STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, *Governor*

COMMISSION ON CALIFORNIA STATE GOVERNMENT ORGANIZATION AND ECONOMY

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Assemblyman

JEANNINE L. ENGLISH
Executive Director

A REVIEW OF

THE OPERATION AND PERFORMANCE OF

THE OFFICE OF THE STATE PUBLIC DEFENDER

OCTOBER 1988

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October 5, 1988

The Honorable George Deukmejian
Governor of California

The Honorable David A. Roberti
President pro Tempore of the Senate
and the Members of the Senate

The Honorable Kenneth L. Maddy
Senate Minority Floor Leader

The Honorable Willie L. Brown, Jr.
Speaker of the Assembly
and the Members of the Assembly

The Honorable Patrick Nolan
Assembly Minority Floor Leader

Dear Governor and Members of the Legislature:

The Commission on California State Government Organization and Economy has completed a review of the operations and performance of the Office of the State Public Defender.

The Commission, also known as the Little Hoover Commission, began its study of the operation and performance of the State Public Defender's Office because of concern about the increasing cost and the potential for serious delay in the justice system.

The Commisson's review confirmed that the cost of indigent appellate defense has risen dramatically in recent years. For instance, during the 1981-82 fiscal year the State spent $9.7 million in contrast to $32 million in the 1988-89 fiscal year budget--an increase of 230 percent in just seven years.

There are many factors in the cost explosion that could not be controlled--an increase in the number of capital cases and the complexity of death penalty appeals, for instance. From 1978 to 1987, five death penalty cases were affirmed on appeal to the California Supreme Court. From 1987 through September 8, 1988, 40 of the 54 capital appeals heard by the Court have been affirmed. Almost 170 cases currently remain to be decided by the Court.

While some factors could not be predicted or contained, others can and should be. For instance, the Office of the State Public Defender has repeatedly fallen short of its own casework goals. In its best year, the office only handled 30 percent of indigent appeals. Because of this inefficiency, the state's indigent appellant defense budget is now divided between the Office of the State Public Defender and the court-appointed private counsel system. This results in duplicative administrative and overview costs.

(This letterhead not printed at taxpayer's expense)

The Commission report presents seven findings on the operation of the Office of the State Public Defender and indigent appellate defense generally:

- Indigent Appellate Defense in California could be provided in a more effective and less costly manner.

- The professional work performed by the Office of the State Public Defender is more complex than the work performed by private court-appointed counsel and is at least comparable in quality.

- The State Public Defender's Office has recently focused its efforts on capital and complex non-capital cases, but has had trouble achieving its own workload productivity.

- The Office of the State Public Defender needs to develop workload standards to measure staff performance.

- The Office of the State Public Defender has not implemented an effective management information system to track cases and monitor and control the work of its staff.

- The lack of a consistent case selection process has hampered the workload management efforts of the Office of the State Public Defender.

- California is experiencing an increase in the amount of work associated with death penalty appeals due to an increase in the number and complexity of appeals.

The Commission understands that the problems faced by the Office of the State Public Defender have arisen over the last 12 years because of changes in criminal law and procedure, as well as inherent inconsistencies and contradictions in carrying out the mandate of the office. The Commission believes, however, that the following actions must be undertaken to address the current problems facing this office and to ensure continued criminal indigent appellate defense of the highest quality in California.

- The functions of the current State Public Defender, the Appellate Projects and private court-appointed counsel should be merged into a single autonomous agency (Appellate Defense Agency) within the judicial branch of government.

- The Director of the newly created Appellate Defense Agency (ADA) will have as its workload all criminal appeals and contract with the Administrative Office of the Courts for administrative support services.

- The Office of the State Public Defender should continue its efforts to develop, implement and enforce workload standards.

- The current Office of the State Public Defender and the new Appellate Defense Agency should increase the law clerk program.

- The existing Office of the State Public Defender and ultimately the new Appellate Defense Agency should assign a high priority to implementing a comprehensive timekeeping and docketing system.

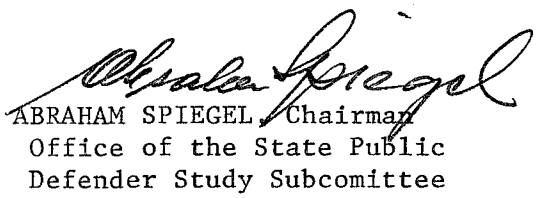
- The Judicial Council should periodically perform a detailed cost efficiency study of the Appellate Defense Agency and its functions.

- The Appellate Defense Agency should collect, maintain, and annually report to the Judicial Council cost information relating to the cost of the indigent criminal appellate work.

- The Appellate Defense Agency should limit itself solely and directly to legal representation of indigent individuals convicted of felonies.

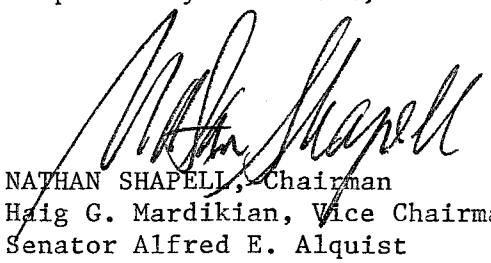
The Commission believes that these actions will promote the timely and effective resolution of criminal appeals which is vital to fair and impartial administration of justice for all parties concerned.

Respectfully submitted,



ABRAHAM SPIEGEL, Chairman
Office of the State Public
Defender Study Subcomittee

George E. Paras
Barbara S. Stone
Richard R. Terzian



NATHAN SHAPELL, Chairman
Haig G. Mardikian, Vice Chairman
Senator Alfred E. Alquist
Mary Anne Chalker
Albert Gersten
Richard E. Gulbranson*
Senator Milton Marks
Assemblywoman Gwen Moore
Assemblyman Phillip Wyman

* Appointed to the Commission after the study was initiated.

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EXECUTIVE SUMMARY

The Sixth Amendment to the Constitution guarantees criminal defendants the right to legal counsel. The Supreme Court of the United States has interpreted this to require that federal, State and local governments provide legal counsel for those criminal defendants unable to afford legal counsel themselves. In California, this function at the appellate court level is divided between the Office of the State Public Defender and a private court-appointed counsel system.

The Office of the State Public Defender (OSPD) is a separate and fully functional agency of the executive branch of State government. The private court-appointed counsel system is a part of the judicial branch of government and consists of three major parts:

- The private bar, whose members accept court appointments in appellate cases and perform the actual casework.

- The "appellate projects," which are either non-profit corporations or in one instance a government entity. The appellate projects, under contract to the State Judicial Council and the Administrative Office of the Courts, recruit and evaluate qualified appellate counsel for court appointment, oversee quality and timeliness of casework, and review and make recommendations on compensation claims to the courts, and also take direct case appointments in a very small percentage of cases.

- The Administrative Office of the Courts, which provides administrative, budget and statistical support to the appellate projects, and also processes payments for appointed counsel.

The two systems duplicate the responsibility for and function of indigent appellate defense.

The cost of defending indigent criminals at the appellate level has been rising steadily in recent years. In the fiscal year 1973-74, prior to the establishment of the State Public Defender, the total cost to the State of private appellate counsel was $859,920 in real dollars. In fiscal year 1981-82, the State spent $9.7 million for this purpose, while in fiscal year 1988-89, the total amount budgeted for indigent criminal defense at the appellate level is $32.0 million--a 230 percent increase in just seven years. Of this total amount, OSPD is currently budgeted $7.2 million, or 22.5 percent of the total expenditure for this function. The balance of this amount, or approximately $24.8 million goes to fund the appointment and supervision of private court-appointed counsel.

Due to the increasing criminal appellate workload in California's courts, and the increasing cost of indigent appellate defense, this Commission decided to undertake a study of the OSPD. Since OSPD provides only a portion of indigent appellate defense in the State, its performance could not be judged in a vacuum. Thus, the Commission also collected information on the known costs and performance of the parallel operations of the court-appointed private counsel system. In this way, the

Commission could better evaluate the efficiency and effectiveness of the OSPD.

The Commission found that the division of responsibility for indigent appellate defense between two systems in separate branches of State government creates inefficiencies and duplication in program administration, and results in greater cost and less efficient case handling.

Due to the inadequate information available to the Commission, the Commission could not make accurate cost comparisons between the cost of the work performed by the OSPD and private court-appointed counsel. However, the quality of the professional work of the OSPD is acknowledged by the State judiciary and other interested parties to be equal to or superior to that of the private bar in general.

Since 1983, OSPD has attempted to concentrate its efforts on handling complex non-capital and death penalty cases. More than half of OSPD's caseload now consists of cases with sentences of 15 years to life, life without parole, or death. OSPD has been unable to achieve its own workload standards and goals in recent years, however. This places an increased burden on both the courts and the private counsel system to redirect and absorb unassigned cases.

The Commission further found that OSPD's effectiveness has been badly hampered because it does not have adequately developed workload standards to measure professional staff performance. Without such standards, individual performance cannot be adequately assessed, and valid estimates of overall workload and goal achievement by OSPD management and outside control agencies cannot be made.

The Commission determined that the lack of a consistent case selection and assignment process has hampered the OSPD's workload management efforts. The methods used for case selection vary widely among each of the OSPD's three regional offices. The lack of a consistent case selection and assignment process has hampered workload goal achievement because the OSPD cannot be certain of the timing of the assignment, or the availability of cases for assignment, in the majority of its regional offices and in the State's appellate court districts.

OSPD's case-tracking and timekeeping systems have not been implemented adequately and do not readily provide information needed by OSPD management and State control agencies to monitor and control the work performed by the staff of the OSPD. Although the OSPD has attempted to implement an integrated management information system, it has encountered both technical and procedural problems which have delayed implementation.

Finally, the Commission determined that the number of trial court death sentences, as well as the amount and complexity of legal work required on appeals from a penalty of death has increased in recent years and is projected to continue to increase in the future. For the period from 1978 to 1987, five death penalty cases were affirmed on automatic appeal by the California Supreme Court. From January 1987 through August 1988, 37 of the 49 death penalty appeals decided by the State Supreme Court have been

affirmed. Both prosecutors and defense counsel assume that a significant proportion of current and future death penalty cases will also be affirmed by the State Supreme Court. A large number of these affirmed cases will be reviewed by the federal courts and will require research and consideration of issues not necessarily confronted before, or confronted in a different form. Methods of process and procedure in federal criminal appeals cases will also be different and will require additional work.

The Administrative Office of the United States Courts currently estimates that an appellant's attorney could spend in excess of 1,000 hours of time pursuing a simple appeal of a death penalty in the federal venue, at an estimated total cost in excess of $80,000. This may potentially result in OSPD needing to spend a significant amount of additional time and resources pursuing federal appeals in many of the 43 capital cases it currently handles as well as future capital case assignments.

The Commission's report presents eight major recommendations for improving the operations of the Office of the State Public Defender, and insuring the continued provision of the highest quality of criminal indigent appellate defense in California. These recommendations include:

1. The Office of the State Public Defender, as a distinct executive branch agency, should be abolished, and the functions of the current SPD, the Appellate Projects and private court-appointed counsel should be merged into a single autonomous agency within the judicial branch of government. The Legislature, with the concurrence of the Governor, should enact appropriate legislation to carry this out. This new agency may be designated the Appellate Defense Agency (ADA). To allow for a smooth transition, the effective date of the organization should be determined by the Judicial Council, but in no case should exceed four years from the date of enactment. This will result in cost savings due to consolidation of administrative functions and greater efficiency in case handling.

2. The Director of the Appellate Defense Agency (ADA) shall be a member of the State Bar of California and be appointed by the Judicial Council. The Agency should be staffed by attorneys appointed by the Director, and will have as its workload all criminal appeals. The Agency should contract with the Administrative Office of the Courts for administrative support services. The Agency should further have the authority to contract with non-profit corporations, government agencies, and private members of the bar to accept appointment or supervise criminal appeals as necessary.

3. Pending the effective date of the above and with the advice and consent of the Judicial Council, the Office of the State Public Defender should continue its efforts to develop, implement and enforce workload production standards for its professional staff.

4. The current Office of the State Public Defender and the Appellate Defense Agency should increase its current law clerk program in order to expose more law students to criminal appellate work and to identify potential staff candidates.

5. The current Office of the State Public Defender and new Appellate Defense Agency should assign a high priority to implementing a comprehensive timekeeping and docketing system. In addition, the staff in each regional office should be fully trained to use and maintain the data bases for this system.

6. The Judicial Council should periodically retain an independent consultant to perform a detailed cost efficiency study of the Appellate Defense Agency and its functions.

7. The Appellate Defense Agency should collect, maintain, and annually report to the Judicial Council cost information relating to the cost of the indigent criminal appellate work including, but not limited to: name of appellant; conviction being appealed by statute section; time spent on case by category of activity for professional, clerical and administrative staff; identity of attorney(s) assigned to each case, and; any additional ancillary costs and services incurred, by category.

8. The Appellate Defense Agency should limit itself solely and directly to legal representation of indigent individuals convicted of felonies. It should in no way engage in legislative advocacy or educational efforts of incarcerated individuals or any activity other than pure individual court representation. Provided, however, the Director of the Appellate Defense Agency, with the consent of the Judicial Council, may respond to questions, if any, initiated and posed to the Director by legislators in connection with pending legislation.

I. INTRODUCTION

The Sixth Amendment to the Constitution guarantees criminal defendants the right to legal counsel. The United States Supreme Court has interpreted the Sixth Amendment to require federal, state and local governments to provide legal counsel for criminal defendants who are unable to afford legal counsel. In California, the Office of the State Public Defender (OSPD) is the State department that is responsible for the representation of indigent criminal appellants. In addition, the courts appoint private counsel to represent indigent criminal appellants in those cases in which the OSPD is not appointed to provide the necessary representation.

The cost of defending indigent criminals at the appellate level in California has increased dramatically in recent years. In fiscal year 1973-74, prior to the establishment of the OSPD, the total cost to the State of private appellate counsel was $859,920 in real dollars. In fiscal year 1981-82, the State spent $9.7 million to provide defense for indigent criminal appellants. The total budget proposed for this purpose in fiscal year 1988-89 is $32 million. This represents a 230 percent increase in these costs in just seven years and a 3,600 percent increase in 15 years. Furthermore, due to the increasing number of death penalty appeals and other complex non-capital appeals, the cost of providing indigent criminal appellant defense in California is expected to continue to increase in coming years. For example, as of July 1, 1988, there were 216 individuals in California on death row awaiting resolution of their appeals by the California or United States Supreme Courts.

The OSPD has a proposed staff of 103 personnel years in fiscal year 1988-89 and a proposed budget of $7.2 million. The OSPD budget accounts for 22.5 percent of the funding for indigent appellant defense in California in fiscal year 1988-89. The majority of funding, an estimated $24.8 million in fiscal year 1988-89, funds the private counsel under contract with the Administrative Office of the Courts.

The OSPD provides defense for only 10 percent of the total volume of criminal appeals in California each year. However, the Office provides representation for approximately 20 percent of the death penalty cases and over half the cases involving sentences of life without parole. It is widely recognized that these cases are significantly more time-consuming and difficult than the short sentence and guilty plea appeals that comprise the majority of criminal cases in the State appellate courts each year.

In recent years, the OSPD has been plagued with internal problems that have contributed to a perception that it is neither efficient nor cost-effective. The OSPD has been hard-pressed to rebut such allegations because it has not maintained complete data on caseload and attorney productivity. Moreover, it has been asserted that the court-appointed private counsel can do the same work as the OSPD for a fraction of the cost.

In response to the growing number of death penalty appeals and other non-capital appeals, as well as the rapidly increasing cost of indigent criminal appellant defense in California, the Commission decided to undertake a study of the operation and performance of the Office of the

State Public Defender. Since the OSPD provides only a portion of the indigent criminal appellant defense in California, its performance could not be judged in a vacuum. Thus, the Commission also collected information on the cost of operating the Appellate Projects, reimbursement to private court-appointed counsel, and case characteristics of private counsel and OSPD. In this way, the Commission could better evaluate the efficiency and effectiveness of the OSPD.

SCOPE AND METHODOLOGY

The Commission initiated its review of current problems in the Office of the State Public Defender in September 1987. Commission Chairman Nathan Shapell appointed Commissioner Abraham Spiegel as Chairman of the Subcommittee responsible for overseeing and directing the study. In addition, Commissioners Richard Terzian, George Paras and Barbara Stone were appointed as members of the Subcommittee. The Commission also retained an expert consultant, Judge Sheldon Grossfeld (retired), to assist with fieldwork, legal analysis and questions of appellate procedure.

The purpose of the study was to review the operations and effectiveness of the OSPD. Specifically, the study examined the following aspects of the Office of the State Public Defender activities:

- Productivity of staff;
- Quality of work performed;
- Timeliness of work;
- Caseload selection and management;
- Cost-effectiveness of work completed; and
- Management information and tracking systems.

As a part of this study, the Commission held a public hearing on March 16, 1988 in Sacramento. At this hearing, the Commission received testimony from the current and former State Public Defenders, the Federal Public Defender's Office, the Administrative Office of the Courts, Appellate Court Justices, and the Executive Director of the California Appellate Project. The Commission staff also conducted extensive fieldwork to collect information from the three regional offices of the OSPD, District Courts of Appeal, and the appellate projects that serve those courts. In addition, Commission staff worked with various federal, State and local agencies to collect information pertaining to the OSPD and the operation of the state criminal appellate system.

STUDY LIMITATIONS

The study of the OSPD included a partial review of the role of court-appointed counsel in indigent appellate defense. This was done because the OSPD could not be evaluated accurately without comparing the OSPD's operations to those of other entities that perform similar tasks. However, it was difficult to perform detailed statistical analyses because, in part, the data necessary was unavailable from the OSPD and the Courts and in some instances incomplete. Thus, a full analysis was precluded. In addition, much of the data to be compared was in different formats, grouped in varying categories, and based on different criteria. Hence, many of the

comparisons that would have been instrumental to determining the relative cost-effectiveness of the two entities could not be made.

The workload and cost information collected from the OSPD and the AOC were reviewed for reasonableness and accuracy by the Commission. However, the Commission relied on data collected and provided by the OSPD and the AOC for making the comparisons provided in this report.

REPORT FORMAT

This report is presented in four chapters. Chapter II provides background information on the establishment of the Office of the State Public Defender and the Appellate Projects in California. It also provides a description of the current organizations providing indigent criminal appellant defense in the State. Chapter III presents the Commission's findings, while Chapter IV provides the Commission's conclusions and recommendations for addressing the specific problems identified during the study.

II. BACKGROUND

This chapter presents an overview of the history and development of the Office of the State Public Defender (OSPD) and the Appellate Projects which contract with the courts to administer private appointed counsel. It also provides a summary of the costs of indigent appellate defense in the State.

OFFICE OF THE STATE PUBLIC DEFENDER

The Office of the State Public Defender was established in 1976. Prior to the establishment of the OSPD, counsel for indigent criminal appellants was provided by private attorneys on a total or partial pro bono publico, or public service basis. The complete pro-bono practice was discontinued in the sixties. Thereafter, all appointed lawyers were compensated by the court in amounts considerably less than fees charged normally by private attorneys.

While this system satisfied the mandate of the Sixth Amendment of the United States Constitution guaranteeing counsel for indigent criminal appellants, the quality of the representation came under fire from the Attorney General's Office, Appellate Court Justices, and groups concerned with the rights of the accused. They argued that the quality of work produced by some private attorneys was inadequate. A 1974 report commissioned by the Judicial Council, the policy-making body of the State Judiciary, found that over half of all attorneys appointed to do criminal appellate work in the district surveyed were in their first year of practice. In addition, the report showed that more than 90 percent of these attorneys had been in practice less than three years and had little or no prior criminal appellate experience.

The inexperience of some appointed appellate attorneys caused problems for the courts in several ways. First, many appellate justices were not comfortable with the then-established system of court-appointed counsel, which gave the Justices the conflicting responsibilities of appointing defense counsel, judging counsel's work, and determining the amount of compensation counsel should receive. Second, the Attorney General's Office, which is responsible for prosecuting cases, frequently had to raise potential defense issues neglected by inexperienced defense counsel in order to refute such issues so that a later judicial challenge could not be launched based on previously unargued issues.

As early as 1971, the Judicial Council proposed legislation to create a State Public Defender. The chief advantage cited was that, like the Attorney General's Office, a Office of the State Public Defender would develop a cadre of attorneys skilled in handling criminal appeals. This expertise would free the courts and the Attorney General from the burden of researching defense issues to avoid reversals and later writ proceedings for alleged incompetency of appellate counsel. After prior unsuccessful attempts to establish a State Public Defender within the Judicial Branch, the Judicial Council and other interested parties sponsored legislation in 1975, (Chapter 1125, Statutes of 1975), which established the OSPD as an Executive Branch agency. The OSPD became fully operational on July 1, 1976.

The State Public Defender is empowered to represent indigent clients in the following matters:

- An appeal, petition for hearing or rehearing to an appellate court or petition for certiorari to the United States Supreme Court or a petition for executive clemency from a judgment relating to criminal or juvenile court proceedings;
- Petitions for an extraordinary writ or action for relief relating to a final judgment of conviction or wardship;
- Proceedings after a judgment of death;
- Proceedings in which an inmate of a state prison is charged with an offense where the county public defender has declined to represent the inmate; and
- Any proceeding where a person is entitled to representation at public expense.

In addition, the Legislature designated the OSPD to represent indigents at hearings to extend their commitments to persons found not guilty by reason of insanity.

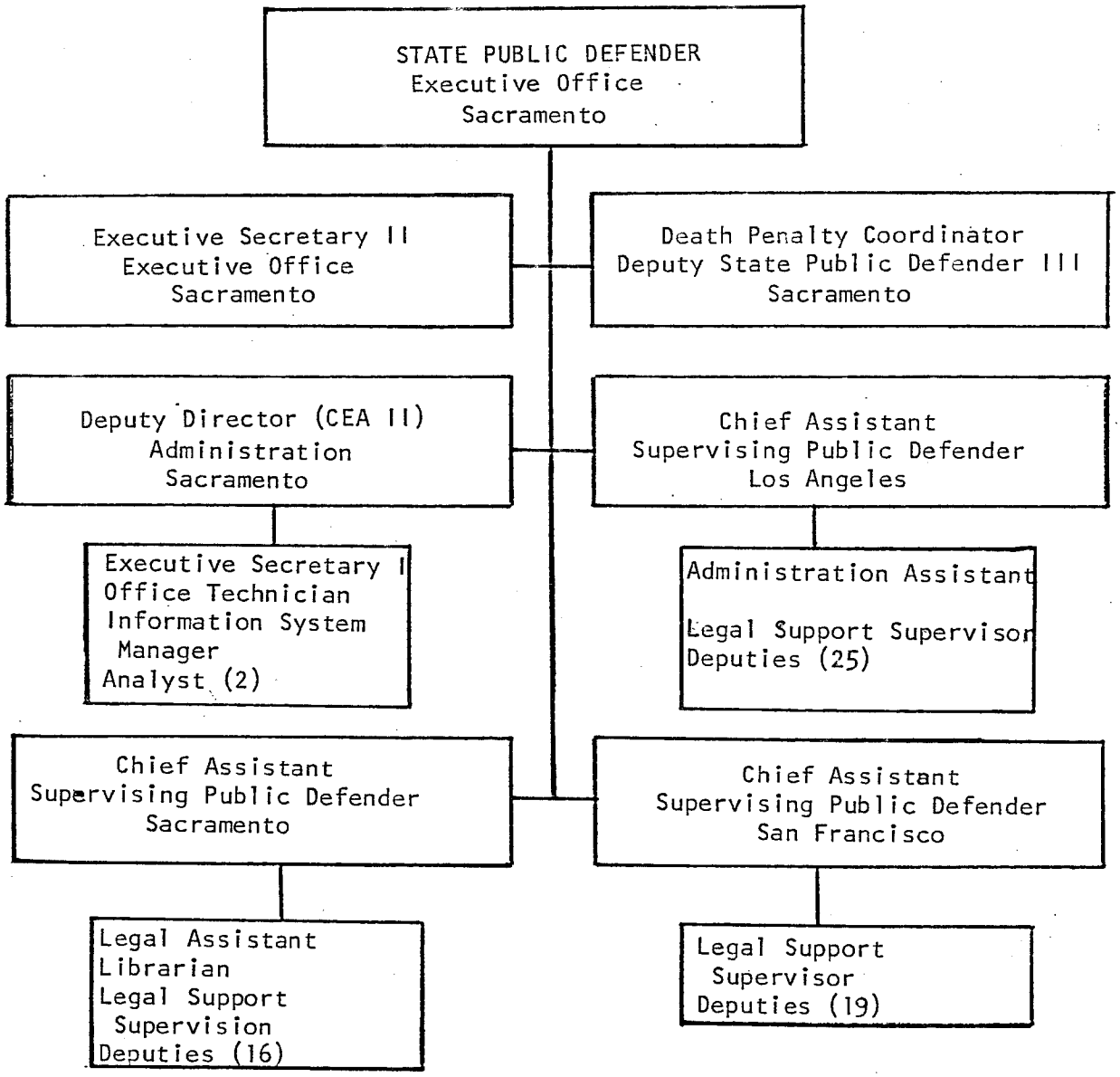
The enabling legislation specifically provides that the OSPD can do the following:

- May employ such deputies and other employees and establish and operate such offices as he may need for the proper performance of his duties;
- May contract with county public defenders, private attorneys, and nonprofit corporations;
- May enter into reciprocal or mutual assistance agreements with the board of supervisors of one or more counties to provide for exchange of personnel; and
- Shall formulate plans for representation of indigents in the Supreme Court and in each appellate district.

Exhibit I provides the current organization chart of the Office of the State Public Defender.

EXHIBIT I

THE STATE PUBLIC DEFENDER'S OFFICE
STATEWIDE ORGANIZATION
July 1988



It was the intent of the Legislature that the OSPD represent all indigent criminal appellants, with its own attorneys handling the serious and complex cases, and with the balance of indigent appellate work performed by private counsel, under contract to OSPD. In actuality, however, the OSPD in the best of years handled only a fraction of all types of cases (approximately 30 percent) and left it to the appellate courts to appoint counsel in the remaining cases, as in the past. In addition, the OSPD also initiated other programs, outside the scope of their authorizing legislation including:

1. Prison Law Projects at Folsom and San Quentin State Prisons, to guide prisoners in the appellate and post-appellate writ procedure (habeas corpus, coram nobis, etc.); and

2. A vigorous and highly visible legislative advocacy role perceived by many to bring about laws and rules more favorable to criminals and criminal appellants.

During its first six years of operation, between fiscal year 1976-77 and fiscal year 1982-83, the OSPD grew from a budget of $2.4 million and 94 authorized positions to a budget of $7.0 million and 154 authorized positions. By fiscal year 1982-83, the OSPD had four regional offices, in Sacramento, San Diego, San Francisco and Los Angeles, and had handled 1,394 cases not including the work of the San Diego office.

In January 1983, the incoming Governor's budget staff reviewed data on the OSPD's case workload and costs. It also reviewed information on the operations of the Prison Law Projects. In fiscal year 1983-84 and again in fiscal year 1984-85, the Governor reduced the staff and budget of the OSPD. By fiscal year 1984-85, the OSPD's staff had been reduced from its prior level of 154 personnel years to 74 personnel years. These reductions caused the discharge of 40 attorneys and 36 support staff and the closure of the San Diego regional office. In addition, its budget was cut from $7.0 million to $4.7 million. The Governor's Office stated that these reductions were undertaken because much of the OSPD's work, particularly on less complex, shorter-sentence cases, could be performed more efficiently and at a lower cost by the private bar.

The 1983 and 1985 Budget Acts also required the OSPD to prepare guidelines and standards for its casework. These Budget Acts also directed the OSPD to establish specific internal case tracking system to provide information on case status, cost of cases, and time expended by staff. In addition, the OSPD was directed to refocus its resources on capital and the most complex non-capital cases.

APPELLATE PROJECTS

With the cutback in funding of the OSPD in fiscal years 1983-84 and 1984-85, $1.654 million was transferred to the Administrative Office of the Courts (AOC) to fund the appointment through that Office of a larger number of private counsel for indigent appellants. In addition, the AOC received $3.854 million to increase the compensation rate for private counsel. The rate was set by the Supreme Court at $40.00 per hour, with the number of billed hours subject to review. This rate was calculated to be 40 percent

of the prevailing rate for private attorneys. Previous payments had ranged from $400 to $800 per case, irrespective of how many hours the case required. It was hoped that a higher compensation rate would attract more qualified attorneys. However, concerns over the competency of appointed counsel remained.

As a means of ensuring the competency of the work performed by appointed private counsel, the Appellate Projects were established. The origin of the Appellate Project concept can be traced to the Fourth Appellate District located in San Diego. In the early 1970s, Appellate Defenders Incorporated (ADI), had been formed as a non-profit corporation to provide representation for indigent criminal defendants. ADI was absorbed by the OSPD when the OSPD opened a regional office in San Diego in 1977. When the OSPD's San Diego branch was closed in 1983, ADI was reestablished employing many former OSPD employees. ADI was the prototype of the current system of Appellate Projects.

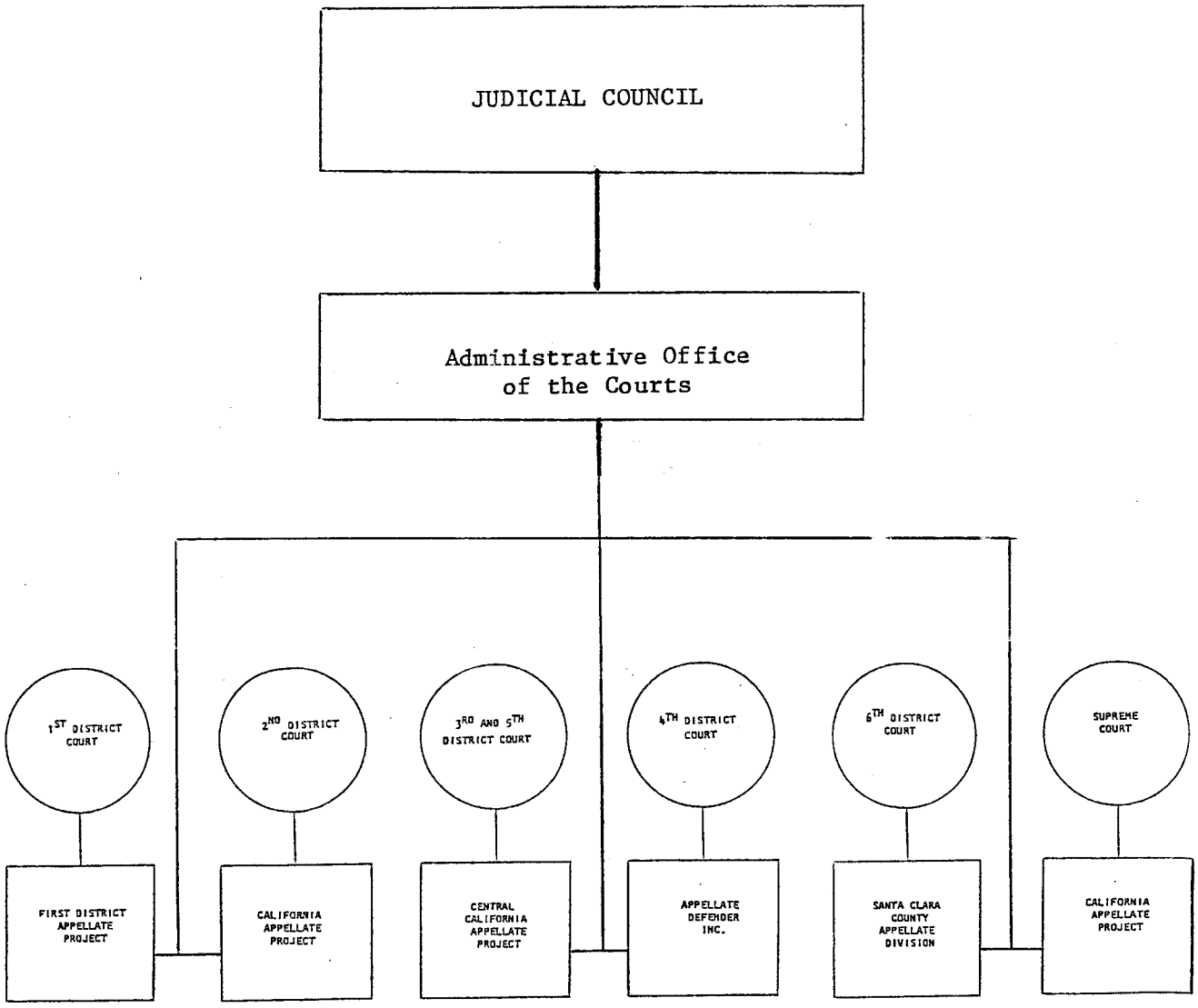
In the First Appellate District, individual Appellate Projects were established on a county-by-county basis during the early 1980s. These projects consisted primarily of individual administrators in the 10 largest counties. These administrators contracted with the appellate court to review cases on appeal, determine their complexity, and match cases with attorneys who had the requisite experience and expertise. While the system was a success, it revealed the need for district-wide administration and closer supervision of attorneys to guarantee uniformly competent representation.

Since 1983, Appellate Projects under contract with the AOC have been established in each of the six appellate districts and for the Supreme Court. Typically, a local bar association is asked to sponsor the program and to assist in setting up a non-profit corporation. Required tasks include hiring an executive director, finding a qualified board of directors, and obtaining initial start-up capital. The executive director then recruits a small staff of experienced criminal defense lawyers, and they in turn screen and rank the field of attorneys who wish to handle cases.

Exhibit II presents the organizational chart of the Appellate Projects and illustrates their relationship to the State Appellate Judiciary.

EXHIBIT II

APPELLATE PROJECTS ORGANIZATION CHART
July 1988



Note: The Judicial Council is established to administer the State Judicial system. The Council is comprised of State Trial and Appellate Judges and members of the State Bar and the Legislature. The Administrative Office of the Courts is the staff office of the Judicial System.

The Appellate Projects recruit members of the private bar to accept case appointments; evaluate cases and recommend assignment by the Court of appropriate attorneys; provide assistance and case progress monitoring as needed; and review case billings and recommend compensation of private bar members to the courts.

Exhibit III outlines the budgets of the Appellate Project contractors for fiscal year 1988-89.

EXHIBIT III
SUMMARY OF APPELLATE PROJECT COSTS
Fiscal Year 1988-89

Project Name	Function	Amount of Contract	Number of Staff
California Appellate Project (Supreme Court)	Death Penalty	$1,239,352	8
First District Appellate Project	First Appellate District	$1,211,375	9
California Appellate Project	Second Appellate District	$1,781,053	15
Appellate Defenders Inc.	Fourth Appellate District	$1,784,282	11
Central California Appellate Project	Third and Fifth Appellate Districts	$1,674,795	13
Santa Clara County	Sixth Appellate District	$654,550	4
TOTAL		$8,345,407	60

Note: Above figures include administrative and some undetermined, but minor direct appellate attorney costs.

As Exhibit III shows, the total amount budgeted for appellate project functions in fiscal year 1988-89 is approximately $8,345,000. The legal staff of the projects total approximately 60 attorneys, including project directors.

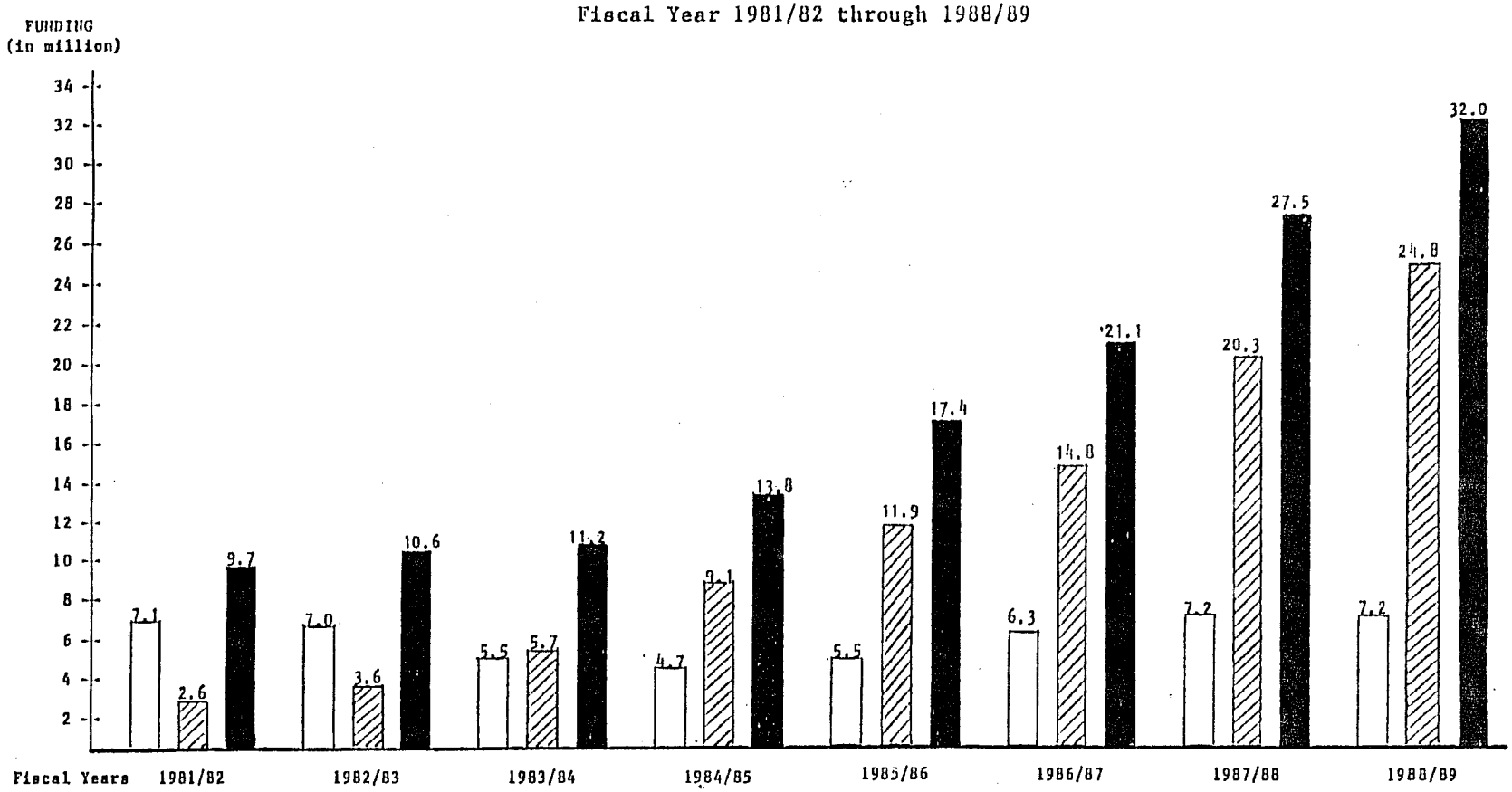
The Appellate Projects effectively duplicate the form and function of the State Public Defender in the private sector. The system is designed to relieve the judiciary from the duties of assignment of private counsel and assessment of performance of counsel for purposes of payment.

FUNDING FOR INDIGENT DEFENSE

The costs of appellate defense have been rising rapidly in recent years. Exhibit IV provides a summary of the changes in the budgets for the OSPD and court-appointed counsel, including the administrative cost of the Appellate Projects, over an eight-year period.

EXHIBIT IV

SUMMARY OF STATE EXPENDITURES FOR INDIGENT APPELLANT DEFENSE
Fiscal Year 1981/82 through 1988/89



Key: ☐ State Public Defender Expenditures

▨ Court-Appointed Counsel and Appellate Project Expenditures

■ Total Indigent Appellant Defense Expenditures

Note: The expenditure information for appointed counsel does not include certain administrative cost incurred by the Administrative Office of the Courts.

SOURCE: Governor's Budgets, fiscal years 1981/82 through 1988/89

Exhibit IV displays the dramatic increase in the total funding for indigent appellant defense between fiscal year 1981-82 and 1988-89. It shows that the total expenditures for indigent appellant defense have increased from $9.7 million in fiscal year 1981-82 to $32 million in 1988-89, an increase of 230 percent.

Exhibit IV also reveals that the funding of the OSPD is approximately at the same level in fiscal year 1988-89 as in fiscal year 1981-82, although it was reduced considerably during intervening years. The OSPD's funding in fiscal year 1988-89 is $7.2 million compared to $7.1 million in fiscal year 1981-82, an increase of slightly more than one percent. This Exhibit also reveals that in the OSPD's leanest year, fiscal year 1984-85, expenditures were as low as $4.7 million.

Conversely, Exhibit IV illustrates the meteoric growth in the state expenditures for private court-appointed counsel. For example, the total expenditures for court-appointed counsel and the Appellate Projects increased from $2.6 million in fiscal year 1981-82 to $24.8 million in fiscal year 1988-89, an increase of 843 percent.

DEATH PENALTY CASES

Under California law, defendants charged with and found guilty of first degree murder under Sections 188 and 189 of the Penal Code are subject to one of two penalties: death or life in prison without possibility of parole, if what are known as "special circumstances" are charged and found true by the jury. Section 190.2 of the Penal Code defines these "special circumstances" to include, but not be limited to:

- Multiple murders;
- Conviction of a prior murder;
- Murder of a judge, prosecutor, police officer, fireman or elected official in retaliation for or to prevent the performance of the victim's official duties;
- Murder of a witness to prevent testimony;
- Murder for financial gain;
- Murder while lying in wait;
- Murder involving torture of the victim; and
- Murder in the commission of such crimes as robbery, kidnapping, rape, sodomy and arson.

As of July 1, 1988, a total of 216 persons in California prisons have been sentenced to death by trial courts under the above conditions.

In California, persons sentenced to death by a trial court automatically have their cases reviewed by the California Supreme Court. The Supreme Court may on appeal affirm the sentence, modify it, or remand the case back to the trial court for further proceedings in either the guilt or penalty phases which may include either a complete new trial or a trial relative to penalty determination. In addition to the initial automatic appeal, defense counsel may pursue a collateral application to the California Supreme Court based on issues not apparent from the transcript of the trial proceedings. If the California Supreme Court affirms a death sentence, the

case is then eligible for review through the federal courts regarding possible federal questions.

Federal criminal proceedings, especially on death penalty cases, can be extremely complex and time consuming. Procedures and substantive issues in many cases are also different. Defense counsel in a capital case will usually file a writ of certiorari to the United States Supreme Court after affirmation by the California Supreme Court. This writ addresses issues raised directly from the record of the trial court proceeding. If a writ of certiorari is denied by the Supreme Court, defense counsel may then choose to file an application for writ of habeas corpus with the appropriate Federal District Court. An application for a writ of habeas corpus is based upon items not found in the trial record, such as omissions of counsel, prejudice or other matters. The application for writ of habeas may be processed through the United State District and Circuit Courts to the Supreme Court.

III. STUDY FINDINGS

This chapter presents the Commission's seven major findings regarding the State's administration of the current system of indigent criminal defense and the operations and performance of the Office of the State Public Defender (OSPD). Each finding is presented separately in the following sections.

FINDING #1 - INDIGENT APPELLATE DEFENSE IN CALIFORNIA COULD BE PROVIDED IN A MORE EFFECTIVE AND LESS COSTLY MANNER

Responsibility for providing indigent appellate defense in California is divided among several different entities located in two separate branches of State government. These include the private bar, contracted Appellate Projects and the Administrative Office of the Courts within the Judicial Branch; and the OSPD, located in the Executive Branch. This creates competition between systems for certain types of cases; causes shortages of available attorneys for other types of cases, particularly complex capital and non-capital cases; duplicates administration and oversight of defense efforts and results in greater cost and less effective case handling.

RESPONSIBILITY FOR INDIGENT APPELLATE DEFENSE

Responsibility for indigent appellate defense in California is currently divided into four categories:

1. the OSPD, which provides direct staff appellate counsel and supervision of such counsel;

2. private members of the bar, who provide appellate representation work under appointment;

3. six "Appellate Project" corporations, who supervise the work of court-appointed counsel, under contract to the Administrative Office of the Courts (AOC); and

4. AOC, which provides staff service to the appellate projects, as well as billing and payment services to private court-appointed counsel.

Early versions of the OSPD's enabling legislation sponsored by the Judicial Council, placed OSPD within the judicial branch of State government. However, the legislation finally enacted (Chapter 1125, statutes of 1975) placed OSPD in the executive branch. The potential role of OSPD in contracting with and overseeing the work of the private bar handling appeals was also foreseen in legislation passed in 1977 (Chapter 1102, statutes of 1977). Section 15402 of the Government Code allows the State Public Defender to contract with private attorneys and non-profit corporations to provide appellate defense services to indigents, and to supervise the work of these private attorneys and corporations.

Exhibit V lays out the overlapping areas of responsibility among the various entities involved in indigent appellate defense in California.

EXHIBIT V

COMPARISON OF
STATUTORY AND CONTRACT RESPONSIBILITY
FOR APPELLATE DEFENSE ACTIVITIES

Function	State Public Defender	Private Bar	Appellate Project	Administrative Office of the Courts
Recruit and Train Capable Appellate Attorneys	X		X	
Perform Initial Review and Case Selection	X		X	
Assign Attorneys and/or Accept Case Assignment	X	X	X	
Monitor Work Quality and Timeliness	X		X	
Review Casework to Set Appropriate Compensation	X		X	
Recommend or Issue Appropriate Compensation	X		X	X
Maintain a Brief Bank and Other Resource Materials	X		X	
Provide Budgetary, Statistical and Administrative Support	X		X	X

Sources: The Office of the State Public Defender and Administrative Office of the Courts.

Exhibit V clearly indicates the overlap and duplication of functions of the OSPD and the various components of the court appointed private counsel system. Direct client representation, for example, can be provided by the OSPD staff, Appellate Project staff, or members of the private bar under contract to either the Appellate Projects or OSPD. Case selection and assignment, as well as oversight, can be performed by either the OSPD or the Appellate Projects.

Administrative support, including budgetary and statistical work, is provided by the OSPD, the Appellate Projects and AOC. In fiscal year 1987-88, the Appellate Projects were budgeted approximately $7.5 million to fulfill their recruitment and oversight functions, as well as directly accept assignment in a limited number of cases. During the same period,

OSPD dedicated approximately $2.1 million of its $7.2 million budget for administrative and senior management functions. AOC has dedicated the services of at least five employees, as well as additional unknown computer and administrative support costs to the Appellate Projects and private court-appointed counsel. This duplication of form and function in two separate branches of State government illustrates the need to better oversee and control the work of private-appointed counsel in the absence of indigent defense by OSPD; the current system was undertaken by the Courts in order to assure adequate indigent appellate defense in California, because of the inability of the OSPD to provide the same.

Indigent Appellate Defense in Other Jurisdictions

Other states and the federal government provide examples of differing structures of indigent defense organizations. Indigent defense for cases originating in the federal courts is handled by the Defender Services Division of the Administrative Office of the United States Courts. Most states house their indigent defense systems in the judicial branch of government, based on the belief that the judiciary is responsible under the Sixth Amendment for providing equal representation for all persons accused of a crime, as well as the idea that an organization which is part of the judicial branch is less likely to engage in partisan politics than one housed within the executive branch.

For example, New York has an "Assigned Counsel Plan" for both trial and appellate levels. This program is housed in the Court of Appeal at the appellate level and is almost identical to California's appellate projects. The Assigned Counsel Plan provides legal counsel for indigents, reviews work for quality and timeliness, and reviews and recommends compensation claims for the courts. In Illinois, the State Appellate Defender handles all appeals (except conflict cases) outside of Cook County. The Cook County Public Defender's Office, which has its own criminal appellate division, is responsible for approximately 57 percent of indigent appeals in Chicago, with the balance divided among the State Appellate Defender (33 percent) and private assigned counsel (10 percent). In Michigan, an Appellate Defender Commission, composed of appointees of the executive, legislative and judicial branches, is technically housed within the judiciary. The Commission is the policymaking authority for both the Michigan State Public Defender and the Appellate Assigned Counsel Program. The State Public Defender is the permanently staffed agency assigned to indigent appellate defense and is required by statute to accept appointment in not less than 25 percent of all felony appeals, subject to certain quality standards. The Appellate Assigned Counsel Program nominates private bar members for court appointment, and oversees the quality and timeliness of appointed counsel's work based upon established standards.

Caseload Conflict

Another difficulty which has arisen is the competition between the OSPD and certain of the Appellate Projects for assignment of certain types of cases. In a few instances, there has been a scarcity of OSPD attorneys or private counsel available for case assignment. Each system attempts to garner cases which its own staff or attorney pool can handle with a minimum of difficulty.

Interviews with senior management of the OSPD and several Appellate Project directors indicate that certain types of cases may be disproportionately assigned to a particular organization. Long record cases, for example, are generally assigned to OSPD, while shorter cases are more often handled by the Appellate Projects. The OSPD has indicated that in some instances its regional offices cannot obtain appointment in less complex cases when there is a temporary lull in the OSPD workload. Conversely, gaps in coverage may appear, particularly in complex cases, when neither OSPD nor the Appellate Projects are available to handle cases in a timely fashion. This is a particular problem in capital cases facing possible federal appeals. OSPD has indicated that it has absorbed all the capital cases it can for several months, and the California Appellate Projects (CAP) has experienced some difficulty in recruiting members of the private bar for assignment to such cases. Potentially, case assignment and work may not be timely in such instances, leading to delays and backlog in the appeal process.

Professional Recruitment

Since the budget cuts in fiscal years 1983-84 and 1984-85, the OSPD has experienced difficulty in recruiting and retaining legal staff. This is due, in part, to the establishment of the various appellate projects, as well as the perceived and actual increases in office workload, and concern over the future direction of the OSPD.

A number of attorneys have left the OSPD in recent years to staff the newly established Appellate Projects, or to act as private-appointed counsel. Former OSPD staff have indicated that they have moved to the Appellate Projects for a number of reasons, including the opportunity to take a teaching/oversight role, a lessened caseload, and a better transition to private practice. Between 1983 and the present as many as 17 former OSPD staff attorneys have worked on the staff of the various Appellate Projects.

The OSPD management and staff also note that the lack of confidence in the OSPD's continued viability as an energetic defense agency has resulted in some loss of staff. Interviews with former staff attorneys further indicate that a number have left as a result of "burnout," the result of working for an extended period on complicated criminal cases involving persons convicted of serious crimes. Additionally, some attorneys have also left the OSPD recently, at least in part, because they had a philosophical or moral aversion to working on mandatory death penalty cases. This occurred because the OSPD, in late 1987, instituted a requirement that all staff attorneys carry at least one death penalty case in their workload after having been with the office for one year.

As an indicator of the vacancies within the OSPD's ranks, Exhibit VI displays the number of authorized positions by category within the OSPD and the number of vacancies for those positions as of October 13, 1987, May 2, 1988 and July 15, 1988.

EXHIBIT VI

STATE PUBLIC DEFENDER'S OFFICE
AUTHORIZED POSITIONS AND VACANCIES

Staff Positions	Authorized	Positions Filled 10/13/87	Positions Filled 5/2/88[1]	Positions Filled 7/15/88[2]
Public Defender and Chief Deputies	4	3	2	2
Attorneys	61	41	47	46
Support Staff	38	30	28	27
TOTAL	103	74	77	75

Note: 1. Three attorneys on maternity leave; one attorney on workers' compensation leave; one support staff on workers' compensation leave.

2. Two attorneys on maternity leave; one support staff on disability leave.

Source: Office of the State Public Defender

Exhibit VI shows that the OSPD had a vacancy of 20 of its 61 attorneys in October 1987. By May 1988, the OSPD still had 14 vacant authorized attorney positions, and in mid-July 1988, 15 attorney positions were vacant. This indicates a continuing staffing problem within the OSPD. Constant high vacancy rates translate to constant reassignment of caseload as attorneys depart and delays in casework as the existing attorneys have a reduced ability to accept new case assignments from the courts. This also results in an increased investment in training by current staff of newly hired staff attorneys, as well as the new attorneys' initial lower productivity.

One successful program which the OSPD has pursued to recruit new staff attorneys over the years is the law clerk program. Particularly in the Los Angeles and San Francisco regional offices, the OSPD has had success in past years in recruiting law students and recent graduates as clerks, in order to expose them to both the OSPD and the process of criminal appellate defense. Several of the most dedicated and competent OSPD attorneys have passed through this program. Such early exposure to the OSPD and criminal appellate practice allows the OSPD to review prospective candidates for staff positions and lessens the possibility of an unsuitable hire.

FINDING #2 - THE PROFESSIONAL WORK PERFORMED BY THE OFFICE OF THE STATE PUBLIC DEFENDER IS CURRENTLY MORE COMPLEX THAN THE WORK PERFORMED BY PRIVATE COURT-APPOINTED COUNSEL AND IS AT LEAST COMPARABLE IN QUALITY

It is difficult to compare the caseloads of the Office of the State Public Defender and the private court-appointed counsel because of the differences in the caseloads each group handles. Generally speaking, however, the OSPD at this time handles a more difficult caseload. For those types of cases which are handled by both the OSPD and private court-appointed counsel, the professional work of the OSPD is acknowledged to be equal to or superior to the work of private court-appointed counsel. The Little Hoover Commission was unable to make valid cost comparisons between the cost of work performed by the OSPD and private court-appointed counsel due to the inadequate cost information available to the Commission at the time of this study.

In fiscal year 1983-84, the Governor reduced the OSPD's budget and directed the OSPD to focus its resources on capital and other complex non-capital work. The funds trimmed from OSPD were then transferred to the judicial branch in order to appoint more private attorneys and set up a formal system of oversight for private counsel. Part of the rationale for the OSPD budget reductions and change in mandate was the belief that private court-appointed counsel could handle the less complex appellate cases more economically than the OSPD.

During the fiscal year 1983-84 budget hearings, members of the Legislature voiced their concerns that, while private court-appointed counsel appeared less expensive in direct costs, it might have greater indirect costs. These members asserted that the work of the OSPD was generally recognized as superior to that of most appointed attorneys and that the increased quality of work resulted in cost savings in both time and money to the courts and the Attorney General. The Legislature, therefore, attempted to fund the operations of the OSPD at a level more nearly equal to its prior funding.

Measuring Case Complexity

While the Governor vetoed the attempt to restore OSPD's funding, he retained the supplemental Language adopted by the Legislature which affected both OSPD and private court-appointed counsel. The language required that both the OSPD and the Administrative Office of the Courts (AOC) gather and analyze data regarding the efficiency of the OSPD and private court-appointed attorneys. Specifically, the language required that each agency:

- Classify appeals by level of complexity (sentence length, record length, etc.);
- Reflect hours claimed or spent on each appeal; and
- Determine compensation paid or cost of each case.

From its experience in appellate work, and in consultation with the AOC, OSPD identified four primary factors that indicate the complexity of a case: sentence length; trial record length; opening brief length; and the number of motions/petitions filed.

In addition, the OSPD notes that there are other subtle factors that reflect case complexity including type of trial, principal penal code violation and number of hours spent in oral argument before the court.

The four primary indicators of complexity are especially significant because the OSPD and the AOC both used them when they prepared their respective cost/complexity reports. The OSPD completed its cost/complexity report in January 1988. The OSPD's report included 1,035 cases which were assigned between July 1, 1985 and June 30, 1987. OSPD's data only reflects the 1,002 cases for which the records were received for case record length data and the 779 cases for which the opening brief was filed for brief length data. OSPD's data regarding the number of motions/petitions filed was limited to closed cases which represented less than half of the sample.

The AOC completed its cost/complexity report in December 1987. The AOC report includes 4,114 cases concluded between July 1, 1986 and June 30, 1987, irrespective of the date of assignment.

One additional factor that should be noted is the major difference in the overall composition of the caseloads of OSPD and private court-appointed counsel. As a matter of policy, the OSPD now takes no cases where the appellant pleaded guilty at the trial level. Also, the OSPD does not currently take cases involving juveniles, except by specific request of the Court. These two categories of cases comprise a large number of the total criminal appeals processed each year and generally involve limited issues, which can be completed more quickly by assigned counsel, at a lower cost to the State. These types of cases represent a significant, but unknown, portion of cases reflected in the AOC cost/complexity study.

While the overall formats of the AOC and the OSPD reports are different, comparisons can be made between three of the four primary indicators agreed upon by the OSPD and the AOC. Exhibit VII presents a summary of selected complexity factors of cases handled by OSPD and private counsel, including sentence length, record length and brief length.

EXHIBIT VII

COMPARISON OF AVERAGE SENTENCE LENGTH, TRIAL RECORD LENGTH AND OPENING BRIEF LENGTH FOR CASES HANDLED BY THE PUBLIC DEFENDER'S OFFICE AND PRIVATE COURT-APPOINTED COUNSEL

Sentence Category[a]	State Public Defender's Office[1] Percent of Cases	Court-Appointed Counsel[2] Percent of Cases
Death Penalty	.3	0
Life Without Parole	3.1	1.5
15 Years to Life	48.9	15.5
5 to 15 Years	35.0	32.5
0 to 5 Years	12.7	37.5
Others	0	13.0
TOTAL	100.0	100.0
Record Length[b]		
1,500 or more pages	13.7	8.5
800 to 1,499	21.4	13.8
300 to 799	46.4	32.3
299 or less	18.5	45.4
TOTAL	100.0	100.0
Brief Length[c]		
40 or more pages	22.8	10.9
30 to 39	17.1	8.5
20 to 29	24.1	19.6
19 or less	36.0	61.0
TOTAL	100.0	100.0

Notes: a. Represents 779 cases for which the OSPD had filed the opening brief. Represents 4,091 cases in the AOC study.

b. Represents 1,002 cases for which the OSPD had received the trial record. Represents 3,561 cases for which the AOC had complete information.

c. Represents 779 cases for which the OSPD had filed the opening brief. Represents 3,561 cases for which the AOC had complete information.

Sources:

1. "Report to the Legislature Regarding OSPD Activities and the Case Complexity of the Criminal Appeals it Handles," OSPD, January 1988.

2. "Report on Complexity and Cost of Criminal Appeals for Indigents Represented by Court-Appointed Counsel," AOC, Judicial Council, December 1987.

As Exhibit VII illustrates, 52.3 percent of the OSPD's caseload is comprised of sentences which involve the death penalty, life without parole, or 15 years to life. Conversely, only 17 percent of the cases not handled by the OSPD involves these more difficult cases. Similarly, 35.1 percent of OSPD's cases have records of over 800 pages, whereas only 22.3 percent of the non-OSPD cases have records of this length. Moreover, 39.9 percent of OSPD's opening briefs are 30 or more pages compared to 19.4 percent for the private bar. Finally, over 60 percent of private lawyer briefs are under 20 pages in length, compared to 36 percent for the OSPD's. When viewed as a whole, the average OSPD case is apparently more complex, carries a longer sentence, has a longer transcript, and requires a longer brief.

As the preceding Exhibit indicated, the OSPD accepts appointment in the more complex cases. It should also be noted that the data from the cost/complexity study tends to understate the true nature of the OSPD's caseload. In the two-year study period, the total number of appointments received by the OSPD was 1,035. OSPD has filed opening briefs in 779 of these cases, but finalized only 496. Many of the most serious cases take longer than two years to process through the system, thus they are not reflected in the data. The most notable example is death penalty work. The two cases reflected in the OSPD cost/complexity study have not yet been decided by the California Supreme Court. The two death penalty cases reflected in the AOC study have been decided in the California Supreme Court, but were assigned several years before the beginning of the study period. Work on death penalty cases represents a significant amount of attorney time during that period.

Quality of Work

The overall comparison of the quality of the work performed by the OSPD and private court-appointed counsel is difficult to assess because each case is, in some way, unique. The OSPD was established in 1976 in response to concerns in the Judiciary and the Legislature over the perceived inconsistent quality of the criminal appellate work performed by the private court-appointed counsel. The Appellate Projects were established in the early 1980s because during this period, the OSPD had absorbed, at best, less than a third of the caseload, leaving the majority of the caseload to be handled by private counsel, with the same concerns for inadequate representation. Some private court-appointed attorneys consistently produce work of the highest quality, while others do not. The improved oversight and organization of private counsel under the system of appellate projects has vastly improved the level of competency of the work performed by private counsel. However, many appellate justices still feel that OSPD performs at a superior level, especially on the most serious cases.

In the process of conducting this study, Commission staff interviewed justices from each of the appellate districts in the State, as well as the Chief Justice of the California Supreme Court. In each instance, the

quality of work of OSPD was praised. Other agencies involved in criminal appellate work also lauded the caliber of OSPD's professional work. At the Commission's public hearing on the operations of OSPD held on March 16, 1988, the Administrative Presiding Justice of the First District Court of Appeals stated, "the quality of the briefing, the representation by the Office of the State Public Defender is universally agreed to be excellent . . . I think that we can be, and are unanimous in that opinion." This statement is consistent with the opinions expressed by justices interviewed in each of the appellate districts.

Cost of Work

Pursuant to the 1983 and 1985 Budget Acts, both the OSPD and the AOC attempted to record the hours spent on each appeal and either the compensation paid, or the cost of each appeal. Both agencies included sections in their recent cost/complexity reports which addressed this issue. The AOC provided the average number of hours claimed by counsel and the number of hours approved, as well as average expenses claimed and approved. The OSPD was able to record the number of hours spent to close cases in a particular category, based upon sentence length.

One of the major difficulties in properly calculating comparative cost per case is that no two cases are exactly the same. In addition, the case profiles of the cases handled by the OSPD and the private court-appointed counsel vary considerably. As noted earlier, the OSPD cases in the same sentence category as those handled by private counsel generally have longer records, require longer briefs, require oral argument, and may require additional petitions and reply briefs.

When calculating the cost of private court-appointed counsel, two factors must be considered. First, there is the direct reimbursement to the attorney for the actual cost of handling the case. For fiscal year 1987-88, the private counsel was reimbursed at the rate of $50 per hour in appellate court cases and $60 per hour in Supreme Court death penalty cases. The second factor is the cost of monitoring the quality of the casework and the progress of the case through the appellate court, as well as the provision of other administrative services. Administrative oversight, quality control, and other support services are provided by the AOC, the staff of the District Courts of Appeal and the Appellate Projects. As noted earlier in this report, the Appellate Projects were specifically established to monitor the quality of work performed by appointed private counsel and to assist such counsel in completing their work in a timely and professional manner.

The Appellate Projects are reimbursed $60 per hour of staff attorney time to assist appointed counsel in the preparation of the case. The actual number of hours spent by Appellate Project staff varies considerably depending on the case and the expertise of the appointed attorney. However, for budgeting purposes, AOC assumes an average of 16 hours per case of Appellate Project attorney oversight. For billing purposes, this time is not recorded as a direct cost to the system, but can be viewed as an additional $960 (16 hours x $60) per case that is not accounted for as billable time. In addition, each case assigned by an Appellate Project is budgeted an administrative services cost of $75.

There are also unknown administrative costs incurred by the appellate courts and the AOC in handling and transmitting payment vouchers, auditing compensation claims made by the appointed private counsel and the Appellate Projects, as well as performing other statistical, budgetary and support services. These additional administrative costs are not reflected in case billings.

Commission staff has attempted to calculate a comparative cost per hour of attorney's time for both the OSPD staff attorney and private court-appointed counsel. However, staff was unable to complete such a comparison. Notwithstanding the mandate by the Legislature, neither agency maintains data on case costs in a manner which readily lends itself to comparison. Essential data on court-appointed counsel costs was not made available to the Commission by either the AOC or the OSPD at the time of this study.

The data within the cost/complexity studies and the information available from both the AOC and the OSPD further limits the ability to perform an accurate case profile and determine the average hours required by each entity to close a comparable case. In order to make an accurate comparison of time needed to close a case, one needs a pool of cases for each entity which have similar profiles. Commission staff identified only two indicators of complexity, penal code violation and length of trial record, which are consistent and accurate for both the AOC and the OSPD. Since the AOC data includes cases that are appealed after a guilty plea in trial court and juvenile cases, both of which are less time consuming, it is difficult to segregate average private counsel cases which would be directly comparable to similar case profiles handled by the OSPD. In short, an accurate analysis of hours needed to close a case cannot be adequately performed using only two profile factors. Furthermore, unless guilty pleas and juvenile appeals can be separated from the body of court-appointed private counsel work, no fully accurate comparison for cost purpose can be made.

The OSPD generally handles a more complex caseload consisting of cases with longer sentences and longer records, which require more extensive briefing and oral argument than cases handled by the private bar. The OSPD's work has consistently been recognized for its quality. The hourly rate paid the OSPD attorneys is comparable to compensation received by court-appointed private counsel. Moreover, reimbursement to private attorneys does not reflect the many administrative costs incurred by the AOC and the Appellate Projects to oversee and monitor private attorney performance.

While it may in the future be possible to compare the average cost per case for the OSPD and the court-appointed private counsel, the Commission was unable to do so with the information available at the time of this study.

FINDING #3 - THE OFFICE OF THE STATE PUBLIC DEFENDER HAS RECENTLY FOCUSED ITS EFFORTS ON CAPITAL AND COMPLEX NON-CAPITAL CASES, BUT HAS HAD TROUBLE ACHIEVING ITS OWN WORKLOAD PRODUCTIVITY

In 1983, the Governor directed that OSPD concentrate its resources and energy on capital and complex non-capital cases. Prior to 1983, OSPD

routinely accepted many less complex cases, but since that time OSPD has focused its efforts on more complex cases. More than half of OSPD's caseload now consists of cases with sentences of 15 years to life, life without parole, or death. However, OSPD has been unable to achieve its own caseload goals. This failure is attributable to several factors including: faulty caseload projection methodologies; an inability to control the type or number of cases assigned to the OSPD; and unanticipated, excessive staff turnover.

CHANGES IN OSPD WORKLOAD

When the OSPD was established in 1976, it was originally intended that the OSPD would handle most or all of the State's criminal appellate cases involving indigents. The enabling legislation granted the OSPD broad authority to represent all indigents on appeal or to contract with the private bar to handle such appeals. Additional legislation (Chapter 1240, Statutes of 1976) authorized the OSPD to defend State prison inmates in trial court proceedings regarding the alleged commission of crimes within prison facilities whenever the county public defender was unable to act. Chapter 164, Statutes of 1977, and Chapter 1114, Statutes of 1979, further authorized OSPD to represent mentally disordered sex offenders at hearings to extend their commitment in state hospitals.

In fiscal year 1980-81, the OSPD handled a total of 1,216 appellate cases, excluding the work of the San Diego office which was abolished in 1983. This represented roughly 30 percent of all criminal appellate work performed in the State for that period. This included a wide variety of cases, such as many guilty pleas, juvenile dependency cases, probation revocations and other simple appeals. Similarly, in fiscal year 1982-83, the Office accepted 1,394 appeals, not including San Diego's caseload. The OSPD was able to handle a relatively large number of cases in these years because the OSPD accepted various types of cases without regard to their length or complexity.

Comparison of Caseload Profiles

No accurate breakdown of OSPD caseload by sentence category exists for the period from 1976 through 1981. However, the statistics for fiscal year 1982-83 are illustrative of the OSPD's case selection policy prior to the Governor's direction that the OSPD concentrate its resources on capital and complex non-capital cases. Since 1983, the OSPD has been keeping closer track of its caseload. Thus, the data for fiscal year 1982-83 can be compared to caseload data from recent years.

Exhibit VIII presents a comparison of OSPD caseload categorized by length of sentence between fiscal years 1982-83 and 1986-87.

EXHIBIT VIII
COMPARISON OF CASELOAD OF THE
STATE PUBLIC DEFENDER'S OFFICE BY
SENTENCE CATEGORY BETWEEN
FISCAL YEARS 1982-83 AND 1986-87

	Fiscal Year 1982-83[1]		Fiscal Year 1986-87[2]	
Sentence Category	Number of Cases	Percent of Total	Number of Cases	Percent of Total
Death Penalty	9	.6	7	1.5
Life-No Parole	24	1.7	20	4.2
15 Years to Life	160	11.5	221	47.0
5 to 15 Years	342	24.5	154	32.8
Probation to 5 Years	693	49.7	68	14.5
Juvenile Appeals	164	11.8	0	0
Conservatorships	2	.2	0	0
TOTAL	1,394	100.0	470	100.0

Source: 1. Memo from the Public Defender's Office to Senate Budget and Fiscal Review Committee, April 29, 1985.

2. Annual Caseload Report, the Office of the State Public Defender, July 1987

The OSPD developed the sentence categories to denote complexity of cases because the length of sentence is a primary indicator of the complexity and seriousness of a case. As Exhibit VIII illustrates, the bulk of OSPD's caseload has shifted from the simpler cases, such as those involving sentences of probation to 5 years and 5- to 15-years, to the more complicated cases involving the death penalty, life without parole, and 15 years to life sentences. In 1982-83, only 13.8 percent of the OSPD's cases involved the death penalty, life without parole, or 15 years to life sentences. However, obviously because of the Governor's mandate in 1986-87, these categories represented 52.7 percent of the OSPD's caseload. Furthermore, in 1982-83, 12 percent of the caseload was comprised of juvenile appeal cases and conservatorships, which are generally considered less demanding than adult appeals. The OSPD no longer handles these cases, except by special request from the courts.

The most complex and time consuming criminal appellate cases are death penalty cases. Benchmarks for an "average" capital appeal total

approximately 1,000 hours on State appeals, but it is not uncommon for a complex capital case to require attorney time in excess of 2,000 hours at the State appellate level, spread out over five or more years. For the period from July 1983 through June 1988, the OSPD has accepted appointment in 24 of the 117 assigned death penalty cases, or 21 percent of the available caseload. The OSPD is currently handling a total of 43 active death penalty appeal cases. The OSPD in October 1987 committed to taking a total of 10 new capital cases in the then-current fiscal year. That commitment was not achieved. In addition, the OSPD agreed to take assignments in 10 additional new cases in fiscal year 1988-89. That commitment was not achieved either, and is now under review by the new management of the Office. Only by handling an increased number of death penalty cases and focusing on the most complex non-capital cases, would the OSPD fulfill the direction given by the Governor in 1983.

WORKLOAD GOALS AND ACHIEVEMENT

During the last several years, OSPD has had great difficulty in both projecting accurate workload goals and achieving those goals.

Exhibit IX displays the projected caseload and actual caseload of the OSPD for fiscal years 1985-86 and 1986-87. It shows the number of cases by category that the OSPD predicted it would be able to accept in each fiscal year and the number of cases it actually accepted.

EXHIBIT IX

SUMMARY OF ACTUAL CASES ACCEPTED BY THE
OFFICE OF THE STATE PUBLIC DEFENDER AS A
PERCENT OF CASELOAD GOALS
FISCAL YEARS 1985-86 AND 1986-87

	Fiscal Year 1985-86			Fiscal Year 1986-87		
Sentence Length	Case Goal	Cases Accepted	Percent of Goal	Case Goal	Cases Accepted	Percent of Goal
Death Penalty	8	7	87.5	10	7	70.0
Life Without Parole	25	17	68.0	22	20	90.9
15 Years to Life	325	278	85.5	393	221	56.2
5 to 15 Years	150	178	118.7	150	154	102.7
0 to 5 Years	100	58	58.0	100	68	68.0
TOTALS	608	538	88.5	675	470	69.6

Source: Office of the State Public Defender

As Exhibit IX indicates, the OSPD has fallen short of its own caseload goals in each of the past two fiscal years. In fiscal year 1985-86, the OSPD achieved 88.5 percent of its overall goal. In fiscal year 1986-87, its productivity dropped further to only 69.6 percent of its caseload goal.

Exhibit X displays the productivity of the Office of the State Public Defender for the twelve months of fiscal year 1987-88, compared with the actual number of attorneys available for casework.

EXHIBIT X

SUMMARY OF APPOINTMENTS AND OPENING BRIEFS FILED COMPARED TO ACTUAL LEGAL STAFF AVAILABLE FOR CASEWORK JULY 1987 THROUGH JUNE 1988

Month	Appointments	Opening Briefs Filed	Positions
July	41	34	48.00
August	36	31	47.25
September	15	32	43.25
October	12	20	43.25
November	12	31	45.30
December	23	34	51.50
January	20	29	54.00
February	40	24	52.50
March	48	26	51.50
April	35	25	51.00
May	20	20	47.80
June	19	26	47.00
TOTALS	321	332	

Note: Positions are based upon total staff attorney hours available in occupied positions. A position left vacant for two weeks, then filled for the remaining two weeks in the month, for example, would be counted as 0.5 position.

Source: The Office of the State Public Defender

Exhibit X indicates that OSPD's receipt of appointments and production of opening briefs has fluctuated greatly during this period. More disconcerting is the overall low net productivity of the Office. Calculations indicate that OSPD attorneys have been averaging only 0.55 appointments and 0.57 opening briefs of all types per attorney per month during this period. This equals less than seven appointments and seven opening briefs per attorney annually.

The Public Defender, Deputy Director of Administration and Chief Deputy Public Defenders are responsible for projecting yearly caseload for the OSPD. To determine the number of cases to be accepted, the OSPD first subtracts the personnel years needed for administrative duties and to complete leftover cases from the previous year. Then, based on the formula that presumes each attorney will take a prescribed number of cases, they attempt to calculate an overall number of cases to be accepted. As an example, for fiscal year 1985-86, the OSPD assumed 47.8 attorney years were available and projected acceptance of 8 capital cases, and 600 District Court of Appeals cases. The assumption that each attorney would accept a specific number of cases each year has not been valid. The OSPD has in

recent years been struggling to implement workload standards for its professional staff.

A second major problem in achieving caseload goals is the OSPD's inability to control the type or number of cases assigned to its regional offices. In each of the five appellate districts where the OSPD accepts cases, assignments are formally made by the Clerk of the Court and Administrative Presiding Judge, supposedly after consultation with the regional office of the OSPD to determine the OSPD's caseload needs. In fact, this system seldom works in such a fashion. In four of the five District Courts of Appeal and in the Supreme Court, the OSPD selects cases either after the Appellate Projects have selected their cases or in consultation with the Appellate Projects. Thus, the OSPD is sometimes precluded from selecting the cases it needs to fulfill its workload goals.

A third impediment to the OSPD's achievement of its productivity goals is the high rate of attorney turnover the OSPD has experienced in recent years. The reasons for the employee turnover at the OSPD vary considerably. Several attorneys have resigned from the OSPD to work for the newly established Appellate Projects. Several attorneys cited the mandatory death penalty work as a reason for leaving. Some have expressed concern about the continued viability of the OSPD. In addition, there is the normal "burn-out" associated with the allegedly stressful work of defending indigent defendants. Each time an attorney leaves, his or her workload must be distributed among the remaining attorneys. While this work is not recorded as new case assignments, the cases must be reviewed again and in many ways treated like new cases by the attorneys assigned to them.

FINDING #4 - THE OFFICE OF THE STATE PUBLIC DEFENDER NEEDS TO DEVELOP WORKLOAD STANDARDS TO MEASURE STAFF PERFORMANCE

Prior to 1978, there was no workload standard established within OSPD. The first OSPD workload standard of 24 new cases opened per year per attorney was established in 1978. This standard was never consistently applied or enforced. The OSPD unsuccessfully attempted to implement a revised workload standard in fiscal year 1986-87, based upon a weighted workload standard. As a result, the OSPD does not have a viable workload standard to measure staff performance. The OSPD recently contracted for a workload study to develop caseload standards suitable for both internal and external use.

The original workload standard for OSPD attorneys was set in 1978. It required that staff attorneys open two new cases per month, or a total of 24 cases per year. The workload standard was based on the recommendations of the National Legal Aid and Defender Association (NLADA), a Washington, D.C. based research association that performs studies of interest to public defenders. The NLADA standard was based on statistical information gathered from appellate public defenders nationwide. The OSPD workload standard was based on the idea that each attorney would accept a mix of guilty pleas, other simple cases, and some complex cases requiring extra work. Workload credit in the form of weighted workload units would be awarded to attorneys for other activities, such as amicus curiae briefs, team leading, and death penalty cases. Given

the fact that guilty pleas and other simple cases could be completed quickly to make room for the more time consuming cases, it was assumed that this standard was practicable.

Prior to the Governor Deukmejian's direction in 1983 that the OSPD should accept only long-record or otherwise complex cases and the concomitant budget reduction, the OSPD was clearly capable of maintaining this standard. Workload statistics from the San Diego office in 1982 indicate that many of its attorneys were able to meet or exceed the 24 case unit minimum. However, with the new mandate to concentrate on lengthy cases and the reassignment of cases from departed staff attorneys, the standard became obsolete. In fiscal year 1984-85, the OSPD accepted only 246 cases. If this number is divided by the 46 active attorneys, it works out to 5.86 new cases per attorney. This statistic represents the extreme because it was directly in the wake of the massive budget cuts and did not reflect work done on cases reassigned from departing staff. OSPD management at that time recognized the previous goal of 24 cases per year per attorney was clearly no longer feasible.

Beginning in August 1985, OSPD management attempted to design and implement a new standard, based upon varying credits or weighted work units granted for various types of cases. Extra case credits were granted for cases with extremely lengthy records, life without parole and death penalty cases. Administrative duties such as supervision or team leading of other attorneys also were credited with work units. Each staff attorney was expected to achieve a total of 24 weighted work units per year. Merit salary raises and fitness for promotion were to be contingent upon staff members' achievement of this standard.

The workload standard was intended to take effect on April 1, 1987. However, the proposed standard met with serious opposition from some staff members and the Association of California State Attorneys (ACSA), the employee organization representing public defender professional staff. ACSA argued that since the workload standard is a new requirement in light of the increased complexity of the caseload, it is subject to confirmation through the meet and confer process and therefore invalid until agreed upon by all parties. ACSA subsequently filed a series of unfair labor practice charges designed to invalidate the standard.

In response to the personnel actions, OSPD management realized that the only way to formulate a valid workload standard and policy was to perform an impartial in-depth study of what could reasonably be expected of an attorney given the variety of cases and duties that might be assigned to that attorney. The OSPD drafted a Request For Proposal (RFP) specifically requesting a report on both manageable caseload (the number and type of cases which can be handled by an attorney at any one time) and a method of calculation and standard for determining how many cases an attorney can be expected to brief during a given period of time.

The RFP also requires that the contractor establish a method or formula for determining staffing requirements which will be acceptable to the State's various funding control agencies. The new standard will also be used by OSPD management to assess individual attorneys' eligibility for merit salary adjustments and promotions.

In early March 1988, the study contract was awarded to the National Center for State Courts (NCSC), a non-profit consulting and statistical survey group serving judicial systems and legal agencies nationwide. The NCSC will be substantially assisted by personnel of the Spangenberg Group, a private Massachusetts consulting firm with extensive workload management study experience in the federal, state and county judicial systems. The study is expected to be completed and released in November 1988.

FINDING #5 - THE OFFICE OF THE STATE PUBLIC DEFENDER HAS NOT IMPLEMENTED AN EFFECTIVE MANAGEMENT INFORMATION SYSTEM TO TRACK CASES AND MONITOR AND CONTROL THE WORK OF ITS STAFF

The OSPD's case-tracking and timekeeping systems do not provide adequate information needed by the OSPD management and State control agencies to monitor and control the work performed by the OSPD's staff. The Supplemental Report of the 1983 Budget Act required the OSPD to adopt an effective system for monitoring the status of cases and the efficiency and timeliness of attorney work. No effective system was adopted and the requirement was not achieved. The OSPD has encountered both technical and procedural problems in trying to implement a suitable system. As a result, the OSPD today still has not implemented an effective system to meet its management information needs.

Prior to 1983, the OSPD did not have a formal timekeeping system and had only a rudimentary procedure for tracking cases. The case tracking or docketing system consisted of docket cards kept within each office that were neither monitored centrally nor easily accessible to anyone wishing to check on the progress of a given case. Attorneys filled out cards upon receiving a case but often neglected to update them as the case progressed.

The OSPD made an initial attempt at adopting an automated case tracking and timekeeping system in 1984. However, the attempt was a failure because the system used two computer programs that were written in two different computer languages. As a result, it was difficult to compare the data from the two systems because each system utilized different criteria. Furthermore, both systems were implemented in a hurried fashion and did not include thorough safeguards or editing functions.

Beginning in July 1986, the OSPD began designing and installing an integrated automated docketing and timekeeping system. This project was originally scheduled to be completed by March 1988. However, it is currently behind schedule due to the loss of key systems personnel and problems with data input and conversion from prior systems.

It is expected that the integrated system will allow concurrent access to both the status of the case and the number of hours expended on it by the assigned attorney. The docketing and timekeeping systems will run concurrently in each regional office and will provide information in a common format to both regional and central office management and personnel.

When fully implemented the system should allow the OSPD to monitor each attorney's activities and overall office activity in a detailed fashion. This will provide management with a valuable tool. The data generated should help management determine what a workable caseload is and what can

be expected of individual attorneys. In addition, the information will help control agencies determine the efficiency of the office by comparing the amount of case specific and non-case specific time expended, much the same as a private law office tracks billable hours.

As the system currently stands, many of these capabilities are still only theoretical. In December 1987, the OSPD lost its key information systems manager, the only staff member who had sufficient computer expertise to implement the new system. Since that time, the OSPD has been trying to fill the position, but as of August 15, 1988 it had not done so.

The production of the OSPD cost/complexity study released in January 1988 points out some of the shortcomings of the current docketing and timekeeping systems. In order to compile this report, senior staff had to first extract data from each of the separate systems, verify the data, which required large-scale manual editing of the numbers, and then dump the raw data into a third common language system. The third system then had to have the data sets reconciled with each other and reassembled in order to produce the base data for this report. This process required approximately six weeks of concerted effort by the Deputy Director for Administration and the Information Systems Manager, as well as additional support staff time in each of the regional and central administrative offices.

Examination of a more recent print out from the docketing system is also illustrative of its current limitations. In December 1987, this Commission requested information on the status of OSPD's open cases, in order to examine the typical case profile. The Commission received a print out from the docketing system which included a single data sheet for each open case. The data sheets provide only basic information such as appellant's name, record size, date of appointment, charges and sentence. They do not currently reflect the process status of the case. Furthermore, a large percentage of sheets have insufficient data recorded on them. Finally, in reviewing the sheets for death penalty and other long-sentence cases, many errors and inconsistencies were found. The most common being a discrepancy between the stated sentence category and the actual sentence length presented on the sheet.

The OSPD continues to strive for an effective system to both track cases through the judicial process and record the time expended by staff attorneys. However, the OSPD has failed thus far to implement such a system.

FINDING #6 - THE LACK OF A CONSISTENT CASE SELECTION PROCESS HAS HAMPERED THE WORKLOAD MANAGEMENT EFFORTS OF THE OFFICE OF THE STATE PUBLIC DEFENDER

As it has now evolved, the current process by which the OSPD receives case assignments varies widely among each of the appellate districts and the California Supreme Court. The OSPD now has a significant degree of control over the type and timing of the cases it accepts in only one of the five appellate districts in which the OSPD takes cases. As a result, the OSPD's workload productivity is negatively effected because the OSPD cannot be certain of the availability of cases for assignment in the majority of the appellate districts.

A major problem in achieving workload goals is the OSPD's inability to control the type or timing of cases assigned to its regional offices. In each of the five appellate districts where the OSPD accepts cases, assignments are formally made by the Clerk of the Court, supposedly after consultation with the regional office of the OSPD to determine the OSPD's caseload needs. In fact, the system seldom works in such a fashion.

In the Second Appellate District (Los Angeles), the Chief Deputy State Public Defender or his designee actually goes to the Court Clerk's Office, reviews preliminary case information, and then requests assignment of specific cases in order to meet caseload goals. In the First and Sixth Appellate Districts (San Francisco and San Jose), all preliminary case information goes to the Appellate Projects. The Chief Deputy in the OSPD regional office must then request cases of a general type from the relevant Appellate Project, and generally must accept the cases they are given unless the Administrative Presiding Judge overrules the Appellate Project. In the Third and Fifth Appellate Districts (Sacramento and Fresno), the OSPD in cooperation with the Appellate Project Director reviews and assigns cases. Finally, for death penalty cases assigned to the Supreme Court, the OSPD accepts cases from the California Appellate Project under appointment from the Supreme Court. The appellate projects usually, but not always, are aware of the current caseload in the OSPD regional office and may adjust case assignments accordingly. This inability to control workload assignment adversely affects case workload management and productivity.

Without the ability to control workload flow into the regional offices, the OSPD can find itself with a backlog of cases which it is unable to handle in a timely manner, or with a shortage of appropriate case assignments which can cause breaks in workload continuity and prevent the OSPD from achieving its yearly caseload goals in certain categories. The State Public Defender recently formally pointed out problems with shortages of serious non-capital cases in three District Courts of Appeal during the period from July through December of 1985.

Further evidence of problems caused by fluctuation in case assignment is the monthly productivity memos of the Los Angeles regional office which indicate the number of available cases, the number requested, and the number actually assigned. For example, in November 1987, the Los Angeles office requested ten Category III (15 years to life) cases from the Second District Court of Appeal. The Office received four Category II assignments (life without parole) and only two Category III appointments. The Sacramento and San Francisco regional offices are unable to compile this type of information because they have no firsthand knowledge of the numbers, types, or characteristics of the cases available for assignment.

Finally, directors of various Appellate Projects have indicated to the Commission that they routinely direct the more complex cases to OSPD. During interviews with Commission staff, one Appellate Project Director indicated that he "routinely" sends all Category II (life without parole) cases and most long-record Category III (15 years to life) cases to the regional office of the OSPD. In testimony at the Commission's public hearing on March 16, 1988, the Executive Director of the California Appellate Project stated that the Project "leans heavily" on the

availability of OSPD attorneys to take the longer record death penalty cases.

Cases of any type may also be, and often are, assigned directly to the OSPD by the Courts outside of the assignment processes outlined above. Since these cases tend to be complex and have long records, they can often adversely affect workload production. Two examples of this may be seen in the Los Angeles Office of the OSPD: a notorious "life without parole" case with an 80,000-page trial record was assigned to the OSPD, requiring one attorney to take eight months to review the record; and a second case with a sentence of 44 years and a 26,000-page initial record was subsequently assigned to the same OSPD office. Such varied case assignment patterns have adversely affected work flow, causing other cases to be delayed.

The cumulative effect of such uncertainties is to leave the OSPD with inadequate lead time to adjust its workload to accommodate unforeseen fluctuations in case assignments from the State appellate courts.

FINDING #7 - CALIFORNIA IS EXPERIENCING AN INCREASE IN THE AMOUNT OF WORK ASSOCIATED WITH DEATH PENALTY APPEALS DUE TO AN INCREASE IN THE NUMBER AND COMPLEXITY OF APPEALS

The number of death penalty cases on automatic appeal from the trial courts to the California Supreme Court is increasing. As of July 1, 1988, there are 216 prisoners on death row in California. In addition, the California Supreme Court has recently affirmed an increased number of capital judgments. Between January 1987 and June 1988, the California Supreme Court affirmed 29 capital judgments out of a total of 35 cases decided. This is significantly greater than the five death penalty cases affirmed by the Court between 1978 and January 1987, one of which was granted a rehearing. Moreover, a significant number of these affirmed cases will be presented to the federal courts and therefore will require considerable additional indigent appellant defense time and expense. Due to the limited number of private attorneys qualified and willing to accept court appointments in death penalty cases, additional demands will be placed on the OSPD to assume responsibility for a greater number of death penalty appeals.

Pursuant to the Governor's directive to the OSPD in July 1983, the OSPD's workload emphasis has shifted to appellate death penalty and complex non-capital casework. For the period from July 1983 to August 1988, the OSPD accepted appointment in 24 of the 117 cases, or 21 percent, of the assigned capital penalty cases on appeal to the California Supreme Court. The OSPD also has a total of 19 prior capital appeals, and thus is now handling a total of 43 capital cases on appeal. This is particularly significant when considering that in fiscal years 1983-84 and 1984-85 the OSPD was discharging staff attorneys. In October 1987, OSPD further committed to taking a total of 10 new death penalty appeals in that current fiscal year. OSPD did not achieve that goal, but rather accepted only five new assignments in fiscal year 1987-88. OSPD had indicated to several control agencies at the same time that it was willing to take 10 new capital cases in fiscal year 1988-89 and to take an increased proportion of total death penalty appeals in future years. This commitment is now being revised by the OSPD; it has currently agreed to accept four new capital

case assignments in fiscal year 1988-89. Several factors affect the ability of the OSPD to successfully carry and complete a significant number of death penalty appeals, including the capacity of court-appointed private counsel to handle death penalty appeals and the time needed to pursue California Supreme Court affirmances through the federal review process.

The yearly number of automatic death sentence appeals from trial courts to the California Supreme Court fluctuates. Exhibit XI shows the number of death sentences automatically referred to the California Supreme Court from May 1978 through June 1988.

EXHIBIT XI

SENTENCES OF DEATH ON APPEAL
TO THE STATE SUPREME COURT
NEW CASES BY YEAR
MAY 1978 THROUGH JUNE 1988

Year of Judgement	Number of Cases
May - December 1978	7
1979	20
1980	24
1981	40
1982	39
1983	37
1984	29
1985	18
1986	27
1987	29
January - June 1988	17
TOTAL	287

Source: Cases in Which Judgement of Death Has Been Filed, California Appellate Project. July 1, 1988.

Exhibit XI indicates that, although there was an abrupt drop in the number of death penalties appealed to the California Supreme Court in 1985, the number of new death sentences on automatic appeal has increased since that time. While there have been no recent studies on the imposition of the death penalty at the trial court level in California, discussions with court administrators, prosecutors and defense attorneys indicate that up to 40 new trial court death sentences each year can be expected on automatic appeal in the future.

A second factor influencing the amount of death penalty work done by the OSPD is the capacity of private counsel to accept appointments in death penalty cases. In his testimony at the Commission's March 16, 1988 public hearing, the Director of the California Appellate Project (CAP) indicated that due to the increasing number of death penalty cases the recruitment of private counsel for court appointment in death penalty cases is becoming much more difficult. The Director indicated that as of March 1988 he had 75 attorneys qualified to accept appointments in death penalty cases, but

that most of these attorneys were not available for new cases because they were already handling one or more capital cases. CAP is conducting a vigorous recruitment campaign, particularly among large and medium-sized law firms, but results are inconclusive as yet. The OSPD therefore will probably need to assume an even greater number of these cases.

A third major factor in the increase in the complexity of death penalty appeals is the increase in federal court proceedings after the California Supreme Court has affirmed a trial court death sentence. As noted earlier, if a death sentence is affirmed by the California Supreme Court, the defendant may file a writ of certiorari directly to the United States Supreme Court. If this writ is denied, the defendant may apply for a writ of habeas corpus, which may be successively heard in the United States District, Circuit and Supreme Courts. This process of appeal to the federal courts operates under vastly different rules and procedures and raises different issues. For example, a writ of habeas corpus can be granted by a federal court only if the petitioners' custody or sentence violates the Constitution or laws of the United States.

In the last two years, the number of death penalty cases affirmed by the California Supreme Court which may result in federal review has increased dramatically. From 1978 to January 1987, five death penalty cases were affirmed by the Court, one of which was subsequently granted a rehearing date. From January 1987 to August 1988, 37 capital judgements have been affirmed out of a total of 49 cases decided. A total of 33 cases have been heard by the Supreme Court as of September 8, 1988, but have not yet been decided. There are a total of 143 capital cases still to be heard. There is no way of accurately predicting how many of the cases which have been heard or have yet to be heard will be affirmed. However, if one makes an assumption that half the death penalty cases currently before the court will be affirmed, the 88 potential affirmed cases combined with the 37 cases already affirmed and the 4 cases already in the federal court could total as many as 129 potential federal cases. As of August 26, 1988, the OSPD had accepted assignment in 43 active death penalty cases, including 10 cases already affirmed by the State Supreme Court. Using the same assumption of a potential 50 percent affirmation rate on capital cases, added to cases already affirmed, the OSPD may be faced with the possibility of pursuing federal appeals in as many as 25 capital cases in the current caseload.

There is as of yet no direct experience which can be used to calculate the cost of federal proceedings from a California Supreme Court affirmation. However, there has been a recent study based upon the cost of federal appeals in other parts of the United States. The Administrative Office of the United State Courts commissioned a study by the American Bar Association titled "Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in Fiscal Year 1988 and Fiscal Year 1989." The report was prepared on behalf of the ABA by the Spangenberg Group, a consulting firm that specializes in criminal justice issues related to indigent defense services, and was issued in September 1987. It concluded that cases under active death warrant take at least one-third more attorney time than cases not under warrant. Based on cases in which the attorneys had documented their hours spent on the federal habeas proceedings in death cases, Spangenberg reported median attorney time in cases under death

warrant in the United States district courts to be 500 hours, in circuit courts 437 hours, and in the United States Supreme Court 100 hours. This represents a total of 1,037 hours. Based on a current compensation rate of $75 per hour, district court representation would cost $37,500, circuit court representation $32,775 and Supreme Court representation $7,500. This results in a total median attorney cost per case of $77,775. Cases not under active death warrant consumed a total of 805 hours of attorney time and would cost $60,375 for attorney time. The average reported non-attorney expenses per case were $6,778. These expenses included preparation of transcripts, investigators, psychiatrists, travel, duplicating, computerized legal research and related items. Thus, in a case under active death warrant, the median total cost would be $84,553. The median total cost for cases not under death warrant would be $67,153. The above figures are based on a single habeas proceeding for the first round of federal litigation.

For example, a certain Robert A. Harris' case was affirmed by the State Supreme Court in 1981. Since that time, state and federal courts have reviewed three State habeas corpus petitions, three petitions for review were filed to the U.S. Supreme Court as well as two federal habeas corpus petitions; and the case has not yet been completed. It is reasonable to conclude that given the increased number of death penalty cases affirmed recently and the limited number of qualified private attorneys willing to accept these cases, greater demands will be placed on the Office of the State Public Defender. However, it should be noted that the cost of federal proceedings is born by the federal government. OSPD will have to develop a mechanism to utilize these federal funds to cover the cost of federal appeals work performed by the Office or the federal monies will revert directly to the State's General Fund.

CHAPTER IV
CONCLUSIONS AND RECOMMENDATIONS

This section presents the conclusions and recommendations of the Commission's review of the operations of the Office of the State Public Defender.

CONCLUSIONS

The cost of defending indigent criminals at the appellate level has been rising steadily in recent years. In fiscal year 1981-82, the State spent $9.7 million for this purpose, while in fiscal year 1988-89 the total amount budgeted for indigent criminal defense at the appellate level is $32.0 million--a 230 percent increase in just seven years and a 3,600 percent increase in the last 15 years. Of this total amount, the Office of the State Public Defender is currently budgeted $7.2 million, or 22.5 percent of the total direct State expenditure for this function. The balance of this amount, or approximately $24.8 million (77.5 percent) in fiscal year 1988-89, goes to fund the appointment and supervision of private court-appointed counsel. Although it is difficult to compare the caseloads of the OSPD and private court-appointed counsel because of the different types of cases that each group handles, the OSPD generally handles the more complex and serious cases. In addition, the professional work of the OSPD is acknowledged in most cases to be equal to or superior to that of the court-appointed private bar. Due to the inadequate information available to the Little Hoover Commission, the Commission could not make accurate cost comparisons between the cost of the work performed by the OSPD and private court-appointed counsel.

In 1983, the Governor directed that the OSPD concentrate its efforts on death penalty and the most complex non-capital criminal appellate cases. Since that time, with the exception of cases taken to train new staff and maintain workload continuity, the OSPD has successfully carried out this mandate. In recent years, over half the OSPD's caseload has involved cases with sentences of more than 15 years, life without possibility of parole, or death. However, OSPD has been consistently unable to achieve its own caseload goals. This is attributable to several factors, including faulty caseload projection methodologies, lack of employee work standards, an inability to control the type or number of cases assigned to OSPD, outside nongovernmental interference, unanticipated, excessive staff turnover; and apparent inability to fill authorized positions.

The OSPD does not have adequately developed workload standards to measure staff performance. Without such standards, individual performance cannot be adequately assessed and proper estimates of overall workload and goal achievement by management and outside control agencies cannot be made. OSPD is currently beginning a contracted workload study which could lead to the development and implementation of workload standards by the end of fiscal year 1988-89.

The OSPD's case-tracking and timekeeping systems to date have not been implemented adequately and do not readily provide information needed by OSPD management and state control agencies to monitor and control the work performed by the staff of the OSPD. Although the OSPD has attempted to

implement an integrated management information system, it has encountered both technical and procedural problems which have thwarted it.

The lack of a consistent case selection and assignment process has hampered the OSPD's workload management efforts. The methods used for case selection vary widely among each of the OSPD's three regional offices. The lack of a consistent case selection and assignment process has helped to hamper workload goal achievement because the OSPD cannot be certain of the timing of the assignment or the availability of cases for assignment in the majority of its regional offices and in the State's appellate court districts.

The number of trial court death sentences, as well as the amount and complexity of legal work required on appeal and post deferments proceeding from judgements imposing a penalty of death, has increased in recent years and is projected to continue to increase in the future. For the period from 1978 to 1987 five death penalty cases were affirmed on automatic appeal by the California Supreme Court, one of which was subsequently granted a rehearing. From January 1987 through August 1988, 37 of the 49 death penalty appeals decided by the California Supreme Court have been affirmed. Both prosecutors and defense counsel assume that a significant number of current and future death penalty cases will also be affirmed by the California Supreme Court. Many of these affirmed cases will be reviewed by the Federal Courts and will require research and consideration of issues not confronted before or confronted in a different form. Methods of process and procedure in the Federal Courts are different and require additional work. The Administrative Office of the United States Courts currently estimates that an appellant's attorney could spend in excess of 1,000 hours of time pursuing a single federal habeas proceeding in a death penalty case in the Federal Courts, at an estimated total cost in excess of $80,000. As a result, the OSPD will need to spend a significant amount of additional time and resources pursuing federal proceedings in a large portion of its capital cases.

RECOMMENDATIONS

The Commission acknowledges that many of the difficulties experienced by the OSPD have arisen over the last 12 years because of changes in criminal law and procedure as well as inherent inconsistencies and contradictions in carrying out the mandate of the Office. The current State Public Defender apparently is attempting to direct the Office towards efficiency and accomplishment in accordance with original legislative intent, but his efforts come too late. The Commission believes, however, that the following actions should be taken to address the current problems facing the Office and to ensure continued high quality criminal indigent appellate defense in California:

1. The Office of the State Public Defender as a distinct executive branch agency should be abolished and the functions of the current OSPD, the Appellate Projects and private court-appointed counsel should be merged into a single autonomous agency within the judicial branch of government. The Legislature, with the concurrence of the Governor, should enact appropriate legislation to carry out this purpose. This new agency may be designated the Appellate Defense Agency (ADA). To

allow for a smooth transition, the effective date for the start of operations should be determined by the Judicial Council, but in no case should exceed four years from the date of enactment. This merger will result in cost savings due to consolidation of administrative functions and greater efficiency in case handling.

2. The Director of the new Appellate Defense Agency should be a member of the State Bar of California and be appointed by the Judicial Council. The Agency should be staffed by attorneys appointed by the Director and will have as its workload all criminal appeals. It should contract with the Administrative Office of the Courts for administrative and support services and should have the authority to contract with non-profit corporations, government agencies, and private members of the bar to accept appointments or supervise criminal appeals as necessary.

3. Pending the effective date of the above, and with the advice and consent of the Judicial Council, the Office of the State Public Defender should continue its efforts to develop, implement and enforce workload production standards for its professional staff.

4. The current Office of the State Public Defender and its successor, the Appellate Defense Agency, should assign a high priority to implementing a comprehensive timekeeping and docketing system. In addition, the staff in each regional office should be fully trained to use and maintain the data bases for this system.

5. The current Office of the State Public Defender and its successor, the Appellate Defense Agency, should increase the current law clerk program in order to expose more law students to criminal appellate work and to identify potential staff candidates.

6. The Judicial Council should periodically retain an independent consultant to perform a detailed cost analysis of the Appellate Defense Agency and its functions.

7. The Appellate Defense Agency should collect, maintain, and annually report to the Judicial Council information relating to the cost of the indigent criminal appellate work including, but not limited to: name of appellant; conviction being appealed by statutory section; time spent on case by category of activity for professional, clerical and administrative staff; identify of attorney(s) assigned to each case, and any additional ancillary costs or services incurred by category.

8. The Appellate Defense Agency should limit itself solely to legal representation in court of indigent individuals convicted of felonies. It should not engage in legislative advocacy or educational efforts of incarcerated individuals or any other activity, except, that the Director of the ADA, with the consent of the Judicial Council, may respond to questions, if any, initiated and posed to the Director by legislators in connection with pending legislation.

The Commission believes that implementation of the above reforms will provide the State of California with an efficient, effective indigent

appellate defense system. Without such reforms, the State's appellate judicial system is in danger of becoming severely backlogged, delaying justice to appellants and society as a whole.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

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SEPARATE STATEMENT OF

COMMISSIONER GEORGE E. PARAS

This Commission's report on the State Public Defender's Office, in which I have whole-heartedly joined, recognizes that the current State Public Defender is attempting actively to correct its past deficiencies (see first paragraph of "Recommendations"). My objective is to enlarge on that thought.

Harvey Zall was appointed and assumed office scarcely six months ago, long after our investigation had begun. Our report discloses the considerable early misdirection of the office, which wasted its resources and disserved the public. Mr. Zall is in no way responsible for any of this, and our inquiry disclosed no suggestion of blame attributable to him. His present corrective efforts are sincere and dedicated; and had they started before the necessary advent of the Appellate Projects, the outlook for the office as California's sole provider of all indigent criminal legal representation on appeal would have been bright.

Now it is hopeless. The Appellate Project system cannot and should not be undone. A permanent dual agency system is fiscally intolerable, despite Mr. Zall's dedication.

GEORGE E. PARAS
Commissioner
October 4, 1988