

The Right to Counsel in Arkansas



A Report of the
Arkansas Advisory Committee to the
U.S. Commission on Civil Rights

October 2024

Advisory Committees to the U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states, the District of Columbia, and five U.S. territories. The committees are composed of citizens who serve without compensation. The committees advise the Commission of civil rights issues in their state or territory that are within the Commission's jurisdiction. They are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state or territory's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

Acknowledgments

The Arkansas Advisory Committee would like to acknowledge the speakers who presented during the Committee's series of public meetings taking place in March 2024 as the Committee worked to understand broad and diverse perspectives on the civil-rights impact of access to counsel in Arkansas. The Committee is also grateful to those who contributed to this work during public comment and via written testimony.

**Arkansas Advisory Committee to the
U.S. Commission on Civil Rights**

The Arkansas Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding the right to counsel as part of its responsibility to study and report on civil-rights issues in Arkansas. The contents of this report are primarily based on testimony the Committee heard during public meetings held via videoconference in March of 2024. The Committee also includes related testimony submitted in writing during the relevant period of public comment. This report reflects the varied input of the committee members. While the general views are discussed and debated, as a group project, not every statement reflects every individual member's views. We hope that the report stimulates additional discussion and attention to the important issues raised herein.

This report begins with a brief background of the issues to be considered by the Committee. It then presents primary findings as they emerged from the relevant testimony, as well as recommendations for addressing areas of civil-rights concern. This report is intended to focus on civil-rights concerns regarding the right to counsel in Arkansas. The Committee specifically sought to examine the role public defenders play in ensuring equal protection of the laws in the administration of justice and the impact such counsel (or the lack thereof) may have on persistent disparities throughout the criminal justice system based on race, color, sex, disability, and national origin. While additional important topics may have surfaced throughout the Committee's inquiry, those matters that are outside the scope of this specific civil-rights mandate are left for another discussion.

**Arkansas Advisory Committee to the
U.S. Commission on Civil Rights**

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Overview

On January 19, 2024, the Arkansas Advisory Committee (Committee) to the U.S. Commission on Civil Rights (Commission) adopted a proposal to study the right to counsel for indigent defendants in Arkansas. The focus of the Committee’s inquiry was to examine the role public defenders play in ensuring equal protection of the laws in the administration of justice. The Committee considered public investment and funding available to support the right to counsel for those who cannot afford it and the impact such counsel (or the lack thereof) may have on persistent disparities throughout the criminal justice system based on race, color, sex, disability, and national origin.¹

As part of this inquiry, the Committee heard testimony via a series of web-based video conferences held throughout the month of March, 2024.² The following report results from a review of the testimony provided at these meetings combined with written testimony submitted during the related timeframe. It begins with a brief background of the issues to be considered by the Committee. It then presents primary findings as they emerged from this testimony. Finally, it makes recommendations for addressing identified civil-rights concerns. This report focuses on the right to counsel for indigent defendants in the State of Arkansas and associated civil-rights protections. While other important topics may have surfaced throughout the Committee’s inquiry, matters that are outside the scope of this specific civil rights mandate are left for another discussion. This report and the recommendations included within it were unanimously adopted by the Committee on October 7, 2024.³

Background

Central to the promise of equal protection of the laws is the right of all accused to face a “fair and speedy” trial.⁴ This right includes the right to *effective* counsel.⁵ Yet Arkansas, as many states, has struggled to provide a sufficiently robust system of public defenders. The Arkansas Public Defender Commission is tasked with ensuring “adequate, effective, and zealous representation of all indigent persons who are at risk of loss of life or liberty in a court proceeding.”⁶ Yet, in March of 2014, the Commission reported that in some jurisdictions in

¹ National Association of Criminal Defense Lawyers, Race and Public Defense. November 29, 2022, at: <https://www.nacdl.org/Content/Racial-Disparity-and-Public-Defense>.

² Meeting records and transcripts are available in Appendix.

Briefing before the Arkansas Advisory Committee to the U.S. Commission on Civil Rights, March 11, 2024, (web-based), Transcript (hereinafter cited as “Transcript I”).

Briefing before the Arkansas Advisory Committee to the U.S. Commission on Civil Rights, March 12, 2024, (web-based), Transcript (hereinafter cited as “Transcript II”).

Briefing before the Arkansas Advisory Committee to the U.S. Commission on Civil Rights, March 15, 2024, (web-based), Transcript (hereinafter cited as “Transcript III”).

³ See Appendix F for Committee Member Statements.

⁴ U.S. Const. Amend VI.

⁵ *Strickland v. Washington*, 466 U.S. 668, 676 (1984).

⁶ <https://apdc.arkansasadmin.net/about-us/>

Arkansas, public defenders were handling four to five times the recommended number of cases.⁷ In 2016, the Commission reported that the problem had worsened, with a five percent increase in the number of defendants, yet a two percent decrease in funding.⁸ At the time, Stephen Hanlon of the National Association for Public Defense lamented that attorneys were so overburdened the indigent defense system had become “unethical and unconstitutional.”⁹ In January of 2022, Chief Public Defender William Simpson, Jr. of the Sixth Judicial District announced that the office would object to any further appointments in the circuit courts on the grounds that their attorney caseloads prevented them from meeting their ethical obligations to provide competent, diligent, and prompt resolution of clients’ cases “in compliance with the rules of professional conduct.”¹⁰

In February of 2022, the Arkansas State Senate approved a slight increase in spending authority for the Public Defender Commission.¹¹ Though this increase has reportedly provided limited relief, particularly in Pulaski County, Arkansas where courts have struggled to resolve a backlog of criminal cases that built up during the coronavirus pandemic.¹² However, public hiring freezes imposed in early 2023 are reported to have exacerbated public defense workloads.¹³

In this study, the Committee sought to examine the following:

- The adequacy of public-defense for those who cannot afford counsel in Arkansas;
- The impact of lagging public-defense adequacy on other outcomes, such as the length of pretrial incarceration, the rates of trials v. plea deals, and sentencing;
- Disparate impact of lagging public-defense resources on protected classes;
- Guidelines and standards for caseload numbers for public defenders;
- Guidelines and standards for public-defender case triage;
- Best practices and recommendations to remediate identified concerns;
- Other related impacts and considerations

⁷ Beherec, Sean, *Public defenders’ workload beyond guideline, panel says*. Northwest Arkansas Democratic Gazette, March 15, 2014.

⁸ Mulder, Brandon. *Little help available for rising caseloads*. Northwest Arkansas Democratic Gazette, June 19, 2016.

⁹ *Id.*

¹⁰ January 7, 2022, letter to the Gregg Parrish, Executive Director of the Arkansas Public Defender Commission: Appointments in Pulaski and Perry Circuit Courts.

¹¹ Wickline, Michael R, and Langhorne, Will. *Arkansas officials working on solutions to mounting caseloads for public defenders, prosecutors*. Northwest Arkansas Democrat Gazette. February 17, 2022.

¹² Langhorne, Will. *Extra state funds for attorneys gets mixed results in easing case backlogs in Arkansas Courts*. Northwest Arkansas Democrat Gazette, September 19, 2022.

¹³ Langhorne, Will. *Arkansas public defenders hampered by governor’s limits on hiring*. Northwest Arkansas Democrat Gazette. February 4, 2023.

Methodology

As a matter of historical precedent, and in order to achieve transparency, Committee studies involve a collection of public, testimonial evidence and written comments from individuals directly impacted by the civil rights topic at hand; researchers and experts who have rigorously studied and reported on the topic; community organizations and advocates representing a broad range of backgrounds and perspectives related to the topic; and government officials tasked with related policy decisions and the administration of those policies.

Committee studies require Committee members to use their expertise in selecting a sample of panelists that is the most useful to the purposes of the study and will result in a broad and diverse understanding of the issue. This method of (non-probability) judgment sampling requires Committee members to draw from their own experiences, knowledge, opinions, and views to gain understanding of the issue and possible policy solutions. Committees are composed of volunteer professionals who are familiar with civil rights issues in their state or territory. Members represent a variety of political viewpoints, occupations, races, ages, and gender identities, as well as a variety of background, skills, and experiences. The intentional diversity of each Committee promotes vigorous debate and full exploration of the issues. It also serves to assist in offsetting potential biases that may result in oversight of nuances in the testimony.

In fulfillment of Committees' responsibility to advise the Commission of civil rights matters in their locales, Committees conduct an in-depth review and thematic analysis of the testimony received and other data gathered throughout the course of their inquiry. Committee members use this publicly collected information, often from those directly impacted by the civil-rights topic of study, or others with direct expert knowledge of such matters, to identify findings and recommendations to report to the Commission. Drafts of the Committee's report are publicly available and shared with panelists and other contributors to ensure that their testimony was accurately captured. Reports are also shared with affected agencies to request clarification regarding allegations noted in testimony.

For the purposes of this study, **Findings** are defined as what the testimony and other data *suggested, revealed, or indicated* based upon the data collected by the Committee. Findings refer to a synthesis of observations confirmed by majority vote of members, rather than conclusions drawn by any one member. **Recommendations** are specific actions or proposed policy interventions intended to address or alleviate the civil rights concerns raised in the related finding(s). Where findings indicate a lack of sufficient knowledge or available data to fully understand the civil rights issues at hand, recommendations may also target specific directed areas in need of further, more rigorous study. Recommendations are directed to the Commission; they request that the Commission itself take a specific action or that the Commission forward recommendations to other federal or state agencies, policy makers, or stakeholders.

Findings

In keeping with their duty to inform the Commission of: (1) matters related to discrimination or a denial of equal protection of the laws; and (2) matters of mutual concern in the preparation of

reports of the Commission to the President and the Congress,¹⁴ the Arkansas Advisory Committee submits the following findings to the Commission regarding the right to counsel for indigent defendants in Arkansas. This report seeks to highlight the most salient civil-rights themes as they emerged from the Committee’s inquiry. The complete meeting transcripts and written testimony received are included in Appendix A and B for further reference.

Finding 1: A robust system of public defense is critical to ensuring legitimacy and trust in the criminal justice system

In a 1963 ruling of the U.S. Supreme Court, *Gideon v. Wainwright*,¹⁵ the Court unanimously held that any person “who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him.”¹⁶ Through this and other subsequent rulings, the Court has upheld that the constitutional right to counsel applies to anyone accused of a felony (including in state court), as well as anyone who is accused of a misdemeanor that could result in jail time.¹⁷ The Arkansas Public Defender Commission was established in 1991 as “an independent state agency responsible for overseeing the provision of legal representation to indigent individuals in criminal cases.”¹⁸ The Commission currently serves all 75 counties across 28 judicial districts.¹⁹

In addition to fulfilling this constitutional mandate, public defenders play a critical role in ensuring legitimacy and trust in the criminal justice system.²⁰ Jacob Worlow, Director of the Criminal Law Clinic at the University of Arkansas School of Law testified:

*One of the most important parts of a healthy criminal justice system is perceived fairness. The less fair the community feels the system is, then obviously the less the community is going to be inclined to trust it. Empowering public defenders and their support staff to flush out the issues one might consider to be unfair, that shows good faith. I think those good faith efforts are the best way to earn and keep that community trust.*²¹

– Jacob Worlow, Director, Criminal Law Clinic at the University of Arkansas School of Law (2024)

Prosecutors expressed agreement with this sentiment. Matthew Durrett, Prosecuting Attorney of the 4th Judicial District in Arkansas, testified that prosecuting a case with a strong defense gives him confidence that he has indeed proven the defendant’s guilt “beyond all reasonable doubt.”²²

¹⁴ 45 C.F.R. § 703.2 (2018).

¹⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963)

¹⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963). See also: *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Alabama v. Shelton*, 525 U.S. 654 (2002).

¹⁷ Gray Testimony, Transcript II, p. 2 line 38 – p. 3 line 9; Tucker Testimony, Transcript III, p. 8 lines 17-36.

¹⁸ Arkansas Public Defender Commission, <https://apdc.arkansasadmin.net/>.

¹⁹ Parrish Testimony, Transcript II, p. 6 lines 33-40.

²⁰ Worlow Testimony, Transcript I, p. 6 lines 20-25; Durrett Testimony, Transcript I, p. 13 lines 24-40; p. 17 lines 6-17; Ward Testimony, Transcript II, p. 11 lines 8-17; p. 11 line 38 – p. 12 line 2.

²¹ Worlow Testimony, Transcript I, p. 6 lines 20-25.

²² Durrett Testimony, Transcript I, p. 13 lines 24-40.

Kelly Ward, Chief Deputy Prosecutor of the 6th Judicial District, similarly testified that quality public defense is essential to ensuring confidence in both the justice system and the outcome of the cases.²³ Prior to her current role as Chief Deputy Prosecutor, Ms. Ward worked part-time as a public defender in Pope County, Arkansas. She shared the stories of multiple clients who were denied or otherwise unable to attain counsel, ultimately forced to represent themselves.²⁴ These clients would often end up in jail, facing heavy fines and other ongoing legal challenges, not due to their guilt or innocence, but rather due to a lack of adequate legal representation. Ms. Ward concluded, “Every time I have a case, whether it was on the defense or whether I was the prosecutor, if I have a good, hardworking, trained attorney on the other side, everything goes smoother. We know that all bases are covered, and that justice has been served.”²⁵

Resource parity between defense and prosecution

Important to the discussion of legitimacy and access to counsel for indigent defendants is consideration of resource parity between public defenders and public prosecutors. Chief Deputy Prosecutor Ward described the debate over “who deserves more” as a “false choice” and emphasized that having competent and efficient representation on both sides is “how we’re going to have our justice system work more effectively and have confidence in the outcome of our cases.”²⁶

According to Arkansas State Senator Clarke Tucker, the legislative committee that oversees the prosecutor’s appropriations in the state works closely with the committee that oversees the public defender appropriations to ensure balance and parity between these offices.²⁷ Despite these efforts, some criticize that the resources available to the Public Defender Commission often lag behind those available to the prosecution.²⁸ Latrece Gray, a Federal Public Defense Attorney of the Eastern District of Arkansas, testified that when every raise in appropriations for public defense is matched with a raise for the prosecutors, it never serves to “level the playing field” between the two.²⁹ Director Gregg Parrish of the Public Defender Commission testified that state-wide, public defenders currently receive \$10 million less in salary compared with the prosecutors.³⁰ Mr. Parrish noted in the previous legislative session, both the Prosecutor’s Office and the Public Defender Commission each received an additional \$1.5 million for salaries.³¹ While the Prosecutor’s Office was able to use this money to create new positions and hire new attorneys, the Public Defender Commission had already lost twenty experienced attorneys to

²³ Ward Testimony, Transcript II, p. 11 lines 8-17; p. 11 line 38 – p. 12 line 2.

²⁴ Ward Testimony, Transcript II, p. 10 line 10 – p. 11 line 13.

²⁵ Ward Testimony, Transcript II, p. 11 lines 14-16.

²⁶ Ward Testimony, Transcript II, p. 11 lines 8-17.

²⁷ Tucker Testimony, Transcript III, p. 8 lines 17-36.

²⁸ Gray Testimony, Transcript II, p. 5 line 36 – p. 6 line 8.; Byrd Testimony, Transcript I, p. 24 lines 24-29.

²⁹ Gray Testimony, Transcript II, p. 5 line 39 – p. 6 line 8.

³⁰ Parrish Testimony, Transcript II, p. 8 lines 20-37.

³¹ Parrish Testimony, Transcript II, p. 14 lines 16-34.

other agencies in the same year and needed to use this funding to provide raises and promotions in hope of retaining as many of its existing attorneys as possible.³²

While acknowledging that resources on both sides are limited and caseloads high,³³ panelists noted some nuanced considerations that should be factored into any discussion of resource parity between prosecutors and public defenders. For example, through collaboration with public law-enforcement agencies, prosecutors often have access to auxiliary supports such as investigators and expert witnesses that the defense does not.³⁴ Additionally, prosecutors have significantly more discretion regarding how and where to use their budget than the defense does—such as deciding whether and which charges to file, e.g., whether to charge a case as a misdemeanor or a felony.³⁵ Senior Policy Attorney at the Deason Criminal Justice Reform Center at the SMU Dedman School of Law, Malia Brink, described incarcerated individuals waiting for up to a year in jail, only to have prosecutors finally review their case and drop the charges because they could not “make the burden” of proof.³⁶ Attorney Jeff Rosenzweig described one case in Jefferson County, Arkansas, where the prosecutor charged everyone standing within a certain radius of a shooting with capital murder. While the prosecution eventually dropped many of these charges, “it took an enormous amount of money from the Public Defender Commission.”³⁷ Unlike prosecutors, public defenders do not have discretion to determine which cases they take or what resources they can use to charge them—they must delay cases and “triage” their attention based on the resources they have.³⁸

Finally, while emphasizing the importance of fully supporting both public prosecutors and public defense, Senator Tucker noted that “because of the constitutional guarantee on the defense side, we’re approaching a real constitutional crisis.”³⁹ Arkansas State Representative Nicole Clowney testified that recent state efforts to deter crime by imposing harsher penalties and tougher sentencing have increased the importance of high-quality public defense.⁴⁰

³² Parrish Testimony, Transcript II, p. 14 lines 16-34. *See finding two for further discussion of attorney retention challenges and efforts.*

³³ Durrett Testimony, Transcript I, p. 21 line 33 – p. 22 line 11; Tucker Testimony, Transcript III, p. 6 line 39 – p. 7 line 1.

³⁴ Gray Testimony, Transcript II, p. 5 line 39 – p. 6 line 8; Tucker Testimony, Transcript III, p. 13 lines 14-28; Parrish Testimony, Transcript II, p. 9 lines 19-36. *See also* Deutch written testimony, Appendix B. Deutch wrote that unlike in other states, Arkansas does not have a shared information system for prosecutors and defenders to access the same case information. Therefore, defenders are often “working from behind as compared to the state.”

³⁵ Rosenzweig Testimony, Transcript III, p. 15 lines 22-37; *See also* Rosenzweig Testimony, Transcript III, p. 10 lines 18-24 regarding differences in how varying prosecutors manage plea agreements.

³⁶ Brink Testimony, Transcript III, p. 25 lines 2-13.

³⁷ Rosenzweig Testimony, Transcript III, p. 15 lines 22-37.

³⁸ Brink Testimony, Transcript III, p. 25 lines 19-24; *see also* Brink Written testimony, Appendix B, pp. 1-2.

³⁹ Tucker Testimony, Transcript III, p. 8 lines 37-43.

⁴⁰ Clowney Testimony, Transcript III, p. 6 lines 8-15; *further discussion of recent legislative changes is included in finding four.*

Gaps in public defense coverage

Despite the Sixth Amendment right to counsel enumerated in the United States Constitution,⁴¹ gaps in the interpretation and application of this protection have arguably left many unprotected. For example, prosecutors have up to 60 days to file charges against defendants incarcerated pre-trial.⁴² By the time charges are filed and court appearance is scheduled, defendants may spend up to three months incarcerated “without counsel and without any appearance in front of a judge.”⁴³ At the time of the Committee’s briefings, the right to counsel was not guaranteed for pretrial detention or bail determination hearings.⁴⁴ On August 21, 2024, District Judge Timothy Brooks ruled that indigent defendants must be afforded counsel at bail determination hearings, though this ruling was described as “unpractical” by Senate President Pro Tempore Bart Hester, R-Cave Springs, and is expected to be appealed.⁴⁵

Defining indigency

Defining “indigency” for the purpose of accessing public defense is also a question of concern. Federal Public Defender of the Eastern District of Arkansas, Latrece Gray, explained that “it’s purely judicial discretion as to whether or not you are indigent.”⁴⁶ While definitions of indigency may vary across courts and between federal and state jurisdictions,⁴⁷ some have criticized that courts are often “way too strict” when determining who is indigent.⁴⁸ When a defendant is found to be indigent, Arkansas law requires judges to secure an affidavit of indigency and appoint a public defender.⁴⁹ According to Public Defender Commission Director Parrish, in approximately 45% of district court cases, judges are not filing these required affidavits.⁵⁰ For those that do receive an affidavit, the affidavit assesses a “user fee” which is intended to take into consideration the ability of the defendant to contribute to the cost of counsel.⁵¹ Mr. Parrish said that he is now seeing defendants in “at least three or four districts” that are being brought in for

⁴¹ U.S. Const., Amend. VI

⁴² If “good cause” is shown for the delay, the court shall reconsider bail for the defendant. Ark. R. Crim. P. 8.6.; See also Rosenzweig Testimony, Transcript III, p. 3 lines 11-17.

⁴³ Rosenzweig Testimony, Transcript III, p. 3 lines 11-17. See also Brink Written Testimony, Appendix B, pp. 1-2. Brink writes that “because Arkansas public defenders cannot provide representation at first appearances, many people languish unnecessarily in Arkansas jails...”

⁴⁴ Worlow Testimony, Transcript I, p. 4 line 20 – p. 5 line 12; Parrish Testimony, Transcript II, p. 9 line 36 – p. 10 line 5; See also: *Ending Arkansas’ First Appearance Crisis*. Deason Criminal Justice Reform Center, SMU Dedman School of Law. Policy Brief (2024), at: <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1011&context=deasoncenter>.

⁴⁵ *Farella et al v. Benton County District Court*, 5:22-CV-5121 (W.D. Ark., 2022); <https://htv-prod-media.s3.amazonaws.com/files/benco-attorney-suit-02912765725-66c86fb0d5050.pdf>. See also Wickline, Michael, *Lawmakers OK extra money for part-time public defenders to ease case backlog*, Arkansas Democrat Gazette, August 23, 2024, <https://www.arkansasonline.com/news/2024/aug/23/lawmakers-ok-extra-money-for-part-time-public/>.

⁴⁶ Gray Testimony, Transcript II, p. 5 line 20; see also p. 3 lines 11- 27; p. 5 lines 8-19.

⁴⁷ Gray Testimony, Transcript II, p. 3 lines 11- 27; p. 5 lines 8-20.

⁴⁸ Rosenzweig Testimony, Transcript II, p. 3 lines 26-28; See also Kendrick Testimony, Transcript I, p. 6 lines 35-39, describes indigency requirements as “pretty much at poverty level.”

⁴⁹ Parrish Testimony, Transcript II, p. 8 line 34 – p. 9 line 5; See Ark. Code § 16-87-213.

⁵⁰ Parrish Testimony, Transcript II, p. 8 line 34 – p. 9 line 5.

⁵¹ *Id.* This fee may range from \$10-\$400; Ark. Code § 16-87-213.

pre-trial, and if they have not paid their user fee, “...the judge is finding them in contempt and ordering their incarceration for being poor. And putting it in an order that says just that.”⁵²

Finding 2: Many of Arkansas’ public defenders are carrying caseloads that far exceed professional standards and may compromise their ability to provide a “meaningful defense”

Until recently, the prevailing standard for attorney caseloads was set by a 1973 study of the National Advisory Commission on Criminal Justice Standards and goals.⁵³ These standards suggest caseload limits for defense attorneys of 150 felony cases, 400 misdemeanor cases, 200 juvenile cases, or 25 appeals.⁵⁴ Critics of these guidelines argue that the standards fail to differentiate between cases based on the seriousness of the charges and the projected amount of time attorneys must spend to effectively navigate them.⁵⁵ In 2023, a study by the RAND Corporation, the National Center for State Courts, and the American Bar Association, offered more nuanced guidance considering hourly time estimates for different classifications of cases.⁵⁶ This new guidance recommends caseloads as low as 63 cases per year for some of the most serious felonies.⁵⁷ Yet, public defenders in Arkansas continue to carry caseloads that far exceed even the 1973 caseload standards.⁵⁸ Currently, the average public defender in Arkansas is carrying a caseload of 200 felony cases or more at any given point.⁵⁹ Malia Brink of the Deason Criminal Justice Reform Center the SMU Dedman School of Law noted that if an attorney has an average of 200-300 open cases at any given time, they may actually receive 400-500 new case assignments during the course of the year.⁶⁰

The need for public defenders in Arkansas is high. With more than 16% of the state population living below poverty level, Arkansas has the seventh highest poverty rate in the nation.⁶¹ Arkansas also ranks among the lowest in the nation for the number of lawyers per capita, with

⁵² Parrish Testimony, Transcript II, p. 8 line 34 – p. 9 line 5.

⁵³ <https://www.nlada.org/defender-standards>; see Worlow Testimony, Transcript I, p. 3 lines 19-29.

⁵⁴ Worlow Testimony, Transcript I, p. 3 lines 19-29.

⁵⁵ Durrett Testimony, Transcript I, p. 14 lines 11-18; Brink Testimony, Transcript III, p. 25 lines 33-37.

⁵⁶ See Appendix C: Supplemental Documents, also: https://www.rand.org/pubs/research_reports/RRA2559-1.html; ABA Ten principles of a Public Defense Delivery System (November 2023); Principle 3: control of workloads, at: https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/standards-and-policies/ten-principles-pub-def/.

⁵⁷ Worlow Testimony, Transcript I, p. 3 line 29 – p. 4 line 8.

⁵⁸ See Everett written testimony, Appendix B, p. 2. The ACLU reports that over a seven-month period in 2023, one Pulaski County public defender carried a caseload of 25 class Y felonies, 46 class A&B felony cases, and 221 class C&D felony cases for a total of 292 felony cases. Another public defender had 151 felony cases across four different counties during the same seven-month period (According to Arkansas Public Defender Commission caseload report obtained via FOIA Request January-July 2023).

⁵⁹ Worlow Testimony, Transcript I, p. 4 lines 9-19; Parrish Testimony, Transcript II, p. 7 lines 32-39.

⁶⁰ Brink Testimony, Transcript III, p. 25 lines 23-34, *including the number of cases an attorney would be reasonably be likely to close during that year.*

⁶¹ Kendrick Testimony, Transcript I, p. 25 lines 18-21; See: <https://worldpopulationreview.com/state-rankings/poverty-rate-by-state>.

just 23.5 lawyers for every 10,000 residents—well below the national average of 40.6.⁶² High poverty rates, combined with relatively few attorneys, has resulted in Arkansas ranking 49th place in the country for accessibility to the court system by those who cannot afford an attorney.⁶³ These challenges are compounded by the vast rural areas that comprise the state.⁶⁴ Rural areas of the state have even fewer attorneys available, and representation is difficult to come by.⁶⁵ The few available attorneys may be assigned to cover judicial districts that span multiple counties, intensifying high caseload numbers as required travel time is often not considered in the number of cases assigned.⁶⁶

The excessive workload expected of state public defenders in Arkansas has raised constitutional concerns regarding the adequacy of representation.⁶⁷ Arkansas State Representative Jimmy Gazaway of Arkansas’ 31st District said, “it is just more work than one person can or should do, especially given the gravity of the charges many of their clients face.”⁶⁸ Public Defender Commission Director Parrish testified that people end up sitting in jail simply because there aren’t enough attorneys—some attorneys travel to three or more different counties and there is just “not enough time in the day.”⁶⁹ In part due to a backlog of cases delayed by the COVID-19 pandemic,⁷⁰ the problem became so pronounced in January of 2022 that the Chief Public Defender of the Sixth Judicial District, William Simpson, Jr., announced the office would object to any further appointments in circuit courts until caseloads could be reduced to “ethically appropriate levels.”⁷¹ Simpson’s objection was based on the conclusion that caseloads had

⁶² Kendrick Testimony, Transcript I, p. 7 lines 1-7; See: <https://lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/> (2018). See also Brink written testimony, Appendix B, p. 3.

⁶³ Kendrick Testimony, Transcript I, p. 7 lines 1-7; See also: <https://www.arkleg.state.ar.us/Home/FTPDocument?path=%2FAssembly%2FMeeting+Attachments%2F420%2F14130%2FHandout+1+-+Access+to+Justice.pdf>

⁶⁴ Parrish Testimony, Transcript II, p. 7 lines 1-31.

⁶⁵ Worlow Testimony, Transcript I, p. 23 lines 5-9; Kendrick Testimony, Transcript I, p. 7 lines 8-15; Everett written testimony, Appendix B, pp. 1-2. See also Brink Written Testimony, Appendix B, p. 3. Brink refers to a recent report, “Greening Criminal Legal Deserts in Rural Texas as a model for structural changes the legislature could consider to improve the availability of attorneys in rural areas, at <https://www.smu.edu/law/centers-and-initiatives/deason-center/issues/star-criminal-justice/greening-criminal-legal-deserts-in-rural-texas>

⁶⁶ Worlow Testimony, Transcript I, p. 5 lines 22-29; Gazaway Testimony, Transcript III, p. 16 lines 8-20.

⁶⁷ See also discussion in finding 3.

⁶⁸ Gazaway Testimony, Transcript III, p. 4 lines 21-32. See also: Tucker Testimony, Transcript III, p. 7 lines 39-41, the average caseload of 250-300 cases is “way more than one person has the capacity for and to do a meaningful job”; Worlow Testimony, Transcript I, p. 3 lines 14-24 – the most important factor in ensuring effective counsel is time--time to learn and understand the case from the client’s perspective, and in the context of the law.

⁶⁹ Parrish Testimony, Transcript II, p. 7 line 39 – p. 8 line 12. See also Deutch written testimony, Appendix B: Deutch wrote that the most serious cases, such as capital murder, receive a lot of resources. It is the “mid-level” cases with a credible defense “but the stakes in our view are just not high enough to warrant the time when we have so many competing cases vying for our time.”

⁷⁰ Tucker Testimony, Transcript III, p. 6 line 39 – p. 7 line 3, COVID “seriously exacerbated” the caseload problem because people were still being arrested and charged, but everything else was delayed. Kendrick Testimony, Transcript I, p. 7 lines 34-39. See also: Durrett Testimony, Transcript I, p. 16 line 34 – p. 17 line 8 – docket congestion was made worse by COVID but is not all COVID-related; caseloads were already too large before COVID.

⁷¹ Simpson’s letter was based on the advice of the Office of Ethics Counsel of the Supreme Court of Arkansas, see APPENDIX C; See also Tucker Testimony, Transcript III, p. 7 lines 4-14.

become so excessive, it was not possible for the attorneys to provide clients with “meaningful representation.”⁷² The Arkansas legislature responded by funding 40-45 new, temporary positions (1.5-2 years) for both prosecutors and public defenders to address the backlog.⁷³ While this funding effectively helped to clear some of the COVID-related backlog of cases, the funding is temporary, and when it expires the Public Defender Commission expects to lose 30-37% of part-time attorneys state wide.⁷⁴

Attorney recruitment and retention

Despite clear need for more attorneys to alleviate these workload challenges, recruiting and retaining public defenders in Arkansas has proven difficult.⁷⁵ Panelists described a cyclical process by which low pay and high caseloads cause attorneys to quit, exacerbating the workload problem for the remaining attorneys and causing even more to leave public service.⁷⁶ While promotion potential has recently increased, new attorneys at the Public Defender Commission still receive a starting salary as low as \$56,039/year.⁷⁷ This salary is not competitive with the private sector⁷⁸ or even with other attorney positions across state government.⁷⁹ Director Parrish testified that it is particularly difficult to attract attorneys with trial experience at this salary

⁷² Tucker Testimony, Transcript III, p. 7 lines 4-14; Tucker Testimony, Transcript III, p. 7 lines 21-30.

⁷³ Tucker Testimony, Transcript III, p. 7 lines 21-30. *Further discussion of legislative challenges to addressing public defense is included in Finding 4.*

⁷⁴ Parrish Testimony, Transcript II, p. 17 lines 14-23; Tucker Testimony, Transcript III, p. 7 lines 31-38. Note: August 23, 2024, the Arkansas Democrat Gazette reported that the Arkansas Legislative Counsel approved the Arkansas Public Defender Commission’s request for \$1.25 million in state funds to continue employing 45 attorney specialists working on this backlog: Wickline, Michael, *Lawmakers OK extra money for part-time public defenders to ease case backlog*, Arkansas Democrat Gazette, August 23, 2024, <https://www.arkansasonline.com/news/2024/aug/23/lawmakers-ok-extra-money-for-part-time-public/>. See also: Brink written testimony, Appendix B, p. 1: Brink states that even with the temporary COVID funding, “Arkansas’ public defense system cannot provide the representation required under Arkansas Rules.”

⁷⁵ Panelists described challenges with recruitment and retention for both public defense and prosecution. See: Durrett Testimony, Transcript I, p. 13 line 38-p. 14 line 10; Gazaway Testimony, Transcript III, p. 4 line 33 – p. 5 line 8; Gray Testimony, Transcript II, p. 14 line 8; Ward Testimony, Transcript II, p. 15 line 25 – p. 16 line 11 & p. 18 lines 3-9.

⁷⁶ Brink Testimony, Transcript III, p. 26 lines 7-17; Ward Testimony, Transcript II, p. 11 lines 17-25 & p. 18 lines 10-21; Tucker Testimony, Transcript III, p. 8 lines 1-4; Gray Testimony, Transcript II, p. 5 lines 24-35; Rosenzweig Testimony, Transcript III, p. 2 lines 36-38;

⁷⁷ Parrish Testimony, Transcript II, p. 14 lines 2-15. (Beginning at the GS-10 level, all now have promotion potential up to the GS-13 level ranging from \$77,862 - \$112,900, annually. See: [https://www.dfa.arkansas.gov/images/uploads/personalManagementOffice/3-CompensationPlan\(PayTables\).pdf](https://www.dfa.arkansas.gov/images/uploads/personalManagementOffice/3-CompensationPlan(PayTables).pdf)).

⁷⁸ Durrett Testimony, Transcript I, p. 14 line 36 – p. 15 line 2; Ward Testimony, Transcript II, p. 13 lines 26-41.

⁷⁹ Tucker Testimony, Transcript III, p. 8 lines 5-16; Parrish Testimony, Transcript II, p. 8 lines 20-37. See also Deutch written testimony, Appendix B. Deutch wrote that all public defenders in Arkansas are “taking a pay cut to do what we feel is right.” As attorneys gain skills and experience, it is “routine” for recruiters from private firms to contact public defenders and offer them a considerable raise to leave the public defender’s office, “taking their years of experience with them.”

level.⁸⁰ Public defenders working within federal courts may start at a higher salary,⁸¹ yet compensation overall remains insufficient to attract experienced attorneys.⁸² Prosecutors reported facing similar recruitment and hiring challenges.⁸³ Both agencies must correct this by either raising salaries to attract more experienced attorneys or by providing (and funding) the necessary training to develop less-experienced attorneys into the needed roles.⁸⁴

Failure to both attract and retain experienced attorneys in public defense impacts the functioning of the entire criminal justice system. High turnover for both prosecutors and public defenders causes delays and continuances in court, as new attorneys must start over learning case facts again.⁸⁵ These delays compound the problem of caseload backlogs and may also compromise other constitutional rights of the defendants, such as the right to a speedy trial.⁸⁶ High turnover also limits the number of attorneys with the necessary training and experience to work some of the most serious cases. Director Parrish of the Arkansas Public Defender Commission testified that he currently has a team of just 10 attorneys who handle all death penalty cases across the state.⁸⁷ Mr. Parrish estimated that fewer than 50 attorneys across the state—including private attorneys—are qualified to handle a death-penalty case.⁸⁸ New and inexperienced attorneys must have opportunities to work with more experienced attorneys on these most serious cases in order to become qualified to work these cases alone in the future and ensure the continued ability of the system to function.⁸⁹ Low attorney-retention rates limit these critical training and development opportunities.

While the Public Defender Commission (and prosecutors' offices) may not be able to compete with salaries offered at private law firms, emphasizing the benefits of public service, such as potential student-loan repayment or forgiveness, as well as the important role that public attorneys play in helping the community, could help with recruitment efforts.⁹⁰ A significant portion of most new lawyer's salaries go toward paying off student loans. While funds available

⁸⁰ Attorneys with trial experience require a salary of at least \$85,000-\$92,000 or more to hire, Parrish Testimony, Transcript II, p. 14 line 35 – p. 15 line 3.

⁸¹ According to Federal Public Defender Latrece Gray, Federal public defenders start at entry level with approximately \$75,000/year salary; once they hit 5+ years of experience starting pay is approximately \$97,000/year, see Gray Testimony, Transcript II, p. 15 lines 8-14.

⁸² Ward Testimony, Transcript II, p. 11 lines 4-8; Parrish Testimony, Transcript II, p. 16 lines 25-34; Gray Testimony, Transcript II, p. 19 lines 1-13.

⁸³ Chief Deputy Prosecutor Kelly Ward testified that entry level prosecutors are being hired at \$62,500, though experienced attorneys require \$85,000-\$95,000/year, see Ward Testimony, Transcript II, p. 13 lines 26-41. Ward also testified that the average caseload for prosecutors currently in Pulaski County is 400-450, though some attorneys have caseloads up to 600. It is difficult to recruit when attorneys are walking into such big caseloads, Ward Testimony, Transcript II, p. 12 lines 3-13.

⁸⁴ Gray Testimony, Transcript II, p. 19 lines 1-13.

⁸⁵ Ward Testimony, Transcript II, p. 12 line 32 – p. 13 line 6; Everett written testimony, Appendix B, p. 2.

⁸⁶ Ward Testimony, Transcript II, p. 12 line 32 – p. 13 line 6; see finding 3 for discussion of the impact on a defendant's right to a "speedy trial."

⁸⁷ Parrish Testimony, Transcript II, p. 9 lines 19-36.

⁸⁸ Parrish Testimony, Transcript II, p. 9 lines 33-36.

⁸⁹ Durrett Testimony, Transcript I, p. 14 lines 20-36; Parrish Testimony, Transcript II, p. 8 lines 20-37.

⁹⁰ Ward Testimony, Transcript II, p. 13 lines 1-19.

to support student-loan forgiveness and repayment have dropped in recent years,⁹¹ these initiatives are an important way to help offset pay disparities between the public and private sectors salaries.⁹² Tying loan forgiveness to a certain number of years of practice, or practice in an underserved area of the state, may assist further by increasing retention as well as supporting initial recruitment.⁹³

Auxiliary staff

Proper defense coverage requires not just attorneys but also sufficient auxiliary staff. This includes office staff, as well as funding for expert witnesses, investigators, and language interpreters.⁹⁴ While the Commission does have a budget for hiring expert witnesses (a task which previously required authorization from the presiding judge),⁹⁵ Public Defender Commission Director Parrish testified that his office currently has just 12 investigators who cover the entire state.⁹⁶ Bilingual attorneys and language interpreters are extremely limited, particularly in rural areas of the state.⁹⁷ Working in public defense is a demanding and difficult role that is often under-appreciated.⁹⁸ In order to keep this system functioning, the jobs must be attractive, including good salaries, training programs, and adequate support staff.⁹⁹

Finding 3: Challenges within the public defender system may compromise other legal protections related to due process and civil rights

Speakers throughout the Committee's inquiry emphasized that public defense attorneys are highly skilled and provide quality representation on par with that of private defense counsel—the important distinctions being those of caseloads and access to auxiliary resources.¹⁰⁰ Judge Tjuana Byrd Manning of the 6th Judicial Court testified that, at times, having a public defender may be an advantage, because public defenders are in court daily with the prosecutors and have a rapport that allows some negotiations to become possible that would not otherwise take place.¹⁰¹ Yet, the shortage of public attorneys may compromise the quality of representation. Chief Deputy Prosecutor Kelly Ward testified that, at times, the prosecutor's office and the public

⁹¹ Durrett Testimony, Transcript I, p. 15 lines 3-16; p. 20 lines 3-23; referring to a decline in funding for the John R. Justice program, though other loan forgiveness programs are still available.

⁹² Durrett Testimony, Transcript I, p. 15 lines 3-16; p. 20 lines 3-23.

⁹³ Tucker Testimony, Transcript III, p. 21 lines 32-38.

⁹⁴ Durrett Testimony, Transcript I, p. 16 line 34 – p. 17 line 8; p. 18 line 12 – p. 19 line 2; Gray Testimony, Transcript II, p. 6 lines 22-26.

⁹⁵ Rosenzweig Testimony, Transcript III, p. 3 lines 28-35.

⁹⁶ Parrish Testimony, Transcript II, p. 9 lines 19-36.

⁹⁷ Worlow Testimony, Transcript I, p. 21 lines 8-13; Kendrick Testimony, Transcript I, p. 7 lines 20-26; p. 8 line 36-p.9 line 2; p. 17 lines 23-33; p. 21 lines 3-7.

⁹⁸ Clowney Testimony, Transcript III, p. 5 lines 33-34.

⁹⁹ Worlow Testimony, Transcript I, p. 5 lines 29-34.

¹⁰⁰ Durrett Testimony, Transcript I, p. 18 line 12 – p. 19 line 2; Kendrick Testimony, Transcript I, p. 25 lines 10-21.

Note: the focus of the testimony and this report is primarily on state-level public defense. While public defenders at the federal level may also face workload challenges, testimony indicated greater access to resources for training and auxiliary supports, as well as overall lower caseloads. See Gray Testimony, Transcript II, p. 4 lines 3-29.

¹⁰¹ Byrd Testimony, Transcript I, p. 22 line 31 – p. 23 line 4.

defender’s office may have to “swap attorneys” to fill in gaps, which is a “huge hurdle” that requires attorneys to re-learn aspects of the job that are “totally different” on each side.¹⁰²

Due process of law

A robust and well-functioning system of public defense is critical to ensuring that constitutional protections related to due process are upheld, and that any gaps or incongruencies in the system are addressed. Delays and challenges in providing public defense can lead to real or perceived problems of fairness and consistency across districts and courts.¹⁰³ In a written statement to the Committee regarding this study, the ACLU of Arkansas reported, “Given the prospect of months in jail awaiting trial resulting in loss of employment, housing, and other hardship on their families, some Arkansans choose to accept plea bargains just to get out of jail regardless of whether they even committed the crime.”¹⁰⁴

While the Public Defender Commission seeks to make indigent legal services accessible, to the same standards, in all counties across the State of Arkansas,¹⁰⁵ courts may rule differently regarding the imposition of money bonds,¹⁰⁶ the appointment of counsel,¹⁰⁷ the continuing duty of representation between district and circuit courts,¹⁰⁸ and sentencing.¹⁰⁹

You have some courts that are simply not complying with the law with regard to appointment of counsel, which not only is a constitutional mandate, but it’s also specifically required among other things by rule 8.2 of the Arkansas Rules of Criminal Procedure.¹¹⁰

– Attorney Jeff Rosenzweig (2024)

Adequate representation is critical to ensuring that a defendant’s constitutional protections are upheld as they navigate this system. Recent legislative initiatives to impose harsher sentencing

¹⁰² Ward Testimony, Transcript II, p. 11 lines 28-37.

¹⁰³ In a written statement to the Committee in response to this study, the ACLU of Arkansas reported that state funding provides for public defenders and staff, while each county remains responsible for providing office space, equipment, and supplies. Some counties can afford more and better resources than others, “including in some cases, additional public defenders.” This leaves people charged with crimes in poorer and more rural areas of the state without the same level of representation as those in wealthier areas. See Everett written testimony, Appendix B, pp. 1-2.

¹⁰⁴ Everett written testimony, Appendix B, p. 2.

¹⁰⁵ Kendrick Testimony, Transcript I, p. 25 lines 25-28.

¹⁰⁶ Matthew Durrett testified that in Washington County, bonds are reasonable and often lowered based on the seriousness of the alleged crime and the circumstances of the defendant (Durrett Testimony, Transcript I, p. 15 line 33 – p. 16 line 32). Latrice Gray testified that the Eastern District of Arkansas (Federal courts) does not impose money bonds as are seen on the state level (see Gray Testimony, Transcript II, p. 3 line 28 – p. 4 line 3). Yet other jurisdictions may not be doing the same (see Rosenzweig Testimony, Transcript III, p. 23 lines 9-19; Parrish Testimony, Transcript II, p. 14 line 35 – p. 15 line 3; Kendrick Testimony, Transcript I, p. 8 lines 13-35).

¹⁰⁷ Rosenzweig Testimony, Transcript III, p.2 lines 38-42, stated that some courts “are simply not complying with the law with regard to appointment of counsel”

¹⁰⁸ Rosenzweig Testimony, Transcript III, p. 3 lines 18-25.

¹⁰⁹ Worlow Testimony, Transcript I, p. 5 line 35 – p. 6 line 17.

¹¹⁰ Rosenzweig Testimony, Transcript III, p.2 lines 38-42; see Ark. R. Crim. P. 8.2.

have raised the stakes for criminal defendants and made the work of public defenders even more critical.¹¹¹ Without adequate representation, lapses in constitutional protections are likely to go unchallenged and unchanged. Examples include:

- Despite constitutional protections against incarcerating people simply because they are too poor to pay,¹¹² Public Defender Commission Director Parrish testified that a majority of his client backlog is coming from circuit-court system felonies where people are being retained in jail because they cannot make bond.¹¹³ The passage of the Protect Arkansas Act (2023), which specifically prohibits financing of bond payments, has reportedly worsened the problem of people being (and remaining) incarcerated simply for their inability to pay.¹¹⁴
- Arkansas state law requires prosecutors to charge a felony indictment within 60 days of a person being housed in a county jail.¹¹⁵ However, in rural areas of the state, where a judge or public defender may only appear once every thirty days, Senator Tucker testified that people are being held in jail for an entire year, only to eventually have charges dismissed.¹¹⁶
- Defendants have a constitutional right to a “speedy and public trial,” which is defined under Arkansas law as within 12-months.¹¹⁷ However, extensions requested by the defense do not count against this timeline. Therefore, if the defense must request repeated continuances due to staffing challenges, this timeline can be extended much farther.¹¹⁸ Attorney Angela Kendrick testified “it’s not unusual for people to have cases from 2021 and 2022 to still be waiting on trial now in 2024.”¹¹⁹
- Malia Brink of the Deason Criminal Justice Reform Center at SMU Dedman School of Law testified that Arkansas has many people sitting in jail with no effective counsel for extended periods of time, mostly because attorney workloads make it impossible for

¹¹¹ Clowney Testimony, Transcript III, p. 6 lines 8-15.

¹¹² AR Const art 2 § 16; *See also* Too Poor to Pay: How Arkansas’s Offender-Funded Justice System Drives Poverty & Mass Incarceration, Fines and Fees Justice Center (March 2019), at:

<https://finesandfeesjusticecenter.org/articles/too-poor-to-pay-how-arkansas-offender-funded-justice-system-drives-poverty-mass-incarceration/>. *See also* Ark. R. Crim. P. 9.2 – The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court.

¹¹³ Parrish Testimony, Transcript II, p. 14 line 35 – p. 15 line 3; *see also* Kendrick Testimony, Transcript I, p. 8 lines 13-35. Latrece Gray testified that the Bail Reform Act (1984) allows federal judges to establish whether a person is a threat to the community or a flight risk and impose conditions other than money bonds to ensure that the person returns to court, 18 U.S.C. 3141 Et Seq.; Gray Testimony, Transcript II, p. 3 lines 28-37.

¹¹⁴ Kendrick Testimony, Transcript 1, p. 8 lines 13-23; *See* AR SB 495 (2023), Section 238, amending Arkansas Code §17-19-301(a) concerning premiums for bail bonds, to specify that the premium of 10% “shall be deposited in full prior to release,” and “in no event shall all or a portion of the premium...be deposited after release” <https://www.arkleg.state.ar.us/Home/FTPDocument?path=%2FBills%2F2023R%2FPublic%2FSB495.pdf>

¹¹⁵ Ark. R. Crim. P. 8.6

¹¹⁶ Tucker Testimony, Transcript III, p. 18 lines 14-30.

¹¹⁷ Ark. R. Crim. P. 28.1; U.S. Const., amend. VI; *See also* Kendrick Testimony, Transcript I, p. 8 lines 3-12.

¹¹⁸ Brink Testimony, Transcript III, p. 25 lines 14-19.

¹¹⁹ Kendrick Testimony, Transcript I, p. 8 lines 3-12.

attorneys to visit or meet with their clients unless an upcoming court hearing or something else pressing forces the lawyer to focus on that case.¹²⁰

- Circuit Court Judge Tjuana Byrd Manning testified of juvenile cases being transferred to her court from other counties without the appointment of counsel.¹²¹ While she and the other Pulaski County judge who handles juvenile cases always ensure that every juvenile is represented, courts in other counties may not.

Disparate Impact

Inconsistencies and challenges within the public defense system have a disparate impact on the basis of race, color, and national origin. Citing data reported by the Bureau of Justice Statistics, Attorney and Deputy Public Defender Angela Kendric testified that people of color are significantly more likely to rely on the public defender system for representation: 69% of white men in prison reported using public attorneys for their defense, compared with 73% of Hispanic men and 77% of African American men.¹²²

People who do not speak English as their primary language are also disproportionately affected, as, without sufficient resources, courts have struggled to provide sufficient access to bilingual attorneys and appropriate language-interpretation services. Particularly for clients who speak indigenous dialects and other less-commonly spoken languages (other than Spanish or English), language-interpretation challenges may impact the quality of the representation.¹²³ For example, both the prosecution and defense may be competing for the same interpreter, or interpretation may need to take place in multiple layers (Language A into Language B, then Language B into English), reducing the quality of the interpretation and the representation.¹²⁴ The few bilingual attorneys who are practicing in the state often end up working with private firms for private clients, because those jobs are more attractive than the public sector.¹²⁵

Special considerations for juveniles

The right to counsel becomes particularly important and nuanced when considering the impact of juvenile and family court cases. Judge Byrd Manning testified that the court's objective is to see all juvenile matters within 90 days, and timely appointment of counsel is critical to this goal.¹²⁶ Unlike in adult court, juvenile judges may appoint an attorney even if the parent is not indigent, at least for the initial hearing to determine if the juvenile can be released.¹²⁷ Judge Byrd Manning

¹²⁰ Brink Testimony, Transcript III, p. 24 line 24 – p. 25 line 2. See also Everett written testimony, Appendix B, p.1: Arkansans represented by public defenders face significant time in jail awaiting trial, even innocent Arkansans.

¹²¹ Byrd Testimony, Transcript I, p. 10 lines 15-27.

¹²² Kendrick Testimony, Transcript I, p. 7 lines 16-32; p. 8 line 36-p.9 line 2. See also Everett written testimony, Appendix B, pp. 2-3.

¹²³ Parrish Testimony, Transcript II, p. 20 lines 18-35; see also Byrd Testimony, Transcript I, p. 20 line 34 – p. 21 line 2: limitations in language interpretation services may cause counsel to restrict their questioning and/or move through the hearings faster than they otherwise would; Everett written testimony, Appendix B pp. 2-3, defendants may then also face additional immigration consequences due to criminal convictions.

¹²⁴ Parrish Testimony, Transcript II, p. 20 lines 18-35.

¹²⁵ Parrish Testimony, Transcript II, p. 21 lines 26-29; Ward Testimony, Transcript II, p. 22 lines 6-15.

¹²⁶ Byrd Testimony, Transcript I, p. 10 lines 28-39.

¹²⁷ Byrd Testimony, Transcript I, p. 9 line 27 – p. 10 line 14; p. 10 lines 28-39.

testified that some parents may wish to waive their child’s right to counsel because the child plans to plead guilty.¹²⁸ She opined, however, that the juvenile should always be appointed an attorney anyway: “every youth that appears in Pulaski County Juvenile Court who is eligible is appointed an attorney, every time, at every stage.”¹²⁹

In dependency and neglect cases, an attorney ad litem is appointed for the child, in addition to counsel appointed for the parents.¹³⁰ If parents are not aware of their own right to be represented, the judge may appoint an attorney for the parents and then ask them at first appearance if they wish to continue to be represented.¹³¹ In Arkansas, both the attorney ad litem and the parent counsel receive special training for those roles.¹³² Judge Byrd Manning testified that continued state funding to train and qualify attorneys in these cases is critical: “there’s a whole different statute book for juvenile matters and lawyers who are not familiar with it, trying to wing it, they really serve sometimes as a disadvantage to the client.”¹³³ She described a “clear disadvantage” for families facing dependency and neglect cases when counsel is not appointed for the parents: “proper advocacy as soon as possible helps to ensure that the parents’ rights are protected and it makes the court function so much better.”¹³⁴

Finding 4: The Arkansas Legislature has struggled to solve these challenges

While access to counsel in Arkansas has improved over the years, challenges remain, and the Arkansas legislature has struggled to sustainably address the public defense crisis.¹³⁵

Representative Jimmy Gazaway of the 31st District explained that the legislature is constantly grappling with competing funding priorities, and it is very difficult to gain public support to prioritize funding “lawyers for criminals.”¹³⁶ Prosecutor Matt Durrett of the 4th Judicial District similarly testified that public opinion does not often support public defense; nonetheless public defenders are out doing very important work for the community, “and our constitution requires it.”¹³⁷

Representative Nicole Clowney of Arkansas’ 21st District testified that legislators often see people accused of crimes as equivalent to people who are guilty of crimes.¹³⁸ Humanizing people accused of crimes and highlighting personal stories of people who were falsely accused may help

¹²⁸ Byrd Testimony, Transcript I, p. 12 lines 40-43.

¹²⁹ Byrd Testimony, Transcript I, p. 12 lines 40-43.

¹³⁰ An attorney ad litem advocates for the best interests of the child, even if that does not match the child’s wishes, see Byrd Testimony, Transcript I, p. 10 line 40 – p. 11 line 8.

¹³¹ Byrd Testimony, Transcript I, p. 12 lines 26-34.

¹³² Byrd Testimony, Transcript I, p. 13 lines 4-11; see also: Byrd Testimony, Transcript I, p. 11 lines 35-40.

¹³³ Byrd Testimony, Transcript I, p. 13 lines 4-11; see also: Byrd Testimony, Transcript I, p. 11 lines 35-40.

¹³⁴ Byrd Testimony, Transcript I, p. 12 line 43-p. 13 line 3.

¹³⁵ Rosenzweig Testimony, Transcript III, p. 2 lines 33-36; See also Everett written testimony, Appendix B, p. 1: Current and previous Directors of the Arkansas Public Defender Commission have repeatedly alerted the state legislature of the need for increased resources, “to no avail.”

¹³⁶ Gazaway Testimony, Transcript III, p. 10 lines 27-42. See also Gray Testimony, Transcript II, p. 5 lines 36-44; Kendrick Testimony, Transcript I, p. 25 lines 1-6; Tucker Testimony, Transcript III, p. 13 lines 21-26, p. 21 lines 24-31.

¹³⁷ Durrett Testimony, Transcript I, p. 15 lines 14-31.

¹³⁸ Clowney Testimony, Transcript III, p. 12 lines 16-42.

raise awareness of the importance of a good defense.¹³⁹ Representative Clowney also noted widespread, bipartisan support for protecting personal liberty, and suggested that framing criminal defense within this topic could help to garner more widespread support.¹⁴⁰ Senator Clarke Tucker concurred: “there is no more serious way to take away someone’s rights than to put them in prison, especially if it’s for something they haven’t done.”¹⁴¹

The Protect Arkansas Act

Among other changes, the Protect Arkansas Act (2023),¹⁴² which took effect on January 1, 2024, raised the stakes for defendants by increasing the mandatory service time on a number of violent felonies to 85—100% of the sentence that is imposed.¹⁴³ While the state’s 28 elected prosecutors are likely to handle these changes differently,¹⁴⁴ Representative Jimmy Gazaway, one of the bill’s sponsors, predicted that the Protect Arkansas Act will lead to an overall-lesser burden on the justice system by deterring crime and encouraging defendants to plea rather than going to trial.¹⁴⁵ Representative Gazaway reasoned that if defendants take their case to trial and they receive a sentence more than what the prosecutor had offered, “every year that they get over what the offer was that the prosecutor made, they’re going to serve day for day until their sentence is served in full. To me, that’s a very strong incentive for a criminal defendant to take a plea.”¹⁴⁶

Public Defender Commission Director Parrish disagreed:

*Our most serious felony is a Y felony. It carries a penalty range of 10-40 years or life. Hopefully we will see prosecutors take that into consideration when making offers, if cases are going to plead, but there absolutely no incentive that doesn’t occur to me to advise my client, if he or she is charged with first degree murder and receives a 40-year offer, to do anything other than go to trial. Because 40 years, day for day, is a life sentence. You might as well run the risk.*¹⁴⁷

- Gregg Parrish, Director, Arkansas Public Defender Commission (2024)

Mr. Parrish predicted, “we’re going to see a lot more jury trials coming in the next 18 months, and we’re going to see a lot more appeals generated from those trials.”¹⁴⁸ He emphasized, “we

¹³⁹ Clowney Testimony, Transcript III, p. 12 lines 16-42.

¹⁴⁰ Clowney Testimony Transcript III, p. 12 lines 4-15.

¹⁴¹ Tucker Testimony, Transcript III, p. 13 lines 29-41.

¹⁴² SB 495 <https://www.arkleg.state.ar.us/Bills/Detail?id=SB495&ddBienniumSession=2023%2F2023R#>

¹⁴³ Parrish Testimony, Transcript II, p. 9 lines 6-22; Clowney Testimony, Transcript III, p. 6 lines 8-15.

¹⁴⁴ Rosenzweig Testimony, Transcript III, p. 10 lines 19-22.

¹⁴⁵ Gazaway Testimony, Transcript III, p. 11 lines 15-28; see also Clowney Testimony, Transcript III, p. 11 lines 33-41.

¹⁴⁶ Gazaway Testimony, Transcript III, p. 11 lines 11-26.

¹⁴⁷ Parrish Testimony, Transcript II, p. 9 lines 6-22; see also: Rosenzweig Testimony, Transcript III, p. 10 lines 8-24.

¹⁴⁸ Parrish Testimony, Transcript II, p. 9 lines 6-22.

don't have the attorneys now at this point in this juncture to do that work that's necessary. And I think I'm afraid it's only going to get much, much worse over the next 18 months.”¹⁴⁹

As the state waits to determine what the true impact of the Protect Arkansas Act will be, Representative Nicole Clowney noted that regardless of the outcome, one thing that is certain is that the stakes for each individual defendant are higher: “people’s liberty is even more on the line that it was before.”¹⁵⁰ As such, these changes have raised the importance of the work of the public defender system.¹⁵¹

Moving forward

In her 2024 written testimony before this Committee, Malia Brink of the Deason Criminal Justice Reform Center at SMU Dedman School of Law argued that the first step to solving the crisis of providing a constitutionally-adequate system of public defense must be to accurately determine the number of public defenders the State of Arkansas needs.¹⁵² Currently the State of Arkansas does not appear to have accurate and complete data on attorney caseloads and staffing—essential information for the state to begin making the necessary reforms to bring public defender workloads in line with current Rules of Professional Conduct and professional practice standards.¹⁵³ Ms. Brink also noted some proposed structural changes to the public defender system could offer a blueprint for improving accessibility to attorneys in rural areas of Arkansas and help ensure better compliance with Arkansas’ rules on early entry of counsel.¹⁵⁴

Absent significant action on the part of the Arkansas Legislature, Senator Tucker described the current situation as a “looming constitutional crisis.”¹⁵⁵ The already overburdened and /under-resourced system of public defenders is currently poised to face the following compounding challenges:

- *Impact of the Protect Arkansas Act.* If the Protect Arkansas Act results in an increase in the number of jury trials and appeals, the burden on the current system of public defenders will become “much worse” over the next 12-18 months.¹⁵⁶

¹⁴⁹ Parrish Testimony, Transcript II, p. 9 lines 19-22.

¹⁵⁰ Clowney Testimony, Transcript III, p. 5 line 34 – p. 6 line 15.

¹⁵¹ Clowney Testimony, Transcript III, p. 5 line 34 – p. 6 line 7; p. 11 line 33 – p. 12 line 3.

¹⁵² Brink written testimony, Appendix B, p. 3.

¹⁵³ Brink written testimony, Appendix B, p. 3.

¹⁵⁴ Brink written testimony, Appendix B, p. 3, see Greening Criminal Legal Deserts in Rural Texas, <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1009&context=deasoncenter>

¹⁵⁵ Tucker Testimony, Transcript III, p. 14 lines 29-31; see also p. 8 lines 39-43

¹⁵⁶ Parrish Testimony, Transcript II, p. 9 lines 6-22; See also, Everett written testimony, Appendix B, p. 3.

- *Farella v. Benton County*.¹⁵⁷ On August 21, 2024, District Judge Timothy Brooks ruled that defendants are entitled to public defenders at all first appearances, further increasing the obligations of public defenders.¹⁵⁸
- *Upcoming COVID relief expiration*. Part-time positions established for COVID relief are temporary, and while the funding was extended in August of 2024, the Public Defender Commission expects to lose 30-37% of part-time attorneys statewide when it expires.¹⁵⁹

With the convergence of these looming challenges, Attorney Rosenzweig predicted that entire system “is going to grid to a halt,” requiring the federal courts to step in and “hold our entire system unconstitutional.”¹⁶⁰ Representative Gazaway suggested that a warning or information from the Arkansas Supreme Court or a push by the Arkansas Bar Association could help to move the legislature to address these challenges.¹⁶¹ Senator Tucker recalled that the most recent legislative movement to address these challenges came after the Chief Public Defender of Pulaski County began refusing any new cases.¹⁶² This type of action may be necessary again in order to continue making progress.

As the legislature continues to grapple with these issues, another way to reduce the overall caseload in the criminal justice system may be to try to better address core causes of criminality. In 2019, the American Civil Liberties Union of Arkansas published a “Blueprint for Smart Justice,” which proposed a series of policy reforms to lower crime and end the State’s “overreliance” on mass incarceration.¹⁶³ Among other changes, the ACLU has advocated for additional investment in evidence-based substance abuse treatment, quality mental healthcare, workforce training, diversion programs, and “other social programs proven to reduce crime” as a

¹⁵⁷ *Farella et al v. Benton County District Court*, 5:22-CV-5121 (W.D. Ark., 2022)

¹⁵⁸ *Farella et al v. Benton County District Court*, 5:22-CV-5121 (W.D. Ark., 2022); opinion and order: <https://htv-prod-media.s3.amazonaws.com/files/benco-attorney-suit-02912765725-66c86fb0d5050.pdf>. Worlow Testimony, Transcript I, p. 4 line 20-p.5 line 12; Parrish Testimony, Transcript II, p. 9 line 36-p.10 line 5.

¹⁵⁹ Parrish Testimony, Transcript II, p. 17 lines 14-23; Tucker Testimony, Transcript III, p. 7 lines 31-38; prosecutors also expect to lose positions and need to reallocate cases when the COVID funding expires, Ward Testimony, Transcript II, p. 17 line 26 – p. 18 line 2. *Note*: August 23, 2024, the Arkansas Democrat Gazette reported that the Arkansas Legislative Counsel approved the Arkansas Public Defender Commission’s request for \$1.25 million in state funds to continue employing 45 attorney specialists working on this backlog: Wickline, Michael, *Lawmakers OK extra money for part-time public defenders to ease case backlog*, Arkansas Democrat Gazette, August 23, 2024, <https://www.arkansasonline.com/news/2024/aug/23/lawmakers-ok-extra-money-for-part-time-public/>.

¹⁶⁰ Rosenzweig Testimony, Transcript III, p. 10 lines 5-8.

¹⁶¹ Gazaway Testimony, Transcript III, p. 11 lines 8-11. *See also* Rosenzweig Testimony, Transcript III, p. 10 lines 1-5, Rosenzweig encourages members of the AR Supreme Court to be proactive in communicating to the legislature about the need for public defenders.

¹⁶² Tucker Testimony, Transcript III, p. 9 lines 1-8.

¹⁶³ Everett written testimony, Appendix B, p. 1, *see also*: Blueprint for Smart Justice – Arkansas, American Civil Liberties Union 2019, <https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-AR.pdf>

way of easing the burden on the public defender system overall, whilst also improving community wellbeing.¹⁶⁴

Ultimately, Representative Gazaway predicted that the only way to gain significant movement in the legislature will likely be through litigation.¹⁶⁵ Senator Tucker agreed that litigation may be necessary, but suggested some interim steps may help to create movement before the system becomes a “train wreck.”¹⁶⁶ He advised holding a joint judiciary committee meeting between now and the next session and getting testimony from the Supreme Court and the Bar Association, as well as a face to face meeting with the governor.¹⁶⁷ “The Governor has more influence over the budget than anyone in the state.”¹⁶⁸ Senator Tucker reasoned that such efforts are worth the investment because they could be successful, and if they are not (and the state ends up getting sued for the constitutional violations), the case will be more compelling, because the legislature has already tried everything, “so the court has to act at that point.”¹⁶⁹

¹⁶⁴ Everett written testimony, Appendix B, p. 3. The Committee also notes, when considering a range of reforms to decrease the upstream causes of public defenders being overworked (crime rates), policymakers should also consider police reform, which in New York City decreased homicide rates by 85% and police killings of civilians by roughly 90%, while also decreasing incarceration, making New York the 6th safest large city (out of 50) in the U.S., and the safest controlling for poverty. See Robert Maranto, Wilfred Reilly, and Patrick J. Wolf, “Which Police Departments Make Black Lives Matter? *Administration & Society*, 56(3, February 15, 2024), 282-303. <https://doi.org/10.1177/00953997241226892>; Robert Maranto and Patrick J. Wolf, “Cops, Teachers, and the Art of the Impossible: Explaining the Lack of Diffusion of Innovations That Make Impossible Jobs Possible,” *Public Administration Review*, 73: 2 (March/April 2013) 230-40; DOI: 10.2139/ssrn.1667128.

¹⁶⁵ Gazaway Testimony, Transcript III, p. 10 line 39 – p. 10 line 7.

¹⁶⁶ Tucker Testimony, Transcript III, p 13 lines 5-21.

¹⁶⁷ Tucker Testimony, Transcript III, p 13 lines 5-21.

¹⁶⁸ Tucker Testimony, Transcript III, p 13 lines 5-21.

¹⁶⁹ Tucker Testimony, Transcript III, p 13 line 27 – p. 15 line 2.

Recommendations

Among their duties, advisory committees of the Commission are authorized to advise the Agency (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws, and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.¹⁷⁰ In keeping with these responsibilities, and given the testimony heard on this topic, the Committee submits the following recommendations to the Commission:

1. **The U.S. Commission on Civil Rights** should:
 - a. Conduct a national study of access to public defense and its impact on civil rights.
 - b. Release a public statement regarding the value of properly funding public defenders as a constitutional obligation.
2. **The U.S. Commission on Civil Rights** should issue the following recommendation to **Governor of Arkansas and the Arkansas Legislature**:
 - a. Prioritize additional and continuous funding for the public defender commission and appointed counsel, appropriate support staff, investigators, and language interpreters based on constitutional obligations to provide effective counsel.
 - b. Incentivize training programs for lawyers to handle complex-criminal defense cases, including obtaining death-penalty certification.
 - c. Evaluate additional investment opportunities in evidence-based substance abuse treatment, quality mental healthcare, workforce training, diversion programs, and other social programs thought to reduce crime as a way of easing the burden on the public defender system overall, whilst also improving community wellbeing.¹⁷¹
 - d. Require complete data collection and reporting of attorney caseloads and staffing within the AR Public Defender Commission to evaluate compliance with current Rules of Professional Conduct and professional-practice standards.

¹⁷⁰ 45 C.F.R. § 703.2 (2018).

¹⁷¹ When considering a range of reforms to decrease the upstream causes of public defenders being overworked (crime rates), policymakers should also consider police reform, which in New York City decreased homicide rates by 85% and police killings of civilians by roughly 90%, while also decreasing incarceration, making New York the 6th safest large city (out of 50) in the U.S., and the safest controlling for poverty. See Robert Maranto, Wilfred Reilly, and Patrick J. Wolf, "Which Police Departments Make Black Lives Matter?" *Administration & Society*, 56(3, February 15, 2024), 282-303. <https://doi.org/10.1177/00953997241226892>; Robert Maranto and Patrick J. Wolf, "Cops, Teachers, and the Art of the Impossible: Explaining the Lack of Diffusion of Innovations That Make Impossible Jobs Possible," *Public Administration Review*, 73: 2 (March/April 2013) 230-40; DOI: 10.2139/ssrn.1667128.

- e. Assess existing student-loan forgiveness programs in other states targeted toward public defenders and prosecutors for possible implementation in Arkansas in order to address shortages.¹⁷²
3. The U.S. Commission on Civil Rights should issue the following recommendation to the **Arkansas Supreme Court**:
 - a. Issue ethical guidance for attorneys regarding their duty to manage or refuse cases if their caseload prevents them from providing effective counsel to their clients.
 - b. Direct the CLE Board in the Office of Professional Programs to offer Continuing Legal Education (CLE) credits for attorneys willing to take on pro bono defense cases.
 4. The U.S. Commission on Civil Rights should issue the following recommendation to the **Arkansas Public Defender Commission (ARPDC)**:
 - a. Conduct a study to determine resources necessary to fully support the ARPDC and its ability to provide timely and effective counsel for indigent defendants.
 - b. Conduct complete data collection and reporting of attorney caseloads and staffing to evaluate compliance with current Rules of Professional Conduct and professional-practice standards.

¹⁷² See Appendix C for a current report of loan forgiveness programs in other states.

Appendix

A. Briefing materials¹⁷³

- a. Transcript
- b. Agenda
- c. Minutes
- d. Panelist Presentations (PPT)
- e. Other records

B. Written Testimony¹⁷⁴

- a. Sarah Everett, ACLU of Arkansas
- b. Lynette Boggs-Perez, Attorney and Private Citizen
- c. David Joseph Deutch, Public Defender, Washington County Arkansas
- d. Malia Brink, Deason Criminal Justice Reform Center
- e. Charles Pennington, Private Citizen

C. Supplemental Documents¹⁷⁵

- a. Simpson letter and AR Supreme Court Ethics Opinion
- b. Farella Order
- c. RAND Corporation: National Public Defense Workload Study
- d. Student loan forgiveness: state-by-state overview (Memorandum)
- e. ABA 10 Principles of a Public Defense Delivery System

¹⁷³ Briefing materials available at: <https://usccr.box.com/s/wh6io7xr9jju6chvxe3wfc9xd4t3rq6>

¹⁷⁴ Written testimony available at: <https://usccr.box.com/s/ecqvht5cmjzzhg58s4vli0cxfabv8bw>

¹⁷⁵ Supplemental Documents available at: <https://usccr.box.com/s/ig7lc3b6niuitc6zqsi9a5cwmrbx53k9>

**Arkansas Advisory Committee to the
United States Commission on Civil Rights**



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