

# Oklahoma

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## Indigent Defense System



BRAD HENRY  
GOVERNOR

KEVIN WARD  
CABINET SECRETARY  
SAFETY AND SECURITY

JAMES D. BEDNAR  
Executive Director

JAMES D. BEDNAR  
EXECUTIVE DIRECTOR



BRAD HENRY  
GOVERNOR

STATE OF OKLAHOMA  
OKLAHOMA INDIGENT DEFENSE SYSTEM

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October 13, 2006

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Oklahoma City, OK 73102

TO THE HONORABLE BRAD HENRY  
HONORABLE MIKE MORGAN  
HONORABLE TODD HIETT  
HONORABLE JOSEPH M. WATT  
HONORABLE CHARLES S. CHAPEL

DON G. POPE, ESQ.  
2424 Springer Drive  
Suite 201  
Norman, OK 73069

It is our privilege to submit a report concerning the duties, activities and accomplishments of the Oklahoma Indigent Defense System for the fiscal year ending June 30, 2006, in accordance with 22 O.S. § 1355.3(B) and 22 O.S. § 1355.4(C)(14).

RANDOLPH S. MEACHAM, ESQ.  
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The Oklahoma Indigent Defense System is grateful for the support that it received during Fiscal Year 2006 from the Governor and his staff, from the Legislature, and from the Judiciary.

DENNIS N. SHOOK, ESQ.  
15768 S. 29<sup>th</sup> East Avenue  
Coweta, OK 74429

As we move forward in 2007, we would like to recognize all of the attorneys, investigators, administrators, secretaries and experts for their commitment to our mission and their unwavering dedication to our clients. We also wish to acknowledge the work and dedication of the private attorneys who serve generously as OIDS contractors. It is only through the efforts of all of these individuals that the right to counsel flourishes in Oklahoma and the interests of justice are protected.

Sincerely,

Rod Wiemer, Esq.  
Chair

Jake Jones, Esq.  
Vice-Chair

Don G. Pope, Esq.

Randolph S. Meacham, Esq.

Dennis N. Shook, Esq.

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Term Ending July 1, 2011

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## Past Board Members

(In Alphabetical Order)

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William Burkett  
Henry Burris  
Michael D. Carter  
Benjamin J. Curtis  
Ken Feagins  
Cheryl Hunter  
Doug Inhofe  
Jack Ivester  
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Marvin Martens  
Alan McPheron  
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John B. Nicks  
Douglas Parr  
Berry Pfefferbaum, M.D.  
Richard L. Reeh  
Charles Richardson  
Donald Kent Switzer  
Rod Uphoff

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# Chapter 1

## ◆ Introduction

The mission of the Oklahoma Indigent Defense System is to provide indigents with legal representation comparable to that obtainable by those who can afford counsel and to do so in the most cost effective manner possible.

OIDS fulfills the majority of the State's obligations under the Oklahoma and United States Constitutions to provide legal representation to certain Oklahoma citizens who are charged with criminal offenses.

OIDS was created after the Oklahoma Supreme Court decided *State v. Lynch*, 1990 OK 82, 796 P.2d 1150. The Supreme Court held that Oklahoma's method of compensating private attorneys in court-appointed criminal cases at the trial level was unconstitutional under the State Constitution.

In response to *Lynch*, the Oklahoma Legislature undertook sweeping reform of the State's delivery of criminal defense services. Legislative action resulted in the Indigent Defense Act which created OIDS as a new state agency under 22 O.S. §§ 1355 et seq., effective July 1, 1991. The Act instituted major changes in the funding and delivery of defense services at trial and on appeal.

Before the enactment of the Indigent Defense Act, criminal appeals in court-appointed cases were the responsibility of the Oklahoma Appellate Public Defender System (APD). The APD began in 1979 as a federally-funded project at the Oklahoma Center for Criminal Justice and by 1988 had evolved into a small state agency that represented indigents on appeal in state court and, in death penalty cases, in

federal court.

The APD became a part of OIDS under the Indigent Defense Act in 1991 and continued its representation of indigents on appeal. The Act also created a division within OIDS to represent indigents at trial who were charged with capital murder offenses and directed OIDS to begin accepting court appointments to provide legal representation in non-capital cases in 75 counties beginning July 1, 1992, its second year of operation.

OIDS' responsibilities are defined by the Indigent Defense Act and have changed with statutory amendments over the fifteen-year history of the agency. The agency's fundamental duty is to provide trial, appellate and capital post-conviction criminal defense services to persons who have been judicially determined to be entitled to legal counsel at State expense. The agency consists of three program areas: the General Operations Program, the Trial Program and the Appellate Program. The Trial Program consists of the Non-Capital Trial Division and two capital trial divisions: Capital Trial Norman and Capital Trial Tulsa. The Appellate Program contains the General Appeals Division, the Capital Direct Appeals Division and the Capital Post-Conviction Division. These programs and divisions are discussed in more detail throughout this report.

OIDS represented a total of 41,066 court appointments in Fiscal Year 2006 in all divisions of the agency. The breakdown by division is as follows:

NON-CAPITAL TRIAL

|                              |               |
|------------------------------|---------------|
| Staff                        | 6,702         |
| County Contracts             | 31,715        |
| Conflicts                    | 386           |
| Overload                     | 1,447         |
| CAPITAL TRIAL - NORMAN       | 38            |
| CAPITAL TRIAL - TULSA        | 29            |
| GENERAL APPEALS              | 651           |
| CAPITAL DIRECT APPEALS       | 27            |
| CAPITAL POST CONVICTION      | 49            |
| EXECUTIVE DIVISION CONFLICTS |               |
| Capital Trial Divisions      | 7             |
| Non-Capital Direct Appeals   | 5             |
| Capital Direct Appeals       | 2             |
| Capital Post Conviction      | 8             |
| TOTAL                        | <u>41,066</u> |

Given the nature of criminal cases, most cases span more than one fiscal year. In complex cases, such as death penalty cases, OIDS may represent a client for three or more years. Accordingly, the total number of cases handled during a fiscal year includes appointments pending from the prior fiscal year in addition to the current year court appointments.

OIDS is appointed by the trial and appellate courts of Oklahoma after an indigence determination is made by the court. OIDS is subject to appointment to provide trial representation in non-capital criminal cases in 75 of Oklahoma's 77 counties.

OIDS contracts with private Oklahoma-licensed attorneys to handle 100% of the indigent non-capital trial caseload in 59 counties and a portion of the caseload in one county. In 16 counties, staff attorneys handle the majority of the indigent caseload, with overload cases handled by private contract counsel. Private attorneys handle the majority of the System's conflict cases and all overload cases.

In death penalty cases and non-capital appeals, attorneys employed by OIDS are assigned the case after OIDS has been appointed by a district court or

the Oklahoma Court of Criminal Appeals.  
FUNDING

At the time of its creation in 1991, OIDS received federal funding as a federal resource center responsible for providing state and federal post-conviction and habeas representation in death penalty cases. This funding ended in October 1995, when Congress closed all of the federal resource centers in the country. OIDS was forced to seek state appropriations to replace the federal funds that had been used for state post-conviction representation.

During its fifteen-year history, OIDS repeatedly has been forced to seek supplemental appropriations from the Legislature. The first, received in early 1992, averted a shutdown of the agency soon after it was created. The original funding mechanism, a \$13.00 increase in statutory court costs on traffic tickets issued by the Oklahoma Highway Patrol, did not generate enough revenue for OIDS to meet its payroll.

OIDS funding for Fiscal Year 1993, through direct appropriations, included an additional \$6 million to finance the cost of contracting with private attorneys around the State to initiate OIDS's statewide defender services in non-capital trial cases in 75 counties. These fiscal-year contracts are awarded by the OIDS Board after considering offers to contract submitted by private attorneys on a county-by-county basis.

In Fiscal Year 1994, the Legislature reduced OIDS' appropriation by \$1 million based on a prediction that the difference in prior and current-year appropriations would be made up by revolving fund collections of OIDS share of fees assessed against criminal defendants.

In Fiscal Year 1995, OIDS received no additional appropriated funds except for a state pay plan. Revolving fund income fell drastically, from \$1.5 million in Fiscal Year 1992 to \$94,079 in Fiscal Year 1995. In Fiscal Year 1996, OIDS' appropriations were reduced by 2.5%, followed by the loss of all federal funding in October 1995. OIDS requested a Fiscal Year 1996 supplemental appropriation of \$1.4 million, but only received \$240,000.

In Fiscal Year 1997, OIDS again suffered a funding

crisis. The effect of the previous fiscal year's funding losses was compounded by the veto of an appropriation of \$919,155 for Fiscal Year 1997. These funding losses resulted in OIDS being fiscally unable to award annual contracts to the private attorney providers for non-capital trial representation. OIDS was forced to assign cases to private attorney providers on a case-by-case basis at hourly rates. The result was significantly higher costs to the agency. In March 1997, OIDS received a supplemental appropriation in the amount of \$2.1 million to fund the non-capital trial representation costs.

In Fiscal Year 1998, OIDS received \$566,000 in additional appropriations to annualize the previous year's supplemental appropriation. After five years of service, the previous Executive Director submitted his resignation to the agency's governing Board on August 8, 1997. The Board selected the current Executive Director, who assumed his duties on December 1, 1997. With the change in agency management, an intensive review of all of OIDS programs began. Many deficiencies in OIDS delivery of services were identified.

For Fiscal Year 1999, OIDS received \$652,521 in additional appropriations to address some of the identified deficiencies. This additional funding was used to pay for mandatory state pay raises and increased benefit costs, a much needed new telephone system, increased staffing in the Executive Division, and costs associated with the opening of satellite offices by the Board to represent the non-capital trial clients in those counties where acceptable contracts with private attorney providers could not be obtained. The additional staffing was added to address identified deficiencies in OIDS' ability to track and report financial and caseload data, to provide data processing support, and to improve the agency's ability to comply with state and federal law.

By the fall of 1998, the Executive Director recognized that OIDS would not be able to meet its Fiscal Year 1999 obligations because of the continued effect of the non-capital trial representation crisis in Fiscal Year 1997. Management projected a \$1.3 million shortfall in funds needed for Fiscal Year 1999 professional services for both the Trial and Appellate Programs, including funds for private-attorney

expenses, experts, and investigators in both capital and non-capital cases. A supplemental appropriation in that amount was obtained in the spring of 1999.

The Fiscal Year 1999 supplemental appropriation was subsequently added to the agency's appropriation base beginning with Fiscal Year 2000. This annualized appropriation enabled the agency to continue to contract with and pay its conflict and overload attorneys, expert witnesses, investigators and translators.

For Fiscal Year 2002, OIDS' initial base appropriation amount was \$16,042,393. However, beginning in January 2002, a state-wide revenue shortfall resulted in across-the-board allocation reductions by the Oklahoma Office of State Finance. The agency's allocation reductions totaled \$607,354 in Fiscal Year 2002, leaving it with an actual appropriation in the amount of \$15,435,039 by the end of the year.

During May 2002, the Executive Director developed a plan to ensure better and more cost-effective expert services were provided to agency clients. He created two separate areas within the Executive Division to address all of OIDS' client needs for forensic and psychological services. The Chief of Forensic Services, a DNA Expert, and the Chief of Psychological Services, an attorney/psychologist, assists the Executive Director in determining what services are appropriate for each individual client. These two OIDS professionals meet with attorneys and experts, and either perform the requested testing or evaluation for the client, or make recommendations to the Executive Director as to the appropriate expert to be used. This process enables the agency to be more effective and utilize tax dollars more efficiently.

OIDS' initial base appropriation amount for Fiscal Year 2003 was reduced by \$802,120. Beginning in September 2002, the continuing statewide revenue shortfall resulted in new allocation reductions, totaling \$1,196,361 through the remainder of the fiscal year.

To address funding reductions, OIDS initially implemented a furlough plan beginning July 2002. The furlough plan provided that all agency employees would be furloughed a maximum of two days without pay per pay period. The plan continued

until September 2002.

The rapidly deteriorating budget picture forced OIDS to take further drastic measures. It adopted a reduction-in-force plan, which eliminated 27 positions, including 10 attorney positions, effective December 31, 2002. While the reduction-in-force hindered the agency's ability to effectively represent its clients, the lack of adequate funding left it with no viable alternatives.

Another critical measure taken by OIDS was to decline to enter into private conflict counsel contracts, where agency attorneys or county contract attorneys were unable to provide representation due to a conflict of interest. The agency filed motions to vacate agency appointments in conflict cases arising throughout the state, on the basis that unencumbered funds did not exist to pay for conflict counsel, and to enter into such contracts would violate the State Constitution, as well as the Central Purchasing Act and the Oklahoma Criminal Code. The District Court of Kay County denied two such motions filed in two separate criminal cases, prompting the agency to seek a writ of prohibition against the district court in the Oklahoma Supreme Court. Upon refusal of the Oklahoma Supreme Court to assume original jurisdiction, the district court issued contempt citations against the Executive Director directing him to show cause why he should not be held in contempt for refusing to provide conflict counsel. The contempt citations prompted the Executive Director to file a petition for writ of prohibition in the Oklahoma Court of Criminal Appeals.

On November 26, 2002, the Court of Criminal Appeals issued its order in *Bednar v. District Court of Kay County*, 2002 OK CR 41, 60 P.3d 1. The court first held that contempt proceedings were not properly before the court, as other adequate remedies existed. However, the court stated that the issues presented in the case were complex and involved multiple conflicting constitutional and statutory provisions, such as the prohibition from entering into a contract if unencumbered funds are unavailable. The court further stated that the case raised important separation of powers questions and potential conflicts in jurisdiction between it and the Oklahoma Supreme Court. More importantly, the court affirmed the State's ultimate responsibility to provide counsel, regardless of whether counsel is

furnished and paid by OIDS, the court fund or the general fund. Therefore, the court ordered the district court to provide counsel at State expense by December 6, 2002, or the defendants in the underlying criminal cases would be released.

As a result, the Governor-Elect, the Senate President Pro Tempore Designate, the Speaker of the House, and the Chief Justice and Vice-Chief Justice of the Oklahoma Supreme Court entered into an agreement providing that the court fund would guarantee payment for conflict counsel representation until the Legislature provided supplemental funding. The agreement became effective December 5, 2002. OIDS was then able to enter into contracts with private conflict counsel to provide representation to its clients. In May 2003, OIDS received a \$600,000 supplemental appropriation for the purpose of payment for conflict counsel. After the end of the fiscal year, OIDS received \$174,123 in additional allocations as a result of better than expected state-wide collections.

An increasing caseload, coupled with a reduced staff due to the fiscal year 2003 reduction-in-force, left the agency with caseload numbers per staff attorney greatly exceeding the maximum set by national standards. In response, the Legislature passed a supplemental appropriation during fiscal year 2005 in the amount of \$1,000,000 to enable the agency to contract with private attorneys to reduce the burgeoning caseload in the appellate and noncapital trial Divisions. A substantial increase in the cost of flat-rate fiscal year contracts with private attorneys for the upcoming fiscal year prompted the Legislature to increase the agency's 2007 appropriation by \$280,000.

OIDS is funded by the Oklahoma Legislature through appropriations from the State's general revenue fund. OIDS also receives a varied and unpredictable amount of funds from the costs of representation assessed against a criminal defendant in certain cases. These assessments, authorized by Section 1355.14 of the Indigent Defense Act, if collected, are deposited in the Indigent Defense System Revolving Fund.

The agency would note that each year, about half of its entire budget finds its way into the Oklahoma economy through expenditures to private firms and individuals for professional and support services.

# Chapter 2

## ◆ General Operations Program

### EXECUTIVE DIVISION

The Executive Division is charged with the responsibility of managing and operating the agency and implementing the Indigent Defense Act. By statute, the Executive Director is selected by and serves at the pleasure of the agency's governing Board. The five members on the Board are appointed by the Governor with the advice and consent of the Senate.

To aid the Executive Director in the implementation of the Indigent Defense Act and agency operations, the Executive Division is staffed with administrative, finance and computer operations personnel.

OIDS provides legal representation through the services of staff members and by contracting with private attorneys, experts and investigators. OIDS employed 125 full-time staff members at its main offices in Norman and its satellite offices in Sapulpa, Okmulgee, Mangum, and Clinton.

In Fiscal Year 2006, the agency entered into 264 new professional services contracts with private attorneys, experts and investigators to provide defense services in court-appointed cases, in addition to administering 136 contracts carried over from the previous fiscal year. The Executive Division services these contracts in addition to providing support services to its staff attorneys and investigators.

#### Statutory Duties

- ◆ Budget
- ◆ Claims
- ◆ Contracts with private attorneys
- ◆ Improve State's criminal justice system
- ◆ Training for attorneys
- ◆ Defense representation
- ◆ Employ necessary personnel
- ◆ Set rates for attorneys who accept court appointments
- ◆ Set maximum caseloads
- ◆ Advise OIDS Board
- ◆ Conferences and training seminars
- ◆ Provide personnel to serve in advisory capacity to criminal defense attorneys
- ◆ Recommend legislation
- ◆ Track costs
- ◆ Adopt policies & procedures
- ◆ Support efforts to recoup costs of representation
- ◆ Provide for expert and investigator services

## WEBSITE

OIDS' website provides information about the agency, resources for public defenders and others interested in criminal law issues, and answers to most frequently asked questions and notices of training opportunities. The website can be accessed at [www.oids.ok.gov](http://www.oids.ok.gov). The website contains many links, including those for legal research, unpublished Court of Criminal Appeals opinions issued since July 2000, and official agency forms used by OIDS contractors, experts and investigators.

## TRAINING PROGRAM

The Indigent Defense Act requires OIDS to provide training for its staff members and private attorneys who are under contract with OIDS to accept court appointments.

OIDs co-sponsored the Patrick A. Williams Criminal Defense Institute held June 29-30, 2006 in Tulsa. It included presentations on such diverse topics as jury selection, sentencing and ethical dilemmas encountered by the prosecution and defense.

## CONFLICT CASELOAD

During Fiscal Year 2006, the Executive Division contracted with outside attorneys for representation on a total of four new cases.

The year began with five pending district court death penalty cases. Two new cases were received. Four death penalty cases were concluded, and three were carried over into Fiscal Year 2007.

The Executive Division started Fiscal Year 2006 with two pending capital direct appeal cases. One case was concluded, and one was carried over into Fiscal Year 2007.

Four non-capital appeal cases were pending at the beginning of the year, with the Division receiving one new conflict appointment during this period of time. Three cases were concluded with a total of two carried into Fiscal Year 2007.

The Executive Division began Fiscal Year 2006 with seven pending capital post conviction cases, with one new

appointment received and seven cases concluded during this period of time. One case was carried into Fiscal Year 2007.

# Chapter 3

## ◆ Trial Program

The Trial Program consists of three Divisions which provide legal representation to agency clients who have been judicially determined to be unable to afford counsel to defend against criminal charges brought by the State in district court. OIDS is appointed by the district courts to represent these defendants.

The right to counsel at State expense was established by the United States Supreme Court in *Gideon v. Wainwright*, 371 U.S. 335 (1963). The right to expert assistance at State expense was established by the United States Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985).

### NON-CAPITAL TRIAL DIVISION

The Non-Capital Trial Division (NCTD) is responsible for defending indigent criminal defendants charged with offenses punishable by incarceration. Cases range from traffic offenses filed in state court to non-capital first degree murder. NCTD's area of responsibility spans 75 counties, with Oklahoma and Tulsa Counties being excluded. Thus, NCTD represents the agency's largest group of clients. In Fiscal Year 2006, new appointments equaled 28,765.

#### DELIVERY OF NON-CAPITAL TRIAL LEGAL SERVICES

In accordance with the Indigent Defense Act, NCTD provides legal representation in the 75 counties for which it is responsible in three ways:

(1) flat-rate fiscal year contracts with private

attorneys;

- (2) satellite offices with salaried staff attorneys; and
- (3) assignment of conflict and over-load cases to private attorneys who have agreed to accept such cases at established agency hourly rates, subject to statutory maximums set by the Indigent Defense Act.

In Fiscal Year 2006 the Division's caseload was handled as follows:

- (1) Flat-rate Fiscal Year Contracts: In 59 counties, all NCTD representation was provided via such contracts. In one other county (Blaine), a portion of the Division's representation was provided via contract.
- (2) Staffed Satellite Offices: NCTD operated four satellite offices: Clinton, Mangum, Okmulgee and Sapulpa. These offices handled the entire caseload in 15 counties and part of the caseload in one other. The Non-Capital Trial Division satellite offices ended Fiscal Year 2006 staffed with 22 attorneys. Over the course of the fiscal year, the offices handled 6,702 active cases. On average, each staff attorney handled 305 cases for the year – 156 felonies, 40 juvenile cases, 91 misdemeanor cases and 17 traffic cases. According to a formula utilized by the National Legal Aid and Defenders Association, in Fiscal Year 2006 each satellite office attorney did the work of 1.50 attorneys who work in only one courthouse. In contrast, all OIDS satellite office staff attorneys worked in several district courts.
- (3) Conflict/Overload Counsel: During Fiscal

Year 2006, NCTD assigned 199 conflict cases to conflict counsel and 1,324 overload cases to overload counsel.

## DISCUSSION

The OIDS Board awards fiscal-year contracts to private attorneys to provide non-capital trial defense services on a county-by-county basis. In response to the agency's solicitations each year, private attorneys offer to provide criminal defense services in felony, misdemeanor, traffic and (delinquent) juvenile cases in one or more counties for a flat annual rate. The Board awards fiscal-year contracts in June, after the System's appropriation bill has been signed into law but only a week or two before the contract term begins on July 1. The contracting process is volatile, not only in terms of the number of offers, if any, received for any particular county, but also the cost of any contract awarded. As a result, the agency's ability to provide contract coverage in many counties, especially the smaller, more rural ones, is unpredictable. Historically, the agency has spent one-third to one-half of its total budget on these fiscal-year contracts to provide non-capital legal representation.

When the agency is unable to obtain a fiscal-year contract for indigent criminal defense work in a county the Board has two options: (1) establish a satellite office with salaried attorneys to accept the System's appointments in the affected county under Section 1355.9 of the Indigent Defense Act or (2) assign the System's appointments in that county to private attorneys who have agreed to accept cases on a case-by-case basis at established agency rates (\$60/hr. for in-court legal services; \$40/hr. for out-of-court legal services) under Section 1355.8(D)(6) of the Indigent Defense Act.

In Fiscal Year 2006, the Non-Capital Trial Division's satellite offices served the following counties:

### CLINTON OFFICE

- Custer
- Dewey
- Ellis
- Roger Mills
- Washita
- Woodward

- Blaine (all of the Division's delinquent juvenile, misdemeanor, and traffic caseload)

### MANGUM OFFICE

- Beckham
- Greer
- Harmon
- Kiowa
- Jackson
- Tillman

### OKMULGEE OFFICE

- Okfuskee
- Okmulgee (2 courthouses)

### SAPULPA OFFICE

- Creek (3 courthouses)

### OVERALL CASELOAD

In Fiscal Year 2006, the Non-Capital Trial Division received a total of 23,954 new contract cases, of which 170 resulted in conflicts. As a result, 23,784 new cases were handled under the county contracts. OIDS Non-Capital Trial Division satellite offices received 4,811 new cases, of which 29 were conflicts and 1,324 were overload cases. Thus, the satellite offices handled 3,458 new cases in Fiscal Year 2006. Total new cases for the division equaled 28,765. (See Appendix B)

The list of counties in order of descending caseload shows that Cleveland County had the highest number of cases (1,514), while Cimarron had the fewest (22). (See Appendix C)

## CAPITAL (DEATH PENALTY) TRIAL REPRESENTATION

The Capital Trial Divisions in Norman and Tulsa are assigned the task of representing indigent defendants in cases where the State is seeking the death penalty. They further represented clients in Oklahoma and Tulsa Counties when the public defender had a conflict of interest. Legal services are provided by salaried attorneys and investigators, assisted in some cases by private attorneys under contract to serve as co-counsel and by contracts with expert witnesses.

The Capital Trial Divisions in Norman and Tulsa operate as separate law firms for conflict purposes. If one of the Divisions cannot accept a court appointment because of a conflict of interest arising from another court appointment, the case is generally assigned to the other Division. If neither Division can accept the court appointment, OIDS contracts with private counsel to represent the client under the provisions of the Indigent Defense Act, Sections 1355.7 & 1355.13.

The Capital Trial Divisions began Fiscal Year 2006 with 28 pending trial level cases. A total of 65 trial level cases were handled during this time with 27 completed.

## CAPITAL TRIAL DIVISION NORMAN OFFICE

The Capital Trial Division – Norman, was the Agency’s original Division to represent clients in death penalty cases. The Division represents defendants in capital cases filed in 45 counties and has primary responsibility for conflicts arising in the remaining counties. In May 2003 the Capital Trial Division – Norman ceased to receive new conflict cases from Oklahoma County due to a statutory change. The Division did, however, retain appointments already made at the time the statute went into effect. Two of those cases are still active in the Division.

Fiscal Year 2006 began and ended with eight attorneys, four investigators and two full-time support personnel.

### TRIAL CASELOAD

The Capital Trial Division – Norman began Fiscal Year 2006 with 19 pending death penalty cases. The Division received appointments in 17 new cases during the fiscal year, bringing the total caseload for Fiscal Year 2006 to 36 cases. By the end of the fiscal year, 16 cases were concluded and 20 were carried over into Fiscal Year 2007.

### FISCAL YEAR 2006 RESULTS

- ◆ two cases were tried to juries, resulting in one

life without parole sentence and one death sentence

- ◆ one case was tried to the district court judge, which resulted in a life with parole sentence
- ◆ in eight cases, a guilty plea was entered resulting in three life without parole sentences, four life with parole sentences and one death sentence (all first degree murder)
- ◆ the death penalty was dropped in one case, which was then referred to the Non-Capital Trial Division
- ◆ one case was opened, then closed when a Bill of Particulars was not filed; upon the later filing of a Bill of Particulars following closure by the Capital Trial Division-Norman, appointment resumed with Capital Trial Division-Tulsa
- ◆ one non-jury mental retardation trial was held resulting in a finding of not mentally retarded, with the case still pending thereafter
- ◆ one competency non-jury trial was held resulting in a finding of competency, with the case still pending thereafter

### FINAL RESULTS OF TRIAL CASES CONCLUDED

| Result   | No.<br>Cases |
|--|--------------|
| Death Penalty  | 2            |
| Life Without Parole  | 4            |
| Life with Parole   | 5            |
| Death Penalty Dropped -<br>Referred to Non-Cap Trial                                       | 1            |
| Bill of Particulars Not Filed During<br>CTN Appointment-Referred to<br>other OIDS Division | 1            |
| Conflict of Interest   | 1            |
| Private Counsel  | 1            |
| Civil Commitment   | 1            |
| Total  | 16           |

### APPELLATE CASELOAD

The Division began Fiscal Year 2006 with two pending capital direct appeals. One case was carried over from Fiscal Year 2004 and one from Fiscal Year 2003. Due to the realignment of resources that occurred on May 1, 2005, the Division did not retain any appointments for appeal from convictions arising out of trials held during Fiscal Year 2006. Oral

arguments before the Oklahoma Court of Criminal Appeals were held during the fiscal year. One of those cases was reversed for a new sentencing proceeding and is now pending trial. The other case is awaiting a decision by the Court, and remains the only appeal managed by the Division.

## CAPITAL TRIAL DIVISION TULSA

The Capital Trial Division - Tulsa was created at the beginning of Fiscal Year 1997 to represent clients in counties in the Eastern-Northeastern area of the State. Historically, that region produced a significantly higher number of first degree murder charges than the remainder of the state, and the new Division was necessary to reduce the expense for conflict counsel and provide better geographical availability for OIDS clients and the courts. This division has the primary responsibility for defending capital cases in 32 counties in the Eastern-Northeastern area of the State. Additionally the division is assigned conflict capital cases in the remaining counties served by the Oklahoma Indigent Defense System. During Fiscal Year 2006, two Appellate attorneys transferred from Capital Trial Tulsa to Norman. One transferred to Capital Trial Norman and one transferred to Capital Direct Appeals. Two trial attorneys resigned during the year and three new trial attorneys were hired. At the time of this report the staff of the Capital Trial Tulsa Division consisted of one chief capital counsel, one deputy chief counsel, both with a full caseload, four trial attorneys with both first and second-chair responsibilities, four investigators and two support staff.

### CASELOAD

Fiscal Year 2006 began with a carryover of nine cases pending from the previous fiscal year. The Division opened 20 cases during the fiscal year, bringing the total caseload handled for the year to 29 cases. The Division concluded 11 cases and carried 18 cases over into Fiscal Year 2007.

### FINAL RESULTS OF CASES CONCLUDED

| Result                              | No. of Cases |
|-------------------------------------|--------------|
| Death Sentences                     | 0            |
| Life Without Parole                 | 1            |
| Life With Parole                    | 1            |
| Pled to Lesser Charge               | 2            |
| Closed, bill dismissed or not filed | 3            |
| Conflict of Interest                | 1            |
| Retained Private Counsel            | 1            |
| Charges Dismissed                   | 2            |
| <br>Total                           | <br>11       |

Through the diligence and hard work of its lawyers, investigators and staff, the Division reported a result of no death penalties for Fiscal Year 2006. Other cases include one dismissed before trial by the District Attorney when Division staff convinced him of a complete defense of self defense. This occurred after months of re-interviewing state witnesses and finding other witnesses the state had overlooked. The District Attorney listened as Division staff played tapes of their interviews of state witnesses which defeated the state's case. The client went from facing the death penalty to being back home with his family. In *State v. James Taylor*, a Tulsa County jury rejected the state's first degree murder allegation against the client, convicting him instead of the lesser offense of second degree murder. The trial team further preserved important issues for purposes of appeal.

The Division is in the process of going to electronic filing. Paper copies are no longer being made of file materials received or created. All materials are scanned and stored in a dedicated computer, with notification to trial team members by e-mail. Division members are able to access files from desk tops and print documents only as needed. Eventually, instead of taking multiple boxes of paper files to court, trial team members can take a laptop, a printer and a disk. These measures are helping to address the growing file storage problem and will result in a cost savings to the agency. Due to its success, this process is now being implemented throughout the agency.

# Chapter 4

## ◆ Appellate Program

The Appellate Program consists of three Divisions which provide legal representation to agency clients who have a right under State law to appeal their convictions and sentences and who have been judicially determined to be unable to afford appellate counsel.

The right to an appeal in a criminal case is guaranteed by Article II, Section 6 of the Oklahoma Constitution, Section 1051 of Title 22 of the Oklahoma Statutes, and, in death penalty cases, Section 701.13 of Title 21 and Section 1089 of Title 22 of the Oklahoma Statutes. The right to counsel at State expense on direct appeal was established under the Federal Constitution by the United States Supreme Court in *Douglas v. California*, 372 U.S. 353 (1963). The right to counsel at State expense in capital post-conviction proceedings is found in Section 1089 of Title 22.

The Appellate Program is appointed to represent clients in accordance with the Indigent Defense Act, Sections 1355 -1369, and the Uniform Post-Conviction Procedure Act, Section 1089 (capital cases) of Title 22 of the Oklahoma Statutes.

### GENERAL APPEALS DIVISION (NON-CAPITAL APPEALS)

The General Appeals Division is appointed by the district courts of Oklahoma to represent clients on direct appeal from the trial court to the Oklahoma Court of Criminal Appeals in cases where the defendant has been sentenced to a term of imprisonment up to life imprisonment without the possibility of parole.

The Division is appointed in 75 counties and in Oklahoma County and Tulsa County when the public defenders have a conflict of interest or where the defendant was represented by retained counsel at trial and is judicially determined to be indigent on appeal. Legal services are provided by salaried attorneys and, under certain circumstances, by a private attorney under contract after a case has been remanded to the trial court for a hearing. The cost of expert assistance and investigative services, if any, are funded in the Division budget. If the General Appeals Division has difficulties meeting court deadlines because of an unusually high number of court appointments, the agency enters into contracts with private attorneys on a case-by-case basis to represent Division clients on appeal.

If the General Appeals Division is unable to accept court appointments because of a conflict of interest arising from a prior court appointment, the agency enters into a contract with a private attorney on a case-by-case basis to represent the client on appeal.

The filing of General Appeals Division cases cannot be delayed because of the decision by the Tenth Circuit Court of Appeals in *Harris v. Champion*, 15 F.3d 1538 (10<sup>th</sup> Cir. 1994). The agency was a defendant in the *Harris* class action litigation, brought by agency clients who alleged prejudice from delays in filing their briefs on appeal. The Tenth Circuit held there is a rebuttable presumption of a Due Process violation if a non-capital appeal has not been decided within two years of judgment and sentence, making it mandatory for the appellate attorney to file a brief within the deadlines established by the Court of Criminal Appeals. Due to caseloads greatly exceeding nationally-recognized standards, which were caused in part by an agency-wide reduction-in-force at the beginning of Fiscal Year 2003, the agency received a supplemental appropriation during the last part of Fiscal Year 2005, which was annualized for Fiscal Year 2006. The Division received a substantial portion of that appropriation to alleviate the Division's caseload.

The General Appeals Division began FY-2006 with 305 open cases in various stages of appeal before the Court of Criminal Appeals, and received appointments in 346 additional cases during the fiscal year. The Division closed 300 cases, ending the fiscal year with 351 open cases to be carried into Fiscal Year 2007. During the course of the fiscal year, the Division handled 651 cases. A chart showing the distribution of cases handled, by county, is attached as Appendix D.

Attorneys in the General Appeals Division filed Briefs-in-Chief on behalf of 160 clients during Fiscal Year 2006. Of those, 12 involved clients convicted of homicide; including six clients convicted of first-degree murder. In addition, Division attorneys appeared for nine oral arguments before the Court of Criminal Appeals in fast track cases, and filed 37 reply briefs and nine petitions for rehearing. An additional 130 cases were briefed by attorneys with whom the agency contracted because of an overload of cases within the Division.

The Division closed 300 cases during the year. Of those, 46 were overload cases that had been briefed by contract counsel. Most of the cases closed, 231, were closed because a final decision was reached by the Court of Criminal Appeals. In 76 of those cases, relief was obtained on behalf of the client. Other cases were closed for various reasons. Forty-three appeals were closed. After the appeal was dismissed, either at the client's request or because the Court of Criminal Appeals lacked jurisdiction to hear them; 12 cases were closed because the System was not properly appointed to handle them; and six cases were closed because outside counsel was retained by the client. Additionally, eight appeals were closed due to consolidation with other cases.

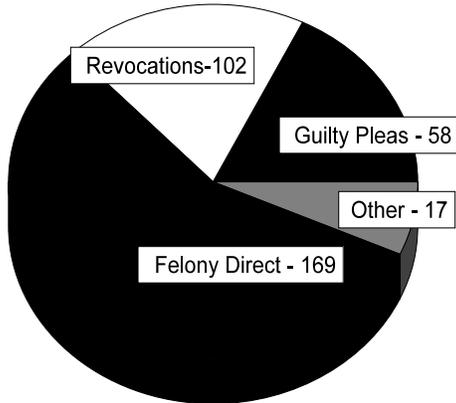
#### INCOMING CASES

Three hundred and forty-six new cases were received from 61 of the State's 77 counties. Twenty-five percent of the incoming caseload, or 87 cases, arose from Oklahoma and Tulsa counties, and 16 of the 22 first-degree murder cases received from across the state arose from those two counties. In 224 of the cases received in FY-06, counsel at trial level was court-appointed, and 122 cases were handled at trial by privately-retained counsel or by the client pro se.

#### SUMMARY OF CASES CLOSED

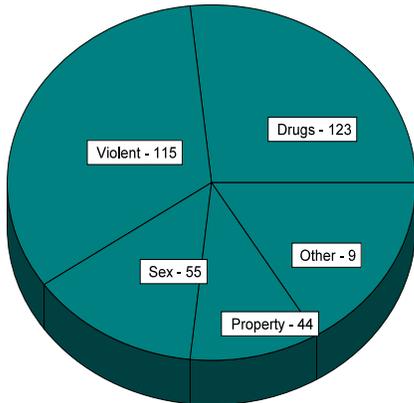
| <u>Reason for Closing</u>  | <u># of Cases</u> | <u>%</u> |
|--|-------------------|----------|
| Decision of Court of Criminal Appeals                              | 231               | 77       |
| Dismissed for Lack of Jurisdiction (Dismissed at Client's request) | 43                | 14       |
| OIDs not properly appointed  | 12                | 4        |
| Outside Counsel Retained by Client                                 | 6                 | 2        |
| Other (Consolidated)   | 8                 | 3        |
| TOTAL  | 300               | 100<br>% |

### Types of Appeals



The graph at left shows the types of appeals received by the General Division. Except for juvenile appeals (included in the “other” category), appeals of everything from burglary to first degree murder involve opening briefs of up to 50 pages in length. Other appeals involve juvenile and responses to State appeals of adverse rulings.

### Types of Offenses Appealed



The majority of the convictions in the cases received by the General Division are drug offenses, including terminations from drug court. Violent crimes, including all degrees of murder and manslaughter, child abuse, assaults, robberies, kidnaping and first degree arson are the second leading category of offenses appealed. The subcategory of sexual offenses includes such violent offenses as rape and molestation, as well as related crimes such as failure to register as a sex offender.

## CAPITAL (Death Penalty) APPEALS

The Capital Direct Appeals Division represents indigent defendants who have been convicted of murder in the first degree and sentenced to death in Oklahoma District Courts. This includes defendants who have been convicted at jury trials, bench trials, and after entering pleas of guilty. Although the Division's primary responsibility is to represent these defendants in their direct appeal to the Oklahoma Court of Criminal Appeals, the Division often serves clients in three different courts. OIDS is appointed by the district courts of Oklahoma to represent clients on direct appeal from the trial court to the Oklahoma Criminal Court of Appeals in cases where the defendant is sentenced to die. Direct appeal in a capital case also includes filing a petition for a writ of certiorari in the United States Supreme Court if the case is affirmed by the Oklahoma Criminal Court of Appeals.

The Capital Direct Appeals Division is subject to appointment by the district courts in 75 counties and in Oklahoma County and Tulsa County when the public defender has a conflict of interest or where the defendant was represented by retained counsel at trial but is judicially determined to be indigent on appeal.

The Capital Post-Conviction Division is appointed to represent all death-sentenced defendants in post-conviction proceedings. By statute, the Capital Post-Conviction Division must represent all death-sentenced defendants, including those who were represented by the Oklahoma County or Tulsa County public defenders on direct appeal. Legal services are provided by salaried attorneys and investigators.

Since November 1995, post-conviction applications in a death penalty case are filed in the Court of Criminal Appeals while the capital direct appeal case is still pending. Before the statutory changes, post-conviction applications in a death penalty case were treated like non-capital post-conviction cases and filed in district court after the capital direct appeal case was decided by the Oklahoma Criminal Court of Appeals.

## CAPITAL DIRECT APPEALS DIVISION

### CASELOAD

The Capital Direct Appeals Division began Fiscal Year 2006 with fourteen pending capital cases and seven cases in which the client was convicted of murder in the first degree but sentenced to life or life without parole. During the fiscal year, six new capital cases were opened. By the end of the year, two capital cases and four non-capital case were closed, leaving the Division with 21 active cases, 18 of these being capital, and three non-capital cases.

### STATEWIDE DISTRIBUTION

The following is a breakdown of the distribution of Division capital cases among the various counties:

#### COUNTY

|               |     |
|---------------|-----|
| (1) Canadian  | 10% |
| (2) Cleveland | 5%  |
| (3) Comanche  | 5%  |
| (4) Grady     | 5%  |
| (5) Oklahoma  | 45% |
| (6) Rogers    | 10% |
| (7) Seminole  | 5%  |
| (8) Tulsa     | 15% |

The statewide distribution of the non-capital cases handled by the Division is as follows:

#### COUNTY

|               |     |
|---------------|-----|
| (1) Cherokee  | 14% |
| (2) Cleveland | 14% |
| (3) Comanche  | 14% |
| (4) Grady     | 14% |
| (5) Muskogee  | 14% |
| (6) Oklahoma  | 15% |
| (7) Tulsa     | 15% |

## DISPOSITION OF CASES

Three non-capital cases were affirmed by the Oklahoma Court of Criminal Appeals and subsequently closed during Fiscal Year 2006. One non-capital case was reversed and remanded for a new sentencing hearing. Of the two capital cases closed during Fiscal Year 2006, one case was reversed and remanded for a new trial and one case was closed after being transferred to contract counsel because of a Division conflict.

## CAPITAL POST CONVICTION DIVISION

The Capital Post Conviction Division began Fiscal Year 2006 with 38 cases. Through the year, the Division was appointed to 11 new cases, comprised of seven original cases and four successor cases. Fourteen cases were closed during the year, leaving the Division with 36 cases at the beginning of Fiscal Year 2007. Cases closed include:

- two original cases dismissed even after the post conviction application was filed because relief was granted on direct appeal
- relief denied in three cases, which were transferred to federal habeas counsel
- one successor case contracted to conflict counsel
- three mental retardation cases on review granted relief and sentences modified to life without parole
- three mental retardation cases on review denied relief and transferred back to federal habeas counsel
- one successor case closed after the United States Supreme Court denied a petition for writ of certiorari

On December 7, 2005 the Court of Criminal Appeals granted unprecedented relief in three mental retardation cases by finding the clients were mentally retarded despite the jury verdicts to the contrary. The death sentences for Darrin Pickens, Robert Lambert and Maximo Salazar were modified to life imprisonment without parole. In April 2006, the State filed a petition for writ of certiorari with the United States Supreme Court to which the Court ordered a response. A ruling on the petition is expected when the Supreme Court reconvenes in October 2006.

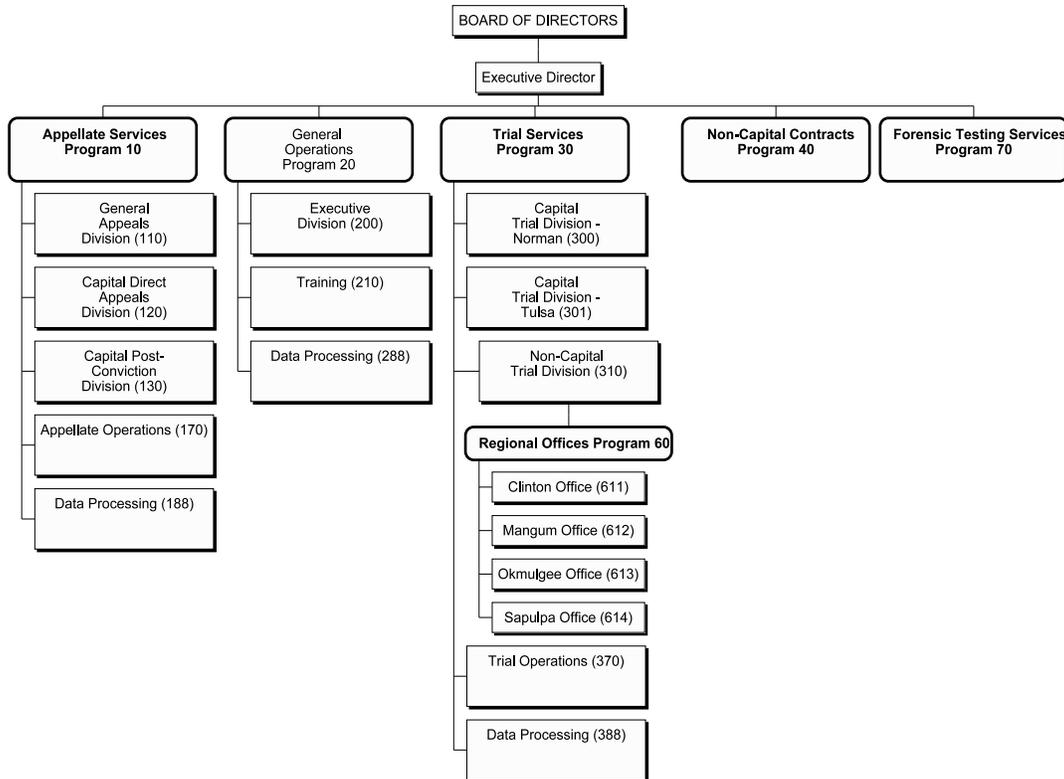
In January 2006, the Division was appointed by the District Court of McIntosh County to represent Patrick Murphy in a remanded mental retardation jury trial. In 2002, when the Court of Criminal Appeals reviewed Mr. Murphy's original post conviction case, it established the Court's mental retardation definition and the mechanism for how it would review such issues. However, Mr. Murphy was never provided the process of a remanded jury trial as had been afforded to more than a dozen others. Mr. Murphy's federal habeas counsel secured private counsel to file a successor post conviction application raising an Indian land jurisdictional issue and a denial of due process on the mental retardation issue. The Court of Criminal Appeals denied the jurisdiction issue, but granted the request for a jury trial on the mental retardation issue. The trial is expected to commence later in 2006.

During Fiscal Year 2006, the Division experienced several personnel changes. Deputy Chief Bryan Dupler resigned in December 2005 to accept a position with Judge David Lewis, a newly appointed judge on the Court of Criminal Appeals. Wyndi Thomas Hobbs was named the new Deputy Division Chief. Three investigators left the agency, one to retirement and two to pursue positions with other agencies. The Division hired one investigator and filled the other positions with attorneys.

The main mission of the Division continues to be representing clients in their original post conviction cases. This representation involves the investigation, preparation and filing of an original application for post conviction relief. The Division strives to provide a thorough review of each case to ensure the clients have the best chance of obtaining relief when the cases move from state court into the federal system.

# Oklahoma Indigent Defense System

## Organization Chart



**OKLAHOMA INDIGENT DEFENSE SYSTEM**  
**Non-Capital Trial Division**  
**Actual FY-2006 Workload**  
**July 1, 2005 through June 30, 2006**

**SUMMARY OF ALL CATEGORIES OF APPOINTMENTS**

| TYPE OF APPOINTMENT   |                                  | FEL           | JUV          | MISD         | TRAF         | WL       | YO        | ALL           |
|---|----------------------------------|---------------|--------------|--------------|--------------|----------|-----------|---------------|
| <b>FY-2006 Contract LESS Conflicts</b>                          |                                  | 15,346        | 2,139        | 5,801        | 487          | 2        | 9         | <b>23,784</b> |
| <b>Plus Contract Carry-Over from Prior Fiscal Years</b>         |                                  | 5,124         | 780          | 1,854        | 169          | 0        | 4         | <b>7,931</b>  |
| <b>Total Contract Workload</b>                                  |                                  | <b>20,470</b> | <b>2,919</b> | <b>7,655</b> | <b>656</b>   | <b>2</b> | <b>13</b> | <b>31,715</b> |
|   |                                  |               |              |              |              |          |           |               |
| <b>2006 Satellite Office LESS Conflicts and Overload Cases</b>  |                                  | 1,756         | 263          | 1,164        | 275          | 0        | 0         | <b>3,458</b>  |
| <b>Plus Satellite Office Carry-Over from Prior Fiscal Years</b> |                                  | 1,681         | 618          | 839          | 106          | 0        | 0         | <b>3,244</b>  |
| <b>Total Satellite Office Workload</b>                          |                                  | <b>3,437</b>  | <b>881</b>   | <b>2,003</b> | <b>381</b>   | <b>0</b> | <b>0</b>  | <b>6,702</b>  |
|   |                                  |               |              |              |              |          |           |               |
| <b>FY-2006 Conflicts</b>  | <b>Contracts</b>                 | 118           | 21           | 31           | 0            | 0        | 0         | <b>170</b>    |
|   | <b>Satellite Offices</b>         | 25            | 1            | 3            | 0            | 0        | 0         | <b>29</b>     |
| <b>Conflicts Carryover from Prior Fiscal Years</b>              | <b>Contract Counties</b>         | 64            | 7            | 23           | 2            | 0        | 0         | <b>96</b>     |
|   | <b>Satellite Office Counties</b> | 56            | 27           | 8            | 0            | 0        | 0         | <b>91</b>     |
| <b>FY-2006 Overload Cases</b>                                   |                                  | 960           | 93           | 232          | 39           | 0        | 0         | <b>1,324</b>  |
| <b>Overload Cases Carry-Over from Prior Fiscal Years</b>        |                                  | 95            | 2            | 22           | 4            | 0        | 0         | <b>123</b>    |
| <b>Total Conflicts and Overload Cases Workload</b>              |                                  | <b>1,318</b>  | <b>151</b>   | <b>319</b>   | <b>45</b>    | <b>0</b> | <b>0</b>  | <b>1,833</b>  |
|   |                                  |               |              |              |              |          |           |               |
| <b>TOTAL FY-2006 NCT Workload</b>                               |                                  | <b>25,225</b> | <b>3,951</b> | <b>9,977</b> | <b>1,082</b> | <b>2</b> | <b>13</b> | <b>40,250</b> |

OKLAHOMA INDIGENT DEFENSE SYSTEM  
 Non-Capital Trial Division  
 FY-2006 CONTRACT APPOINTMENTS  
 (including conflicts)

| County       | Number of Appointments | County     | Number of Appointments |
|--------------|------------------------|------------|------------------------|
| Cleveland    | 1,514                  | Osage      | 292                    |
| Pottawatomie | 1,321                  | Choctaw    | 284                    |
| Kay          | 1,176                  | McClain    | 272                    |
| Muskogee     | 1,089                  | Texas      | 272                    |
| Bryan        | 1,088                  | Marshall   | 254                    |
| McCurtain    | 868                    | Pushmataha | 243                    |
| Payne        | 813                    | Nowata     | 231                    |
| Canadian     | 752                    | Atoka      | 229                    |
| Garfield     | 730                    | Murray     | 229                    |
| Carter       | 641                    | Coal       | 228                    |
| Washington   | 634                    | Johnston   | 217                    |
| Pittsburg    | 630                    | Adair      | 201                    |
| Ottawa       | 567                    | Pawnee     | 186                    |
| Rogers       | 566                    | Noble      | 178                    |
| Garvin       | 556                    | Latimer    | 169                    |
| Cherokee     | 527                    | Love       | 123                    |
| LeFlore      | 511                    | Haskell    | 114                    |
| Wagoner      | 478                    | Kingfisher | 111                    |
| Delaware     | 465                    | Hughes     | 105                    |
| Comanche     | 445                    | Woods      | 100                    |
| Pontotoc     | 442                    | Cotton     | 94                     |
| Stephens     | 431                    | Craig      | 93                     |
| Grady        | 421                    | Major      | 85                     |
| Mayes        | 400                    | Jefferson  | 80                     |
| Caddo        | 394                    | Blaine     | 75                     |
| Seminole     | 384                    | Grant      | 66                     |
| Lincoln      | 382                    | Beaver     | 54                     |
| McIntosh     | 373                    | Alfalfa    | 37                     |
| Logan        | 341                    | Harper     | 37                     |
| Sequoyah     | 334                    | Cimarron   | 22                     |

GENERAL APPEALS  
 CASES RECEIVED BY COUNTY  
 FY-2006

|           |    |            |   |              |     |
|-----------|----|------------|---|--------------|-----|
| Adair     | 0  | Grant      | 1 | Nowata       | 0   |
| Alfalfa   | 0  | Greer      | 0 | Okfuskee     | 1   |
| Atoka     | 6  | Harmon     | 1 | Oklahoma     | 54  |
| Beaver    | 0  | Harper     | 0 | Okmulgee     | 6   |
| Beckham   | 8  | Haskell    | 0 | Osage        | 1   |
| Blaine    | 4  | Hughes     | 3 | Ottawa       | 15  |
| Bryan     | 13 | Jackson    | 4 | Pawnee       | 2   |
| Caddo     | 10 | Jefferson  | 2 | Payne        | 4   |
| Canadian  | 3  | Johnston   | 1 | Pittsburg    | 6   |
| Carter    | 2  | Kay        | 7 | Pontotoc     | 1   |
| Cherokee  | 4  | Kingfisher | 3 | Pottawatomie | 13  |
| Choctaw   | 3  | Kiowa      | 1 | Pushmataha   | 7   |
| Cimarron  | 1  | Latimer    | 1 | Roger Mills  | 0   |
| Cleveland | 10 | Leflore    | 2 | Rogers       | 6   |
| Coal      | 1  | Lincoln    | 5 | Seminole     | 6   |
| Comanche  | 11 | Logan      | 2 | Sequoyah     | 1   |
| Cotton    | 0  | Love       | 1 | Stephens     | 11  |
| Craig     | 1  | McClain    | 1 | Texas        | 3   |
| Creek     | 7  | McCurtain  | 3 | Tillman      | 0   |
| Custer    | 5  | McIntosh   | 2 | Tulsa        | 32  |
| Delaware  | 12 | Major      | 0 | Wagoner      | 3   |
| Dewey     | 0  | Marshall   | 3 | Washington   | 6   |
| Ellis     | 0  | Mayes      | 1 | Washita      | 1   |
| Garfield  | 3  | Murray     | 0 | Woods        | 0   |
| Garvin    | 2  | Muskogee   | 7 | Woodward     | 0   |
| Grady     | 9  | Noble      | 1 | TOTAL        | 346 |