

A COMPARATIVE STUDY OF INDIGENT DEFENSE SYSTEMS IN KANSAS

by

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Abstract

In the decades since the Supreme Court handed down its landmark decision in *Gideon v. Wainwright* in 1963, significant nationwide debate has surrounded the methods and means by which the right to legal representation for indigent defendants should be upheld. Issues of efficiency, due process, adequate defense, and the breadth of charges which the state is constitutionally bound to protect have all colored how this subject is legislated and held in the public imagination. This research project is designed to describe, analyze, and evaluate the indigent defense process across the state of Kansas. To this end, quantitative and qualitative data on three separate jurisdictions in areas of varying population density will be compiled and assessed. These include the State Indigent Defense Offices in Shawnee County and Junction City, as well as the assigned counsel system present in Marshall County. Factors such as attorney caseloads, the funding of these institutions, and the likelihood that defendants in a given jurisdiction will qualify for indigence will be considered to better understand the experience that disadvantaged defendants across the state have with the criminal justice system. While a relatively small sample of jurisdictions will not provide an irrefutably conclusive picture of the current state of indigent defense in Kansas, this case study will contribute significant regional information to the ongoing national conversation on the subject.

Review of the Literature

The central challenge at the heart of the provision of indigent defense services is balancing the competing government interests of efficiency and due process. As with all state-provided services under a representative and elective system, indigent defense organizations are expected to fulfill their mandates in a streamlined manner, without unnecessarily wasting taxpayer money. This pressure is especially pronounced in this field, as the representation of indigent defendants is often deemed by the general public a mere rubber-stamp hurdle preceding justified and inevitable incarceration of the accused.¹ As a result, the funding that makes these programs possible is an easy target for those looking to decrease state spending without awakening widespread public backlash. Attempting to protect the rights of disadvantaged defendants is almost always politically unpopular, and accordingly ranks relatively low on the list of goals driving local and state governments.² Concerns over efficiency would seemingly motivate the architects of indigent defense systems to pursue and prefer inexpensive, fast-moving, and cooperative representative structures.³

Standing in stark contrast to this set of incentives are the dictates of the anti-majoritarian Supreme Court, whose interpretation of the constitutional provisions relating to counsel since the mid-twentieth century has clearly followed a more liberal bent.⁴ Due process as it has been framed by that august body demands of the justice system a higher standard, the provision of

¹ Molly Wilson, "Defense Attorney Bias and the Rush to the Plea," *Kansas Law Review*, April 2016, <https://doi.org/10.17161/1808.25553>, 274.

² Robert L. Spangenberg, and Marea L. Beeman, "Indigent Defense Systems in the United States," *Law and Contemporary Problems* 58, no. 1 (1995), doi:10.2307/1192166, 38.

³ Meredith Anne Nelson, "Quality Control for Indigent Defense Contracts," *California Law Review* 76, no. 5 (1988): 1147-1183, doi:10.2307/3480518, 1155.

⁴ Carol S. Steiker, "Keynote Address: Gideon at Fifty: A Problem of Political Will," *The Yale Law Journal* 122, no. 8 (2013): 2694-712, <http://www.jstor.org.er.lib.k-state.edu/stable/23528690>, 2699.

“effective counsel.” The road to this standard began with the Warren Court’s decision in *Gideon v. Wainwright*.⁵ There the Court established the precedent that this individual right, however inexpedient ensuring it may be, cannot be overlooked if a state wishes to comply with the spirit of the law that governs the United States. It was at this point that the final clause of the Sixth Amendment, that, “the accused shall... have the assistance of counsel for his defence [sic],”⁶ was incorporated beyond merely the federal court system. As a result, the right to an attorney was extended to any defendant whose conviction would result in their loss of life or significant property when they stood accused by an individual state.⁷ In his majority opinion, Justice Hugo Black wrote that a right to competent and involved counsel is a, “fundamental and essential right made obligatory upon the states by the Fourteenth Amendment.”⁸ Combining expediency with judicial integrity remains the white whale of indigent defense systems across the United States, and several different methods of providing defendants with satisfactory counsel have emerged since the 1960s to accommodate these needs.⁹

Over two decades later, the Supreme Court further advanced this right by deciding that state-provided counsel must act competently and effectively in order for this Constitutional mandate to be fulfilled. In *Strickland v. Washington* in 1984, the Court laid out the standards for establishing ineffective assistance of counsel. In order to meet these standards, a defendant pursuing such a claim must, “show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair

⁵ Carol S. Steiker, "Keynote Address: Gideon at Fifty: A Problem of Political Will," *The Yale Law Journal* 122, no. 8 (2013): 2694-712, <http://www.jstor.org.er.lib.k-state.edu/stable/23528690>, 2704.

⁶ U.S. Const. amend. VI

⁷ *Gideon v. Wainwright*, 372 US 335 (1963), 15.

⁸ *Gideon v. Wainwright*, 372 US 335 (1963), 8.

⁹ Tim Young, "The Right to Counsel: An Unfulfilled Constitutional Right," *Human Rights* 39, no. 4 (2013), <http://www.jstor.org.er.lib.k-state.edu/stable/24630069>, 8.

trial.”¹⁰ The 8-1 decision featured a majority opinion written by Sandra Day O’Connor which established the precedent that the service of counsel can only be reasonably objected to if it is so poor as to completely change the outcome of a case. A new trial can only be garnered if the defender’s actions in court fell below an objective standard of reasonableness.¹¹ Although the bar set by this decision was high, it furthered the Warren Court’s vision of a system that was driven by the substance and not merely the appearance of adversarial justice. No longer was the state merely required to provide a warm body that had passed the bar exam in order to represent indigent defendants. This ruling resulted in the continuing improvement of public defense systems, as the threat of ensuing litigation contributed to increases in the hiring of attorneys specializing in criminal procedure.¹²

Although a significant amount of literature has been generated concerning the broad issues discussed above, there remains a dearth of academic research into the role that population density plays in the experience that impoverished defendants have with the justice system in the U.S..¹³ While this paper will focus on that experience within a specific state, Kansas, this emphasis is not meant to limit the scope of the findings herein. Rather, it is hoped that this research will serve as a case study of this extremely broad issue. In seeking to quantify and effectively evaluate the level of competence and availability expressed by counsel, the existing body of research has relied on several outcome variables. Among these are the caseload placed

¹⁰ *Strickland v. Washington*, 466 US 668 (1984), 2.

¹¹ *Strickland v. Washington*, 466 US 668 (1984), 11.

¹² Amy Knight Burns, "Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance," *Stanford Law Review* 64, no. 3 (2012), <http://www.jstor.org.er.lib.k-state.edu/stable/41511103>, 735.

¹³ "Addressing the Access to Justice Crisis in Rural America," American Bar Association (ABA), July 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/access_justice_rural_america/.

on the attorneys providing indigent defense, their trial experience, relevant legal training, the resources which they have at their disposal, and the likelihood that similarly situated defendants will be encouraged to go to trial or pursue a plea deal.¹⁴

Obviously, the set of facts surrounding any defendant will be the product of enumerable variables, making comparisons between trial outcomes a shaky metric by which to evaluate the performance of a defending attorney.¹⁵ Attempts to address this uncertainty have taken the form of reducing external validity in order to enhance the internal validity of a given research design. The bulk of scholarly articles in this area are quick to note that the patchwork of indigent defense systems across the country makes findings from one jurisdiction difficult to directly apply elsewhere. Instead, it has often been argued that more study of this topic in varying contexts is needed instead of taking any one regional system as representative of the whole of the country.¹⁶ The benefit of such a smaller study is that it allows for an in-depth analysis of the caseloads that defenders face, as well as important particulars like the funding mechanisms for various defense systems. A study conducted in Michigan in 1999 focused solely on the time that attorneys were able to devote to their clients, while noting the difficulty associated with developing a performance metric for public defenders and assigned counsel.¹⁷ That study found that the

¹⁴ Andrew Manuel Crespo "The Hidden Law of Plea Bargaining." *Columbia Law Review* 118, no. 5 (2018): <https://www-jstor-org.er.lib.k-state.edu/stable/26434609>, 1354.

Fender, Blakely Fox, and Carl Brooking, "A Profile of Indigent Defense and Presentencing Jail Time in Mississippi," *The Justice System Journal* 25, no. 2 (2004), <http://www.jstor.org.er.lib.k-state.edu/stable/27977188>, 215.

¹⁵ Richard E. Priehs, "Appointed Counsel for Indigent Criminal Appellants: Does Compensation Influence Effort?" *The Justice System Journal* 21, no. 1 (1999), <http://www.jstor.org.er.lib.k-state.edu/stable/27977003>, 65.

¹⁶ Fender, Blakely Fox, and Carl Brooking, "A Profile of Indigent Defense and Presentencing Jail Time in Mississippi," *The Justice System Journal* 25, no. 2 (2004), <http://www.jstor.org.er.lib.k-state.edu/stable/27977188>, 210.

¹⁷ Richard E. Priehs, "Appointed Counsel for Indigent Criminal Appellants: Does Compensation Influence Effort?" *The Justice System Journal* 21, no. 1 (1999), <http://www.jstor.org.er.lib.k-state.edu/stable/27977003>, 74.

amount and method of compensation did not affect the time commitments of counsel enough to reject the study's null hypothesis, but argued that additional research in other jurisdictions should be carried out.

Another outcome variable relating to the experience of indigent defendants is the likelihood of taking plea deals rather than pursuing a trial by jury. The general consensus in this area among scholars is that defendants represented by assigned counsel rather a full-time public defender tend to pursue plea outcomes more frequently.¹⁸ It should be specified at this point that in Kansas as elsewhere in the United States, public defender offices are instituted only in areas deemed populated enough to justify their increased cost over court appointed or contract attorney systems. For the majority of counties in the United States, the latter methods of representation are used, while the overwhelming majority of the nation's population and indigent defendants live within the jurisdictions served by public defender offices.¹⁹ Therefore, this type representation in Kansas is highly dependent on the population density in which a defendant is arrested, with eight offices covering twenty-five of the one-hundred and five counties in the state.²⁰ Studies explicitly covering similar urban-rural divides are not prevalent in the existing literature, but use can be made of past analyses of differences in performance between assigned counsel, court appointed counsel, and public defenders.

¹⁸Robert L. Spangenberg, and Marea L. Beeman, "Indigent Defense Systems in the United States," *Law and Contemporary Problems* 58, no. 1 (1995), doi:10.2307/1192166, 45.

Andrew Manuel Crespo "The Hidden Law of Plea Bargaining." *Columbia Law Review* 118, no. 5 (2018): <https://www-jstor-org.er.lib.k-state.edu/stable/26434609>, 1405.

¹⁹ "2018 Policy Paper: Courts Need to Enhance Access to Justice" (Conference of State Court Administrators , September 3, 2018), [https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy Papers/Policy-Paper-1-28-2019.ashx](https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Policy-Paper-1-28-2019.ashx), 8.

²⁰ "Kansas State Board of Indigents' Defense Service" (Kansas State Board of Indigents' Defense Service, April 2014), <http://www.sbids.org/>.

As previously mentioned, the majority of research concerning these divergent systems of representation has found that plea deals are more prevalent within assigned or contract counsel systems. Many scholars have also concluded that the nature of court appointed counsel work can affect outcomes for indigent defendants, as attorneys under these systems are paid an hourly wage rather than receiving a yearly salary as to public defenders. This difference in payment delivery means that the former group is more likely to have less criminal procedure experience than its more urban counterparts.²¹ The question of quality of representation also appears in rural contexts because there are necessarily fewer qualified candidates for assigned counsel positions, undermining the potential for legitimate and high-quality competition between local attorneys to be placed on the court's panel in their jurisdiction.²²

Ultimately, the existing literature on the subject of indigent defense in urban and rural contexts tends to support the conclusion that the standardization and additional resources at the disposal of public defenders offices produces better case outcomes for defendants than those generated by assigned counsel or contract attorneys.²³ These findings, however, are not conclusive, with much additional surveying still needed to complete the picture begun with early

²¹ Meredith Anne Nelson, "Quality Control for Indigent Defense Contracts," *California Law Review* 76, no. 5 (1988), doi:10.2307/3480518, 1174.

²² Alissa Pollitz Worden, "Privatizing Due Process: Issues in the Comparison of Assigned Counsel, Public Defender, and Contracted Indigent Defense Systems," *The Justice System Journal* 14/15, no. 3/1 (1991), <http://www.jstor.org.er.lib.k-state.edu/stable/27976752>, 393.

²³ Meredith Anne Nelson, "Quality Control for Indigent Defense Contracts," *California Law Review* 76, no. 5 (1988), doi:10.2307/3480518, 1156.

Alissa Pollitz Worden, "Privatizing Due Process: Issues in the Comparison of Assigned Counsel, Public Defender, and Contracted Indigent Defense Systems," *The Justice System Journal* 14/15, no. 3/1 (1991), <http://www.jstor.org.er.lib.k-state.edu/stable/27976752>, 415.

James M. Anderson and Paul Heaton, "Measuring the Effect of Defense Counsel on Homicide Case Outcomes" (National Institute of Justice, December 2012), <https://nij.ojp.gov/library/publications/measuring-effect-defense-counsel-homicide-case-outcomes>.

studies. For the purposes of this research project, a wholistic evaluation of the experience of state-represented defendants will be utilized. Factors including average attorney experience, caseload, continuing legal education, funding, and the existence of oversight for attorneys will all be utilized to examine how variations in population density impact quality of representation. Although the existing scholarly opinion is largely that urban defendants receive a higher quality of representation from the state, that hypothesis must be thoroughly investigated in jurisdictions such as Kansas in order to continue to hold weight in the academic community.

Methods

In this study, the topic of state-funded indigent defense in the state of Kansas is approached through a wholistic comparison of its provision in three distinct jurisdictions within the state. Both quantitative and qualitative data are used to this end. The experimental variable is population density, which directly influences whether a given jurisdiction has a public defender office or relies on appointing private attorneys to represent indigent defendants. According to the United States Census Bureau, the population densities of Shawnee, Geary, and Marshall counties, the three jurisdictions used, were 327, 89, and 11 people per square mile, respectively, as of July 1, 2018.²⁴ These jurisdictions were selected to provide a representative cross section of population density in Kansas, although convenience was also a factor contributing to their use.

²⁴ “U.S. Census Bureau QuickFacts: Shawnee County, Kansas,” Census Bureau QuickFacts. U.S. Census Bureau, August 2018, <https://www.census.gov/quickfacts/shawneecountykansas>.

“U.S. Census Bureau QuickFacts: Geary County, Kansas,” Census Bureau QuickFacts. U.S. Census Bureau, August 2018, <https://www.census.gov/quickfacts/gearycountykansas>.

“U.S. Census Bureau QuickFacts: Marshall County, Kansas,” Census Bureau QuickFacts. U.S. Census Bureau, August 2018, <https://www.census.gov/quickfacts/marshallcountykansas>.

The quality of representation afforded defendants in these systems is analyzed through the use of both quantitative and qualitative methods in order to provide both objective comparison and the perspective of those who themselves provide these services. Although the elusive dependent variable of ‘quality of representation’ cannot be reduced to a single data point, it is assumed based on the literature that several desirable characteristics are integral to the operation of an effective public defense system.²⁵ Among these are a manageable caseload for defenders, compensation comparable to that of prosecuting attorneys in the same jurisdiction, consistent access to investigators and paralegals, and acquaintance with the applicable law.²⁶

Quantitative data relied upon include the caseload handled by the indigent defense systems examined, as well as the compensation scheme for defense counsel, and the likelihood that the given defense system would provide plea deals for similarly situated cases. Here, level five drug offenses, denoting the possession of small amounts of Schedule Two substances, common to all three jurisdictions, are used for this metric. These statistics were received from the county clerks in each of jurisdiction, as well as from the administrative office for the state Bureau of Indigent Defense. Qualitative data were compiled via semi-structured interviews with the chief attorneys for the public defender organizations responsible for Shawnee and Geary counties, as well as with the private attorney covering indigent defense in Marshall county. Through them, an accurate picture of access to additional resources, relevant attorney experience, and of the relationship between the court and the defender could be obtained.

²⁵ Robert L. Spangenberg, and Marea L. Beeman, "Indigent Defense Systems in the United States," *Law and Contemporary Problems* 58, no. 1 (1995), doi:10.2307/1192166, 4.

²⁶ Meredith Anne Nelson, "Quality Control for Indigent Defense Contracts," *California Law Review* 76, no. 5 (1988): 1147-1183, doi:10.2307/3480518, 1163.

Ultimately, this wide breadth of outcome variables was necessary in order to develop a complete understanding of how a defendant's location in Kansas impacts the quality of representation which they receive and the resources available to those who provide it. The methods of evaluation relied upon are widely accepted in this field, particularly the use of a frequent charge as a means of comparing the likelihood of plea deals in given jurisdictions.²⁷ Through this methodology, both the objective and intangible aspects of this field can be thoroughly examined, and their consequences for defendants grasped in their proper context.

Findings

Background Information

Before statistics concerning the indigent defense systems in these jurisdictions can be properly understood, the personnel that each has access to should be appraised. This information allows for a proper appreciation of the context in which these attorneys operate. In Shawnee County, the Public Defender Office is composed of nine trial attorneys, one investigator, one legal assistant, and three non-legally trained staff members.²⁸ The North Central Regional Office in Junction City is staffed by eleven attorneys, two investigators, two legal assistants, and three office assistants with no legal training. In Marshall County, the attorney interviewed asserted that in cases involving no conflict of interest, he was the only attorney available in the County to handle indigent defense cases.²⁹ Due to the fact that his time is split between public and private

²⁷ Molly Wilson, "Defense Attorney Bias and the Rush to the Plea," *Kansas Law Review*, April 2016, <https://doi.org/10.17161/1808.25553>, 268.

²⁸ "Kansas State Board of Indigents' Defense Service" (Kansas State Board of Indigents' Defense Service, April 2014), <http://www.sbids.org/>.

²⁹ Stephen Kraushaar, interview by author, Marysville, October 16, 2019.

practice, his office is not furnished with a salaried investigator, and the compact nature of his practice precludes the need for a secretary or legal assistants.

Furthermore, the geographical areas for which these offices are responsible must be thoroughly grasped in order to understand their operations on a daily basis. The Shawnee County Office handles only cases originating among the population of Topeka and its immediate suburbs, a total population of 177,934 according to the last census within roughly 550 square miles.³⁰ The overwhelming majority of the defendants they represent live in the city, all are held there while awaiting trial, and all of the trials they are responsible for take place there. The Junction City Office is currently tasked with representing defendants from five surrounding counties, which had a combined population of 139,689 in 2010.³¹ This jurisdiction includes any indigent students charged with state crimes while attending Kansas State University, a responsibility often made difficult by the transient nature of this young population group. While fewer people live in this area than in Shawnee County, the Office is accountable for trials in five different county seats at any given time, as well as a total offender residence area of 3,237 square miles. The appointed counsel currently responsible for Marshall County is Stephen Kraushaar. During his interview, he discussed the fact that he is also responsible for indigent defense cases in neighboring Nemaha, Brown, and Doniphan counties within the Twenty-Second Judicial District. When these jurisdictions are added to Marshall County, the area which he oversees was

³⁰ “U.S. Census Bureau QuickFacts: Shawnee County, Kansas,” Census Bureau QuickFacts. U.S. Census Bureau, August 2018, <https://www.census.gov/quickfacts/shawneecountykansas>.

³¹ “Kansas State Board of Indigents' Defense Service” (Kansas State Board of Indigents' Defense Service, April 2014), <http://www.sbids.org/>.

“U.S. Census Bureau QuickFacts: Counties of Kansas,” Census Bureau QuickFacts. U.S. Census Bureau, August 2018, <https://www.census.gov/quickfacts/gearycountykansas>.

populated by 38,224 as of the 2010 Census, and is 2,586 square miles in size.³² This single attorney is responsible for handling all of the indigent defense cases arising in this large area, barring a legal conflict of interest.

Experience

In any criminal case, it is essential to the provision of effective counsel that the attorney representing a client has experience in the area of law in which they are arguing: that they are both well acquainted with the relevant statutes and have spent time in the courtroom on the subject at hand. In a thankless area of the law such as indigent defense, where compensation for attorneys is often not competitive with the private sector, the retention of experienced and savvy lawyers is extremely difficult. Hawver pointed out that in the North Central Office, “oftentimes people just out of law school will start here to get time in the courtroom and practice on their feet. But just as soon as they’re getting really good, they leave to go elsewhere.”³³ The crucial distinctions between appointed counsel and public defenders are their connections to an area and the percentage of their practice which is dedicated to indigent defense.

The appointed counsel interviewed in this investigation represented one of the best-case scenarios for defendants receiving this manner of representation. Since beginning to practice in Marshall County in 1986, Kraushaar has continuously served as appointed counsel, meaning that at this point he has defended poor clients in essentially any manner of case which he is assigned. Furthermore, fully 60% of his time spent practicing law today is in this area.³⁴ He is familiar with the expectations and individuals present in any of the courthouses where he handles cases.

³² “U.S. Census Bureau QuickFacts: Counties of Kansas,” Census Bureau QuickFacts. U.S. Census Bureau, August 2018, <https://www.census.gov/quickfacts/gearycountykansas>.

³³ Cole Hawver, interview by author, Junction City, October 2, 2019.

³⁴ Stephen Kraushaar, interview by author, Marysville, October 16, 2019

That being said, that is obviously not the case in all situations involving rural indigent defense. Contracted attorneys might normally only handle wills, divorces, or tax law. How qualified can they then be to argue for an assigned client in a murder case? While having a personal connection of the area in which they serve and the people they represent can be valuable, many lack the proper courtroom pedigree to effectively produce adversarial trial outcomes.³⁵

Stacey Donovan, Chief Defender in Shawnee County, noted with pride that, “In my office, we’re one-trick ponies. We only handle felony cases, and each of the attorneys here is seasoned in this field.”³⁶ She personally has been working in that office for twenty-two years, the last nine as its head attorney. Donovan explained that working in the Shawnee Office is a bit of a prestige position within SBIDS, and that eight of the nine attorneys in the office are career public defenders. Unlike Hawver, Donovan does not often have to deal with the departure of qualified attorneys who are utilizing public defense merely as a learning experience. For his part, Hawver is a knowledgeable practitioner, having spent ten years as a private defense attorney in Kansas City Kansas before moving to the North Central Office, where he’s been for the last eleven years. Having originally entered to gain trial experience and develop his courtroom skills, he eventually elected to stay in the area, and has been the chief defender for five years. He also cited the lack of opportunity for advancement in the North Central office as a reason that promising young attorneys leave to practice elsewhere. In short, retaining talented and accomplished lawyers in this area requires skillful management and remains extremely difficult.

³⁵ Meredith Anne Nelson, "Quality Control for Indigent Defense Contracts," *California Law Review* 76, no. 5 (1988): 1147-1183, doi:10.2307/3480518, 1162.

³⁶ Stacey Donovan, interview by author, Topeka, October 29, 2019.

Caseload

The first major consideration made when evaluating these three defense systems is assessing the number of cases that each is responsible for in a given year. For public defender offices, the number that each member attorney is responsible for at a given time is also a significant factor in determining the quality of defense that they are able to provide. According to the American Bar Association, attorneys should handle no more than 150 felony cases or 400 misdemeanor cases in a given year.³⁷ Since these offices and attorneys are not able to select the cases that they are assigned, each of the systems surveyed has mechanisms by which excessive caseloads can be avoided. The degree of effectiveness associated with the process by which each reacts to an overload of cases is discussed below.

The Shawnee County Public Defender Office was tasked with providing counsel in 1,852 cases in fiscal year 2018 between its nine attorneys.³⁸ The maximum caseload acceptable at a given time before the branch asks that new cases be referred elsewhere, according to Chief Public Defender Stacey Donovan, is fifty-five cases per attorney. At that point the branch “shuts down”, and incoming cases are given first to the Conflicts Office in Topeka, which is also accountable for the cases which the Public Defender Office cannot handle due to conflicts of interest and has eight attorneys. If that office likewise becomes overwhelmed, then the private law firm of Tenopir and Huerter is contracted to provide indigent defense services, with five attorneys available for the purpose if necessary. If all of these offices are inundated, then a judge-appointed panel of attorneys is utilized.

³⁷ Norman Lefstein, “Securing Reasonable Caseloads,” *Ethics and Law in Public Defense*, 2011.

³⁸ “Shawnee County Public Records,” Third Judicial District (Shawnee County, January 2019), <https://public.shawneecourt.org/PublicA/access/?agent=51558572&hu=080208>

The North Central Office closed 1,243 cases in fiscal year 2018, the majority of those being drug interdiction cases along Interstate 70, which runs directly through Riley, Geary, and Dickinson Counties.³⁹ Chief Defender Cole Hawver asserted that the caseload handled by individual attorneys at a given time was predicated on their experience level and considerations for the distance that has to be travelled to appear at certain trials. It was clear that due to relatively high turnover in that office, the caseload each attorney could handle varied significantly. Hawver, for example, sets his personal limit at seventy cases, the reason being that he has worked in the office for eleven years and typically handles only cases at the Geary County Courthouse, less than a mile from the Office.⁴⁰ For the other attorneys at that branch, the limit before ‘shutting down’ is fifty cases per experienced attorney, and thirty for those who are relative neophytes in the process, as well as those primarily responsible for cases involving a great deal of travel to reach clients or hearings. This office does not have access to support from other nearby State Bureau of Indigent Defense Services (SBIDS) Offices as does Shawnee County, and thus any shutdown leads to cases being tried by the local panel of attorneys.⁴¹

Court-appointed defense attorney Steve Kraushaar closed 216 cases in fiscal year 2018, with the most coming not in Marshall County where he lives and has his office, but rather in Brown County, two counties over.⁴² He estimated that at a given time he is personally responsible for approximately fifty cases in the four counties that he works.⁴³ As a result of the relative lack of staffing in the region, many cases involving poor defendants receive repeated

³⁹ “Records for the Eighth Judicial District,” Judicial District Statistics (Kansas Judicial Branch, 2019), <http://www.kscourts.org/districts/District-Info.asp?d=8>).

⁴⁰ Cole Hawver, interview by author, Junction City, October 2, 2019.

⁴¹ “Kansas State Board of Indigents' Defense Service” (Kansas State Board of Indigents' Defense Service, April 2014), <http://www.sbids.org/>.

⁴² “Records for the Twenty-Second Judicial District,” Judicial District Statistics (Kansas Judicial Branch, 2019), <http://www.kscourts.org/districts/District-Info.asp?d=22>).

⁴³ Stephen Kraushaar, interview by author, Marysville, October 16, 2019.

continuances. This issue is present not only on the defense side of many issues, but also for local prosecutors, the majority of whom are also one of only one or two county attorneys accountable for carrying out all of their jurisdiction's prosecutorial needs. At times when Mr. Kraushaar feels he cannot adequately represent all of the clients that he has, the county encounters a significant issue concerning the dearth of qualified individuals available. The county only has five other licensed attorneys outside of Kraushaar and the County Attorney.⁴⁴ As a result, clients may receive representation from one of the two other defense attorneys in Marysville, the county seat, or from a panel attorney from nearby Washington county. In the more easterly counties that Kraushaar covers, attorneys from Topeka or the Saint Joseph area are occasionally retained to represent poor clients. Kraushaar noted with dismay the effect that a lack of qualified attorneys with knowledge of criminal trial law has on the right of poor defendants to adequate counsel and a relatively speedy trial. He pointed out that, "If you've passed the bar and live in these counties, you're going to be on the list, even if you never touch criminal law in the rest of your practice."⁴⁵

It is difficult to assess exactly how many cases each of the attorneys in the public defender offices closes in a given year given. This is due to the fact that different individuals handle varying caseloads and each client's situation is unique in the amount of time it takes to process. However, both of these offices only take clients charged with felonies, meaning that American Bar Association standards would dictate that each attorney takes no more than 150 cases each year. Stacey Donovan's office was able to close 1,458 of the 1,852 cases that it was assigned during the last calendar year, with the remaining 394 being assigned to the SBIDS

⁴⁴ Stephen Kraushaar, interview by author, Marysville, October 16, 2019.

⁴⁵ Stephen Kraushaar, interview by author, Marysville, October 16, 2019.

Conflicts Office and the private firm noted earlier.⁴⁶ Thus on average an attorney in that office was responsible for 162 cases in fiscal year 2018, over the national industry recommendations. In the North Central Office, the average number of cases closed was 113. However, the manner in which Hawver balances experience and travel when assigning cases means that those attorneys who have been in his office for some time and argue cases in Junction City likely handle closer in 140 cases in a year, although it is not certain. The 216 cases settled by Kraushaar appears far above the standard until it is clarified that the majority of the cases he handles are misdemeanor or juvenile cases. Unlike in the larger offices, Marshall County pays him handle these smaller, less demanding cases in order to keep them moving through the smaller judicial system present therein.⁴⁷ As a result, the seemingly alarming number of cases that he handles is actually well within the ABA standards mentioned above, with 120 being misdemeanor cases and the remaining 86 being those involving felony charges. However, the travel associated with defending clients in four counties still exacerbates this already substantial amount of work.

Funding

The compensation scheme for the Shawnee County and North Central Office are extremely similar, with all attorneys being salaried state employees. The Chief Defender in these offices make \$82,580 per year, while member attorneys are paid on a scale that reflects their history of employment with SBIDS, on a current range of \$47,670 to \$65,230 per year.⁴⁸ For

⁴⁶ “Records for the Eighth Judicial District,” Judicial District Statistics (Kansas Judicial Branch, 2019), <http://www.kscourts.org/districts/District-Info.asp?d=8>).

⁴⁷ Stephen Kraushaar, interview by author, Marysville, October 16, 2019.

⁴⁸ “Kansas State Board of Indigents' Defense Service Compensation Scheme” (Kansas State Board of Indigents' Defense Service, April 2014), <http://www.sbids.org/compenation>.

public defender offices, this is a much less expensive and convoluted solution than paying attorneys on a case-by-case or hourly basis.

All salaries are drawn from the SBIDS budget, approved each year by the governor. In fiscal year 2016, the budget was \$26.9 million, which increased in 2017 to \$27.3 million, and again to \$29.4 million in fiscal year 2018. In 2019, \$31.4 million was set aside for the agency, the governor's recommendation for the SBIDS budget in 2020 is \$32.8 million.⁴⁹ These substantial increases reflect a number of things. The first is the state's growing recognition of the underfunded nature of these services across jurisdictions and a willingness to properly allocate funds in an attempt to bolster indigent defense. The second is the hiring crisis which the Bureau experienced in 2018, which led to rapid increases in wages because many branches, including the North Central Office, were hemorrhaging employees. Hawver noted that six of the attorneys in his office left during 2018 as a result of non-competitive pay, better offers in the private sector, or dissatisfaction with legal work in such a rural area in general.⁵⁰ Of this funding, approximately \$10.5 million was set aside for public defender wages in 2019, up from \$9.9 million in fiscal year 2015. For assigned counsel across the state, the same period has seen a wage increase for \$10.9 to \$14.8 million.⁵¹

This is another key reason for the budget increase: growth in the salaries of assigned or contracted counsel in order to stay somewhat competitive with the private sector. Kraushaar noted that the increase in hourly wages has been welcome, as the rate has gone from \$67 per

⁴⁹ "Governor's Budget Report," Governor's Budget Report (Kansas Division of the Budget, January 2019), <https://budget.kansas.gov/budget-report/>).

⁵⁰ Cole Hawver, interview by author, Junction City, October 2, 2019.

⁵¹ "Governor's Budget Report," Governor's Budget Report (Kansas Division of the Budget, January 2019), <https://budget.kansas.gov/budget-report/>).

hour to \$80 since 2015.⁵² However, he argued that this compensation is still not enough to attract many top legal minds practicing in rural areas, who are more likely to charge between \$100 and \$150 per hour depending on the case and the client. For criminal cases, attorneys statewide in rural counties charge an average of \$130 per hour. Thus the increase in wages put forward by SBIDS in the last five years has hardly changed many minds. Kraushaar said that he is paid a salary of \$62,300 annually by Marshall County, but that in the three other counties in which he works he receives the SBIDS flat fee for contracted or assigned counsel.⁵³ As a result, he is able to supplement his county salary substantially, and the overall compensation is enough to persuade him that private practice isn't necessarily his most competitive source of income.

Pleas

The likelihood that similarly situated defendants will pursue a plea deal has long been used as a means of monitoring the effectiveness of indigent defense systems.⁵⁴ In each of the three jurisdictions studied, level five drug offenses, the least extreme offense on the state's sentencing range, were among the most common felony charge that those representing indigent defendants were likely to encounter.⁵⁵ As a result, cases involving this offense will be used to compare the likelihood that a given defendant in one of these jurisdictions qualifies for indigence. It will also be used to assess the likelihood that they will plead guilty to possession or a lesser charge rather than seeking a trial by their peers. Each case is obviously characterized by

⁵² Kansas State Board of Indigents' Defense Service Compensation Scheme" (Kansas State Board of Indigents' Defense Service, April 2014), <http://www.sbids.org/compenation>.

⁵³ Stephen Kraushaar, interview by author, Marysville, October 16, 2019.

⁵⁴ Molly Wilson, "Defense Attorney Bias and the Rush to the Plea," *Kansas Law Review*, April 2016, <https://doi.org/10.17161/1808.25553>, 268.

⁵⁵ "KBI Crime Index 2018," Kansas Bureau of Investigation (State of Kansas, February 2019), [http://www.kansas.gov/kbi/stats/docs/pdf/Crime Index 2018.pdf](http://www.kansas.gov/kbi/stats/docs/pdf/Crime%20Index%202018.pdf)).

a variety of different factors, but taken as a whole the plea rate among low-level drug offenders is a reasonable and helpful means of comparison

In Shawnee County, there were 115 cases of level five drug offense charged in 2018. Of those, 104 defendants qualified for indigent defense services, a rate of approximately 90.5%. In 89 of these cases, an intermediate plea deal was reached between the District Attorney and the Defense, a rate of roughly 85%.⁵⁶ In the five counties covered by the North Central PD Office, there were 190 cases of this nature charged in 2018, and 176, or 92.6% of those were handled by the Office.⁵⁷ The higher number of cases charged here is likely the result of the fact that Interstate (I-70) runs through the majority of these counties.⁵⁸ Of the cases they received, the public defenders' clients pled guilty in 157, or approximately 93% of them. In Marshall, Nemaha, Brown, and Doniphan Counties, those under the responsibility of Stephen Kraushaar, there were forty-seven cases of level five drug offenses charged, and in forty-one of them the task of defense counsel fell to him. In 39, or roughly 96% of those cases, his clients pled guilty, with only two of them going to trial.⁵⁹

What this data tells us should not be treated with absolute certainty. However, this information does provide a compelling picture of the situations facing each of these defense systems in a given year, and how they respond in turn. There are two particularly interesting trends to be noted here. The first is that a higher rate of these defendants received state-provided counsel in Shawnee County and the North Central Office than did in the Twenty-Second Judicial

⁵⁶ "Records for the Third Judicial District," Judicial District Statistics (Kansas Judicial Branch, 2019), <http://www.kscourts.org/districts/District-Info.asp?d=3>).

⁵⁷ "Records for the Eighth Judicial District," Judicial District Statistics (Kansas Judicial Branch, 2019), <http://www.kscourts.org/districts/District-Info.asp?d=8>).

⁵⁸ Cole Hawver, interview by author, Junction City, October 2, 2019.

⁵⁹ "Records for the Twenty-Second Judicial District," Judicial District Statistics (Kansas Judicial Branch, 2019), <http://www.kscourts.org/districts/District-Info.asp?d=22>).

District. The highest rate, in the North Central Office, can likely be explained by the fact that the judges there are willing to provide counsel even if defendants don't necessarily qualify for indigence but fail to provide their own counsel in a timely manner. Appointing first and billing later likely accounts for this higher rate. The second notable trend is that as population density increases, the likelihood that the representative of a poor defendant pleads guilty decreases. Any number of causes could be responsible for this trend. But the bottom line is that the Public Defender Offices that were studied were less likely to pursue plea deals than was the court-appointed attorney studied. This raises important questions about the degree to which the quality of representation defendants receive is contingent on where they live.

Conclusion

In comparing the systems responsible for criminal indigent defense in different jurisdictions of Kansas, there are five central factors to consider. They are the resources available to the attorneys representing these defendants, the caseload they are tasked with, the manner in which funding is received, the likelihood that a given case will result in a plea deal, and the level of experience that counsel brings to the table. On the basis of these criteria, this study has found that there is a substantial difference in the experience that poor defendants have with these systems in the state of Kansas based on whether they live in an urban or rural county.

The literature review conducted at the outset of this research suggested that on the whole public defender offices produce better trial outcomes for their clients. While this report is not exhaustive in its analysis of the state of indigent representation in Kansas, the findings strongly suggest that this is likewise the case in this state. The initial and perhaps most compelling distinction between the assigned counsel system in rural areas and the offices in more densely

populated ones can be found in resources. The interviews conducted suggest unequivocally that centralized offices have greater access to other attorneys, investigators, legal researchers, and even secretarial assistants. This means that cases receive more attention and oversight, decreasingly the disparity between the means of the district attorney's office and the defenders. This in turn produces trial outcomes that are fairer with regard to the office's clients.

While the findings concerning caseload were less clear-cut, it is nonetheless evident that here too centralized offices act at an advantage over assigned counsel. While the average amount of cases for experienced attorneys across the jurisdictions were all between fifty and sixty, the mechanisms for dealing with numbers beyond that were clearly best equipped in the Shawnee County Office, followed by the North Central Office, and finally the Twenty-Second Judicial District. Having a panel of attorneys to draw on benefits more urban areas greatly, and the reduced need to travel to see clients meant that defender offices were able to devote more time and attention to their cases. This was consistent with the literature reviewed.

The stability of funding brought on by salaried work evidently appealed to all three attorneys surveyed. For the majority of the jurisdictions which they service, compensating attorneys on a per case basis simply isn't feasible, and would be more expensive. It was apparent that the hourly wage for assigned counsel throughout the state is not competitive enough to draw the best rural attorneys away from private practice, and thus counties in these areas are largely dependent on the goodwill of well-qualified attorneys or the desperation of those who cannot find legal work through other means in rural communities. This criterion seems to favor the centralized administration of defense services through an office or an agreement with the county, as Mr. Kraushaar relies on in Marshall County.

While a relatively small sample size was used to assess the likelihood that a given defense system will embrace plea deals over a jury trial, a trend was nonetheless visible in the level five drug offenses studied. The higher the percentage of the jurisdiction's area that was rural, the more likely the defender was to pursue an agreement with prosecutors rather than seek the decision of a jury. Again, this result squared with findings in other states, affirming the hypothesis that urban offices, with their greater access to resources and less personal relationship with prosecutors, are better able to contest charges and are more willing to do so.

All of the systems reviewed for this research were staffed by qualified, passionate attorneys who took their responsibility to their clients seriously and were focused on providing the best outcomes possible for them. That is unfortunately not the case everywhere, as Stacey Donovan pointed out in her interview. She noted that, "in the public defender office, we're one-trick ponies. All we handle is criminal defense, and most of us have a lot of experience with it. Assigning counsel is much more of a shot in the dark." Attorneys directly employed by SBIDS are also required to receive twelve hours of continuing legal education each year, sometime not asked of attorneys who merely contract with the agency. While defenders like Steve Kraushaar do have a wealth of experience in criminal defense to draw on, there is no way to effectively ensure that that is the case for all assigned counsel in rural Kansas. Have more experienced, highly focused, and better trained attorneys helps public defender offices produce, on average, better outcomes for their indigent clients, and this is true in Kansas as elsewhere in the U.S.

As the evidence compiled clearly demonstrates, the results of this study point in much the same direction as previous inquiries in other states and regions. While all systems of indigent defense struggle with retention, disparities with the prosecution, and high caseloads, better outcomes are consistently rendered by public defender offices rather than assigned counsel.

While prescribing a remedy for each of these systemic issues is beyond the scope of this work, it is sufficient to note that the crisis surrounding rural law practice in the country in general has a disproportionate effect on the defendants that the Supreme Court has ruled must receive the effective assistance of counsel. As the nation becomes increasingly urbanized, issues of distance, recruitment, and funding affecting the upholding of the Sixth Amendment must be addressed by less densely populated jurisdictions. From this research, it is clear that these are not problems of the past or distant future. They are already impacting the lives and cases of Americans through no fault of their own, but merely as a result of where they have elected to live.

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