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without trial. Many were found guilty of stigmatizing the
treatment of those held prior to trial in Mississippi. In 2003, the
Legal Defense Fund (“LDF”) reported that, across the state, felony
defendants were held in jail for months or years before trial, or before even
being charged.

¹ Widespread deficiencies in the state’s public
defender system had also been extensively documented.² Our goals were to
cv-00745-HTW-LRA (S.D. Miss

Sept. 23, 2014).

1. SARAH GERAGHTY & MIRIAM GOHARA, NAACP LEGAL DEFENSE AND EDUCATION
FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI’S INDIGENT DEFENSE CRISIS (2003), [https://static.
prisonpolicy.org/scans/Assembly_Line_Justice.pdf](https://static.prisonpolicy.org/scans/Assembly_Line_Justice.pdf) [<http://perma.cc/EQY6-3RTM>].

2. See, e.g. PHYLLIS E. MANN, NAT’L LEGAL AID & DEFENDER ASSOCIATION,
MISSISSIPPI: A SHORT STORY (2010), http://nlada.net/library/article/ms_ashortstory [[http://perma.
cc/6U7A-NMEJ](http://perma.cc/6U7A-NMEJ)].

Appalachian Foothills.³ In our conversations with public defenders, prosecutors, judges, and policymakers across Mississippi, it became clear that the phenomenon had deep roots. In almost every county, local officials described systems by which arrestees who could not afford counsel were held for months or longer without seeing a lawyer. Amazingly, those in counties that only required arrestees to languish in jail for “only a few weeks” typically viewed themselves as exemplary. Even where the county did make an arrestee wait for months, some other county was always worse.

We eventually identified three structural reasons why Mississippi’s

particularly in more rural areas—and Mississippi is very rural—have only two or three trial terms per year, forcing arrestees to wait three to five months **just to see if the grand jury acts on their case**.¹⁴ Compounding matters, local officials in several counties reported that cases are rarely presented to the grand jury during the next trial term either. Our arrestee in the hypothetical district must now wait five to six months to learn her fate with the grand jury.

To determine how long arrestees actually wait until indictment, we surveyed public defenders from seventeen of the state's twenty-one judicial districts.¹⁴ The results confirmed that these hypothetical concerns are quite real. Almost without exception, indictments typically occurred within six months to a year of arrest, and no public defender reported that the district regularly secured indictments within three months of arrest.¹⁵

The third driving force behind indefinite detention is another omission. Mississippi is one of six states that delegates non-capital, trial-level defense entirely to its counties.¹⁶ There are no standards for the timing of counsel appointment, nor is there any oversight mechanism to enforce existing constitutional and ethical standards for appointed counsel. In this void, many districts wait until an arrestee is indicted to appoint counsel.

This perfect storm of deficiencies has helped spawn a culture of apathy toward the accused. To minimize the costs of providing appointed counsel, many counties use a flat-fee contract system to retain public defenders.¹⁷ These arrangements usually involve a county contracting with one or more attorneys to handle all or some percentage of the county's indigent caseload. The contracting attorneys typically accept this work on a part-time basis, maintaining a private practice along with their defender duties.¹⁸ The county's incentive to control costs is thus passed on to the public defender. As each new appointed client reduces the marginal value of the contract, while also threatening the time the attorney can devote to "paying clients," defenders naturally look to minimize their time on appointed cases.¹⁹ One of the lasting memories from our investigation was a part-time public defender who candidly

14. Brandon Buskey & Marshall Thomas, *Mississippi Public Defender Survey* (Dec. 2014) (on file with author).

15. .55.

admitted that she did not know her clients existed until indictment, and that, if she was to “keep the lights on” at her private practice, she could not afford to know them.

As open secrets go, indefinite detention without counsel may be one of Mississippi’s most shameful. A lack

pretrial process without regard to wealth. Indefinite detention without counsel cannot survive such a standard.

I. CRITICAL STAGES AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment requires that states provide attorneys for felony³²

probable cause to authorize a brief period of detention is not a critical stage, as “[t]his issue can be determined reliably without an adversary hearing.”⁴¹

Though the Supreme Court has grappled with the critical stage inquiry for over eighty years, it has never addressed an issue near the center of indefinite detention without counsel: whether an indigent defendant has a right to counsel at the first court appearance.⁴² The Court came closest to deciding this issue in 2008 with *Rothgery v. Gillespie County*.⁴³ Walter Rothgery went six months—including three weeks in jail—without an attorney on a felony charge of being a felon in possession of a weapon.⁴⁴ Only, Mr. Rothgery had never been convicted of a felony.⁴⁵ Soon after his arrest, Rothgery had one court appearance, where a magistrate found probable cause for the arrest, informed Rothgery of the charge, and set bail—

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determinations at the initial appearance.⁶⁵ While the Court later ruled that the probable cause determination must happen within forty-eight hours of arrest,⁶⁶ regardless of when the initial appearance occurs, it has remained silent on whether arrestees have a comparable constitutional right to a prompt bail determination.⁶⁷

Absent a constitutional requirement that states must conduct meaningful bail hearings at the first appearance, it is far from certain that the Court will require counsel at a proceeding most judges could literally conduct without looking up at or hearing from the defendant, where they need only recite the alleged charges and preset bail amount.⁶⁸ There is nothing “trial-like” about this process, though, as described above, the outcome of that process—release or detention—may prejudice the outcome in a defendant’s case. Yet, even if the Court finally settles whether initial appearances are critical stages and/or the required promptness of bail hearings, there remains another puzzle to solving indefinite detention without counsel: when must counsel be appointed if the initial appearance and/or bail hearing is delayed? Or simply never happens?

Consider the curious case of Jessica Jauch. Police in Starkville, Mississippi

and the Court's line of cases establishing the right of meaningful access to

criminal cases.⁸⁶ And the same day the Court issued *Gideon*, it also decided *Douglas v. California*, which held that *Griffin* required the appointment of counsel on a defendant's first appeal as of right.⁸⁷ More explicit about its equal access framework, the *Douglas* Court explained:

There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.⁸⁸

Taken together, *Griffin*, *Gideon*, and *Douglas* support the proposition t

stage analysis. Pretrial detention is critical in its own right. Jailing an