

October 12, 2020
Kansas Criminal Justice Reform Commission
BIDS Report on the Status of Public Defense in Kansas

Testimony of
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Dear Chairman Bennett, Senator Haley, Senator Wilborn, Representative Finney, Representative Owens, and Members of the Committee,

Approximately eighty-five percent of criminal adult felony cases in the state of Kansas require appointed counsel. The Board of Indigents' Defense Services (BIDS) provides all of those appointed counsel through its public defense systems: either through the Kansas public defender offices or through the BIDS assigned counsel program.

Both of these systems are currently plagued by a lack of resources—staffing, funding, basic infrastructure—to the point where BIDS is struggling to provide the constitutionally and statutorily required effective counsel to which our clients are entitled under the Sixth Amendment to the United States Constitution, the Kansas Constitution, and our statutory provisions.

Some BIDS Facts

In fiscal year 2020, BIDS attorneys completed 26,237 cases.¹ Our public defenders completed 11,456 cases and our assigned counsel program completed 14,781 cases. In FY 2020, the average cost of a public defender case was \$818 while the average cost of an assigned counsel case was \$993. This means that in FY 2020, the same case being

¹ BIDS FY 2020 caseloads were off by around 20% compared to FY 2019 in large part due to the COVID-19 pause of the court system for almost the entire 4th quarter of the year, along with an historic number of public defender office case refusals due to caseloads and turnover.

handled by an assigned counsel attorney was, on average, \$175 *more expensive* than the same case if it were handled by a public defender.

It's no secret that over the last few years, BIDS has received some attention as a result of its troubles.² In FY 2019, our turnover rate included reports that 1 out of 4 public defenders were leaving our system. While our FY 2020 turnover rate has fallen to 15% agency-wide, that turnover rate is still too high for us to sustain long term due to the turnover we've already experienced for the last several years. Around 60% of our public defenders have five years or less of experience as attorneys. Approximately 38% have two years of experience or less.

Although 81% of our employees report that they believe in the work we do and listed that as the reason they began working in public defense, in a recent agency wide employee survey, 55% of our employees reported that they have considered leaving their public defender offices *within the past year*.³ When asked to name the single biggest issue that negatively impacts their well-being at work, the top three specific responses were workload (24.7%), poor pay and/or lack of raises/promotions (22.3%), and compassion fatigue and/or burnout (15.2%).

In short, we are literally driving away mission-driven, dedicated employees from public defense work.

The truth is, our attorneys, support staff, and assigned counsel are overworked, underpaid, and under resourced. While this may not be news to many of you who regularly work in our criminal legal system, it is something that should be of concern to everyone on this committee. Because, with 85% of adult criminal felonies in Kansas requiring appointed counsel, BIDS' problems are not just our problems, they are the problems of the entire Kansas criminal legal system.

Overworked

The 1973 National Advisory Commission on Criminal Justice Standards and Goals for the Defense set defense attorneys workloads at **no more than 150 felonies per year**, no more than 400 misdemeanors per year, and no more than 25 appeals per year.⁴ More recently, in 2015, the National Association for Public Defense issued workload

² Ujjiyediin, Nomin, *One In Four Kansas Public Defenders Quit Last Year, Leaving Agency 'In Crisis,'* KCUR, published April 8, 2019. <https://www.kcur.org/government/2019-04-08/one-in-four-kansas-public-defenders-quit-last-year-leaving-agency-incrisis>; Ujjiyediin, Nomin, *Kansas Public Defender Agency Still 'On Fire', Struggling to Keep staff,* KCUR, published March 11, 2020. <https://www.kcur.org/government/2020-03-11/kansas-public-defender-agency-still-on-fire-struggling-to-keep-staff>

³ Summer 2020 BIDS Well-Being Committee Employee Well-Being Survey

⁴ See NAC Standard 13.12

guidelines that called for public defense agencies to consider that NAC 150 felonies standard as the “absolute maximum” number of cases an attorney can ethically handle because of the significant changes in criminal defense case standards since that cap was enacted in 1973.⁵

In FY 2020, 8 of BIDS’ 11 trial offices substantially exceeded that absolute maximum workload standard.⁶ Of the three trial offices that managed to stay at or just under that 150 felonies per attorney, per year maximum, one of those offices, our Third Judicial District Public Defender Office had to refuse new case appointments for 51.5% of the year while our Sedgwick County Conflicts Public Defender Office had to refuse new case appointments 36.4% of the year to stay under that limit.

Our trial public defender average caseload in FY 2020 was 205 cases per attorney, per year. What that means is that an attorney working 40 hours a week, 52 weeks out of the year would have 2,080 hours to dedicate to their cases.⁷ With an average of 205 cases per year, that means our average trial attorney has just over 10 hours *per year* to work each case from start to finish.

That is unacceptable under any measure of professional standards.

Of course, when our public defenders refuse new case appointments in order to control their caseloads, those cases are offloaded to our more expensive assigned counsel program. Unfortunately, our assigned counsel panels frequently lack enough attorneys, or enough experienced attorneys to handle the ever increasing workloads they are being asked to shoulder.

Caseload overload isn’t just an employee retention problem, it’s also an ethical problem. The Kansas Professional Rules of Conduct, Rule 226, 1.3 Diligence, comment 1 states “A lawyer’s workload should be controlled so that each matter can be handled adequately.” This is because excessive caseloads, by their very nature, interfere with an attorney’s competency and diligence in representing their clients. More than that, it’s a problem that opens up the state to a variety of expensive post-trial litigation including

⁵ NAPD Workload Position Paper https://www.publicdefenders.us/files/NAPD_workload_statement.pdf

⁶ In FY 2020, the Northeast Kansas Conflicts Office (Topeka) averaged 170 cases per active atty, the Salina Regional Defender Office (Salina) averaged 262.25 cases per active attorney, the 10th Judicial District Public Defender (Olathe) averaged 204.75 cases per active attorney, the Reno County Regional Defender (Hutchinson) averaged 192 cases per active attorney, the Sedgwick County Public Defender Office (Wichita) averaged 278.16 cases per active attorney, the Western Regional Defender Office (Garden City) averaged 194.5 cases per active attorney, and the Southeast Regional Defender Office in Chanute averaged 239.67 cases per active attorney while the Southeast Regional Defender Office in Independence averaged 216.5 cases per active attorney. Only the Third Judicial District Public Defender (Topeka) at 150.33, the Sedgwick County Conflicts Public Defender (Wichita) at 143, and the Northeast Regional Defender Office in Junction City at 144.36 cases per active attorney per year managed to stay below that 150 felony threshold.

⁷ With no vacations, no sick leave time off, working through holidays, never late and never leaving early.

viable claims of ineffective assistance of counsel, wrongful convictions lawsuits, potential legal malpractice claims, and protracted litigation over the constitutional adequacy of the public defense system as a whole.

But most importantly, outrageous caseloads impede our ability to provide our core agency mission: to give our clients an effective criminal defense. Our lack of sufficient funding to support staffing levels adequate to handle the caseloads we experience on a daily basis results in a fundamental failure to serve our clients and our core mission.

Underpaid

Years of a lack of sufficient funding and lack of political support for pay equity issues and regular raises has left our public defenders and assigned counsel shockingly underpaid. This has contributed to our agency turnover rates and our difficulty filling our appointed counsel lists.

The American Bar Associations Ten Principles of a Public Defense Delivery System, explicitly calls for parity between defense counsel and the prosecution with respect to resources and that defense counsel be included as an equal partner in the criminal legal system. At its most fundamental level, that parity principle should be applied to pay between county attorneys and public defenders.

A recent review of prosecutor salaries across the state revealed an unsurprising but concerning trend: that while starting salaries of new county attorneys and new public defenders were somewhat comparable, once those attorneys gained experience, prosecutor salaries quickly outpaced public defender salaries by a significant amount. For example, the top paid trial public defenders in three of our largest judicial districts are paid 23% to 50% below the salaries of comparable prosecutors in those districts.⁸

Those contrasts are even more stark compared with other government agencies in the same jurisdictions. For example, our top paid public defenders, with as much as 35 years of trial experience make less money than what an Assistant Federal Defender with little to no experience can make one block down the street here in Topeka.⁹ And those pay disparities are not limited to our public defenders.

⁸ In Shawnee County, our experienced defender is 23% below the equivalent prosecutor pay. In Sedgwick County, our experienced defender is 34% below the equivalent prosecutor pay. In Johnson County, our experienced defender is 50% below the equivalent prosecutor in pay.

⁹ Currently, none of our public defenders make over \$100,000 a year. In FY 2020, an Assistant Federal Defender with 0-3 years of experience who substantially exceeds expectations on their merit review could make as high as \$109,922.

Our increased reliance on our assigned counsel program has also put the spotlight on our low assigned counsel hourly rate, which is currently statutorily capped at \$80 per hour. That rate is now only 36% of the current going market rate for private counsel.¹⁰

Even if we weren't suffering from caseload overload, these pay disparities in and of themselves would be sufficient reasons for many public defenders and assigned counsel to leave our system.

Under Resourced

Even more than just caseloads and compensation issues, our agency suffers from a chronic lack of resources.

We lack a formal training division or dedicated training staff focused on teaching the wide variety of on-going defense specific continuing legal education for our attorneys, paralegals, investigators, and support staff from both our public defense offices and assigned counsel participants.

We lack sufficient information technology infrastructure to meet our needs. We are unable to comply with IT security audit findings because of a lack of funding to purchase the necessary equipment. We lacked resources and continue to struggle to provide our employees sufficient equipment to effectively remote work and conduct remote hearings and client visits during the pandemic. We currently process all of our assigned counsel attorney vouchers on paper because we have yet to be able to modernize our voucher system. We also lack a modern case management system and instead rely on a convoluted combination of access databases, outdated storage methods, and labor intensive calendaring procedures to keep our track of our cases and data.

We also lack sufficient staff to support our offices. We currently administer our entire 35 million dollar state agency with 200 employees, over 350 assigned counsel, hundreds of experts, witnesses, and private investigators spread out amongst 31 judicial districts with a grand total of eight full time employees in our administration office. That lack of sufficient support staff extends out to our regional public defender offices as well. Our recent assessment of appropriate staff to public defender ratios revealed that in addition to the 71 additional public defenders that we calculate we will need to address our more normal fiscal year caseloads, we calculated that we would need an additional 85 legal assistants (we have 23), 114 investigators (we have 15), 85 administrative support staff (we have 25), and 114 social workers (we have 1).

While state government is always on an endless quest to cut down bureaucracy to save money, there is a point at which a lack of necessary administrative staffing and

¹⁰ In 2017, a KBA report listed the average hourly market rate in Kansas at around \$225 per hour.

infrastructure actually ends up costing the state government *more* money because of inefficiencies created by an inability to modernize and sufficiently administer all of the agency's necessary functions.

Impacted by COVID-19

Unsurprisingly, the coronavirus pandemic has only taken all of these “normal” problems and exacerbated them. Not only has it put a greater strain on our already insufficient resources, it has also highlighted the fact that during times of great societal difficulties, the criminal legal system, and in turn, public defense, is almost always on the front lines of these struggles. Whether it is renewed focus on racial justice and equality in the eyes of the law, or the fallout from the on-going pandemic, the people who work in public defense are feeling those increased pressures acutely.

During the last quarter of FY 2020 and now into FY 2021, the Kansas courts ground to a slow crawl, saddling our already overloaded public defenders and assigned counsel with a steady influx of new cases while largely preventing much movement on their older pending cases, thereby creating a bottleneck in our system and further extending our caseload problems. Furthermore, the ongoing daily dangers our employees face while attempting to do their jobs zealously and ethically representing their clients in a meaningful way during pandemic-related outbreaks in the county jails and KDOC prison system, along with the difficulties reopening our courts safely have only added to the chronic stress felt by everyone throughout the system.¹¹

It's obvious to all, including to BIDS, that the loss of state revenues as a result of the pandemic will have a huge impact on the state general funds that we, along with so many others depend. But there is no way to sugar coat the hard reality that any plan to address our chronic staffing issues, substantial caseload problems, and our compensation and lack of resources issues is going to require an additional significant financial investment in our agency above and beyond our currently allotted budget.

The Solution

Obviously, this is a difficult time to have a productive conversation about our agency's very real needs in light of the very real budget shortfalls that the state is facing. However, the constitutional right to counsel applies to all poor Kansans charged with

¹¹ Nozicka, Luke, *Kansas City Region is home to two of the biggest coronavirus clusters in the U.S.*, The Kansas City Star, published May 12, 2020. <https://www.kansascity.com/news/local/article242681591.html> ; *Department of Correctional locks down Hutchinson Correctional Facility unit due to COVID-19 outbreak*, KMBC 9 News, Published August 12, 2020. <https://www.kmbc.com/article/kansas-department-of-corrections-locks-down-hutchinson-correctional-facility-unit-due-to-covid-19-outbreak/33587499>; Stavola, Michael, *First results in on massive inmate COVID-19 testing at Sedgwick County Jail*, The Wichita Eagle, Published August 13, 2020, <https://www.kansas.com/news/coronavirus/article244936407.html>

felonies, regardless of the state’s fiscal outlook or a once-in-a-lifetime pandemic’s impact on state revenues.

We’ve taken a long, hard look at our agency’s struggles, received feedback from a variety of sources including our own employees, and have proposed a three phase plan to address our fundamental needs by moving our Kansas public defense system towards a more effective and cost-efficient, client-centered holistic defense model.

A recent study of holistic defense models found that holistic defense was able to prevent incarceration, reduce the likelihood of a prison sentence, reduce the actual prison-sentence lengths, and save taxpayers millions of dollars in inmate housing costs alone, all without harming public safety.¹²

In FY 2022, our efforts to move closer to a holistic defense model includes funding for additional public defenders and public defense support staff, funding for an updated compensation plan that attempts to provide better pay parity for defense counsel, a request to fund an increased assigned counsel hourly rate, and funding for a BIDS training division and other basic infrastructure needs. In future fiscal years, that plan includes fully staffing our public defender offices, additional adjustments to our assigned counsel rate, ongoing efforts to maintain competitive compensation plans, among a variety of other programs and concepts aimed at permanently stabilizing our system while providing constitutional effective and cost-efficient client-centered services. I look forward to sharing some of those details with you during my live presentation.

Conclusion

The chronic underfunding of the public defense system in Kansas is not just a BIDS problem. It’s a criminal legal system problem. And everyone, defense counsel, defense clients, prosecutors, victims, police, and the courts all suffer the expensive consequences of it. That’s why that fact I mentioned at the beginning of my testimony—that eighty-five percent of adults charged with felonies in Kansas qualify for appointed counsel—matters. Because the entire criminal legal system hinges on public defense being adequately funded and resourced in order to function.

In other words, there is no Justice without us.

I appreciate your time today and look forward to answering your questions about our current situation and proposed solutions.

¹² Holistic Representation: An innovative approach to defending poor clients can reduce incarceration and save taxpayer dollars—without harm to public safety, https://www.rand.org/pubs/research_briefs/RB10050.html

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