



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION  
GEORGETOWN UNIVERSITY LAW CENTER

March 14, 2023

Clerk of the Supreme Court  
Gartin Justice Building  
P.O. Box 249  
Jackson, MS 39205

**Re: Proposed Amendments to Rule 7.2 of the Mississippi Rules of Criminal Procedure**

Dear Members of the Rules Committee on Criminal Practice and Procedure,

We write to you as former federal prosecutors and Department of Justice officials. We have extensive experience, either directly or in our managerial capacities, investigating and prosecuting criminal cases and working together with defense counsel to resolve cases before they ever go to trial. Based on our experience, we know that zealous and continuous legal representation of criminal defendants from initial appearance through case resolution not only is consistent with the Sixth Amendment’s guarantee, but also saves prosecutorial and judicial resources and instills trust in the criminal justice system. Conversely, we know that failing to provide that representation unless and until defendants are indicted undermines all of these goals—especially in cases where defendants are detained for long periods of time prior to indictment. We accordingly write to urge the Committee to adopt the proposed amendments to Rule 7.2 of the Mississippi Rules of Criminal Procedure and ensure the right to counsel during a key stage of a criminal defendant’s case.

Under the current version of Rule 7.2, an indigent defendant charged with a felony in Mississippi is provided with counsel for the initial appearance and any preliminary hearing, but that initial lawyer is allowed to abandon the representation once the defendant is bound over to a grand jury.<sup>1</sup> The defendant then waits months or even years—without counsel—until indictment.<sup>2</sup> Indigent defendants who are too poor to afford bail, or who are denied bail, spend that time in jail, with no lawyer to advocate on their behalf. Indigent defendants who are able to make bail avoid lengthy pre-indictment detention, but the lack of counsel during that time has consequences for them too. If the defendant ultimately is indicted, a new lawyer is assigned only at that point,<sup>3</sup> and that lawyer has to get up to speed on the case, investigate the facts, and quickly put together a defense to the charges that the State has spent months or years preparing.

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<sup>1</sup> See MRCrP 7.2 & cmts.

<sup>2</sup> See Sixth Amend. Ctr., *The Right to Counsel in Mississippi: Evaluation of Adult Felony Trial Level Indigent Defense Services* 65 & n.191 (2018), [https://sixthamendment.org/6AC/6AC\\_mississippi\\_report\\_2018.pdf](https://sixthamendment.org/6AC/6AC_mississippi_report_2018.pdf) (explaining that “Mississippi law does not impose any limits on the amount of time that can take”).

<sup>3</sup> See *id.* at 74.

The lack of representation for indigent defendants from the time that they are bound over to a grand jury to the time that the prosecutor decides whether to indict—what some in Mississippi have referred to as the “dead zone”—raises serious constitutional concerns. From the point that a defendant initially appears before a judge, he “finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.” *See Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). This initial appearance “marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.” *Id.* at 213. As the United States Supreme Court has explained, “a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives.” *Id.* at 210 (noting that the possibility that a prosecutor later “may choose not to seek indictment” does not negate this need).

Depriving defendants of representation during the time that the prosecutor is deciding whether to indict jeopardizes defendants’ right to “adequate representation.” *Id.* at 212. This is particularly acute when, as in Mississippi, the delay between initial appearance and indictment can be months or years. If a public defender cannot begin preparing the case until the defendant is formally indicted, exculpatory evidence may be lost, witnesses may become unreachable, and memories of events may dissipate. When defendants have continuous representation prior to indictment, by contrast, lawyers can investigate, take witness statements while events are still fresh, and prepare parts of the case in advance. If the defendant is detained solely due to an inability to pay bail, defense counsel also can file bail motions to secure the defendant’s release from detention.

In our experience, the period between initial appearance and indictment is a fruitful time for resolving cases, as early resolution during that period saves prosecutorial and judicial resources and often provides defendants with a more favorable outcome than they could expect if found guilty after a jury trial. In some cases, when investigation confirms the defendant’s innocence, defense counsel may be able to convince the prosecutor to dismiss the charges, resulting not only in justice for the defendant, but also allowing prosecutorial and investigative efforts to be put toward finding the responsible party before too much time passes. In short, for the roughly 85 percent of Mississippi defendants who rely on public defenders, the “dead zone” constitutes a tragic missed opportunity.<sup>4</sup>

To give just one example, Duane Lake spent almost three years in Coahoma County jail before he was indicted.<sup>5</sup> Because Mr. Lake could not afford a lawyer, he initially received a public defender for his preliminary hearing—but, as Rule 7.2 allows, that lawyer stopped representing him after the hearing. Mr. Lake then spent the next nearly three years in jail with no one to advocate on his behalf. When the prosecutor finally obtained an indictment, Mr. Lake received a new public defender. But by that time, some of the potential witnesses who could have helped to prove his innocence had passed away. A jury eventually acquitted Mr. Lake, but only after he had spent a cumulative six years behind bars. In his words, this long detention meant that he

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<sup>4</sup> See Erin Brady, *Many Mississippi Inmates Too Poor to Pay Bail, Lack Public Defender When Needed: Report*, Newsweek (Jan. 12, 2022), <https://www.newsweek.com/many-mississippi-inmates-too-poor-pay-bail-lack-public-defender-when-needed-report-1668721>.

<sup>5</sup> See Zhu Wu, *‘The system is not designed for you to win’: Underfunded public defender system penalizes Mississippians*, Mississippi Today (Oct. 31, 2022), <https://mississippitoday.org/2022/10/31/public-defender-system-underfunded/>.

“lost it all—[his] family, [his] marriage, [his] job, [his] career.”<sup>6</sup> He likely could have walked free much earlier—perhaps even avoiding trial—if he had had a lawyer gathering evidence, preparing his case, and communicating with prosecutors during the pre-indictment period.

Duane Lake’s case is egregious, but it is not unique in Mississippi.<sup>7</sup> So long as the “dead zone” is allowed to persist, this gaping hole in the right to counsel undermines the credibility of the justice system in Mississippi and punishes people for being poor. All defendants “need[] to get a lawyer working” during this time, “whether to attempt to avoid . . . trial or to be ready with a defense when the trial date arrives.” *Rothgery*, 554 U.S. at 210. But poor defendants in Mississippi currently cannot.

Our work as prosecutors depends on building trust with the communities we serve, and the “dead zone” undermines that trust by forcing indigent defendants—and only indigent defendants—to stand unrepresented during a crucial period in the course of their criminal cases. In our experience, the communities most affected by this kind of wealth-based inequality are often the communities where crime is more prevalent, and where prosecutors must turn for evidence and testimony. But members of these communities may not be willing to work with prosecutors if they do not believe the justice system will treat them and their loved ones fairly. Because of the “dead zone,” indigent defendants are left with no one to advocate on their behalf while the State spends months or years preparing the case against them, undermining the legitimacy of the criminal justice system and the credibility of those entrusted to prosecute crimes within it.

The proposed amendments to Rule 7.2 would put an end to Mississippi’s “dead zone” problem and would go a long way towards making the State’s justice system fairer, more balanced, and better equipped to do justice in felony cases involving indigent defendants. We urge the Committee to adopt the amendments.

Sincerely,



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Georgetown University Law Center;

Former Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for National Security, U.S. Department of Justice; former Assistant U.S. Attorney and Chief, Criminal Division, U.S. Attorney’s Office for the District of Columbia

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<sup>6</sup> See Jerry Mitchell, ‘Dead zone’ leads innocent man to spend six years behind bars, Mississippi Ctr. for Investigative Reporting (Jan. 12, 2022), <https://www.mississippicir.org/news/dead-zone-leads-innocent-man-to-spend-six-years-behind-bars>.

<sup>7</sup> See, e.g., Warren Kulo, *Autistic Gautier teen spent 270 days in county jail without ever being indicted—part of statewide problem*, Gulflive.com (Jun. 20, 2019), <https://www.gulflive.com/news/2019/06/autistic-gautier-teen-spent-270-days-in-county-jail-without-ever-being-indicted-part-of-statewide-problem.html>; Kayode Crown, *Lost in the ‘Dead Zone’: Thousands Languish in Mississippi Jails Without Lawyers*, Mississippi Free Press (Jan. 13, 2022), <https://www.mississippifreepress.org/19658/lost-in-the-dead-zone-thousands-languish-in-mississippi-jail-without-lawyers>.

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