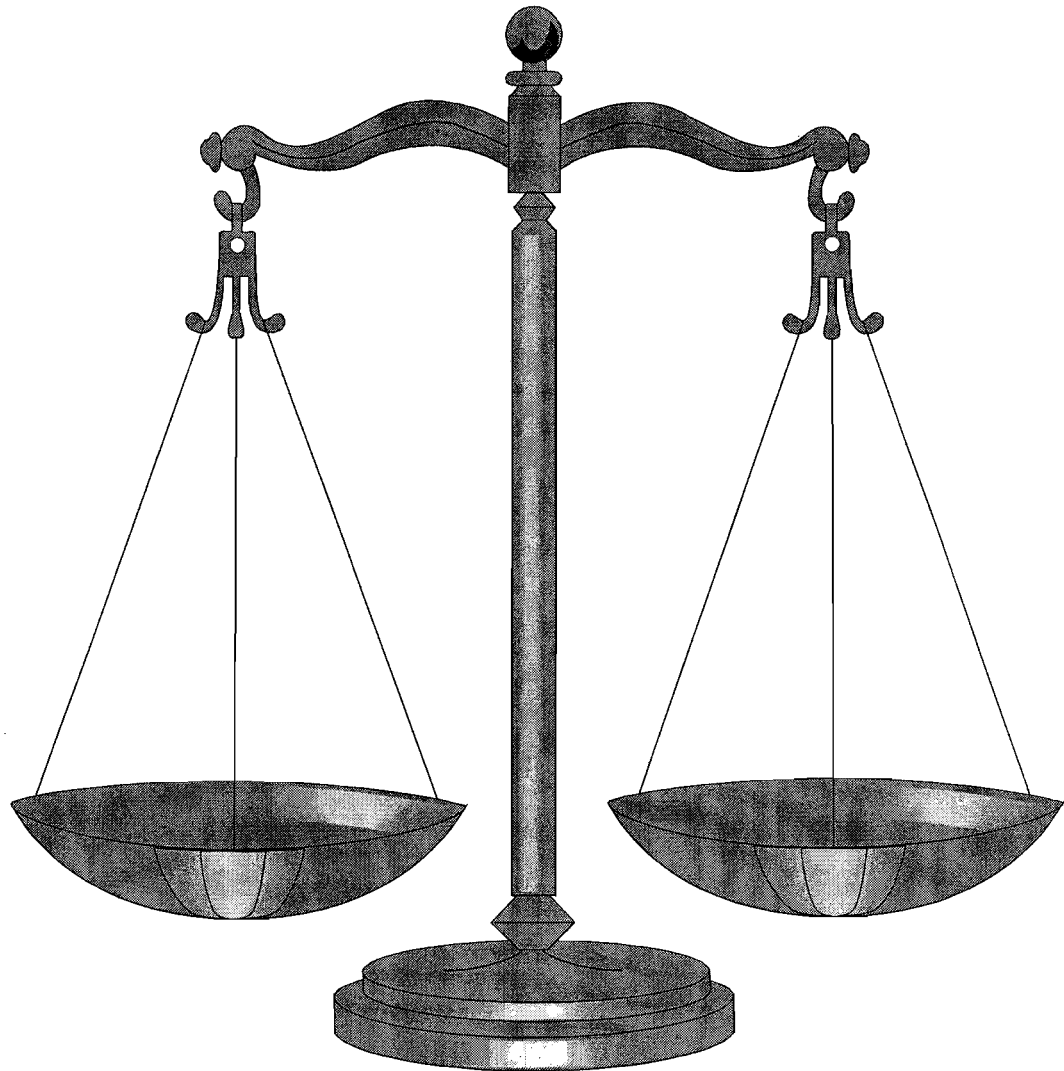


# OKLAHOMA

## INDIGENT DEFENSE SYSTEM



## 2009 Annual Report

*... 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.*

# Oklahoma

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## *Indigent Defense System*



BRAD HENRY  
GOVERNOR

KEVIN WARD  
CABINET SECRETARY  
SAFETY AND SECURITY

JOE P. ROBERTSON  
Executive Director

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This publication is printed and issued by the Oklahoma Indigent Defense System as authorized by 74 O.S. 2001, §§ 3103-3106.1. Forty-Five (45) copies have been prepared and distributed at a cost of \$61.65. Copies have been deposited with the Publications Clearinghouse of the Oklahoma Department of Libraries.

JOE P. ROBERTSON  
EXECUTIVE DIRECTOR



BRAD HENRY  
GOVERNOR

STATE OF OKLAHOMA  
OKLAHOMA INDIGENT DEFENSE SYSTEM

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October 30, 2009

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TO THE HONORABLE BRAD HENRY  
HONORABLE GLENN COFFEY  
HONORABLE CHRIS BENGÉ  
HONORABLE JAMES EDMONDSON  
HONORABLE CHARLES JOHNSON

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, 2009, in accordance with 22 O.S. § 1355.3(B) and 22 O.S. § 1355.4(C)(14).

The Oklahoma Indigent Defense System is grateful for the support that it received during Fiscal Year 2009 from the Governor and his staff, from the Legislature and from the Judiciary.

As we move forward in 2010, 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,

Handwritten signature of Rod Wiemer.

Rod Wiemer, Esq.  
Chair

Handwritten signature of Jake Jones.

Jake Jones, Esq.  
Vice-Chair

Handwritten signature of Don G. Pope.

Don G. Pope, Esq.

Handwritten signature of Randolph S. Meacham.

Randolph S. Meacham, Esq.

Handwritten signature of Dennis N. Shook.

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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Ken Feagins  
Cheryl Hunter  
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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 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 Oklahoma Indigent Defense Act, 22 O.S. § 1355, *et seq.*, which created the agency, sets forth the duties and responsibilities of the agency, the Indigent Defense System Board and the OIDS Executive Director.

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 39,385 court appointments in Fiscal Year 2009. The

numerical breakdown by division is as follows:

NON-CAPITAL TRIAL	
<i>Staff</i>	7,395
<i>County Contracts</i>	30,029
<i>Conflicts</i>	477
<i>Overload</i>	720
CAPITAL TRIAL - NORMAN	43
CAPITAL TRIAL - TULSA	43
GENERAL APPEALS	529
CAPITAL DIRECT APPEALS	91
CAPITAL POST CONVICTION	42
EXECUTIVE DIVISION CONFLICTS	
<i>Capital Trial Divisions</i>	3
<i>Non-Capital Direct Appeals</i>	9
<i>Capital Direct Appeals</i>	1
<i>Capital Post Conviction</i>	3
TOTAL	<u>39,385</u>

Given the nature of criminal cases, most 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 56 counties. In 19 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.

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 passage 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 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. During its 18-year history, OIDS has repeatedly 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 the agency's statewide defender services in non-capital trial cases in 75 counties.

In Fiscal Year 1994, the Legislature reduced the agency's 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, the agency's 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.

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.

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 James Bednar as the new 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 the agency's 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, the agency's 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. Allocation reductions totaled \$607,354 in Fiscal Year 2002, leaving OIDS 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.

The agency's 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

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. For fiscal year 2008, the agency unsuccessfully sought an increase of \$392,500 to offset increasing contract costs and a desperately needed satellite office in the Oklahoma panhandle region. However, for Fiscal Year 2009, the agency received an increase in its appropriation, enabling it to establish the new satellite office and address increasing county contracting costs.

In September 2008, Executive Director James Bednar announced his retirement from the agency. At its October 31, 2008 meeting, the Indigent Defense System Board selected Joe P. Robertson, formerly the Chief of the OIDS Capital Trial - Tulsa Division, as the new Executive Director, effective November 1, 2008.

Due to the nationwide economic downturn, OIDS, along with the majority of state agencies, received a large reduction in its appropriation for the upcoming fiscal year. The agency's appropriation was reduced by \$999,986, or 6% of its Fiscal Year 2009 appropriation, leaving OIDS with a total Fiscal Year 2010 appropriation of \$15,720,785. This loss, along with further anticipated funding allocation reductions during the new fiscal year, compelled OIDS to take severe cost-cutting measures, such as eliminating further assignment of overload cases to private contract attorneys. The inability to contract with private overload counsel is expected to substantially increase the caseloads handled by staff attorneys in two of the largest agency divisions, adversely impacting the agency's constitutional mandate to provide effective legal services to its clients.

# 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 127 full-time equivalent staff members at its main offices in Norman and its satellite offices in Clinton, Guyton, Mangum, Okmulgee, and Sapulpa.

In Fiscal Year 2009, the agency entered into 223 new professional services contracts with private attorneys, experts and investigators to provide defense services in court-appointed cases, in

addition to administering 137 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

The agency's website provides information about OIDS, 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 Oklahoma Court of Criminal Appeals opinions issued, 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 25<sup>th</sup> and 26<sup>th</sup>, 2009 in Midwest City, Oklahoma. It included presentations on such diverse topics as representing high profile clients, the impact of mental illness and addiction on the criminal justice system, effective cross examination and closing arguments, drug courts and evidence.

## EXECUTIVE CONFLICT CASELOAD

During Fiscal Year 2009, the Executive Division contracted with outside attorneys for representation in a total of eight new cases.

The year began with two pending district court death penalty cases. Two cases were closed and one opened, leaving one case carried over into Fiscal Year 2010. The Division started Fiscal Year 2009 with one pending capital direct appeal case, which was carried over into the new fiscal year. Three non-capital appeal cases were pending at the beginning of the fiscal year, with the Division receiving six new conflict appointments. Five cases were concluded with a total of four carried into Fiscal Year 2010. The Division began Fiscal Year 2009 with two pending capital post conviction cases. One new appointment was received and one case was closed during this period, resulting in the carryover of two cases into Fiscal Year 2010.

# 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. NCTD represents the agency's largest group of clients. In Fiscal Year 2009, the Division received 29,062 new appointments.

### 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 2009, the Division's caseload was handled as follows:

- (1) Flat-rate Fiscal Year Contracts: In 56 counties, all NCTD representation was provided via such contracts. Since Fiscal Year 1998, OIDS has made a concerted effort to ensure that NCTD fiscal-year contracts are adequately staffed by giving weight, during the contracting process, to the number of law firms participating in an offer.

- (2) Staffed Satellite Offices: NCTD operated five satellite offices: Clinton, Mangum, Okmulgee, Sapulpa and Guymon. The three counties of the Oklahoma Panhandle (Cimarron, Texas and Beaver Counties) were primarily serviced for the first half of Fiscal Year 2009 by a single staff attorney. In January 2009, a second attorney was added to the Guymon office to assist with the provision of non-capital trial services in the Panhandle.

The Non-Capital Trial Division satellite offices ended Fiscal Year 2009 with 22 attorneys, who handled 7,395 active cases over the course of the year. During Fiscal Year 2009, a satellite office staff attorney handled an average of 336 cases – 183 felonies, 37 juvenile cases, 105 misdemeanor cases and 11 traffic cases. According to a formula utilized by the National Legal Aid and Defenders Association, in Fiscal Year 2009 each satellite office attorney did the work of 1.87 attorneys who operate in only one courthouse. All satellite office attorneys handled work in several district courts. The largest satellite office region covered eight courthouses and 8,623 square miles.

Over the last four fiscal years, the Non-Capital Trial Division has utilized annual funding designated to provide overload attorneys in the satellite office areas. Until Fiscal Year 2009, this funding enabled NCTD to diminish the workload per satellite office staff attorney to more acceptable levels.

- (3) Conflict/Overload Counsel: During Fiscal Year 2009, NCTD assigned 356 cases to conflict counsel. In addition, 406 cases were assigned 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 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 agency's appointments in the affected county under Section 1355.9 of the Indigent Defense Act or (2) assign the agency'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 2009, the Non-Capital Trial Division's satellite offices served the following counties:



**Clinton Office**

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

**Mangum Office**

- Greer
- Harmon
- Kiowa
- Jackson
- Tillman

**Okmulgee Office**

- Okfuskee
- Okmulgee (2 courthouses)

**Sapulpa Office**

- Creek (3 courthouses)

**Guymon Office**

- Beaver
- Cimarron
- Texas

**Overall Caseload**

In Fiscal Year 2009, the Non-Capital Trial Division received a total of 23,485 new contract cases, of which 231 resulted in conflicts. As a result, 23,254 new cases were handled under the county contracts. OIDS Non-Capital Trial Division satellite offices received 5,577 new cases, of which 125 were conflicts and 406 were reassigned as overload cases. As a result, the satellite offices handled 5,046 new cases in Fiscal Year 2009. Total new cases for the division equaled 29,062. Cleveland County had the highest number of cases (1,1651), while Beaver County had the fewest (23).

In Fiscal Year 2009, NCTD reduced the number of cases which would otherwise been assigned to contracting conflict and overload attorneys due to anticipated reductions in state revenues. Compared to Fiscal Year 2008, NCTD assigned 60% fewer overload cases to contracting attorneys in Fiscal Year 2009. New overload case assignments dropped from 1,014 cases in Fiscal Year 2008 to 406 cases in Fiscal Year 2009. Further, more conflict cases were traded among the satellite office and conflict case assignments accepted from county contractors in an effort to reduce the cost of conflict contract case assignments to private counsel.

Although the reduction in overload and conflict case assignments to private contract counsel reflects sound budget planning, the reduction has resulted in substantially increased work loads for the agency’s satellite attorneys. In Fiscal Year 2008, each satellite attorney did the work of 1.37 attorneys. In Fiscal Year 2009, each satellite attorney did the work of 1.87 attorneys. As stated above, this calculation presupposes that each attorney practices in one courthouse, when, in fact, satellite attorneys practice in several courthouses and many drive hundreds of miles per week to make court appearances and counsel clients. With the reduction in the agency’s Fiscal Year 2010 appropriation and further anticipated funding allocation reductions, the agency expects the demands on the satellite attorneys to worsen.

***CAPITAL (DEATH PENALTY)  
TRIAL REPRESENTATION***

The OIDS Capital Trial Divisions are assigned the task of representing indigent defendants in cases where the State is seeking the death penalty. The two Divisions combined represent clients throughout the State, with the exception of Oklahoma and Tulsa Counties. Both Divisions operate as separate law firms for conflict purposes. If one Division cannot accept

a court appointment because of a conflict of interest arising from another court appointment, the case is generally assigned to the other. If neither Division can accept the court appointment, OIDS contracts with private counsel to represent the client under Sections 1355.7 and 1355.13 of the Indigent Defense Act. In September 2007 a program instituted by the agency shifted responsibility for defending selected first degree murder appointments to the Capital Trial Divisions.

The Capital Trial Divisions began Fiscal Year 2009 with 47 pending trial level cases. A total of 86 trial level cases were handled during this time with 38 completed by the end of the fiscal year.

## ***CAPITAL TRIAL DIVISION NORMAN OFFICE***

The Capital Trial Division – Norman represents defendants in capital cases filed in 46 counties and has primary responsibility for conflicts arising in the remaining counties regularly serviced by the Capital Trial Division – Tulsa.

Fiscal Year 2009 began with seven attorneys, four investigators, and two full-time support personnel. During the fiscal year one attorney position became vacant due to a transfer to another Division within the agency. The vacant attorney position was filled by an agency attorney who transferred to the Division from a Non-Capital Trial Division (NCTD) satellite office. The current number of staff within the Division is 13. Fiscal Year 2009 ended with no vacancies.

### **TRIAL CASELOAD**

The Capital Trial Division – Norman began Fiscal Year 2009 with 26 pending cases carried over from Fiscal Year 2008. The Division received new appointments in 17 cases during the fiscal year, bringing the total number of cases managed by the Division in Fiscal Year 2009 to 43 cases. By the end of the fiscal year, 13 of those cases were concluded and closed; the remaining 30 cases

were carried over into Fiscal Year 2010. Although the Capital Trial Division – Norman ceased taking on any new conflict case appointments from Oklahoma County in 2003, the Division continues to monitor one remaining inactive Oklahoma County case to which the Division was appointed prior to 2003.

In an effort to meet the overall agency mission of providing the highest quality of representation to indigent defendants, using the most cost-effective and efficient means possible, the Division took on a much more active role during the Fiscal Year 2009 in the representation of non-capital clients charged with murder in the first degree. Close consultation between the Chiefs of the Capital Trial Division - Norman and the Non-Capital Trial Division (NCTD), respectively, led to many case referrals to the Division when it appeared the death penalty might be sought in the case. The Division has also accepted referrals from NCTD when necessary to alleviate strain on the NCTD satellite offices and local contractors, as well as to resolve conflicts without the agency having to incur the expense of hiring outside counsel. In Fiscal Year 2009, 14 of the 17 appointments received by the Capital Trial Division - Norman were official referrals from NCTD.

### **FISCAL YEAR 2009 RESULTS**

#### ***Jury and Non-Jury Trials***

Result of three cases tried in Fiscal Year 2009:

- ◇ 1 death sentence (jury trial)
- ◇ 1 life without the possibility of parole sentence (jury trial)
- ◇ 1 not guilty by reason of insanity (non-jury trial)

One capital case was in the midst of jury trial at the end of Fiscal Year 2009, but did not conclude until after the beginning of Fiscal Year 2010. The result in that case was a verdict of life

without parole, and will be reported in the Fiscal Year 2010 Annual Report.

*Guilty Pleas*

The Division represented 11 clients who resolved their cases by entering guilty pleas. The results of those pleas are as follows:

- ◇ 4 First Degree Murder – Life Without Parole sentences
- ◇ 3 First Degree Murder – Life With Parole sentences
- ◇ 1 Murder II – 25 years
- ◇ 2 Manslaughter I – one received 30 years; one received 25 years with 5 years suspended
- ◇ 1 Burglary II – 20 years

**FINAL RESULTS OF CASES CONCLUDED**

Result	No. of cases
Death Penalty	1
Life Without Parole	5
Life with Parole	3
Murder II	1
Manslaughter I	2
Burglary II	1
<b>Total</b>	<b>13</b>

One case, with the result of not guilty by reason of insanity, requires the Division to maintain semi-active representation because Oklahoma law requires periodic review of the client’s mental health status at which the client may need representation, and therefore is not considered a closed case.

***CAPITAL TRIAL DIVISION  
TULSA***

The Capital Trial Division - Tulsa has the primary responsibility for defending capital and non-capital first degree murder cases in 29 counties in the Eastern Northeastern area of the State. The Division is further assigned to conflict capital and non-capital first degree murder cases in the remaining counties served by OIDS.

**DIVISION CHANGES**

With the appointment of the previous Division Chief, Joe P. Robertson, as the agency’s new Executive Director, James C. Bowen was appointed as the Division’s new Chief, with Gretchen Mosley appointed as Deputy Division Chief. A new attorney was hired to fill the position left vacant because of the foregoing changes, and one investigator transferred to the OIDS Capital Post Conviction Division.

The Division continued to accept appointments of all first degree murder cases within its geographic region throughout the year. That process has been further refined and has dramatically assisted the agency in better utilizing available resources and obtaining better results for clients. While the Division’s caseload has been high, it has been manageable.

**CASELOAD**

Fiscal Year 2009 began with a carryover of 21 pending cases from the previous fiscal year. Twenty-two new cases were opened during the fiscal year, bringing the total caseload for the year to 43 cases. The Division concluded 25 cases, carrying over 18 cases into Fiscal Year 2010.

## FISCAL YEAR 2009 RESULTS

There were no death penalties imposed against any Division clients during the fiscal year - the fourth year in a row. Three jury trials were conducted during the fiscal year, resulting in 1) an acquittal of a first degree murder charge, 2) a conviction of life without parole where the prosecution sought the death penalty a second time, and 3) a conviction where the defendant received life with the possibility of parole.

Other cases included two clients who were adjudicated not guilty by reason of insanity in potential capital cases. The Division further had a great deal of success in negotiating good dispositions for clients, including seven who pled to reduced charges of first degree manslaughter (one received a 10-year sentence with four years suspended, one received a 30-year sentence with 12 years suspended, and one received a 30-year sentence with 11 years suspended). Another Division client faced first degree murder charges in two separate jurisdictions as well as the death penalty. After extensive pretrial preparation, a plea was negotiated for the client in both cases, with charges modified to manslaughter and second degree murder, resulting in two 45-year sentences running concurrently. In one particularly egregious death penalty case, two life without parole sentences were negotiated. A first degree murder charge against a client was dismissed with a plea to accessory to murder, resulting in a 25-year sentence. Another client had his first degree murder charge dismissed, pleading to an amended charge of conspiracy to commit burglary, resulting in a sentence of five years.

All of these results are due to the ability, commitment and hard work of Division attorneys, investigators and support staff.

## FINAL RESULTS OF CASES CONCLUDED

Result	No. of Cases
Death Sentences	0
Life Without Parole	4
Not Guilty by Reason of Insanity	2
Life With Parole	3
Pled to Lesser Charge	10
Conflict of Interest	2
Acquitted at Trial	1
Closed (No Action taken)	1
Closed-Transferred to CTN	1
Adjudicated as a Youthful Offender	1
<b>Total</b>	<b>25</b>

# 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 and 22 O.S. § 1089.

### ***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 and Tulsa Counties 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. 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, and adequate funding is available, the agency enters into contracts with private attorneys on a case-by-case basis to represent Division clients on appeal. If the 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. The Division received a substantial portion of that appropriation to alleviate the Division's caseload. However, with the recent economic downturn and reduction in the agency's Fiscal Year 2010 appropriation, the Division's ability to assign contract overload appeals to private counsel has been severely curtailed.

The General Appeals Division began FY-2009 with 253 open cases in various stages of appeal before the Court of Criminal Appeals, and received appointments in 276 additional cases during the fiscal year. The Division closed 309 cases, ending the fiscal year with 220 open cases to be carried into Fiscal Year 2010. During the course of the fiscal year, the Division handled 529 cases.

Attorneys in the General Appeals Division filed Briefs-in-Chief on behalf of 169 clients during Fiscal Year 2009. Division attorneys appeared for four oral arguments before the Court of Criminal Appeals in fast-track appeals, filed 31 reply briefs and filed one petition for rehearing.

The Division closed 309 cases during the year. Of most of the cases closed, 165 were closed because a final decision was reached by the Court of Criminal Appeals. In 25 of those cases, relief was obtained on behalf of the client. Other cases were closed for various reasons. Sixty-five cases contracted to outside counsel were closed upon completion. Fifty-two appeals were closed after the appeal was dismissed,

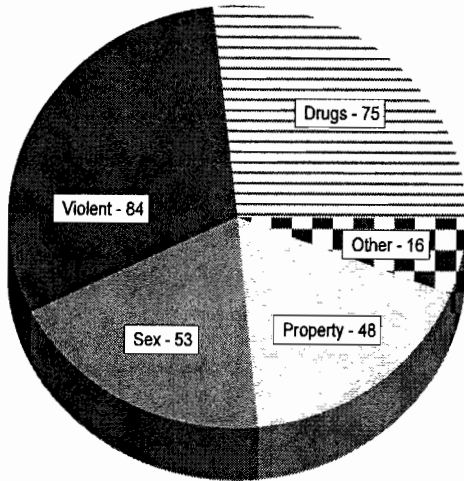
either at the client's request or because the Court of Criminal Appeals lacked jurisdiction to hear them; four cases were closed because the agency was not properly appointed to handle them; and three cases were closed because outside counsel was retained by the client. Additionally, 15 appeals were closed due to consolidation with other cases.

New cases were received from 50 of the State's 77 counties. Almost 25% of the incoming caseload, or 68 cases, arose from Oklahoma and Tulsa counties. In 191 of the cases received in FY-2009, counsel at trial level was court-appointed, and 85 cases were handled at trial by privately-retained counsel or by the client pro se.

#### SUMMARY OF CASES CLOSED

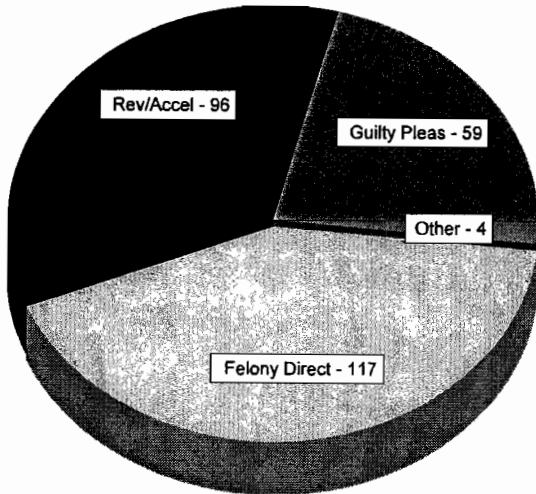
<u>Reason for Closing</u>	<u># of Cases</u>	<u>%</u>
Decision of Court of Criminal Appeals	165	53
Contracted outside and completed	65	21
Dismissed for Lack of Jurisdiction (Dismissed at Client's request)	52	17
OIDS not properly appointed	4	1
Outside Counsel Retained by Client	3	1
Transferred to another Division	5	2
Other (Consolidated)	15	5
<b>Total</b>	<b>309</b>	<b>100%</b>

## Types of Offenses Appealed



The majority of the convictions in the cases appealed by the General Appeals Division are violent crimes, including all degrees of murder and manslaughter, child abuse, assaults, robberies, kidnapping and first degree arson. 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. Drug offenses are the second leading category of offenses appealed.

## Types of Appeals



The graph at the left demonstrates the types of appeals received by the General Appeals 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.

## ***CAPITAL (Death Penalty) APPEALS***

The Capital Direct Appeals Division is appointed by the district courts of Oklahoma to represent 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, direct appeal in a capital case also includes filing a petition for a writ of certiorari to the United States Supreme Court if the case is affirmed by the Oklahoma Criminal Court of Appeals. Although the Division's primary responsibility is to represent capital defendants in their direct appeal, over the past several years, the Division has also accepted cases transferred from the General Appeals Division for direct appeal clients convicted of any form of homicide.

The Capital Direct Appeals Division is subject to appointment by the district courts in 75 counties and in Oklahoma and Tulsa Counties 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 2009 with 13 pending capital cases and 42 cases in which the client was convicted of some form of homicide. During the fiscal year, one new capital case and 35 new non-capital homicide cases were opened. By the end of the year, two capital cases and 37 non-capital cases were closed, leaving the Division with 52 active cases, 12 of these being capital, and 40 non-capital homicide cases.

### **STATEWIDE DISTRIBUTION**

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

#### **COUNTY**

Oklahoma	36%
Tulsa	22%
Cleveland	14%
Blaine	7%
Custer	7%
Garvin	7%
Seminole	7%

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



COUNTY

Tulsa	26%
Oklahoma	27%
Cleveland	5%
Comanche	5%
Osage	5%
Garfield	3%
Muskogee	3%
Pittsburg	3%
Pontotoc	3%
Caddo	1%
Carter	1%
Cherokee	1%
Custer	1%
Delaware	1%
Garvin	1%
Grady	1%
Hughes	1%
Latimer	1%
Lincoln	1%
Love	1%
Mayes	1%
McClain	1%
McCurtain	1%
Okfuskee	1%
Ottawa	1%
Payne	1%
Rogers	1%
Wagoner	1%
Woodward	1%

DISPOSITION OF CASES

Twenty-three non-capital homicide cases were affirmed by the Oklahoma Court of Criminal Appeals and subsequently closed during Fiscal Year 2009. One non-capital guilty plea homicide case was remanded for further proceedings. Of the two capital cases closed during Fiscal Year 2009, one capital case was reversed and remanded for a new trial, and one case was closed after being affirmed by the Court of Criminal Appeals and denied certiorari by the United States Supreme Court.

***CAPITAL POST  
CONVICTION DIVISION***

The primary 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. In addition, the Division has recently been handling conflict cases from the General Appeals Division and overflow non-capital homicide appeal cases from the Capital Direct Appeals Division.

The Capital Post Conviction Division began Fiscal Year 2009 with 24 cases. The Division was appointed to seven new capital cases, five from Oklahoma County, one from Tulsa County, and one from Garvin County. In addition, the Division accepted 11 non-capital direct appeal cases. Eight capital cases were closed during the year, leaving the Division with 34 cases at the beginning of Fiscal Year 2010. Of the cases which were closed:

- one original post conviction case was dismissed after the application had been filed because relief was granted on direct appeal;
- two cases were closed after conflict counsel was assigned;
- four cases were transferred to federal habeas counsel after relief was denied by the Oklahoma Court of Criminal Appeals; and
- one case was closed after the client was granted executive clemency.

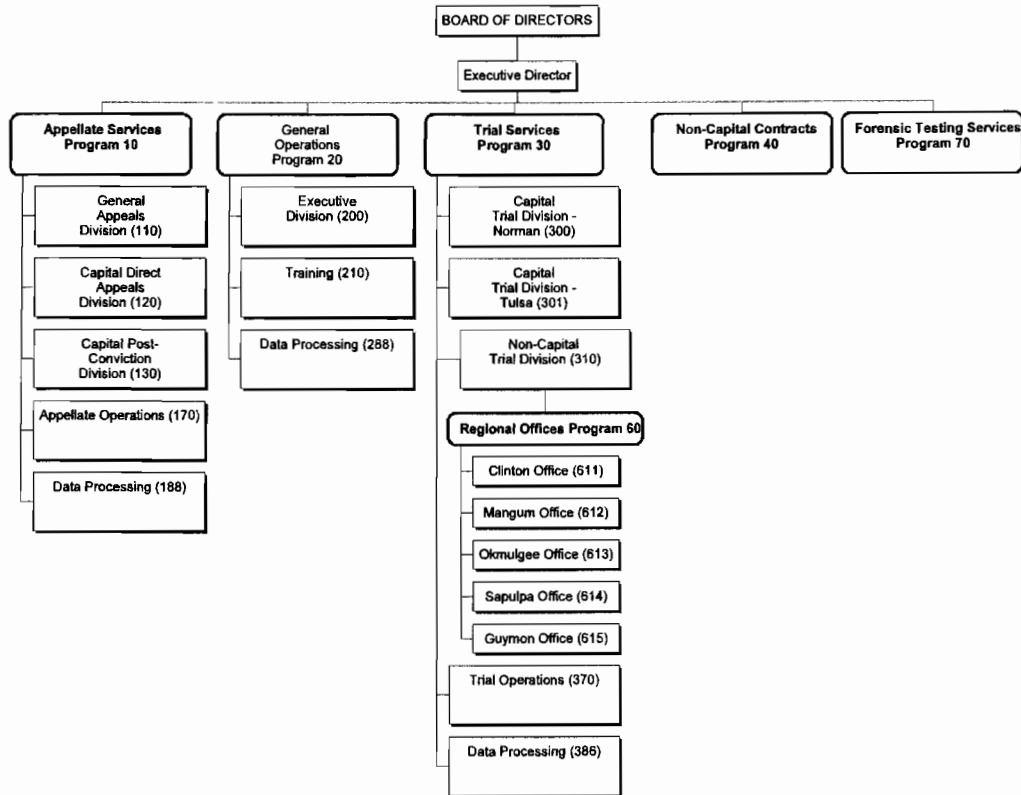
As reported last year, the Division continues to represent Garry Allen in the District Court of Pittsburg County on the issue of competency to be executed. A jury trial was held April 28-May 1, 2008. By a vote of nine to three, the jury found Mr. Allen competent. The court has since granted Mr. Allen's request for an evidentiary hearing on his motion for new trial. The hearing is scheduled for September 28, 2009.

A statute enacted by the Oklahoma Legislature now requires the Court of Criminal Appeals to order a response by the State before relief can be granted in a post conviction case. The Court ordered the Oklahoma Attorney General's Office to respond to three original applications for post conviction relief in FY 2009. The Division filed reply briefs in all three cases.

Due to budget constraints, the Division was forced to give up two FTE appellate defense counsel positions in Fiscal Year 2009.

# Oklahoma Indigent Defense System

## Organization Chart



**OKLAHOMA INDIGENT DEFENSE SYSTEM**  
**Non-Capital Trial Division**  
**Actual FY-2009 Workload**  
**July 1, 2008 through June 30, 2009**

**SUMMARY OF ALL CATEGORIES OF APPOINTMENTS**

TYPE OF APPOINTMENT		FEL	JUV	MISD	TRAF	WL	YO	ALL
FY-2009 Contract <i>LESS</i> Conflicts		14,157	1,918	6,783	393	2	1	23,254
Plus Contract Carry-Over from Prior Fiscal Years		4,383	720	1,571	99	0	2	6,775
<b>Total Contract Workload</b>		<b>18,540</b>	<b>2,638</b>	<b>8,354</b>	<b>492</b>	<b>2</b>	<b>3</b>	<b>30,029</b>
2009 Satellite Office <i>LESS</i> Conflicts and Overload Cases		2,864	381	1,623	178	0	0	5,046
Plus Satellite Office Carry-Over from Prior Fiscal Years		1,166	442	692	49	0	0	2,349
<b>Total Satellite Office Workload</b>		<b>4,030</b>	<b>823</b>	<b>2,315</b>	<b>227</b>	<b>0</b>	<b>0</b>	<b>7,395</b>
FY-2009 Conflicts	Contracts	166	17	46	2	0	0	231
	Satellite Offices	97	10	17	1	0	0	125
Conflicts Carryover from Prior Fiscal Years	Contract Counties	75	11	28	0	0	0	114
	Satellite Office Counties	2	4	1	0	0	0	7
FY-2009 Overload Cases		322	38	44	2	0	0	406
Overload Cases Carry-Over from Prior Fiscal Years		206	39	64	5	0	0	314
<b>Total Conflicts and Overload Cases Workload</b>		<b>868</b>	<b>119</b>	<b>200</b>	<b>10</b>	<b>0</b>	<b>0</b>	<b>1,197</b>
<b>TOTAL FY-2009 NCT Workload</b>		<b>23,438</b>	<b>3,580</b>	<b>10,869</b>	<b>729</b>	<b>2</b>	<b>3</b>	<b>38,621</b>