding for the Criminal Justice Act<sup>10</sup> found that, as of 1991, African Americans comprised only 12% of the nation's population but comprised 30% of the families living below the poverty line.<sup>11</sup> In 2002, the United States Census Bureau found that 23.9% of Americans who identified themselves as African American lived in poverty, compared to 12.1% of all races combined, and 10.3% of those who identified themselves as White.<sup>12</sup>

Mississippi has a higher percentage of African Americans than the rest of the country. The Census Bureau found that 36.3% of Mississippi residents identified themselves as Black or African American in the 2000 Census.<sup>13</sup> The percentage of African Americans in Quitman County was even greater:<sup>14</sup> 68.6% of the county's residents identified themselves as Black or African American.<sup>15</sup>

The poverty rate is also higher in Mississippi than elsewhere in the country. In fact, Mississippi has the highest percentage of people living below the poverty line of any state.<sup>16</sup> Census Bureau statistics show that in 1999, 12.4% of United States (U.S.) citizens and 9.2% of American families lived beneath the poverty line.<sup>17</sup> During that same

9. Terence F. MacCarthy, *Unanimous Resolution*, 23 CHAMPION 20, 25 (Apr. 1999) (citations omitted).

10. Criminal Justice Act of 1964, Pub. L. No. 88-455 § 2, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A (1996)).

11. MacCarthy, *supra* note 9.

12. BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. CENSUS BUREAU, P60-222, POVERTY IN THE UNITED STATES: 2002 2 tbl.1 (2003), available at <http://www.census.gov/prod/2003pubs/p60-222.pdf>.

13. U.S. CENSUS BUREAU, C2KPROF/OO-MS, MISSISSIPPI: 2000, CENSUS 2000 PROFILE 2 tbl.DP-1 (2002), available at <http://www.census.gov/prod/2002pubs/c2kprof00-ms.pdf> [hereinafter MISSISSIPPI CENSUS 2000 PROFILE].

14. As mentioned in note 1, *supra*, portions of the Article were adapted from an *amici curiae* brief of the NAACP Legal Defense and Educational Fund, Inc. (LDF) and 100 Black Men in support of Quitman County's lawsuit against the state for its failure to contribute funds toward the county's indigent defense costs. Quitman County is one of several impoverished Mississippi counties having a poverty rate of 31.4%. See MISSISSIPPI POVERTY RATES, *supra* note 6. This also reported that Issaquena County has a poverty rate of 41.0%, Leflore County 32.2%, Holmes County 35.6%. *Id.* The research on the dearth of funding for indigent defense in Quitman County may be analogized to apply to counties in similar financial straits.

15. U.S. CENSUS BUREAU, CENSUS 2000 tbl.DP-1, available at <http://censtats.census.gov/data/MS/05028119.pdf>.

16. MARK MATHER, PATTERNS OF POVERTY IN AMERICA (2002), <http://www.prb.org/AmeristatTemplate.cfm?Section=2000Census1&template=/ContentManagement/ContentDisplay.cfm&ContentID=7939>.

17. ALEMAYEHU BISHAW & JOHN ICELAND, U.S. CENSUS BUREAU, C2KBR-19, POVERTY: 1999, CENSUS 2000 BRIEF 4 tbl.3, 9 tbl.7 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-19.pdf>.

year, nearly 20% of all Mississippi residents and 16% of Mississippi families were living in poverty.<sup>18</sup> The poverty rate was even higher in Quitman County, where 33.1% of all individuals and 28.6% of families were living in poverty.<sup>19</sup>

The poverty rate among African American Mississippians surpassed even these figures. In 1999, approximately 35% of all African American Mississippians, and 31.6% of African American families in Mississippi lived below the poverty line.<sup>20</sup> Poverty among African Americans living in Quitman County was even more pronounced: over 40% of African American individuals in Quitman County, and nearly 38% of African American families were living in poverty.<sup>21</sup> Of the 20% of Mississippians living below the poverty line, approximately 66% were African American.<sup>22</sup>

The concentration of poverty among African Americans marks Mississippi as a whole, and Quitman County in particular, as places where effective indigent defense is necessary in the interests of justice and Constitutional compliance.<sup>23</sup> Moreover, the preceding statistics indicate that the consequences of Mississippi's failure to provide adequate indigent defense services to its poor citizens generally "fall[s] disproportionately on communities of color because of the greater incidence of poverty in these communities and, hence, their greater reliance on public defender services."<sup>24</sup>

Survey evidence suggests that the overwhelming majority of criminal cases brought in Mississippi are against indigent defendants. In its 2000 Report to the Mississippi Legislature, the Mississippi Public

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18. MISSISSIPPI CENSUS 2000 PROFILE, *supra* note 13, at 4 tbl.DP-3.

19. *Id.*

20. U.S. CENSUS BUREAU, CENSUS 2000 tpls.P159B, P160B, available at [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-geo\\_id=D&-ds\\_name=d&-\\_lang=en&-mt\\_name=DEC\\_2000\\_SF3\\_U\\_P159B](http://factfinder.census.gov/servlet/DTable?_bm=y&-geo_id=D&-ds_name=d&-_lang=en&-mt_name=DEC_2000_SF3_U_P159B); [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-geo\\_id=D&-ds\\_name=D&-\\_lang=en&-redoLog=false&-mt\\_name=DEC\\_2000\\_SF3\\_U\\_P160B](http://factfinder.census.gov/servlet/DTable?_bm=y&-geo_id=D&-ds_name=D&-_lang=en&-redoLog=false&-mt_name=DEC_2000_SF3_U_P160B).

21. *Id.*

22. The Census Bureau does not provide this number on its website. The figure was calculated by multiplying the total number of African Americans living in Mississippi in 1999, 1,033,809, by .35 (or 35%), the percentage of those African Americans individuals living in poverty, to get approximately 361,831 African American individuals living in poverty. Dividing 361,831 by 548,079 (see [http://factfinder.census.gov/servlet/SAFFacts?\\_event=search&geo\\_id=&\\_geoContext=&\\_street=&\\_county=&\\_cityTown=&\\_state=04000US28&\\_zip=&\\_lang=en&\\_sse=on&pctxt=fph&pgsl=010](http://factfinder.census.gov/servlet/SAFFacts?_event=search&geo_id=&_geoContext=&_street=&_county=&_cityTown=&_state=04000US28&_zip=&_lang=en&_sse=on&pctxt=fph&pgsl=010)), the total number of individuals living in poverty in Mississippi in 1999, the result is approximately .6602 or 66%. These figures can be found at <http://factfinder.census.gov>.

23. MISS. CONST. art. III, § 26.

24. Charles J. Ogletree, Jr., *Toward a More Effective Right to Assistance of Counsel: An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 82 (1995).

Defenders Task Force asked judges in Mississippi's twenty-two judicial circuits to estimate the number of indigent criminal defendants that came before them in felony cases. The fifteen courts that responded estimated that the number of indigent defendants appearing before them in felony cases ranged between 50% and 95%.<sup>25</sup> The average of these responses was just over 82%. In Quitman County, the court estimated that over 90% of all criminal defendants who appeared before it in felony cases were indigent.<sup>26</sup> These results, combined with the high degree of poverty in Mississippi's African American community, indicate that the State's failure to provide even minimally sufficient funding for indigent defense has an inordinate impact on African Americans.

A recent U.S. Department of Justice (DOJ) survey compared rates of representation by public and private attorneys in state and federal court systems.<sup>27</sup> The survey results showed that 77% of African Americans incarcerated in state prisons reported that they were represented by assigned counsel<sup>28</sup> or public defenders, compared to 69% of White inmates and 73% of Hispanic inmates.<sup>29</sup> Among those incarcerated in federal facilities, 65% of African Americans had publicly financed attorneys, compared with 57% of Whites and 56% of Hispanics.<sup>30</sup> In Alabama – Mississippi's neighbor and a state with similar demographics<sup>31</sup> – a study found that over half of the defendants using the state's indigent defense system were African American.<sup>32</sup> As observed in a report by the American Bar Association's Section on Criminal Justice, "one conclusion to be drawn from these harsh statistics is that people of color require appointed lawyers disproportionately more often than White people. Therefore, when the quality of representation provided by appointed lawyers is diminished

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25. MISSISSIPPI PUBLIC DEFENDERS TASK FORCE, REPORT TO THE MISSISSIPPI STATE LEGISLATURE Attachment C: Compilation of Results of Circuit Judges Survey 1 (2000) (Entitled Compilation of Results of Circuit Judges Survey. The responses were provided in percentages only; no information on the actual number of defendants per jurisdiction was available.).

26. *Id.* at Attachment E: Copy of Results of County System and Costs Survey 3.

27. CAROLINE W. HARLOW, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., DEFENSE IN CRIMINAL CASES 1 (Nov. 2000, NCJ 179023), available at <http://www.ojp.usdoj.gov/bjs/pud/pdf/dccc.pdf>.

28. See INDIGENT DEFENSE SERVICES, *supra* note 7, at 5 for a definition of "assigned counsel."

29. *Id.* at 9.

30. *Id.*

31. See generally U.S. CENSUS BUREAU, C2KPROF/00-AL, ALABAMA: 2000, CENSUS 2000 PROFILE (2002), available at <http://www.census.gov/prod/2002pubs/c2kprof00-al.pdf>.

32. David Allan Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Towards Change*, 52 ALA. L. REV. 975, 994 (2001).

by underfunding, the consequences will be disproportionately felt by people of color.”<sup>33</sup>

**B. Poor African American Defendants Represented by Publicly Funded Counsel Spend More Time in Pre-Trial Detention and Serve Longer Prison Sentences.**

Insufficient, part-time public defense services tend to result in longer periods of incarceration for all indigent defendants, both before and after trial. A nationwide study conducted by the DOJ showed that only about half of the defendants represented by a public defender or assigned counsel were released from jail before trial, while three-quarters of those employing a private attorney were released.<sup>34</sup> The same study found that inmates with court-appointed counsel were far less likely to have contact with their attorneys within a week of their arrest than those with hired counsel.<sup>35</sup>

A study commissioned by the NAACP Legal Defense and Educational Fund, Inc. (LDF Study) showed that poor defendants in Mississippi who are represented by court-appointed counsel (working only part-time representing indigent defendants) tend to spend more time in jail waiting for their cases to be resolved than defendants who are represented by full-time public defenders.<sup>36</sup> Specifically, the LDF Study found that individuals represented by part-time assigned counsel were 40% less likely to get out of jail before trial, and spent an average of ninety-six more days in jail than those represented by full-time counsel.<sup>37</sup> Individuals represented by part-time contract counsel were 28% less likely to get out of jail than defendants represented by full-time counsel, and spent an average of eighty-one more days in jail prior to release.<sup>38</sup>

The LDF Study also reported that non-minorities are able to make bail in disproportionately greater numbers than minorities.<sup>39</sup> Overall, the study found that minorities were 19% less likely to get

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33. MacCarthy, *supra* note 11, at 25.

34. CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 5 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

35. *Id.* at 8. The study found that only 37% of state inmates and 54% of federal inmates represented by appointed counsel met their attorneys within a week of arrest. In contrast, 60% of state inmates and 75% of federal inmates represented by private counsel spoke with their attorneys within a week of arrest.

36. See generally BROOKING & FOX, *supra* note 7.

37. *Id.* at 22.

38. *Id.*

39. *Id.* at 11.



out of jail, and spent an average of fifty-two more days in jail than non-minorities.<sup>40</sup> Research from individual counties showed an inversely proportional relationship between a county's minority population and a defendant's chances of being released from jail prior to trial: the greater the concentration of minorities in a particular county, the less likely it was that an accused person would be released prior to trial.<sup>41</sup>

Furthermore, the LDF Study revealed that the disabling effects of representation by part-time defense counsel continue after an accused person is convicted. Part-time, court-appointed counsel tend to provide their clients with less sentencing advocacy than full-time public defenders, which translates into longer prison sentences.<sup>42</sup> The lack of meaningful advocacy in all stages of criminal proceedings results in harsh convictions and sentences even for non-violent, minor crimes.<sup>43</sup> Thus, the punishment that begins in pre-trial detention continues, unnecessarily, for many years to come.

This impact is evident in the composition of the state and national prison populations. African Americans made up only 12% of U.S. citizens in 1999, yet they constituted almost 50% of all incarcerated people nationwide.<sup>44</sup> The same is true in Mississippi: while African Americans comprise less than 40% of the state's residents, the Mississippi Department of Corrections reported that, as of April 1, 2004, they represented 68.25% (16,197) of the State's 23,733 inmates.<sup>45</sup> By one estimate, one out of every twelve African American males in Mississippi between the ages of twenty and twenty-nine was in prison as of August 2003 – a rate four times that for white males in the same age group.<sup>46</sup> An even greater proportion of incarcerated people convicted in Quitman County are African American. As of May 13, 2004, of the ninety-seven offenders imprisoned in state facilities and convicted in

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40. *Id.* at 22.

41. *Id.* Moreover, the longer the delay, the more punitive the effect of pre-trial incarceration. See *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (“[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”); *Id.* at 527 (“[A] defendant confined to jail prior to trial is obviously disadvantaged by delay . . . .”). Cf. *Esparza v. State*, 595 So. 2d 418, 423-24 (Miss. 1992).

42. *BROOKING & FOX*, *supra* note 7, at 14.

43. *ASSEMBLY LINE JUSTICE*, *supra* note 4, at 10-12.

44. MacCarthy, *supra* note 11, at 25 (using 1993 incarceration figures) (citation omitted).

45. MISSISSIPPI DEPT OF CORR., MONTHLY FACT SHEET (2004), available at <http://www.mdoc.state.ms.us/PDF%20Files/2004%20April%20Fact%20Sheet.pdf>.

46. Matt Volz, *Young Black Male Prison Population Soars*, BALTIMORE AFRO-AMERICAN, Aug. 30 - Sept. 5, 2003, at B8.

Quitman County, eighty-two of them (approximately 84.5%) were African American.<sup>47</sup>

C. Prolonged Incarceration Has a Disproportionate and Debilitating Impact on African American Families and Communities.

Excessive periods of incarceration, when caused by an inadequate defense, subject entire families to severe consequences and deprive minority communities of both the financial and human capital necessary to sustain themselves. National figures show that African Americans are disproportionately burdened by the separation of parents from children due to incarceration. The Bureau of Justice Statistics found that in 1999, of the 1,498,800 children nationwide with a parent in prison, 51.2% (767,200) of those children were African American.<sup>48</sup> In total, 7% of all African American children had a parent in prison, which is nine times higher than the percentage of White children.<sup>49</sup> Although comparable statistics are not available for Mississippi, the state's large African American population and the high degree of poverty within it, combined with the documented failure of the state's indigent defense system, make it predictable that Mississippi's African American children are similarly affected.<sup>50</sup>

The lack of a full-time public defender system has also taken its toll on the fiscal resources of poor African American families and communities in Mississippi. The LDF Study indicated that the majority of people held in pre-trial detention whose cases were studied were working at the time of their arrest.<sup>51</sup> While sitting in jail for needlessly protracted periods awaiting trial, many poor defendants lost their

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47. E-mail from Nic Lott, Communications Specialist, Mississippi Dep't of Corr., to Kareem Rabie, Paralegal, NAACP Legal Defense and Educational Fund, Inc. (LDF) (May 13, 2004, 15:31 EST) (on file with the authors).

48. CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN 2 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

49. *Id.*

50. According to one estimate, over 5,000 African American children in Mississippi have at least one parent in prison. Mississippi State University Relations, *MSU Study Seeks to Assist Children of Imprisoned Parents* (Sept. 12, 2001), <http://www.ur.msstate.edu/news/stories/2001/parentinprison.asp>. These children are "more likely to have a greater exposure to violence, are at a higher risk for physical or sexual abuse and are more likely to suffer drug and alcohol addiction [and] [a]s a result, they are more likely to turn to a life of crime themselves." *Id.* Thus, the harmful effects of incarceration are cyclical and will be borne by subsequent generations of African Americans.

51. BROOKING & FOX, *supra* note 7, at 23.

jobs, homes, cars, and other sources of income and wealth.<sup>52</sup> Economic resources were expended when children were displaced, and valuable tax revenue was lost to the towns and counties affected. Moreover, these communities wasted funds that could have been spent on much-needed social services instead of paying for pre-trial jail time.<sup>53</sup> The same extent to which African Americans are disproportionately among the state's poor, they are detrimentally affected by the loss of resources.

D. Repeated Injustices and Inequities Lead African American Defendants and Crime Victims to Lose Faith in the Criminal Justice System.

There is a sense in Mississippi among many poor people and African Americans that the criminal justice system is stacked against them, not only as criminal defendants but also as crime victims.<sup>54</sup> The situation among Mississippi residents exemplifies the fact that those who cannot afford to pay lawyers spend months, and sometimes years, languishing in jail waiting for their cases to be resolved. While these poverty-stricken defendants wait in pre-trial incarceration limbo, they rarely hear from their court appointed lawyers. Indigent defendants often meet their court-appointed counsel for the first time on the date of critical hearings. Subsequently, some defendants plead guilty to serious charges without the benefit of investigation or even an explanation of the consequences of the plea agreements. In other instances, over-worked, under-paid, or incompetent defense lawyers have gone to trial, resulting in numerous cases of wrongful convictions all over the country.<sup>55</sup> Mississippi is no exception.<sup>56</sup> Many poor defendants

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52. *Id.* Among those indigent defendants surveyed for the LDF Study, 73% who were working lost their jobs, 24% lost their homes, 22% lost their cars, 16% lost utilities, and 14% lost their phones. The resulting financial impact was felt by many of their families. See also *Barker v. Wingo*, 407 U.S. 514, 532 (1972) ("The time spent in jail awaiting trial . . . often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.").

53. BROOKING & FOX, *supra* note 7, at 15-17.

54. See generally ASSEMBLY LINE JUSTICE, *supra* note 4; cf. Tony Fabelo, *What Policy-Makers Need to Know to Improve Indigent Defense Systems*, 29 N.Y.U. REV. L. & SOC. CHANGE 135, 137 (2004).

55. See, e.g., *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc) (reversing death penalty conviction in Texas case because counsel fell asleep during trial); BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000) (detailing the authors' work on behalf of the wrongfully convicted).

56. See, e.g., *Butler v. State*, 608 So. 2d 314 (Miss. 1992) (reversing wrongful conviction of Sabrina Butler, who was accused of murdering her infant child); ASSEMBLY LINE JUSTICE, *supra* note 4, at 19 (noting that "three young men spent four-and-a-half years awaiting trial in Biloxi,

are burdened with sentences that are often incommensurate with the crimes for which they are convicted because their lawyers failed to engage in any meaningful advocacy on their behalf during sentencing.<sup>57</sup>

Those who have no choice but to rely on the inadequate services provided by over-worked and under-funded appointed counsel understandably lose confidence in the fairness of Mississippi's justice system. When inadequate indigent defense services lead to wrongful convictions, unreasonable pre-trial incarceration, and excessive and inappropriate sentences, collective faith in the system suffers. There is a ripple effect in the African American community for each individual defendant whose liberty interests are trampled upon. Families, friends, neighbors, and co-workers all lose trust in the effectiveness and fairness of the criminal justice system when an individual is mistreated or ignored by his or her counsel. Meanwhile, victims of crime in poor communities served by inadequate indigent defense systems wait longer for resolution of cases and at times question whether the actual perpetrators were apprehended, tried, and convicted. This loss of public confidence undermines the validity and finality of the results.<sup>58</sup>

E. The Collateral Consequences of Criminal Convictions in Mississippi are Disproportionately Borne by the African American Community.

The convictions and sentences meted out by the court, and the economic losses caused by these detentions are not the only consequences of Mississippi's broken indigent defense system. Severe and continuing collateral consequences are attached to criminal convictions in Mississippi. For example, the state's professional and occupational licensing statutes restrict participation in a variety of professions by those convicted of crimes.<sup>59</sup> Moreover, Mississippi

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only to have the case against them dismissed"); Michael Radelet *et al.*, *Prisoners Released from Death Row Since 1970 Because of Doubts About Their Guilt*, 13 COOLEY L. REV. 907, 931 (1996) (reporting the *Butler* case).

57. ASSEMBLY LINE JUSTICE, *supra* note 4, at 9-10.

58. Historically, when confronted with a law or system they believe is unjust, some jurors have resorted to a unique means of community self-help: jury nullification. Some see a moral justification for this practice that lends legitimacy to an otherwise unjust criminal justice system. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 714 (1995); David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J. L. REFORM 861, 893-94 (1995).

59. See, e.g., MISS. CODE ANN. §§ 73-35-21, 73-11-57 (2004).

“[e]mployers can ask about arrests that never led to conviction and refuse to hire anyone with a criminal record no matter their qualifications.”<sup>60</sup> The state provides no mechanism for people with criminal records to obtain certificates of rehabilitation that would signal to the community that a former offender is capable of being a productive and contributing member of society. In addition, people convicted of drug crimes face a lifetime ban on public assistance and food stamps in Mississippi, denying them and their families a crucial means of support and aid in the process of rebuilding their lives.<sup>61</sup>

Perhaps the most damaging collateral consequence of felony convictions is the denial of the right to vote, known as felon disfranchisement. In Mississippi, disfranchisement is generally a lifetime sanction.<sup>62</sup> Statistics current through the end of the year 2000 show that approximately 119,943 Mississippians were permanently barred from voting or serving on juries because of felony convictions.<sup>63</sup> This figure accounts for nearly 6% of Mississippi’s entire voting-age population.<sup>64</sup> Approximately 63% of disfranchised Mississippi residents were African American. In total, over 11% (76,106) of all African Americans of voting age in Mississippi were disfranchised by a felony conviction.<sup>65</sup> In this way, the state’s felon disfranchisement scheme dilutes the voting strength of the African American community. As a result, African Americans are left unable to affect the very circumstances that disproportionately impact them.

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60. LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY, A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS, available at [http://www.lac.org/lac/upload/reportcards/25\\_Image\\_Mississippi.pdf](http://www.lac.org/lac/upload/reportcards/25_Image_Mississippi.pdf).

61. *Id.*

62. The Mississippi Constitution bars those convicted of “murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy” from voting. MISS. CONST. ANN. art. 12, § 241 (2004). For purposes of this bar, theft includes armed robbery. *Cotton v. Fordice*, 157 F.3d 388, 389 (5th Cir. 1998). A person may regain the right to vote if the governor issues an executive order (pardon), or if legislation specifically restoring a particular person’s right to vote passes both houses of the State legislature by a two-thirds majority of all elected members and is then signed by the governor. MISS. CONST. ANN. art. 12, § 253 (2004).

63. Jeff Manza and Christopher Uggen, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AMER. SOC. REV. 777, 797 tbl.A (2002), available at <http://www.sentencingproject.org/pdfs/uggenmanza.pdf>.

64. *Id.*

65. *Id.* at 798 tbl.B. A 1998 report indicated that 28.6% of all the African American men in the state were disfranchised as a result of felony convictions. JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 9 (1998), available at <http://www.sentencingproject.org/pdfs/9080.pdf>.

## II. FULL-TIME, ADEQUATELY FUNDED PUBLIC DEFENDERS WILL IMPROVE THE QUALITY OF SERVICE PROVIDED TO POOR DEFENDANTS AND HELP RESTORE CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM AMONG AFRICAN AMERICAN MISSISSIPPIANS

As one commentator noted, effective indigent defense systems are “the first line of defense against corruption of the justice system,” which tends to be unleashed upon “poor people alienated from the socioeconomic and political mainstreams.”<sup>66</sup> A fair dispensation of justice requires a “strong indigent defense system . . . to shield poor citizens, and indirectly all citizens, against abuses by the state.”<sup>67</sup> A statewide public defense system in Mississippi featuring full-time public defenders would enhance the quality of representation afforded to indigent African American defendants, and lead to greater confidence in the African American community about the state’s administration of criminal justice.

### A. A Full-Time and Properly Funded Public Defender System Would Help Raise the Quality of Representation of Poor African Americans up to Constitutional Standards.

While not a panacea for all of the problems that exist in the criminal justice system, a full-time and properly funded indigent defense system would yield many positive results. People served by full-time public defenders tend to receive more meaningful advocacy than those who are represented by part-time, under-funded appointed counsel.<sup>68</sup> For example, the LDF Study indicated that in the Mississippi counties with full-time public defenders, defense attorneys visited their clients in jail more frequently, spent more time with them, were more responsive to their clients’ phone calls, investigated cases more diligently, interviewed witnesses, and attempted to reduce bond more vigorously.<sup>69</sup> Full-time defenders also filed more motions on behalf of their clients and investigated cases more frequently and thoroughly than part-time defenders.<sup>70</sup> In addition, full-time defenders tended to remain engaged in cases, which reduced the rate of turnover

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66. Fabelo, *supra* note 54, at 136.

67. *Id.*

68. BROOKING & FOX, *supra* note 7, at 5.

69. *Id.* at 23-26.

70. *Id.* at 11, 14, 19.

in counsel, and provided greater continuity and better quality of defense.<sup>71</sup>

The consistent advocacy provided by full-time public defenders in a properly funded system would provide more in-depth investigation and meaningful advocacy at plea hearings, trials and sentencing hearings.<sup>72</sup> This would almost certainly lead to less pre-trial jail time and a reduction in the number of undeserving felony convictions. Those represented by publicly funded counsel would be more likely to be acquitted, or when convicted they would receive prison sentences more proportionate to their crimes. The components necessary to provide a basic Constitutionally-mandated right to defense, as put forth by the ABA, include: an independent body funding and appointing counsel to indigent defendants; appointment of counsel within twenty-four hours of arrest, detention, or request; provision of private space for client interviews; limitations on defense counsel's workload; continuous representation by the same attorney throughout a defendant's case; parity between defense and prosecution resources; regular, meaningful evaluation; and training of counsel assigned to indigent defendants.<sup>73</sup> Adequately funded representation would spare countless African American individuals and families the burdens of needless incarceration and the collateral consequences of criminal convictions.

#### B. A Full-Time and Properly Funded Public Defender System Would Enhance the Legitimacy and Effectiveness of the Criminal Justice System.

Beyond a defendant's individual liberty interests, full-time public defender systems also provide benefits to the entire community and the criminal justice system itself. While seemingly counter-intuitive, serving the individual defendant's interests actually coincides with improving the system as a whole, because "the true adversarial system of American jurisprudence will gain legitimacy in the eyes of the entire population," including defendants' families and, indirectly, crime vic-

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71. *Id.* at 11, 19. The authors found that 40% of the Mississippi defendants represented by contract counsel experienced a change in their attorney, while only 15% of those represented by full-time public defenders saw such a change. *Id.* at 19.

72. Ogletree, *supra* note 24, at 93.

73. See generally, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) [hereinafter ABA].

tims through increased faith in the accuracy of criminal verdicts.<sup>74</sup> “A strong indigent defense system allows those most alienated from our institutional mainstream to feel that the system is not ‘stacked’ against them, even when they break the law and are punished by the system.”<sup>75</sup> In the long term, this increased confidence will lead to fewer “grievances ‘against the system’ among alienated populations.”<sup>76</sup>

This enhanced legitimacy would also benefit crime victims in the African American community. Statistics show that African Americans are more likely to be victims of crime than members of other racial groups.<sup>77</sup> Properly funded, full-time public defender offices force prosecutors to use their own resources efficiently and to work diligently to avoid fingering the wrong perpetrator or wasting time and money prosecuting innocent parties. In addition, through zealous advocacy, full-time public defenders help ensure that police officers and prosecutors apprehend and appropriately charge the correct offenders, bringing closure for African American crime victims and their families.

Moreover, effective indigent defense systems aid in the expeditious dispensation of justice by allowing cases to move quickly through the system and creating opportunities for implementation of innovative programs – effects that increase the system’s capacity to respond to growing demands.<sup>78</sup> Cases are resolved more reliably and efficiently with adequately staffed and funded indigent defense services than without. As a result, African American defendants, crime victims, and victims’ families would spend far less time waiting for justice.

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74. Felice, *supra* note 32, at 1000.

75. Fabelo, *supra* note 54, at 137.

76. *Id.* (citation omitted).

77. See, e.g., Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1255 (1994) (“Like many social ills, crime afflicts African-Americans with a special vengeance. African-Americans are considerably more likely than whites to be raped, robbed, assaulted, and murdered.”); *id.* at 1278 n.2 (citing Ted Gest et al., *Violence in America: The Victims’ Profiles*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 22, 30) (noting that African American male youth ages fourteen to seventeen, with a victimization rate of 65.9 per 100,000 in the population, are more likely to be victims of crime than white youth in the same age group, who have a victimization rate of only 8.5 per 100,000). See also Hanna Rosin, *Action Jackson: Jesse’s Volte-face on Crime*, New Republic, Mar. 24, 1994, at 18 (reporting that African Americans are four times as likely than Whites to be raped, three times as likely to be robbed, twice as likely to be assaulted, and seven times more likely to be murdered).

78. Fabelo, *supra* note 54, at 137.



## CONCLUSION

Improving indigent defense is a civil rights issue implicating myriad concerns for Mississippi's African American communities. Research indicates that constitutionally adequate indigent defense services benefit both the accused and law-abiding families and community members. African Americans rely upon publicly funded defense counsel more often than other citizens when accused of criminal acts and are disproportionately harmed by the failure in the system. Because of this imbalance, it follows that the African American community would benefit directly from a full-time and adequately funded public defender system.

Fifteen years ago, the Mississippi Supreme Court urged the state legislature to review the indigent defense system and contribute state funds for defense services, as it does for prosecution services.<sup>79</sup> Despite years of calls for reform,<sup>80</sup> Mississippi is no closer to establishing a constitutionally adequate indigent defense system today than it was then. The Mississippi Public Defender System Task Force, which included judges, state legislators, and a representative from the Administrative Office of the Courts, recommended modest, incremental reforms in its 1998 Implementation Plan.<sup>81</sup> Two years later this recommendation for reform was reiterated,<sup>82</sup> and the constitutional pitfalls of the current system have been described over and over again.<sup>83</sup>

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79. *Wilson v. State*, 574 So. 2d 1338, 1341 (Miss. 1990); *Mease v. State*, 583 So.2d 1283, 1285 (Miss. 1991) (suggesting “that the Legislature address the problem of indigent representation on a statewide basis, rather than [continue to] thrust the burden on financially-strapped counties”).

80. In 1998, the Mississippi legislature passed the Statewide Public Defense System Act, but it never appropriated the funds to pay for the mandated reform. *Cf. MISS. CODE ANN. § 99-15-15* (1998). In 2000, the legislature repealed the bill. Other than the state-funded office establishing full-time defense in capital cases, other calls for state funding for indigent defense have gone unheeded. *See MISS. CODE ANN. §§ 99-39-101, 99-39-103* (2000).

81. *See generally*, THE MISSISSIPPI PUBLIC DEFENDER COMMISSION, IMPLEMENTATION PLAN (1998) [hereinafter IMPLEMENTATION PLAN].

82. Fully staffed public defender offices, including support staff were recommended by the Public Defender Task Force in its 2000 report, which was chaired by Justice William L. Waller of the Mississippi Supreme Court and included judges, legislators and prosecutors. The report found that indigent defense remained a major burden for the counties and recommended a statewide public defender office as well as district public defenders paid for by a source other than counties. It recommended phasing in the statewide public defender system over several years at a total initial cost of \$14 million. *See, e.g.*, IMPLEMENTATION PLAN, *supra* note 81.

83. *See id.* at 9-10; *see also* ASSEMBLY LINE JUSTICE, *supra* note 4, at 15-17 (listing as “factors contributing to a wasteful and inadequate system:” excessive caseloads and financial disincentives for private counsel to provide adequate representation to indigent defendants, disparity between the state’s prosecution and defense spending, a lack of independent statewide regulation or oversight, and the counties’ inability to pay for indigent defense services which pass constitutional muster).

The fact that equal justice is unavailable to many Mississippians who happen to be poor, and in disproportionate numbers African American, calls for the advocating of basic, reasonable reforms that will balance the system. Standards such as those enumerated by the ABA's Ten Principles are the baseline for what constitutes a constitutional defense in any criminal case.<sup>84</sup> Reports have consistently shown that Mississippi is falling far short of providing its criminally accused poor with fundamental constitutional protections. African Americans are bearing a disproportionate share of this burden. They will continue to suffer the consequences of the state's failure until proper funding is allocated to give counsel appointed to represent indigent defendants the training and resources that will make the assistance of counsel meaningful in all criminal cases.

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84. See ABA, *supra* note 73; see, e.g., NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS (2000) (detailing minimum standards for basic representation at all stages of a criminal case).