

KANSAS

HOLISTIC

DEFENDERS

Roadmap

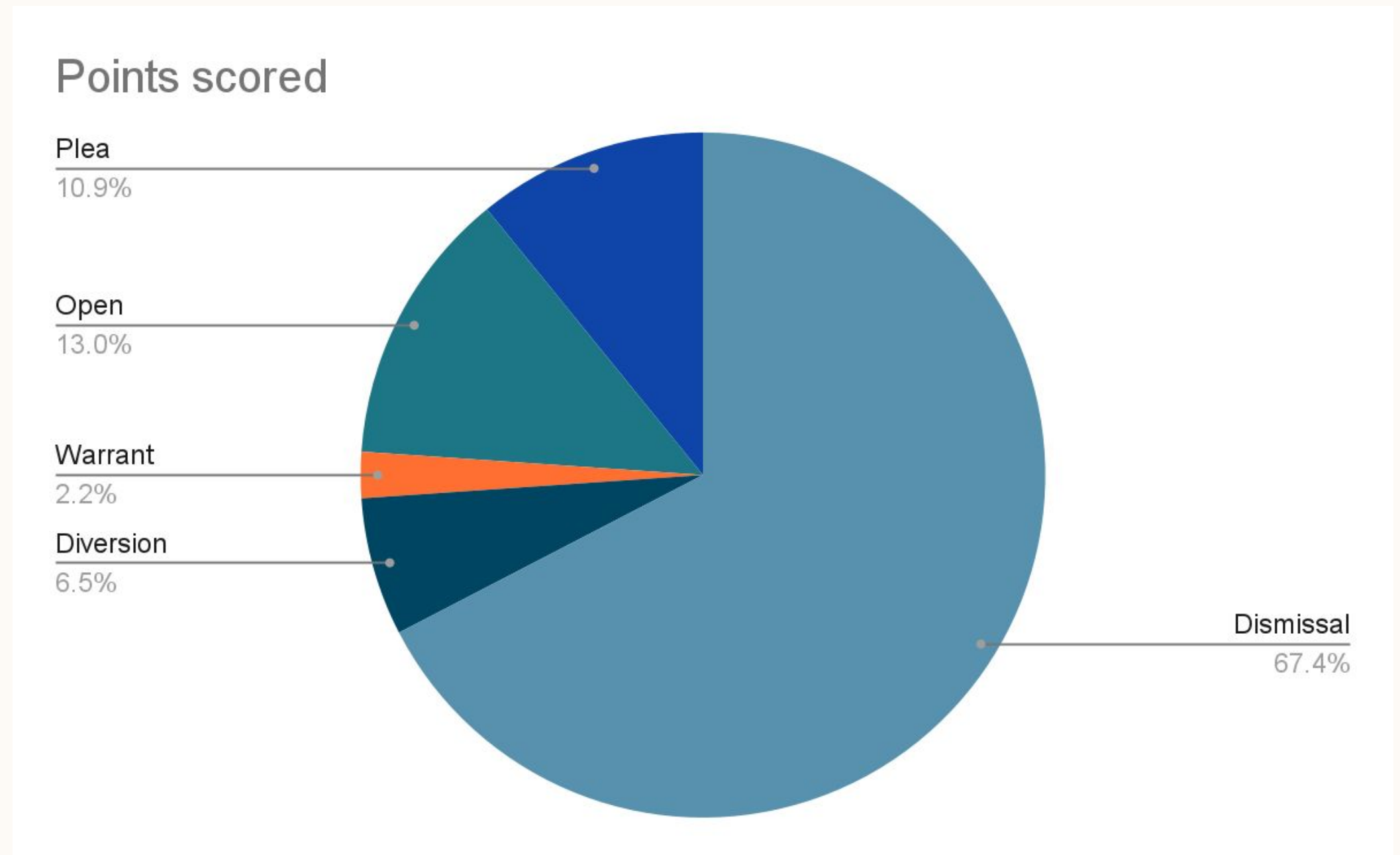
- 1) What is self-defense immunity?
- 2) Why this works - Strategy and Tactics
- 3) Review the Statutes
- 4) Important case-law
- 5) Practice points to ensure success

**Does Sam
Know
What He's
Talking
About?**

Scoreboard

I have filed 50 Immunity Motions

- 5 pled
- 3 Diversions
- 1 warrant status
- 4 Open immunity cases
- 31 Dismissed
- 6 Open





Content of the Motion

DEFENDANT'S MOTION FOR IMMUNITY

Defendant, by and through counsel, Sam Allison-Natale, requests an immunity hearing pursuant to K.S.A.

21-5231 and 21-5226.

Respectfully submitted,

Basics of the Defense

It's the State's Burden

The State has the burden of production and burden of proof.

The Government must show that self-defense immunity *doesn't* apply.

Probable Cause

i.e. the proof “sufficient for person of ordinary prudence and caution to conscientiously entertain reasonable belief of defendant's guilt, despite defendant's self-defense-of-force immunity”

Deadly vs. Non-deadly

There are only two levels. Deadly force can only be justified by reasonable belief of great bodily harm or death.

Non-deadly force just requires unlawful force.

Standards

Two Prong Test

Subjective: Did your client honestly believe that force was necessary to prevent the imminent unlawful use of force by another?

Objective: Was that belief objectively reasonable?

Presumptions

There are three circumstances in which the Court must *presume* your client's use of force was subjectively and objectively reasonable

- Defense of the home
- Place of work
- Occupied vehicle

No deference

Factual disputes don't automatically fall to the State's favor (unlike a prelim).

Court must come down one way or the other by evaluating the evidence.

Totality of the circumstances test.

What's Covered

Words

Words or actions that reasonably convey the threat of force, including threats to cause death or great bodily harm to a person

Presentation

- Display or presentation of the means of force, e.g. a threatening gesture or the display of a weapon.

Physical force

By a weapon or through the actions of another.

Strategic and Tactical Uses

Fastest way to a dismissal

Very low risk

Beats misdemeanors and felony charges

Free discovery - test your theory and lock in testimony

Free bite at the apple

Pressures the State

21-5221. Use of force; definitions.

- (a) As used in article 32 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto:
- (1) "Use of force" means any or all of the following directed at or upon another person or thing:
 - (A) Words or actions that reasonably convey the threat of force, including threats to cause death or great bodily harm to a person;
 - (B) the presentation or display of the means of force; or
 - (C) the application of physical force, including by a weapon or through the actions of another.
 - (2) "Use of deadly force" means the application of any physical force described in paragraph (1) which is likely to cause death or great bodily harm to a person. Any threat to cause death or great bodily harm, including, but not limited to, by the display or production of a weapon, shall not constitute use of deadly force, so long as the actor's purpose is limited to creating an apprehension that the actor will, if necessary, use deadly force in defense of such actor or another or to affect a lawful arrest.
- (b) An actor who threatens deadly force as described in subsection (a)(1) shall be subject to the determination in subsection (a) of K.S.A. 21-5222, and amendments thereto, and not to the determination in subsection (b) of K.S.A. 21-5222, and amendments thereto.

21-5222. Defense of a person; no duty to retreat.

(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such use of force is necessary to defend such person or a third person against such other's imminent use of unlawful force.

(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.

(c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person.

21-5223. Defense of dwelling, place of work or occupied vehicle; no duty to retreat.

(a) A person is justified in the use of force against another when and to the extent that it appears to such person and such person reasonably believes that such use of force is necessary to prevent or terminate such other's unlawful entry into or attack upon such person's dwelling, place of work or occupied vehicle.

(b) A person is justified in the use of deadly force to prevent or terminate unlawful entry into or attack upon any dwelling, place of work or occupied vehicle if such person reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or another.

(c) Nothing in this section shall require a person to retreat if such person is using force to protect such person's dwelling, place of work or occupied vehicle.

21-5224. Use of force; presumptions.

(a) For the purposes of K.S.A. 21-3211 and 21-3212, prior to their repeal, or K.S.A. 2019 Supp. 21-5222 and 21-5223, and amendments thereto, a person is presumed to have a reasonable belief that deadly force is necessary to prevent imminent death or great bodily harm to such person or another person if:

(1) The person against whom the force is used, at the time the force is used:

(A) Is unlawfully or forcefully entering, or has unlawfully or forcefully entered, and is present within, the dwelling, place of work or occupied vehicle of the person using force; or

(B) has removed or is attempting to remove another person against such other person's will from the dwelling, place of work or occupied vehicle of the person using force; and

(2) the person using force knows or has reason to believe that any of the conditions set forth in paragraph

(1) is occurring or has occurred.

21-5225. Defense of property other than a dwelling, place of work or occupied vehicle

A person who is lawfully in possession of property other than a dwelling, place of work or occupied vehicle is justified in the use of force against another for the purpose of preventing or terminating an unlawful interference with such property. Only such use of force as a reasonable person would deem necessary to prevent or terminate the interference may intentionally be used.

21-5226. Use of Force By an aggressor

The justification described in K.S.A. 21-3211, 21-3212 and 21-3213, prior to their repeal, or K.S.A. 2019 Supp. 21-5222, 21-5223 and 21-5225, and amendments thereto, is not available to a person who:

- (a) Is attempting to commit, committing or escaping from the commission of a forcible felony;
- (b) initially provokes the use of any force against such person or another, with intent to use such force as an excuse to inflict bodily harm upon the assailant; or (c) otherwise initially provokes the use of any force against such person or another, unless: (1) Such person has reasonable grounds to believe that such person is in imminent danger of death or great bodily harm, and has exhausted every reasonable means to escape such danger other than the use of deadly force; or (2) in good faith, such person withdraws from physical contact with the assailant and indicates clearly to the assailant that such person desires to withdraw and terminate the use of such force, but the assailant continues or resumes the use of such force.

21-5228. Private person making arrest.

(a) A private person who makes, or assists another private person in making a lawful arrest is justified in the use of any force which such person would be justified in using if such person were summoned or directed by a law enforcement officer to make such arrest, except that such person is justified in the use of deadly force only when such person reasonably believes that such force is necessary to prevent death or great bodily harm to such person or another. (b) A private person who is summoned or directed by a law enforcement officer to assist in making an arrest which is unlawful, is justified in the use of any force which such person would be justified in using if the arrest were lawful.

21-5229. Resisting arrest.

A person is not authorized to use force to resist an arrest which such person knows is being made either by a law enforcement officer or by a private person summoned and directed by a law enforcement officer to make the arrest, even if the person arrested believes that the arrest is unlawful.

21-5230. No duty to retreat

A person who is not engaged in an unlawful activity and who is attacked in a place where such person has a right to be has no duty to retreat and has the right to stand such person's ground and use any force which such person would be justified in using under article 32 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or K.S.A. 2019 Supp. 21-5202 through 21-5208, 21-5210 through 21-5212, and 21-5220 through 21-5231, and amendments thereto.

21-5231 Immunity from prosecution or liability; investigation.

(a) A person who uses force which, subject to the provisions of K.S.A. [2016 Supp.] 21-5226, and amendments thereto, is justified pursuant to K.S.A. [2016 Supp.] 21-5222, 21-5223 or 21-5225, and amendments thereto, is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer who was acting in the performance of such officer's official duties and the officer identified the officer's self in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, 'criminal prosecution' includes arrest, detention in custody and charging or prosecution of the defendant. "(b) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (a), but the agency shall not arrest the person for using force unless it determines that there is probable cause for the arrest. "(c) A prosecutor may commence a criminal prosecution upon a determination of probable cause."

Foundational Procedural Cases

State v. McCullough, 293 Kan. 970 (2012)

- **Holdings:** Self-defense immunity requires a two-pronged test:
 - 1) A *subjective* belief, sincerely and honestly held, that the use of force was necessary
 - 2) an *objective* set of facts which would lead a reasonable person to believe that self-defense was necessary

State v. Ultreras, 296 Kan. 828 (2013)

- This case set the procedural requirements for litigating a stand your ground.
- **Holdings:** 1) Standard of proof is probable cause without deference to the State.
 - 2) State bears the burden of proof
 - 3) Court must consider the totality of the circumstances

State v. Hardy, 305 Kan. 1001 (2017)

- **Facts:** Complainant reached into defendant's car, hitting him, during a drunken dispute. Defendant **shot** him with a gun.
- **Holdings:** 1) Evidence should not be weighed with deference to the State.
 - Court must come down one way or the other by evaluating the evidence.
 - Court must consider the totality of the circumstances.
- 2) Deadly force is presumptively reasonable when acting in defense of one's home, occupied vehicle or place of work.
- 3) Immunity hearing may be held at a preliminary hearing.

Limiting Cases

State v. Betts, 316 Kan. 1919 (2022)

- Facts: Cop tried to shoot a dog and hit a little girl.
- Holding: Unintentional / Reckless harm caused to bystanders not covered under immunity statute.
 - Mistaken reasonable belief that a person against whom force is used was an aggressor can still enable immunity.

State v. Collins, 56 Kan.App.2d 140 (2018)

Facts: Collins was chased by three women, who followed him up the stairs and were grabbing at his clothing during a dispute. Collins slashed them with a knife.

Holding: Defendant's use of deadly force was not objectively reasonable when the threat was being grabbed or falling down the stairs. Deadly force requires a threat of great bodily harm to be justified

Investigation

Investigation

You need an investigator to do these well. Your investigator can get a written statement from the CW which you can use for impeachment, or work product which you can use to prep.

File a motion to pay them.

Criminal History

Look up the criminal history of the CW. Their history is relevant (so long as your client was aware of it) in that it goes to the reasonableness of your client's subjective perception of threat.

Easy vs. Hard Witnesses

Some witnesses will concede that they were the initial aggressor. If you have them locked in through a written statement, your cross is extremely easy.

CROSS-EXAMINATION

BY MR. ALLISON-NATALE

Q. ~~Hi Steve.~~ We can agree that both of you had hit each other that night?

A. Yeah.

Q. And there was a lot of emotion involved in the situation?

A. Oh yeah.

Q. I want to talk to you about some of those emotions. One of the reasons this fight had started was because he had contacted his ex-wife?

A. Yeah. Yes.

Q. More than contacted, he had gone over to her place?

A. No.

Q. But the contact that he did have was a

form of cheating?

A. Yeah, it felt -- yes.

Q. It felt hurtful?

A. Mm-hmm, yes.

Q. Anybody in that situation would have felt really angry?

A. Yes.

Q. And you felt really angry?

A. Yes.

Q. You both were drinking?

A. Yeah, yes, more than usual. Not that we drink a lot, but you know, more than just the occasional --

Q. The drinking didn't help the anger?

A. Not at all.

Q. Made it more intense?

A. Yes.

Q. And you were feeling a lot of intense anger at that point?

A. Yes.

Q. And hurt?

A. Yes.

Q. Angry enough that you just couldn't stand to really look at him?

A. Yes, definitely.

Q. You wanted him to leave?

A. Yes.

Q. And he didn't want to leave?

A. Yes, so we were both, you know, when you're in a relationship, you're trying to talk things out and trying to explain your side, and explain the other person's side. And so there was not, you know, I didn't necessarily want him to leave at first, I wanted to talk it out, but it just kind of came to that.

Q. After it had escalated, you wanted him to leave?

A. Right.

Q. You told him that you wanted him to leave?

A. Yes.

Q. You raised your voice at him?

A. Yes.

Q. And he said no, and he got in your face?

A. Sorry. It's like, I don't remember everything, but eventually, yeah, we got in each other's faces.

Q. And that was when you shoved him?

A. Yes.

Q. Multiple times?

A. Yes.

Q. And that shove, that was the first physical contact that was made?

A. Yes.

Q. And you had also slapped him at some point?

A. Yes.

Q. And he hit you?

A. Yes.

Q. The rest of the fight was back-and-forth?

A. Yes.

Q. And then you decided to walk away?

A. Yes.

Q. And he agreed also to walk away, stop the fight then?

A. Yes.

Q. And that was when you called the police?

A. Yes.

Q. And he called someone to pick him up?

A. Yes.

MR. ALLISON-NATALE: Nothing further.

Establish the Subjective Prong

Direct Examination

You will need to prep your client for direct examination because you'll need them to establish the subjective prong. Spend a lot of time with them.

Remember to ask them what they were thinking and feeling.

State Fumbles

Sometimes, the State will admit the entirety of an unredacted video of an officer's bodycam. If they put it into evidence whole, you may be able to use your client's statements to establish the subjective prong.

Use the Presumption

Some circumstances, you will enjoy a presumption that you have the subjective prong (Car, work or home). If you get these presumptions, you may not need your client.

Snappy Answers to Stupid Objections

“You need a memo!”

There is no requirement in statute or caselaw (that I’m aware of) that requires anything other than a good-faith basis to raise the immunity hearing.

“There’s no evidence here”

“Discovery” is not “Evidence.” The prosecutors think if they don’t have it in a police report, there’s no support for the motion.

Receiving evidence is what the hearing is for!

“Defense should go first!”

They might want you to go first. Don’t fall for it. It’s their burden to show probable cause. If they can’t get there, don’t help them out!

What Holistic Defense Looks Like

One of our attorneys picked up a case from a withdrawing panel attorney. The client had been in jail for two-and-a-half months, asking his attorney to make bond modification. The client had previously gotten an apartment through a local housing program, but was prohibited from returning there due to an order of protection on his open case.

Within a day of being on the case, the KHD Attorney made a motion to modify bond to get the client out on an OR bond with GPS monitoring. He then worked to get the client a bed at the shelter.

This was no easy feat - the shelter had a new policy that folks on GPS monitoring aren't allowed. Thankfully, our investigator and our advocates called the shelter to find a rare bed opening up. Later, we filed a motion with the Court to remove the GPS monitor.

Our client advocates helped the client to get a COVID vaccine (so the client could get into the shelter), and when they were done at the Walgreens, got him set up in the shelter.

Our Civil Programs



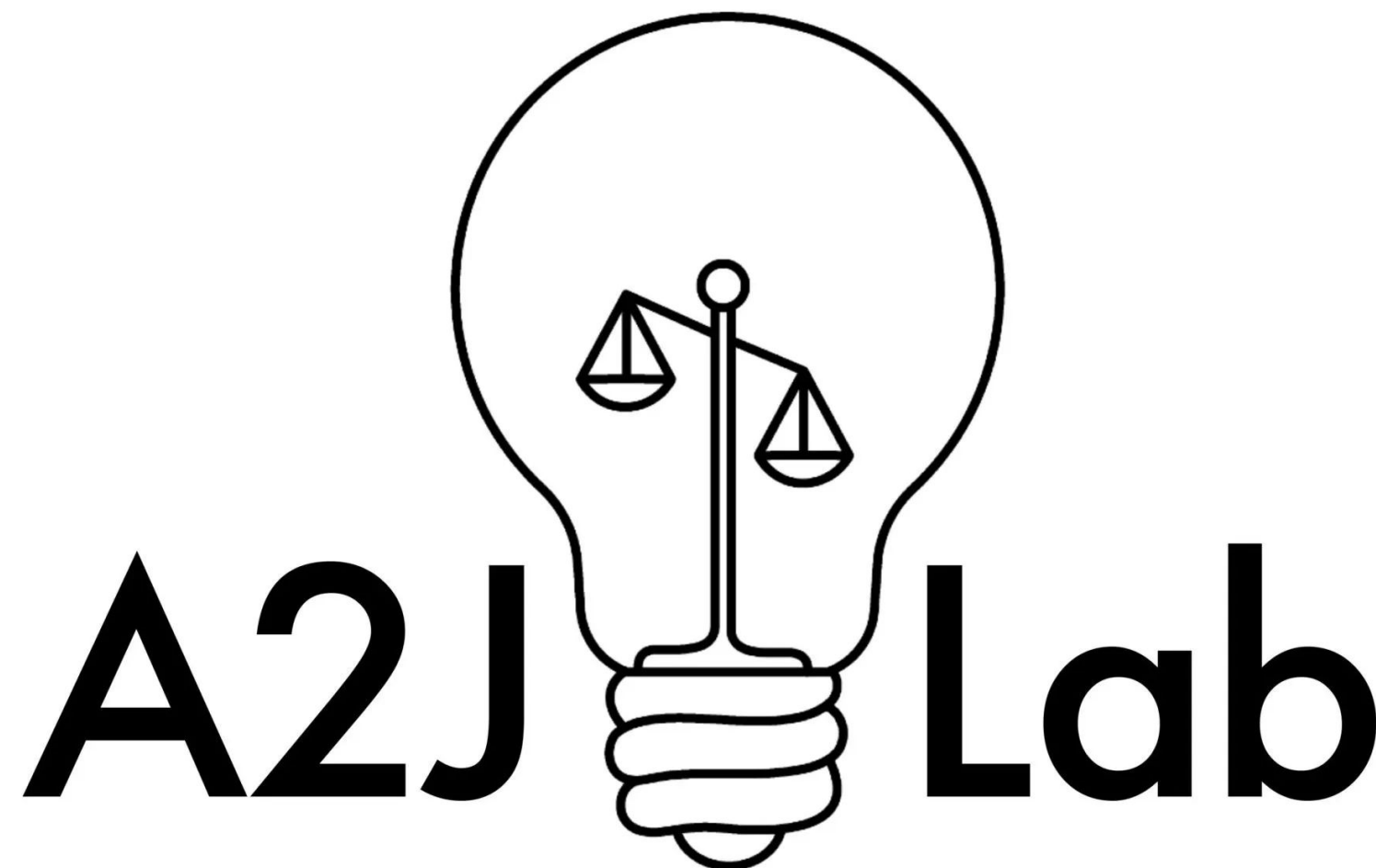
**Topeka Family
Legal Project
(RCT)**

**Douglas County Eviction
Defense Pilot**

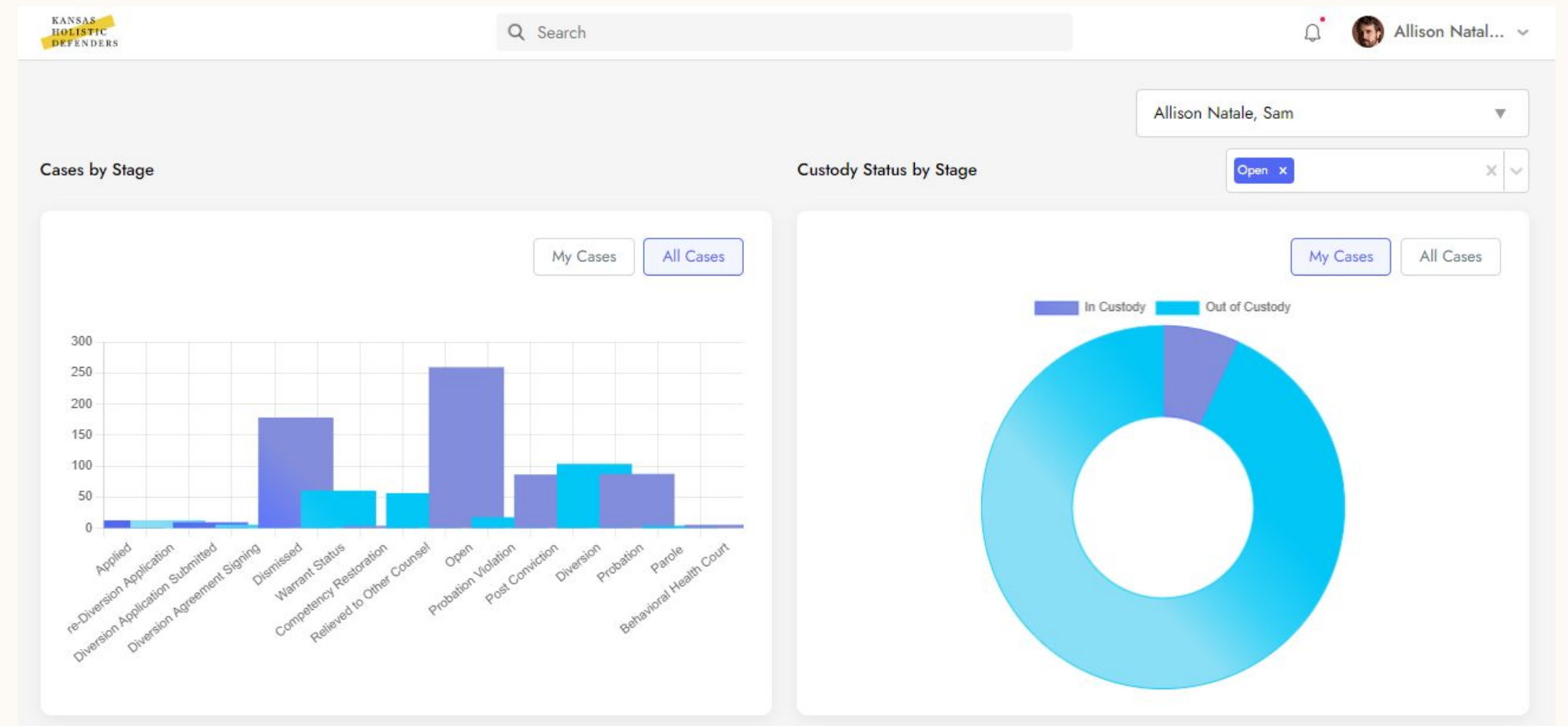


Our Hypothesis:

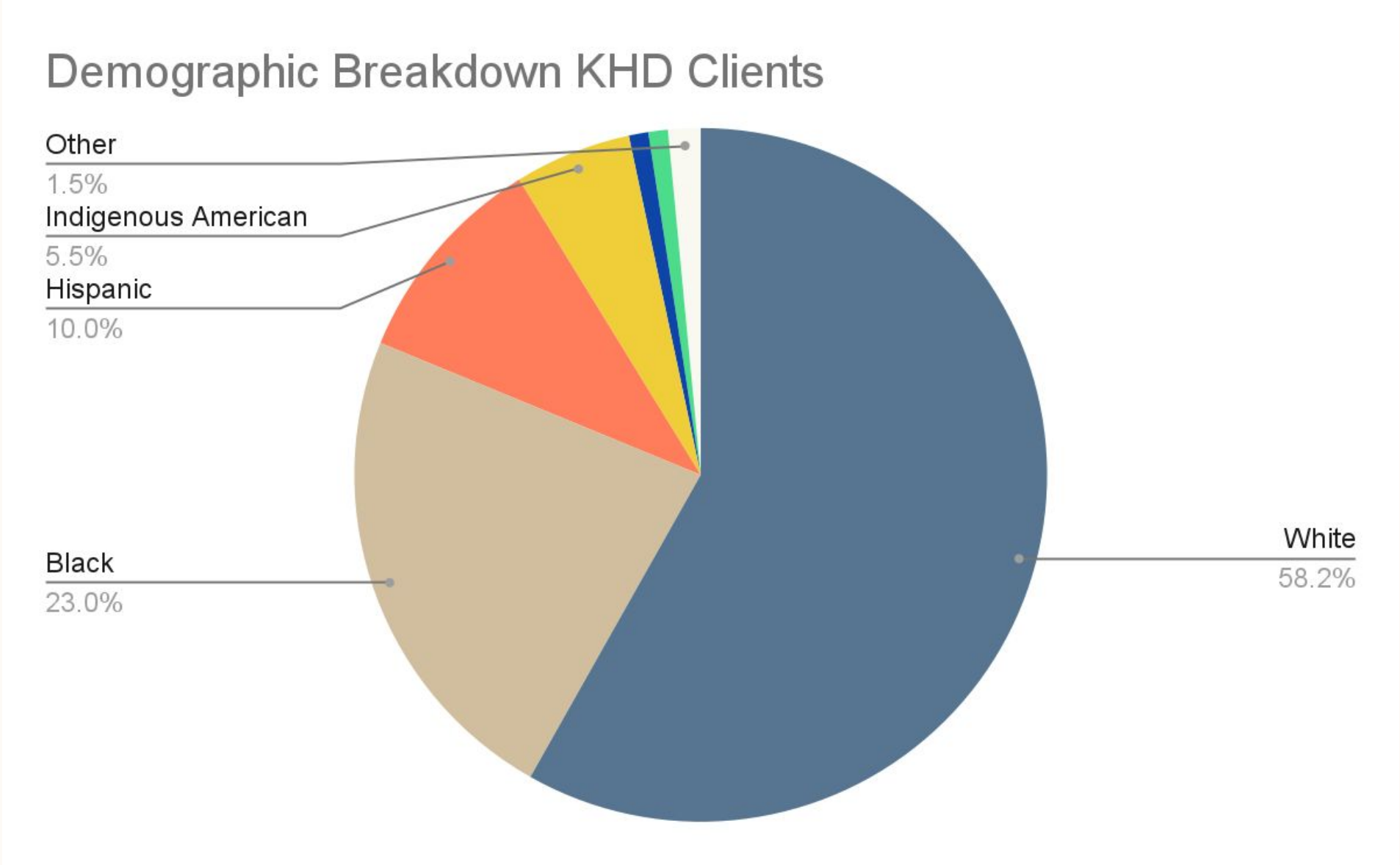
Timely access to civil legal services for families will reduce likelihood of DCF involvement / child removal



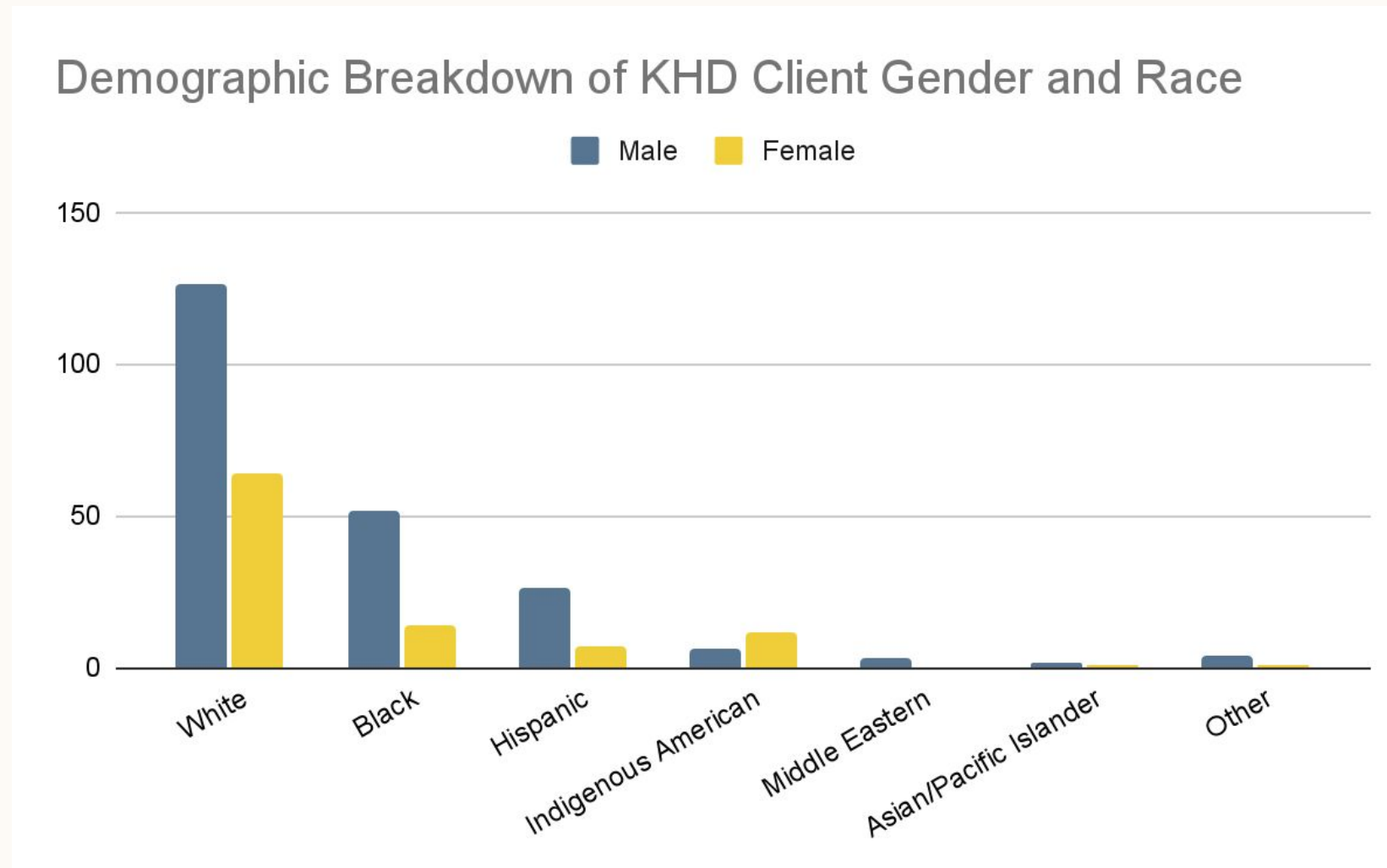
Our Data Rocks



Demographic Breakdown of KHD Clients



Demographic Breakdown of KHD Clients



Speedy Resolution

Because of KHD's early meeting with clients, our zealous approach to litigation, and the assistance of client advocates, our cases tend to resolve quickly.

On average, KHD's cases were:

- dismissed within 115 days from appointment to resolution
- granted diversion within 126 days
- granted probation in 129 days,
- sentenced to time served within 95 days.

Diversions

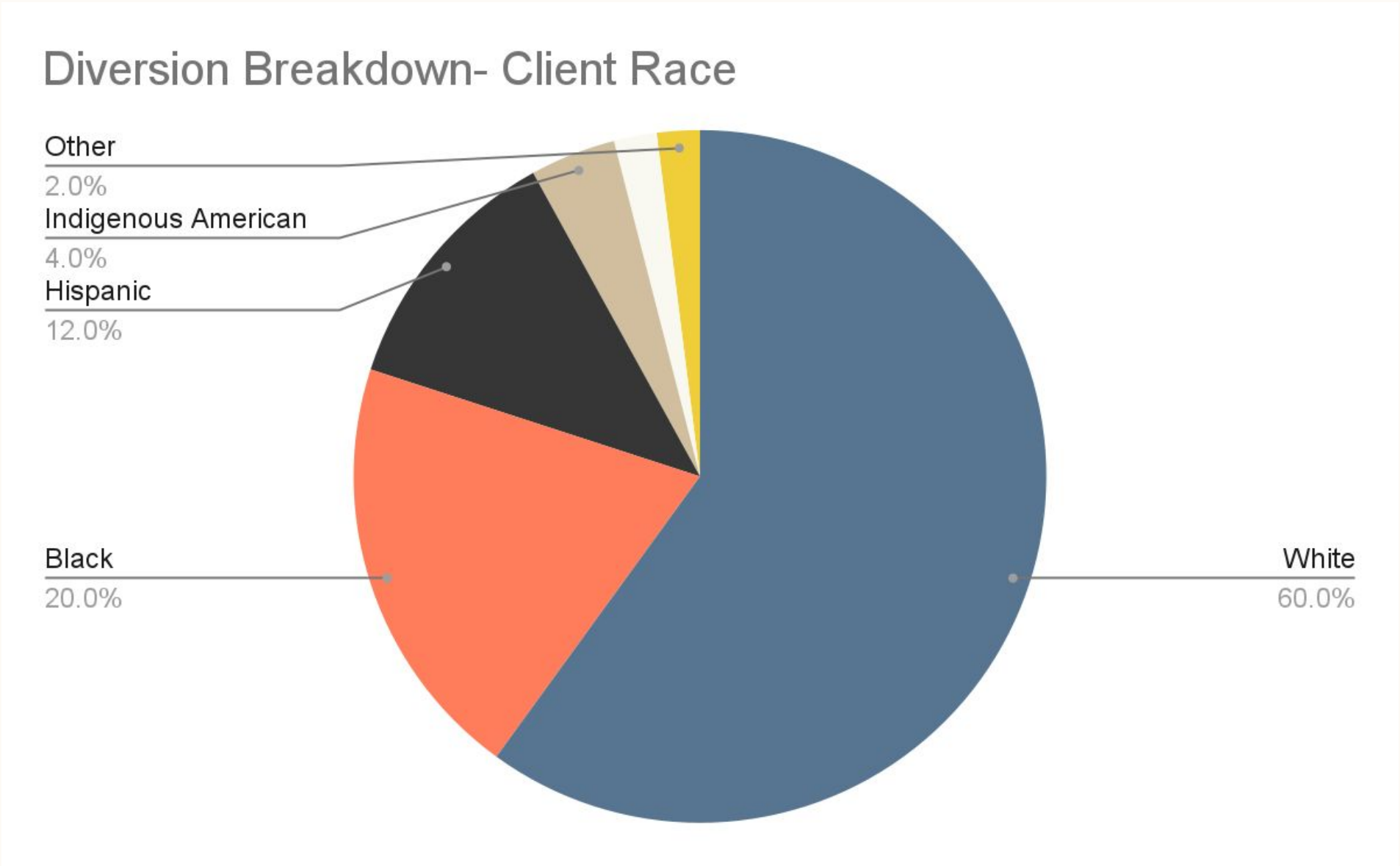
KHD Approach to Diversion

Diversion Requirements

KHD Diversion Outcomes

Diversions Outcomes

59 Cases have been resolved by Diversion.

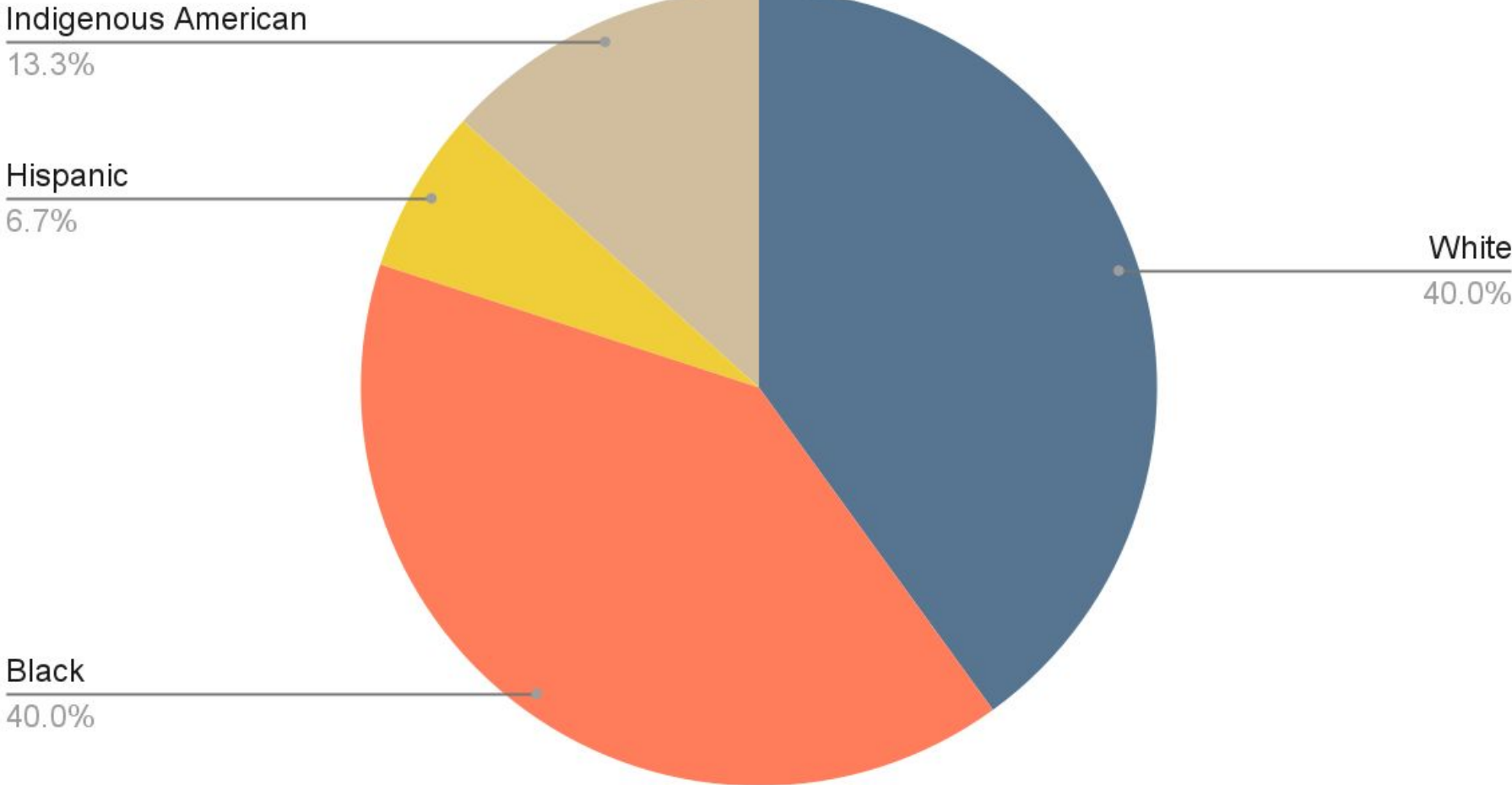


Diversions Denials

15 clients have been Denied Diversion by the District Attorney.

- 6 Black Clients
- 6 White Clients
- 1 Hispanic Client
- 2 Indigenous American

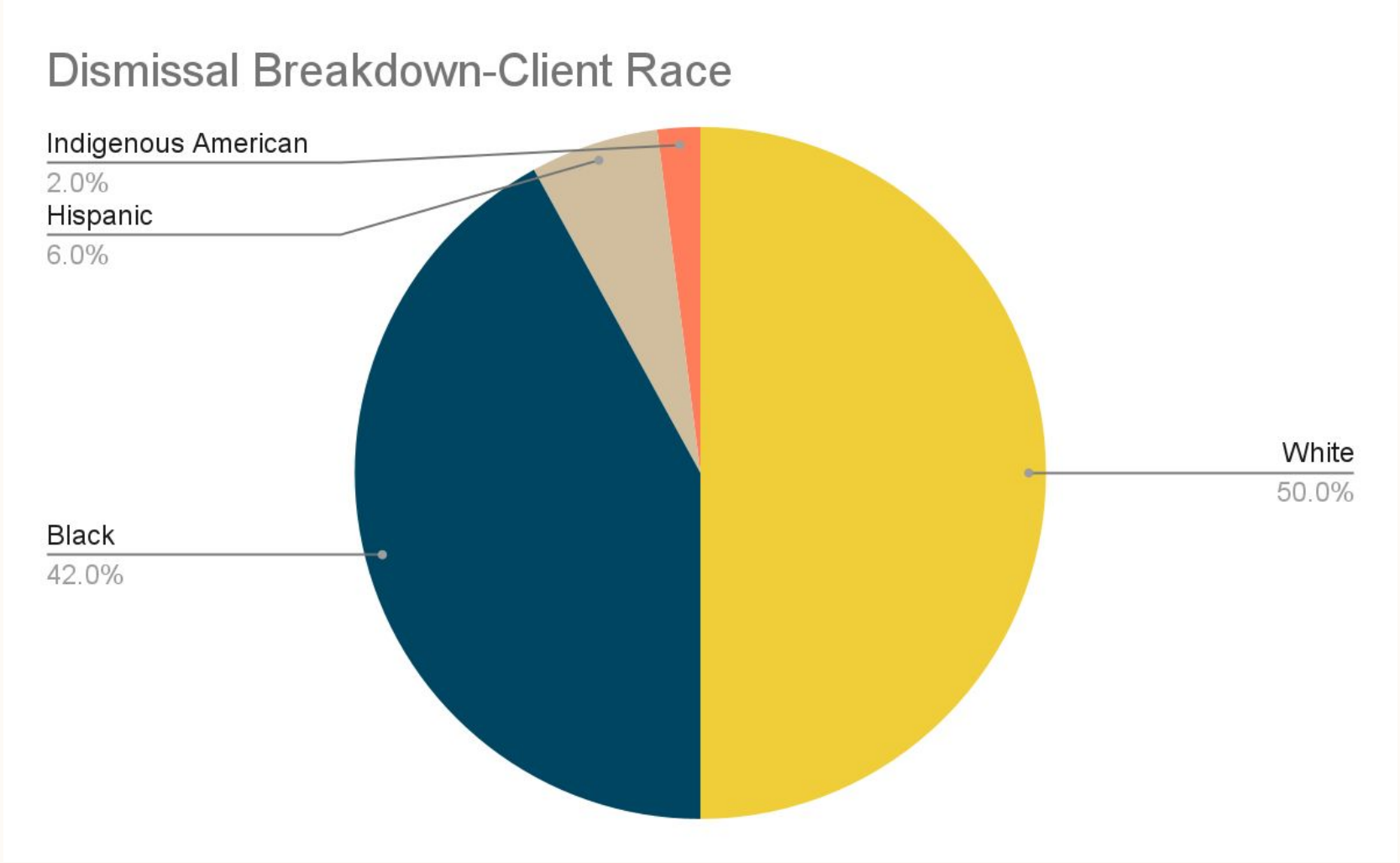
Diversions Denial- Demographic Breakdown Client Race



Litigation - Dismissed by Prosecution

- 56 KHD cases have been dismissed by the District Attorney's office prior to trial, representing 32% of cases closed by our office
- This can be because of motions to dismiss, litigation of unlawfully obtained evidence, lack of cooperation by complaining witnesses, or uncovering evidence of innocence and submitting that to the DA
- Each of these cases represents a person who would otherwise receive probation/jail time and a criminal record without zealous representation by counsel

Litigation - Dismissed by Prosecution



Outcomes

Dismissals and Acquittals

Through these practices KHD has **closed 176 cases**. The most common outcome was a dismissal - either eventual dismissal through the **DA's diversion program (59 cases)**, through **Behavioral Health Court (1 case)** or through **litigation (56 cases)**.

KHD has also completed one jury trial to verdict, in which the client was acquitted on all charges.

Outcomes

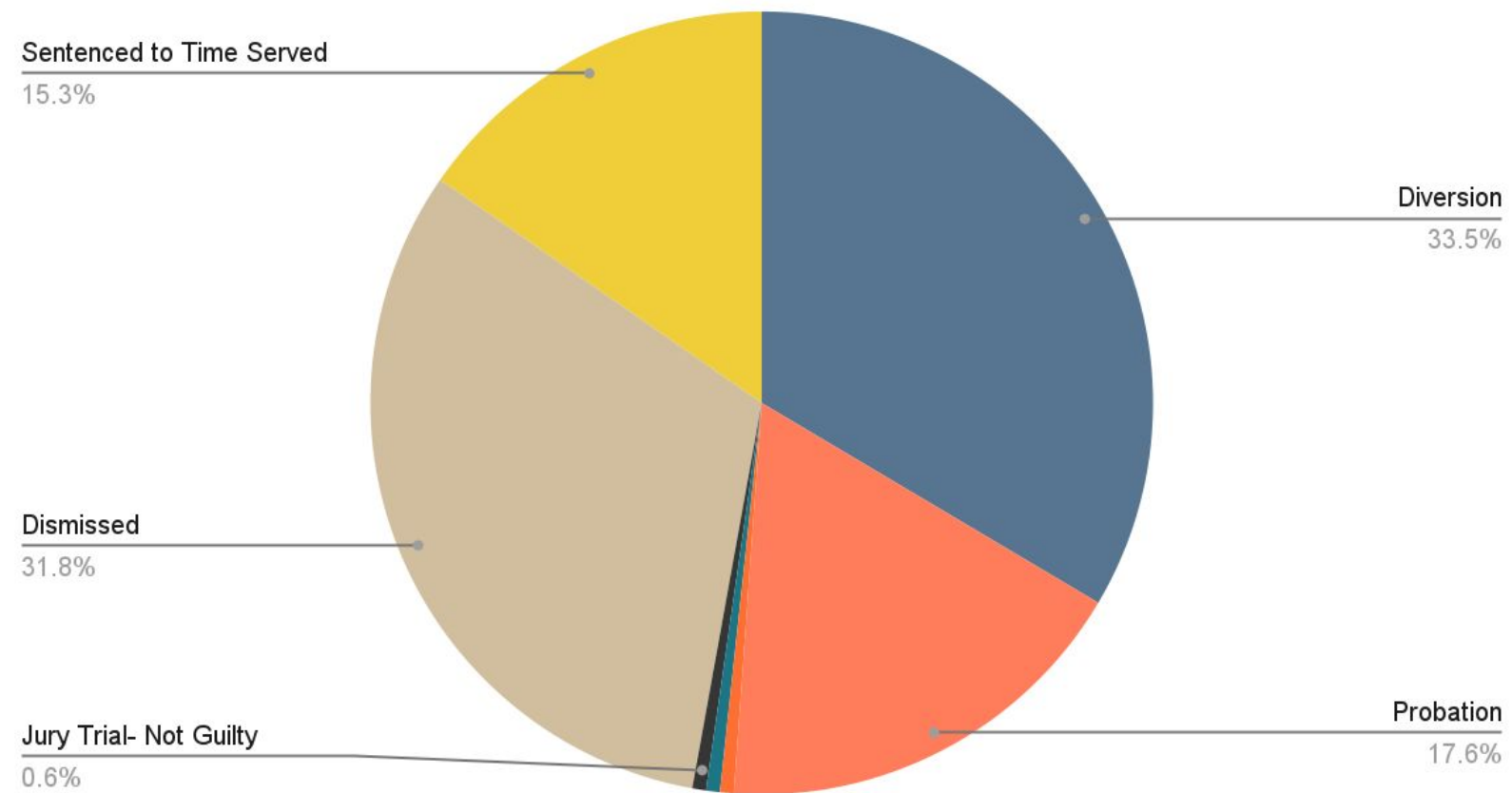
Pleas

Of clients who are convicted, nearly all of them avoid further jail time. **31 cases resulted in a sentence of probation, 4 case resulted in parole, and 27 resulted in a sentence of jail time, usually time served.**

- We have had only 4 clients receive jail time beyond that which they already served (or which was part of their original sentence on a probation violation). Each of those clients served just 48 Hours, which was the mandatory minimum before the DUI law changed in July.

Outcomes

Closed KHD Cases February 2022 - November 2022



Strategic Litigation

Woman who had a detainer from immigration officials is released from Douglas County Jail

PUBLIC SAFETY

JAN 24, 2023 - 3:11PM



Policy Development - Fines and Fees Reform

Before KHD

- Wealth-based gatekeeping of diversion
 - \$175 Assessment required for diversion application, \$158 court fee on submission
- Long delays in case processing
- Frequent diversion / probation revocations

After KHD

- Assessments are now paid for by the court
 - It saves the Court time and our clients money
- DUI Fines now waived to statutory minimum
- Court costs eliminated for nearly all diversions
- Advocates leveraging nonprofit funding to pay for necessary classes

Reduction of Pretrial Detention

Due to the County's remarkable pretrial release program, and KHD's presence at first appearances, **the vast majority (90%) of our clients are released at their first appearance.**

When clients are not released, KHD will seek a modification of the conditions of bond or detention to get clients out of the jail.

In 2022, KHD filed **39 Motions to Modify Bond**, and **10 Motions to Transport a client to a non-jail drug or mental health rehabilitation facility.**

Advocate Services

KHD has had 70 Clients served by client advocates, with an average 5 service goals per client. The most common service goals are:

- Housing - Obtain Emergency or long-term housing
- Benefits – Food assistance, Rental assistance, Clothing, health insurance, SSI/SSDI
- Health – Obtaining Mental Health Counseling, obtaining medical treatment
- Financial – Opening a bank account
- Court Case assistance – Obtaining assessments for diversion
- Obtaining Vital Documents (license, social security, birth certificate)

Advocate Services

Of these goals, **68% were resolved by successful connection to outside social services, 8% by preparation of mitigation documents for court, and 10% involved a referral to our civil attorney**, with an overall success rate of 86%.

METRICS AS OF JANUARY 1 – AUGUST 31, 2022	F
Total 2022 referrals	70
Total 2022 referrals per Advocate	35
Average referrals per week	1.6
Average open cases per Advocate	23
Average # of service goals per client, 2022	5.1
% of cases with social service referral, 2022	68%
% mitigation memos or release plans, 2022	8%
% of cases with civil attorney referrals, 2022	10%
% of cases worked on in 2022 with case open date	100%
% of 2022 cases with service goals entered	89%

Shattering Our Own Records

In 2022, we had **59 cases dismissed.**

In just the first eight months of 2023, we have won **119 more dismissals.**

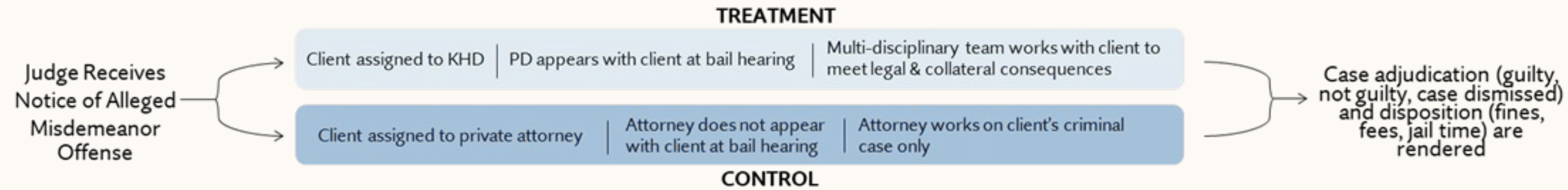
Telling Our Story With Data

Due to staff turnover in fall of 2022 necessitating a case-freeze, we were presented with the opportunity for a natural experiment to demonstrate the efficacy of holistic public defense for misdemeanors.

Figure 1

Progression of Study Conditions With Client Estimate Totals												
2021		2022										
Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
Control		Treatment					Control			Treatment		
40 clients		120 clients					60 clients			40 clients		

Research Design



Outcome Measures			
Measure Category	Measure	Measured in Control	Measured in Treatment
Client Demographics	Race	Y	Y
	Ethnicity	Y	Y
	Gender	Y	Y
	Sex	Y	Y
	Age	Y	Y
Special Considerations	Collateral Consequences	N	Y
	Housing	N	Y
	Disability	N	Y
	Mental Health Services	N	Y
	Treatment	N	Y
	Immigration	N	Y
	Property Recovery	N	Y
	Employment	N	Y
	Medical Services	N	Y
	Upcoming Diversion	N	Y
Use of Investigator	N	Y	
Case Characteristics	Charge(s)	Y	Y
	Arrested at time of Offense?	Y	Y
Case Outcomes	Adjudication	Y	Y
	Disposition	Y	Y
	Diversion	Y	Y
	Diversion Revocation	Y	Y
	Recidivism	Y	Y
Client Perceptions	Responsiveness of attorney	Y	Y
	Preparedness of attorney	Y	Y
	Service Referral Outcomes	Y	Y

Our Research Partner



Dr. Miltonette Craig
Sam Houston University
Department of Criminal Justice

Becoming Study-Ready

Improve Collection

Large amounts of data entry is strongly correlated with burnout in professionals. Using a data specialist to manage high volume data entry makes sure no one cuts corners or makes mistakes

Validate Inputs

It's important to our clients that records are accurate, that means making sure that outcomes agree with court records and vice versa.

Best Practices

We want to spend time setting up best practices for data collection going forward, working with experts to identify the most important variables to track and improve our software.