

KANSAS PUBLIC DEFENSE WORKLOADS REPORT

PART ONE: CRIMINAL DEFENSE IN CRISIS



THE KANSAS STATE BOARD OF INDIGENTS' DEFENSE SERVICES | DECEMBER 2023



EXECUTIVE SUMMARY

In Violation of the Sixth Amendment

Kansas provides constitutionally deficient criminal defense services in adult felony-level cases.

That is, as a State, we are failing to meet the minimal staffing demands, under current ethical and professional norms, to provide reasonable assistance of counsel to each adult facing felony charges in Kansas, as mandated by the Sixth Amendment, Section 10 of the Kansas Constitution Bill of Rights, *Strickland v. Washington*, and *Gideon v. Wainwright*.¹

A significant investment in staffing, salaries, and other resources is necessary to assist The Kansas State Board of Indigents' Defense Services and the State of Kansas in its ability to meet these needs now and in years to come.

New Workload Standards

In September 2023, the American Bar Association's Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID), together with The Rand Corporation (RAND), The National Center for State Courts (NCSC), and the Law Offices of Stephen Hanlon, published a new National Public Defender Workload Study (hereinafter referred to as the "Study").²

This collaborative Study established new national standards for public defender workloads based on a well-developed and nationally accepted methodology, rooted in professional, ethical standards and the constitutionally minimum requirements for public defenders to provide reasonable assistance of counsel to each individual they represent.

The new national public defender workload standards outlined in the Study are as follows:

Case Type	Case Weight (Hours per Case)	Sample Annual Caseload
Felony- High- LWOP	286	7
Felony - High - Murder	248	8
Felony - High - Sex	167	12
Felony-High-Other	99	21
Felony - Mid	57	36
Felony - Low	35	59
DUI - High	33	63
DUI - Low	19	109
Misdemeanor - High	22.3	93
Misdemeanor - Low	13.8	150
Probation or Parole Violations	13.5	154

¹ *Strickland v. Washington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² https://www.rand.org/pubs/research_reports/RRA2559-1.html

In comparison, in FY 2023, the average active public defender had an average of approximately 12 hours to dedicate to each case, regardless of case type.³

The Clock Is Ticking

The Board of Indigents' Defense Services has been openly discussing the severe staffing shortages and workload issues in Kansas public defense with various stakeholders across Kansas since the issuance of our 2020 Report on the State of Public Defense in Kansas.⁴

However, the implementation of these new nationally recognized workload standards for trial-level defense officially puts all state governments, including ours here in Kansas, on notice that there is no reasonable, rational, or defensible excuse to continue underfunding and under-resourcing our constitutional obligation to provide reasonably effective counsel to each individual charged with an adult felony.

While this crisis was not created overnight and will take some time to correct, with the issuance of this Study and its clarity in defining what constitutes reasonable effective counsel under the Sixth Amendment, the clock on the time to correct this crisis is now officially ticking. A failure to take substantive actions in a reasonable timeframe to address the staffing crisis in public defense may expose Kansas to the same type of systemic litigation regarding the constitutionality of our state public defender system as has been seen in other states across the U.S..⁵

Kansas Public Defense Attorney and Staffing Shortages

As explained in greater detail below, based on the new National Public Defense Workload Study Standards, the Board of Indigents' Defense is estimating that Kansas needs the following approximate number of trial-level attorneys for the State to comply with the Sixth Amendment's mandates in every adult felony case:

Public Defender Covered Jurisdictions:	400 Full-Time Attorneys Needed ⁶
Non-Public Defender Covered Jurisdictions:	216 Equivalent of Full-Time Attorneys Needed ⁷

BIDS currently has approximately 123 full-time trial-level public defenders in Kansas.

This means that for areas covered by a public defender, BIDS needs over THREE TIMES the number of full-time employee public defenders to adequately staff current caseloads in those jurisdictions at the base level constitutional standard of reasonably effective counsel.

³ In FY 2023, active attorneys averaged 169 cases each. Divided by 2,080 hours, that means that even if an attorney took no vacation, sick leave, holidays, lunches, and dedicated every working hour to case specific work, that they still each only had approximately 12 hours to work each case.

⁴ The Board of Indigents' Defense Services, A Report on the Status of Public Defense in Kansas, September 2020.

<https://www.s bids.org/publications-media-inquiries>

⁵ See, <https://blog.idahoreports.idahoptv.org/2023/12/01/lawsuit-over-idahos-public-defense-system-back-in-court/>; <https://www.jsonline.com/story/news/2022/08/24/wisconsin-sued-over-lack-defense-lawyers/7874165001/>; <https://wsac.org/washingtons-counties-file-suit-against-the-state-of-washington/>; <https://themainemonitor.org/justice-rejects-settlement-to-overhaul-indigent-defense-in-maine/>; <https://www.opb.org/article/2023/11/09/oregon-public-defender-shortage-supreme-court-law-courts-crime/>

⁶ (574 FTE for initial felony filings + 42 FTE for probation violations) x 65% = 400 FTE

⁷ (574 FTE for initial felony filings + 42 FTE for probation violations) x 35% = 216 FTE (or FTE equivalent attorneys accepting BIDS appointment cases).

But simply hiring more public defenders is not enough. The new National Workload Standards assume that each attorney is supported by an adequately staffed office. Based upon the National Association for Public Defense Staffing Ratio recommendations, BIDS' current attorney and staffing shortage ratios look like this:

Calculations of Shortages Based on Current Trial Level Staffing

Positions	Projected Needed FTEs	Current FTE	Add'l FTE Needed
Trial Attorneys	400	123	277
Investigators	134	23	111
Legal Assistants	100	35	65
Mental Health/Social Workers	134	1	133
Admin Specialists	100	19	81
Total New trial level FTE Needed:			667

A Solution Requires Increasing Capacity and Decreasing Demand

While increasing staffing across all of BIDS' trial-level public defender offices and better supporting our privately appointed attorneys is necessary, increased staffing to meet caseloads cannot be the only piece of the solution.

Efforts to increase the number of law school graduates heading into public defense through collaborations with regional law schools, higher recruitment-ready salaries, and better long-term salary support will all aid BIDS' ability to recruit and retain new employees. However, any serious efforts to meet these constitutionally-based workload standards must also include a serious discussion of decreasing the demand for defense services in Kansas.

What those efforts to decrease the demand for felony defense services may come to look like in Kansas is necessarily a larger conversation beyond the scope of this report. However, we hope that the issues brought to light in this report about staffing and the demands of cases on our public defense system will spur a larger dialogue between the Governor, the Legislature, and other legal system stakeholders on what criminal reforms may be necessary and possible here in Kansas.

A Commitment to Steady Progress Toward a Solution

At the end of the day, what BIDS hopes to achieve with this report is a commitment from the Governor, the Legislature, and the Judiciary to work steadily toward a timely and progressive solution to adequately staff and resource our Kansas Public Defense System so that each individual charged with an adult felony in Kansas is provided, at the very least, the minimum reasonable assistance of counsel as required by our Federal and State Constitutions.

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INTRODUCTION: A WATERSHED MOMENT IN CRIMINAL DEFENSE

How many criminal defense attorneys are needed to provide constitutionally adequate representation to all indigent people charged with adult felony-level cases in Kansas each year?

This is a deceptively simple question. The answer, however, is not simple.

This is a complex question that has caused significant discussion among criminal defense experts across the United States for the better part of the last 50 years. Thankfully, over the last 15 years, criminal defense experts from across the country have come together to develop and apply a methodology for answering this question solidly rooted in constitutionally ethical standards of representation.

The **National Public Defense Workload Study**, released in September 2023, now provides the definitive methodology for each state to begin answering that basic question of how many defense attorneys are needed to adequately represent every indigent person charged with a crime.⁸

This collaborative Study, by The RAND Corporation, the National Center for State Courts (NCSC), the American Bar Association Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID), and the Law Office of Stephen Hanlon, represents a truly watershed moment in American Criminal Defense, as it sets out workload recommendations, by sentence severity, based on constitutional standards of representation, ethical obligations, and the professional standards expected of criminal defense counsel.

Using these workload recommendations, public defense systems across the United States can now use case data to calculate how many hours of work are needed to meet these baseline average standards, and, from there, calculate how many full-time qualified defense attorneys are needed to work those hours.

From there, public defense systems can use the National Association for Public Defense Staffing ratio recommendations to calculate, based on the number of attorneys needed, how many non-attorney staff (e.g. legal assistants, investigators, etc.) are also required to provide constitutionally reasonable representation in every case. This gives public defense administrative bodies such as the Kansas State Board of Indigents' Defense Services, as well as other stakeholders responsible for funding and resourcing the constitutional provision of defense counsel in Kansas, a far more specific and nuanced understanding of what it will take to meet our constitutional obligation to provide counsel for indigent client's charged with adult felony crimes.

Make no mistake: few, if any, public defense systems across the United States are currently meeting these updated constitutional standards. However, this new National Public Defense Workload Study has now put all of us—Kansas included—on notice of just how far off we are from providing the constitutionally

⁸ Available at: https://www.rand.org/pubs/research_reports/RRA2559-1.html.

required representation in each criminal felony case in Kansas. The continued failure to adequately address our criminal defense crisis in Kansas is no longer an option. The clock is now ticking. Failure to take substantive action in a reasonably timely manner runs the risk of exposing Kansas to the likelihood of systemic litigation over the constitutionality of our public defense delivery system.

It is our responsibility to take these standards seriously, to fully appreciate the enormity of the work we have ahead of us, and to make a clear plan forward to systemically address these shortages. This report is the first part of a two-part report from The Kansas State Board of Indigents' Defense Services to begin addressing the workload issues facing our current Kansas Public Defense System.

In this, **Part One** of the Report, we set out the background of the 2023 National Public Defense Workload Study, the group of studies underpinning the Study, provide a summary of the updated 2023 workload recommendations and apply those new workload standards to Kansas. That is, Part One sets out our calculations for how many criminal defense attorneys and staff it will take for Kansas to meet current caseloads with constitutionally effective criminal defense counsel in each adult felony-level case. It will also set out how short we are of meeting those needs.

In **Part Two**, aimed to be released in mid-2024, we will provide a clear roadmap for how the Kansas Board of Indigents' Defense Services, The Governor, and The Legislature can steadily work to meet those needs over the coming years. Our shortages of defense counsel were not created overnight and it will take some time to sufficiently address these shortages. Part Two of this report will help provide all stakeholders looking for a solution to this issue with a step-by-step guide for how to systemically meet these needs in a relatively timely manner.

The State of Kansas' failure to provide constitutionally adequate criminal defense representation is no longer acceptable when liberty, livelihoods, and unquantifiable collateral ramifications for Kansans are at stake.

CONSTITUTIONAL OBLIGATIONS

The fundamental right to the assistance of counsel when accused of a crime was enshrined as part of the fabric of our nation when the founding fathers included the Sixth Amendment in the United States Constitution. Among other stated rights, The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense."⁹

In 1963, the landmark United States Supreme Court case of *Gideon v. Wainwright*, 372 U.S. 335, found that the Sixth Amendment obligation to provide counsel was a fundamental right and applied it as an obligation to the states through the Fourteenth Amendment. A unanimous Supreme Court declared that:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.¹⁰

⁹ U.S. Constitution. amend. VI, <https://constitutioncenter.org/the-constitution/amendments/amendment-vi>

¹⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

However, since the *Gideon* decision in 1963, states have wrestled with what, exactly, their obligation to provide that counsel requires of them.

In Kansas, we have our own state constitutional protection of the right to counsel. Section 10 of the Kansas Constitution Bill of Rights provides, “In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel.”¹¹

In 1984, the United States Supreme Court further articulated the constitutional requirement of counsel when it held in *Strickland v. Washington* that “[t]he Sixth Amendment right to counsel is the right to the effective assistance of counsel.”¹² This is the federal standard for reviewing constitutionally effective counsel in Kansas today.¹³

6TH AMENDMENT ETHICAL AND PROFESSIONAL OBLIGATIONS

There are several widely accepted professional guidelines for what it means to effectively represent someone accused of a crime under the Sixth Amendment.

Kansas has adopted the Kansas Rules of Professional Conduct (KRPC) for attorneys, which is based on the ABA’s Model Rules of Professional Conduct. Specifically, KRPC Rule 1.1 on Competence states, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”¹⁴ Comment 1 to KRPC Rule 1.3 on Diligence states, “A lawyer’s workload should be controlled so that each matter can be handled adequately.”¹⁵

In short, the professional ethical rules of conduct that apply to all attorneys in Kansas require, unequivocally, that attorneys allow not only sufficient time to develop the knowledge and skills necessary to represent each client but also that they allow sufficient time to be able to reasonably prepare for that representation, including through the method of controlling their caseloads to allow enough time for each case to be handled properly. This standard applies to any attorney in any case. There are no exceptions from these obligations for criminal defense attorneys, nor, specifically, appointed counsel or public defenders.

Another overlay of professional expectations for criminal defense counsel specifically includes the ABA’s Criminal Justice Standards, including the Standards for the Defense Function (Defense Function Standards).¹⁶ Specifically, Standard 4-1.8 addresses appropriate workloads, saying, “Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client’s interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel’s existing matters.”¹⁷ The ABA also provides

¹¹ See *State v. Lawson*, 296 Kan. 1084, 1093 (2013) (Right to counsel guaranteed by state constitution and statutes as well as federal constitution.)

¹² *Strickland v. Washington*, 466 U.S. 668, 669 (1984) (emphasis added).

¹³ See *State v. Bilbrey*, 317 Kan. 57, 64 (2023) (discussing the Strickland standard as part of an ineffective assistance of counsel claim).

¹⁴ <https://www.kscourts.org/KSCourts/media/KsCourts/Rules/RULE-1-1.pdf?ext=.pdf>

¹⁵ <https://www.kscourts.org/KSCourts/media/KsCourts/Rules/RULE-1-3.pdf?ext=.pdf>

¹⁶ https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/

¹⁷ ABA Defense Function Standard 4-1.8(a).

significant additional guidance on defense standards in the *Ten Principles of a Public Defense Delivery System*, the *Eight Guidelines of Public Defense Related to Excessive Workloads*, and the *ABA Standards for Criminal Justice: Providing Defense Services*.¹⁸

Another guideline includes the National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Defense Representation.¹⁹ This includes Guideline 1.3, General Duties of Defense Counsel, which states, “Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge, and experience to offer quality representation to a defendant in a particular matter.”²⁰

The common factor underlying each of the aforementioned guidelines is that to sufficiently perform all of the basic duties and tasks required of defense counsel to provide constitutionally effective representation, counsel must have sufficient time to perform these duties.

Excessive workloads deprive attorneys of sufficient time to provide constitutionally required effective representation.

HISTORY OF NATIONAL WORKLOAD STANDARDS

The workload standards that most criminal-legal-system-stakeholders in Kansas likely recognize from historic conversations about public defender workloads are the long-standing, and, frankly, widely loathed 1973 NLADA/NAC standards.

In 1973, the National Advisory Commission on Criminal Justice Standards (NAC) established workload standards for public defenders, conveying that public defense caseloads should not exceed more than 150 felonies per year, not more than 400 misdemeanors, not more than 200 juvenile or mental health act cases, and not more than 25 appeals per year.²¹ These standards were used by public defenders across the United States to assess workloads for the better part of 50 years.

However, from the start, these standards were highly problematic.

They were not based upon any identifiable or agreed upon professional methodology for how to assess workload. They were not nuanced to the type of cases involved, essentially assessing high-level felony cases like murders equivalent to low-level felony cases such as theft, even though higher severity-level cases typically require significantly more time to investigate and defend.

¹⁸ https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/standards-and-policies/

¹⁹ <https://www.nlada.org/defender-standards/performance-guidelines/black-letter>

²⁰ NLADA Defender Standards Guideline 1.3(a).

²¹ NAC Standard 13.12 Workload of Public Defenders.

Furthermore, these 1973 standards certainly have not been able to account for the substantial development of forensics techniques and the sheer volume of body camera and security camera footage that now inundates large numbers of cases as science and technology have developed, all of which has added a substantial amount of time needed to adequately investigate, research, and litigate criminal defense cases.²²

Since the NAC standards were promulgated in 1973, a national consensus was reached that the NAC set workload standards at unreasonably high levels and failed miserably to account for necessary considerations when assessing workloads and the effect those workloads have on the quality of representation each client receives. As a result, a nationwide effort got underway to determine a better way to assess public defender workloads.

MODERN PUBLIC DEFENSE WORKLOAD STUDIES: THE USE OF DELPHI METHODOLOGY

While the 1973 NAC standards lacked an evidentiary or scientific methodology, 17 modern state-specific public defense workload studies conducted since 2005 have created a robust, data-backed framework for assessing public defender workloads.

Those 17 studies all developed recommended **case weights** (average attorney time needed per case) for specific **case types** (a defined category of cases with similar complexity), usually with a breakdown of time needed for individual components of representation, or **case tasks** (e.g. client communication, attorney investigation, or motions writing). The studies all employed elements of three methodologies:

1. a time study,
2. an attorney survey, and/or
3. deliberations by an expert panel, typically using the Delphi method (explained below), to develop case weights that express attorney workload in terms of the average time required to provide constitutionally effective representation to a client in a case of a particular type.²³

²² National Public Defense Workload Study at 15-22.

²³ Rubin Brown and the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, *The Colorado Project: A Study of the Colorado Public Defender System and Attorney Workload Standards*, August 2017. ("Colorado"); Vanessa Crossgrove Fry, Sally Sargeant-Hu, Lantz McGinnisBrown, and Greg Hill, *Idaho Public Defense Workload Study 2018*, Boise, Idaho: Idaho Policy Institute, Boise State University, 2018. ("Idaho"); American Bar Association Standing Committee on Legal Aid and Indigent Defendants and Crowe LLP, *The Indiana Project: An Analysis of the Indiana Public Defense System and Attorney Workload Standards*, July 2020. ("Indiana"); Postlethwaite & Netterville and the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards*, February 2017. ("Louisiana"); Brian J. Ostrom, Matthew Kleiman, and Christopher Ryan, *Maryland Attorney and Staff Workload Assessment, 2005*, National Center for State Courts, 2005. ("Maryland"); Melissa Labriola and Ziyad Hopkins, *Answering Gideon's Call Project (2012-DB-BX-0010) Attorney Workload Assessment*, Committee for Public Counsel Services and Center for Court Innovation, October 2014. ("Massachusetts"); Nicholas M. Pace, Dulani Woods, Shamena Anwar, Roberto Guevara, Chau Pham, and Karin Liu, *Caseload Standards for Indigent Defenders in Michigan: Final Project Report for the Michigan Indigent Defense Commission*, RAND Corporation, RR2988-MIDC, 2019. ("Michigan"); RubinBrown and the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards—With a National Blueprint*, June 2014. ("Missouri"); Daniel J. Hall, *A Workload Assessment Study for the New Mexico Trial Court Judiciary*, New Mexico District Attorneys' Offices, and New Mexico Public Defender Department: Final Report, National Center for State Courts, June 2007. ("New Mexico 2007"); American Bar Association Standing Committee on Legal Aid and Indigent Defense and Moss Adams LLP, *The New Mexico Project: An Analysis of the New Mexico Public Defense System and Attorney Workload Standards*, January 2022a. ("New Mexico 2022"); Unpublished 2016 project memorandum provided to the New York State Office of Indigent Legal Services by Nicholas M. Pace, Shamena Anwar, Dulani Woods, Thomas Bogdon, Chau

The results of those state-specific studies then informed the application of the **Delphi Method** in the 2023 National Public Defense Workload Study to create the new national public defense workload standards.

Time Studies and Attorney Surveys

Fifteen²⁴ of the seventeen studies conducted some aspect of a time study wherein attorneys track how much time they spend on different case types. (Attorneys were asked to track time specifically for the study, by using existing timekeeping systems, or some combination thereof.) This information was then used to calculate the average amount of time public defenders had to spend working on individual cases.

While such time information does help illustrate staffing deficiencies, the time-study component, by itself, could show only how much time already overloaded public defenders had per case, not the time needed to provide constitutionally effective representation as required by the Sixth Amendment. In other words, it is a measurement of only what is, not what ought to be.

Eleven²⁵ of the seventeen studies also surveyed impacted attorneys by asking them to address how much time should be spent representing clients. These typically asked attorneys to either estimate the time needed for specific cases or to assess the frequency in which the attorney generally had enough time to complete all the duties necessary to represent a client. These surveys could then demonstrate that defense attorneys subjectively recognized that impacted attorneys had insufficient time to provide adequate and effective representation.²⁶

Expert Adjustment and the Delphi Method

All of the modern studies utilized an expert panel of criminal defense practitioners to develop **case weights** expressing the average time required to provide constitutionally effective representation to a client in a case type.²⁷

Pham, and Karen C. Lui. (“New York”); Cynthia G. Lee, Lydia E. Hamblin, and Brittney Via, North Carolina Office of Indigent Defense Services Workload Assessment, National Center for State Courts, February 2019. (“North Carolina”); American Bar Association Standing Committee on Legal Aid and Indigent Defense and Moss Adams LLP, The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workload Standards, January 2022b. (“Oregon”); BlumShapiro, American Bar Association Standing Committee on Legal Aid and Indigent Defendants, and the National Association of Criminal Defense Lawyers, The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workload Standards, November 2017. (“Rhode Island”); Dottie Carmichael, Austin Clemens, Heather Caspers, Miner P. Marchbanks, and Steve Wood, Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission, Public Policy Research Institute, Texas A&M University, January 2015. (“Texas”); Nicholas M. Pace, Dulani Woods, Roberto Guevara, Chau Pham, and Shamena Anwar, Provisional Caseload Standards for the Indigent Defense of Adult Criminal and Juvenile Delinquency Cases in Utah: Report for the Utah Indigent Defense Commission, RAND Corporation, RR-A1241-1, 2021. (“Utah”); Matthew Kleiman and Cynthia G. Lee, Virginia Indigent Defense Commission Attorney and Support Staff Workload Assessment: Final Report, National Center for State Courts, March 2010. (“Virginia”)

²⁴ Colorado, Idaho, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Mexico, New Mexico, New York, North Carolina, Rhode Island, Texas, Utah, Virginia

²⁵ Idaho, Maryland, Massachusetts, Michigan, Missouri, New Mexico 2007, New York, North Carolina, Texas, Utah, Virginia

²⁶ See, e.g., Utah at 42.

²⁷ National Public Defense Workload Study at 49

Initially, these studies developed standards bound to the results of the time studies as their starting point, effectively tying recommendations to the “what is” component with less regard to what ought to be.²⁸

Starting in 2011 and 2012, however, researchers began to develop case weight standards bound as a starting point from professional standards, including the ABA Criminal Justice Standards, the applicable Rules of Professional Conduct, and *Strickland v. Washington*. That is, they began to employ the **Delphi Method**, which is a research technique developed by the Rand Corporation in the 1950s and 60’s to systematically gather expert consensus on complex questions that are otherwise difficult to answer with certainty.²⁹ Before its use in developing public defender workload standards, the Delphi Method was used in diverse subject areas including developing reasonable judicial workload standards³⁰, health care, and engineering.³¹ By utilizing the Delphi Method to conduct the expert analysis, it altered case weight standards so that they were firmly rooted in the time required to provide constitutionally effective representation to a client in a case of a particular type.³²

In broad terms, the Delphi Method is a system where a panel of carefully selected experts in a given field are asked to answer the same questions, with the overall results then being shared with the panel of experts. Those experts may then discuss or comment on the findings before being asked to engage by answering another round of questions, providing the opportunity to modify their original answers. The ultimate goal of the process is to reach a point where the panel of experts develops a satisfactory level of consensus.³³

As applied to public defender workloads, this Delphi process meant that over a series of discussion rounds, criminal defense experts were asked to estimate the amount of time needed to reasonably perform specific case activities for different case types, ultimately reaching a consensus in the specific case weight for each case type.³⁴ This case weight then provided the basis for understanding the amount of time necessary to provide constitutionally effective representation by a defense attorney representing a client in each case type.

Consensus Developed from Modern Studies

Ultimately, as the modern public defense workload studies from different states developed and refined the methodology for addressing the time needed to provide effective representation, areas of national consensus and the need for new national standards became apparent.

For example, the studies typically addressed case types in broadly similar categories including murders, sex offenses, high-, mid-, and low-level felonies, and probation violations.³⁵ Likewise, the results illustrated the badly outdated nature of the 1973 NAC standards. Whereas the NAC standards recommended a caseload of no more than 150 felony cases of any type per year, the average time recommendation from the modern

²⁸ See, e.g. Maryland, New Mexico (2007), and Virginia; USE OF DELPHI METHOD IN ABA SCLAID PUBLIC DEFENSE WORKLOAD STUDIES: A REPORT ON LESSONS LEARNED at 8-10.

²⁹ New Mexico 2022 at 35, Michigan at xvii.

³⁰ See Brian J. Ostrom, Charles W. Ostrom, Daniel Hall, William E. Hewitt, and Timothy Fautsko, Florida Delphi Based Weighted Caseload Project: Final Report, National Center for State Courts, 2000, p. 1.

³¹ Missouri at 9

³² USE OF DELPHI METHOD IN ABA SCLAID PUBLIC DEFENSE WORKLOAD STUDIES: A REPORT ON LESSONS LEARNED at 12-13.

³³ Michigan at xvii; Utah at xix; New Mexico 2022 at 35; National Public Defense Workload Study at 26.

³⁴ A Report on Lessons Learned at 18-20.

³⁵ National Public Defense Workload Study at 91-95.

studies addressing only the low-level felony category would support a maximum of 83 solely low-level felony cases per year, assuming the attorney spent every possible work hour on direct representation.³⁶

As such, the 17 modern state-specific public defense workload studies provide a consensus in trends and methodology demonstrating that the 1973 NAC workload standards are badly out of alignment with modern-day evidence revealing what caseload standards are necessary to enable defense counsel to provide constitutionally effective representation.

State Studies Predating the National Public Defender Workload Study

Jurisdiction	Primary Research Organization	Year
Colorado	ABA SCLAID	2017
Idaho	Idaho Policy Institute	2018
Indiana	ABA SCLAID	2020
Louisiana	ABA SCLAID	2017
Maryland	NCSC	2005
Massachusetts	Center for Court Innovation	2014
Michigan	Rand	2019
Missouri	ABA SCLAID	2014
New Mexico	NCSC	2007
New Mexico	ABA SCLAID	2022
New York (five counties)	Rand	2016
North Carolina	NCSC	2019
Oregon	ABA SCLAID	2022
Rhode Island	ABA SCLAID	2017
Texas	Public Policy Research Institute	2015
Utah	Rand	2021
Virginia	NCSC	2010

³⁶ National Public Defense Workload Study at 77 (the 83 recommendation is derived from taking 2080 working hours divided by the Low-level Felony mean of 25).

THE 2023 NATIONAL PUBLIC DEFENSE WORKLOAD RECOMMENDATIONS

It quickly became clear as more and more states began to use this Delphi methodology to assess their state-specific workloads that there was a consensus developing. This was particularly striking, given that each jurisdiction had unique criminal law codes. However, it was becoming clear that there was a consensus building for updated national workload guidance based on the Delphi Method. This was particularly important given that not every state had the funding and the resources to conduct its own, state-specific studies. As a result, a movement was underway to help fill that vacuum and replace the old 1973 NAC standards.

The Rand Corporation, the ABA SCLAID, the National Center for State Courts, and the Law Offices of Stephen Hanlon, approached this task and compiled a national panel of criminal defense experts to sit as the national Delphi panel. To accomplish the significant work that it would take to create new national standards, these groups undertook the following:

- reviewed all state-level public defense caseloads studies since 2005,
- chose the Delphi Method as their analytical process,
- identified and reviewed key ethics rules and professional standards, defined a set of case types and activity categories to use for data collection,
- assembled an expert panel of defense attorneys with expertise in adult criminal defense practice and a track record of quality work,
- shared the applicable ethics rules, professional standards, and weighted caseloads research, as well as the results of the 17 prior state-level studies,
- held in-person meetings to conduct Delphi sessions to determine a reasonable consensus as a foundation for the proposed national workload standards.³⁷

Breaking Down Case Types

Because the new workload recommendations needed to be more nuanced than the old 1973 workload recommendations, the committee intentionally parsed case types by (1) severity level, and (2) the general sentence associated with the severity level of the case, with the underlying thought process being that the more severe the case and significant the potential prison sentence, the more time an attorney must dedicate to all the distinct tasks associated with providing reasonably effective assistance of counsel to that client.

The following is the breakdown of case types that the National Public Defense Workload Study participants agreed upon³⁸:

³⁷ National Public Defense Workload Study at pgs. 36-37.

³⁸ National Public Defense Workload Study at pgs. 58-59.

Case Type	Description	Sentencing Range	Examples
Felony- High- LWOP	Felonies with possible sentences of LWOP	LWOP	
Felony - High - Murder	Non-LWOP felonies involving intentional killing of a person	Up to life with possibility of parole	First-degree murder, malice murder, second-degree murder, felony murder
Felony - High - Sex	Non-LWOP felonies involving serious sex offenses	More than 15 years (including life with possibility of parole)	Rape, aggravated sexual assault, child sex abuse, child pornography with victim
Felony–High–Other	Non-LWOP felonies (including DUIs resulting in death) other than charges falling into the high felony categories for murder or serious sex offenses	More than 15 years (including life with possibility of parole)	Negligent homicide, manslaughter, aggravated assault, assault with a deadly weapon, kidnapping
Felony - Mid	Felonies (including DUIs resulting in death) including serious property crimes, serious drug distribution crimes, and less serious violent crimes	Possible sentences of 3 to 15 years	Arson, armed robbery, grand theft, breaking and entering, drug distribution or manufacturing, battery
Felony - Low	Felonies (including DUIs resulting in death) including less serious property crimes, less serious drug felonies, and minor crimes of violence	Possible sentences of up to 2 years	Theft, larceny, burglary, simple assault
DUI - High	Repeat DUIs, serious DUIs, and DUIs causing nonfatal injuries (can be a felony or misdemeanor)	Possible sentences of more than 2 years	
DUI - Low	First or successive DUIs (typically misdemeanors)	Possible sentences of up to 2 years	
Misdemeanor - High	Serious misdemeanors (other than DUIs) involving enhanceable misdemeanors (such as misdemeanors triggering repeat offender sentencing), sex misdemeanors, or violent misdemeanors	Any	Domestic violence, misdemeanor assault, misdemeanor animal cruelty, exposure
Misdemeanor - Low	Less serious misdemeanors (other than DUIs or those falling into the high misdemeanor category)	Any	Petty theft, drug possession, drug paraphernalia, trespass, status offenses, criminal traffic offenses
Probation or Parole Violations	Probation or parole violations derived from either felony or misdemeanor offenses	Any	

Breaking Down Case Activity Types

Similarly, to sufficiently determine how much time an attorney needed to reasonably spend on each case, the committee also had to break down and agree upon specific case activities for which the attorney was primarily responsible.

The committee agreed upon the following case activity types:³⁹

Activity Type	Definition	Includes	Excludes
Client communication and care	Time spent communicating with client or arranging care, support, or other personal and social services for the client	<ul style="list-style-type: none"> • All out-of-court communication with clients (mail, phone, video call, in person, etc.) as well as communication with client family members related to the criminal case • Client care and support activities performed by the trial attorney, including working with social services, treatment providers, or outside agencies on behalf of clients, as well as handling medical, family, or other issues affecting the client during a criminal case 	<ul style="list-style-type: none"> • Meetings or communications to prepare client or family members for court hearings, which falls under Court Preparation • Arranging services exclusively related to Sentencing and Mitigation, which falls under Sentencing and Mitigation • Time spent traveling or waiting to

³⁹ National Public Defense Workload Study, pgs. 61-62.

Discovery and investigation	Time spent on investigation of the case and exchange of discovery with the prosecution	<ul style="list-style-type: none"> • Requesting and reviewing discovery materials and other case-related documents, materials, recordings, or other evidence • Case-related investigation activities conducted by the attorney, such as viewing the scene and physical evidence, canvassing for witnesses, preparing for witness interviews, and interviewing witnesses, preparing subpoenas, taking photos or videos, and working with and supervising investigators <ul style="list-style-type: none"> • Reviewing, analyzing, and organizing case-related materials and evidence; case file documentation • Drafting memos or notes related to discovery and investigation 	
Experts	Time spent hiring and working with pretrial and trial experts (but excluding experts exclusively related to sentencing)	Locating, interviewing, corresponding with, consulting with, and reviewing reports of experts for the defense, including experts related to competency and other pretrial matters, as well as trial experts	<ul style="list-style-type: none"> • Experts exclusively related to Sentencing and Mitigation, which falls under Sentencing and Mitigation
Negotiations	Time spent on resolving the matter or any part of the matter by agreement	Discussions with a prosecutor or officer to dismiss a case or resolve by plea bargain	

Court preparation	Time spent preparing for any and all pretrial hearings, as well as trial	<ul style="list-style-type: none"> •Preparing for factual and legal arguments at hearings • Preparing for direct examinations, crossexaminations, voir dire, etc. • Client and/or family preparation for hearing and trial • Subpoenaing and preparing witnesses • Preparing materials for court, including exhibits and presentations • Defense team meetings or other consultation with colleagues specifically in preparation for hearing or trial • Moot arguments and mock examinations 	Preparation for hearings exclusively related to Sentencing and Mitigation, which falls under Sentencing and Mitigation
Court time	Time spent in court for pretrial hearing and trial	<ul style="list-style-type: none"> •Attending pretrial hearings, such as initial appearance, bail hearings, status hearings, competency proceedings, motions hearings, etc. • Trial (bench or jury) 	<ul style="list-style-type: none"> • Travel time and waiting time • Court time related to Sentencing and Mitigation, which falls under Sentencing and Mitigation

<p>Sentencing and mitigation and postadjudication</p>	<p>Time spent preparing for sentencing, attending sentencing hearing(s), and on any postadjudication activities</p>	<ul style="list-style-type: none"> • Developing or collecting evidence to be used in sentencing • Witness preparation for sentencing hearings • Consulting with sentencing and mitigation experts • Preparing for sentencing, including review and rebuttal of prosecutorial sentencing materials • Preparing for and attending sentencing hearings • Addressing fines, fees, and restitution • Filing postadjudication motions or notices, e.g., notice of intent to appeal or waiver of appeal, motion or request for appellate counsel, motion for DNA expungement • Preparing and filing any required documentation for appeal, e.g., statement of issues • Preparing file for appeal or transition to appellate attorney • Communication with appellate attorney 	
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Final National Public Defense Workload Study Recommendations

Once the panel was able to agree upon the case types and the case activity types, they were able to come together through several rounds of discussions to determine how much time was needed to provide reasonable assistance of counsel in each case type. This then formed their final recommendations for the number of hours each case type requires of attorney work time⁴⁰:

Case Type	Case Weight (Hours per Case)	Sample Annual Caseload/ Case Weight Standard
Felony- High- LWOP	286	7
Felony - High - Murder	248	8
Felony - High - Sex	167	12
Felony–High–Other	99	21
Felony - Mid	57	36
Felony - Low	35	59
DUI - High	33	63
DUI - Low	19	109
Misdemeanor - High	22.3	93
Misdemeanor - Low	13.8	150
Probation or Parole Violations	13.5	154

This table contains not only the recommended number of hours to complete all the necessary case activities by case severity level but also has an example of caseload standards for each case type. For example, if an attorney was working only probation- and parole-violation cases, under these new standards, assuming the attorney has 2,080 hours within a year to complete the work, that attorney would be limited to effectively handling 154 probation- or parole-violation cases.

But, notably, 2,080 is not a reasonable number of hours to assume an attorney has to dedicate to case-specific work in a year as it does not allow for basic needs such as lunch breaks, sick and vacation time, holidays, and non-case specific, but still necessary work-related items such as office duties and training. The example case standards were offered by the national study as an example, but BIDS, as explained further below in this report, has developed its own, realistic standard for a reasonable assumption of hours an attorney has to dedicate to case-specific work in a year based in part on a review of the case study recommendations conducted by the Kansas Judiciary in 2020, among other resources and considerations.

Nonetheless, the importance of these revised, far more realistic workload recommendations cannot be understated. The fact that they are grounded in sound methodology and that they take into full account the appropriate professional, ethical, and constitutional standards that apply to the questions of sufficient criminal defense representation, makes these workload recommendations substantially more defensible than the old

⁴⁰ National Public Defender Workload Study, pg. 113.

1973 standards. More importantly, they hold all practitioners—including public defenders—to the same professional, ethical, and constitutional standards as every other criminal defense counsel, as they should be.

But most importantly, what these standards specifically do is help illustrate just how far beyond the pale our national acceptance of criminal defense casework has historically been when it comes to public defender caseloads.

Make no mistake—many public defenders who have been overworked and understaffed for the better part of the last 50 years have not been living up to their professional, ethical, and constitutional standards of representation through no fault of their own. Public defense must be adequately resourced to meet the basic standards upon which these new workload recommendations are based. This is not an individual problem for any attorney who has worked in public defense under these unconstitutional conditions. It is a systemic problem caused by a lack of staffing and resources that requires a systemic solution.

WORKLOAD STANDARDS BEYOND TRIAL-LEVEL CASES

While the National Public Defense Workload Study provides updated and reliable workload standards for most state trial court proceedings, they did not address all areas of felony indigent representation BIDS provides under the Constitution and State law.

Major areas of representation not addressed in the National Public Defense Workload Study include appellate representation, representation in death penalty proceedings, and post-conviction (habeas) representation. However, modern workload standards have been developed in some of those areas in ways that are comparable to Kansas and allow estimation of staffing needs based on expected workload.

Appellate Standards

The 1973 NAC standards initially set public defender appellate workload recommendations at no more than 25 appellate cases per year.⁴¹

However, much like the National Public Defense Workload Study showed for trial court proceedings, the 2022 Delphi-based workload study in New Mexico published by ABA SCLAID and Moss Adams addressed appellate workload standards and showed the NAC standards were, likewise, woefully insufficient.⁴²

That study addressed appellate workload organized into case types based on general length of the record on appeal, direct review to the State Supreme Court, and discretionary review proceedings by the

⁴¹ National Advisory Commission on Criminal Justice Standards and Goals, Courts, 1973, p. 276.

⁴² American Bar Association Standing Committee on Legal Aid and Indigent Defense and Moss Adams LLP, The New Mexico Project: An Analysis of the New Mexico Public Defense System and Attorney Workload Standards, January 2022. (“New Mexico 2022”)

State Supreme Court, all of which are characteristics shared with Kansas, and have already been used for decades in relative weighting of appellate workload by Kansas appellate defenders.⁴³

Likewise, the case tasks identified, such as client communications, record review, and brief preparation, are all tasks required in Kansas appellate representation and share similar complexities.⁴⁴ The appellate work hours recommendations from the New Mexico study were as follows:

Case Type	Hours
General Calendar Ct. of Appeal- Record under 250 pages (up to 2 hours recorded)	89.87
General Calendar Ct. of Appeal- Record 250-750 pages (2-6 hours recorded)	123.85
General Calendar Ct. of Appeal- Record 750-1500 pages (6-12 hours recorded)	161.14
General Calendar Ct. of Appeal- Record over 1500 pages (more than 12 hours recorded)	232.07
Direct File in the Supreme Court (Murder I and Child Abuse Resulting in Death)	242.53
Discretionary Review in Supreme Court (following General Calendar Review)	191.37

Post-Conviction (Habeas) Standards

There are no modern workload studies directly addressing attorney work hours for Post-Conviction (Habeas) proceedings in terms of average hours.

However, it is recognized that Post-Conviction representation requires the completion of case tasks present in both trial-level proceedings and appellate proceedings, including independent investigation, review of existing transcripts, legal research, and time in the district court.

As such, a very conservative estimate requires at least workload standards consistent with the initial trial-level proceedings based on the original severity level of the alleged crime at an absolute bare minimum.

Death Penalty Representation Standards

The National Public Defense Workload Study also did not address the workload standards for the defense of death penalty eligible cases, recognizing existing specialized standards exist for that field.⁴⁵

Those specialized standards recognize the need for significant workload control in the defense of death-penalty eligible cases and that studies tracking average attorney hours in those fields show each case

⁴³ New Mexico 2022 at 45. The study also addressed a “Summary Calendar” case type that is not directly applicable to Kansas metrics and is not included in later discussion.

⁴⁴ New Mexico 2022 at 45, 74-75.

⁴⁵ National Public Defense Workload Study at 60; See, e.g., ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, February 2003.

requires thousands of attorney hours at each stage of proceedings including at the trial court, on direct appeal, and in postconviction proceedings.⁴⁶

Those standards also require capital defense to be conducted by a specially trained interdisciplinary team, with unique staffing requirements.⁴⁷

Given the general arbitrariness and inconsistency with which Kansas prosecutors pursue the death penalty, defying general trends that allow calculating other caseload estimates and the multi-year caseload imposed by a single capital case, it was determined that capital caseloads should be addressed as a separate matter outside of this staffing report.

NAPD Non-Attorney Staffing Recommendations

One of the key assumptions of the state-level Delphi studies and the National Public Defender Workload Study is that each attorney working these recommended hours on their cases is fully supported by a sufficiently staffed office.

This is because these workload recommendations account only for attorney time, but, as every attorney knows, the time they spend on a case is only a percentage of the time that is dedicated to that client and that case. The time that non-attorney staff— legal assistants, investigators, support staff, mitigators, client advocates, or social workers—are not accounted for in these workload recommendations. So, the question then becomes how much non-attorney staff does it take to adequately support an attorney who is working these recommended hours?

A Non-Attorney Staffing recommendation paper was put out by the National Association For Public Defense in 2020.⁴⁸ That staffing paper sets out the rationale for the necessity of fully staffed offices in detail, giving recommendations rooted in the same professional and ethical standards that were discussed earlier in this paper, which also underlies the new national workload recommendations. NAPD's staffing recommendations break down as follows:

⁴⁶ See, e.g. ABA, Guidelines at at 968 (Study from 1990-1997 showing death penalty cases averaged 1889 Attorney Hours Average through trial); ABA, Guidelines at at 968 (Noting study showing average of over 3,300 attorney hours required in post-conviction proceedings); Gould and Greenman, Report to the Committee on Defender Services Judicial Conference of the United States Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases. 29-30 (Median attorney hours in death eligible cases were 2,746 hours for tried cases and 1,028 for pleas); Brian J. Ostrom, Matthew Kleiman, and Christopher Ryan, Maryland Attorney and Staff Workload Assessment, 2005, National Center for State Courts, 2005. (1,464 average attorney hours required for each death eligible case at trial level)

⁴⁷ ABA Guideline 4.1; See also Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008)

⁴⁸ National Association for Public Defense, NAPD Policy Statement of Public Defense Staffing, May 2020.

Non-Attorney Staff Category	NAPD Recommended Ratio Per Attorney
Investigators	1 for every 3 attorneys
Legal Assistants	1 for every 4 attorneys
Mental Health Professional/ Social Worker	1 for every 3 attorneys
Office Administrative Staff	1 for every 4 attorneys

Knowing these recommendations can help organizations such as BIDS not only determine how many more attorneys we need to staff our caseloads, but also how many more staff we need to adequately staff our attorneys to support those caseloads.

KANSAS ON NOTICE: THE NATIONAL PUBLIC DEFENSE WORKLOAD SURVEY

With this new national consensus on appropriate public defender workloads based on widely accepted workload methodology, Kansas is now officially on notice of what it takes to provide the constitutionally reasonable assistance of counsel required by the Sixth Amendment.

Even at a glance, seasoned practitioners looking at these workload recommendations know that Kansas has not been anywhere near meeting these workload recommendations based on its current staffing levels in its public defender trial offices and the dwindling number of private attorneys who accept appointments across the state.

But now, with these standards, we can calculate out just how short of attorneys we are to handle the caseloads currently being charged by prosecutors across the state.

APPLYING THE NATIONAL STANDARDS TO KANSAS:

Our methodology of applying these new national workload standards to Kansas was fairly straightforward:

1. Categorize all Kansas felony offenses into severity-level categories comparable to the National Workload Study categories,
2. Determine how many cases in Kansas typically fall into each of those case type categories,

3. Use the recommended hours for each case type from the National Workload Study to calculate how many total hours of attorney work time are required to provide constitutionally adequate defense representation in all of those cases,
4. Determine how many hours a typical public defender has to dedicate specifically to casework in a year,
5. Divide the total number of hours required to provide constitutionally adequate defense representation in all of those cases by the number of hours a public defender has to dedicate to casework each year and find the total number of attorneys needed to support our state-wide felony criminal caseload.

Mapping Kansas Felony Filings to National Workload Case Types

The first step as outlined above, is applying the case type categories identified in the National Public Defense Workload Study to the best available data tracking criminal caseloads in Kansas Courts.

After conducting a review of available sources, it was determined that the “Annual Report of the Courts of Kansas”⁴⁹ by the Office of Judicial Administration provided the best overall available data with its summary of all felony filings for a given fiscal year broken down into categories of Capital Crime, Off Grid, Unclassified, Severity Level 1-10, Drug Grid Severity Level 1-5, and Non-Grid Felonies.

To reduce yearly variations, this report took the average of those types over the five most recent, non-pandemic affected years of available data resulting in the following 5-year average⁵⁰:

Number of Felony Case Filings in Kansas by Fiscal Year and Case Severity Level

	FY 2019	FY 2018	FY 2017	FY 2016	FY 2015	5 YR AVG
Capital Crime	14	2	9	3	12	8
Off Grid	320	314	301	316	294	309
Unclassified	398	268	363	427	495	390.2
SL 1	316	366	297	302	292	314.6
SL 2	14	23	14	14	13	15.6
SL 3	609	586	560	564	550	573.8
SL 4	694	658	583	479	472	577.2
SL 5	950	976	1451	1619	1707	1340.6

⁴⁹ <https://www.kscourts.org/Cases-Decisions/Case-Statistics>

⁵⁰ At the time of this report, Judicial reports for years following FY 2019 have only displayed the total number of felony filings without the detailed breakdown available in these reports. As such, it was determined best to use the most detailed reports available, with the hope that future judicial reports continue to use an in-depth breakdown of felony filings.

SL 6	976	932	850	815	757	866
SL 7	3426	3237	2838	2851	2870	3044.4
SL 8	2777	2840	2607	2571	2339	2626.8
SL 9	4923	4722	4770	4867	4897	4835.8
SL 10	480	594	592	602	603	574.2
Non-Grid	455	505	576	644	667	569.4
Drug 1	106	103	68	63	75	83
Drug 2	457	507	407	321	294	397.2
Drug 3	487	455	423	384	386	427
Drug 4	249	327	341	379	434	346
Drug 5	4645	4305	3860	3653	3152	3923

From this available breakdown of yearly felony filings, we can then map Kansas' felony filings to the case type categories⁵¹ from the National Public Defense Workload Study using their category descriptions.⁵²

Then, by adding together Kansas' total felony filings matching those descriptions and multiplying that number by Kansas' indigence rate (84%)⁵³ we can calculate the total number of indigent felony cases for each case type in a given year:

⁵¹ In adopting the National Public Defender Workload Study Case Type Categories, we note that the Kansas Equivalent categories match the relevant descriptions, and that the underlying case activities in the National Public Defense Workload Study all match the workload components of criminal defense in Kansas.

⁵² The mapping of the National Public Defender Workload Study case types onto Kansas felony filings was made significantly easier by the efforts of BIDS attorneys in adopting an internal weighted caseload system based upon then existing Delphi studies in 2020 and 2021. That internal system mapped Kansas offenses to similar case type categories as those in the National Public Defender Workload Study, and assigned the case a relative weight, often using more detailed category descriptions than those discussed in this report. However, because that data is limited to the caseloads in a given public defender office, without including indigent cases handled by assigned counsel, it was determined to start with the total felony filing numbers tracked by the Judicial Branch to give a more reliable estimate of the total indigent caseload in Kansas.

⁵³ FY 2022 Indecency Rate for Felony Cases provided by the Kansas Sentencing Commission in August 2023.

Mapping Kansas Felony Case Filings into NPDWS Comparable Categories

NPDWS Case Types	Description	Kansas Equivalent	Average Yearly Filings Requiring Indigent Representation
Felony - High - Murder	Non-LWOP felonies involving intentional killing of a person	Off Grid ⁵⁴	124.32
Felony - High - Sex	Non-LWOP felonies involving serious sex offenses	Off Grid	135.24
Felony-High-Other	Non-LWOP felonies (including DUIs resulting in death) other than charges falling into the high felony categories for murder or serious sex offenses	SL 1-3, Drug SL 1	829.08
Felony - Mid	Felonies (including DUIs resulting in death) including serious property crimes, serious drug distribution crimes, and less serious violent crimes	SL 4-7, Drug SL 2-4	5878.656
Felony - Low	Felonies (including DUIs resulting in death) including less serious property crimes, less serious drug felonies, and minor crimes of violence	SL 8-10, Drug SL 5, Unclassified	10374
DUI - High	Repeat DUIs, serious DUIs, and DUIs causing nonfatal injuries (can be a felony or misdemeanor)	Non-Grid	478.296

Having then calculated Kansas' average yearly new felony filings requiring indigent representation mapped to the National Public Defense Workload Study case types, those filings can then be multiplied by the attorney work hours required per case in that category to estimate the total attorney work hours required for indigent defense of new felony cases each year:

⁵⁴ Kansas' Off Grid felony classification includes both felonies involving intentions murder (I.E. First-Degree Murder); and serious sex offenses (I.E. Jessica's Law cases). To reach the breakdown for each type, this report used the 2022 Kansas Crime Index reporting of the 10 year average number of yearly murders in Kansas (148) as the base expected number for the intentional killings category, with the remaining number of off grid offenses (161) counting as high level sex offenses.

Calculation of Total Attorney Hours Needed To Support Felony Caseloads

NPDWS Case Types	Average Yearly Filings in Kansas Requiring Indigent Representation	Associated Work Hours Per Case	Total Associated Attorney Hours
Felony - High - Murder	124.32	248	30831.36
Felony - High - Sex	135.24	167	22585.08
Felony–High–Other	829.08	99	82078.92
Felony - Mid	5878.656	57	335083.392
Felony - Low	10374	35	363090
DUI - High	478.296	33	15783.768

Total Hours:	849,452.52
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By combining the hours associated with each case type, we calculate that the average yearly new felony filings requiring indigent representation require 849,452.52 hours of dedicated attorney work time to provide constitutionally adequate criminal defense representation.

Kansas Public Defense Base Work Hours Calculations

The new national workload standards allow Kansas to apply those national recommendations to our specific set of Kansas criminal code cases. However, one of the initial questions we had to decide was how many hours each attorney handling those cases has each year to dedicate specifically to casework.

While the national workload study assumed 2,080 hours of casework-specific time for each attorney each year, that assumption is, on its face, absolutely unrealistic. By starting with an assumption of 2,080 hours of case-specific work time, it fails to include any accounting for a variety of basic factors such as state holidays, vacation time, sick leave, parental leave, lunches, non-case specific work time such as general office work and training, etc. In reviewing the National Workload Study and looking at its application to our workloads in Kansas, it became very clear that to have appropriately staffed cases we needed to appropriately account for the realistic day-in-day-out common activities that all attorneys experience.

Most importantly, however, we wanted to explicitly center our agencies and our Kansas Supreme Court’s emphasis on attorney well-being. A necessary part of an attorney’s ability to show up every day on

behalf of their clients is the necessity to center their own well-being. We cannot take care of our clients if we are failing to take care of ourselves.

Additionally, inadequately controlled caseloads is consistently one of the main factors listed by Kansas public defense employees year after year as one of the top issues negatively affecting their well-being that contributes to their consideration to leave their public defense offices.⁵⁵ Since the retention of public defense staff, particularly of attorneys, is one of the top issues affecting staffing shortages, the realistic calculation of time associated with those workloads is a key issue that, if weighted appropriately in these case calculations, can positively impact public defense employee retention.

Our Kansas Supreme Court has recognized the ethical imperatives of addressing attorney well-being by creating the Kansas Task Force on Attorney Well-Being. Furthermore, the Board of Indigents' Defense Services has maintained a very proactive employee Well-being Committee that assists our Board through a variety of activities and initiatives aimed at identifying and finding solutions to the common areas that most negatively affect our defense employee well-being and retention. Workloads are always a key negative factor in low job satisfaction and retention issues in every survey our Well-Being Committee has conducted since it began in 2020.⁵⁶

To that end, we asked our BIDS Well-Being Committee to look specifically at the question of how many hours each trial-level line attorney has for case-specific work to eventually implement these new national workload standards. That committee looked at a variety of factors and took into account other workload surveys such as the Kansas Judicial Workload survey conducted by the National Center for State Courts in 2020, to use as guidance for how to appropriately calculate the amount of time each attorney has to dedicate to case work.

When making these calculations, the committee determined that there were two different categories of time to evaluate. First, there is total available work time. Second, there is the average non-case related time. To arrive at the final number of total working hours available for direct client representation, the committee subtracted the second number from the first. What follows is a summary of their methodology for arriving at a "total working hours available per year" for each public defender.

Starting Assumption

The starting assumption is that there are 52 weeks in a year with five days a week per year. That leaves 260 paid working days during the year.

Holidays + Discretionary Days

There are now ten state holiday days in addition to one discretionary day for each state employee which, when subtracted from 260, results in 249 days of work time left. (260-11 = 249).

⁵⁵ See BIDS Well-Being Surveys, 2020, 2021, 2022, 2023 at <https://www.sbids.org/initiatives>

⁵⁶ BIDS Well-Being Survey Report 2023 (September 2023); BIDS Well-Being Survey Report 2022 (August 2022); BIDS Well-Being Survey Report 2021 (July 2021); BIDS Well-Being Survey Report 2020 (July 2020).

Sick Time

Each public defender receives 3.7 hours of sick time per pay period, of which there are 26 pay periods in a given year. This then amounts to 96.2 hours of sick time per year or 12.025 days. When subtracted from 249 days, that leaves 236.975 days of general work time. (249-12.025 = 236.975 days)

Parental Leave

There is always a certain amount of public defenders taking parental leave. To calculate an average number of hours for parental leave, the committee took 240 hours (30 days) for primary leave multiplied by the percentage of Americans who are having children each year plus 120 hours (15 days) for secondary leave employees, multiplied by the percentage of Americans who are having children each year. National data indicates that approximately 5% of Americans have a child each year and halve that to 2.5% to apply it to public defender parents, which equals 9 hours of average parental leave time per year, or 1.125 days per year.⁵⁷ (236.975 days -1.125 days = 235.85 days)

Vacation

To account for appropriate vacation time, the Committee averaged the lowest amount of vacation a public defender could have in a year (96.2 hours or 12.025 days) and the highest amount a public defender could accrue in a year (169 hours or 21.125 days) and took that average to get to 132.6 average hours or 16.575 days of vacation. (235.85-16.575 =219.275 days)

Of the 219.275 days of general work days remaining multiplied by 7.5 hours (accounting for a half-hour lunch each work day), that leaves 1,644.56 hours of general work time each year.

Final Summary of Calculations for Total Working Hours:

Description	Number	Category	Calculation
Weeks Per Year	52	A	
Work Days Per Week	5	B	
Possible Work Days Per Year	260	C	A x B
Holidays and Discretionary Day	11	D	
Days of Sick Leave	12.025	E	
Days of Vacation	16.575	F	
Days of Parental Leave	1.125	G	
Yearly Work Days	219.275	H	C-D-E-F-G
Hours in Workday	7.5	I	
Total Yearly Work Hours	1,644.56	J	H x I

⁵⁷ The assumption that 5% of Americans are having a child each year is based upon national fertility rate trends. See Osterman, Michelle J.K., Brady E. Hamilton, Joyce A. Martin, MAnne K. Driscoll, and Claudia P. Valenzuela, Division of Vital Statistics, National Vital Statistics Reports, Volume 72, Number 1, January 31, 2023. <https://www.cdc.gov/nchs/data/nvsr/nvsr72/nvsr72-01.pdf>

260 days (52 weeks x 5 days a week) – 88 hours for holidays (10 state holidays + 1 discretionary day) – 12.025 days for sick leave (3.7 hours x 26 pay periods divided by 8 hrs) – 1.125 days of parental leave ((.025 x (240 + 120))/8) – 16.575 days for vacation (12.025 days (min vacation) + 16.575 days (max vacation)/ 2) multiplied by 7.5 hours of work time per day (8 hrs - .05 lunch) = **1644.56 hours of work time each year.**

Average Non-Case-Related Hours

In looking at BIDS trial public defender job descriptions, for Public Defenders I-III, their job are 90% direct client representation. The other 10% of the job includes things like the Annual BIDS CLE, power hour training, new attorney training, weekly office meetings, in-office training, administrative tasks, and/or duty attorney tasks.⁵⁸ In other words, it is assumed as part of their job descriptions that 10% of their work time is intentionally not case-specific work time to allow for training and other work-related responsibilities.

Total Number of Working Hours Available Per Year

Therefore, the total number of working hours available from above (1644.56 hours) minus 10% of hours for these other non-case specific tasks results in **1,480.1 total working hours** available per year for direct client case-specific representation.

This means that each non-supervisory public defender has approximately 1,480 hours a year to dedicate specifically to case-related tasks to apply this national workload standard average hours.⁵⁹

Total Number of Full-Time Indigent Defense Counsel Needed

Based on all these calculations and considerations above, there is a clear calculation to determine how many full-time indigent criminal defense counsels are needed to support typical felony caseloads in Kansas each year.

By dividing the total number of hours needed to provide constitutionally adequate representation (849,452.52) by the total number of hours each attorney has to dedicate to case-specific work (1,480 hours), it can be determined that **574 full-time felony criminal defense attorneys**, taking only BIDS appointed trial level indigent cases (and no other outside casework), are needed to provide constitutionally adequate trial-level criminal defense representation in Kansas each year.

In comparison, Kansas currently only 123 full-time trial-level public defenders in Kansas.

⁵⁸ This ratio is consistent with the attorney surveys conducted in the National Public Defender Workload Study, at 98, showing an average of 11.8% of attorney work time focused on non-case related duties.

⁵⁹ In comparison, work studies of the Kansas Judicial branch estimated Judicial Officers annual case related work time as 76,050 minutes or 1267.5 hours. Kansas District Court Judicial Officer Workload Assessment Study, 2020 at 17 (December 2020).

OTHER AREAS OF INDIGENT CASELOAD IMPACTING WORKLOADS:

While much of the workload for indigent representation is encompassed by the yearly new felony filings, several other major areas impact public defender workloads including the caseloads associated with probation revocations, appeals, capital cases, postconviction cases, and misdemeanors.

Probation Revocations

As indicated in the National Public Defense Workload Study, probation violation proceedings involve an additional workload separate from the initial case with an associated 13.5 attorney work hours required per case.

The Kansas Sentencing Commission most recently reported⁶⁰ 5,455 probation violators occurring in FY 2022. Taking 5,455 probation cases multiplied by the 13.5 hours of work hours required for each case equals 73,642.5 hours of attorney work time needed. Only 84% of cases generally require appointed counsel, so 84% of 73,642.5 results in 61,859.7 hours of appointed attorney work time. With 1,480 hours of case-specific work time to dedicate to these cases, 61,859.7 hours of probation violations would require **approximately 42 additional full-time defense attorneys** to provide constitutionally adequate criminal defense representation in probation violation proceedings.

Appellate Representation

Kansas also has constitutional and statutory duties to provide adequate representation in appeals by criminal defendants. The Kansas Appellate Defender Office currently handles the vast majority of those appeals for indigent appellants and tracks internal case data in a manner that should allow for long-term calculation of appellate workload requirements using the standards provided in the 2022 Delphi-based workload study in New Mexico published by ABA SCLAID and Moss Adams. While this report focuses on calculating trial-level workload standards, initial estimates and data limitations for appellate workload are discussed in Appendix I of this report.

Postconviction (Habeas) Cases

Kansas also has constitutional and statutory duties to provide adequate representation in postconviction representation cases, primarily in Habeas cases under 60-1507 cases.

Between FY 2015 and FY 2019 the Kansas Judicial Branch averaged approximately 150 original filings in 60-1507 cases per year.⁶¹

Assuming the typical rate of indigent representation (84%) and an associated workload matching at least a mid-complexity appeal case at the trial level (161.14 hours), Kansas sees approximately 20,303.64 hours of defense workload per year in postconviction cases.

⁶⁰ KANSAS SENTENCING COMMISSION FY 2022 ANNUAL REPORT at 60.

⁶¹ <https://www.kscourts.org/Cases-Decisions/Case-Statistics> FY 2019-FY 2015 Civil Case Filings.

Based on the base work hours calculations discussed above, the new felony habeas filings would require approximately 14 full-time defense attorneys to provide constitutionally adequate criminal defense representation in post-conviction proceedings.

Misdemeanors

Finally, while Kansas provides funding for misdemeanor representation at the County level, and separate from BIDS, it is important to note those caseloads exist and Kansas still retains constitutional and statutory duties to provide adequate representation in misdemeanor cases as well.⁶²

Kansas Courts reported 12,675 misdemeanor case filings in Fiscal Year 2023 without further description.⁶³ Conservatively estimating that those misdemeanors required attorney work hours based upon the “misdemeanor-low category (13.8 hours) and the typical rate of indigent representation (84%) the misdemeanor indigent caseload requires 146,928.6 hours of attorney work time for adequate representation which would require the work of approximately 99 full-time defense attorneys to provide constitutionally adequate criminal defense representation.

DELIVERY OF DEFENSE SERVICES: PUBLIC DEFENDER OFFICES AND ASSIGNED COUNSEL

Public defense services in Kansas are administered by BIDS through a combination of dedicated full-time public defender offices and an assigned private counsel program providing representation when a public defender office is unavailable. Both of these systems are necessary to support the full range of services required to support constitutionally appropriate criminal defense.

As of FY 25 BIDS will administer one state-wide appellate defender office, handling most indigent felony appeals, as well as regional trial-level public defender offices operating in 13 judicial districts consisting of 24 counties wherein approximately 65% of Kansas’ yearly felony caseload is filed.

The remaining 18 judicial districts, wherein approximately 35% of Kansas’ yearly felony caseload is filed, are covered primarily by the assigned private counsel program. The assigned counsel program also operates in areas with a regional public defender office, when the public defender has a conflict, and a regional conflict office is unavailable or is unable to otherwise handle a particular case, such as when an office currently shuts down from taking cases to control caseloads.

Assuming for purposes of this staffing report that the 65% of the felony indigent caseload occurring in areas with regional public defenders could be fully represented by adequately staffed public defender offices or conflicts public defender offices and the remaining 35% requires the assigned counsel program, the resulting breakdown of the distribution of attorneys required to provide constitutionally adequate representation looks like this:

⁶² See *State v. Youngblood*, 288 Kan. 659, 206 P.3d 518 (2009) (Right to counsel exists in misdemeanor cases).

⁶³ FY 2023 State of Judiciary at 41.

Public Defender Covered Jurisdictions: 400 Full-Time Employee Attorneys Needed⁶⁴
 Non-Public Defender Covered Jurisdictions: 216 Equivalent of Full-Time Attorneys Needed⁶⁵

This means that for the areas where public defender offices already exist or will exist within the next year, **BIDS needs over three times the number of full-time employee public defenders to adequately staff current caseloads at the base standard of reasonably effective counsel.**⁶⁶

Impact on Public Defender Staffing

As discussed above, adequately staffing public defender caseloads isn't just about the actual attorney shortages. The National Public Defense Workload Study recommendations assume that each public defender is being fully supported by an adequately staffed office.

We've discussed the attorney-to-staff ratios that have been recommended by the National Association for Public Defense to achieve adequate office staffing. This is what those staffing ratios look like when applied in the context of the new National Standards and will be a consideration for how many staff BIDS currently has on hand:

Calculations of Shortages Based on Current Staffing Levels

Positions	Projected Needed FTEs	Current FTE	Add'l FTE Needed
Trial Attorneys	400	123	277
Investigators	134	23	111
Legal Assistants	100	35	65
Mental Health/Social Workers	134	1	133
Admin Specialists	100	19	81
Total New FTE Needed:			667

⁶⁴ (574 FTE for initial felony filings + 42 FTE for probation violations) x 65% = 400 FTE

⁶⁵ (574 FTE for initial felony filings + 42 FTE for probation violations) x 35% = 216 FTE (or FTE equivalent attorneys accepting BIDS appointment cases).

⁶⁶ BIDS currently has 123 Full-time trial level Public Defenders.

PROJECTED ESTIMATED COST OF NEEDED STAFFING

Kansas Is Already Paying the Cost of Public Defender Shortages

The reality is that Kansas is already paying the financial cost of these staffing shortages in our public defender offices through higher assigned counsel costs as cases overflow from those offices into the assigned counsel program where BIDS now pays \$120 per hour for appointed panel counsel to handle cases.

Additionally, that overflow of cases to the panel attorneys due to staffing shortages in the public defender offices is exacerbating assigned counsel shortages that already exist in many parts of the state and adding to the need for BIDS to more frequently ask those private counsel to cover cases at far greater distances from their practices than in years past, which, in turn, increases mileage costs and windshield time costs for our assigned counsel program. In FY 2024, BIDS is estimating that the assigned counsel program will cost as much as \$27.6 million.⁶⁷

Projected Estimated Cost of Attorneys Needed

The average total agency cost to the State of a public defender, based on an average salary for a trial level, non-supervisory defender, is approximately \$123,375.00.⁶⁸ That cost breaks down in this way:

Avg. Base Salary	Fringe (35%)	Overhead	Training	Total Cost Per FTE Per Yr.				
\$82,500.00	+	\$28,875.00	+	\$10,000.00	+	\$2,000.00	=	\$123,375.00

Currently, BIDS has approximately 123 trial level public defender positions. To bridge the gap between where we are now and the projected need of a total of 400 FTE attorneys, BIDS would require, in addition to filing every vacant attorney FTE it current has, an additional 277 attorneys in our public defender offices.

At a total cost to the agency per FTE per year of \$123,375.00 that would cost Kansas an additional \$34.2 million dollars a year to constitutionally staff current caseloads in the public defender offices with attorneys.

⁶⁷ BIDS estimates during October Caseloads Consensus meeting with BIDS, Division of Budget, and KS Legislative Research Dept, October 2023.

⁶⁸ Based on FY 2023 BIDS Approved Pay Scales

Projected Estimated Cost of Investigators Needed

But attorney positions alone won't solve this staffing crisis. Attorneys must also be properly staffed with investigators. At the recommended ratios by the National Association For Public Defense discussed above, BIDS should have one investigator for every three attorneys.

For a total of 400 attorneys at BIDS, this means BIDS should have 134 investigators. BIDS currently has 23. BIDS would need 111 new investigator FTEs to staff these attorneys.

The following is the cost for the agency of an average investigator FTE per year:

Avg Base Salary Per Yr		Fringe (35%)	Overhead	Training	Total Cost Per FTE
\$55,000.00	+	\$19,250	\$10,000	\$2,000 =	\$86,250.00

If BIDS needs an additional 111 investigators, at an average cost to the agency of \$86,250.00 per investigator, it will cost BIDS \$9.6M to fund those additional investigator positions.

Projected Estimated Cost of Legal Assistants Needed

A big part of being appropriately staffed requires an adequate number of legal assistants. At the ratios discussed above, BIDS should have one legal assistant for every 4 attorneys.

For a total of 400 attorneys at BIDS, this means BIDS should have 100 legal assistants. BIDS currently has 35. BIDS would need 65 additional legal assistant FTEs to staff these attorneys.

The following is the cost for the agency of an average legal assistant FTE per year:

Avg Base Salary Per Yr		Fringe (35%)	Overhead	Training	Total Cost Per FTE
\$55,000.00	+	\$19,250	\$10,000	\$2,000 =	\$86,250.00

If BIDS needs an additional 65 legal assistants, at an average cost to the agency of \$86,250.00 per legal assistant, it will cost BIDS \$5.6M to fund those additional legal assistant positions.

Projected Estimated Cost of Client Advocates Needed

Another particular area of non-attorney staffing support that BIDS currently largely lacks is in the area of client advocates, either mental health specialists or social workers who can do the leg work of connecting our clients to the services they need pre-trial and post-trial and assist with the preparation of mitigation information for plea negotiations or sentencing hearings.

At the ratios discussed above, BIDS should have one mental health advocate or social worker for every 3 attorneys.

For a total of 400 attorneys at BIDS, this means BIDS should have 134 of these specialists. BIDS currently has only one in our trial offices. As a result, BIDS would need 133 of these additional advocates to staff these attorneys.

The following is the cost for the agency of an average Mental Health Advocate/ Social Workers FTE per year:

Avg Base Salary Per Yr		Fringe (35%)	Overhead	Training	Total Cost Per FTE
\$65,000.00	+	\$22,750.00	\$10,000	\$2,000 =	\$99,750.00

If BIDS needs an additional 133 mental health advocates/social workers at an average cost to the agency of \$99,750.00 per advocate, it will cost BIDS \$13.3M to fund those additional mental health advocate/social worker positions.

Projected Estimated Cost of Administrative Specialists Needed

One of the last pieces of adequate staffing in our trial offices is to have sufficient numbers of administrative specialists to assist with various case tasks.

Based on the ratios discussed above, there should be one administrative specialist for every four attorneys. Based on 400 attorneys, that means BIDS should have approximately 100 administrative specialists. BIDS currently has only 19 administrative specialists in our trial offices. That means BIDS needs 81 additional administrative specialist FTEs.

The following is the cost for the agency of an average experienced administrative specialist FTE per year:

Avg Base Salary Per Yr		Fringe (35%)	Overhead	Training	Total Cost Per FTE
\$45,000.00	+	\$15,750.00	\$10,000	\$2,000 =	\$72,750.00

If BIDS needs an additional 81 administrative specialists at an average cost to the agency of \$72,750.00 per administrative specialist, it will cost BIDS \$5.9M to fund those additional administrative specialist positions.

For Quick Reference, this is what the breakdown of needed trial-level positions and estimated cost projections (based on current salary levels) look like to meet the constitutional requirements of reasonable assistance of counsel across our currently existing public defender offices:

Quick Reference Breakdown of Staffing Shortages and Estimated Costs

Positions	Projected Needed FTEs	Current FTE	Add'l FTE Needed	Cost Per FTE	Total Cost of Add'l FTE
Trial Attorneys	400	123	277	\$123,375.00	\$34.2M
Investigators	134	23	111	\$86,250.00	\$9.6M
Legal Assistants	100	35	65	\$86,250.00	\$5.6M
Mental Health/Social Workers	134	1	133	\$99,750.00	\$13.3M
Admin Specialists	100	19	81	\$72,750.00	\$5.9M
Total New FTE Needed:			667	Total Estimated Agency Cost:	\$68.6M

A total projected cost of an additional \$68.6M in FTE costs for the current public defender system certainly looks significant and is significant. **However, it is important to keep in mind that if all 849,452.52 hours of criminal defense time were being handled entirely by the assigned counsel program at the current \$120 per hour rate, that total cost to the state would be approximately \$101.9M each year just for attorney time, not including litigation costs, investigator and expert time, and other expenses.**

As a result, investing in the Kansas Public Defender Offices still constitutes a significant cost savings for the state compared with private defense counsel. Additionally, even if it were not, due to attorney shortages across the state, there are not currently enough full-time, private attorneys taking BIDS cases at our reduced hourly rates to be able to handle the full burden of the state’s felony trial-level caseloads.

Our crisis in defense services was not built in a day and it will likely not be possible to solve it in one grand investment. The reality of being able to recruit, hire, onboard, and house that many new employees will require that any solution to this crisis will need to be implemented over time.

While BIDS intends to follow up Part One of this Report with Part Two where we will look more closely at an actual implementation plan in the first half of 2024, to start the conversation of what that timeline might look like, this is a rough breakdown of what a potential implementation schedule of these staffing investments might look like averaged throughout a Five Year Plan:

Potential Five-Year Staffing Plan

Year One	Year Two	Year Three	Year Four	Year Five
55.4 Attorney FTEs 6.84 M	55.4 Attorney FTEs 6.84 M	55.4 Attorney FTEs 6.84 M	55.4 Attorney FTEs 6.84 M	55.4 Attorney FTEs 6.84 M
78 Staff FTEs 6.88 M	78 Staff FTEs 6.88 M	78 Staff FTEs 6.88 M	78 Staff FTEs 6.88 M	78 Staff FTEs 6.88 M
Total: 133.4 FTEs 13.72 M	Total: 133.4 FTEs 13.72 M	Total: 133.4 FTEs 13.72 M	Total: 133.4 FTEs 13.72 M	Total: 133.4 FTEs 13.72 M

Adequate Representation Requires Changes to Assigned Counsel Funding

For areas with regional public defender offices, the bottom-line implementation of adequate representation is relatively straightforward: Kansas needs more FTE public defenders. However, resolving shortages for the assigned counsel program requires additional regulatory and statutory fixes.

As BIDS has historically operated, the BIDS assigned counsel rate is set by statute at \$80 an hour for compensation of non-contract counsel, though that provision has been temporarily modified by budget proviso over the last several years up to \$120 an hour.⁶⁹

However, by regulation, BIDS also has levels of “reasonable compensation” on typical case categories as a maximum reimbursement rate in a case unless a judge declares the case “exceptional” under BIDS’s administrative regulations, allowing a higher total payment. These “reasonable compensation” levels have historically capped compensation to assigned counsel at dangerously low levels.

For example, the most recent published compensation table provided \$1200, or the equivalent of 15 hours of paid representation at \$80 an hour for a non-tried severity level 6-10 grid felony case. An off-grid non tried case provides \$1700 in compensation for the equivalent of 21.25 paid hours of representation. In contrast, the National Public Defense Workload Study requires an average of 35-57 hours of attorney time for low and medium cases and 167-248 hours for the off-grid categories to meet minimum constitutional standards.

⁶⁹ K.S.A. 22-4507(c)

Functionally, then, the reasonable compensation caps currently in effect mean that assigned counsel who comply with those caps are forced either to provide work that they are compensated for at a constitutionally inadequate rate or provide adequate representation at an operative rate for less, such as the equivalent of \$34 an hour for the lowest level cases or \$6.80 an hour for the highest severity murder cases. In contrast, adequate funding of the assigned counsel program will require costs equivalent to at least \$19,840 for an off-grid homicide case at \$80 an hour or \$29,760 at \$120 an hour.⁷⁰

BIDS is currently going through the amendments process to adjust its administrative regulations on the reasonable rates of compensation for a higher hourly rate and to account for the updated national standards and professional expectations of the number of hours required, by severity level of crime, that it is reasonable to expect assigned counsel to dedicate to meet those minimum constitutional standards. BIDS is also in the process of running HB 2351 to make that higher hourly rate a permanent part of their compensation statute.

Moreover, even the budget proviso rate of \$120 an hour appears inadequate to maintain an adequate pool of assigned counsel willing to take indigent felony caseloads in Kansas.

In Kansas, an attorney in private practice typically charges an average hourly rate of \$227.⁷¹ The hourly rate of appointed cases in the federal system is \$155 to \$158.⁷² It is, therefore, obvious that an attorney willing to take indigent felony cases in Kansas's state courts is doing so at a rate significantly reduced from the general market, and unsustainable in comparison to other practice areas.⁷³ Finally, and most notably, the fact that the \$120 an-hour rate is unsustainable for a solo defense attorney strongly indicates that the compensation rate cannot further support the minimum staffing requirements for adequate defense addressed above.

SUPPLY SIDE AND DEMAND SIDE FACTORS IMPACTING STAFFING REQUIREMENTS

Kansas shows significant deficits in providing the adequately staffed public defender system that our Constitution requires. Fixing this deficit requires significant investment in hiring and expansion of our public defense delivery systems. However, numerous factors impact the supply (i.e., hiring) of new public defenders in Kansas, and the demand (i.e., number of felony filings) for public defender services in Kansas.

Supply Factor: Hiring Additional FTE Attorneys

The core initial solution to the public defender deficit is the hiring of new attorneys through the funding of new FTE positions.

BIDS as an agency has shown a capacity to hire extensively when provided funding and competitive salaries, filling 28 new FTE attorney positions in FY 2023. However, even those positive hiring numbers are

⁷⁰ See *State ex rel. Stephan v. Smith*, 242 Kan. 336 (1987) (state has obligation to compensate attorneys appointed to represent indigent defendants accused of crime, and responsibility to provide Sixth Amendment right to counsel is public responsibility that is not to be borne entirely by private bar).

⁷¹ Clio, Legal Trends Report 2023, Appendix A, 2023.

⁷² <https://www.fd.org/news/2022-increases-cja-hourly-rates>

⁷³ See also Testimony of KANSAS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS on HB 2363 to House Judiciary Committee, February 15, 2021 (Explaining that BIDS compensation rates are unsustainable for private defense attorneys operating in small practices).

insufficient to support fixing the public defense deficit at a yearly rate, as projected above. Additional improvements to the capacity to recruit high-quality candidates and incentives for new candidates to work as public defenders are required to achieve those thresholds.

First, BIDS requires an increased capacity to hire and train recruits. This will require additional administrative staffing dedicated to hiring and training new attorneys to increase the overall agency's capacity to hire, onboard, and begin utilizing those attorneys in the courtroom. This will also require an increased level of work with local law schools and recruiting from a broader section of regional and national law schools to improve recruiting capacity.

For example, law schools in Kansas reported incoming class sizes of 91 students for Washburn Law and 137 for KU Law in 2022⁷⁴. Assuming BIDS ultimately hires 10% of incoming Kansas law school students (which is an aggressive target) as public defenders, that would amount to only approximately 23 new FTE attorneys at given rates, far below the thresholds required to resolve the assigned counsel crisis. As such, solutions will require working with regional law schools to better serve Kansas' public defender needs through combinations of increased recruiting, increased programs that encourage public defense career paths such as law clinics and internships, and increased recruiting from law schools nationally.

Further, BIDS also requires additional monetary incentives to encourage new attorneys to join public defense, most particularly by providing salary parity with other major stakeholders in the criminal legal field, such as prosecutors and court staff.

Unfortunately, after briefly obtaining near parity in pay with prosecutors in FY 2022, BIDS was quickly outpaced by salary increases by prosecutors and high inflation rates almost immediately. This means that new attorneys who experience high levels of debt following law school graduation are likely to be pushed toward prosecution as the only economically viable field in the criminal legal system in Kansas. To maintain an adequate staff of public defenders, and resolve this dilemma, salary parity levels must be periodically reviewed to ensure that parity is maintained over the years so that public defender salaries are not outpaced by inflation rates and salary levels of other major stakeholders. This issue of pay parity and recruitment is discussed more fully by BIDS' companion report, "Public Defender Staffing Report" which is due to be issued at the end of December 2023.

Supply Factor: Retaining FTE Attorneys

Retention of existing, experienced, public defenders remains another factor in achieving constitutionally adequate staffing levels.

For the last several years, BIDS has conducted a yearly Well-Being Survey addressing positive and negative factors within BIDS. Respondents have consistently reported inadequate pay, inadequate staffing, and high caseloads as major detractors of their continued employment with BIDS. This report already addresses the issues with staffing levels, but ensuring adequate pay is also necessary.

To this end, in 2022 BIDS implemented an experience-based pay scale, allowing for increased compensation as employees continue with the agency. However, continuing to fund the yearly progression for employees along that pay scale remains necessary to ensure employee retention. Likewise, funding changes to

⁷⁴ ABA 509 Disclosures

the scale over time to ensure it remains in parity with prosecution and court staff salaries is imperative to retaining our experienced personnel.

Supply Factor: Leasing Adequate Space

A final supply factor is ensuring adequate office space to meet the constitutionally necessary staffing requirements.

Existing BIDS offices are at or near capacity for current staffing levels, and reaching the projected adequate staffing levels will require additional leased space for every area with a regional public defender office. Identifying and acquiring additional leased space in prior years has required months of work and dedication of significant staffing resources.

As such, the agency will require additional staffing in its administrative office to identify and enable the timely acquisition of office space to meet the unique requirements of a public defender office.

Demand Factor: Reversing the increasing rate of felony filings

Finally, it is important to acknowledge that the requirements of public defense staffing are directly impacted by prosecutorial decision-making and the rate of felony filings in Kansas. Reforms leading to decreased felony filings and decreased felonization of certain crimes in Kansas may also translate into reduced staffing requirements for providing indigent defense in felony cases.

Unfortunately, over the last 30 years, Kansas has trended only towards higher rates of felony filings, with the number increasing by 48.5 percent from 15,267 in FY 1995 to 22,672 in FY 2019⁷⁵, which has therefore corresponded with a directly comparable increased demand for public defenders. However, our staffing levels of public defenders has not kept pace with those felony filing increases.⁷⁶

If this increasing felony filing trend line continues, the need for indigent defense will continue to increase, causing for periodic upward revision of the staffing numbers addressed in this report. Inversely, decreasing the rate of felony filings in Kansas would reduce staffing needs. As such, additional reforms of the criminal legal system that decrease the severity of certain crimes or decriminalize certain offenses are also likely to reduce the cost of providing indigent representation, as well as serve other fiscal impacts such as reducing costs for KDOC in the long term.

However, BIDS recognizes that these larger conversations around significantly impactful criminal reform in Kansas requires not just a larger group of stakeholders across the state, but also a certain amount of political will that is outside of BIDS' individual control. As a result, these staffing discussions contained in Part One of this Report and the subsequent staffing discussions that will be contained in Part Two of this Report with our actual proposed staffing plan will continue to address the areas over which BIDS has either direct

⁷⁵ Statistical History of Case Filings by Judicial District FY 1995 through FY 2004; Statistical History of Case Filings by Judicial District FY 2010 through FY 2019

⁷⁶ Assuming all of the 7,405 additional yearly felony filings between FY 1995 and FY 2019 fell in the "Felony – Low" category for workload assessments that amounts to 217,707 additional indigent defense work hours (7,405 x 35 x 84%), or an increased need for 147 trial attorney FTE positions. Between FY 2000 and FY 2023 BIDS has added 61 new trial attorney positions. See Board of Indigents' Defense Services, Annual Report, FY 2000.

control or a significant amount of influence over—i.e., meeting the caseloads we have with constitutionally sufficient staffing in our public defender offices and with sufficient support to our assigned counsel program.

CONCLUSION

The takeaway from this Report is this: Kansas is not providing constitutionally reasonable effective assistance of counsel in each adult felony-level case as required by the Sixth Amendment.

While recent efforts over the last several years have had significant positive impacts on the delivery of constitutional defense in Kansas, we still have a long way to go to achieve that minimum level of defense required by the Sixth Amendment, the Kansas Constitution, *Gideon v. Wainwright*, and *Strickland v. Washington*.

The benefit of the new National Public Defense Workload Study and its workload recommendations, is that it provides all states, including Kansas, with a clear, methodologically sound, method of being able to estimate the staffing levels needed to meet these minimal constitutional standards.

But now it is up to us as a collective group of stakeholders across all three branches of government in Kansas, to commit to the reforms and support necessary to achieve that constitutionally minimal standard of representation together.

We must have a larger conversation about serious criminal reforms in Kansas to impact felony filings and public defender, court, and prosecutor caseloads.

We must commit to meeting our staffing obligations in our public defense system with ongoing yearly support that consists of additional staffing, additional resourcing, and additional salary support to allow BIDS to continue to make efforts in hiring new public defense employees and in retaining our current employees.

We must continue to commit to meeting our obligations to sufficiently resource and pay our private panel attorneys who support our jurisdictions both with and without public defender offices.

And we must do all of this with a timely and reasonable plan. Because while this crisis was not created overnight, and will require some time to solve, it cannot be allowed to stagnate or delay any longer than necessary.

These are hard conversations to have and these are hard plans to make, but BIDS is committed as an agency to meeting these difficult problems with realistic and impactful solutions. But BIDS cannot do this alone. We need the Governor, the Legislature, and the Courts to work with us on solving this crisis along the way while we continue to prioritize our clients' needs and their constitutional rights.

There is no Justice in our criminal legal system without us, the public defenders and public defense employees throughout Kansas. We look forward to working with our other legal system stakeholders to make impactful strides toward a more just legal system in Kansas.

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APPENDIX

APPENDIX I: PRELIMINARY WORKLOAD HOURS REQUIRED FOR KANSAS CRIMINAL APPEALS

As discussed in the body of this report, the 2022 delphi-based workload study in New Mexico published by ABA SCLAID and Moss Adams addressed appellate workload standards in a manner comparable to appellate practice in Kansas.

That study addressed appellate workload organized into case types based on general length of the record on appeal, direct review to the State Supreme Court, and discretionary review proceedings by the State Supreme Court.

To calculate a preliminary workload estimate for indigent appellate representation, those New Mexico Study case types were applied to data provided by the Kansas Appellate Defender Office that tracked the record size for 655 cases docketed by that office in FY 2023 as follows:

Case Type	Work Hours per Case	Kansas Cases in Category	Work Hours
General Calendar Ct. of Appeal – Record under 250 pages (up to 2 hours recorded)	89.87	348	31274.76
General Calendar Ct. of Appeal – Record 250-750 pages (2-6 hours recorded)	123.85	206	25513.1
General Calendar Ct. of Appeal – Record 750-1500 pages (6-12 hours recorded)	161.14	63	10151.82
General Calendar Ct. of Appeal – Record over 1500 pages (more than 12 hours recorded)	232.07	36	8354.52
Direct File in the Supreme Court (Murder I and Child Abuse Resulting in Death)	242.53	Data Unavailable.	
Discretionary Review in Supreme Court (following General Calendar Review)	191.37	Data Unavailable	

Total Hours: 75294.2

Based on the base work hours calculations discussed in this report, the preliminary workload estimate would require 50.9 FTE attorney positions. The Kansas Appellate Defender Office currently has 21 public defenders.

However, multiple factors indicate this is likely a conservative estimate. Initially, this preliminary data review did not differentiate and allow for inclusion of the additional workload from direct appeal cases filed directly in the Kansas Supreme Court and cases where discretionary reviews were granted.

Moreover, the number of appellate cases docketed in FY 2023 remains decreased due to court slowdowns from the Covid-19 Pandemic. For example, in FY 2020 the Kansas Appellate Defender Office completed 981 cases, nearly 1.5 times the cases docketed in FY 2023. As such, workload estimates may increase significantly in coming years as case numbers again reach pre-pandemic numbers.