

Financial Costs of the Death Penalty

Office of Performance Evaluations
Idaho Legislature



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Promoting confidence and accountability in state government

From the Director

March 17, 2014

Members
Joint Legislative Oversight Committee
Idaho Legislature



Idaho does not have readily available, comprehensive data necessary to estimate financial costs of the death penalty. Collecting comprehensive data would require a considerable amount of effort and resources for stakeholders but would likely not result in anything different than what we already know from national and other states research.

Our study shows that capital cases take longer to complete than noncapital cases because of their inherent complexity and added statutory steps. This inherent complexity is depicted through several lengthy flow charts in our report.

Formal responses from the Governor and the director of the Department of Correction are included at the end of this report.

Sincerely,

A handwritten signature in blue ink that reads "Rakesh Mohan". The signature is fluid and cursive, with the first name "Rakesh" and last name "Mohan" clearly distinguishable.

Rakesh Mohan

Executive Summary

Financial Costs of the Death Penalty



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Legislative Interest and Study Purpose

Idaho's death penalty involves many criminal justice stakeholders at both the local and state levels and in all three branches of government. Because death penalty processes involve so many entities, legislators asked for a better understanding of the structure, workings, and costs. The following events also sparked legislative interest: (1) two offenders sentenced to death were later released from prison in 2001 and (2) two recent executions after a 17-year pause. Legislators wanted to know whether costs of sentencing defendants to death could be compared with costs of sentencing them to life in prison.

Major Findings and Conclusions

Major limitations in available cost data prevented us from quantifying the total financial cost of the death penalty in Idaho. From the beginning of the study, criminal justice stakeholders cautioned us that comprehensive cost data would be difficult, at best, to collect.

Because of the limited availability of cost data, we found other ways to provide policymakers with meaningful information. For example, we analyzed the time taken to complete parts of the guilt and penalty phase as well as parts of the appeal and post-conviction phase for capital and noncapital first-degree murder defendants. We also compared the number of offenders originally sentenced to death with the number of offenders currently serving a death sentence and the reasons for a new sentence.

Only minimal cost data were readily available.

Of the 40 offenders sentenced to death, 3 have been executed since 1977, when Idaho's death penalty laws became compliant with the US Constitution.

Comprehensive data are not available to quantify the total costs of the death penalty.

Criminal justice stakeholders track very few costs specific to death penalty cases. Some agencies were able to provide more complete cost data than others, but overall, only minimal cost data were readily available to us, and comprehensive cost data were nearly nonexistent. There are many challenges to calculating costs. For example, staff who work on death penalty cases are often salaried and do not track time spent by type of case.

Very few first-degree murder defendants are sentenced to death and even fewer are executed.

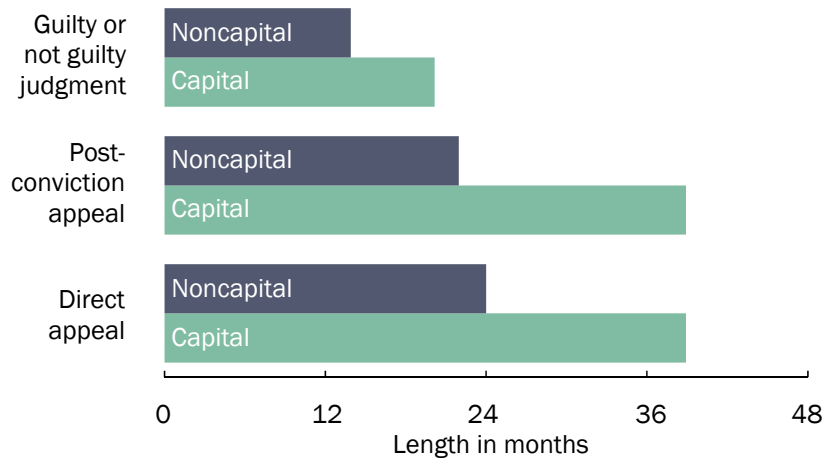
In our analyses of 251 defendants charged with first-degree murder from 1998 to 2013, we found that county prosecutors sought the death penalty as a sentencing option for 55 defendants (22 percent). At some point during the guilt and penalty phase, the intent to seek the death penalty was officially withdrawn for 13 defendants, leaving 42 defendants eligible for the death penalty. Of those 42 defendants, 7 received a death sentence—the last in 2005.

Of the 40 offenders sentenced to death since 1977, 3 have been executed and 21 have received a new sentence. Because Idaho authorizes the death penalty, the state must comply with federal court decisions to keep its death penalty laws compliant with federal laws. We found violations of the US Constitution are the leading cause for Idaho to change a death sentence to a life sentence.

Capital cases take longer to complete compared with noncapital cases.

We found parts of the guilt and penalty phase and parts of the appeal and post-conviction phase take longer to complete for capital cases as compared with noncapital cases. We analyzed 251 defendants charged with first-degree murder from 1998 to 2013. We found that for those who went to trial, reaching a judgment of guilty or not guilty took 7 months longer for capital cases than for noncapital cases.

In our analysis of defendants sentenced for first-degree murder and represented by the State Appellate Public Defender's Office since 1998, we found the difference in the median number of months taken to complete the post-conviction appeal and the direct appeal for capital cases as compared with noncapital cases was 17.1 and 14.9 months respectively (see exhibit on page v).



Simply having death as a sentencing option costs money.

Because Idaho allows county prosecutors to seek death as a sentencing option when specific statutory aggravating circumstances are present in a first-degree murder case, the state incurs costs. At least some of the extra costs are reflected in statutory requirements that must be adhered to for capital cases. For example, not only are two attorneys required to represent the defendant, but the Idaho Supreme Court must also conduct a mandatory review of all death sentences. In addition, the Department of Correction must maintain a certain level of readiness for executions.

Our findings align with national and other states research.

National and other state researchers have published studies with similar findings:

1. In states where the death penalty is an option, relatively few defendants are sentenced to death. Even fewer remain sentenced to death and are executed.
2. Capital cases take longer to complete than noncapital cases because of the complexity of the cases or steps required to complete a death sentence.
3. The availability of cost data is limited. Not only does each study's methodology differ at least slightly from any other, but many studies also require a tremendous amount of time and effort to complete.

Additional research on Idaho's death penalty costs will not likely result in new information for policymakers.

4. Even though every study has its own set of limitations, the studies we reviewed found that capital cases are more expensive than noncapital cases.

The findings and conclusions we outline in this report align with national and other states studies. Any additional or more detailed cost studies would likely have the same findings: death penalty cases are inherently more expensive.

Acknowledgements

We appreciate the cooperation and assistance we received from the Office of the Attorney General, the State Appellate Public Defender's Office, the Department of Correction, the Idaho Supreme Court, the Idaho Association of Counties, and the Legislative Reference Library. We also thank the many local government agencies who provided assistance.

Hannah Crumrine and Tony Grange of the Office of Performance Evaluations conducted this study. Margaret Campbell copy edited and desktop published the report.

Amanda Bartlett, consultant, conducted additional research. Robert Thomas of Robert C. Thomas and Associates and Brad Foltman, former administrator of the Division of Financial Management, conducted the quality control review.

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Introduction

Study request and evaluation approach

In March 2013 the Joint Legislative Oversight Committee approved a study to identify the structure, workings, and costs of the death penalty in Idaho. The study request is in appendix A. The request and subsequent study scope identified a number of areas for research that could help inform policymakers when making decisions about Idaho's death penalty laws (see appendix B for the study scope).

Appendix C has detailed information about our report methodology including policy and data analysis, interviews with stakeholders and site visits, national and other states research, and a bibliography.

Idaho and four neighboring states authorize the death penalty.

As shown in exhibit 1, Idaho is 1 of 32 states that authorizes death as a sentencing option for defendants convicted of first-degree murder. According to the US Bureau of Justice Statistics, from 1977 to 2013, 1,359 offenders were executed in the United States, 3 of whom were executed by the federal government. In 2013, 39 offenders were executed in nine states.

Executions have attracted recent media attention because of a shortage of pentobarbital, a drug commonly combined

with other drugs and used for lethal injections. The shortage is expected to delay previously scheduled executions or force states to find other types of drugs or look into other execution methods.

Eighteen states do not permit a sentence of death, and they vary greatly in the length of time that has passed since they abolished this penalty.

For instance, Michigan abolished the death penalty in 1846, and most recently Maryland repealed its death penalty laws in 2013. In addition, two states have had a moratorium on all executions by their governors: Oregon in 2011 and Washington in February 2014.

From 2007 to 2013, 5 states abolished the death penalty.

Death has always been a sentencing option in Idaho.

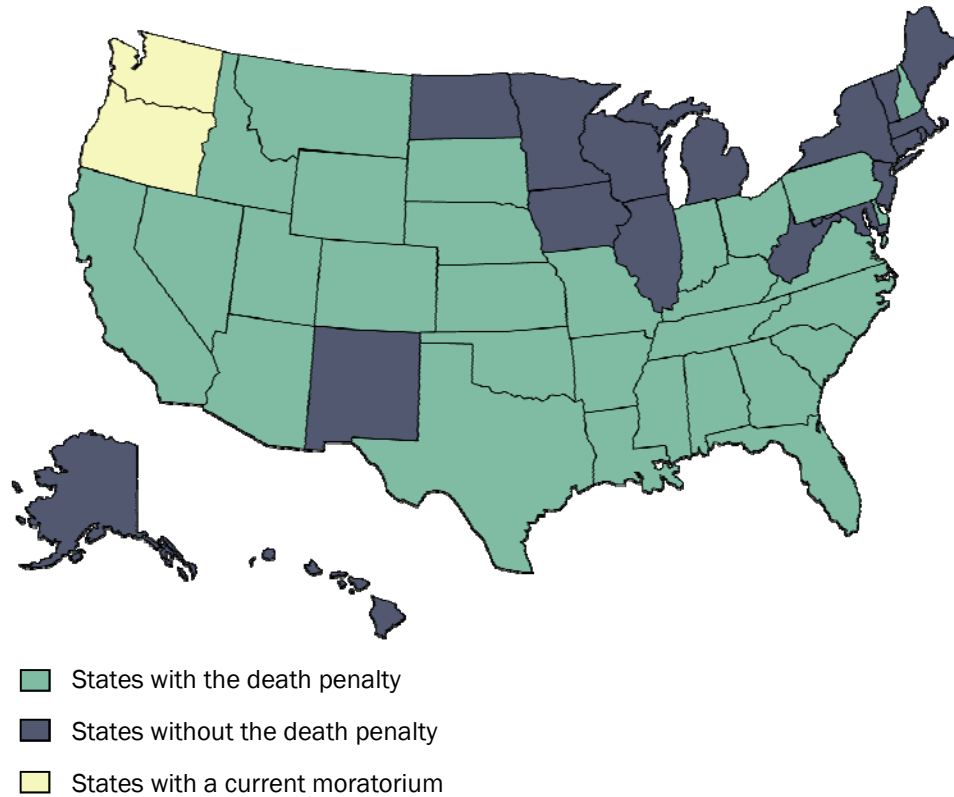
In 1864, the year after Idaho became a territory, the Legislative Assembly of the Territory of Idaho established the death penalty within the Criminal Practice Act. That same year, the first territorial execution took place. Since 1864 Idaho has executed 29 offenders.

3 executions have taken place in Idaho since 1977.

Currently, 12 offenders are sentenced to death in Idaho: 11 males incarcerated in the Idaho Maximum Security Institution and 1 female incarcerated in the Pocatello Women's Correctional Center. No dates have been set for their executions.

Exhibit 1

32 states authorize the death penalty.



Source: Death Penalty Information Center, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>, accessed February 25, 2014; Ian Lovett, "Executions Are Suspended by Governor in Washington," *New York Times*, February 11, 2014; Helen Jung, "Gov. John Kitzhaber Stops Executions in Oregon, Calls System Compromised and Inequitable," *Oregonian*, November 22, 2011.

Note: The New York Court of Appeals holds that a portion of the state's death penalty laws are unconstitutional. Although no action has been taken to restore those laws, the death penalty has not been statutorily repealed. Map template is courtesy of Presentation Magazine.

In Idaho, three crimes (first-degree murder, first-degree kidnapping, and perjury that results in the execution of an innocent person) are punishable by death.

The county prosecutor decides whether to seek the death penalty as a sentencing option for all three crimes. Death penalty cases are also referred to as capital cases.

In response to US Supreme Court decisions, significant changes were made to Idaho's death penalty laws during the 1970s.

In *Furman v. Georgia*, 408 US 238 (1972), the US Supreme Court ruled unconstitutional state statutes that gave juries complete sentencing discretion, indicating this type of discretion could result in arbitrary sentences. The ruling voided death penalty statutes in 40 states, including Idaho, essentially creating a moratorium on state executions.

In response, Idaho revised section 18-4004 of statute in 1973 to mandate the death penalty for any first-degree murder conviction and to eliminate jury sentencing. However, in *Woodson v. North Carolina*, 428 US 280 (1976), the US Supreme Court found a mandated death penalty for certain crimes was unconstitutional, making Idaho's change unconstitutional.

Also in 1976, the US Supreme Court ruled the death penalty as constitutional in three states after each state amended statute to include aggravating and mitigating factors, thereby limiting the use of the death penalty and making the sentence less arbitrary (see *Gregg v. Georgia*, 428 US 153; *Jurek v. Texas* 428 US 262; and *Proffitt v. Florida*, 428 US 242). In 1977 Idaho revised section 19-2515 of statute to permit the sentence of death when (1) the trial judge finds at least one statutory aggravating factor and (2) the mitigating circumstances do not collectively outweigh the severity of each aggravating circumstance. As a result, Idaho's death penalty laws became compliant with the US constitution.

Idaho's death penalty processes involve many criminal justice stakeholders.

Entry into the criminal justice system starts with local law enforcement and eventually touches every branch of state government. A death penalty case also involves the federal judicial system through a petition for *habeas corpus*, which is a legal action for the defendant to seek relief in federal court from unlawful imprisonment.

The following list describes the basic roles and responsibilities of the primary stakeholders involved in death penalty cases within Idaho's criminal justice system.

Local law enforcement agencies investigate the alleged crime, gather evidence, preserve and maintain that evidence, and arrest the suspect. County sheriffs transport the defendant to all court appearances from a county jail or a state prison.

The **district judge** presides over the arraignment, the jury selection, and the trial. The district judge also oversees the post-conviction proceedings and issues the death warrant.

The **county prosecutor** represents the interests of the state in the county where the crime was allegedly committed. He or she files a charge of first-degree murder, participates in the jury selection, and must submit notice to seek the death penalty based on the presence of at least one statutory aggravating circumstance. The county prosecutor also represents the state during the post-conviction proceedings.

Two **county public defenders**, required by rules of the Idaho Supreme Court, represent the defendant in death penalty cases. Public defenders, often assigned by the district judge, also participate in jury selection.

The **jury** determines a first-degree murder conviction and weighs any mitigating circumstances collectively against each statutory aggravating circumstance to determine whether the death penalty is just. The jury must unanimously agree to sentence a defendant to death.

The **Department of Correction** houses offenders and oversees and carries out each execution.

The **State Appellate Public Defender's Office**, represents indigent defendants in felony appeals. Through its Capital Litigation Unit, the

office represents defendants in the post-conviction proceedings and automatically appeals the conviction of a capital crime.

The **Criminal Law Division of the Office of Attorney General** represents the state in all death penalty appeals and *habeas corpus* litigation.

The **Idaho Supreme Court** reviews every death sentence and hears direct appeals and post-conviction appeals, all of which are consolidated into one hearing for capital defendants.

The **Commission of Pardons and Parole** may recommend to the Governor that a sentence of murder be commuted or pardoned.

The **Governor** may commute a sentence of death to life in prison. The Governor may also pardon an offender or stay an execution.

National and Other States Research



As part of our review of national literature and other states cost studies, we found all death penalty research acknowledges limitations in available cost data and outlines assumptions made to estimate costs. The cost studies we reviewed differed in their methodologies based on available data, but all shared similar themes and findings. This chapter discusses three major themes that align with our analyses of Idaho's death penalty. Appendix D cites examples of legislation in other states that expand or repeal death penalty laws.

Few defendants are sentenced to death and even fewer are executed.

Some researchers have approached cost studies by looking at the number of defendants who have been sentenced to death, remain sentenced to death, and are ultimately executed. At least three recent studies have found very few eligible defendants were sentenced to death, a large percentage of death sentences were overturned or reversed, defendants were dying in prison with pending appeals, and only a small number of executions actually took place.

For example, the Loyola of Los Angeles Law Review published a study in 2011 about the death penalty in California. The following findings came from this study:

- 714 offenders were serving a sentence of death in 2011 with 13 executions taking place since 1976.
- From 1976 to 2011, 78 offenders who had been sentenced to death died of other causes, and 32 of those died with a federal appeal pending.
- From 1978 to 2006, the US Supreme Court vacated or set aside the judgments or sentences of 95 offenders who had been sentenced to death.
- Nearly 70 percent of California's offenders sentenced to death had been granted federal relief through a new guilt trial or a new penalty hearing.

Capital cases take longer to complete than noncapital cases.

When cost data are limited, comparing the time taken to resolve capital cases with noncapital cases can provide supplemental information to policymakers. In our review of national and other states research, we found that at least five recent studies concluded the guilt and penalty phase takes longer to complete for capital cases as compared with noncapital cases. Of those five studies, three found the appeal process takes longer, and one found the post-conviction takes less time.

For example, a 2013 Colorado study published by the University of Denver Criminal Law Review identified death penalty and first-degree murder cases with similar facts and compared the cases against two criteria: (1) the number of days in court

and (2) the length of time from charging to sentencing. The researchers found that death penalty cases required more days in court than other first-degree murder cases (148 days as compared with 24 days), and death penalty cases took longer to complete than first-degree murder cases that result in life without parole (1,902 days as compared with 526 days).

Among national and other states research, we found evidence that certain factors (e.g., longer and more extensive jury selection, mitigation and sentencing processes, and additional time spent in preparation) lengthen the guilt and penalty phase for capital cases. In addition, we found consensus that death penalty cases are more complex and involved.

Capital cases are more expensive than noncapital cases.

At least seven states have studied the cost of the death penalty in the last decade (from 2003 to 2013) using various methods. Regardless of the method used, these studies concluded that either the entire process or parts of the process of death penalty cases are more expensive than cases of life without parole.

For example, in 2008 the Urban Institute completed one of the most cited and credible studies to quantify the cost of the death penalty in Maryland. The study estimated the costs of capital-eligible cases in which prosecutors did not seek the death penalty and compared those costs with capital-eligible cases where the prosecutor either successfully or unsuccessfully sought the death penalty.

To calculate these costs, the Urban Institute constructed case-level estimates to approximate the costs of each phase: pre-trial, trial, penalty, appellate, and

post-conviction plus the cost of housing and healthcare. The costs within each phase were largely made up of defense and prosecution costs, the costs of expert witnesses and specialists, courtroom costs, judge costs, and jury costs.

The authors evaluated 1,136 murder cases eligible for the death penalty from 1978 to 1999 and estimated the lifetime cost of capital-prosecuted cases to be \$186 million. The authors studied two key costs (the filing of a death notice and the imposition of a death sentence) that added significant costs to the case. About 70 percent of the added costs come from the trial phase because of the longer trial periods, longer and extensive jury selection, longer trials, and more preparation time.

The data the Urban Institute used to quantify the cost of the death penalty are not readily available in Idaho. Later in the report we discuss costs in Idaho.

Number of Defendants Sentenced to Death in Idaho



Throughout the decades, Idaho's death penalty laws have been revised to comply with US Supreme Court decisions, expedite certain steps, provide indigent representation, and clarify processes. We found that changes to Idaho's death penalty laws may have resulted in fewer death sentences. We also found that noncompliance with federal laws is the most common reason a death sentence is changed to a life sentence.

Most first-degree murder cases proceed as noncapital cases.

We analyzed case data for 251 defendants charged with first-degree murder in Idaho from 1998 to 2013. Exhibit 2 compares the number of first-degree murder defendants prosecuted as noncapital cases to those prosecuted as capital cases. County prosecutors sought the death penalty for 42 defendants (17 percent).¹ Of these

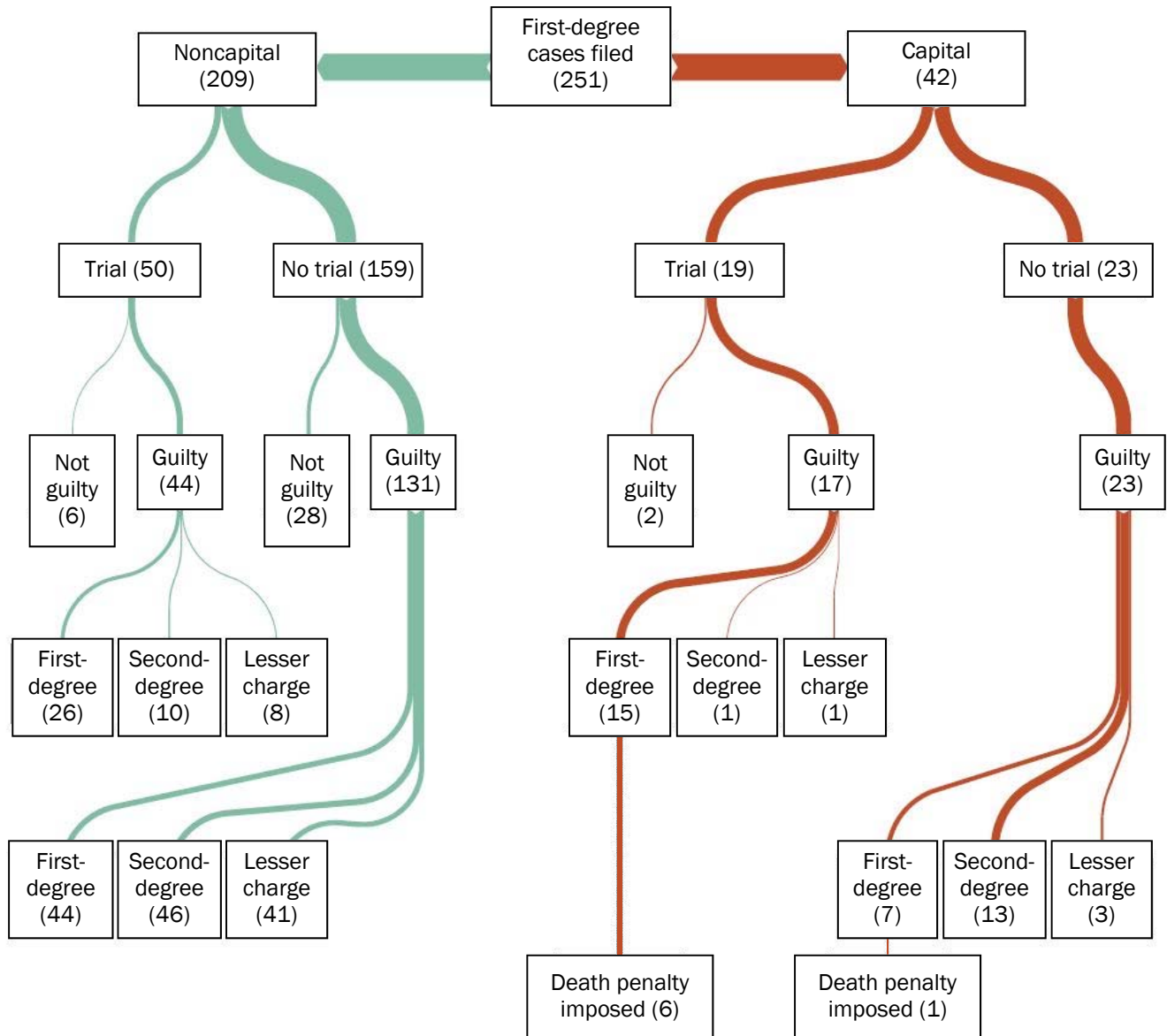
1. This total does not include 13 defendants for whom the county prosecutor originally submitted a notice of intent to seek death penalty but later withdrew the notice. Those 13 defendants are included in the noncapital cases.

defendants, 7 were sentenced to death. From 1998 to 2013, most first-degree murder defendants (83 percent of capital cases and 97 percent of all cases) received a sentence other than death.

As shown in the exhibit, the majority of defendants—76 percent of noncapital cases and 55 percent of capital cases—did not go to trial regardless of whether the death penalty was sought. The exhibit also shows that the majority (86 percent) of all first-degree murder defendants either pled guilty or were found guilty at a trial.

Exhibit 2

Of the 251 defendants charged with first-degree murder since 1998, prosecutors sought the death penalty in 42 cases.



Source: Office of Performance Evaluations' analysis of Idaho Supreme Court defendant case data for all defendants charged with first-degree murder from 1998 to 2013.

Note: One case filed in November 1997 was included in the count because the county prosecutor submitted a notice of intent to seek the death penalty and the defendant received the death penalty in 1999.

Changes to Idaho's death penalty laws may have resulted in fewer death sentences.

Since complying with US constitutional requirements in 1977, the Legislature has continued to revise Idaho's death penalty laws. This section explains some of the more crucial changes and identifies trends in the number of death sentences over the past 40 years.

Since 1998, county prosecutors have been required to submit a notice of intent to seek the death penalty.

Idaho's death penalty laws were amended in 1977 to permit the sentence of death when at least one statutory aggravating factor is found by the trial judge and the mitigating circumstances do not outweigh the severity of the aggravating circumstances. From 1977 to 1998, death was automatically a sentencing option for all first-degree murder cases.

During the 1998 legislative session, Idaho Code § 18-4004A was added to mandate that county prosecutors file a notice of intent to seek the death penalty with the court and serve the defendant or the defendant's attorney of record within 30 days after the entry of a plea.²

In *Ring v. Arizona*, 536 US 584 (2002), the US Supreme Court ruled that allowing judges rather than juries to determine the statutory aggravating factors for a death penalty sentence was unconstitutional. In

response to the *Ring* decision, Idaho's death penalty laws underwent many revisions during the 2003 legislative session:

- Prosecutors must list all aggravating circumstances in the notice of intent to seek the death penalty.
- The jury, or the judge if a jury is waived, must impose a death sentence if they unanimously find at least one statutory aggravating circumstance and that no mitigating circumstances are sufficiently compelling to make a sentence of death unjust, and they must unanimously determine that the penalty of death should be imposed.
- If the jury, or the judge if a jury is waived, finds a statutory aggravating circumstance beyond a reasonable doubt but finds that the imposition of the death penalty would be unjust, the judge shall impose a fixed life sentence.
- If the jury, or the judge if a jury is waived, does not find a statutory aggravating circumstance beyond a reasonable doubt, or they cannot unanimously agree on the existence of at least one statutory aggravating circumstance, or if the death penalty is not sought, the judge shall impose a life sentence with a minimum period of confinement of not less than 10 years.

2. The filing date of 30 days was amended to 60 days in the 2008 legislative session.

To identify potential trends in death sentences in relationship to changes in laws, we analyzed three data sources: (1) Department of Correction data for 170 offenders sentenced for first-degree murder from 1977 to 2013 and eligible for the death penalty, (2) offender death sentence data from the Criminal Law Division of the Office of the Attorney General, and (3) data from the Idaho Supreme Court repository. As shown in exhibit 3, seven defendants have been sentenced to death since the 1998 change (two of those defendants subsequently had their sentence changed to life without parole).

Department and division data show that since 2003, juries have sentenced two offenders to death, although at least 12 offenders faced death as a possible

sentencing option. Our analysis does not include offenders who were resentenced to death after an appeal. Reasons for fewer death sentences being imposed may include the following:

- Juries may be less likely to impose a sentence of death when life in prison with or without parole is also a sentencing option.
- Juries cannot reach a unanimous decision about the presence of at least one aggravating circumstance or a unanimous decision about the imposition of death.
- Juries determine that mitigating circumstances outweigh any aggravating circumstances.

Exhibit 3

Fewer death sentences have been imposed since July 1, 1998.

Sentence	Changes to death penalty laws		
	Jul. 1, 1977— Jun. 30, 1998	Jul. 1, 1998— Feb. 12, 2003	Feb. 13, 2003— Dec. 31, 2013
Death	33 (22%)	5 (31%)	2 (17%)
Life with or without parole	115 (78%)	11 (69%)	10 (83%)

Source: Office of Performance Evaluations' analysis of offender data from the Department of Correction, the Criminal Law Division of the Office of the Attorney General, and the Idaho Supreme Court.

Note: Department of Correction sentencing data are different from Idaho Supreme Court filing data and the total number of offenders does not match between the two datasets.

Very few eligible defendants are sentenced to death and even fewer are executed.

53% of death sentences have been changed to life in prison with or without parole.

In Idaho, 40 offenders have been sentenced to death since 1977. When reviewing original and revised sentencing data for these offenders, we found that 21 later received a new sentence other than death.³ As a result, 53 percent of death sentences have been changed to life in prison with or without parole:

15 offenders are now serving life in prison without parole

6 offenders are or were serving life in prison with parole

Exhibit 4 highlights the reasons for sentence changes among the 21 offenders. As shown, nine sentence changes were required to keep Idaho compliant with federal law.

- Two offenders received a new sentence because of the withholding of exculpatory evidence by prosecutors, which violated due process under the fourteenth amendment as explained in *Brady v. Maryland*, 373 US 83 (1963).

3. After the federal district issued a writ of *habeas corpus*, one defendant was released because adequate evidence was not available to prove guilt beyond a reasonable doubt. This defendant is not included in the count of new sentences.

- Three offenders, sentenced before 2003, received a new sentence because of the US Supreme Court's 2002 ruling in *Ring v. Arizona* that the sixth amendment requires juries to find aggravating circumstances.
- Four offenders received a new sentence because of ineffective assistance of counsel, which violated the sixth amendment—the right to counsel, as explained in the 1984 US Supreme Court decision of *Strickland v. Washington*.

Each of the 12 offenders currently serving a death sentence has an active appeal pending with either the state or federal government. Until the respective courts issue a decision for each offender, we do not yet know how many might receive a new sentence.

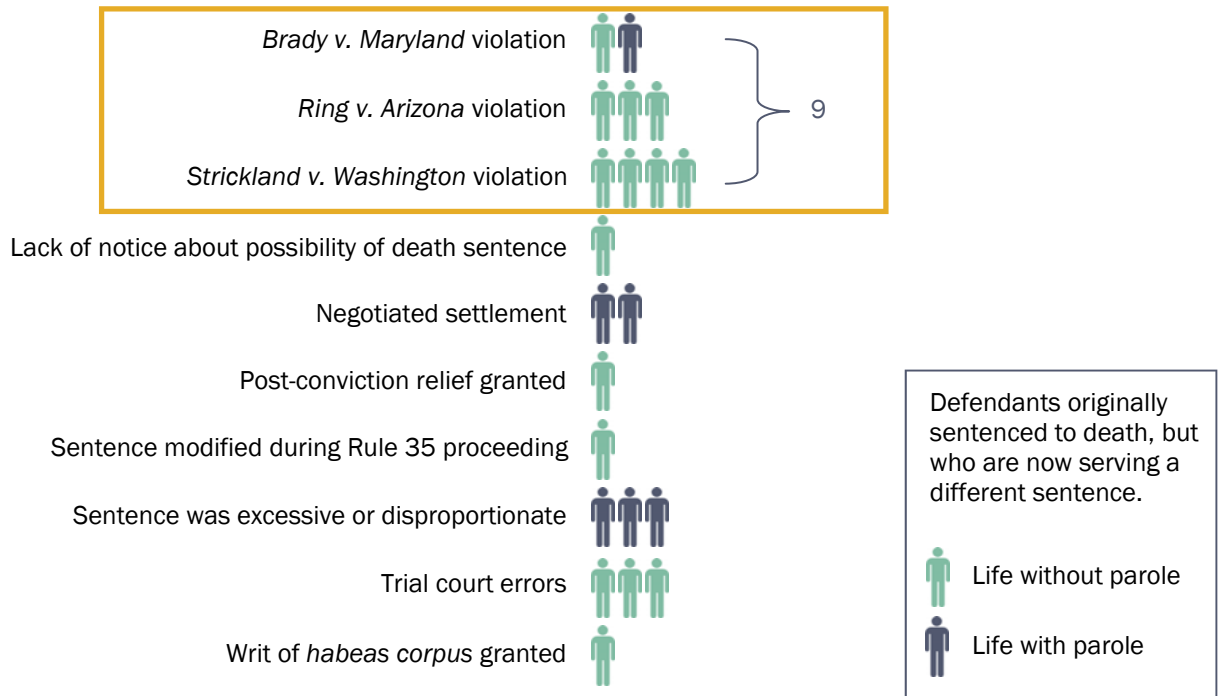
Of the 40 offenders originally sentenced to death since 1977, 29 remain in prison. Exhibit 5 explains the status of the 11 offenders who are no longer in prison. As noted in the exhibit, four offenders originally sentenced to death have been released.

Of the four offenders who died in prison, three were still serving a death sentence at the time of their death and one was serving a new life sentence. Since 1977 Idaho has executed 3 of the 40 offenders sentenced to death (7.5 percent).

Compliance with federal laws has led to a lesser sentence for 9 of 21 offenders originally sentenced to death.

Exhibit 4

Compliance with federal laws is the most common reason for a change in death sentence.



Source: Office of Performance Evaluations' analysis of offender data from the Criminal Law Division of the Office of Attorney General.

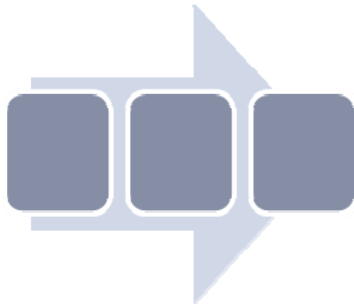
Exhibit 5

11 of 40 offenders originally sentenced to death since 1977 are no longer in prison.

	Number of offenders
Executed	3
Died in prison	4
Released from prison	4

Source: Office of Performance Evaluations' analysis of offender data from the Department of Correction and the Criminal Law Division of the Office of Attorney General.

Death Penalty Processes



Some states have quantified the costs of their death penalty by comparing the processes (and the length of those processes) of capital and noncapital cases. Working with the Idaho Supreme Court, the State Appellate Public Defender's Office, and the Department of Correction, we collected defendant data and compared the lengths of time needed to complete phases of death penalty cases. Similar to other studies, we found that death penalty cases take longer to complete.

Differences between capital and noncapital cases in the guilt and penalty phase are mandated by Idaho Code.

Both capital and noncapital first-degree murder cases proceed similarly until the county prosecutor submits a notice of intent to seek the death penalty, as shown in exhibit 6. Because capital cases must meet certain statutory requirements after a notice of intent, the two processes begin to differ.

The guilt and penalty phase comprises pretrial, trial, and judgment of conviction and sentence.

The role of the jury is perhaps the largest difference between capital and noncapital cases. As discussed previously, the jury (or the judge if the jury is waived) must determine the appropriateness of imposing a death sentence. Capital cases require special sentencing procedures that one public

defender we spoke with likened to a second trial where new evidence may be presented. In making a decision, the jury must unanimously agree on two points: (1) a statutory aggravating circumstance exists without the presence of any mitigating circumstances that would make the imposition of a death sentence unjust and (2) the willingness to impose a sentence of death.

If the jury finds no aggravating circumstances, the judge sentences the defendant to life in prison with a fixed term of not less than 10 years. If the jury finds at least one aggravating circumstance but also finds mitigating circumstances sufficiently compelling to make the death penalty unjust, the judge sentences the defendant to life in prison without the possibility of parole.

Examples of circumstances

Idaho Code § 19-2515(9) lists 11 statutory **aggravating circumstances**, including the defendant was previously convicted of another murder and the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

Mitigating circumstances are not listed in statute but might include the absence of violent behavior or whether the defendant acted under extreme duress.

To argue that compelling mitigating circumstances outweigh the existence of each aggravating circumstance, public defenders rely heavily on the assistance of mitigation investigators. Public defenders we interviewed commented that mitigation investigators collect comprehensive information about the defendant often dating back more than one generation, a time consuming and expensive process.

Conversely, after the jury finds a noncapital defendant guilty of first-degree murder, the judge will impose a life sentence with or without the possibility of parole. The judge imposes the sentence after reviewing a presentence report detailing the defendant's prior criminal, social, educational, employment, residence, financial, physical health, mental health, and substance abuse history.

Exhibit 6

The guilt and penalty phase between noncapital and capital cases proceeds similarly until the county prosecutor submits a notice of intent to seek the death penalty.

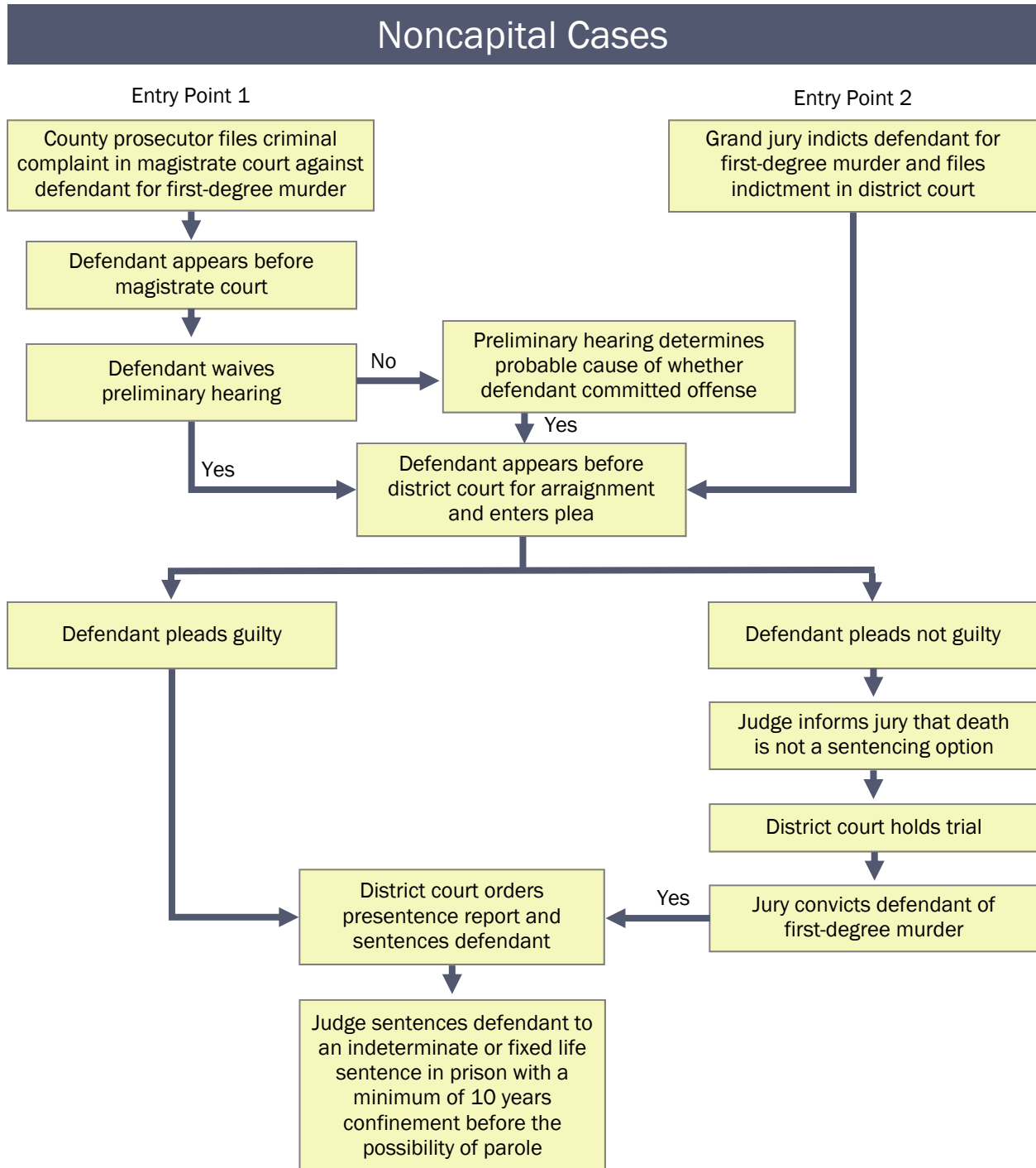
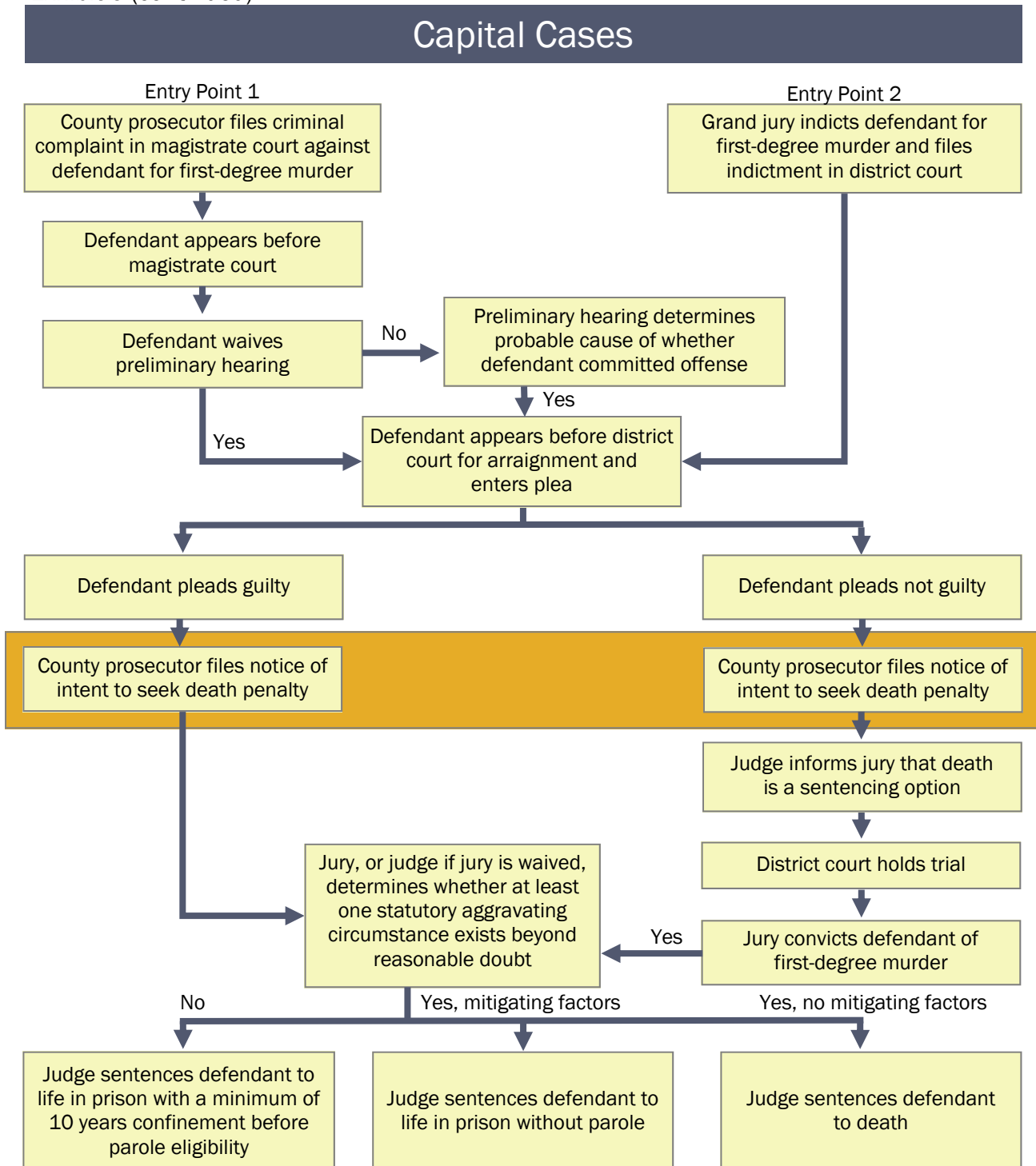


Exhibit 6 (continued)



Source: Office of Performance Evaluations' review of statute, rules, and policies in collaboration with the State Appellate Public Defender's Office and the Idaho Supreme Court.

Note: These flowcharts represent the path of defendants who are found guilty of first-degree murder.

Parts of the guilt and penalty phase for capital cases take longer to complete than noncapital cases.

Capital cases take longer to complete than noncapital cases, which aligns with other states research.

We analyzed Idaho Supreme Court case data for 251 defendants charged with first-degree murder from 1998 to 2013. We found parts of the guilt and penalty phase took longer to

complete for defendants who faced a possible death sentence. When analyzing the median length to reach a judgment of guilty or not guilty, we found capital cases took 14.5 months and noncapital cases took 11.4 months, a difference of 3.1 months, regardless of whether the defendant had a trial.

For defendants who had a trial, we found a greater difference between capital and noncapital cases. Capital cases took 20.5 months while noncapital cases took 13.5 months—a difference of 7 months to reach a judgment of guilty or not guilty. The special sentencing procedures for capital cases may account for the discrepancy in length of time.

Although we found that certain phases of capital cases took longer to complete, one county prosecutor we interviewed pointed out that costs hinge on the complexity of each case. For example, a death penalty case with four witnesses might be less expensive than a forgery case requiring national experts.

Defendants who receive a sentence of death must complete the post-conviction process before the direct appeal process.

Unlike the guilt and penalty phase, the appeal and post-conviction phase is vastly different between capital and noncapital cases. All defendants sentenced for first-degree murder may file a notice of direct appeal challenging the judgment of conviction and sentence, but filing such an appeal is where the similarities between capital and noncapital cases end. The differences in the appeal and post-conviction phase is shown in exhibit 7. In a post-conviction petition, the defendant sues the state in a civil procedure, usually claiming ineffective assistance of counsel, which means the trial attorneys' performance was deficient, resulting in prejudice to the defendant.

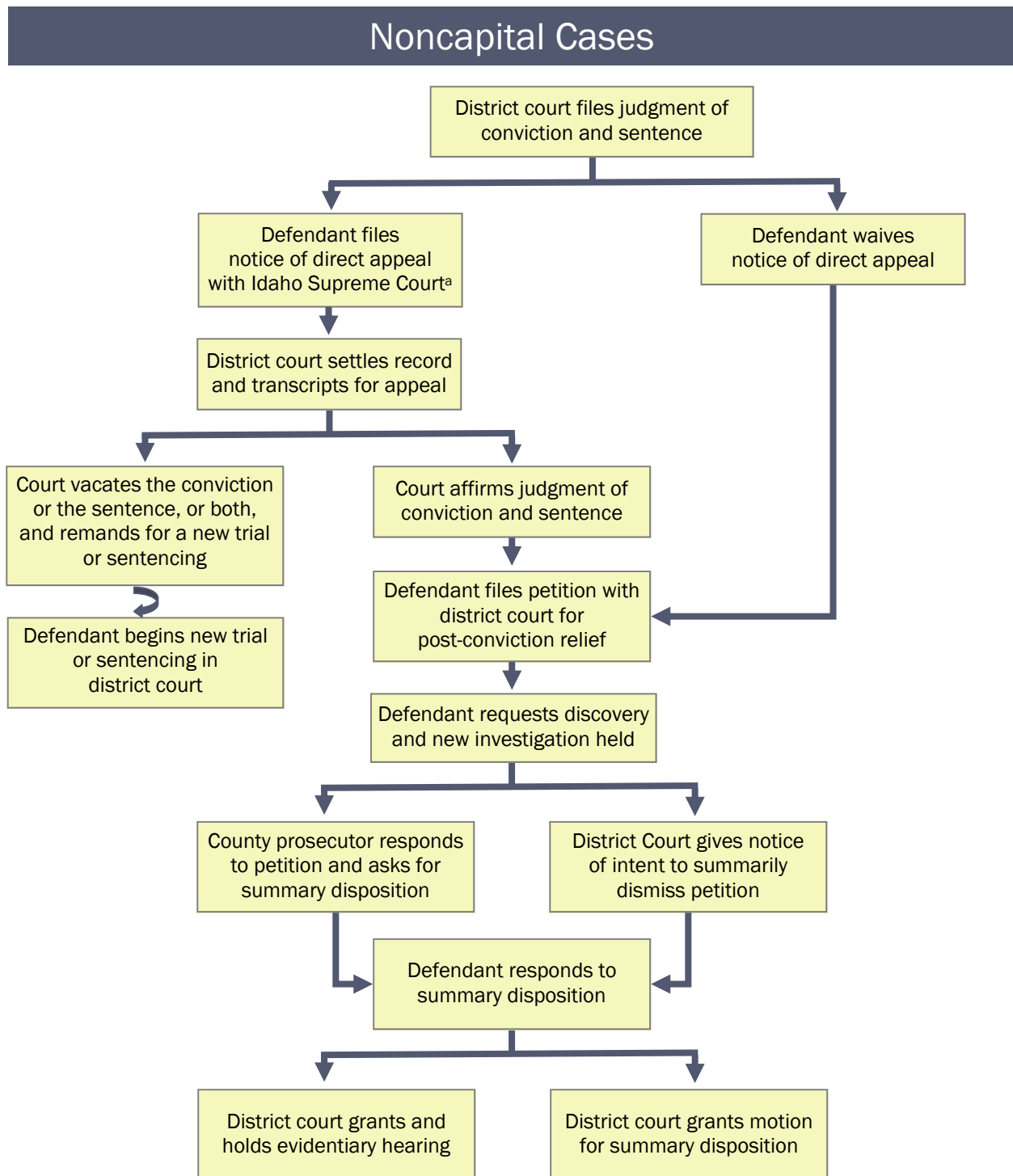
Both capital and noncapital defendants may file a petition for post-conviction relief. In capital cases, the State Appellate Public Defender's Office will file the petition for the defendant. A capital defendant must file both the direct appeal and the post-conviction petition within 42 days after the district court files a judgment of conviction imposing the death sentence. The law

requires the capital defendant to first complete the post-conviction proceedings while the direct appeal is stayed. Additionally, the Idaho Supreme Court conducts a review of all death sentences after receiving district court transcripts. The Supreme Court's review becomes part of any direct appeal.

Noncapital defendants are not subject to the same requirement. These defendants must complete the direct appeal process before proceeding to the post-conviction process. Noncapital defendants must file the direct appeal within 42 days after the judgment of conviction. Their petition for post-conviction relief may be filed within one year from one of the following three events: (1) the expiration of the 42-day limit to file a direct appeal, (2) the determination of the appeal, or (3) the determination of a proceeding following the appeal. Unlike capital defendants, noncapital indigent defendants file the petition without the assistance of counsel. Additionally, the Idaho Supreme Court is not mandated to conduct a review of sentences other than death.

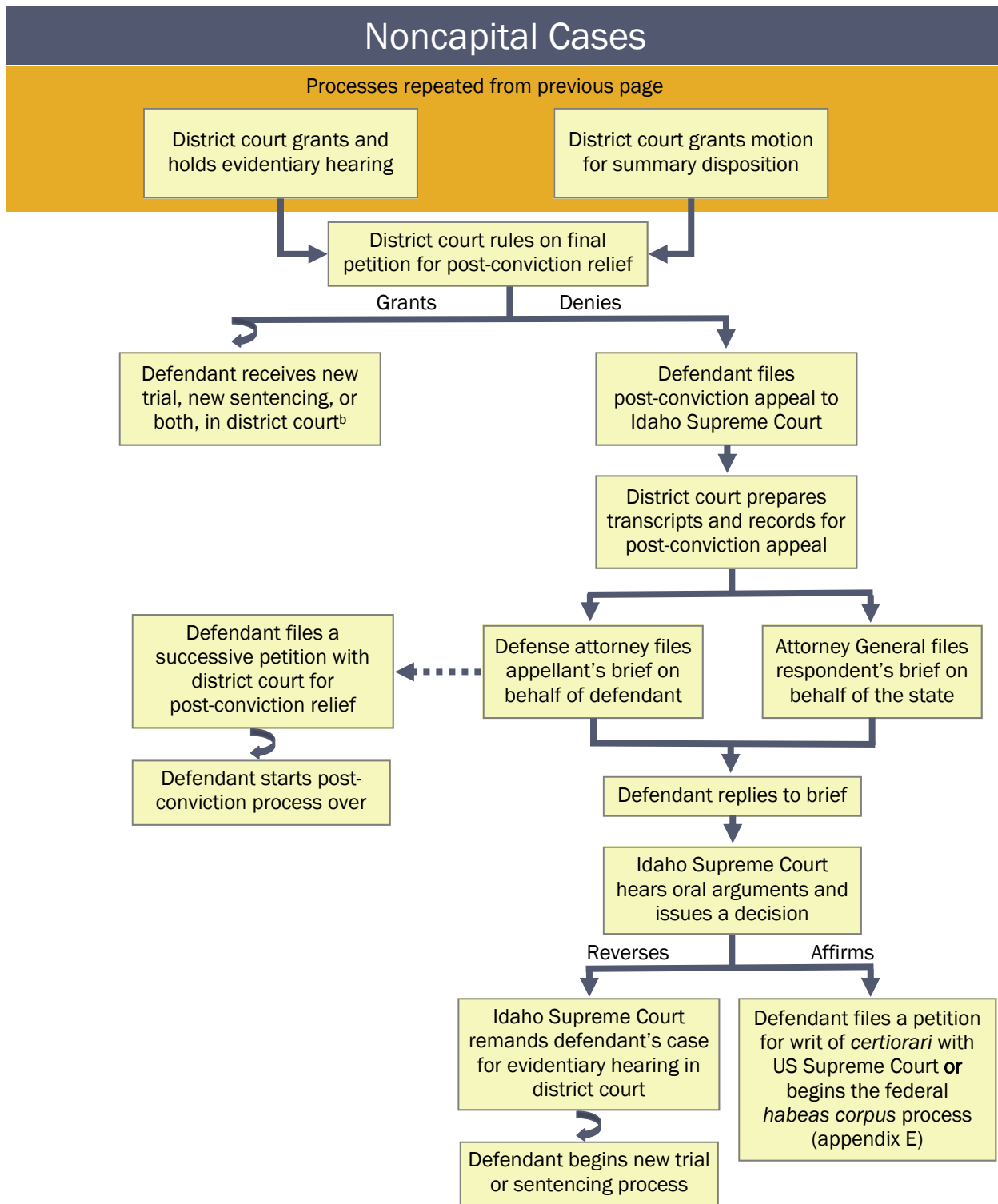
Exhibit 7

Noncapital defendants complete the direct appeal before filing a petition for post-conviction relief.



a. Unlike a capital case, the Idaho Supreme Court may assign the case to the Court of Appeals. The defendant may then petition the Idaho Supreme Court to review the case but the Idaho Supreme Court is not obligated to accept the case for review.

Exhibit 7 (continued)



b. The state may appeal to the Idaho Supreme Court the decision of the district court to grant the defendant relief.

Exhibit 7 (continued)

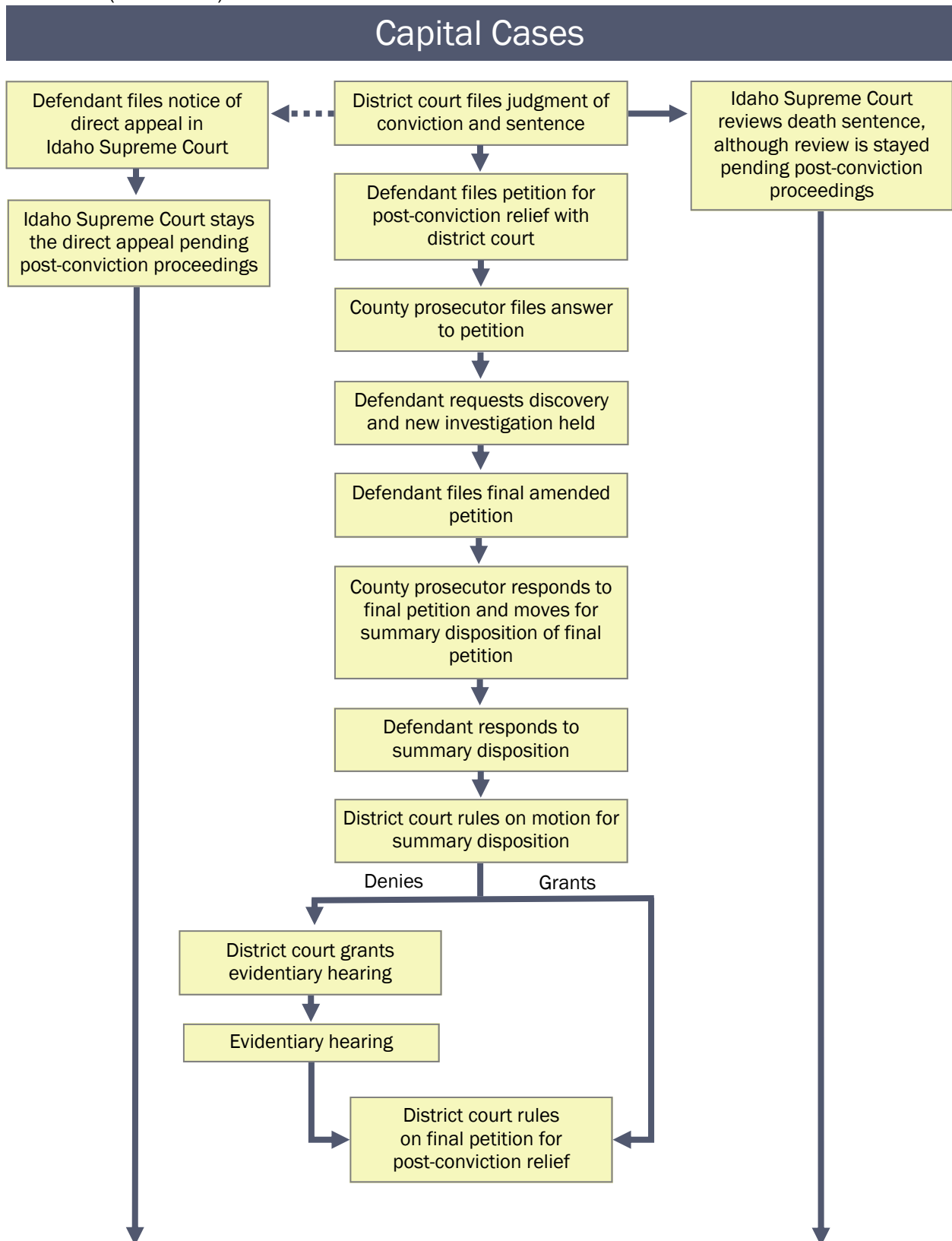
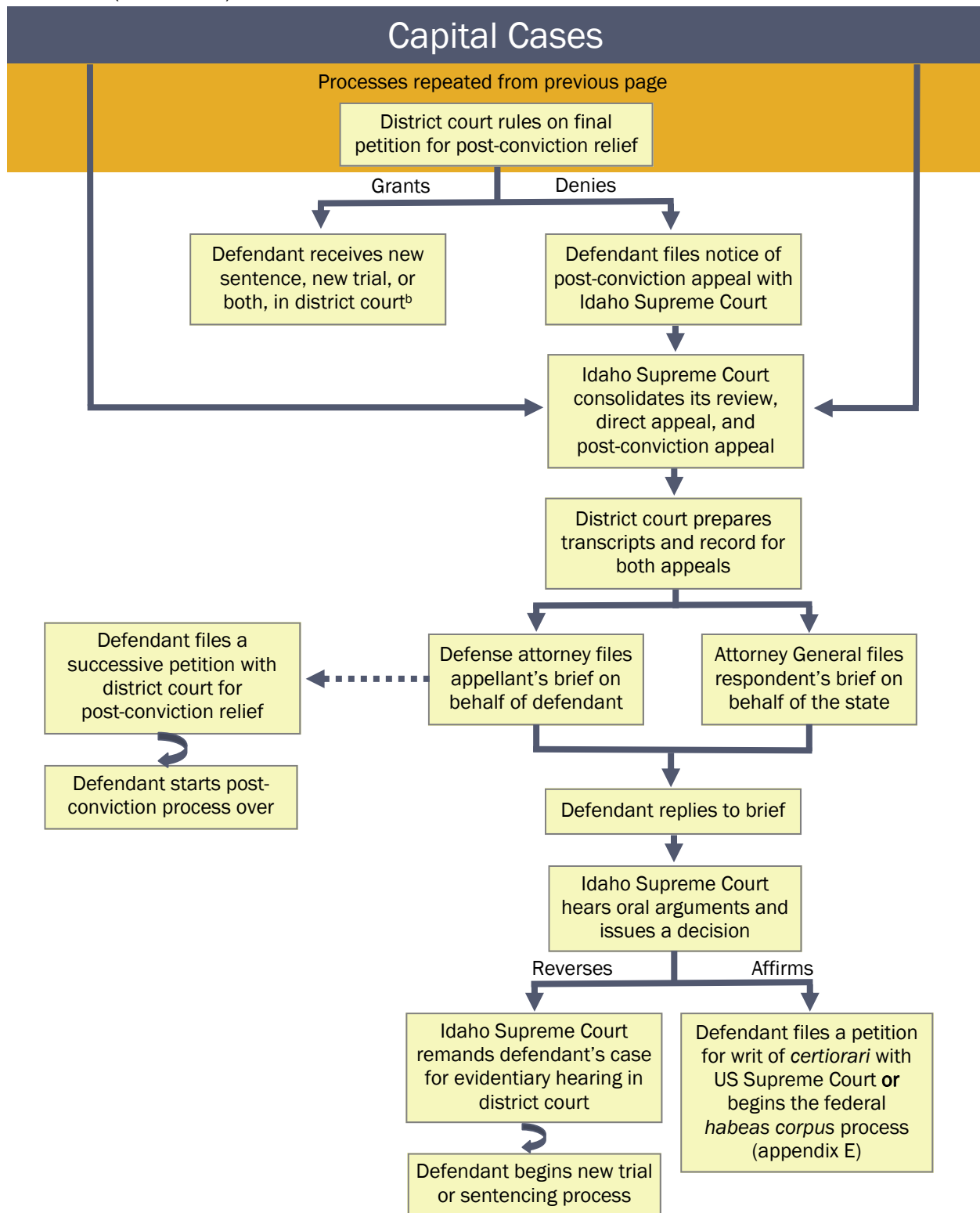


Exhibit 7 (continued)



Source: Office of Performance Evaluations' review of statute, rules, and policies in collaboration with the State Appellate Public Defender's Office, the Office of the Attorney General, and the Idaho Supreme Court.

Because of statutory requirements, the direct appeal process for capital cases takes longer to complete than noncapital cases.

We analyzed direct appeal and post-conviction appeal data from the State Appellate Public Defender's Office for 65 noncapital, first-degree murder cases represented by the office from 1998 to 2013.⁴ We also analyzed direct appeal and post-conviction appeal data from the Idaho Supreme Court for 10 capital defendants represented by the office during the same timeframe. Using filing dates, we compared the length of the direct appeal and post-conviction appeal for capital and noncapital cases.

As we have previously indicated, Idaho Code § 19-2719(6) requires capital defendants to first complete the post-conviction proceedings while their direct appeal is stayed, extending the length of time to complete the direct appeal process. Because the direct appeal is stayed while a capital defendant completes the post-conviction proceedings, we analyzed how long the direct appeal was stayed for eight capital defendants. We found that median length of time the appeal was stayed was 3.2 years. We then analyzed the actual time taken to complete the direct appeal by excluding the time the appeal was stayed.

We found the direct appeal generally takes longer to complete in capital cases compared with noncapital cases. As shown in exhibit 8,

the median length of the direct appeal is 2 years for a noncapital case and 3.2 years for a capital case—a difference of 1.2 years. Exhibit 8 also shows the time taken to complete the post-conviction appeal for capital and noncapital cases. The median length of the post-conviction appeal is 1.8 years for a noncapital case and 3.2 years for capital cases—a difference of 1.4 years. Because the direct appeal and post-conviction appeal are consolidated for capital defendants, the lengths of time are the same for each appeal.

Some criminal justice stakeholders we spoke with commented that the current law delays the appeals process by requiring the post-conviction proceeding be completed before allowing the Idaho Supreme Court to hear the direct appeal. We were told of instances when the direct appeal would have negated the need for post-conviction proceedings. For example, a trial error discovered during the direct appeal could negate the need for a post-conviction petition—a process that takes about 3 years to complete for capital defendants.

Other differences in the length of time may be attributed to consolidating the direct appeal, the post-conviction appeal, and the Idaho Supreme Court's review of the death sentence for capital defendants. For example, the court must wait for court transcripts and the Idaho Supreme Court must review three consolidated processes.

4. We analyzed case data, not defendant data, and some defendants were represented more than once for different appeals and have more than one case included in the dataset.

Exhibit 8

The median difference to complete the direct appeal and the post-conviction appeal for a capital case as compared with a noncapital case is more than one year.

	Number of years			
	Minimum	Maximum	Average	Median
Direct appeal cases				
Noncapital (N=54)	.2	9.1	2.5	2.0
Capital (N=5)	1.6	5.8	3.3	3.2
Post-conviction appeal cases				
Noncapital (N=11)	1.2	4.1	2.2	1.8
Capital (N=5)	1.6	5.8	3.3	3.2

Source: Office of Performance Evaluations' analysis of defendant data from the State Appellate Public Defender's Office and the Idaho Supreme Court for first-degree murder defendants represented by the State Appellate Public Defender's Office from 1998 to 2013.

Inherent limitations will affect the outcomes of a detailed death penalty analysis.

As shown in exhibit 8 on the previous page, the number of comparable cases was small for capital cases because our analysis excluded defendants with an active direct appeal or post-conviction appeal. Although our analysis found differences in the length of time taken to complete parts of the appeal and post-conviction phase, the small number of capital cases available for comparison should be considered when drawing conclusions. Additionally, the process for capital defendants is statutorily different, which creates some challenges when making comparisons.

Furthermore, offenders originally sentenced to death but now serving a life sentence may influence the findings of a time or cost analysis. One stakeholder we interviewed expressed concerns about how to fairly and accurately assess costs for offenders who were originally sentenced to death but later had their sentence reversed or changed.

The purpose of the appeal and post-conviction phase is to attempt to overturn a death sentence, which is one reason the process requires more time and resources. An analysis of the costs of the death penalty could categorize offenders who receive a new sentence in either comparison group, depending on how the researchers define the parameters of the analysis.

Death Penalty Costs



The major objective of this study was to identify and estimate the costs of Idaho's death penalty. This chapter discusses those costs. Although many criminal justice stakeholders were able to provide us with partial cost data, most do not collect enough data for us to accurately estimate the total costs of the death penalty.

Most cost data for the death penalty are incomplete and not readily available.

Idaho has very limited data to estimate the cost of the death penalty.

This section summarizes the types of data available to estimate the cost of the death penalty in Idaho. We found many of the cost data were not available, only partially available, or not compiled in a way that allows for comparison between capital and noncapital cases.

Law Enforcement Investigation Costs

We spoke to local law enforcement stakeholders from Ada County and the City of Boise about costs of the death penalty. We learned that law enforcement costs do not typically differ between capital and noncapital first-degree murder cases for two reasons: (1) all criminal investigations begin the same and (2) the county prosecutor's decision to seek the death penalty does not happen until after the investigation.

Much later in the process, when the defendant has been sentenced and moved to a facility under the custody of the Department of Correction, the county sheriff transports offenders to and from court appearances. These transportations can occur daily for offenders who are serving sentences for many different types of convictions. Because the county sheriff transports all offenders regardless of sentence, we did not calculate the county costs for transporting offenders to and from court appearances.

Costs of County Prosecutors and Public Defenders

We spoke to members of the Idaho Prosecuting Attorneys Association and three county prosecutors to learn more about death penalty costs incurred by county prosecutors. We found county prosecutors do not track hours or costs for any case.

County prosecutors do not track costs for capital or noncapital cases.

Idaho created the Capital Crimes Defense Fund in 1998 to help counties pay for trial costs for death penalty cases. The fund comprises contributions from participating counties and any other court fees or funds designated or appropriated by the Legislature. Participation in the fund is voluntary, and all counties but Jefferson participate. Counties must pay the first \$10,000 of trial costs before submitting reimbursement claims to the fund, and they must pay the wages of the lead defense attorney.

Exhibit 9 shows the total dollar amount paid to 11 counties for defense costs since 1999. The exhibit does not include the first \$10,000 of trial costs per defendant or the cost of the lead defense attorney. Given that exhibit 9 represents reimbursements for 32 defendants, we can assume counties paid a combined \$320,000 of trial costs before seeking reimbursement.

Exhibit 9

11 counties have been reimbursed more than \$4 million for defense costs since 1998.

County	Number of defendants	Claims paid (\$)
Ada	9	1,851,040
Bannock	1	85,396
Benewah	1	42,914
Boise	3	197,884
Bonneville	2	0
Canyon	9	450,638
Elmore	2	226,914
Jerome	1	40,103
Kootenai	1	279,596
Latah	1	441,167
Payette	2	425,654
Twin Falls	2	92,525
Total		4,133,831

Source: Idaho Association of Counties.

Note: Ada, Bonneville, Kootenai, and Payette counties have open cases and may be entitled to future reimbursements.

District Courts and Jury Costs

Depending on the local structure, the county clerk or the court administrator tracks jury costs. In our interviews with

five counties, we found that although they differed in their ability to track all death penalty trial costs, all five counties track jury costs for capital and noncapital cases. However, those costs do not include judge and court staff time, transcripts, or security.

State Appellate Public Defender's Office Costs

Six staff work in the capital litigation unit of the State Appellate Public Defender's Office: three attorneys, one investigator, one mitigation specialist, and one administrative assistant. These staff represent defendants sentenced to death during the post-conviction proceeding, the direct appeal, and the post-conviction appeal. The office provided us with the total number of billable hours spent on capital litigation from 2001 to 2013. During those 13 years, staff accumulated 79,178 billable hours on capital litigation for 10 defendants sentenced to death—an average of 7,918 hours per defendant.

During that same time frame, the office's appellate unit accumulated 16,980 billable hours of litigation for 95 defendants with a life sentence—an average of approximately 179 hours per defendant.

The office spent \$477,716 in operating expenses to litigate death penalty cases from July 1, 2004, to December 31, 2013. The office assigned these operating expenses to 50 separate expenditure categories. The most commonly used categories were consultant fees, long distance phone calls, lodging and vehicles for travel, and other general services.

Attorney General Costs

Two attorneys in the Criminal Law Division of the Office of the Attorney General work capital cases in addition to their other duties. The attorneys do not separate their time and are not able to calculate actual time spent on capital cases.

The division was able to provide some data for costs of evidentiary hearings and travel for federal *habeas corpus* appeals in capital cases. From fiscal year 2001 to 2013, the division spent at least \$363,513 representing the state in appeals filed by 20 offenders originally sentenced to death.

The greatest costs have been the accumulated litigating appeals from three offenders sentenced to death in the 1980s. The division has spent approximately \$90,000 per offender. Although one of the offenders has been executed, the other two offenders currently have pending appeals. We do not have cost data to compare these costs to noncapital appeals.

Supreme Court Costs

The Idaho Supreme Court does not track any of the direct costs for death sentence appeals. In addition, the court does not maintain segregated data for appellate proceedings.

Department of Correction Costs

The Idaho Department of Correction incurred construction and operational costs to prepare and conduct two executions in 2011 and 2012. The department also incurs costs to house offenders.

In 2011 Idaho held its first execution in 17 years. To prepare for the execution, the department remodeled one of its buildings. The construction costs and purchase of small assets required for the building totaled \$165,351. The department spent \$4,418 on facility and ground improvements for the demonstrator and media areas.

The department incurs operating expenses to carry out each execution. As shown in exhibit 10, the operational costs per execution have been relatively similar. In addition to operating expenses, some department staff accrue overtime to carry out an execution.

The department also incurs ongoing costs to house offenders sentenced to death and life in prison. The department provided us with the average housing cost per day by facility, but to compare the costs of life imprisonment with a death sentence would require a large, detailed analysis with many caveats and assumptions. This complex analysis could, however, arrive at a reasonable estimate (i.e., range of costs).

The Department of Correction spent nearly \$170,000 in one-time costs to prepare for a 2011 execution.

Exhibit 10

The Department of Correction's operational cost for two recent executions was \$102,567.

	2011 (\$)	2012 (\$)
Total expenses	53,212	49,355
Personnel expenditures		
Staff overtime	<u>25,583</u>	<u>21,513</u>
Subtotal	25,583	21,513
Operating expenditures		
Entrance control checkpoint lease	628	—
F Block modification for media	—	862
Light towers and generators	1,705	600
Meals and coffee service	1,608	1,798
Medical supplies, training, and other expenses	18,319	16,973
Miscellaneous travel expenditures	—	1,894
Restroom rentals	300	280
Services for the condemned	585	685
Signs and posters	1,078	780
Tent lease and media supplies	<u>3,406</u>	<u>3,970</u>
Subtotal	27,629	27,842

Source: Department of Correction.

Next Steps



We compared the number of offenders originally sentenced to death with the number of offenders currently serving a death sentence and the reasons for a new sentence. We also analyzed the time needed to complete parts of the guilt and penalty phase as well as parts of the appeal and post-conviction phase for capital and noncapital defendants. Our findings align with national and other states research. Should policymakers wish to learn more about the total costs of Idaho's death penalty, we have provided information about the types of cost data necessary to complete any future analyses.

Policymakers should consider whether additional cost studies will provide new information.

The results of analyses we completed on the length of time needed to complete death penalty processes indicate that a more rigorous cost study in Idaho would yield results similar to national research and cost studies performed in other states. We found that to conduct a study estimating the total cost of the death penalty would require extensive time and resources, requiring that we complete a second phase of the current study.

A second phase would include designing and implementing a study methodology comparable to the approach the Urban Institute used to collect and estimate all of the necessary cost data in its 2008 study of the death penalty in Maryland. The researchers collected and coded extensive defendant case data from state and federal databases, surveyed stakeholders to gather estimated time data, and used statistical analyses to estimate costs at various stages in the process.

Now that policymakers know which types of cost data are readily available and which types of data will require additional effort to collect, policymakers could consider the following options to proceed with conducting a study like the Urban Institute:

- Require or request that stakeholders begin to track cost data specified in exhibit 11.
- Direct our office to gather cost data specified in exhibit 11 using snapshot methods such as stakeholder surveys to estimate the time spent on death penalty cases as compared with other first-degree murder cases.
- Ask for a case study approach, given the very few number of cases where the death penalty is sought and the even fewer cases where the death penalty is imposed.
- Consider some combination of these options.

Regardless of these options and their assumptions, any future studies would require complete data for the following in capital and noncapital first-degree murder defendants:

- A. Investigation, prosecution, public defense, and court costs for the guilt and penalty phase at the county level.
- B. Case data starting with the original charge to the most recent appeal decision to determine trends among defendants and in the entire process.
- C. Prosecution and court costs for post-conviction and post-conviction appeals at the county level.
- D. Litigation costs for the State Appellate Public Defender's Office.
- E. Litigation costs for the Criminal Law Division of the Office of the Attorney General.
- F. Court costs for the Idaho Supreme Court to hear all direct appeals, post-conviction appeals, and conduct a review of each death sentence.










G. Housing and execution costs for the Department of Correction.

Exhibit 11 summarizes the necessary cost data described in items A–G and provides an additional level of detail. The exhibit is intended to provide policymakers with a comprehensive overview of the cost data available and to what extent.

Piecing together historical data will not necessarily lead to different findings. If policymakers want additional cost information, they should focus on future data collection.

Exhibit 11

Availability of cost data varies by stakeholder.

Investigation		
Local law enforcement		Staff salaries Number and type of staff investigating each case Hours spent conducting first-degree murder investigations
Trial and Sentence		
County prosecutor		Attorney and staff salaries Time spent on capital and noncapital first-degree murder cases Travel, consultants, and contracted services
County public defender		Attorney and staff salaries Time spent on capital and noncapital first-degree murder cases Travel, consultants, and contracted services
District court and jury		Judge salaries Court staff salaries Time spent on capital and noncapital first-degree murder cases Estimate of facility costs (e.g., courtroom, jury room) Jury costs, security costs
Expert witnesses and specialists for all parties		Estimate of fees charged by type of witness, specialist, or expert
Appeal and Post-Conviction		
County prosecutor		Attorney and staff salaries Time spent on capital and noncapital first-degree murder cases Travel, consultants, and contracted services
State Appellate Public Defender's Office		Attorney and staff salaries Billable hours on capital cases Billable hours on noncapital first-degree murder cases Travel, consultants, and contracted services
County public defender		Attorney and staff salaries Time spent on capital and noncapital first-degree murder cases Travel, consultants, and contracted services
Supreme Court		Judge salaries Court staff salaries Time spent on capital and noncapital first-degree murder cases



Data available












Data partially available



Data not available

Exhibit 11 (continued)

Appeal and Post-Conviction		
Office of the Attorney General		<ul style="list-style-type: none"> Attorney and staff salaries Time spent on capital cases Time spent on noncapital first-degree murder cases Time spent on travel, experts, witnesses, and specialists
District court		<ul style="list-style-type: none"> Judge salaries Court staff salaries Time spent on capital cases Time spent on noncapital cases, murder cases Estimate of facility costs (e.g., courtroom, jury room)
Expert witnesses and specialists for all parties		<ul style="list-style-type: none"> Estimate of fees charged by type of witness, specialist, or experts
Federal Appeals		
Office of the Attorney General		<ul style="list-style-type: none"> Attorney and staff salaries Time spent on capital cases Time spent on noncapital first-degree murder cases Time spent on travel, experts, witnesses, and specialists
Housing		
Department of Correction		<ul style="list-style-type: none"> Cost of incarcerating offenders sentenced to death Cost of incarcerating offenders sentenced to life without parole Life expectancy of offenders Cost of health care
Execution		
Department of Correction		<ul style="list-style-type: none"> Costs per execution Ongoing costs
 Data available  Data partially available  Data not available		

Source: Office of Performance Evaluations' analysis of available data based on stakeholder interviews and data requests.

Policymakers should consider the limitations of a future study.

Gathering data for all of these costs would require an overwhelming level of support and commitment from stakeholders. Some stakeholders, like the State Appellate Public Defender's Office and the Department of Correction, may be better prepared to submit the necessary data, while other county and state agencies may need more time to develop processes for data collection. Additionally, some stakeholders may not be able to provide comprehensive historical data.

Some defendant case data are available on the Idaho Supreme Court Data Repository; however, county clerks differ in the level of detail they enter, which makes some entries more complete than others. Therefore, the data available on the repository have some limitations.

The Supreme Court has requested funding and legislation to support a new five-year technology plan to replace its current statewide data system. A large portion of the funding will go toward a new case management and electronic filing system called Odyssey. The Odyssey system will not capture cost data, but it will provide the

court with more comprehensive case data that relies on standardized codes. The data entered by counties will be more consistent among counties, allowing users or researchers to collect comprehensive case data from start to finish.

Although undertaking a much longer, more in depth study of death penalty costs would enable us to make some reasonable estimates and comparisons, it would not lend itself to predicting the total savings that may be achieved by eliminating the death penalty. A conclusion that death penalty cases require more time and effort than other types of first-degree murder cases would not necessarily translate into costs savings for all instances.

Many stakeholders within the criminal justice system, such as judges, prosecutors, defenders, sheriff's deputies, and correctional staff may have only marginal increases in their workload due to the existence of the death penalty. Eliminating the death penalty would mean that resources among many agencies would be available for other priorities, but translating the avoided time and effort into budgetary savings for each stakeholder would be challenging.

Appendix A

Study Request



Two members of the Joint Legislative Oversight Committee requested this study; both had previously served together as cochairs of the committee. Their request was selected for evaluation at a meeting of the committee on March 14, 2013.

Memorandum

To: Joint Legislative Oversight Committee
From: Senators Elliot Werk and Clifford Bayer
Date: March 11, 2013
Subject: Request for an Evaluation of Idaho's Death Penalty System

Idaho's death penalty system is fragmented and inefficient. To better understand the death penalty system this proposal asks OPE to study the structure, workings, costs, and effectiveness of the death penalty system in Idaho and to compare Idaho's system to best practices across the country. It's hoped that this study will provide the legislature with important information that can be used to make informed public policy decisions about Idaho's death penalty system.

Background

According to Idaho statute (19-2512), "a person convicted of murder in the first degree shall be liable for the imposition of the penalty of death if such person killed, intended a killing, or acted with reckless indifference to human life, irrespective of whether such person directly committed the acts that caused death." The death penalty in Idaho is administered by lethal injection (19-2716).

According to the Death Penalty Information Center, Idaho is one of 34 states with a death penalty. Idaho currently has 14 offenders on death row (13 men and one woman). Since 1864, Idaho has executed 30 people with the most recent execution occurring in June 2012. Before an execution in November of 2011 no person was executed in Idaho for a period of 18 years.

In 2001, after almost 18 years on Idaho's death row, Charles Fain was exonerated by DNA evidence. In addition, two people have been released from Idaho's death row. These include Donald Paradis convicted in 1981 and released from prison in 2001 after spending 14 years on death row. And Mark Landford's death sentence was recently vacated and his sentence reduced to life in prison.

According to information provided by the Idaho Department of Correction, the direct cost of the last execution was \$53,411. This total only reflects the cost of the execution and does not take into account the cost of prosecution, incarceration or legal fees associated with appeals. Questions have been raised about the costs associated with a death penalty sentence and how those costs compare to a sentence of life in prison. In addition, questions arise from the fragmented nature of the death penalty system in Idaho and whether Idaho follows best practices that minimize costs and ensure that justice is fairly administered.

Idaho's death penalty system is fragmented with counties making the decision to seek the death penalty. Costs for death penalty prosecutions are shared between 43 of 44 counties in Idaho (the exception being Jefferson County) through the Capitol Crimes Defense Fund. Appeal costs are split depending on where the appeal is heard with the county involved only in post-conviction relief.

Proposal

A performance evaluation seeking to analyze the structure, workings, costs, and effectiveness of the death penalty system in Idaho as well as comparing Idaho's system to best practices across the country will, for the first time, allow the legislature to fully evaluate the death penalty system. This will allow the legislature to make informed policy decisions that could save the state millions of dollars in a time of great budgetary stress and competition. In addition, the evaluation could help policymakers develop a less fragmented and more effective system that helps lessen the number of improper convictions.

This request is particularly timely since the state recently began carrying out executions after an 18 year hiatus. This has focused attention on the issue and raised questions about the costs and benefits of the current system. In addition, an evaluation of the costs of the death penalty system in Idaho is particularly timely given the fast rising demands of the corrections system and the strain this system places on other budgetary priorities.

Necessity

The need to eliminate unnecessary expenses and waste in government operations has never been greater. It's clear that Idaho's death penalty system is fragmented and inefficient. Developing objective and current information will allow policymakers to make the system more efficient and effective while allowing precious resources to be put to better use in higher priority areas of state and local government.

In addition, with a spate of recent exonerations and reduced sentences it's clear that our system of justice for death penalty cases is flawed. The people of Idaho expect and deserve a system that ensures that justice is properly, thoroughly, and efficiently implemented. To reach this standard, data is needed and changes are required. This can only be done if policymakers at all levels of government have the objective data that this evaluation will provide.

Appendix B

Scope



Beginning with the initial decision to seek the death penalty and following cases through investigation, trial, incarceration, the appeal processes, and the execution, this study answers six questions.

Death Penalty Cost Structure

August 2013 Project Scope

1. What are the roles and responsibilities of stakeholders within the criminal justice system from the time an individual is charged with a capital crime to the time of execution, including the appeals process?
2. How have changes to state and federal law affected the death penalty structure in Idaho?
3. What factors play a role in a county prosecutor's decision to seek the death penalty as a potential sentencing option?
4. To what extent can Idaho calculate the costs associated with the prosecution, sentencing, and appeals of those crimes eligible for the death penalty?
5. How do the costs associated with a death penalty case compare with that of a life sentence, including incarceration costs?
6. How are other states addressing the costs associated with death penalty cases?

Appendix C

Methodology



This appendix lists the methods we used to better understand Idaho's death penalty, the criminal justice stakeholders involved, and the costs of the death penalty as compared with costs for life in prison.

Policy and Data Analysis

- Studied Idaho's death penalty laws including statute, administrative rule, Idaho Supreme Court appellate and criminal rules, and Department of Correction policies.
- With assistance from the Office of the Attorney General, developed a comprehensive timeline of changes to Idaho's death penalty laws from 1864 to 2012.
- Identified trends in the number of death sentences given in comparison to changes in Idaho's death penalty laws in 1998 and 2003.
- Analyzed current and revised sentence data for 40 offenders sentenced to death since 1977, when Idaho amended its death penalty laws to comply with US constitutional requirements.
- Analyzed case data for 284 defendants charged with first-degree murder from 1998 to 2013, such as length of parts of the guilt and penalty phase, notice of intent to seek the death penalty, entry of plea, and withdrawal of intent to seek the death penalty. Major revisions were made to Idaho's death penalty laws in 1998, which is why we selected that year as the starting point for our dataset. Thirty-four cases were excluded from the analysis because either no disposition date was available or other issues rendered the data inappropriate or unavailable. One case filed in November 1997 was included because the county prosecutor submitted a notice of intent to seek the death penalty and the defendant received the death penalty in 1999.
- Analyzed post-conviction appeal and direct appeal data for 128 cases for defendants convicted of first-degree murder who also received criminal defense services from the State Appellate Public Defender's Office since September 1998. The analysis determined the median length for parts of the appeal and post-conviction phase. We used the median rather than the mean to minimize the effect of outliers in the dataset. Sixty-three cases were excluded from the analysis because the case was active, suspended, categorized as a conflict or contract, or withdrawn from office representation.
- Analyzed post-conviction appeal and direct appeal data from the Idaho Supreme Court for 10 defendants convicted of first-degree murder and sentenced to death and also represented by the State Appellate Public Defender's Office to determine the median length for parts of the appeal and post-conviction phase.
- Analyzed the number of billable hours the State Appellate Public Defender's Office accumulated while working on litigation for both capital and noncapital first-degree murder cases from 2001 to 2013.
- Analyzed expenditure data from the Capital Litigation Unit of the State Appellate Public Defender's Office from July 1, 2004, to December 31, 2013.
- Analyzed the total dollars spent by the Criminal Law Division in the Office of the Attorney General to represent the state in federal *habeas corpus* appeals from 2001 to 2013.

- Analyzed cost data from the Department of Correction for executions and offender housing and programming.
- Reviewed available cost data from 7 of the 12 counties that submitted claims to the Capital Crimes Defense Fund (Ada, Bannock, Bonneville, Canyon, Kootenai, Latah, and Twin Falls) and the Idaho Association of Counties.
- With assistance from the Criminal Law Division in the Office of the Attorney General, the Idaho Supreme Court, and the State Appellate Public Defender's Office, created detailed flowcharts explaining the guilt and penalty phase and the appeal and post-conviction phase for capital and noncapital defendants.

Interviews and Site Visits

- Interviewed criminal justice stakeholders at the county level, such as law enforcement, clerks, jury or court administrators, public defense attorneys, prosecuting attorneys, the Idaho Association of Counties, and the Idaho Prosecuting Attorneys Association to learn more about costs of the death penalty and what costs, if any, are tracked. The criminal justice stakeholders we spoke to represented Ada, Bannock, Bonneville, Canyon, Kootenai, Latah, and Twin Falls counties.
- One of our scope questions asked which factors play a role in a county prosecutor's decision to seek the death penalty as a potential sentence. We originally thought prosecutors might consider factors such as direct costs, time, political influences, societal norms, or cultural values. Interviews with three county prosecutors and a representative from the Idaho Prosecuting Attorneys Association found that although each case is unique,

prosecutors only consider the statutory criteria found in Idaho Code § 19-2515. Therefore, we did not expand on the scope question in the report.

- Interviewed the mayor of Boise and a representative of the Boise Police Department to learn more about city criminal investigations and costs. In addition, we interviewed the mayor to learn more about his experiences as a former legislator and a bill he introduced in 2003 to study the death penalty.
- Interviewed criminal justice stakeholders at the state level, such as current legislators, the Criminal Law Division in the Office of the Attorney General, the Idaho Supreme Court, the State Appellate Public Defender's Office, and the Department of Correction, to learn more about the death penalty and which death penalty costs are tracked.
- Visited the Idaho Maximum Security Institution, where we interviewed staff and toured the facility, including the cell block that houses offenders sentenced to death and the cell block that houses the execution chamber.

National and Other States Research

- Researched other states, including states that have recently repealed the death penalty, states that have expanded their death penalty laws, and states that have conducted or been the subject of studies attempting to identify the costs of their state's death penalty.
- Interviewed Michael Radelet, a national expert and scholar in the field of capital punishment. Dr. Radelet is the chair of Department of Sociology at the University of Colorado.

Selected Bibliography

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Appendix D

Death Penalty Legislation in Other States



In addition to reviewing national and state cost studies, we reviewed recent legislative efforts in other states to provide policymakers with information about current death penalty reform efforts. We found that states take one of two approaches when reforming their death penalty laws: (1) repeal or abolish their death penalty laws and (2) expand or streamline current laws. This appendix provides summary information about both approaches.

Five states have repealed the death penalty in the last decade.

Eighteen states do not allow the death penalty. Of those states, five have repealed their death penalty laws in the past 10 years:

Maryland, 2013
Connecticut, 2012
Illinois, 2011
New Mexico, 2009
New Jersey, 2007

In 2004 the New York Court of Appeals found that a portion of the state's death penalty law created the potential for jurors to be coerced into sentencing defendants to death, which essentially rendered operation

of the death penalty invalid. In 2007 the last remaining individual sentenced to death received a reduced life sentence. Then, in 2008 the governor mandated the removal of all execution equipment from state facilities. As a result, New York has no individuals sentenced to death and no viable death penalty laws. Therefore, New York is considered one of the 18 states without the death penalty and is included in our research.

More recently, the governors of Oregon and Washington placed a moratorium on all executions in 2011 and 2014.

States have not made their repeal legislation retroactive.

Four of the five most recent states to repeal the death penalty did not include provisions in their repeal legislation to resentence individuals already serving a death sentence. Collectively, 18 inmates remain sentenced to death in Connecticut, Maryland, and New Mexico. Further, although the repeal in Illinois did not affect the 15 individuals

serving a sentence of death, the governor commuted their sentences to life without parole in 2011. New Jersey is the only state to resentence all individuals sentenced to death with the repeal of its death penalty laws.

18 individuals remain sentenced to death in 3 states that no longer authorize the death penalty.

Several states have passed laws intended to either expand eligibility for the death penalty or streamline the appeals process.

At the same time some states are repealing their death penalty laws, other states are expanding the list of crimes that are eligible for the death penalty. We provide the following examples:

- In 2013 Mississippi added the act of terrorism when a victim is killed.
- In 2011 New Hampshire added murders committed during home invasions.
- In 2010 Virginia added the murder of auxiliary law enforcement officers, deputy sheriffs, and fire marshals.

Efforts to reduce delays in executions have largely focused on the appeals and post-conviction process:

- In 2013 Florida passed the Timely Justice Act that focuses on ending delays in the post-conviction process. It ensures that conflicts of interest, which are cited as a reason for replacing attorneys, are legitimate. The act also took steps to prevent defense attorneys from representing offenders sentenced to death if these attorneys have been found to have provided deficient representation twice in the past five years.
- In 2013 North Carolina repealed the Racial Justice Act that barred death penalties obtained on the basis of race and allowed death row inmates to use

statistical analysis to argue that race was a sentencing factor.

- In 2011 Utah set limits on obtaining stays of execution for successive post-conviction petitions.

In addition to the legislation states have already passed, a number of states are considering revisions to their death penalty laws in the 2014 session. When this report went to print on March 17, 2014, states were considering the following:

- Alabama introduced a bill to allow the death penalty for murder at a school or daycare and another bill to eliminate judges' power to override a jury's recommendation for a life sentence.
- Alabama also introduced a bill to streamline the appeals process. In addition, district attorneys in California have proposed a ballot initiative to curtail the appeals process, and Kansas is considering a bill that would curtail their appeals process.
- Arizona may expand their list of aggravating factors, but has also introduced a concurrent resolution to repeal the death penalty.
- Louisiana, Missouri, Tennessee, Virginia, and Wyoming are considering bills that offer alternative methods of execution to lethal injection.

- Louisiana is also considering a bill that would accelerate the appeals process and Missouri is considering one that would require faster setting of execution dates.
- Virginia is considering disallowing any use of the electric chair.
- Delaware, Florida, Kansas, Kentucky, Missouri, Nebraska, New Hampshire, Ohio, South Dakota, Washington, and Wyoming all have or may consider repeal bills.
- West Virginia introduced a bill that would reinstate the death penalty.

Appendix E

Basic Federal Appeal Process



A complete review of the federal appeal process was outside the scope of our research. However, because the Criminal Law Division of the Office of the Attorney General represents the state in the federal appeal process and therefore accrues costs to prosecute capital defendants, we worked with the division to develop a basic understanding of the process.

Defendants begin the federal *habeas corpus* process after the Idaho Supreme Court issues a decision.

Both capital and noncapital defendants may petition the federal district court for a writ of *habeas corpus* and petition the US Supreme Court for a writ of *certiorari* if the Idaho Supreme Court affirms the actions of the state district court. Exhibit 12 shows how defendants move through the federal *habeas corpus* process. The exhibit makes the assumption that the defendant petitions for a writ of *certiorari* after the federal district court and the Ninth Circuit Court of Appeals affirms the decision of the lower court.

For capital defendants, the state district court will issue a death warrant if the US Supreme Court affirms the decision made the Ninth Circuit Court. Once the death warrant is issued, the Department of Correction will begin to prepare for the defendant's execution, which must take place within 30 days after the death warrant is issued.

Definitions

A writ of *habeas corpus* is a legal action where the defendant seeks relief in federal court from unlawful imprisonment.

A writ of *certiorari* is a petition to the US Supreme Court to review the decision of a lower court.

Exhibit 12

The federal judicial system allows defendants to appeal the decision of the lower court.

Noncapital Cases

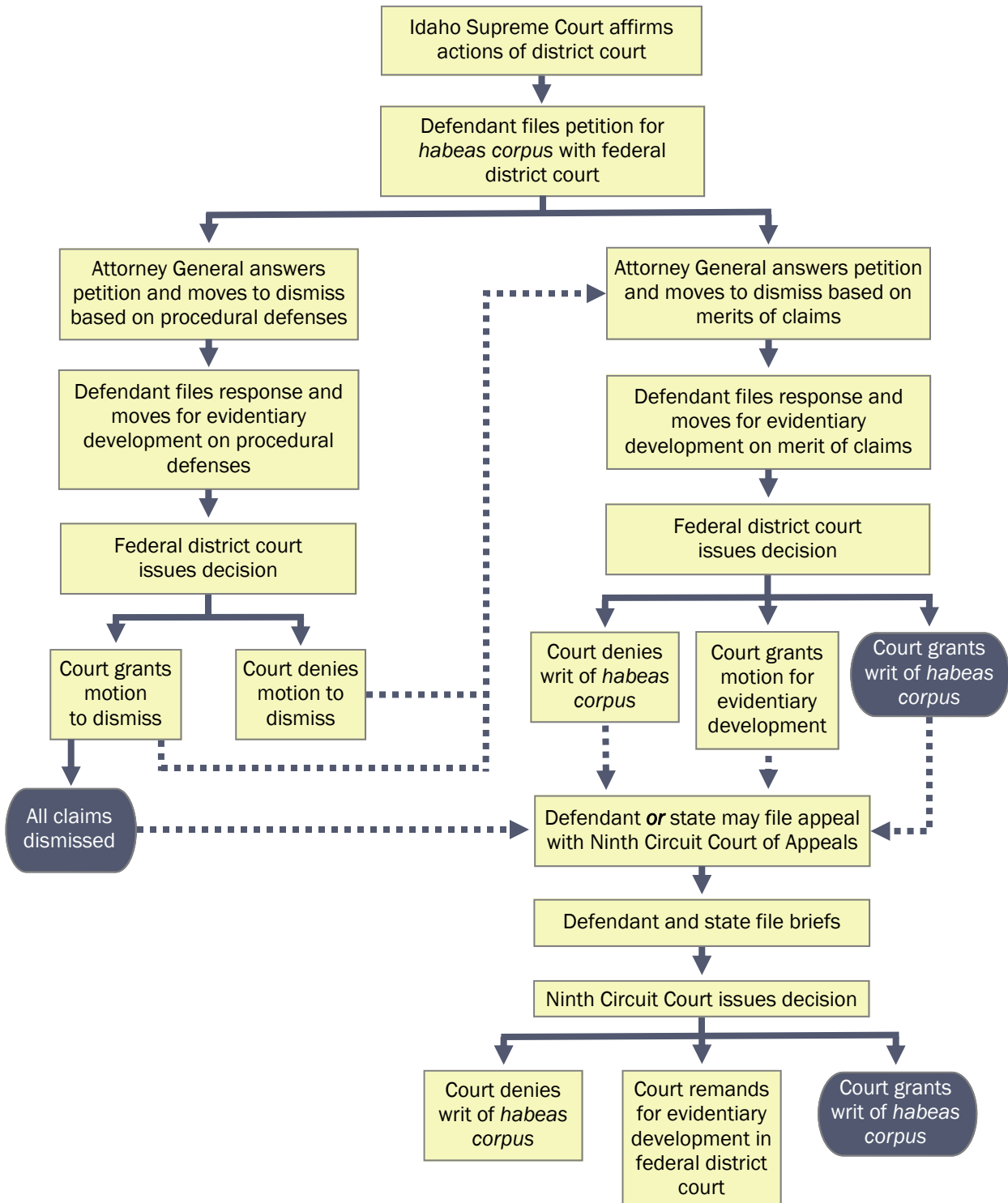


Exhibit 12 (continued)

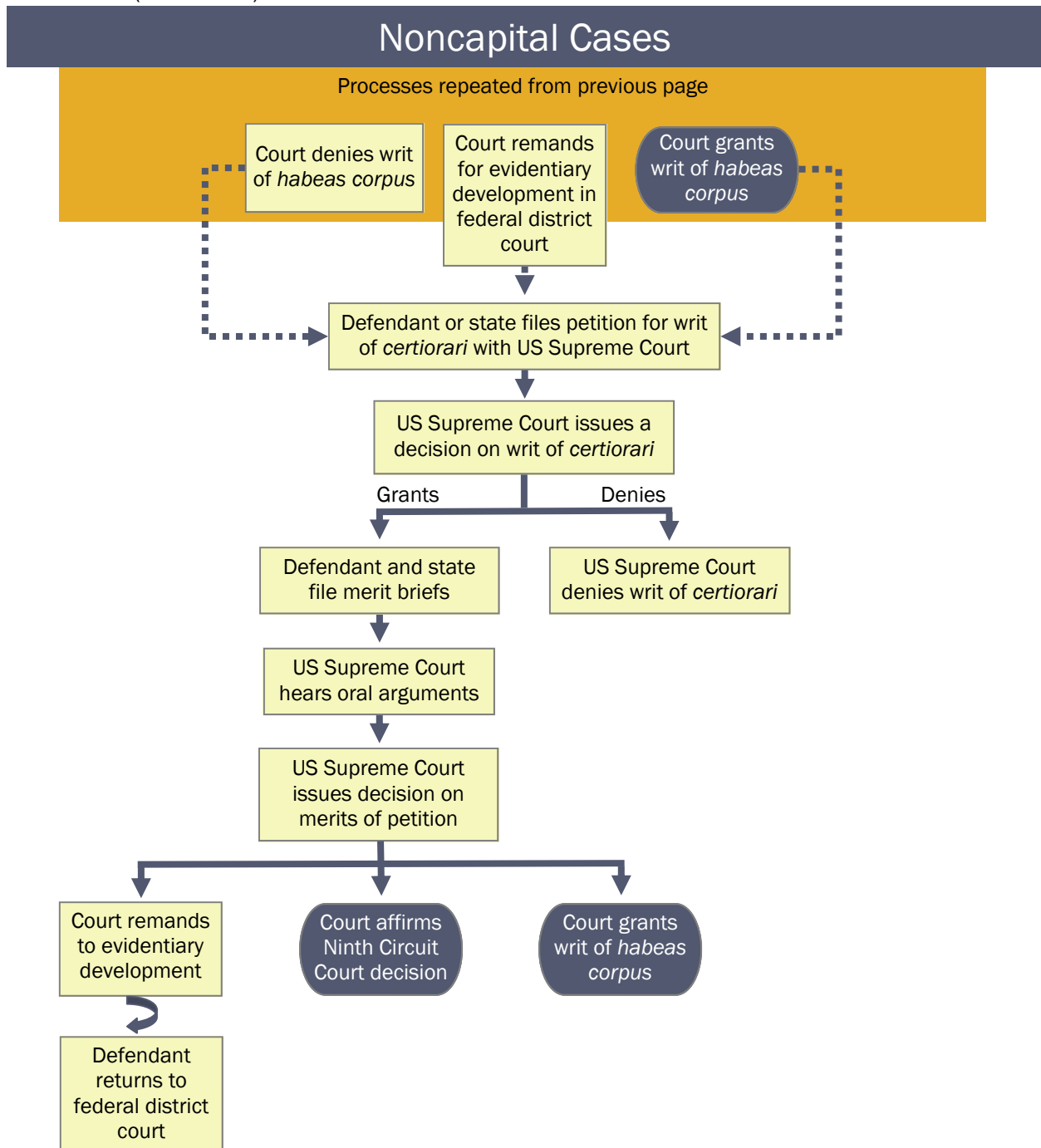


Exhibit 12 (continued)

Capital Cases

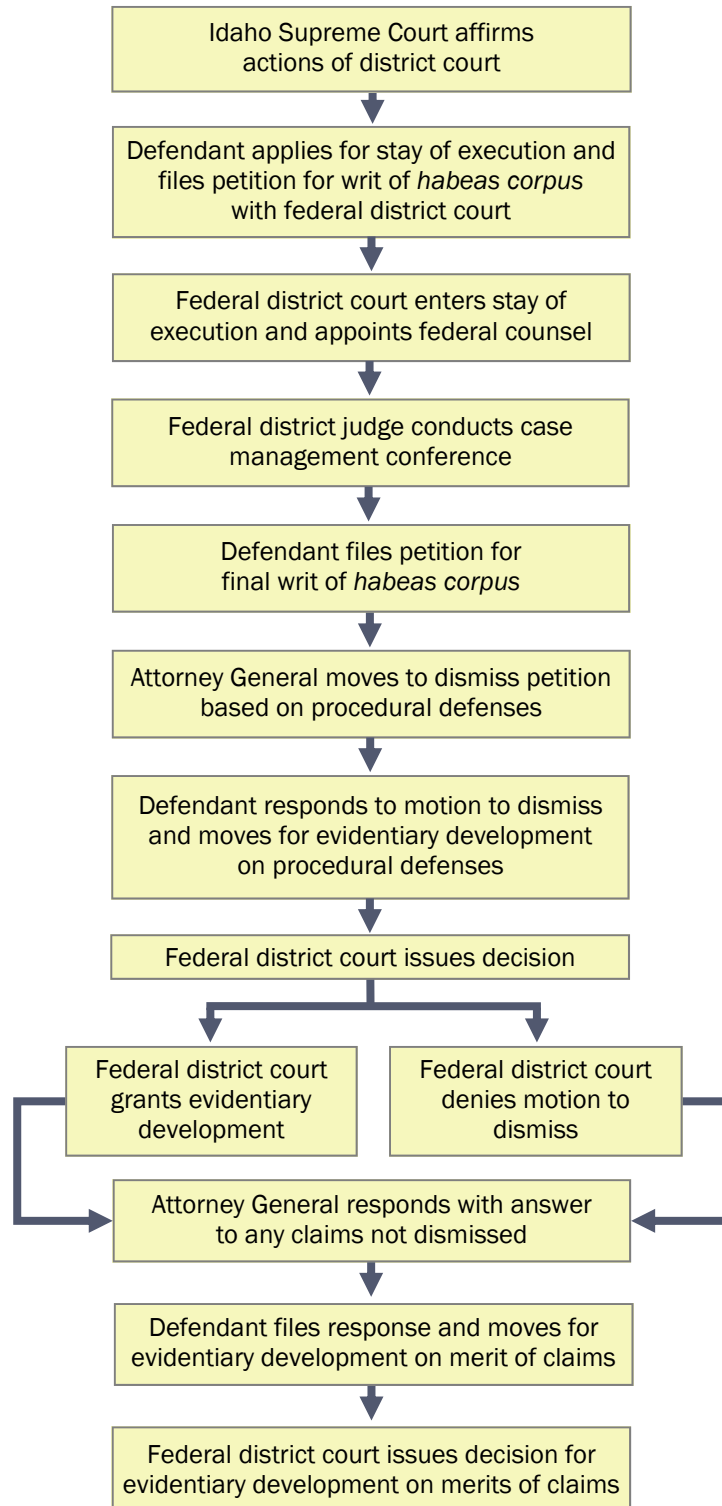


Exhibit 12 (continued)

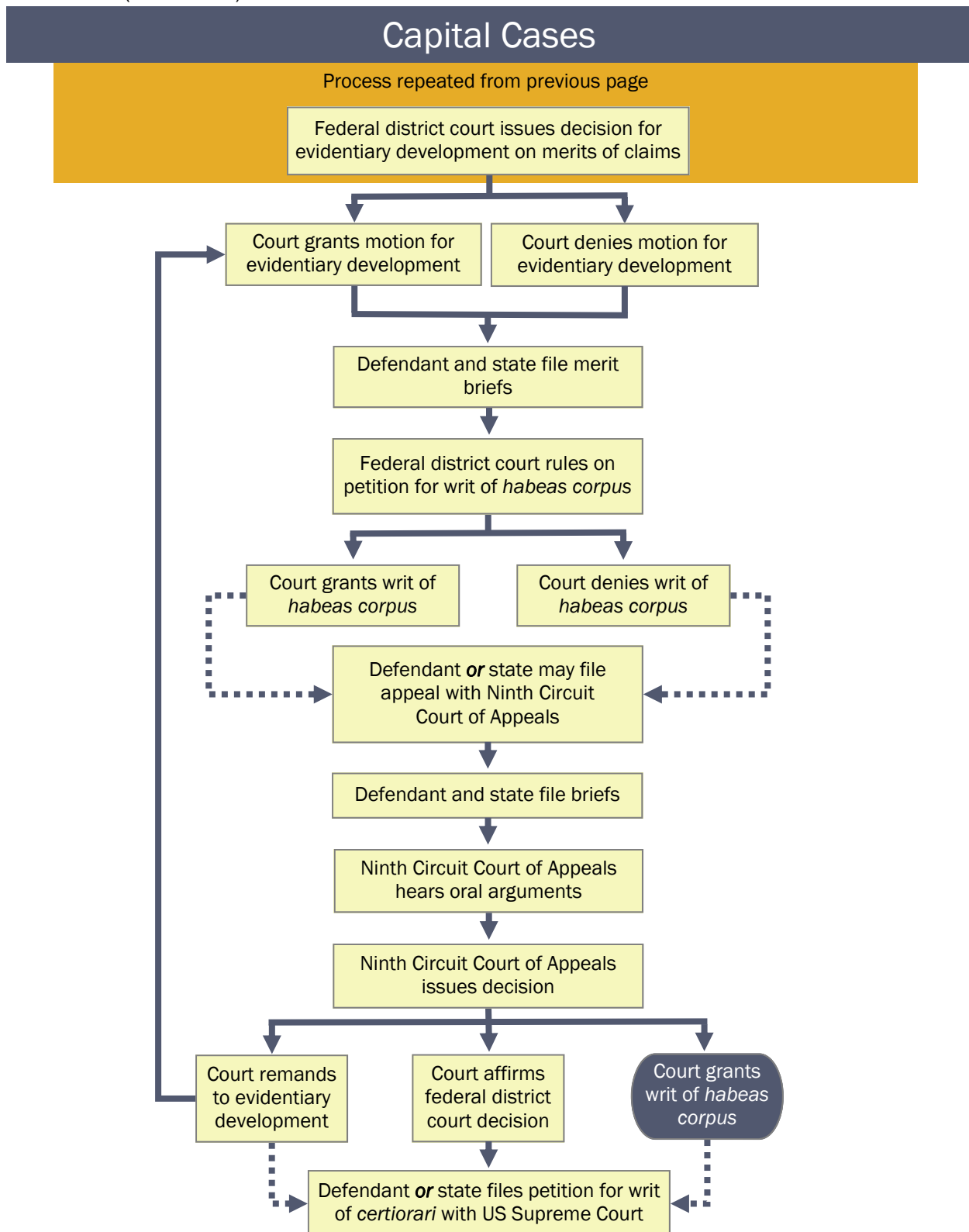
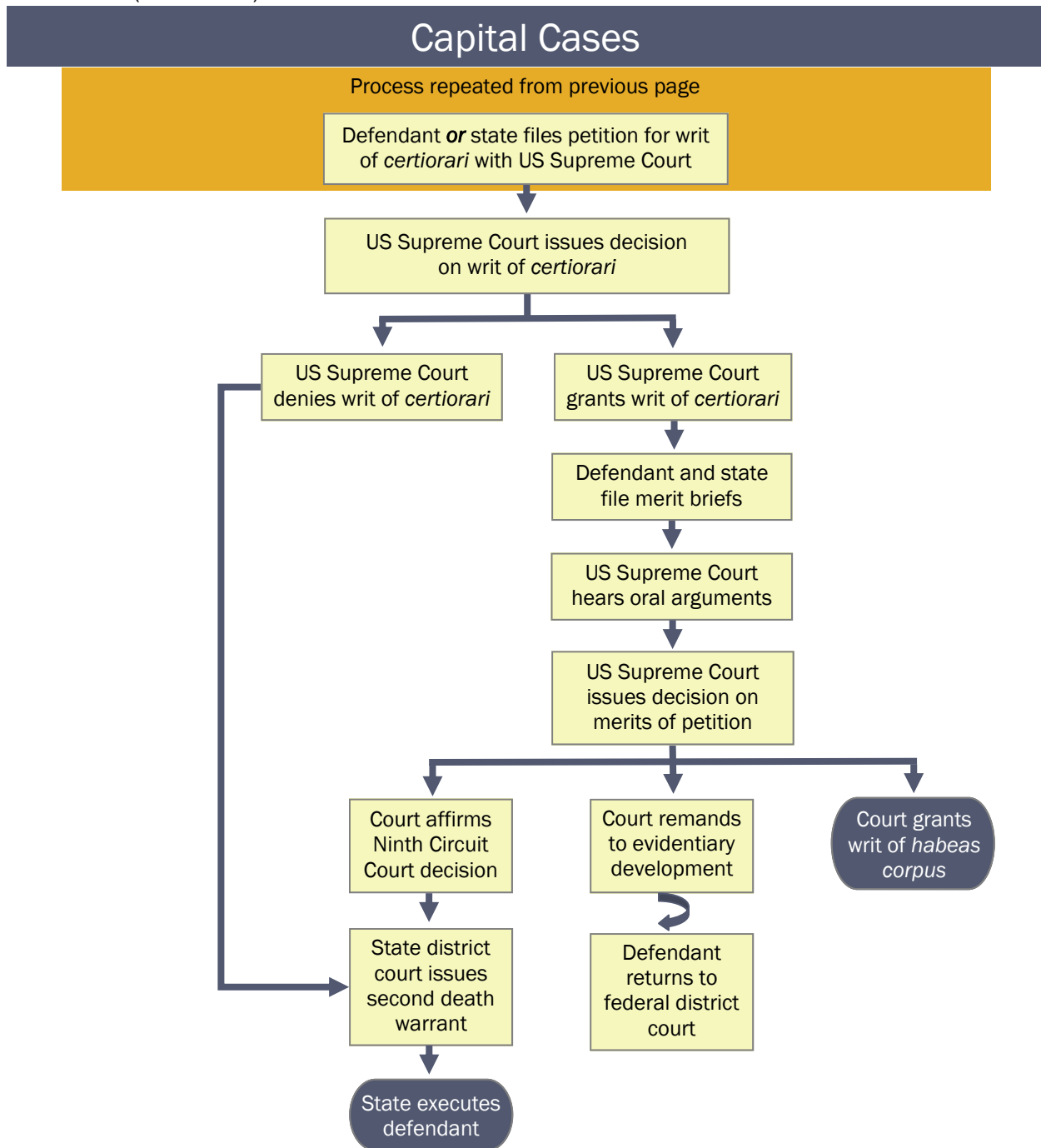


Exhibit 12 (continued)



Source: Office of the Attorney General.

Note: When a writ of *habeas corpus* is granted, the state district court is directed to issue the writ. The defendant is released unless a retrial or resentencing occurs within a specified time designated by the higher court.

Responses to the Evaluation



C.L. "BUTCH" OTTER
GOVERNOR

March 12, 2014

Rakesh Mohan, Director
Office of Performance Evaluations
Idaho Legislature
954 W. Jefferson St.
Boise, ID 83720-0055

Dear Rakesh,

This acknowledges receipt and review of your office's work on the new report "Death Penalty Cost Structure."

While meaningful cost information and other data can be difficult to attain with such diversity in standards, practices and available resources between jurisdictions, it also is clear that our State agencies have been diligent in both accounting for and containing their associated costs. The Idaho Department of Correction in particular has been exemplary in its duty to responsibly carry out death sentences.

I did however find interesting the stark difference between county reimbursements for defense costs in capital cases – particularly the more than \$1.85 million in payments to Ada County and the significantly lower \$450,000 in payments to neighboring Canyon County for the same number of defendants (nine each) during the same time period.

And while your report raises and then leaves open the policy question of whether tax dollars are wisely spent on death penalty cases, let me leave no doubt about my own continuing support for our existing laws and procedures.

As Always – Idaho, "Esto Perpetua"

A handwritten signature in black ink, appearing to read "C.L. Butch Otter", with a long horizontal stroke extending to the right.

CLO/mw

C.L. "Butch" Otter
Governor of Idaho



IDAHO DEPARTMENT OF CORRECTION

To promote a safer Idaho by reducing recidivism

C. L. "BUTCH" OTTER
Governor

BRENT D. REINKE
Director

March 14, 2014

Mr. Rakesh Mohan, Director
Office of Performance Evaluations
P.O. Box 83720
Boise, ID 83720-0055

Dear Director Mohan:

RE: Death Penalty Cost Structure

The Department of Correction thanks the Office of Performance Evaluations for an objective review of the cost of Idaho's death penalty.

The agency appreciates the evaluators' willingness to visit the Idaho Maximum Security Institution where Idaho's execution chamber is located and inmates sentenced to death are housed.

The Department of Correction carries out its statutory obligations in death sentences very somberly, with the utmost professionalism, dignity and respect for the condemned, witnesses, victims' families and all staff and inmates in facilities.

Again, we offer our appreciation to the Office of Performance Evaluations for their research on the cost of Idaho's death penalty.

Sincerely,

Brent D. Reinke
Director, Department of Correction

BDR:tj

Office of Performance Evaluations Reports, 2012–Present

Publication numbers ending with “F” are follow-up reports of previous evaluations.

Pub. #	Report Title	Date Released
12-01	Reducing Barriers to Postsecondary Education	January 2012
12-02F	Delays in Medicaid Claims Processing	January 2012
12-03	Lottery Operations and Charitable Gaming	February 2012
12-04	Establishing an Efficiency Commission	February 2012
12-05F	Coordination and Delivery of Senior Services in Idaho	February 2012
12-06F	Operational Efficiencies in Idaho’s Prison System	February 2012
12-07F	Idaho’s End-Stage Renal Disease Program	March 2012
12-08F	Idaho Transportation Department Performance Audit	March 2012
12-09F	Delays in Medicaid Claims Processing	November 2012
12-10F	Increasing Efficiencies in Idaho’s Parole Process	November 2012
13-01	Workforce Issues Affecting Public School Teachers	January 2013
13-02	Strengthening Contract Management in Idaho	January 2013
13-03	State Employee Compensation and Turnover	January 2013
13-04	Policy Differences Between Charter and Traditional Schools	March 2013
13-05F	Coordination and Delivery of Senior Services in Idaho	March 2013
13-06	Guide to Comparing Business Tax Policies	June 2013
13-07F	Lottery Operations and Charitable Gaming	June 2013
13-08F	Governance of EMS Agencies in Idaho	June 2013
13-09F	Equity in Higher Education Funding	June 2013
13-10F	Reducing Barriers to Postsecondary Education	June 2013
13-11	Assessing the Need for Taxpayer Advocacy	December 2013
13-12	The Department of Health and Welfare’s Management of Appropriated Funds	December 2013
14-01	Confinement of Juvenile Offenders	February 2014
14-02	Financial Costs of the Death Penalty	March 2014