



Office of State Public Defender

Interim Budget Committee Requests Response

During the December 15, 2021 Interim Budget Committee hearing, OPD was requested to provide additional information related to the following questions:

- How OPD demonstrated the COVID Effect in its ARPA Request; and
- How OPD determined the number of necessary attorneys generally, and specifically in the Billings area

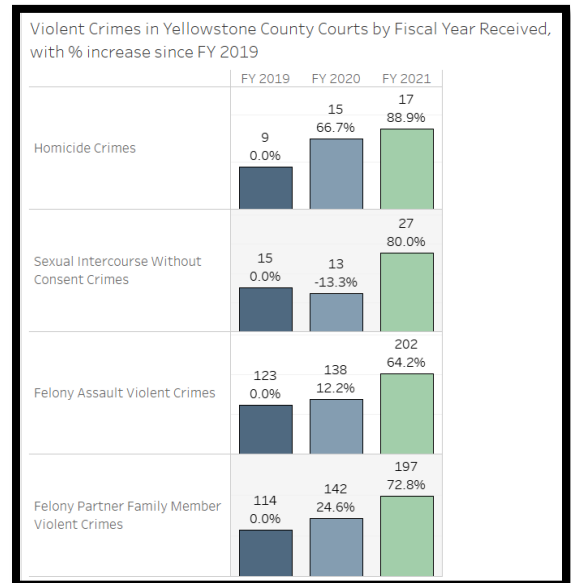
To provide the best information and context, OPD has prepared this memo to the Interim Budget Committee. Several factors came together to create the situation OPD is experiencing in the Billings area. This memo will focus on what OPD believes to be the three most important factors:

- 1) the rise in serious crime in Yellowstone County;
- 2) the Covid-19 Pandemic and its effect on the justice system; and,
- 3) OPD’s attempts to enforce its workforce management standard, called Ethical Case Management (ECM).

Rise in Serious Crime in the Billings Area

The rise of serious and violent crime in the Billings area has been well documented [time](#) and [again](#) (and [again](#))¹. As these sources also show, there is a strong correlation between the recent rise in serious and violent crime and the Covid-19 Pandemic. The United States Department of Justice also issued a [press release](#) in September of 2020 to the same effect. OPD’s own data on serious and violent crime also reflects this rise in serious crime in the same time frame:

While the overall new filings in the area have remained effectively the same since FY 2019, as discussed below, the share of serious and violent crimes in these new filings has increased, as shown above. The rise of serious and violent crime has put increased pressure on OPD’s attorneys as these cases take much greater time and resources than lesser charges.



¹ Additional sources [here](#) and [here](#).

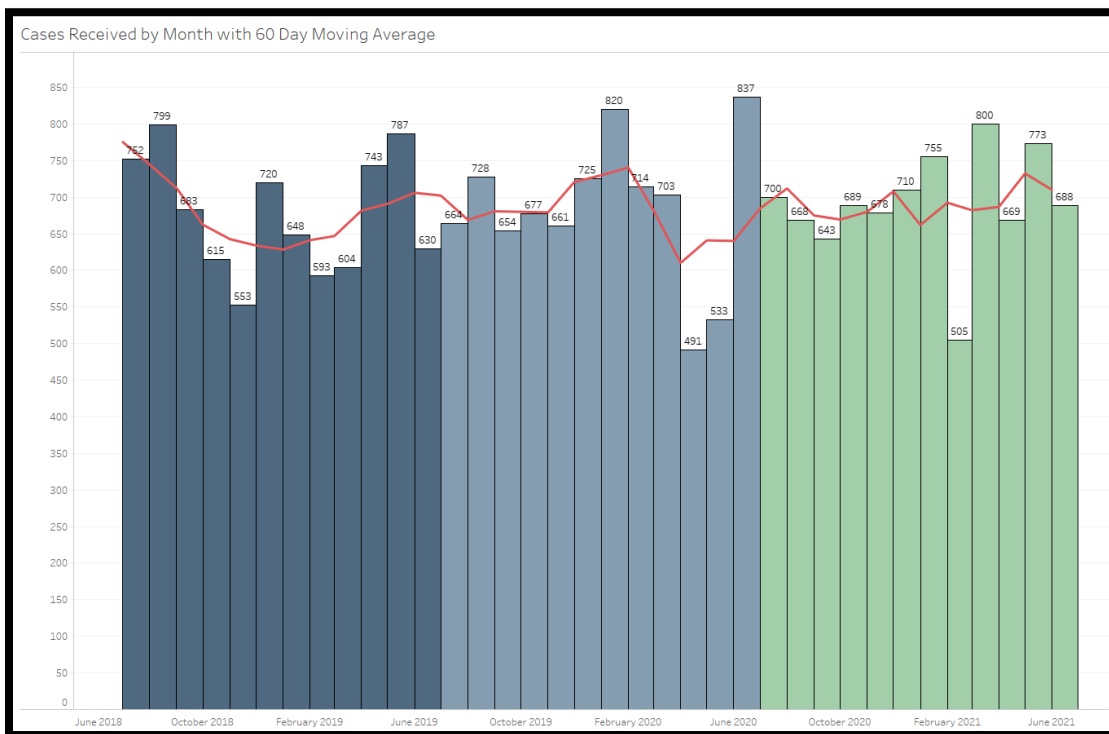
The Covid-19 Effect on the Justice System

The Covid-19 Pandemic has greatly increased the pressure OPD attorneys are under, as justice system slowdowns have increased the number of open and active cases they are assigned, creating a “backlog” of open and active cases in Region 9.

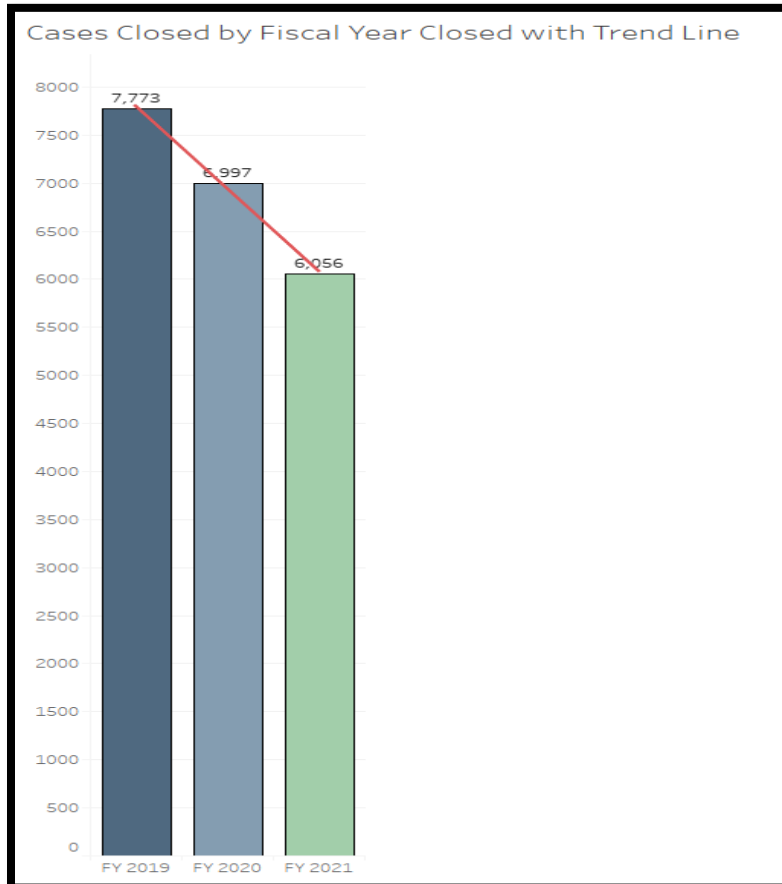
Despite a very short dip in new filings, Region 9 has continued to receive new cases at essentially the same rate as before the pandemic:

- FY 2019: 8,127
- FY 2020: 8,207
- FY 2021: 8,278

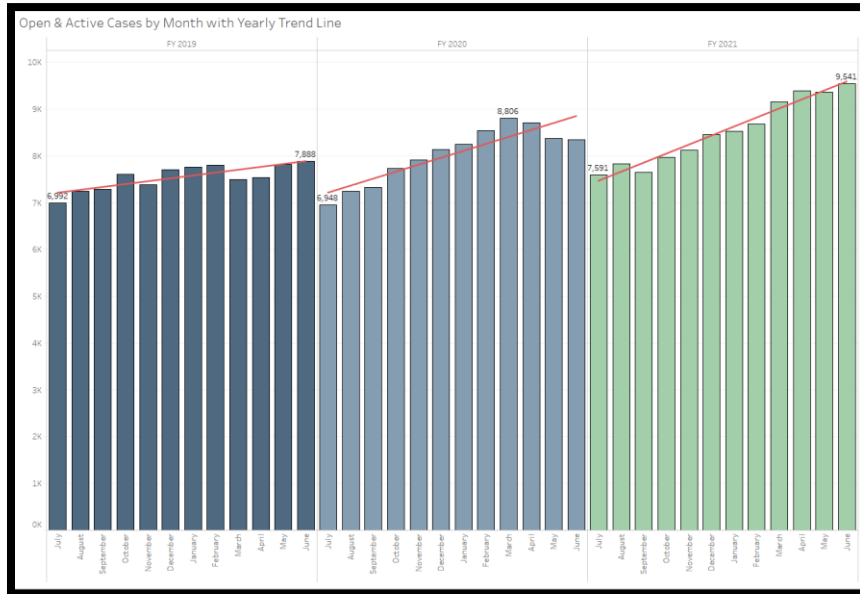
The chart below shows new filings in Region 9 by month, colored by Fiscal Year, and the red line is a 60 day moving average of new case filings.



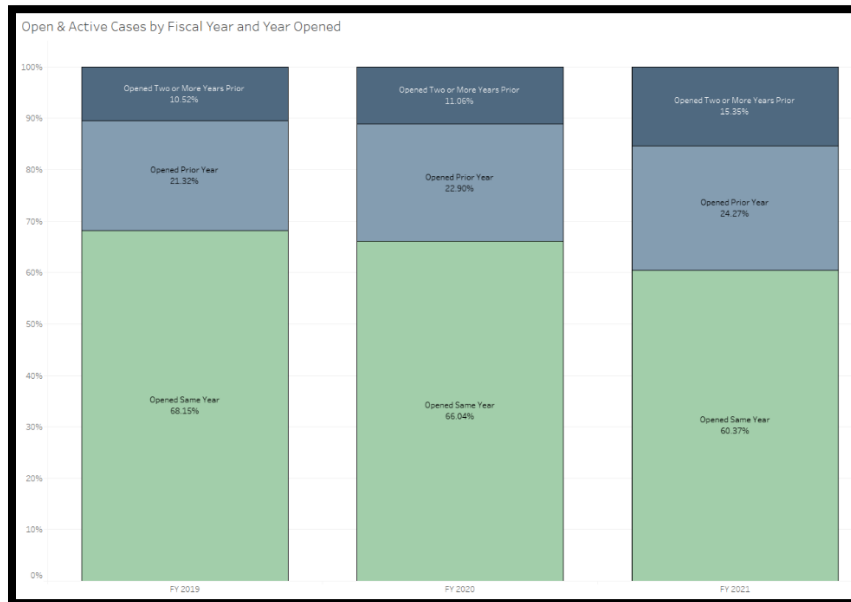
Although new case filings have continued at the same basic rate across the last three fiscal years, the number of cases being processed through the justice system and closed has steeply declined. The chart below shows the number of cases closed by Fiscal Year in Region 9, with the red line indicating the overall trend over time.



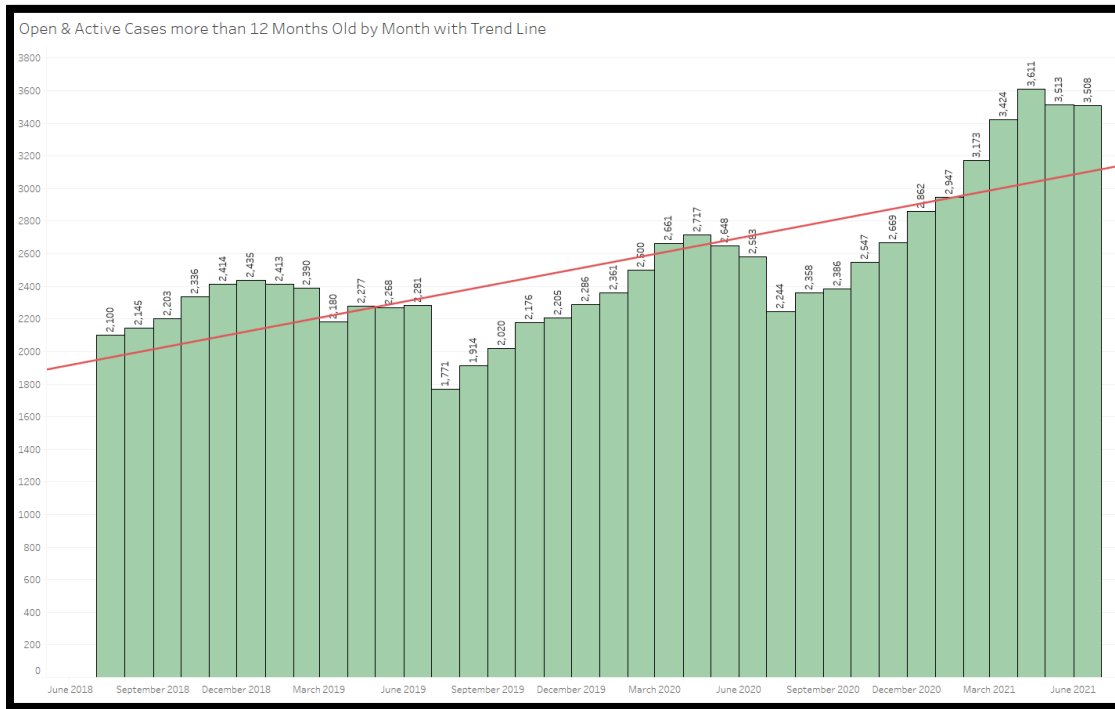
The slowdown of cases being processed through the system without a corresponding drop in new case filings has led to an increase in the amount of Open and Active Cases in Region 9, with FY 2021 having the highest amount of Open and Active cases in the last three completed fiscal years. The chart below shows the number of Open and Active in Region 9 by month, colored by Fiscal Year, with the red line showing the yearly trend.



In addition to the raw number of Open and Active Cases increasing, these cases are also aging in our system. The chart below displays the share of Open and Active cases in Region 9 as of June 30 of each fiscal year grouped and colored by whether the cases were opened in the current fiscal year, the prior fiscal year, or two or more fiscal years prior.

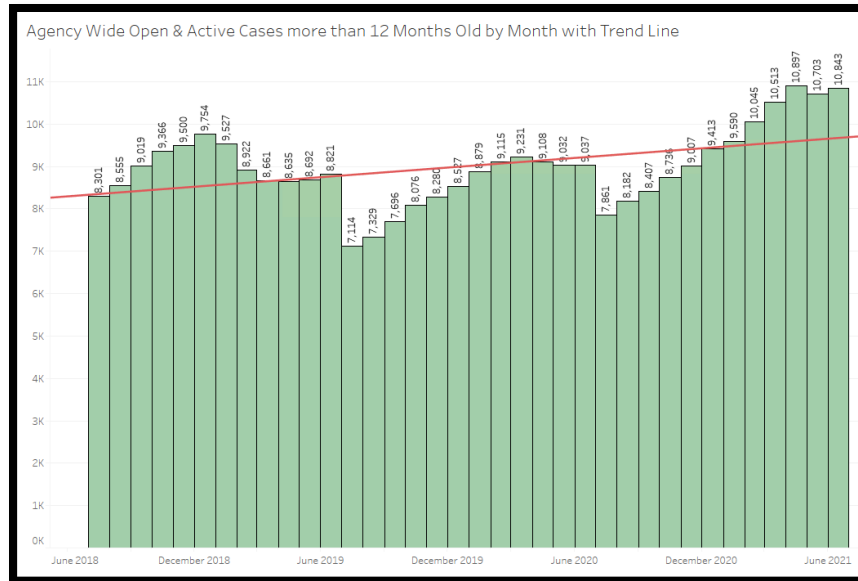


There is a clear trend of Open and Active cases opened in prior fiscal years increasing from roughly 32% of Open and Active cases on June 30, 2019 to roughly 40% on June 30, 2021. The aging of these Open and Active cases can also be seen by looking at the number of cases that are Open and Active that were opened more than twelve months prior. The chart below displays the number of Open and Active cases by month that have been open for more than twelve months in Region 9.



As of the end of Fiscal Year 2021 OPD has almost 1,000 additional Open and Active Cases than at the end of Fiscal Year 2020, which is more than triple the increase seen between Fiscal Year 2019 and Fiscal Year 2020. As a reference, the amount of additional work that the *oldest* 1000 cases that were Open and Active as of June 30, 2021 is over **11,000 case weight hours**, or enough for nearly 8 additional attorneys at 1500 case weight hours.

While OPD has experienced this same trend Agency wide, as shown below, the rise is not as steep as observed in Yellowstone County, and in fact, roughly 50% of the increase in cases more than 12 months old at the end of Fiscal Year 2021 as compared to Fiscal Year 2020 are from Yellowstone County alone.



Due to the steady new case filings and Covid-19 related slowdown in cases being processed through the justice system OPD’s Open and Active cases have both aged and increased, creating a backlog of cases that has increased pressure on OPD attorneys in Region 9.

Ethical Case Management

As ECM plays a significant role in this situation, it is important to address why ECM exists and why it is so important to ensuring OPD’s long term stability. Pursuant to national guidelines, OPD has adopted a workforce management standard that caps and controls the amount of work assigned to individual public defenders on a monthly and yearly basis. The metric of work is called “case weight hours” and represents the expected amount of work an individual case will take from assignment to completion, though only at an aggregate level. Cases that go to trial or that have complicated or contested issues will often exceed the case weight, and OPD managers have the ability to adjust the weight associated with a case as necessary. The goal of our ECM is to ensure that our attorneys are not overburdened with work and that they are able to provide competent and effective representation, as mandated by both the US and Montana constitutions, as well as OPD’s authorizing statute.

The Legislative Audit Division conducted a Performance Audit of OPD focused on FY 2019 and made several relevant key findings here:

- OPD’s case weight hours associated with individual cases are accurate in the aggregate;
- OPD attorneys are generally overworked under the ECM and national guidelines; and,
- OPD attorneys are underpaid, in relation to other state attorney employees and colleagues across the justice system.²

Although OPD has had a workforce standard in place for some time, the Agency was never able to

² The Audit found OPD attorneys were the lowest paid attorneys in the state, which remains to be true today.

enforce it in any meaningful way due to the volume of work received. The volume of work makes it difficult to recruit new attorneys and to retain existing attorneys, both of which further pressure OPD's workforce. As a result, and in response to the Audit, OPD has committed to addressing these workload issues and has made material progress towards enforcing the ECM. This has, in turn, shone light on Yellowstone County as an area where OPD is under resourced.

In addition to the increased workload in Region 9 due to the rise in serious crime and the justice system slowdown due to Covid, OPD's efforts to enforce the ECM have led to it taking longer to assign counsel, as even with both FTE and Contract attorneys being assigned as much as possible within ECM and the limits of Contract attorneys, there is simply too much work for the existing attorneys to handle.

Ethical Case Management in the Billings Area and the State

During the last complete fiscal year, FY 2021, OPD received the following new cases in Yellowstone County courts, which is displayed along with the total case weight hours for these cases, as well as the total number of attorneys necessary if OPD were to enforce its ECM of 125 new case weight hours a month for a total of 1500 new case weight hours a year. The necessary attorney per year number is the number of individual attorneys that must be assigned 1500 case weight hours per year to keep within ECM, and it is not specific to FTE or Contract attorneys, only that this is the number of attorneys needed to staff the cases received within OPD's ECM standards.

	# of Cases Received	Total Case Weight Hours	# of Attorneys Necessary/yr
Thirteenth Judicial District Court- Yellowstone County	3,248	47,298	31.5
Billings Municipal Court	3,237	16,655	11.1
Yellowstone County Justice Court	954	5,461	3.6
Laurel City Court	122	739	0.5
Grand Total	7,561	70,153	46.8

As can be seen, if OPD were to enforce its ECM, it would have required 46.8 Attorneys at 1500 case weight hours to staff cases received in Yellowstone County Courts in FY 2021.

The chart below displays the same metrics for OPD Regions 9 and C, which includes all cases in the Billings area, and also includes the number of currently allocated FTE Attorneys, as well as an indication of the gap between current allocation and the necessary number of attorneys.

New Billings Regions Trial Level Filings FY 2021

	# of Cases Received	Total Case Weight Hours	# of Attorneys Necessary/yr	FTE Attorney Allocations	Necessary Attorney Gap
Region 9	5,785	50,963	34.0	27.5	-6.5
Region C	3,006	32,737	21.8	4.5	-17.3
Grand Total	8,791	83,699	55.8	32.0	-23.8

Please note the FTE Attorney Allocation column includes one Regional Public Defenders position, which carries little to no caseload. Further, there are 4 managing attorneys in this area that carry caseloads commensurate with the number of attorneys they supervise, though, in higher volume offices like Billings, these attorneys also carry little to no caseloads.

As OPD is only appropriated 32 FTEs in the area, several of which are managers unable to carry full caseloads, there was a gap of over 22,000 case weight hours in FY 2021, the workload equivalent of nearly 15 FTE attorneys, that had to be assigned to FTEs **over** ECM standards or assigned to an already thin and depleted contracting pool. Further, as of January 18, 2022, OPD had 27 FTE Attorney positions vacant across the state³, with 11 of those being in the Billings area Regions. These issues have combined to put an increasingly large amount of pressure on OPD's existing employees and contractors and the Agency's ability to assign newly filed cases.

OPD determined that a combined approach of contracting out the bulk of new cases in Billings Municipal Court and putting additional modified FTEs into Yellowstone County District Court would address most of the existing workload issues in the Billings area regions. While the Billings Municipal Court contract started in December and is going well, unfortunately OPD has not yet been able to fill the newly provided modified FTEs due to OPD's much lower rate of pay.

Determining the Number of Necessary FTEs for OPD's Workload

OPD has begun using ECM data to determine how many attorneys are needed and where they are located. Ensuring OPD attorneys are not over-assigned is a paramount goal for OPD, as both the audit and Agency history show this is a critical factor in recruitment and retention. OPD is using this data to more efficiently and effectively allocate its existing FTEs throughout the State. And as OPD prepares for the next session, it will be using this data to formulate its budget requests, including its FTE allocation.

OPD is also looking at its existing contracting structure and seeking new ways to address those needs. OPD will always have a need for contractors and finding the right balance is important to ensure we are getting as much value per tax-payer dollar spent as possible.

³ Including 4 Modified FTEs, all of which are in the Billings area Regions