

October 6, 2020  
Legislative Budget Committee  
BIDS Report on the Status of Public Defense in Kansas

Testimony of  
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Dear Chairperson and Members of the Committee,

Eighty-five percent of criminal adult felony cases in the state of Kansas require appointed counsel. The Board of Indigents' Defense Services (BIDS) provides that counsel through two public defense systems: the Kansas public defender offices and the 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.

Last spring, BIDS was asked to submit a report to this committee regarding our staffing issues. At the time we were reporting high turnover rates, difficulties recruiting candidates for positions in our agency, and chronically unfilled positions. This committee asked not just for an assessment of our problems, but also a plan to move forward with some permanent solutions to these issues. The report that we submitted to this committee last week is the stark assessment of those problems and the roadmap forward that I believe will have a huge positive impact not just on our public defense system, but on the entire Kansas criminal legal system as a whole.

*The Staffing Problem*

Our report goes into detail about the staffing issues we are currently facing in our system. Highly summarized, those include an ongoing 15% agency turnover rate in our public defender offices, a chronic understaffing of our offices compared to national

standards based on our caseloads, as well as some difficulties filling our assigned counsel appointments lists.

Our turnover rate, while lower compared to past years, is still problematic due to the consistently high turnover that we've experienced over those past several years. We've lost so many experienced defenders and defense support staff recently that even a comparatively low turnover rate now is still an ongoing loss that we cannot continue to absorb without serious consequences to our ability to continue handling cases. This is complicated further by our suppressed salaries, which lack parity with other participants in the criminal legal system, and not only prevent us from hiring back in similarly experienced personnel to those that we've lost, but also continue to contribute to our turnover problems.

Furthermore, our caseloads, even if we were fully staffed within our current FTEs, would still require an additional 71 public defenders just to meet caseload standards that are almost fifty years old. To meet more modern caseload considerations, BIDS would likely need closer to 216 public defenders or more, on top of the current 123.5 public defenders we have now, to have something comparable to objectively reasonable modern caseloads.

As it stands right now, in FY 2020, our trial public defenders only had an average of approximately 10 hours *per year* to spend on each of their cases.<sup>1</sup> That is unacceptable.

These staffing issues don't stop at our public defenders. Based on the national staffing recommendations issued by the National Association for Public Defense and our anticipated needed level of public defenders, we could need upwards of 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).

And our staffing issues are not limited to our public defender offices. Our assigned counsel program, suffering from low rates of pay and increasingly higher caseloads because of the issues our public defender offices are facing, is also suffering from a shortage of qualified and willing attorneys to serve on appointments panels in many areas of the state. We regularly field phone calls in our administrative office from judges who need help locating attorneys to cover cases in their jurisdictions beyond those available on their local appointments lists.

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<sup>1</sup> Average caseload in FY 2020 for our trial public defenders was 204 cases per attorney. At 40 hours per week, 52 weeks per year (2,080 hours to work), that would average out to roughly 10 hours per case, per year.

## *The Solution*

In other words, our staffing issue isn't hard to pin point. Furthermore, it also is not hard to figure out how to solve. We need additional staffing to handle the cases that we have and additional funding to support our salary needs and our assigned counsel hourly rates to keep the attorneys we have doing BIDS work and to entice more to join us. In short, BIDS is in need of additional funding beyond its traditional budget in order to effectively address any of these issues in a meaningful way. We've set out in our report what some of that additional funding might look like and how it specifically would impact our caseloads, our staffing, and our mission to provide constitutionally effective counsel to our clients.

Most importantly, particularly now in light of our state revenue woes as a result of the pandemic, we've also set out some of the ways in which we believe those additional investments in a more client-centered, holistic public defense system model will have downstream positive impacts on not just our agency, but on the Judiciary, the Department of Corrections, and a host of other stakeholders in our criminal legal system.

Of course, as with everything else in the state, however, this issue of additional funding along with our staffing problems have been determinately affected by COVID-19.

## *COVID-19 Pandemic*

As a result of the COVID-19 pandemic and concerns about the spread of the virus through close quarter interactions, the Kansas courts largely shutdown last spring to all but the most emergent matters.

Practically speaking, that also meant that already outstanding cases could not continue to be processed through our court system. But it also did help, at least initially, stem the tide of incoming cases. At that point, our biggest agency problem was a lack of infrastructure needed to support this sudden and unprecedented demand for our employees to engage in remote working, remote court appearances, and remote client contact.

As we struggled over the spring and summer to address those infrastructure issues, it became clear that cases were continuing to be charged. Our already overloaded public defenders and appointed attorneys continued to receive appointments on new cases while

not being able to effectively finish up work on their already open cases. This has not only created an increasingly large bottleneck in our court system, it's also further exacerbated our staffing and caseload problems on both sides of our public defense system.

It's only been relatively recently that the Kansas Supreme Court has begun approving plans for our district courts to reopen with pandemic appropriate restrictions. So while some cases are starting to move forward slowly, this bottleneck and the resulting pressure on our public defense system is going to continue to be a problem for the foreseeable future, long after our society returns to some semblance of normalcy.

### *Conclusion*

When public defender offices cannot operate as they are intended to, because of high caseloads and low staffing levels, a wave of consequences flow from that throughout the entire criminal legal system.

When defense counsel are not available or are not prepared to move cases forward because they don't have the funding or the help they need to investigate and prepare their cases, then judges and prosecutors cannot keep their dockets moving in a productive manner and victims are delayed closure.

When defense counsel are unprepared or unable to live up to their professional obligations because of underfunding and lack of resources, they may make mistakes. And those mistakes cause further costly litigation such as ineffective assistance of counsel claims, malpractice suits, and wrongful conviction claims, the costs of which the state must eventually shoulder. Convictions get reversed, new trials have to be held, and the entire process starts all over again.

In short, 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.

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