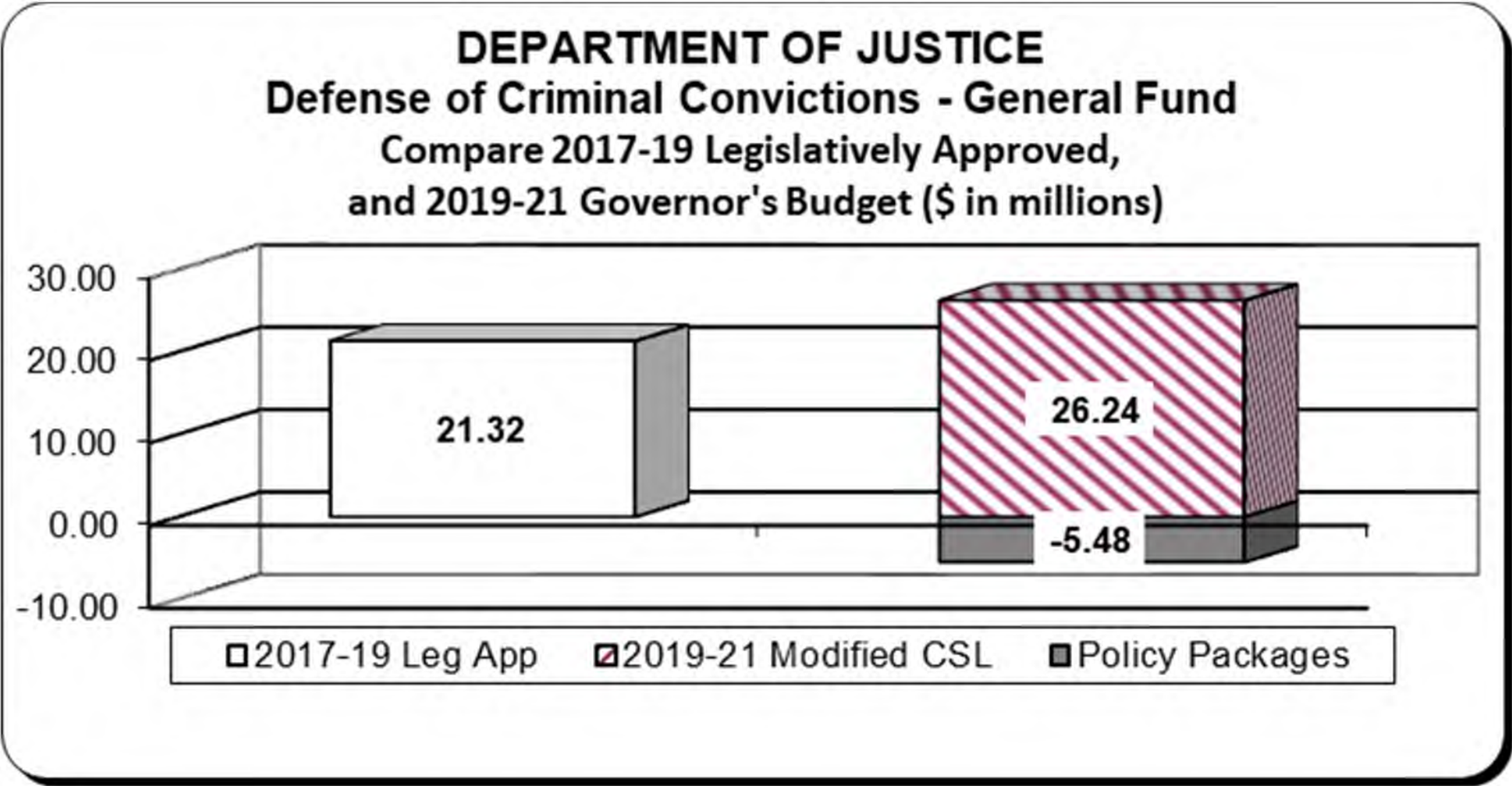


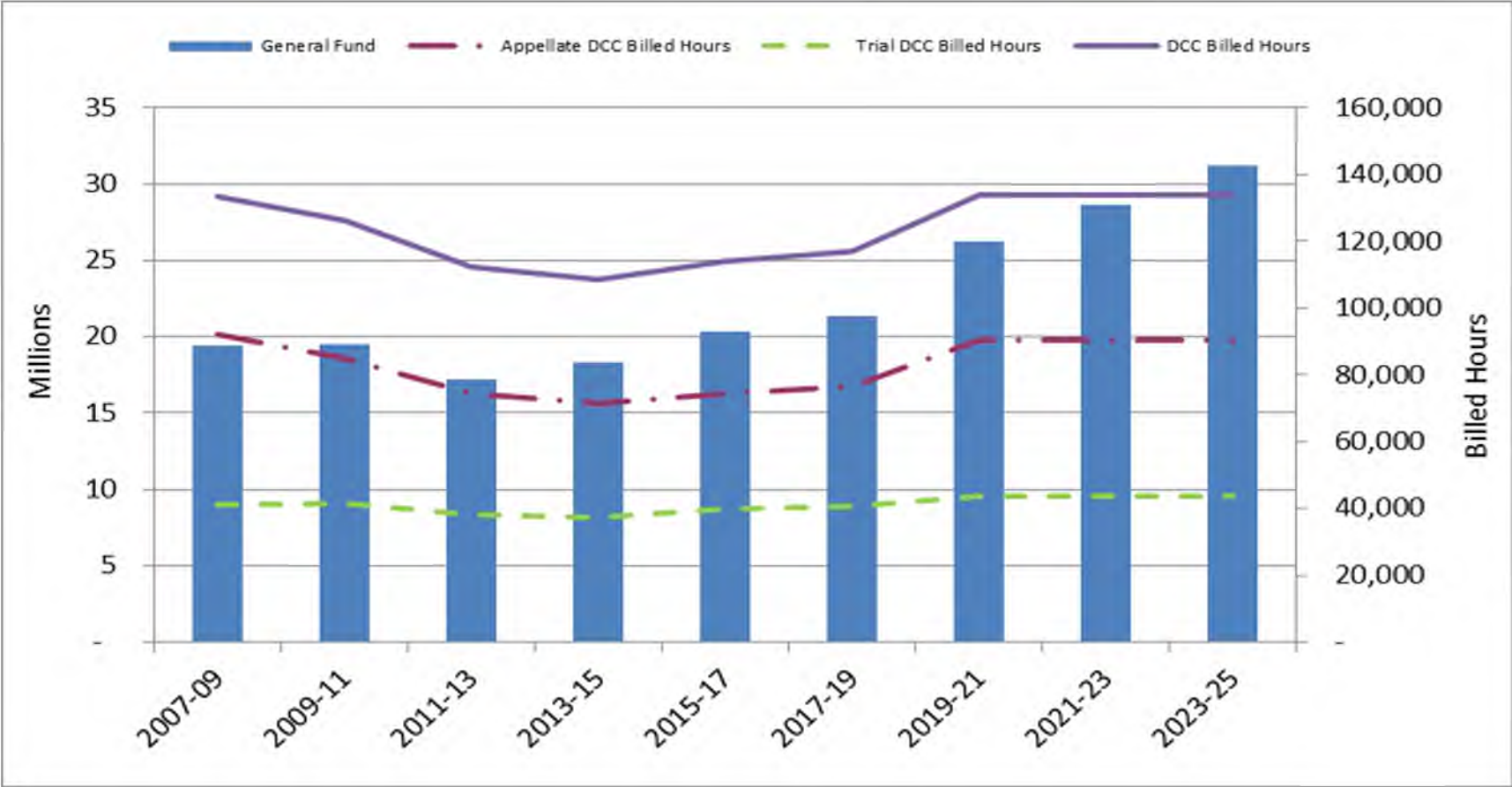
Defense of Criminal Convictions



Governor's Budget

Executive Summary

Primary Focus Area: Safer, Healthier Communities
 Secondary Focus Area: Excellence in State Government
 Program Contact: Steve Lippold, Chief Trial Counsel, 503.947.4700
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Governor's Budget

Program Overview

The Defense of Criminal Convictions Program (DCC) covers work performed in the Appellate and Trial Divisions. The purpose of the program is to preserve convictions and sentences obtained by the state's prosecutors, as well as to appeal from adverse trial court decisions that place criminal prosecutions in jeopardy. Oregon centralizes criminal post-conviction and appellate work in the Department of Justice. The goal of this centralization is to achieve top quality legal work and consistency in the legal positions the state takes in cases statewide and in a way that most efficiently utilizes limited resources. The program is categorized with the Safer, Healthier Communities focus area and supports the outcome goal of improving citizen access to justice and the ability to exercise their rights. It does this by ensuring competent and timely representation for the state to defend criminal convictions. The program also works closely with the courts and the public defenders to ensure that cases are resolved as quickly as possible and in the fairest manner possible. The program's work is also critical to public safety—by providing defense of criminal convictions, the program helps ensure that the justice system has its intended deterrent and punitive effect.

Program Description

There are three types of challenges to criminal convictions or sentences: (1) direct appeal, in which the convicted offender challenges the judgment of conviction based on alleged legal or factual errors that appear in the record of the criminal trial or pre-trial proceedings; (2) state post-conviction challenges, collateral challenges beginning in the state trial court, in which the offender is allowed a second challenge to his or her conviction based on claims that could not have been raised in the direct appeal; and (3) federal habeas corpus challenges, in which offenders can raise in federal district court and the Ninth Circuit Court of Appeals all claims of violations of federal constitutional rights that previously were raised on direct appeal or in state post-conviction proceedings.

The Trial Division represents the state in trial court post-conviction proceedings, as well as district court federal habeas corpus cases. The Appellate Division represents the state in direct appeals and state post-conviction challenges in the Oregon Court of Appeals and the Oregon Supreme Court, as well as in federal habeas corpus proceedings in the Ninth Circuit Court of Appeals. The same inmate's case often goes back and forth between the Trial and Appellate Divisions.

A typical case begins in the Oregon Court of Appeals. A party unhappy with his or her conviction or sentence seeks direct review by this appellate court and files a written brief describing the alleged errors and the relief sought. The Appellate Division then responds on behalf of the state in a written brief, and the court may hear a brief oral argument in which the judges can question the parties about the issues. The court then decides the case either by a written opinion or an order affirming without opinion.

Governor's Budget

The typical case then is handled by the Trial Division when an inmate's petition for post-conviction relief is filed in state court. These petitions raise collateral challenges to criminal convictions filed after the defendant has exhausted any direct appeal. Petitions typically include claims that a criminal defense was ineffective or that a guilty plea was invalid. Division lawyers review the trial transcripts, pleadings and briefs; research legal questions; take depositions and secure testimony by affidavit; and present the state's case in post-conviction trials.

When the Trial Division is successful, the inmate may then appeal to the Oregon Court of Appeals the trial court's determination on his or her petition for post-conviction relief. At that point the case is once again handled by the Appellate Division through determination of that appeal in the Oregon Court of Appeals or Oregon Supreme Court. If the Trial Division is unsuccessful, the case will return to the county district attorney's office either for a new trial or resentencing.

Once an inmate's state relief is exhausted, the inmate may then file a petition for habeas corpus in federal District Court. The Trial Division represents the state's interests at that trial court level. There, the inmate usually raises federal constitutional issues related to his or her confinement.

When the Trial Division is successful at that stage, the inmate may appeal to the Ninth Circuit Court of Appeals. When they do, the Appellate Division then steps in once again to represent the state's interests on appeal. As in the case of post-conviction relief, if the Trial Division is unsuccessful, the case returns to the county district attorney's office for a new trial or resentencing.

The DCC caseload is a mandatory caseload. The number and complexity of these cases are driven by the decisions of individuals convicted of crimes to contest those convictions. That said, these cases must be defended regardless of the number of cases or appeals filed, or the complexity with which they are litigated. The Appellate and Trial Divisions have no control over the number or complexity of cases or appeals that are filed by other parties which accounts for over 95% of the DCC workload. In a much smaller number of appeals, the Solicitor General may approve the state's appeal of a lower-court decision. Those cases typically involve a challenge to the dismissal of criminal charges or the exclusion of evidence critical to the successful prosecution of the case. In a given biennium, the state will appeal approximately 10-20 such cases.

Another significant component of DCC's work is the analysis of major court decisions. Because it is critical that the state's prosecutors understand the implications of appellate court decisions for criminal law to avoid committing legal error in their cases, DCC attorneys analyze these decisions and provide informational material to District Attorneys, their deputies, and law-enforcement officers about how these changes in the law will affect law enforcement and trial court prosecutions. DCC attorneys also routinely answer questions from the state's prosecutors about charging decisions, pre-trial matters, and issues that come up mid-trial. The Appellate Division's DCC

Governor's Budget

attorneys and staff also maintain a series of publications to help prosecutors and law enforcement stay up to date on Oregon criminal law, including:

- weekly legal bulletins summarizing each Oregon appellate court case from the previous week;
- a Search and Seizure Manual, a several-hundred page, comprehensive guide to Oregon search and seizure law; and
- an Oregon Criminal Reporter (OCR), a detailed, comprehensive guide to all other areas of Oregon criminal law.

Prosecutors use the resources to advise and train law-enforcement officers, review warrants, prepare for motions hearings, and decide whether to commence a prosecution. This advice and information also helps prosecutors negotiate pleas or secure convictions and makes convictions and sentences less susceptible to reversal on appeal. DCC attorneys also present training directly to prosecutors and law-enforcement officials.

Capital cases

The DCC budget also funds the defense of appeals from death sentences, including collateral challenges to the convictions and sentences. Of all the criminal cases, death penalty cases are the most complex and require the most resources. Unlike other criminal cases reviewed first in the Court of Appeals and only occasionally in the Oregon Supreme Court, direct appeals from convictions where the death penalty is imposed are first considered by the Supreme Court. Appeals in death penalty cases raise more numerous and more complex legal issues. A single direct review appeal in a death penalty case may take 700 hours of attorney time to defend the conviction. Death penalty cases also are unlike other cases in that defendants often have little incentive to accelerate consideration of challenges to their sentence. If the conviction is overturned, defendants are generally not released; instead they are entitled to a new trial. If the conviction is upheld, the sentence is another step closer to being carried out. Consequently, delay is often an effective strategy for a death penalty defendant.

In addition, after a capital case is upheld on direct review; the defendant may pursue collateral challenges through state post-conviction and federal habeas as discussed in the section above. Because of the specialized nature of death-penalty work and the goal of more efficiently handling these cases by assigning attorneys already familiar with the extensive records, Appellate Division attorneys team up with Trial Division attorneys to handle the trial proceedings in those collateral challenges as well as any resulting appeals. At the federal-court level, the Federal Public Defenders are devoting significant resources to attacking the constitutionality of Oregon's death penalty laws, in part because the federal courts have not considered the validity of Oregon's laws since they were re-enacted in 1984. DCC attorneys are therefore confronted with many novel legal arguments that require additional time and resources to address.

Governor's Budget

Program Justification and Link to Long Term Outcomes

The DCC program supports the primary goal of Safer, Healthier Communities. The program's work is critical to public safety—by providing defense of criminal convictions, the program helps ensure that the justice system has its intended deterrent and punitive effect on those who would put the public at risk. The program supports a secondary goal of Excellence in State Government by ensuring competent and timely representation for the state to defend criminal convictions. The program also works closely with the courts and the public defenders to ensure that cases are resolved as quickly as possible and in the fairest manner possible.

Program Performance

On the Appellate side, the DCC program's performance can be measured by the amount of time it takes for the state to file its briefs in appeals. Due to budget cuts in past biennia, the average length of time that it took both the defendant and the state to file a brief was around 350 days for each side's brief. Reducing that time was critical: if cases take too long to resolve on appeal, cases are more difficult to prosecute again if the courts overturn a conviction. And in cases where resolution takes too long, there is a greater risk that federal courts will intervene in state-court operations. The DCC program has worked closely with the state courts and the Office of Public Defense Services to bring down that amount of delay. The current goal is that briefs be filed within 210 days. In 2018, the program achieved that goal in 83% of cases.

On the Trial side, performance can be measured by the number of cases it handles and resolves, and by their outcome. From July 1, 2015 to June 30, 2017, the Trial Division opened 783 cases and, during that same period, closed 860 cases. In cases closed during that time period, the state prevailed in 96% of its cases, settled 1% and received unfavorable results in 3%.

Enabling Legislation/Program Authorization

Under ORS 138.040, anyone convicted by a trial court may appeal their convictions in the Court of Appeals as a matter of right. The legislature has designated the Attorney General to represent the state on appeal in all criminal cases in the Court of Appeals and in the Supreme Court. ORS 180.060(1). Under ORS 138.650, a petitioner in a post-conviction case may appeal an adverse decision to the Court of Appeals as a matter of right. The legislature has also designated the Attorney General to represent the state in all post-conviction cases filed by anyone who is serving a prison sentence. ORS 138.570. In addition, the Attorney General represents the state in habeas corpus proceedings pursuant to ORS 180.060(4).

Governor's Budget

Funding Streams

The DCC program is funded entirely with General Fund.

Significant Program Changes from 2017-19

Both Appellate and Trial Divisions' current service level includes additional positions to meet the anticipated growth in Defense of Criminal Convictions cases for 2019-21 that was projected during the development of the mandated caseload package (Package 040).

Governor's Budget

Defense of Criminal Convictions

031 – Standard Inflation and State Government Service Charge

Purpose: Standard inflation of 3.8% was applied to all services and supplies accounts except for Rent, Professional Services, Attorney General, and State Government Services Charges. The package adjusts the State Government Service Charges assessed by DAS, Secretary of State Audits Division, State Library, Supreme Court Library, Risk Management, and others based on the 2019-21 State of Oregon Price List of Goods and Services. Inflation of 3.8% was applied to Rent (uniform and non-uniform), 4.2% to Professional Services, and 20.14% to Attorney General line items.

How Achieved: Accounts were adjusted using the DAS published instructions.

2019-21/2021-23 Staffing Impact: None

Revenue Source: \$4,257,228 General Fund

Governor's Budget

Defense of Criminal Convictions

040 – Mandated Caseload - see also Pkg 040 in Trial and Appellate Divisions

Purpose: To provide necessary resources to meet the anticipated growth in DCC workload for 2019-21.

How Achieved: Generally, the DCC program defends criminal convictions obtained by District Attorneys in the trial courts. DCC attorneys defend three categories of challenges to state court criminal convictions: (1) direct appeals to the state appellate courts; (2) post-conviction challenges in the state trial and appellate courts; and (3) federal habeas challenges in the federal trial and appellate courts. The Department has projected an estimated 3,072 non-capital cases in 2019-21 compared to 3,013 in 2017-19.

Additionally, post-conviction appeals, post-conviction trial and federal habeas trial cases are seeing a significant increase in average billed hours per case when looking back over the last three-year period. The requested increase in staffing in the Trial and Appellate Mandated Caseload 040 packages is intended to meet the demand for the anticipated growth in DCC workload for 2019-21.

Governor's Budget

Defense of Criminal Convictions

040 – Mandated Caseload - see also Pkg 040 in Trial and Appellate Divisions (continued)

How Achieved (continued):

| | Appellate Court | | | | | Trial Court | | | | Combined |
|------------------------------|-----------------|---------------|------------------------|---------------|---------------|-------------|----------------------|---------------|--------------|---------------|
| | Direct Appeals | PC Appeals | Federal Habeas Appeals | Supreme Court | Total | PC Trial | Federal Habeas Trial | PSRB/SHRP | Total | |
| 2019-21 Estimated FTE | 17.16 | 7.77 | 1.19 | 2.89 | 29.01 | 7.92 | 4.21 | 1.02 | 13.15 | 42.16 |
| Attorneys | 15.77 | 6.17 | 0.90 | 2.86 | 25.71 | 5.73 | 2.13 | 0.98 | 8.84 | 34.55 |
| Paralegals | 0.64 | 1.23 | 0.25 | 0.03 | 2.14 | 0.69 | 1.53 | 0.00 | 2.22 | 4.36 |
| Law Clerks ¹ | 0.75 | 0.22 | 0.04 | 0.00 | 1.01 | 1.42 | 0.51 | 0.04 | 1.97 | 2.98 |
| Investigators | 0.00 | 0.15 | 0.00 | 0.00 | 0.15 | 0.08 | 0.04 | 0.00 | 0.12 | 0.27 |
| 2017-19 LAB FTE | 17.09 | 7.97 | 1.88 | 2.35 | 29.29 | 7.25 | 4.18 | 1.69 | 13.12 | 42.41 |
| Attorneys | 15.35 | 6.21 | 1.66 | 2.32 | 25.54 | 4.97 | 1.91 | 1.41 | 8.29 | 33.83 |
| Paralegals | 1.06 | 1.43 | 0.16 | 0.03 | 2.68 | 0.45 | 1.20 | 0.01 | 1.66 | 4.34 |
| Law Clerks | 0.68 | 0.19 | 0.06 | 0.00 | 0.93 | 1.81 | 1.06 | 0.27 | 3.14 | 4.07 |
| Investigators | 0.00 | 0.14 | 0.00 | 0.00 | 0.14 | 0.02 | 0.01 | 0.00 | 0.03 | 0.17 |
| Change from 17-19 LAB | 0.07 | (0.20) | (0.69) | 0.54 | (0.28) | 0.67 | 0.03 | (0.67) | 0.03 | (0.25) |
| Attorneys | 0.42 | (0.04) | (0.76) | 0.54 | 0.17 | 0.76 | 0.22 | (0.43) | 0.55 | 0.72 |
| Paralegals | (0.42) | (0.20) | 0.09 | 0.00 | (0.54) | 0.24 | 0.33 | (0.01) | 0.56 | 0.02 |
| Law Clerks | 0.07 | 0.03 | (0.02) | 0.00 | 0.08 | (0.39) | (0.55) | (0.23) | (1.17) | (1.09) |
| Investigators | 0.00 | 0.01 | 0.00 | 0.00 | 0.01 | 0.06 | 0.03 | 0.00 | 0.09 | 0.10 |

| | Rate | Hours | FTE | Total Hours | GF Expenditures |
|---------------|--------|-------|--------|-------------|---|
| Attorneys | \$ 223 | 3,200 | 0.72 | 2,301 | \$ 513,144 |
| Paralegals | \$ 98 | 2,467 | 0.02 | 52 | \$ 5,106 |
| Law Clerks | \$ 55 | 1,303 | (1.09) | (1,416) | \$ (77,878) |
| Investigators | \$ 126 | 2,685 | 0.10 | 269 | \$ 33,929 |
| | | | | | <u>\$ 474,301</u> Subtotal |
| | | | | | \$ 184,280 Services and Supplies |
| | | | | | <u>\$ 658,581</u> Total 19-21 ARB 040 Request |

Governor's Budget

Defense of Criminal Convictions

040 – Mandated Caseload - see also Pkg 040 in Trial and Appellate Divisions (continued)

How Achieved (continued):

| | 2017-19 LAB | 2019-21 | | | | | Agency Request Budget CSL | % Change from 2017-19 LAB |
|------------------------------|-------------------|-------------------|------------------|---------|------------------|-------------------|---------------------------|---------------------------|
| | | Base | Pkg 031 | Pkg 032 | Pkg 040 | | | |
| Appellate Courts | 15,608,196 | 15,608,196 | 3,111,637 | - | 128,683 | 18,848,515 | 20.76% | |
| <u>Capital Cases</u> | 3,979,686 | 3,979,686 | 772,316 | - | (752,836) | 3,999,165 | 0.49% | |
| <i>Professional Services</i> | 183,142 | 183,142 | 7,692 | - | - | 190,834 | 4.20% | |
| <i>Attorney General</i> | 3,796,544 | 3,796,544 | 764,624 | - | (752,836) | 3,808,331 | 0.31% | |
| <u>Non-Capital Cases</u> | 11,628,510 | 11,628,510 | 2,339,321 | - | 881,519 | 14,849,350 | 27.70% | |
| <i>Professional Services</i> | 16,693 | 16,693 | 701 | - | - | 17,394 | 4.20% | |
| <i>Attorney General</i> | 11,611,817 | 11,611,817 | 2,338,620 | - | 881,519 | 14,831,956 | 27.73% | |
| Trial Courts | 5,489,918 | 5,489,918 | 1,100,125 | - | 529,899 | 7,119,942 | 29.69% | |
| <i>Professional Services</i> | 34,786 | 34,786 | 1,461 | - | - | 36,247 | 4.20% | |
| <i>Attorney General</i> | 5,455,132 | 5,455,132 | 1,098,664 | - | 529,899 | 7,083,695 | 29.85% | |
| Publications | 225,751 | 225,751 | 45,466 | - | - | 271,217 | 20.14% | |
| <i>Attorney General</i> | 225,751 | 225,751 | 45,466 | - | - | 271,217 | 20.14% | |
| Total | 21,323,865 | 21,323,865 | 4,257,228 | - | 658,581 | 26,239,674 | 23.05% | |
| <i>Professional Services</i> | 234,621 | 234,621 | 9,854 | - | - | 244,475 | 4.20% | |
| <i>Attorney General</i> | 21,089,244 | 21,089,244 | 4,247,374 | - | 658,581 | 25,995,199 | 23.26% | |

Governor's Budget

Defense of Criminal Convictions

040 – Mandated Caseload - see also Pkg 040 in Trial and Appellate Divisions (continued)

2019-21/2021-23 Staffing Impact: See corresponding Package 040 in Appellate and Trial

Quantifying Results:

APPELLATE: Results will be realized both in terms of efficiency and the quality of our representation. The best way to quantify efficiency gains will be through monitoring the number of briefs we are able to file, the extent to which we are able to keep pace with the DCC caseload without developing a backlog of cases, and the time it takes from the time we open a case until the time we file a brief. Specifically, we monitor as part of our key performance measures the percentage of cases that we are able to file a brief within 210 days from the filing of the opposing brief. That KPM has most recently been measured approximately 83%, well below our target of 95%. That reflects in part the resource challenges posed by the 5% assumed vacancy savings this biennium. Providing the resources requested in this package should help us return closer to our historical performance in the 90-95% range. Qualitative gains are difficult to measure, but the requested funds will allow us to spend slightly more hours per brief, which improves the quality of the analysis and increases the chances of the state prevailing on appeal. We do measure the percentage of cases in which the state's position is upheld, but this is not particularly accurate gauge as many factors (changes in controlling precedent, e.g.) are beyond our control.

TRIAL: Results will be measured in two ways: First, by tracking the success rate at various stages of litigation such as motions to dismiss, motions for summary judgment, alternative dispute resolution and trial, then comparing those rates to historical data to indicate whether the Division is meeting its objectives. Second, by tracking "pending cases" to determine whether, at current staffing levels, the Division is building up or reducing case backlog.

Revenue Source: \$658,581 General Fund

Governor's Budget

ESSENTIAL AND POLICY PACKAGE FISCAL IMPACT SUMMARY

Justice, Dept of
Pkg: 031 - Standard Inflation

Cross Reference Name: Defense of Criminal Convictions
Cross Reference Number: 13700-100-00-00-00000

| <i>Description</i> | General Fund | Lottery Funds | Other Funds | Federal Funds | Nonlimited Other Funds | Nonlimited Federal Funds | All Funds |
|--------------------------------------|--------------------|---------------|-------------|---------------|------------------------|--------------------------|--------------------|
| Revenues | | | | | | | |
| General Fund Appropriation | 4,257,228 | - | - | - | - | - | 4,257,228 |
| Total Revenues | \$4,257,228 | - | - | - | - | - | \$4,257,228 |
| Services & Supplies | | | | | | | |
| Professional Services | 9,854 | - | - | - | - | - | 9,854 |
| Attorney General | 4,247,374 | - | - | - | - | - | 4,247,374 |
| Total Services & Supplies | \$4,257,228 | - | - | - | - | - | \$4,257,228 |
| Total Expenditures | | | | | | | |
| Total Expenditures | 4,257,228 | - | - | - | - | - | 4,257,228 |
| Total Expenditures | \$4,257,228 | - | - | - | - | - | \$4,257,228 |
| Ending Balance | | | | | | | |
| Ending Balance | - | - | - | - | - | - | - |
| Total Ending Balance | - | - | - | - | - | - | - |

Governor's Budget

ESSENTIAL AND POLICY PACKAGE FISCAL IMPACT SUMMARY

Justice, Dept of
Pkg: 040 - Mandated Caseload

Cross Reference Name: Defense of Criminal Convictions
Cross Reference Number: 13700-100-00-00-00000

| <i>Description</i> | General Fund | Lottery Funds | Other Funds | Federal Funds | Nonlimited Other Funds | Nonlimited Federal Funds | All Funds |
|--------------------------------------|------------------|---------------|-------------|---------------|------------------------|--------------------------|------------------|
| Revenues | | | | | | | |
| General Fund Appropriation | 658,581 | - | - | - | - | - | 658,581 |
| Total Revenues | \$658,581 | - | - | - | - | - | \$658,581 |
| Services & Supplies | | | | | | | |
| Attorney General | 658,581 | - | - | - | - | - | 658,581 |
| Total Services & Supplies | \$658,581 | - | - | - | - | - | \$658,581 |
| Total Expenditures | | | | | | | |
| Total Expenditures | 658,581 | - | - | - | - | - | 658,581 |
| Total Expenditures | \$658,581 | - | - | - | - | - | \$658,581 |
| Ending Balance | | | | | | | |
| Ending Balance | - | - | - | - | - | - | - |
| Total Ending Balance | - | - | - | - | - | - | - |

Governor's Budget

DETAIL OF LOTTERY FUNDS, OTHER FUNDS, AND FEDERAL FUNDS REVENUE – Not Applicable

Governor's Budget

ORBITS DETAIL OF LOTTERY FUNDS, OTHER FUNDS, AND FEDERAL FUNDS REVENUE (BPR012) – Not Applicable