OREGON'S DEATH PENALTY: A COST ANALYSIS

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EXECUTIVE SUMMARY

The primary goal of this study was to estimate the economic costs associated with aggravated murder cases that result in death sentences and compare those costs to other aggravated murder cases, the majority of which resulted in some form of a life sentence, in the state of Oregon. Importantly, Oregon law *does not require* the prosecution to file a formal notice indicating whether or not the state will seek the death penalty in aggravated murder cases. Therefore, all aggravated murder cases are treated as death penalty cases, likely inflating the average cost of aggravated murder cases that do not result in a death sentence. In order to provide a bit more context, we include costs for non-aggravated cases where defendants were charged with a lesser charge of murder, in categories where data were both available and reliable. The following are the main findings from the study, presented by total (includes all cost categories), then by individual cost category.

The information contained within this research report reflects a thorough analysis of data collected from hundreds of aggravated murder and murder cases over 13 years in Oregon, from 2000 through 2013. We also examined the appeals process of aggravated murder cases that resulted in death sentences between 1984 until 2000. The economic findings below are limited because no cost data were available or provided by district attorneys or the courts. We were able to get cost-related information from local jails (costs associated with incarceration during trial), Department of Corrections (DOC) (incarceration costs), Office of Public Defense Services (OPDS) (trial, appeals, and all stages of post-conviction costs), and the Department of Justice (DOJ) (Oregon's Attorney General's Office) (costs related to appeals and all stages of post-conviction). Although these categories make up a great deal of the overall costs related to aggravated murder cases, they only represent a portion of the total costs for pursuing the death penalty in Oregon. We approached all data and cost estimations from a conservative standpoint, meaning the costs are intentionally underestimated.

A. Main Findings

Results indicate that the costs for aggravated murder cases that resulted in death sentences range, on average, from about $800,000 to over $1,000,000 more per case when compared to similar non-death aggravated murder cases.

We provide economic cost findings by case category and cost subcategory. Because of the complex nature of aggravated murder cases — for example, that some death penalty cases had original death sentences reversed and resentenced as true life/life without the possibility of parole (LWOP) — we provide two separate sets of analyses based on each main case category. First, we provide findings based on whether the case was designated as a death penalty case, meaning there was a conviction and original sentence of death, but in some cases, that initial sentence was reversed. Those findings are marked "A" below. Second, we provide an analysis based on final (to-date) case categories. Those findings are marked "B" below. Cost subcategories include jail costs, OPDS costs, DOC costs, and DOJ costs. For both, we compare the death penalty cases to death-eligible but not sentenced to death cases, most of which resulted in true life/LWOP sentences.

Similar to the non-enumerated analyses above, where appropriate (only jail and OPDS costs could be reliably calculated) we bring in non-aggravated murder as an additional point of comparison.[i] With that context in mind, here are our main findings:

- The average cost difference between aggravated murder cases that (A) *begin* or (B) *result in* the death penalty, compared to those aggravated murder cases that result in either true life/LWOP, ordinary life, or shorter sentences is (not including DOC costs): A= **$802,106** (3.55); B= **$1,056,093** (4.16).
- The average cost difference including DOC costs: A= **$918,896** (1.69); B= **$887,385** (1.53).
- The average cost of pursuing the Death Penalty has increased significantly over the last few decades. This continuing trend can be seen in Chart 2, below.
- A total of 62 individuals have been convicted and sentenced to death in Oregon since 1984. Twenty-eight of those individuals are no longer on death row. Of those 28 cases, just two cases have resulted in death (both individuals dropped their appeals and "volunteered" to be executed), four people died of natural causes while in prison, and 22 people, or roughly 79%, have had their sentences reduced. One person had his case dismissed on direct appeal and another person pled to manslaughter—both were released. The remaining 20 people had their sentences changed from death to either true life/LWOP or ordinary life.

(Note: above, ratios are presented in parentheses; in Table 1.e below, A= Original Death Sentence, B= Current Sentence Status)

[i] The prosecution and courts could not produce any reliable per-case cost estimates. For all adjustments, the Organization for Economic Co-operation and Development (OECD) Main Economic Indicators (complete database, base year 2010, Consumer Price Index – Total All Items for the United States) were used to adjust nominal values into 2010 dollars. The findings are then presented in real 2016 dollars.

Table 1.e. Total Average Differences by Cost Category and Case Category, in 2016 Dollars.

Cost Category	Case Category	N	Mean	Mean Diff	Ratio
Set A. Total w/o DOC Costs	Agg Mur	313	$315,159		
	DP	61	$1,117,265	$802,106*	3.55
Set A. Total with DOC Costs	Agg Mur	313	$1,354,883		
	DP	61	$2,273,779	$918,896*	1.68
Set B. Total w/o DOC Costs	Life	219	$334,522		
	DP	41	$1,390,616	$1,056,093*	4.16
Set B. Total with DOC Costs	Life	219	$1,682,282		
	DP	41	$2,569,667	$887,385*	1.53

Note: Case Category: Set 1 = all death penalty designated cases; Set 2 = current sentence death penalty compared to life sentences. *p< .001 (t-tests for set 1 and F, ANOVA for set 2).

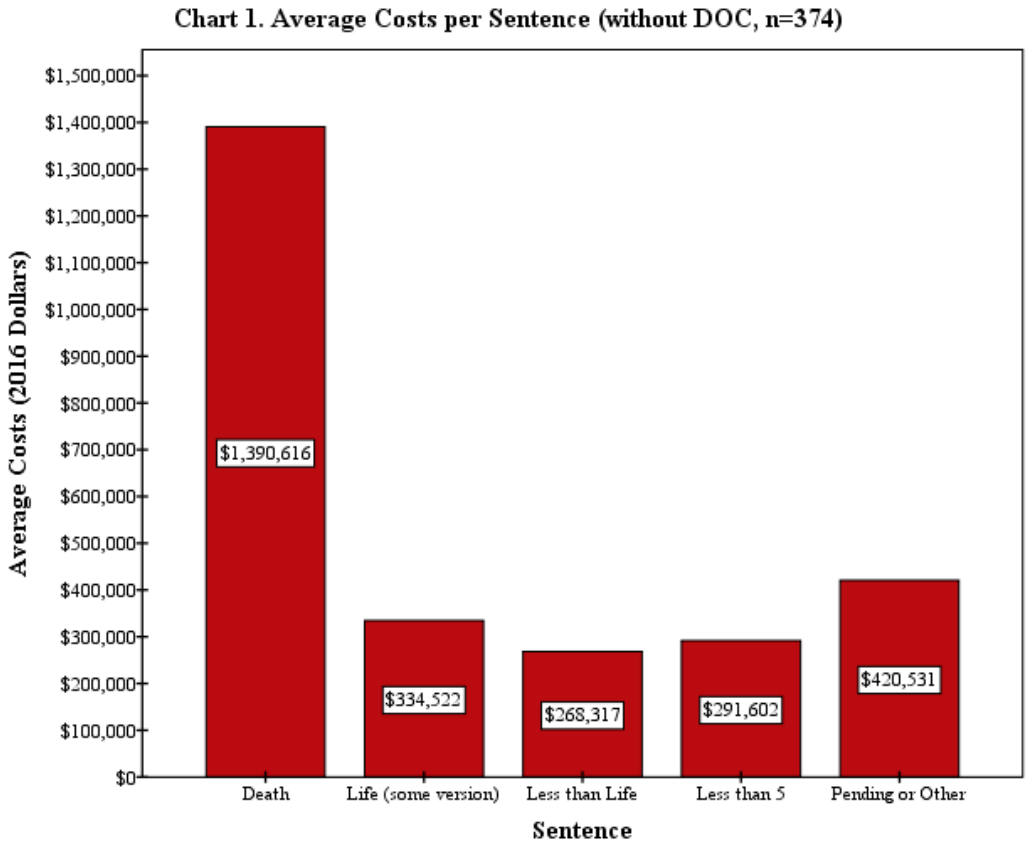
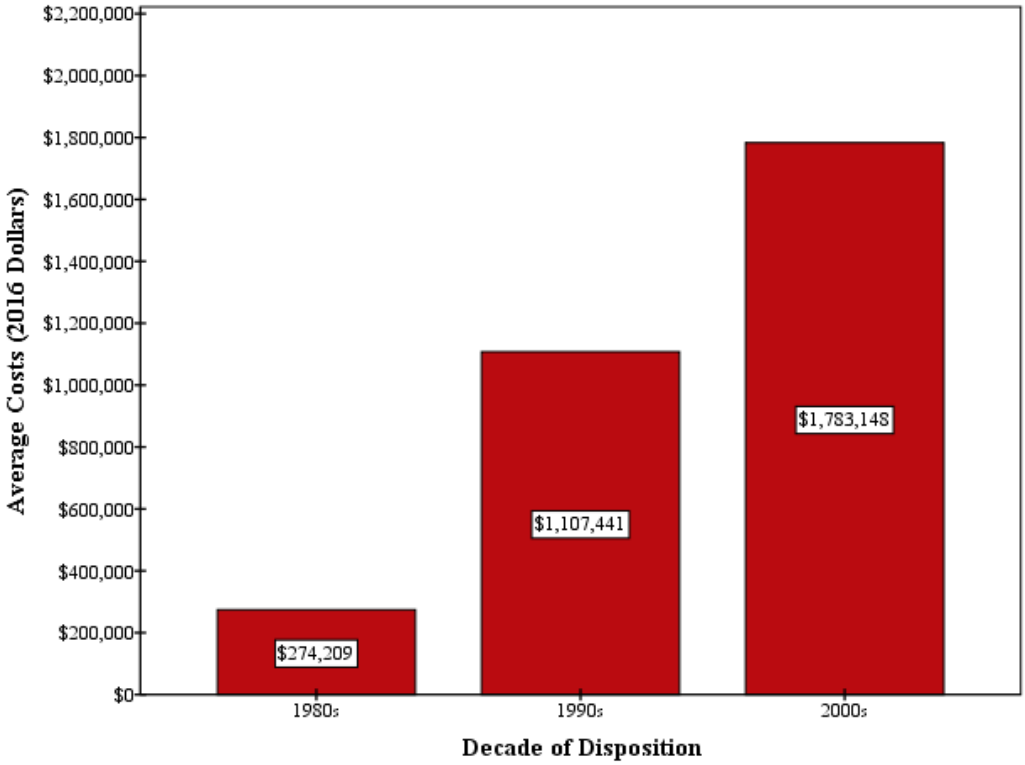


Chart 2. Average Cost of Death Penalty by Decade (n= 61).



Note: 2010 represented only three full years of data only so it was not inclued here, the average to date was $1.39 million.

B. Death Penalty Post-Conviction Findings

Since 1984, when Oregon reinstated the death penalty, juries have sentenced 62 people to death. Of the 62 sentenced, 34 (54.84%) people remain on death row today and their cases are still active and at some stage in the appeals process. Of the remaining 28, two people were put to death after voluntarily dropping their appeals and four people have died in prison of natural causes. One person had his case dismissed on direct appeal and was released from prison, and another person, after multiple appeals pled to manslaughter and was released after serving his sentence. The remaining 20 people had their sentences changed from death to either true life/LWOP or ordinary life. For all of the effort to pursue death, so far just two out of 62 death cases have concluded with an execution.

Table 2.e. Death Penalty Post-Conviction Details (n=62).

	n	% total	w/in group%
DP since 1984	62	100	
Still in Process	34	54.84	
Total Completed	28	45.16	
Death (vol)	2	3.23	7.14
Death (nat)	4	6.45	23.04
Off Death Row	22	35.48	78.57

Notes: "Completed" means that the case has come to a conclusion: "vol" = voluntary "nat" = natural causes.

C. Additional Findings

The vast majority of aggravated murder cases, whether death penalty or non-death penalty, are complicated and time-consuming cases. Death penalty cases, however, outpaced all others in the average number of hearings and defense and prosecution court filings. We include the following analysis to shed light on these complexities. Additionally, because we had reliable data for a sample of non-aggravated murder cases, we include averages here to provide an additional point of comparison.

- Average number of hearings: Aggravated Murder Death Penalty= 20.93, Aggravated Murder non-Death= 9.79, Average Difference= 11.14 (ratio= 2.138).
    - Non-aggravated Murder= 8.13; Average Difference when compared to Aggravated Murder Death Penalty = 12.8 (ratio= 2.574), and when compared to Aggravated Murder non-Death= 1.66 (ratio= 1.204).
- Average number of defense court filings: Aggravated Murder Death Penalty= 39.21, Aggravated Murder non-Death= 19.58, Average Difference= 19.63 (ratio= 2.003).
    - Non-aggravated Murder= 5.63; Average Difference when compared to Aggravated Murder Death Penalty= 33.58 (ratio= 6.964), when compared to Aggravated Murder non-Death= 13.95 (ratio= 3.478).
- Average number of prosecution court filings: Aggravated Murder Death Penalty= 25, Aggravated Murder non-Death= 10.31, Average Difference= 14.69 (ratio= 2.425).
    - Non-aggravated Murder= 3.2; Average Difference when compared to Aggravated Murder Death Penalty= 21.8 (ratio= 7.813), when compared to Aggravated Murder non-Death= 7.11 (ratio= 3.222).

D. Geographic Analysis for Sample Cases

Table 3.e., below, provides a breakdown of the geographic location of where the crime was committed, in total, of the cases included in this study (N = 374). The majority of the cases are concentrated in six counties, beginning with Multnomah, followed by Clackamas, and then Washington, Lane, Marion, and Umatilla counties.

Table 3.e. Database Case Frequency (*f*), by County and Sentence Outcome (B) (N = 374).

	Death	Life (some version)	Other	Total *f* (%)
Multnomah	6	70	46	123* (32.9)
Clackamas	3	23	7	33 (8.8)
Washington	5	15	7	29 (7.2)
Lane	7	12	7	26 (7.0)
Marion	9	12	1	22 (5.9)
Umatilla	0	15	5	20 (5.3)
Coos	2	11	4	17 (4.5)
Deschutes	1	12	2	15 (4.0)
Douglas	3	7	4	14 (3.7)
Linn	0	5	5	10 (2.7)
Total	36	182	88	307 (82.1)

Notes: The following counties had fewer than 9 cases and were not included above: Klamath (8); Benton (6); Clatsop (6); Jackson (6); Josephine (5); Curry (4); Polk (4); Yamhill (4); Columbia (3); Grant (3); Lincoln (3); Malheur (3); Tillamook (3); Harney (2); Union (2); Wasco (2); Baker (1); Crook (1); Hood River (1); Total in notes: Death: 5, Life: 37, Other: 25, Total = 67 (17.9%), 307 (82.2%), 374 total. *Multnomah also contains one acquittal case, not counted in the columns, but counted in the row total.

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I. INTRODUCTION

In total, 1439 people have been executed across the country since the U.S. Supreme Court re-instated the death penalty in 1976.[1] There are 31 states that currently have a death penalty system in place, but a substantial majority of executions occur in only a few states.[2] In fact, 937 of the total executions since 1976 have been imposed in five states: Texas, Oklahoma, Virginia, Florida, and Missouri.[3] Within those states, executions predominately occur within just a few counties. For example, Texas alone accounts for 538 of the total executions, but nearly half (252) of them took place in just 5 of 254 counties.[4]

The number of post-1976 executions peaked in the late 1990's—with 98 people executed in 1999.[5] The number of executions has steadily dropped since that time. In 2015, the number of people executed across the country was 28.[6] There are many reasons for the decline. The National Conference of State Legislatures (NCSL) notes that as the conversation around the death penalty increases, "so do questions surrounding its fairness, reliability and cost."[7] Several states have recently abolished the death penalty: New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2015).[8] The Governors of these states explained that cost, racial and economic bias, concern over wrongful convictions, and human fallibility influenced their decisions to abolish the death penalty.[9]

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[1] *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (the court ruled the new Georgia death penalty statute constitutional); *Executions by State*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last updated, November 7, 2016).

[2] *States and Capital Punishment*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx (Aug. 24, 2016) (States currently with a death penalty system in place are: Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Georgia, Indiana, Idaho, Kansas, Kentucky, Louisiana, Missouri, Mississippi, Montana, North Carolina, New Hampshire, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming.).

[3] *Executions by State*, *supra* note 1.

[4] Harris County (116), Dallas County (50), Tarrant County (37), Bexar County (36), Montgomery County (16). *See Executions by County*, DEATH PENALTY INFO. CTR. http://www.deathpenaltyinfo.org/executions-county (last updated, Jan, 1, 2013).

[5] *Executions by Year*, DEATH PENALTY INFO. CTR. http://www.deathpenaltyinfo.org/executions-year (last updated, July 15, 2016).

[6] *Id.*

[7] *States and Capital Punishment*, *supra* note 2.

[8] *Id.*

[9] Press Release, Governor Bill Richardson, State of N.M., Governor Bill Richardson Signs Repeal of the Death Penalty (Mar. 18, 2009) http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf; *Governor Corzine's Remarks on Eliminating Death Penalty in New Jersey*, DEATH PENALTY INFO. CTR. (Dec. 17, 2007) http://www.deathpenaltyinfo.org/node/22; Press Release, Governor Daniel Malloy, State of Conn.,

Of the remaining states that currently impose death sentences, four of them, including Oregon, have gubernatorial moratoria on death penalty executions.[10] In Oregon, then Governor John Kitzhaber implemented the moratorium in 2011,[11] and current Governor Kate Brown, extended it in 2015.[12]

Prior to the moratorium, Oregon's last involuntary execution occurred more than 50 years ago. Oregon's most recent executions took place two decades ago, (the first in 1996 and the second in 1997), when two inmates dropped their remaining appeals and requested the state put them to death.[13] However, despite the moratorium and length of time since Oregon's last executions, data indicate that maintaining the death penalty incurs a significant financial burden on Oregon taxpayers. The increase in relative costs is consistent with a pattern found by cost analyses conducted in other states. For example, a 2015 report exploring the costs of death penalty cases

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Governor Malloy on Signing Bill to Repeal Capital Punishment (Apr. 25, 2015) http://portal.ct.gov/Gov-Malloy-on-Signing-Bill-to-Repeal-Capital-Punishment/; George Ryan, *In Ryan's Words "I Must Act,"* N.Y. TIMES (Jan. 11, 2003) http://www.nytimes.com/2003/01/11/national/in-ryans-words-i-must-act.html.

[10] The four states with a moratorium are Colorado, Washington, Pennsylvania and Oregon. *See The Death Penalty in Flux*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-penalty-flux (last updated June 24, 2016).

[11] Press Release, Governor John Kitzhaber, State of Oregon, Governor Kitzhaber Issues Reprieve – Calls for Action on Capital Punishment. Press Release (Nov 22, 2011) http://us2.campaign-archive2.com/?u=41b11f32beefba0380ee8ecb5&id=693e109ee2. ("Oregonians have a fundamental belief in fairness and justice – in swift and certain justice. The death penalty as practiced in Oregon is neither fair nor just; and it is not swift or certain. It is not applied equally to all. It is a perversion of justice that the single best indicator of who will and will not be executed has nothing to do with the circumstances of a crime or the findings of a jury... The hard truth is that in the 27 years since Oregonians reinstated the death penalty, it has only been carried out on two volunteers who waived their rights to appeal. In the years since those executions, many judges, district attorneys, legislators, death penalty proponents and opponents, and victims and their families have agreed that Oregon's system is broken. But we have done nothing. We have avoided the question.").

[12] Hillary Borrud, *Gov. Brown plans to keeps death penalty moratorium*, PORTLAND TRIBUNE, (Feb. 20, 2015) http://portlandtribune.com/pt/9-news/251384-120519-gov-brown-plans-to-keep-death-penalty-moratorium.

[13] *The History of the Death Penalty in Oregon,* DOC OFFICE OF COMMC'NS, (Aug. 1, 2016) https://www.oregon.gov/doc/OC/Pages/cap_punishment/history.aspx. ("Douglas Franklin Wright´s execution was Oregon´s first execution in 34 years. It cost Oregon taxpayers nearly $200,000. Although Wright chose not to pursue any of the legal appeals available to him, approximately $90,000 was expended on legal fees to fend off third-party law-suits, and $85,000 for staff overtime for training and security duties. The average cost-per-day to incarcerate an inmate in Oregon in 1996 was $53.73. Harry Charles Moore was the second inmate to be executed in recent times. He, too, chose not to pursue his appeals. Moore died at 12:23 a.m. on May 16, 1997.").

in Washington found that the average costs were $1.15 million higher in cases where the state sought the death penalty compared to cases where it did not.[14]

In Oregon, however, there has been no significant scholarship produced on the fiscal impacts of pursuing death sentences. This study aims to shed light on the complexities unique to Oregon's death penalty. The information contained within this report reflects a thorough analysis of data collected from hundreds of aggravated murder and murder cases over 13 years in Oregon, from 2000 through 2013. We also examine aggravated murder cases that resulted in death sentences between 1984 until 2000.

We begin with an overview of prior scholarship on the fiscal impacts of the death penalty in Oregon and the empirical data produced in studies from other states. We continue with an overview of Oregon's death penalty, a historical timeline, and current status of Oregon's death row inmates. Additionally, we present several narrative reports from various criminal justice stakeholders, three case studies, a methodological summary, and an analysis of our findings.

II. PREVIOUS STUDIES

A. Previous Oregon Studies

There are no previous cost studies, and there is only a minimal amount of scholarship on Oregon's death penalty. In his 2006 essay about Oregon's death penalty costs, Dr. William Long compared the cost of administering the death penalty in Oregon in a case where a defendant pursued all appeals as provided by law, to the costs of a case that resulted in a sentence of true life/life without the possibility of parole (LWOP) where a defendant waived all of his rights to further appeals at the trial court level.[15] The purpose of Dr. Long's research was to provide testimony about the cost of Oregon's death penalty in defendant Sebastian Shaw's death penalty sentencing phase trial.[16] Long concluded that it was at minimum 50 percent more expensive to execute someone in Oregon and could be as much as five times the cost of a true life/LWOP sentence, conceding that there were many "numerical uncertainties" in cases going forward.[17]

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[14] PETER A. COLLINS, ROBERT C. BORUCHOWITZ, MATTHEW J. HICKMAN & MARK A. LARRANAGA, AN ANALYSIS OF THE ECONOMIC COSTS OF SEEKING THE DEATH PENALTY IN WASHINGTON STATE 4 (2015).

[15] Memorandum from Dr. William Long on "Costs of the Oregon Death Penalty" to Richard Wolf, defense attorney, (May 5, 2006) (on file with author).

[16] *Id.*

[17] *Id.* Dr. Long examined the costs of incarceration, appeals provided by law (appellate, post-conviction review, and habeas corpus review), potential interlocutory appeals, remands, and the cost of executing someone after all appeals provided by law are exhausted. According to Long, "[t]he empirical data is readily available to permit one to conclude that, for the defendant who has *not* waived his appeals, the

Lewis & Clark Law School professor Aliza Kaplan (one of the authors of this study) examined Oregon's death penalty in a 2013 law review article. While Kaplan's article discussed many issues about Oregon's death penalty, her research relating to its cost was limited by the lack of any prior cost studies or official cost record keeping. Data related to state costs for individual death penalty cases, or for the system as a whole, was simply unavailable.[18] Some state agencies, however, did report some generalized financial totals when asked. In 2012, Oregon's DOC, OPDS, and DOJ provided Professor Kaplan with the following information about death penalty costs: the average cost to house an inmate (death row or otherwise) was $30,105.20 per year or $82.48 per day;[19] the average cost of defending a death penalty case at the trial level between 2002 and 2012 was $438,651, while the average cost of defending a non-death aggravated murder case at the trial level was less than half that at $216,693.[20] DOJ spent on average $66,728.65 and 818.5 attorney hours on direct automatic appeals in the cases of 61 death penalty defendants.[21] But the figures the DOC, OPDS, and DOJ provided do not tell the entire story as they only include certain direct legal costs and expenses that were accounted for by case. The figures exclude other staffing and administrative costs and do not include any costs associated with administering the death penalty, such as pre-conviction jail costs, jury costs, cost of prosecution, and court costs, to name a few.[22]

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cost to execute a person in Oregon in the 'best case' scenario—i.e., when everything goes 'smoothly,'—is almost twice that for a person who receives an LWOP sentence and waives his appeals. For one whose case is remanded, however, the costs can be four to five times as much as one who faces life imprisonment without the possibility of parole and has waived his appeals." For a detailed explanation of Dr. Long's data and calculations, see *id*.

[18] Aliza B. Kaplan, *Oregon's Death Penalty*, 17 LEWIS & CLARK L. REV. 1, 35 (2013) (discussing the lack of costs known to citizens and that Oregon lacks a procedure for collecting data on costs of the death penalty).

[19] *Id.* at 36 (quoting telephone interview with Anita Nelson, DOC Government Efficiencies and Communications Office of May 14, 2012 and referencing the 2011–2013 DOC Budget).

[20] *Id*. (citing email correspondence and a telephone interview with Billy J. Strehlow, Or. Office of Pub. Def. Servs., May 11 & 14, 2012). These amounts are based on the average cost of the 232 adult trial level cases with an aggravated murder charge and final disposition between January 1, 2002, and December 31, 2011. Sixteen of these cases resulted in a death sentence. *Id.* This accounts for defense costs only, which include all costs related to attorney time, investigators, mitigation specialists, various experts, administrative work and assistance. This amount does not include any costs associated with the defendants' automatic appeals to Oregon's Supreme Court or appeals to the U.S. Supreme Court, as OPDS does not keep a record of those costs. *Id.*

[21] *Id.* (citing Or. Dep't of Justice, Time and Expenses by Matter Client 137680, Inception to May 16, 2012) (unpublished chart) (on file with the author). The average cost to fully prosecute a capital case or even a capital trial has never been recorded by DOJ. Email correspondence & telephone interview with Tony Green, Spokesperson, Or. Dep't of Justice, to author (May 15, 2012) (on file with author).

[22] *Id.* at 35 (noting that these are the only numbers that were made available to Kaplan during her study of Oregon's death penalty).

B. Empirical Studies in Other States

Recently conducted studies in Washington, Idaho, Kansas, Colorado, California, and North Carolina demonstrate that the costs associated with seeking and administering the death penalty are significantly greater than cases where capital punishment is not an option.

1. Washington

In 2015, Seattle University professors (including Peter Collins, an author of this study) released an analysis of the costs of pursuing the death penalty in aggravated first-degree murder cases in Washington state.[23] The study found that the total average cost for cases where the death penalty was sought amounted to $3.07 million as compared to the $2.01 million spent on cases where the death penalty was not sought.[24]

Jail costs for cases where the death penalty was sought were 1.4 to 1.6 times more expensive than for cases where the death penalty was not sought; trial level defense costs were 2.8 to 3.5 times higher; trial level prosecution costs were 2.3 to 4.2 times higher; court, police/sheriff, and miscellaneous costs were 3.9 to 8.1 times higher; and personal restraint petitions and appeals are 5.7 to 6.3 times higher.[25]

The average costs related to pursuit of the death penalty exceeded those for cases where death was not sought in all but one cost category. The study concluded that, combining all cost categories, "[t]he total average difference in costs when the death penalty is sought is $1,058,885 in 2010 dollars, or $1,152,808 in 2014 dollars."[26]

2. Idaho

The Idaho Legislature released a report on the financial costs of the death penalty in 2014. The committee that conducted the study was unable to obtain comprehensive cost data and so proceeded using other metrics, such as time.[27]

For example, between 2001 and 2013, the state Appellate Public Defender's Office accumulated almost 80,000 billable hours on capital litigation for 10 defendants with death sentences

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[23] COLLINS ET AL., *supra* note 14, at 3.
[24] *Id.* at 4.
[25] *Id.*
[26] *Id.* at 5.
[27] IDAHO LEGISLATURE OFFICE OF PERFORMANCE EVALUATIONS, FINANCIAL COSTS OF THE DEATH PENALTY, at iii (2014).

compared to about 17,000 hours for 95 defendants with life sentences.[28] That translates to an average 44 times more billable hours worked on capital cases per defendant.

Additionally, capital cases that went to trial took an average of 20.5 months to reach a judgment, while non-capital cases took an average of 13.5 months.[29] Capital cases took an average of seven months to reach judgment.[30]

In 2011, Idaho conducted its first execution in 17 years. To prepare for this and a second 2012 execution, the Idaho Department of Correction spent nearly $170,000 in one-time construction and improvement costs.[31]

3. Kansas

In 2014, the Kansas Judicial Council's Death Penalty Advisory Committee published a death penalty cost analysis—an update to its earlier 2009 study.[32] Looking at a small sampling of cases, the Committee found that the average defense costs totaled $395,762 for trial cases where death was sought and $98,963 for non-death cases.[33] For cases that resulted in pleas, the average defense costs were $130,595 (death) and $64,711 (non-death).[34]

The Kansas Supreme Court estimated that, during the three years leading up to the study's release, its seven justices spent a total of 2,000 hours working on death penalty cases and its research attorneys spent 1,600 hours on death penalty appeals.[35] The Court also estimated that justices spend five times the number of hours on death penalty cases than non-death cases—and 20 times the number if the justice that was assigned to write the opinion.[36]

4. Colorado

In 2013, the *University of Denver Criminal Law Review* published a study about the cost of Colorado's death penalty, measuring that cost in terms of court days.[37] The study found that death penalty cases that go to trial require six times more days in court than cases where LWOP

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[28] *Id.* at 31.
[29] *Id.* at 20.
[30] *Id.*
[31] *Id.* at 32.
[32] KAN. JUDICIAL COUNCIL DEATH PENALTY ADVISORY COMM., REPORT OF THE JUDICIAL COUNCIL DEATH PENALTY ADVISORY COMMITTEE 2 (2014).
[33] *Id.* at 7.
[34] *Id.*
[35] *Id.* at 11.
[36] *Id.*
[37] Justin F. Marceau & Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 U. DENV. CRIM. L. REV. 145, 145 (2013).

is sought.[38] Pretrial hearings took an average of 85 days in death penalty prosecutions compared to 14 days in LWOP prosecutions; voir dire took 26 days and 1.5 days, respectively; the guilt phase took 19 days versus 8.2 days; and the sentencing phase took 21 days versus 0.78 days.[39]

From start to finish, LWOP prosecutions that went to trial took an average 526 days to resolve, whereas death prosecutions that went to trial took an average 1,902 days, almost four years longer.[40] Death prosecutions that resulted in LWOP pleas before trial actually took one day longer in court than LWOP prosecutions that went to trial.[41]

5. California

In 2011, a comprehensive analysis of the costs of California's death penalty was published by a Ninth Circuit Court of Appeals judge and Loyola Law School Los Angeles professor. The study found that the state of California had spent more than $4 billion on the death penalty since it was reinstated in 1978, despite only 13 people being executed in the history of the state.[42]

The report estimates that since 1978, death penalty costs including both pre-trial periods and trials totaled $1.94 billion;[43] automatic appeals and state habeas corpus petitions cost $925 million;[44] federal habeas corpus petitions cost $775 million;[45] and incarcerating inmates on death row cost $1 billion.[46]

Those totals did not include an estimated $400 million required to build a new facility to house death row inmates, the estimated $1.2 billion that the new facility will cost to maintain for the first 20 years, or the estimated $775,250,000 cost of litigating the existing inmate's federal habeas corpus petitions until resolution.[47]

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[38] *Id.* at 153.
[39] *Id.*
[40] *Id.* at 154.
[41] *Id.* at 157.
[42] Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S41 (2011).
[43] *Id.* at S69.
[44] *Id.* at S79.
[45] *Id.* at S88.
[46] *Id.* at S99.
[47] *Id.* at S110.

6. North Carolina

In 2009, a Duke University professor published a report on the costs of the death penalty in North Carolina and the potential effects of abolishing it. The report focused on costs accrued during fiscal years 2005 and 2006 and concluded that the state could have saved almost $11 million each year by abolishing the death penalty.[48] Accounting for inflation, this figure in 2016 represented a potential savings of approximately $13.5 million per year.

Researchers estimated extra expenditures during the two-year period as follows: $13,180,385 in defense costs for capital cases during the trial phase, $224,640 in payments to jurors, $7,473,556 in post-conviction costs for capital cases, $594,216 for resentencing hearings, and $169,617 in prison system costs.[49]

The report also noted the in-kind costs related to the death penalty, which the author asserted would be eliminated by abolition.[50] He estimated a yearly savings of 345 days in court for trial, 10 percent of the resources of the Supreme Court and Appellate Defender's Office, as well as "freeing up the equivalent of nine assistant prosecutors."[51]

III. OREGON'S DEATH PENALTY

Presently, there are 34 people (33 men and one woman) on Oregon's death row.[52] While a moratorium on executions has been in place since 2011, prosecutors are still free to pursue death sentences and juries may still impose death sentences under Oregon's aggravated murder statute.[53] Then Governor John Kitzhaber first established the moratorium, and Governor Kate Brown continued it when she took office in 2015.[54] Because of this moratorium, and because Oregon has only executed two individuals since the death penalty resumed in 1984, the U.S. Supreme Court considers Oregon an "abolitionist state."[55]

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[48] Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 499, (2009).
[49] *Id.* at 525.
[50] *Id.*
[51] *Id.*
[52] OR. DEP'T OF CORR., SUMMARY OF DEATH ROW INMATES (Mar. 16, 2016), https://www.oregon.gov/doc/OC/docs/pdf/death_row_inmates.pdf.
[53] *Id.* Since Governor Kitzhaber put the moratorium into effect on November 22, 2011, only David Ray Taylor has been sentenced to death, in May 2014; Aggravated Murder Research Database (2016) (updated Aug 3, 2016) (on file with author).
[54] *See* Press Release, Kitzhaber *supra* note 11; Borrud *supra* note 12.
[55] Hall v. Florida, 134 U.S. 1986, 1997 (2014).

A. History of Oregon's Death Penalty

Since 1904, 60 individuals have been executed in Oregon.[56] The last involuntary execution in Oregon occurred in 1962, with the death of LeRoy Sanford McGahuey.[57] Over the last 32 years since capital punishment was reinstated in 1984, only two people have been executed.[58] Douglas Franklin Wright in 1996 and Harry Charles Moore in 1997. Both volunteered for death, meaning they waived their appeals and requested that their executions be carried out.[59]

Oregon's capital punishment system has undergone a variety of changes over the last century. First enacted by statute in 1864, Oregon voters later repealed the death penalty in 1914 and restored in 1920, both times by constitutional amendment.[60] Voters again outlawed the practice in 1964.[61] The repeal remained in effect until 1978, when 64 percent of Oregon voters approved Ballot Measure 8,[62] reinstituting capital punishment in certain murder cases.[63] Unlike earlier death penalty laws in Oregon, Measure 8 did not amend the state Constitution. Instead the Legislature incorporated it into the Oregon Revised Statutes, amending ORS 163.115 and creating ORS 163.11.[64] In 1981, the Oregon Supreme Court struck down the Measure 8 death penalty statute because it deprived the defendant of his right to trial by jury.[65] In 1984, Oregon voters approved Ballot Measures 6 and 7.[66] Measure 6 amended the Oregon Constitution by adding Article I, section 40, which mandates that upon a unanimous jury verdict the penalty for aggravated murder "shall be death" or "otherwise shall be life imprisonment" with a statutory minimum.[67] In addition, Measure 6 included language to exempt capital punishment from the prohibitions of Article I, sections 15 and 16.[68] Measure 7 effectively created ORS 163.150, which

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[56] *Executions*, OR. DEP'T OF CORR., https://www.oregon.gov/doc/OC/docs/pdf/exec_table.pdf (last visited Sept. 15, 2016).

[57] *The History of the Death Penalty in Oregon*, DOC OFFICE OF, COMMC'NS, https://www.oregon.gov/doc/OC/Pages/cap_punishment/history.aspx (last visited Sept. 15, 2016) [hereinafter *History*].

[58] *Id*.

[59] *Id.*

[60] *Id.*

[61] See Hugo Adam Bedau, The 1964 Death Penalty Referendum in Oregon: Some Notes from a Participant–Observer, 26 CRIME & DELINQUENCY 528, 534–35 (1980).

[62] *Id*.

[63] *History*, *supra* note 57.

[64] *Id.*

[65] State v. Quinn, 623 P.2d 630, 644 (Or. 1981).

[66] *History*, *supra* note 57.

[67] *Id.*

[68] *Id.*; OR. CONST. art. I, § 40 (1984) ("Notwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law."); OR. CONST. art. I, § 15 (1859) ("Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice," which was amended in 1996 to read, "l[L]aws for the

mandates a separate sentencing trial by jury for aggravated murder convictions and adds death, or life with a mandatory minimum, as sentencing options.[69] Measure 6 passed with 55 percent of the vote and Measure 7 passed by a larger margin of 75 percent. Oregon has maintained a death penalty since 1984.[70]

As the death penalty laws in Oregon have changed, so too have the methods of execution. Until 1931, all executions in Oregon were by hanging, although the majority of other states with the death penalty utilized electrocution, and to a lesser extent other states used the gas chamber during the early to mid-1900s.[71] From 1939 through 1962, Oregon used the gas chamber.[72] Today, the current method of execution in Oregon is lethal injection,[73] following a similar trend throughout the country.[74]

In 1989, the U.S. Supreme Court in *Penry v. Lynaugh* reversed a Texas death penalty sentence ruling it a violation of the Eighth Amendment.[75] The Texas statute did not allow the jury to give adequate consideration to the defendant's mental retardation as a mitigating factor during his sentencing trial.[76] The Court reasoned that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[77] Because Oregon's death penalty statute was modeled after Texas' law, *Penry* had a

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punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation.); OR. CONST. art. I, § 16 ("Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense. —In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.").

[69] OR. REV. STAT. § 163.150. (2015).

[70] *History*, *supra* note 57.

[71] Chris Wilson, *Every Execution in U.S. History in a Single Chart*, TIME, (July 24, 2014), http://time.com/82375/every-execution-in-u-s-history-in-a-single-chart/.

[72] *Executions*, *supra* note 56 (listing only one execution by means other than the gas chamber during this span—the hanging of J Willos in 1949).

[73] *Id*. Wilson, *supra* note 71.

[74] Lethal injection is currently the predominant method of execution in death penalty states, with a minority of states allowing alternative methods including death by firing squad (Utah), electrocution (Alabama, Florida, Kentucky, South Carolina, Tennessee and Virginia), lethal gas, (California and Missouri), or hanging (New Hampshire and Washington). *See* Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331, 1343 (2013); *Methods of Execution*, DEATH PENALTY INFO. CTR. http://www.deathpenaltyinfo.org/methods-execution?scid=8&did=245#state (last visited Sept. 15, 2016).

[75] Penry v. Lynaugh 492 U.S. 302, 328 (1989).

[76] *Id.*

[77] *Id.* at 316, (quoting Woodson v. North Carolina, 428 U.S. 280 (1976)).

significant effect on Oregon's law.[78] At the end of its session in 1989, the Oregon Legislature passed two substantial amendments to Oregon's capital punishment law.[79] Oregon's response to *Penry* was to add a "fourth question" to the penalty provision of its death penalty statute that assured jury consideration of all mitigating circumstances.[80] The addition was upheld in 1990 but required editing by the Oregon Supreme Court due to imprecise grammar.[81] The result was an updated "fourth question" which asked the jury the following: *"Should defendant receive a death sentence? You should answer this question 'no' if you find that there is any aspect of defendant's character or background, or any circumstances of the offense, that you believe would justify a sentence less than death*."[82] The *Penry* decision resulted in the resentencing of 21 individuals originally given the death penalty in Oregon.[83] Out of these 21 cases, 8 were given ordinary life (life imprisonment with a 30 year minimum), 4 were given true life/LWOP, and 9 were resentenced to death.[84]

The second 1989 legislative amendment to Oregon's aggravated murder statute was the addition of a true life/LWOP sentence for cases in which the jury fails to unanimously agree upon a death sentence.[85] Previously, juries had a choice between only two possible sentences for aggravated murder: death or ordinary life.[86] Under the amended provision, juries receive three

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[78] For analysis of similarities between Texas and Oregon statutes, see Stephen Kanter, *Brief Against Death: More on the Constitutionality of Capital Punishment in Oregon*, 17 WILLAMETTE L. REV. 629, 641–49 (1981).

[79] William R. Long, *A Tortured Mini-History: The Oregon Supreme Court's Death Penalty Jurisprudence in the 1990s*, 39 WILLAMETTE L. REV. 1, 2–5 (2003).

[80] *Id.* at 3; OR. REV. STAT. § 163.150(1)(b)(A), (B) & (C) (1987). (Before the creation of the fourth question that gives effect to mitigating evidence, the penalty phase of a capital trial required the jury to answer 3 questions concerning the defendant's deliberation of the killing, the future dangerousness of the defendant, and the extent of provocation by the victim.).

[81] State v. Wagner, 786 P.2d 93,100 (Or. 1988).

[82] *Id*. at 101; OR. REV. STAT. § 163.150 has since been amended and the fourth question now reads:

> (b)(D) Whether the defendant should receive a death sentence. (B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection no if, after considering any aggravating evidence and any mitigating evidence concerning any aspect of the defendants character or background, or any circumstances of the offense and any victim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors believe that the defendant should not receive a death sentence.

[83] Aggravated Murder Research Database (2016) (updated Aug 3, 2016) (on file with author).

[84] *Id*.

[85] OR. REV. STAT. § 163.150 *see also* 1989 Or. Laws ch.720 § 2.

[86] OR. REV. STAT. § 163.150, (the aggravated murder sentencing statute was originally enacted in 1985 with two sentencing options of life imprisonment or death. *See* Or. Laws (1985) ch.3 § 3 for enactment.).

sentencing options during the penalty phase—death, ordinary life, or true life/LWOP—after they find the defendant guilty of capital murder.[87]

In 1995, the Oregon Legislature provided for the admission of victim-impact evidence when considering the "fourth question" during the penalty phase of aggravated murder trial.[88] In 1999, the Legislature proposed, and Oregon voters approved, an amendment to the state Constitution that stated "that the victim is entitled 'to be heard at . . . sentencing' and that that right applies to all proceedings 'pending or commenced on or after' the effective date and 'supersedes any conflicting section of the Constitution.'"[89]

B. Oregon's Death Penalty Today: ORS 163.105

Under Oregon's current death penalty law, only those convicted of aggravated murder are eligible for the death penalty. Oregon's Constitution reads: "the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law."[90] Aggravated murder as defined by ORS 163.095, qualifies a murder as aggravated if the facts of the crime include any of 18 particular circumstances including felony murder.[91] Examples of these circumstances include murder for hire; more than one victim; a victim officially involved in the justice system; murder occurring during another felony act; by means of explosives; or in effort to conceal a crime.[92]

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[87] OR. REV. STAT. § 163.150 (2015) now reads, "[the court] shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to life imprisonment, life imprisonment without the possibility of release or parole, or death."

[88] OR. REV. STAT. § 163.150(1)(a) now reads, "evidence may be presented as to any matter that the court deems relevant to sentence including, but not limited to, victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victims family" *See also* Or. Laws (1995) ch.657 § 23 for amendment; *see also* Hayward v. Belleque, 273 P.3d 926, 938 (Or. App. 2012). (summarizing changing law with regard to victim-impact evidence and ex post facto provisions in sentencing phase under ORS 163.150). Note that prior to this amendment, admission of victim-impact evidence had been found reversible error, as it was irrelevant to the law's four penalty-phase questions. State v. Metz, 887 P.2d 795, 802–03 (Or. App. 1994).

[89] Hayward, 273 P.3d at 937 (quoting OR. CONST. art. I, § 42).

[90] OR. CONST. art I, § 40.

[91] OR. REV. STAT. § 163.095 (2015) (listing eighteen particular circumstances including felony murder). ORS 163.115 lists eighteen additional felony murder circumstances required to reach the aggravated standard. Thus, in total there are thirty-six particular circumstances that can render the crime aggravated and eligible for death.

[92] OR. REV. STAT. § 163.095 provides:

> As used in ORS 163.105 (sentencing options for aggravated murder) and this section, aggravated murder means murder as defined in ORS 163.115 (Murder) which is

Under the Oregon Constitution a defendant facing an aggravated murder charge may not waive a trial by jury[93] except to plead guilty.[94] To comply with the U.S. Supreme Court's ruling in *Gregg v. Georgia*,[95] aggravated murder trials are separated into two phases:[96] (1) a fact-finding

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committed under, or accompanied by, any of the following circumstances: (1)(a) The defendant committed the murder pursuant to an agreement that the defendant receive money or other thing of value for committing the murder; (b) The defendant solicited another to commit the murder and paid or agreed to pay the person money or other thing of value for committing the murder; (c) The defendant committed murder after having been convicted previously in any jurisdiction of any homicide, the elements of which constitute the crime of murder as defined in ORS 163.115 (Murder) or manslaughter in the first degree as defined in ORS 163.118 (Manslaughter in the first degree); (d) There was more than one murder victim in the same criminal episode as defined by ORS 131.505 (Definitions for ORS 131.505 to 131.525); (e) The homicide occurred in the course of or as a result of intentional maiming or torture of the victim; (f) The victim of the intentional homicide was a person under the age of 14 years. (2)(a) The victim was one of the following and the murder was related to the performance of the victims official duties in the justice system: (A) a police officer as defined in ORS 181.610 (Definitions for ORS 181.610 to 181.712); (B) a correctional, parole and probation officer or other person charged with the duty of custody, control or supervision of convicted persons; (C) a member of the Oregon State Police; (D) a judicial officer as defined in ORS 1.210 (Judicial officer defined); (E) a juror or witness in a criminal proceeding; (F) an employee or officer of a court of justice; (G) a member of the State Board of Parole and Post-Prison Supervision; or a regulatory specialist (b) The defendant was confined in a state, county or municipal penal or correctional facility or was otherwise in custody when the murder occurred. (c) The defendant committed murder by means of an explosive as defined in ORS 164.055 (Theft in the first degree). (d) Notwithstanding ORS 163.115 (Murder) (1)(b), the defendant personally and intentionally committed the homicide under the circumstances set forth in ORS 163.115 (Murder) (1)(b). (e) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime. (f) The murder was committed after the defendant had escaped from a state, county or municipal penal or correctional facility and before the defendant had been returned to the custody of the facility.

[93] In Oregon, all juries in capital trials consist of 12 persons. Additionally, up to six alternate jurors may be selected. *See* OR. REV. STAT. § 136.210; OR. REV. STAT. § 136.260(1)(a)(A); OR. REV. STAT. § 163.150(1).

[93] ORCP 57 D, provides grounds for challenges.

[94] OR. CONST art. I, § 11; State v. Smith, 872 P.2d 966, 968–9 (1994).

[95] Gregg v. Georgia, 428 U.S. 153, 195 (1976). ("In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for *a bifurcated proceeding* at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." (emphasis added)).

jury trial to determine guilt and (2) a separate penalty phase trial. Upon a finding of "guilty" in the first phase, ORS 163.150 stipulates that a separate proceeding must be conducted before the jury as "soon as practicable" to determine the sentence.[97] Sentencing options available to juries for aggravated murder are death, true life/LWOP, or ordinary life.[98] At the penalty trial, the jury answers four questions: (1) whether the murder was deliberate; (2) whether the defendant posed a continuing threat to society; (3) whether the defendant's acts were unreasonable in response to any provocation by the deceased; and (4) whether the defendant should receive a death sentence.[99] Moreover, the jury is instructed to consider any mitigating factors, such as "the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed"[100] along with any aggravating evidence and any victim impact evidence.[101] The state must prove each issue beyond a reasonable doubt, and the court cannot impose a death sentence if at least one juror believes that it should not be imposed.[102]

In Oregon, as in other states with the death penalty, prosecutors have the discretion to seek the death penalty.[103] Yet, unlike some other states where prosecutors are required to file a timely notice of intent to seek a death sentence,[104] no such requirement exists in Oregon. Instead, once

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[96] If the defendant is a juvenile or the State expresses to the court on the record that it declines to present evidence supporting a death sentence, the defendant may waive a jury for the sentencing proceeding because the death penalty is removed as a sentencing option. If a defendant waives the right to a jury for the sentencing proceeding, then the trial judge determines whether to impose a sentence of true life/LWOP or ordinary life. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968); State v. Montez, 309 P.2d 564, 574 (Or. 1990).

[97] OR. REV. STAT. § 163.150(1)(a) (2015).

[98] *Id.*

[99] *Id.* § 163.150(1)(b).

[100] *Id*. § 163.150(1)(c).

[101] *Id*.

[102] *Id*. § 163.150(1)(d). (Jurors are told that it takes a unanimous vote of "yes" to each of the four questions in order to impose death.).

[103] See generally John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571 (1997) (discussing the role of prosecutorial discretion in capital cases).

[104] For example, Washington, Nevada, and Idaho require the prosecutor to file a notice of their intentions to seek the death penalty. *See* WASH. REV. CODE § 10.95.040 (2015) ("[T]he prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency. . . . The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder."); NEV. SUP. CT. R. § 250(4)(c) (2014) ("No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice must allege all aggravating circumstances which the state intends to prove and allege

the jury returns an aggravated murder conviction, the defendant faces the possibility of a death sentence unless the defendant has already been determined ineligible for death. And, unlike many death penalty states where jurors are required to find that the aggravating aspects of the crime outweigh any proffered mitigation,[105] Oregon jurors are not required to "weigh" aggravating versus mitigating factors to affirmatively conclude that death should be imposed. Therefore, under Oregon's statute, jurors could conclude that the mitigating factors outweigh the aggravating factors but still return a sentence of death.[106]

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with specificity the facts on which the state will rely to prove each aggravating circumstance."); IDAHO CODE ANN. § 18-4504A (West 2014) ("A sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty with the court and served the notice upon the defendant or his attorney of record no later than thirty (30) days after entry of a plea.").

[105] *See e.g.*, DEL. CODE ANN. tit. 11 § 4209(d) (West 2015) (stating that the court "shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court . . . "); IDAHO CODE ANN. § 19-2515(3)(b) (West 2014) ("Where a statutory aggravating circumstance is found, the defendant shall be sentenced to death unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust."); KAN. STAT. ANN. § 21-6617(e) (West 2011) ("[F]urther, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death ...."); NEV. REV. STAT. ANN § 175.554(3) (West 2015) ("The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.); NH. REV. STAT. ANN. § 630:5(IV) ("[T]he jury shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death."); OHIO REV. CODE ANN. § 2929.03(D)(2) (West 2008) ("If the trial jury unanimously finds by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed."); UTAH CODE ANN. § 76-3-207(5)(b) (West 2015) ("The death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.")

[106] OR. REV. STAT. § 163.150(1)(c)(B) provides:

> The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection "no" if, after considering any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence as described in paragraph

Oregon's current death penalty law allows for a ten-part review process prior to execution for all those convicted of aggravated murder and sentenced to death. First, when a jury returns a death sentence, the Oregon Supreme Court automatically reviews it.[107] Following the review, the defendant may appeal to the U.S. Supreme Court on a discretionary basis.[108] After those appeals are complete, the case can move into the post-conviction process.[109] Following a denial of the post-conviction petition, the ruling can be appealed to the Oregon Court of Appeals and after that, a petitioner can seek discretionary review first in the Oregon Supreme Court and then the U.S. Supreme Court.[110] After post-conviction appeals, the defendant may file a habeas corpus petition in federal district court, and if the petition is denied, the defendant can appeal to the Ninth Circuit Court of Appeals and then seek discretionary review from the U.S. Supreme Court.[111] The tenth, and final, step is to file a petition for clemency. Under Oregon law, the governor retains sole authority to grant clemency.[112]

(a) of this subsection, one or more of the jurors believe that the defendant should not receive a death sentence.

[107] OR. REV. STAT. § 138.012(1) (2015) provides: "The judgment of conviction and sentence of death entered under ORS 163.150(1)(f) is subject to automatic and direct review by the Supreme Court."

[108] *Id.* (discussing Supreme Court's remand).

[109] OR. REV. STAT§ 138.510(1)(3) (2015) provides that any person convicted of a crime under the laws of Oregon may file post-conviction relief within two years of either the date of the final appeal in Oregon appellate courts, or from the data a writ of certiorari to the U.S. Supreme Court is denied, or from the date of entry of a final state court judgment following remand from the U.S. Supreme Court.

[110] OR. REV. STAT. § 138.650 (2015) provides post-conviction appeals procedures; 28 U.S.C. § 1257 (2016).

[111] Antiterrorism and Effective Death Penalty Act of 1996 § 104, 28 U.S.C. §§ 2254; 28 U.S.C. § 1254 (2016).

[112] OR. REV. STAT. § 144.649 (2015).

History of the Death Penalty in Oregon	
1850	The first execution took place in the Oregon territory.
1864	The death penalty was explicitly legalized in the new State of Oregon.
1914	Oregonians voted to repeal the death penalty.
1920	Voters reversed their decision of six years earlier, reinstating the death penalty.
1964	Oregonians voted a second time to repeal the death penalty.
1978	Voters again reversed their decision and restored the death penalty.
1981	Oregon Supreme Court found that this latest version of the death penalty statute was unconstitutional and required amendment before it could be used.
1984	Oregonians voted to amend the state constitution to make capital punishment legal once again.
1996	Douglas Franklin Wright was executed at Oregon State Penitentiary having waived his right to his appeals. This was the first execution to take place in Oregon since 1962.
1997	Harry Charles Moore was executed at Oregon State Penitentiary having waived his right to his appeals. This is the most recent execution to have taken place in Oregon.
2011	Governor John Kitzhaber announced a moratorium on executions.
2015	Governor Kate Brown took office and announced the moratorium on executions would continue as she studies the death penalty.

Periods during which the death penalty was available to the state

C. Defense Lawyer Qualifications for Capital Cases

1. *History of Defense Qualifications*

In the 1950s and early 1960s, if there existed any requirements for criminal defense lawyers, they were established by the circuit court of the county in which the crime occurred. A retrospective of public defense in Oregon by the State Bar describes the system of administration at the county level:

> Several attorneys practicing in the late 1950s and early 1960s remember the local judges having a list of all attorneys in the county and simply appointing the next attorney on the list, whether or not that attorney had any criminal law experience. Barnes Ellis, a longtime proponent of public defense in Oregon, recalls the scene at the Portland Municipal Court in the old Portland Police Headquarters (now the offices of Stoll Berne). According to Ellis, several older attorneys would hang around the court, and a judge, looking for an attorney to appoint, would simply walk out to the hallway and choose one.[113]

In 1964, the Oregon Legislature created the state Public Defenders Office to act as attorney for any individual held in either of the two state prisons[114] for every stage of a proceeding.[115] But, because the court system was still run on the county level, the legislature was limited in what it could do regarding appointed counsel at the trial level. Administration of public defense remained the responsibility of each county from 1963 until 1983.[116]

By the late 1970s and early 1980s, there was nationwide recognition of the need to establish guidelines for legal counsel assigned to represent individuals potentially facing the death penalty. When the death penalty was reinstated in Oregon in 1984, it was the responsibility of the Chief Justice of the Oregon Supreme Court to set baseline qualifications for attorneys in death penalty cases.[117] After taking over the Administration of Public Defense, the state Indigent

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[113] Marc D. Brown, *Humble Roots: Chronicling the State Public Defender's Office*, OR. STATE BAR BULLETIN (Dec. 2013), http://www.osbar.org/publications/bulletin/13dec/legalheritage.html.

[114] *Id.* In 1964, the two state prisons were Oregon State Penitentiary and the Oregon Correctional Institution. *Id.*

[115] *Id*. The State Public Defenders office was limited though. It was not authorized to represent individuals for habeas corpus proceedings or civil contempt of court. *See* OR. REV. STAT. § 138.770 (1963).

[116] *Id.*

[117] OR. REV. STAT. § 135.053(3) (repealed 1985) provides:

> The Chief Justice of the Supreme Court shall prescribe qualifications for attorneys to serve on panels established under subsection (2) of this section. The circuit court for a

Defense Board revised those qualifications in May of 1986 and the state Court Administrators office revised the standard in 1988.[118]

In 2001, recognizing the need for separation of the public defense administration from the supervision of the Oregon Judicial Department, the Oregon Legislature enacted Senate Bill 145, which established the Public Defense Services Commission (PDSC).[119] Today, the PDSC operates as an independent state agency within the Judicial Branch, comprising seven commissioners appointed by the Chief Justice of the Oregon Supreme Court.[120] The PDSC is responsible for regulating the standards of effective public counsel, while OPDS manages the day-to-day operations.[121]

2. Current Defense Requirements for Death Penalty Cases

The current defense requirements for death penalty cases, first established by the newly formed PDSC in 2001, are more stringent.[122] Notable changes include: the requirement of familiarity with the latest ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases; prior experience in major felony cases including cases tried to a jury with at least one murder case; completion of comprehensive training in capital defense; official certification of professed qualifications; and a limited caseload of no more than two capital cases at the same time without authorization.[123] Appeals and post-conviction proceedings in capital cases also have special requirements.[124]

> county, by rule, may prescribe qualifications for attorneys to serve on the panel for the county that are more stringent than those prescribed by the Chief Justice.

See Or. Laws (1979) ch. 806 § 1.

[118] Memorandum from R. William Linden, Jr. State Courts Administrator, Judicial Department, Oregon on Revising Eligibility Standards for Appointed Counsel to Members of the Judicial Conference, Trial Court Administrators, Trial Court Clerks, Presidents of Local Bar Associations (Feb. 4, 1988) (on file with author).

[119] Cliff Collins & Susan Evans Grabe, *Kumbaya at the Capital,* OSB Bulletin Magazine (Aug, 2001) https://www.osbar.org/publications/bulletin/01augsept/kumbaya.htm.

[120] *The Commission,* OFFICE OF PUBLIC DEFENSE SERVICES, http://courts.oregon.gov/OPDS/Pages/PDSCMain.aspx (last visited Sept. 15, 2016).

[121] *Welcome,* OFFICE OF PUBLIC DEFENSE SERVICES, http://www.oregon.gov/OPDS/Pages/index.aspx (last visited Sept. 15, 2016).

[122] PUB. DEF. SERVS., PUBLIC DEFENSE SERVICES COMMISSION QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE 1 (2009) http://www.oregon.gov/OPDS/docs/CBS/AttorneyQualificationStandards05-21-09fillin.pdf.

[123] *Id.* at 4–6.

[124] *Id.* at 10–12.

Counsel in Oregon wishing to obtain certification of attorney qualification for appointment to capital cases must first establish eligibility for the qualification standards for court-appointed counsel to represent financially eligible persons at state expense.[125] OPDS reviews submitted certificates and approves attorneys for requested case types, giving preference to applicants who: are more than minimally qualified, have specialized skills, are able to cover large geographic areas, and other criteria.[126]

IV. STUDY METHODOLOGY

A. Introduction

The primary goal of this study was to estimate the economic costs associated with aggravated murder cases, with death and non-death penalty outcomes, in the state of Oregon. Prior empirical research clearly shows that pursuing the death penalty in the vast majority of capital cases is much more expensive than not.[127] Although the generalizability of these studies beyond the particular states in which the research took place is somewhat limited, their findings all suggest that the pursuit of the death penalty is more expensive. The main reason for the added expense cited in many, if not most, of the more empirically rigorous studies, relate to increased case complexity, increased time to complete all phases of the trial process including appeals, and increased effort in the form of human capital, all of which are constitutional requirements.[128]

There has been no comprehensive empirical study of the economic costs of seeking the death penalty in Oregon. Thus, the current study adds significantly to research on the death penalty in Oregon and beyond. As with previous studies, other important limitations may negatively affect findings, including issues surrounding sample size, truncated observation periods, and poor data quality. We give each of these issues careful consideration and we fully describe all limitations that may bear on our overall findings. Below, we describe our sample of cases followed by an explanation of the general analytic plan and results.

B. Sample of Cases and Data Quality

To most accurately illustrate the costs associated with Oregon's death penalty, our first step was to determine the appropriate comparison groups for our study. Oregon's unique process for

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[125] *Id*.
[126] *Id*. at 13–14.
[127] Cook, *supra* note 48, at 498–529; John K Roman, Aaron J. Chalfin & Carly R. Knight, *Reassessing the Cost of the Death Penalty Using Quasi-Experimental Methods: Evidence from Maryland*, 11 AM. L. & ECON. REV. 530–574 (2009).
[128] *Id*.

aggravated murder, or capital-eligible cases, significantly affected our decision.[129] Oregon does not require the prosecution to file a notice indicating whether or not it will seek the death penalty. This is an extremely important factor, as the absence of such a notice means that, in practice, the death penalty is "on the table" from arraignment until either a plea deal is reached or the end of trial, unless clear characteristics of ineligibility (i.e. severe mental illness or juvenile status) are present. Consequently, all aggravated murder cases in Oregon can be characterized as "death penalty sought."

In contrast, in the large majority of other death penalty states, state statutes require the prosecutor to declare by a certain point during pretrial whether the state is seeking death.[130] Once this occurs, the case follows a particular track: death sought or not sought. Seeking death means specific costs are incurred, such as hiring death-qualified defense attorneys, providing additional due process protections, filing motions and holding hearings surrounding the death penalty, and bifurcating the trial into a guilt phase and a sentencing phase. When death is not sought, the state is not required to provide death-eligible defense attorneys and there is no constitutional requirement for a bifurcated trial. Consequently, these states' statutes naturally provide two distinct groups of aggravated murder cases ("death penalty sought" and "death penalty not sought"), which are convenient for comparing costs.

Because Oregon lacks this clear and important distinction, we determined we would need to provide several different metrics for comparing cases to ensure we could distinguish costs unique to seeking and sentencing people to death. Yet, even without the statutorily created distinction, there are considerable differences within the complete list of aggravated murder cases. Additionally, in order to provide a clear contrast between cases where death is and is not at issue, we decided to create a second dataset of non-aggravated murder cases as an alternative baseline comparison group. While we recognize the limitations of comparing charges that necessarily lead to completely different sentences if convicted, we decided that doing so would nonetheless be useful, as it provides yet another baseline from which to examine costs and other related measures of case-complexity such as time, motions, and other filings.

Our next step was choosing the time frame for our sample of cases.[131] We initially chose to examine aggravated murder cases that commenced between 2000 and 2015 to create a manageable sample of cases that were not so old as to not have any quality data available, and where we could show a progression through case milestones, such as guilt and sentencing phases and appeals. However, once we started reviewing the available case data on state databases, we chose an earlier ending date due to the slow progression of aggravated murder

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[129] *See supra* Part III.B, Oregon's Death Penalty Today: ORS 163.105

[130] *Id.*

[131] *See supra* Part III.A, History of Oregon's Death Penalty (explaining the timeframe of when the death penalty was reintroduced in Oregon).

cases. Thus, our final aggravated murder dataset includes cases between January 1, 2000, and December 31, 2013.[132] The dataset gave us an adequate beginning sample size of 354 aggravated murder cases. We initially did not exclude any cases based on case status (whether the case was still pending or dismissed), process leading to conviction (whether the defendant accepted a plea deal or went to trial), or the sentencing outcome, for example. Case exclusion came into play once all of the data were collected and individual cases were assessed based on how many data points were available. If additional databases provided by DOJ, DOC, or ODPS did not provide data on a particular case, then it was excluded from our analysis.[133] This resulted in a sample size of 338 cases. We discuss this process further, below.

Next, we requested a list of all murder cases from January 2000 to January 2013 (the most recent complete year available at the time of the request) from the Oregon Judicial Department. Our initial list contained more than 800 murder cases. Therefore, we randomly selected 354 cases (the same number of cases in the aggravated murder dataset) from the original list of murder cases. From this random group, we found a handful of cases that were actually aggravated murder cases and some that were dismissed or re-indicted and then re-filed under new case numbers; those were replaced through random selection of the remaining unselected murder cases from the larger original dataset. We then went through the same processes requesting data from partner agencies. Again, a few cases were unusable due to some error in the case number or complete lack of data. This resulted in the loss of just four cases, leaving a total of 350 non-aggravated murder cases that could be compared on a few cost and case-level indicators with the aggravated murder cases.

We then created a third dataset of aggravated murder cases that resulted in a death sentence between 1984 and 2000. This group originally consisted of 47 cases. We determined that it was necessary to expand the death penalty sample because the death penalty appeals process is so slow that none of the defendants sentenced to death between 2000 and 2013 had proceeded far into their appeals processes. In fact, only one of them had moved into the post-conviction stage of his available appeals.[134] Consequently, we realized we needed to go further back to fully capture the costs of the death penalty appeals process in Oregon. Even with this additional dataset extending back to 1984, only six of the defendants have reached the first phase of habeas corpus review in federal court.

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[132] Generally, pretrial moves slowly in aggravated murder cases, often with several months between motions and hearings. Thus, cases filed within a few months of the beginning of our analysis had very little data to work with.

[133] We use the term "matched" here as a way to describe whether or not a case (individual defendant) had cost related data from additional data sources. A "no match" does not mean that the case or individual did not go through trial or is in prison, for example, just that there was a lack of data provided by the particular criminal justice agency or institution.

[134] *See infra*, Part IVD, Appeals; *See infra*, Part VIIIB, The 34 People Currently on Death Row in Oregon.

Table 1. Selected Aggravated Murder Cases by Decade and Sentence (N = 374).

	Sentence Outcome						
Decade of Disposition	DP	Acq	LWOP	LTL	Lt5	P or O	Total
1980s	1	0	13	0	0	0	14
1990s	17	0	5	0	0	1	23
2000s	14	0	145	52	5	6	222
2010s	9	1	56	19	1	29	115
Total	41	1	219	71	6	36	374

Notes: Sentence definitions: DP = Death Penalty; Acq = Acquitted; LWOP = True Life/LWOP or ordinary life; LTL = Less than Life; Lt5 = Less than 5 year sentence; P or O = Pending or Other.

The pre-2000 death penalty cases, 37 of which were selected based on data availability, were added to the aggravated murder dataset, resulting in a final sample size of N = 374 aggravated murder cases, see Table 1 above for details (332 cases from the year 2000 forward).[135] There were four main aggregated cost categories that were used to inform whether a case had enough information to remain in the analysis (DOC, jail, OPDS, DOJ). After excluding cases that had only one cost data point, a simple missing values analysis was performed, including a visual analysis of missing data patterns to test for monotonicity and determine which missing data patterns were the most frequent. Overall, 88.3 percent of the cells had complete data, and there was a distinct visual difference between the most frequently occurring pattern (complete) and the next four patterns, further indicating data missing at random rather than systematic missing data (which minimizes the chance of bias in the missing and imputed values).

1. County-Level Representation in this Sample of Cases

There are county-level/geographic differences regarding both the incidence and prevalence of aggravated murder and the pursuit of capital punishment. Although anecdotal, there is some evidence of a relationship between a given county's population/crime rate, budget, and whether or not a case is pursued capitally. Although an empirical analysis of this particular issue is well beyond the scope of this study, it is important to understand where, at the county level, the cases used in this study originated. Table 2 below provides a breakdown of the geographic location, in total, of the cases included in the study. The majority of the cases are concentrated in six counties, beginning with Multnomah, followed by Clackamas, and then Washington, Lane, Marion, and Umatilla counties.

[135] This is a sample and therefore may not represent the patterns of sentence outcome in all aggravated murder cases prior to 2000.

Table 2. Database Case Frequency (*f*), by County and Sentence Outcome (N = 374).

	Death	Life (some version)	Other	Total *f* (%)
Multnomah	6	70	46	123* (32.7)
Clackamas	3	23	7	33 (8.8)
Washington	5	17	7	29 (7.7)
Lane	7	12	7	26 (6.9)
Marion	9	12	1	22 (5.9)
Umatilla	0	15	5	20 (5.3)
Coos	2	11	4	17 (4.5)
Deschutes	1	12	2	15 (4.0)
Douglas	3	7	4	14 (3.7)
Linn	0	5	5	10 (2.7)
Total	41	221	113	309 (82.2)

Notes: The following counties had fewer than 9 cases and were not included above: Klamath (8); Benton (6); Clatsop (6); Jackson (6); Josephine (5); Curry (4); Polk (4); Yamhill (4); Columbia (3); Grant (3); Lincoln (3); Malheur (3); Tillamook (3); Harney (2); Union (2); Wasco (2); Baker (1); Crook (1); Hood River (1); total = 67 (17.8%), 309 (82.2%), 374 total. *Multnomah also contains one acquittal case, not counted in the columns, but counted in the row total.

C. Process for Entering Pre-Trial, Trial, and Appeals Record Data

To quantify the economic costs associated with litigating aggravated murder cases, we considered the entire judicial process from pre-trial through federal habeas corpus review. Trial and appeal reports are public records and can be accessed through online databases. We obtained trial, direct appeal, writ of mandamus, state habeas corpus, and post-conviction appeal records through Oregon Judicial Case Information Network (OJCIN OnLine), which comprises Oregon eCourt Case Information Network (OECI), Oregon Judicial Information Network (OJIN), and Appellate Case Management System (ACMS). We then obtained federal habeas records through PACER (Public Access to Court Electronic Records), which houses case and docket information for federal courts.

Employees of the county where each case is prosecuted create OJIN and eCourt records. While there is overall consistency in how record data are entered, there were also many areas of recordkeeping that were inconsistent from county to county, from year to year, and from record to record. For instance, in some counties, meticulously detailed records were kept as to how long hearings took and who was present, whereas in other counties there was only a bare entry noting that a hearing took place. In some counties, there was little information provided about which party filed what motions or the subject of the motion, while in other counties we were

able to discern considerable detail about the substance of the trial as it occurred. Older records often lacked necessary detail, so we filled in the gaps where we could. That said, often so little information was preserved that not much could be extrapolated beyond the record itself. Below, we describe the procedures we used to input information from these records into our database as consistently and accurately as possible.

1. Record Entries

First, we obtained information relating to the charges, disposition, initial and final pleas, and dates for the disposition and pleas, without interpretation, from the trial record. Next, we started our pre-trial and trial data collection after the last "arraignment" entry in the trial record. If the defendant had another arraignment entry much later in the trial record and there were significant and/or numerous filings between arraignment entries, we made a decision about when to begin data collection. Following this starting point, we reviewed entries for hearings, judicial orders, defendant and state filings, subpoenas, and defendant and witness transport orders.

We counted and dated hearings only when they actually occurred; we did not count hearings that were merely "scheduled." The "type" of hearing (motion, omnibus, status check, further proceedings, settlement conference, etc.) was ascertained from the entry's heading, and the hearing's start time and length was determined from the corresponding "scheduled" hearing's details. If a more specific time estimate was provided in the actual hearing entry, we input that data. In addition, we determined whether or not the defendant was present at the hearing based on a corresponding and independent transport order, the inclusion of the defendant in the list of present parties, or the actual hearing details articulating the defendant's attendance.

All subpoenas that were entered into the record were counted, whether they were submitted by the defense or the state. Likewise, all judicial orders were counted regardless of the type of order, such as "order to continue," "order changing judge," or "order appointing counsel." Defendant and witness transport orders were counted in their own separate categories.

When counting defendant and state filing entries, we first had to determine which party made the entry. For OJIN trial records, the filing party would be listed at the bottom of the entry. For eCourt records, the entry noted the name or affiliation of the attorney who filed. If there was nothing listed, we made a determination based on the date and the description. For example, if a motion requested, "*TO REQUIRE THE STATE TO DISCLOSE ALL AGGRAVATING INFORMATION,*" we could confidently attribute the filing to the defense. When we were unable to determine the side with sufficient certainty, we counted the entry as an "unclear source."

Next, we created an interpretative process to consistently include or exclude certain filings. Only specific, more common types of entries were counted (e.g. motions, memorandums, demurrers, responses), and others were categorically not counted (e.g. requests, notices). While all motions were counted, only "independent" memorandums were considered. A

memorandum was "independent" if it was not connected to a motion entry, as determined by looking at the entries' dates and descriptions. However, if a memorandum "in support" of a motion was filed at a later date, we decided if it was sufficiently separated to count it as an independent filing. The purpose behind counting only "independent" was not to double-count activity by either side. In other words, if the state made a motion and filed a memo in support of that motion, we considered that one in the same activity and thus only counted one.

2. Jury and Trial Data

If the data indicated that a defendant did not accept a plea bargain and his case went to trial, we evaluated the number of days, as well as the start and end dates, for jury selection, voir dire, the guilt phase, and the penalty phase. Unfortunately, there was great variability in record keeping from county to county, with some counties clearly entering data for each phase and others providing much less information. For cases lacking precise entries, we estimated the start and end dates for each phase. When the trial record was severely deficient, which occurred most often in older cases, we considered the data to be "not available." For Multnomah, Washington, Clackamas and Tillamook counties, we were able to obtain information for the jury process through public record requests and by speaking to the court administrator, which helped to corroborate the trial record data. We considered the date of the sentencing hearing the end date of the trial phase, as well as the constructive end date for cases in which the defendant accepted a plea bargain.

3. Defendant and Victim Characteristics

Defendant characteristics, including gender, date of birth, and race, were almost exclusively gathered from the defendant's trial record. If not found in the record, we then looked to Oregon's DOC's "Offender Search" database.[136] When race was not listed in either the trial record or the DOC database, we researched news media articles about the defendant, entering race only if explicitly articulated therein. The defendant's age at the time of sentencing was determined by calculating the difference between the defendant's date of birth and the date of sentencing. Furthermore, the defendant's prison location and start date of incarceration were obtained from the DOC's database. Victim characteristics were rarely featured in the defendant's trial record. Consequently, data such as the victim's gender, age, race, and alleged relationship to the defendant were gathered from newspaper articles about the incidents. All sources were recorded in our database. See Table 3, below, for sample descriptives.

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[136] *Oregon Offender Search*, Or. DEP'T OF CORR., http://docpub.state.or.us/OOS/intro.jsf (last visited Sept. 15, 2016).

Table 3. Sample Descriptives (N= 374).

Offender			Victim		
Measure	f	(%)	Measure	f	(%)
Number of Victims[1]			O-V Relationship		
1	304	81.3	Stranger	137	36.9
2	55	14.7	Knew at least 1 Victim	234	63.1
3	8	2.1	Total	371	100
4	5	1.3			
5	1	0.3			
6	1	0.3			
Total	374	100			
Offender Race			Victim Race		
White non-Hispanic	242	69.5	Non-Minority	140	71.1
Asian	5	1.4	Minority	57	28.9
Black/AA	50	14.4	Total	197	100
Hispanic	43	12.4			
Native American	7	2			
Other	1	0.3			
Total	348	100			
Offender Gender			Victim Gender		
Female	40	10.7	Female	127	35.2
Male	334	89.3	Male	164	45.4
Total	374	100	All Female	11	3.0
			All Male	16	4.4
			Mixed	43	11.9
Avg. Offender Age (at sent)[2]	30.6		Total	361	100
Case Details			Minor Victim		
Plea (yes)	230	75.2	18 and Over	293	84.4
Trial Phase (yes)	119	31.8	Minor	54	15.6
Penalty Phase (yes)	92	24.7	Total	347	100

Notes: (1) Average number of victims = 1.25. (2) Average age for all offenders.

D. Appeals

To capture the full cost of Oregon's death penalty process, we reviewed all accessible appeal records for the aggravated murder cases in our dataset. These records were obtained from OJIN, eCourt, and PACER, and covered direct appeals, post-conviction relief, state habeas corpus, and federal habeas corpus proceedings. Most aggravated murder cases have not gone further than automatic direct appeal, and very few have reached habeas proceedings.

After compiling physical copies of the appeal records, we analyzed and input the relevant "time cost" data. For "General Appeal" records, we first identified the type of appeal (i.e. "general criminal," "death sentence," "pre-trial") and the court handling the appeal. Next, we identified the date the appeal was filed and argued/submitted, the date of "appellate judgment," and the disposition date. If there was no entry for the date of the appellate judgment, we substituted the date the appeal was "decided." This decision ensured a more conservative estimate for "time cost" because the "decided" date is prior to the appellate judgment, and thus there is a shorter length of time between the date the appeal was filed and the date it concluded.

We also entered the disposition (i.e. denied, affirmed, denied/affirmed in part) along with the number of judicial orders, hearings, and state and petitioner filings (i.e. motions, briefs, and responses). To determine which party submitted the filing, we identified the attorney connected to the entry. We did not count motions or orders corresponding to transcripts or those filed independently by the court. If the filing had no identifying party attached, or was otherwise indistinguishable, we counted it as an "unclear source." We followed the same general process for all three levels of post-conviction relief, state habeas corpus proceedings, and federal habeas corpus proceedings.

E. Economic Measures and Adjustments

As stated above, the main aggravated (including death penalty cases) and non-aggravated murder data sets were circulated within the corresponding criminal justice agencies, where representatives were asked to match names and case numbers to their database and provide financial information on a case-by-case basis. Each separate dataset was converted into a new file using IBM SPSS software and was cleaned (checked for accuracy, recoded, etc.) and merged with the main aggravated murder and non-aggravated murder "seed" files. We tied costs to each particular case within general stages of the case process, and where possible, we triangulated costs using several sources of data. Because the cases, and therefore their costs, occur at different times across about four decades (not to mention forecasted costs for DOC), the cost figures all needed to be adjusted for inflation. For all adjustments, the Organization for Economic Co-operation and Development (OECD), Main Economic Indicators (complete database, base year 2010, Consumer Price Index – Total All Items for the United States), were used to adjust nominal values into 2010 dollars. The main findings are then presented in real 2016 dollars where noted.

In the following categories, we provide more information on each key measure as well as basic descriptive analyses.

1. Jail Data

Death penalty cost studies, at times, fail to include the costs associated with pre-sentence incarceration in jail. As can be seen here, these costs are significant for aggravated murder and non-aggravated murder cases, as the defendants are often held in segregated, high-security areas within particular county jails. As noted in a previous study, the research shows both a positive relationship with case severity/complexity and time served between arrest and sentencing. In addition, the cost of running these high-security areas within jails differs significantly from placements in lower-risk cells, as the inmate to staff ratio decreases considerably.[137] These cost differentials are warranted, and we do not make any assumptions that the costs associated with managing high-risk individuals would significantly change in the absence of a death penalty option, as there would still be a need to segregate high-risk violent offenders. We include time and expenses related to aggravated and non-aggravated murder cases, as this is one place where we can take a look at pre-sentencing security costs (jail) and compare between the two main categories of cases.

For each case, we calculated the time between the date the case was filed and the date of disposition. We did not use the sentence date because we wanted to err on the side of caution and report the most conservative cost estimates. We used average daily costs for jails by county, relying on a report conducted by the Multnomah County Performance Management Group.[138] A total of 367 (97.6%) of the aggravated murder cases contain jail cost data and a total of 312 (89.1%) of the non-aggravated murder cases had jail cost data.

2. State of Oregon Department of Corrections (DOC) Data

We elected to include costs associated with post-sentence incarceration. We provided the DOC with a complete list of the aggravated murder cases included here and requested information regarding costs of incarceration. A total of 332 (88.2%) of the cases contain usable data within the DOC database. We also asked for cost information regarding the actual administration of the death penalty; however, these data are difficult to collect or estimate, given the rarity of the punishment (there have only been two executions since 1962). The DOC stated that the average cost, per day, per offender (for all offenders) is $94.55 (2013–2015), regardless of where offenders are housed. We used this value to calculate costs associated with an estimated life sentence, unless the offender had a release date prior to the estimated end-date.

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[137] *See* COLLINS ET AL., *supra* note 14, at 29.

[138] Matt Nice, *Oregon's Jails: A Brief Comparative Analysis Report #001-02*, MULTNOMAH CTY. PERFORMANCE MGMT. GRP. 2 (Dec. 2002).

Because we covered four decades of cases in Oregon, we needed to adjust the DOC cost figures to account for both inflation and time, as for example, those cases occurring in the 1990s, for example, have accumulated more costs than recent cases have which would artificially skew the results. Therefore, we used a two-step process: first, we retained the existing DOC records, up to 2015; next we calculated age at sentencing and forecasted time past 2015 using both an average life sentence of 470 months and an in-prison life expectancy of 65 years.[139] The retained and forecasted costs were then adjusted using base year 2010 annual CPI figures. All final figures are presented as 2010 dollars, unless otherwise noted. CPI figures were forecasted using an average rate of about 2.1 percent (the R^2 for the linear model was .9998).[140] Additionally, there is a pattern in both the Washington study and this study, where non-death penalty cases, or here the true life/LWOP group, costs more on average that cases sentenced to death. The main reason there is a cost discrepancy is because of an age discrepancy at the time of sentencing—the true life/LWOP group is younger on average, which means they will spend more time in prison and incur more costs over time. The table below provides a breakdown of costs based on age at sentencing for illustrative purposes.

Table 4. Offender Age at Sentencing, by Outcome (n= 328).

	N	Mean	Std. Deviation
Death	40	34.91	11.09
Life (some version)	201	30.67	10.97
Less than Life	62	28.98	10.02
Less than 5yrs	4	24.22	7.29
Pending or Other	21	27.99	10.13
Total	328	30.61	10.84

3. Prosecution Data, Including Appeals

Unlike defense attorneys who bill and are often paid by the hour, prosecutors' offices in Oregon do not keep or bill the time that their attorneys spend on cases. This makes estimating prosecution-specific costs difficult from the initial stages up through trial and post-conviction. Therefore, data associated with prosecution costs at trial were either not available or were not provided to the researchers upon request. We were, however, able to gain both qualitative and quantitative data from two main sources: first we interviewed prosecutors and the Deputy

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[139] For average life sentence, see *Appendix A, Descriptions of Datafiles, Variables, and Footnotes Introduction,* UNITED STATES SENTENCING COMMISSION (2016) http://www.ussc.gov/policymaking/meetings-hearings/appendix-0; *See also, Michigan Life Expectancy Data For Youth Serving Life Sentences*, ACLU OF MICHIGAN JUVENILE LIFE WITHOUT PAROLE INITIATIVE http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf

[140] *See* COLLINS ET AL., *supra* note 14, at 38.

Solicitor General of the Appellate Division of DOJ. We interviewed prosecutors from two counties to discuss the differences in costs between capital and non-capital aggravated murder cases. Although enumerating economic costs from personal interviews could not be accomplished at that time, the qualitative responses provide context and therefore their importance should not be overlooked. We include this qualitative information in Part IX.

Second, DOJ provided us with case-level cost-related information for post-conviction appeals (direct appeals, post-conviction review, and federal habeas corpus) and in some rare instances, DOJ assisted county-level district attorney's offices with trial prosecution. There were a total of 171 records provided and matched from DOJ data to our sample data. Of these, all original death penalty sought cases were included (61, one case was not included because that offender was not mentally competent for execution), and the remaining appeals were for non-death penalty aggravated murder cases. Future research could address the benefit of documenting prosecutor attorney time at the trial level.

4. Defense Data, Including Appeals

Data associated with defense costs were collected primarily from the OPDS, which was able to provide the cost of trial, appeal, and post-conviction review by case. A total of 354 or about 95 percent of the sample cases recorded matched data within the OPDS database, or had case-level cost information. Additionally, we met and talked with defense lawyers to discuss the differences in costs between capital and non-capital aggravated murder cases. Costs for defense services at the trial level represented two main categories, the first was for attorney hours logged on each case, and the second was for any additional or "other" costs. Other expenses may include fees for investigation, mitigation, psychiatric/psychological evaluation, other expert opinions/testimonies, mileage reimbursement, forensics, paralegals, lodging, meals, interpreters, polygraph tests, discovery, lay witnesses, and out-of-pocket expenses. If there is a sentence of death OPDS calculates the total public defense expenses at the end of each phase of the case. If there is a death sentence, or if the expenses were incurred after OPDS became an agency in July of 2003, the expenses are well supported. Prior to that time, OPDS did not guarantee that they would always have supporting documentation for all expenses. All of the other information is queried from OJIN and OECI. OPDS was also able to provide cost-related data on direct appeals and post-conviction review trials and appeals.[141] They were also able to help estimate average costs for appeals and not only provided this information for all aggravated murder cases, but also for non-aggravated murder cases.

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[141] OPDS does not cover defense costs for federal habeas corpus litigation, as these are the responsibility of the federal government, rather than the state. However, the state of Oregon is responsible for the costs associated with defending these federal claims.

5. Court Data

The courts did not directly supply us cost-specific information. We relied on open access court documents in forming many of our databases. See the "Record Entries" section above for additional information on the elements we gathered.

F. Combined Data and Adjustment Strategy

We asked stakeholders to match records in their databases using the original list of charged aggravated murder cases from 2000 to 2013. Later, we added death penalty cases dating back to 1984 and asked for the same information for those cases. We added the additional death penalty cases because the more recent cases have no appeals records (or are still "in process") and therefore lacked any post-conviction cost information (see Part VIIIB for a detailed explanation of where the current death row cases are in their respective appeals processes). Generally, we received data back from participating stakeholders in Microsoft Excel spreadsheets. A small amount of cost-related qualitative and quantitative information was conveyed in PDF format. As each dataset was delivered we cleaned (checked for accuracy, recoded, etc.), prepped, adjusted cost information, and then matched and merged that data within our main database. Once we had all unique cost measures, broken out by category, we were able to assess whether there were data that were systematically missing from the sheet. A small number of cases (n= 27) had virtually no information and were therefore removed from the database. Because most of the records were intact, meaning they contained valid and reliable cost data, we did not conduct multivariate imputation. For all adjustments, the Organization for Economic Co-operation and Development (OECD) Main Economic Indicators (complete database, base year 2010, Consumer Price Index – Total All Items for the United States), were used to adjust nominal values into real 2010 dollars. CPI figures were rounded to the ten thousandths and the annual CPI value for 2015/16 was provided using Sahr's (2012) estimate.[142]

G. Analytic Plan

To reiterate, the primary goal of this study was to estimate the economic costs associated with aggravated murder cases that result in the imposition of death sentences, true life/LWOP

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[142] Robert Sahr, Inflation Conversion Factors, COLL. OF LIBERAL ARTS – SCH. OF PUB. POLICY, OR. STATE UNIV. (Sept. 10 2016) http://liberalarts.oregonstate.edu/sites/liberalarts.oregonstate.edu/files/polisci/faculty-research/sahr/inflation-conversion/pdf/cv2010.pdf ("Consumer Price Index (CPI) Conversion Factors 1774 to estimated 2024 to convert to dollars of 2010. Estimates for 2014-2024 are re-based on the average of OMB and CBO estimates as early 2014. . . . Conversion factors for years before 1913 are re-based from data from the Historical Statistics of the United States Millennial Edition (Cambridge University Press, 2006). Calculation starting 1913 uses the CPI-U as the base, from the US Bureau of Labor Statistics. Monthly and annual CPI data are available at the BLS web site: http://stats.bls.gov/cpi/home.htm#data (CPI-U = all urban consumers)").

sentences, or ordinary life sentences in the state of Oregon. Oregon law does not require the prosecution to file a notice indicating whether or not it will seek the death penalty in aggravated murder cases. Therefore, all aggravated murder cases are treated as death penalty cases, inflating the average cost of aggravated murder cases that do not result in a death sentence. To provide additional context, we include costs for non-aggravated cases where defendants were charged with the lesser charge of murder, in categories where data was both available and reliable. The following are the main findings from the study, presented by total (includes all cost categories), then by individual cost category.[143]

The information contained within this research report reflects a thorough analysis of data collected from hundreds of aggravated murder and murder cases in Oregon, from 2000 through 2013. We also examine aggravated murder cases that resulted in death sentences between 1984 and 2000. The economic findings are limited because no cost data were available or provided by district attorneys or the courts. We were able to get cost-related information from local jails (costs associated with incarceration during trial), the DOC (incarceration costs), OPDS, (trial and appeals costs), and DOJ (costs related to appeals and all stages of post-conviction). Although these categories make up a great deal of the overall costs related to aggravated murder cases, they only represent a portion of the total costs necessary to pursue the death penalty in Oregon. We approached all data and costs estimations from a conservative standpoint, meaning the costs are purposely underestimated here.

Prior to moving on to the analyses presented below, there are a couple of important observations that need to be made. First, like other research undertaken in the Washington study, we consider cost differentials to be opportunity costs; that is, in the absence of a death penalty option, the funds that would have been used to pursue the death penalty would likely be shifted to other cases and other locations within the criminal justice and public support systems. We do not provide any suggestions as to whether this would be the case, or further, what (if any) percentage of any differentials would be redistributed across the system. Such matters are well beyond the scope of this study. Second, we do not make any normative assumptions as to the social utility of the death penalty. We are simply providing evidence as to the nature of the costs of aggravated murder cases.

We present the main economic analyses below in three stages. First, we provide descriptive analysis using several non-enumerated measures, such as the number of court filings, to provide some additional context for understanding the economic findings. Second, we provide a detailed analysis on each main cost category, such as jails, DOC, defense, and DOJ. Last, we

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[143] Prosecution and courts could not produce any reliable per-case cost estimates. For all adjustments, the Organization for Economic Co-operation and Development, (OECD) Main Economic Indicators (complete database, base year 2010, Consumer Price Index – Total All Items for the United States), were used to adjust nominal values into 2010 dollars. The findings are then presented in real 2016 dollars.

provide the overall or combined cost findings. All figures reported below have been adjusted to 2016 dollars.

V. FINDINGS

The findings below are organized into three main sections. In the first section, we provide findings related to non-enumerated measures, such as hearings and court filings. In the second section, we provide analysis of each of the main cost subcategories separately, followed by the final section, where we provide the main combined economic findings. In these sections, we provide economic cost findings by case category and cost subcategory. Because of the complex nature of aggravated murder cases — for example, that some death penalty cases had original death sentences reversed and resentenced as true life/LWOP — we provide two separate analyses based on case category. The first relies on a comparison between cases that were designated by official sources (DOJ, DOC) as death penalty cases (cases where there was a conviction and original sentence of death including cases where the initial death sentence was reversed) with non-death cases (cases that never resulted in a death sentence). The second uses case outcomes as the case categories for the purpose of comparisons.

To begin, we present some additional non-enumerated descriptive findings. Because of a lack of data and/or organizational capacity to provide data based on antiquated information management systems, such as paper-only records (synthesis of such records would place an undue burden on the agency), we were not able to enumerate costs from every source of information (e.g. courts). We were, however, able to capture data from case/docket records that provides insight into the empirical pattern of increased case complexity surrounding aggravated murder cases (both death and non-death cases); and where data were both valid and reliable, we expand the comparison to non-aggravated murder cases. To be clear, we provide these numbers for context, in order to shed light on case complexity, not to directly compare costs associated with non-aggravated murder cases to aggravated murder cases. To further explain why aggravated murder and death penalty cases are, on average, more complex we provide some basic findings regarding number of court filings and length of time from charge to sentencing (a proxy for pre-trial and trial); and in Part VIIIB, we provide detailed information on the current status of the people who are currently on death row.

A. Non-Enumerated Measures

Table 5, below, provides information regarding the average number of hearings, defense and prosecutorial filings, judicial orders, and the average number of days from the date that the charges were filed to sentencing date (pre-trial and trial). The average number of hearings for non-death cases was just over 10, while the number of hearings for death penalty cases was double that number (ratio= 2.03). The average number of defensive filings for aggravated murder cases was just under 20 on average, while the average number for the death penalty cases was just under 40. The average number of prosecution filings for aggravated murder cases was about nine on average, while they averaged nearly three times that, or 25, for death penalty cases. The average number of judicial orders issued in aggravated murder cases was about 17

and three times that for death penalty cases, at an average of 52 per case. The average length of time, in days, from the date that the charge was filed to sentencing, was about 562 days for non-death aggravated murder, about 741 for the death cases, and for the purpose of adding another point of comparison—the average number of days for non-aggravated murder was about 417 days.

Simple t-tests were used to determine whether the differences between the means of each of the groupings were statistically significant. As indicated in the table below, the differences between cases in hearings, filings (all), and judicial orders were all significant ($p < .01$), while the difference between days between initial charges and sentencing were significant, they were so at $p < .10$. Importantly, with the exception of days between charges and sentencing, the ratios presented in this table all range from double to triple the number of processes. Hearings, filings, and judicial orders all take time and here it is clear that there is additional time and effort for these processes within all aggravated murder cases and especially death penalty cases. To provide additional context, we again expand the comparison here to include averages for non-aggravated murder cases. Although comparing non-death eligible cases to those cases where the death penalty is an option is problematic due to the statutory requirements and differences in case processing, we provide these numbers here just for added context and an additional point of comparison.

Table 5. Differences in the Number of Court Processes: Death and non-Death Cases (n=324).

Category	Case Designation	Mean	sd	Ratio
Number of Hearings	Aggravated Murder	10.32	8.66	
	Death Penalty	20.93	9.72	2.03*
	Total	10.77	8.95	
Number of Def. Filings	Aggravated Murder	19.29	21.09	
	Death Penalty	39.21	27.09	2.03*
	Total	20.14	21.71	
Number of Pros. Filings	Aggravated Murder	9.12	12.77	
	Death Penalty	25.00	21.85	2.74*
	Total	9.8	13.62	
Number of Judicial Orders	Aggravated Murder	16.97	17.70	
	Death Penalty	52.14	34.46	3.07*
	Total	18.47	19.95	
Length of Time from Charge to Sentencing	Aggravated Murder	561.91	388.58	
	Death Penalty	740.93	280.75	1.32**
	non-AM, Murder	416.63	363.70	
	Total	569.65	385.94	

Note: *p< .01; **p= .09; (t-tests were used to text differences in means). 1. Length of time = days. 2. Aggravated murder n= 313, death penalty n= 14. 3. Death Penalty cases do not include pre-2000 cases. 4. sd = standard deviation.

In Table 6, below, we present the comparisons between aggravated murder (death/non-death) and non-aggravated murder cases on the average number of hearings, filings, and judicial orders (pre-trial and trial). These findings illustrate the significant differences between aggravated murder cases in general and a much greater divide between these cases and death penalty cases. With much additional effort from both researchers and key stakeholders and their organizations, we may be able to enumerate these figures and provide cost-related information. The ratios presented below, however, are just as powerful indicators of the

differences between these cases' processes. Time is an extremely important measure for these analyses because as processes lengthen, we can assume additional costs with little mental effort. In other words, in the criminal justice system, time is money. Additionally, if one were to assume that the time and effort put forth in hearings, filings, and judicial orders were similar across case types (1 to 1), which would in fact be a conservative assumption, we could assign dollar values and say that for every one dollar spent in relation to an aggravated murder defense filing, death penalty case defense case filings would cost double that. Or, to give another example, for every one dollar spent on non-aggravated murder defense filings, death penalty case defense case filings would cost seven times that.

Table 6. Number of Court Processes: Non-Aggravated Murder Comparison.

Death Penalty	N	Mean	Diff	ratio
Number of Hearings	344	8.13	12.80	2.57
Number Def. Filings	343	5.63	33.58	6.96
Number Pros. Filings	340	3.20	21.80	7.81
Number of Judicial Orders	346	10.41	41.73	5.01

Non-Death Penalty	N	Mean	Diff	ratio
Number of Hearings	344	8.13	2.19	1.27
Number Def. Filings	343	5.63	13.66	3.43
Number Pros. Filings	340	3.20	5.92	1.54
Number of Judicial Orders	346	10.41	6.56	1.63

Notes: Diff = average difference.

B. Findings by Cost Subcategory

In this section and the final section below, we provide economic cost findings by case category and cost subcategory. Because of the complex nature of aggravated murder cases, for example, where some "death penalty cases" had original death sentences reversed and resentenced as "true life/LWOP," we provide two separate analyses based on case category. In the first, we provide findings based on whether the case was designated as a "death penalty case" meaning there was a conviction and original sentence of death, regardless of whether that initial sentence was reversed. In the second, we provide an analysis based on final (to-date) case categories. For both, we compare the death penalty cases to death-eligible but not sentenced to death cases, most of which resulted in life sentences (true life/LWOP). Cost subcategories include jail costs, OPDS costs, DOC costs, and DOJ costs. Similar to the non-enumerated analyses above, where appropriate (only jail time and OPDS could be reliably calculated), we bring in non-aggravated murder as an additional point of comparison. We begin with jail costs, followed by OPDS results, DOC, and end with DOJ costs for both sets of analyses.

1. Sentenced to Death and Death Eligible but Not Sentenced to Death

The figures presented in Table 7, below, represent average differences between aggravated murder cases that are at some point designated as death penalty cases (conviction and original death sentence), compared to death-eligible but not sentenced to death cases. Jail costs were calculated using the date that the case was filed, or charge date to the date of sentencing. The total average difference in costs for jailing offenders/suspected offenders from charge to sentence between designated death penalty and death-eligible not-sentenced aggravated murder cases is $18,614 dollars (t = 2.767 (365), p<. 01). For added context and for an additional point of comparison, we calculated jail costs for the non-aggravated murder sample as well. The average costs for that sample of cases is $41,081, and the average difference when compared to the death penalty group is $34,340 (ratio = 1.84). These figures are likely underestimated due to the inability to differentiate between security levels, as we used a per-inmate, per-day, by county estimated figure. These figures likely do not account for any additional security, transportation, or other additional costs incurred by the county jail or the county for services rendered.

Table 7. Average Differences by Cost Category and Case Category, in 2016 Dollars.

Cost Category	Case Category	N	Mean	Mean Diff	Ratio
Total Jail Cost	DP	61	$75,420	$18,614*	1.328
	Agg Mur	306	$56,807		
	Non-AM†	312	$41,081	$34,340	
OPDS Total Appeals	DP	33	$906,275	$891,388*	60.877
	Agg Mur	46	$14,887		
OPDS Total Attorney Costs	DP	61	$299,275	$30,265	1.113
	Agg Mur	289	$269,010		
OPDS Total Costs	DP	61	$789,555	$521,880*	2.950
	Agg Mur	293	$267,674		
	Non-AM†	267	$33,799	$755,756	
Total DOC	DP	61	$1,156,514	-$53,276	0.956
	Agg Mur	269	$1,209,790		
Total DOJ Prosecution Costs	DP	61	$252,290	$226,532*	9.795
	Agg Mur	110	$25,758		

Note: *p< .01; †Agg Mur = Aggravated Murder non-death; DP = Death Sentence designated by system.
*Non-AM = non-aggravated murder, differences measured against Death category only here.

Next, we provide average differences in costs between case types for OPDS. We first broke out differences by appeals and then by total attorney costs. The average difference in costs for

OPDS appeals is $891,388 per case (t = 6.451 (32.04), p < .01). The average difference in costs for OPDS attorney costs (labor and other) is $30,265 (p > .05). The total average difference in costs between death-eligible but no-sentence and death penalty designated (sentenced to death) cases for OPDS is $521,880 (t = 5.075 (62.72), p <. 01). For added context and for an additional point of comparison, we calculated OPDS costs for the non-aggravated murder sample as well. The average costs for that sample of cases is significantly lower, at $33,799 (ratio= 23.36).

When comparing the death penalty designated (sentenced to death) cases to all others, the average difference in cost for DOC was -$53,276 (p > .05), which was not statistically significant, but still an important pattern to note. Again, the DOC analysis assumes a life sentence for each individual, unless they had an actual release date, which was used if it indeed existed. As noted elsewhere and in the following analysis, the overall differences in DOC costs are driven by offender age at sentencing. The non-death penalty group is, on average, about five years younger than those who have received a death sentence. This gives the aggravated murder group more time to generate costs in the system, therefore making them more expensive on average. Once age is weighted or controlled for, any differences in lifetime costs disappear.

Last, the average difference in DOJ costs between the case types is $226,532 (t = -8.016 (64.27), p < .01). These costs represent direct appeals, state post-conviction review, habeas corpus, and some trial-level support to county prosecutors. The difference in DOJ spending for death penalty appeals is about ten times that of spending for non-death cases.

2. Current Sentence Outcome

The figures presented in Table 8, below, represent average differences between sentence outcomes, current at the time of drafting this report. Jail costs were calculated using the date that the case was filed or charge date to the date of sentencing. The total average difference in costs for jailing offenders/suspected offenders from charge to sentence between death penalty-sentenced and life-sentenced cases is $14,904 dollars (p > .05). As with the previous case category analysis, we added an additional point of comparison for context, as we calculated jail costs for the non-aggravated murder sample as well. The average costs for that sample of cases is $41,081, and the average difference when compared to the death penalty group is $29,165 (ratio = 1.71).

Again, we provide average differences in costs between case types for OPDS. The average difference in costs for OPDS appeals is $853,712 per case (F = 15.51, p < .001). The average difference in costs for OPDS attorney costs (labor and other) is $113,884 (F = 2.243, p < .001). The total average difference in costs between death-eligible but not-sought and death-penalty-sought cases for OPDS is $744,079 (F = 27.565, p <. 001). As with the previous case category analysis, we added an additional point of comparison for context, as we calculated OPDS costs for the non-aggravated murder sample as well. The average costs for that sample of cases is significantly lower, at $33,799 (ratio = 29.96).

When comparing the death-penalty-sentenced cases to life sentences, the average difference in cost for DOC was -$282,133 ($F = 38.32$, $p < .001$). Again, the DOC analysis assumes a life sentence for each individual, unless they had an actual release date, which was used if it indeed existed. As noted above once age is weighted or controlled for, any differences in lifetime costs disappear. The costs are reported here, however, to continue to provide conservative cost estimates and to be clear where costs may increase or decrease with any changes to policy.

Last, the average difference in DOJ costs between the case types is $258,861 ($F = 30.90$, $p < .001$). As with the previous model, these costs represent direct appeals, state post-conviction review, habeas corpus, and some trial-level support to county prosecutors. The difference in DOJ spending for death penalty appeals is over six times that of spending for life sentenced cases.

Table 8. Average Differences by Cost Category and Case Category, in 2016 Dollars.

Cost Category	Case Category	N	Mean	Avg. Diff	Ratio
Total Jail Cost	Death	41	$70,245		
	Life	215	$55,341	$14,904	1.269
	Non-AM†	312	$41,081	$29,165	1.710
OPDS Total Appeals	Death	28	$945,732		
	Life	44	$92,019	$853,712*	10.278
OPDS Total Attorney Costs	Death	41	$366,587		
	Life	207	$252,703	$113,884**	1.451
OPDS Total Costs	Death	41	$1,012,453		
	Life	210	$268,373	$744,079*	3.773
	Non-AM†	267	$33,799	$978,654	29.955
Total DOC	Death	41	$1,179,051		
	Life	202	$1,461,185	-$282,133*	0.807
Total DOJ Prosecution Costs	Death	41	$307,918		
	Life	102	$49,056	$258,861*	6.277

Note: Case Category = to-date case status. †Non-AM = non-aggravated murder, differences measured against Death category only here. *p< .001; **p< .05; significance tests = F, ANOVA, additional categories not listed here: Acquitted, Less than Life, Pending.

C. Cost Totals for Combined Case Categories

Next, we present the main findings for both sets of case categories. Set 1, listed below, refers to the death-designated (n=61) compared to death-eligible but not-sought aggravated murder cases (n= 313). Set 2 refers to the comparison of current status for sentence case categories, or death and life. We begin our analysis with Set 1. The first cost category provides the average differences, without DOC incarceration costs. The average difference between death and non-death cases is $802,106 (t= -6.567 (62.17), p< .001). When DOC costs are added in, the difference increases to $918,896 (t= -5.734 (70.66), p< .001). The ratio between death and non-death cases, not including DOC costs is 3.55, and the ratio, including DOC costs, is 1.68.

Table 9. Total Average Differences by Cost Category and Case Category, in 2016 Dollars.

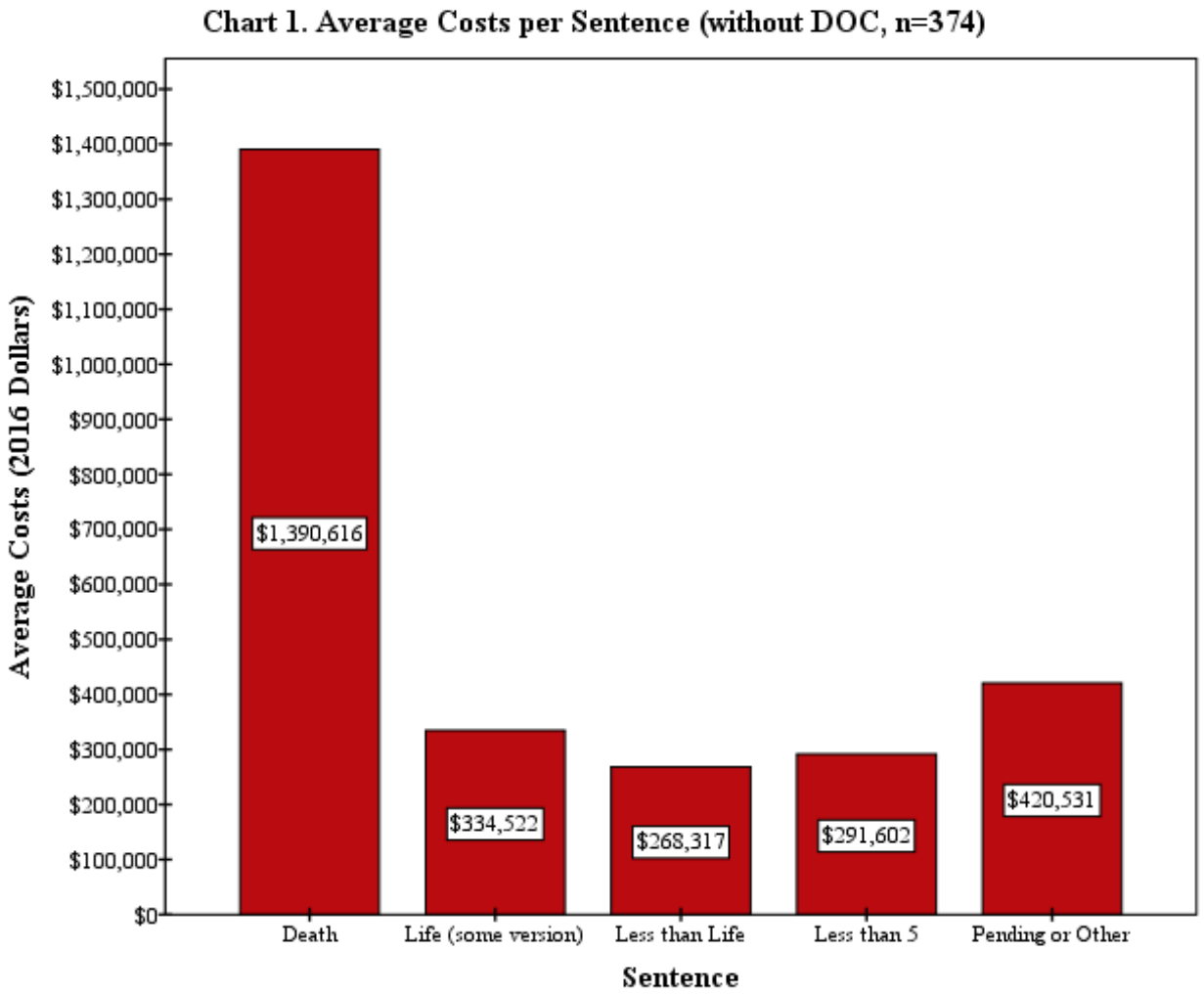
Cost Category	Case Category	N	Mean	Mean Diff	Ratio
Set 1. Total w/o DOC Costs	Agg Mur	313	$315,159		
	DP	61	$1,117,265	$802,106*	3.55
Set 1. Total with DOC Costs	Agg Mur	313	$1,354,883		
	DP	61	$2,273,779	$918,896*	1.68
Set 2. Total w/o DOC Costs	Life	219	$334,522		
	DP	41	$1,390,616	$1,056,093*	4.16
Set 2. Total with DOC Costs	Life	219	$1,682,282		
	DP	41	$2,569,667	$887,385*	1.53

Note: Case Category: Set 1 = all death penalty designated cases; Set 2 = current sentence death penalty compared to life sentences. *p < .001 (t-tests for set 1 and F, ANOVA for set 2).

For Set 2, the first cost category provides the average differences, without DOC incarceration costs. The average difference between death and non-death cases is $1,056,093 (F = 43.62, p< .001). When DOC costs are added in, the difference decreases to $887,385 (F = 39.46, p< .001). The ratio between death and non-death cases, not including DOC costs is 4.16, and the ratio that includes DOC costs is 1.53.

Both models presented here are conservative estimates—they both lack data related to several other critical cost-centers, such as prosecution and court costs, as well as additional costs surrounding law enforcement, and local, state, and federal government actors, to name a few. Still these cost differences between cases range from about $800,000 to over $1,000,000 not counting DOC costs. When DOC is accounted for, the cost differences range from about $920,000 to $890,000, depending on which case categories are used. Specific to Set 2 we include Chart 1, below, which illustrates the differences in the average costs by sentence category. It is

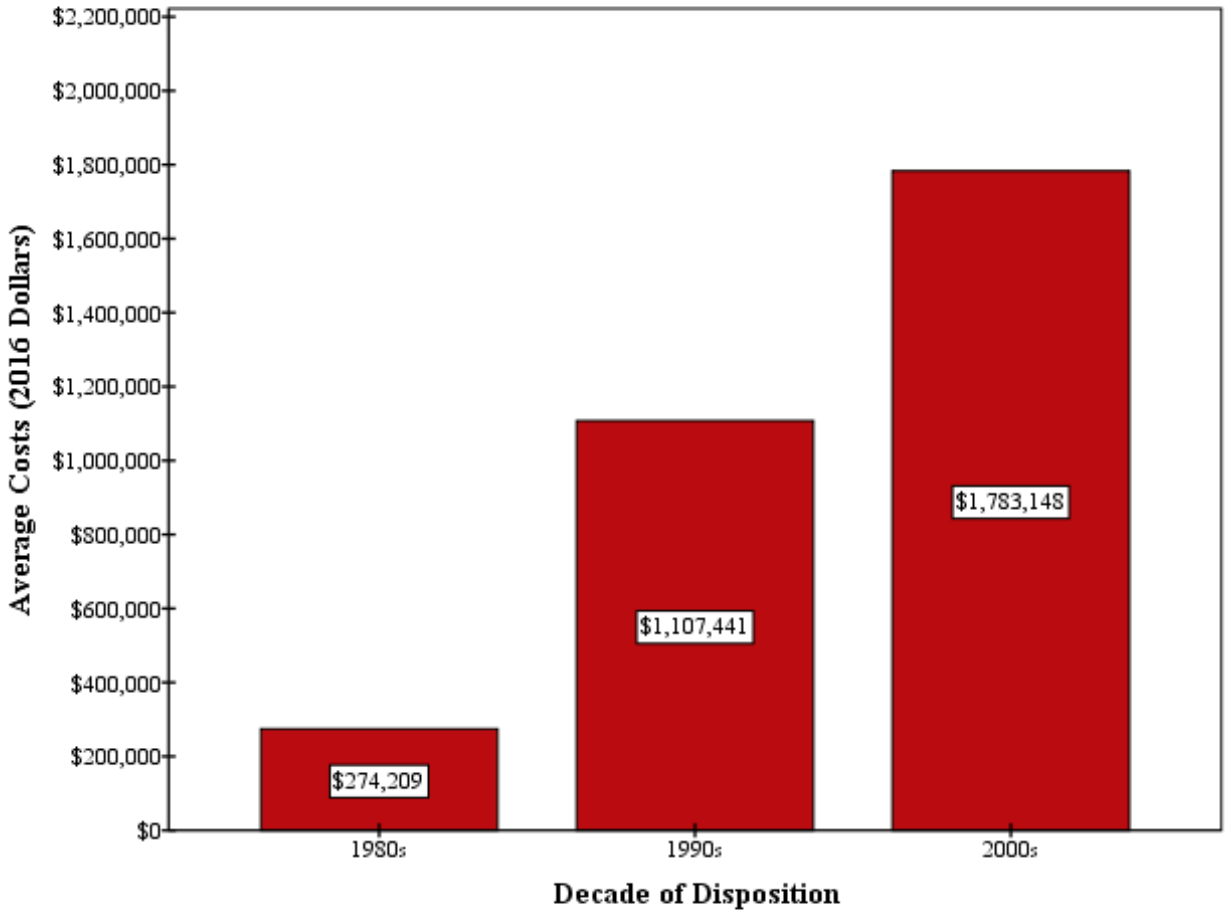
clear that cases where death is pursued and ultimately sentenced are significantly more expensive, on average, than non-death sentenced cases.



Additionally, an important question regarding trends in costs related to the death penalty can be answered here. In Chart 2 below, we provide information on the average cost of the pursuit of the death penalty in Oregon, by decade. As is clear here, the average costs have increased significantly over the last 30 plus years. The low average in the 1980s may be a result of business as usual (cases were just cheaper then), poor record keeping at that time, or the possibility that it took time to ramp-up after the death penalty came back into use in 1984. Whatever the reason for the low average, the trend continues to increase significantly. The 2010s are not listed in this chart because that category represents only a portion of a decade (captured cases for three years, through 2013), and many of those cases are still "pending" meaning they have not moved out of the trial stage to sentencing, and many others have not started direct appeals or post-conviction review, which is a significant generator of financial costs. The

percent change from the 1990s to the 2000s, likely the most reliable data here, was 61 percent. If this trend continues, the current 2010 average of $1,387,900 will easily match and eventually eclipse the 2000s average.

Chart 2. Average Cost of Death Penalty by Decade (n= 61).



Note: 2010 represented only three full years of data only so it was not inclued here, the average to date was $1.39 million.

VI. OREGON'S DEATH ROW 1984-2016

Since 1984, 62 people have been sentenced to death. Twenty-eight individuals are no longer on death row and 34 remain on death row.

A. The 28 People No Longer on Death Row in Oregon

NAME	HISTORY
JERRY LEE MOORE, **DOUGLAS FRANKLIN WRIGHT**	"Volunteered" for execution by waiving their appeals
SCOTT HARBERTS	Case dismissed by Oregon Supreme Court on direct review; released
GREGORY PAUL WILSON	Oregon Supreme Court reversed aggravated murder conviction on direct review; retried on different charges; ultimately released from prison after he later pled down to manslaughter and served his time
CORNELIUS LEAMONZA BROWN,* **RICKY LEON DOUGLAS,** **STEPHEN LEWIS FARRAR,** **STRESSLA LYNN JOHNSON,** **REYES MIRANDA,** **RONALD HOWARD MOEN,*** **STEPHEN LEROY NEFSTAD,** **JASON WAYNE ROSE,** **CHARLES FRANKLIN SMITH,** **MICHAEL ROBERT TUCKER,** **JEFFREY,** **SCOTT WAGNER,**	Resentenced to ordinary life or true life/LWOP to comply with U.S. Supreme Court ruling in *Penry v. Limbaugh,* 492 U.S. 302 (1989)[144]

[144] *Penry v. Limbaugh,* 492 U.S. 302 (1989), in which the U.S. Supreme Court ruled that the Texas statute, upon which the Oregon statute was modeled, did not give jury's the ability to give full effect to mitigating evidence presented in penalty phase trial.

TYRONE EARL WALTON, (12 PEOPLE)	
MICHAEL JAMES MCNEELY, JESSE CLARENCE PRATT, RANDALL LOYAL SMITH	Resentenced to true life/LWOP to comply with U.S. Supreme Court ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002)[145]
ROBERT JAMES ACREMENT	Found not mentally competent to be executed by Oregon Supreme Court; resentenced to true life/LWOP
JESSE STUART FANUS, TRAVIS LEE GIBSON	Ordered resentencing trial by PCR trial court; pled to true life/LWOP
GRANT STEVEN CHARBONNEAU, DALLAS RAY STEVENS	Resentenced to true life/LWOP after Oregon Supreme Court reversed death sentence on direct review
CESAR FRANCESCO BARONE, JAMES MICHAEL ISOM, MARK ALLEN PINNELL, ALLEN GARY ZWEIGART	Died on death row with appeals still pending

* Died while in prison, but after being resentenced to ordinary life or true life/LWOP.

[145] Atkins v. Virginia, 536 U.S. 304 (2002) in which the U.S. Supreme Court ruled that it is unconstitutional to execute intellectually disabled people.

B. The 34 People Currently on Death Row in Oregon

NAME	YEARS ON DEATH ROW	DIRECT REVIEW	PCR	FEDERAL HABEAS	CURRENT STATUS
RANDY GUZEK	28	Sentence reversed 3 times, resentenced 4 times Affirmed 2015	Not yet commenced	Not yet commenced	Filed writ of certiorari to U.S. Supreme Court for reconsideration in 2016
MICHAEL MARTIN MCDONNELL	28	Sentence reversed 3 times, resentenced 4 times Affirmed 2007	PCR trial 2008-2015/Denied	Not yet commenced	PCR appeal pending
MARCO ANTONIO MONTEZ	28	Sentence reversed once, resentenced Affirmed 1997	PCR trial & appeal, 1997-2014/ Denied	Filed 2014	Fed Habeas pending
ROBERT PAUL LANGLEY	27	Sentence reversed 3 times, resentenced 4 times	Not yet commenced	Not yet commenced	4th direct review pending
DAYTON LEROY ROGERS	27	Sentence reversed 3 times, resentenced 4 times	Not yet commenced	Not yet commenced	4th direct review pending
DAVID LYNN SIMONSON	27	Affirmed 1997	PCR trial & appeal 2000-2015/Denied	Not yet commenced	PCR petition for review to Oregon Supreme court filed

NAME	YEARS ON DEATH ROW	DIRECT REVIEW	PCR	FEDERAL HABEAS	CURRENT STATUS
JEFFERY RAY WILLIAMS	27	Sentence reversed once, resentenced Affirmed 1996	PCR trials & appeals 1997-2013/ Denied	Filed 2003/ Denied in 2008	4th PCR trial pending
CLINTON WENDELL CUNNINGHAM	24	Affirmed 1994	PCR trials & Appeals 1999-2015/Denied	Filed in 2005	Fed Habeas stayed pending successor petition in state court
ERNEST NOLAND LOTCHES	23	Affirmed 2002	PCR trial & appeal 2001-2014/Denied	Filed in 2014	Fed Habeas pending
KARL ANTHONY TERRY	21	Affirmed 2001	PCR trial & appeal, 2001-2015/Denied	Not yet commenced	PCR trial pending
MICHAEL J HAYWARD	20	Affirmed 1998	PCR trial & appeal 1998-Present/ Denied	Filed in 2013	PCR appeal pending
MATTHEW DWIGHT THOMPSON	20	Affirmed 1999	PCR trial & appeal, 1999-2014/Denied	Not yet commenced	PCR petition for review to Oregon Supreme court filed
HORACIO ALBERTO REYES-CAMARENA	19	Affirmed 2000	PCR filed in 2001	Not yet commenced	Held in abeyance since 2008
JESSE CALEB COMPTON	18	Affirmed 2001	PCR trial 2003-2012/Denied	Not yet commenced	PCR appeal pending
CONAN WAYNE HALE	18	Affirmed 2001	PCR trial & appeal, 2004-2013/Denied	Filed in 2015	Fed Habeas pending

NAME	YEARS ON DEATH ROW	DIRECT REVIEW	PCR	FEDERAL HABEAS	CURRENT STATUS
BILLY LEE OATNEY JR.	18	Affirmed 2003	PCR trial & appeal, 2004-2015/ Reversed in part	Not yet commenced	PCR sentence reversed and remanded for resentencing in 2015
JEFFREY DANA SPARKS	17	Affirmed 2004	PCR trial 2005-2012/ Reversed in part	Not yet commenced	PCR sentence reversed and remanded for resentencing in 2015
DAVID LEE COX	16	Affirmed 2005	PCR trial 2006-2014/Denied	Not yet commenced	PCR appeal pending
ERIC WALTER RUNNING	16	Affirmed 2004	PCR process 2005-present	Not yet commenced	PCR trial pending
JEFFREY DALE TINER	16	Affirmed 2006	PCR trial and appeal 2008-present/ Reversed in part	Not yet commenced	New penalty trial ordered in 2011/PCR appeal pending
MICHAEL ALLEN JOHNSON	15	Affirmed 2006	PCR trial 2006-2015/ Granted	Denied in 2006	PCR conviction and sentence reversed and remanded for new trial in 2013
GREGORY ALLEN BOWEN	13	Sentence remanded to merge charges/ Affirmed 2014	PCR trial 2014-present	Not yet commenced	PCR trial pending

NAME	YEARS ON DEATH ROW	DIRECT REVIEW	PCR	FEDERAL HABEAS	CURRENT STATUS
CHRISTIAN MICHAEL LONGO	13	Affirmed 2006	PCR trial 2007-2016/Denied	Not yet commenced	PCR appeal pending
JESSE LEE JOHNSON	12	Affirmed 2006	PCR trial 2008-2015/Denied	Not yet commenced	PCR appeal pending
MICHAEL ANDRE DAVIS	11	Affirmed 2008	PCR trial 2009-2016/ Reversed in part	Not yet commenced	PCR sentence reversed and remanded for resentencing in 2016
GARY DWAYNE HAUGEN	9	Affirmed 2010	PCR trial 2015-present	Not yet commenced	PCR trial pending
JASON VAN BRUMWELL	9	Affirmed 2011	PCR trial 2012-2015/Granted in part	Not yet commenced	PCR sentence reversed and remanded for resentencing in 2015
RICARDO SERRANO	6	Affirmed 2014	Not yet commenced	Not yet commenced	Filed writ of certiorari to U.S. Supreme Court for reconsideration in 2015
MICHAEL SPENCER WASHINGTON	6	Affirmed 2014	Not yet commenced	Not yet commenced	Writ of certiorari to U.S. Supreme Court denied in 2014.
ISAAC CREED AGEE	5	Sentence reversed and remanded	Not yet commenced	Not yet commenced	Remanded for *Atkins* hearing

NAME	YEARS ON DEATH ROW	DIRECT REVIEW	PCR	FEDERAL HABEAS	CURRENT STATUS
		2015			
ANGELA MCANULTY	5	Affirmed 2015	Not yet commenced	Not yet commenced	Petition for reconsideration to Oregon Supreme Court denied in 2015
BRUCE ALDON TURNIDGE	5	Affirmed 2016	Not yet commenced	Not yet commenced	Filed writ of certiorari to U.S. Supreme Court for reconsideration in 2016
JOSHUA ABRAHAM TURNIDGE	5	Affirmed 2016	Not yet commenced	Not yet commenced	Petition for reconsideration to Oregon Supreme Court pending
DAVID RAY TAYLOR	2	Appeal pending	Not yet commenced	Not yet commenced	Appeal pending

Each death-row inmate's appeals process follows its own individual timeline. Nevertheless, the timing of a conviction also has an impact on how the appeals process proceeds. For instance, *Penry*[146] required resentencing for eight individuals currently on death row.

However, *Penry* alone does not account for the fact that four of the longest serving residents of death row, Guzek (28 years), Langley (27 years), McDonnell (28 years), and Rogers (27 years), have altogether spent over 110 years on death row, yet not one of their appeals has progressed much past the Oregon Supreme Court direct review.[147] Each has had his sentence overturned three times for different reasons,[148] and each of their cases has then gone through the expensive and laborious process of re-sentencing jury trials three additional times. Resolution in these four cases is still decades away.

Many of those convicted later have progressed much further into their post-conviction process. Williams (27 years), Lotches (23 years), Hayward (20 years), and Hale (18 years) as well as Montez (28 years), have exhausted all of their state appeals and have now commenced their

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[146] *See supra* Part III.A, History of Oregon's Death Penalty.

[147] The Oregon Supreme Court affirmed Guzek's fourth direct review in November 2015. State v. Guzek, 358 P.3d 251 (Or. 2015). On his first appeal, the court reversed his sentence per *Penry*. State v. Guzek, 797 P.2d 1031 (Or. 1990). The second time his sentence was reversed when the State used victim impact evidence at the penalty phase trial. State v. Guzek, 906 P.2d 272 (Or. 1995). It was then reversed a third time because true life/ LWOP was not offered as a sentencing option during his re-sentencing. State v. Guzek, 86 P.2d 1106 (Or. 2004). The Oregon Supreme court modified the ruling, State v. Guzek, 153 P.3d 101 (Or. 2007), after the U.S. Supreme Court addressed whether his mother would be permitted to provide new alibi evidence at his next re-sentencing trial. Oregon v. Guzek, 546 U.S. 517 (2006). Langley is currently awaiting his fourth direct review oral argument. His first sentence was reversed per *Penry*. State v. Langley, 314 P.2d 247 (1992). It was reversed a second time because true life/LWOP was not offered as a sentencing option. State v. Langley, 16 P.3d 489 (Or. 2000). The third time it was reversed because the sentencing court erred when it inferred defendant had waived counsel because he made objections to the representation provided by his lead counsel. State v. Langley, 273 P.3d 901 (Or. 2012). McConnell had his fourth direct review affirmed in 2007, State v. McDonnell, 176 P.3d 1236 (Or. 2007), and he has commenced his PCR process. His first sentence was reversed because the court ruled that the District Attorney had improperly delegated the decision of whether to enter into plea negotiations to the victim's parents. State v. McDonnell, 794 P.2d 780 (Or. 1990). His second sentence was reversed per *Penry*. State v. McDonnell, 837 P.2d 941 (Or. 1992). The court reversed his third death sentence because the sentencing court did not offer true life/LWOP as a sentencing option. State v. McDonnell 987 P.2d 486, (Or. 1999). Rogers had his first sentence reversed because of *Penry*. State v. Rogers, 836 P.2d 1308 (Or. 1992). His second sentence was reversed because the sentencing court did not offer true life/LWOP as a sentencing option, State v. Rogers, 4 P.3d 1261 (Or. 2000), and his third sentence was reversed because sentencing court erred when they empaneled an "anonymous" jury because it was prejudicial, amongst other reasons, State v. Rogers, 288 P.3d 544 (Or. 2012).

[148] Although all four of them had their death sentence reversed again because the re-sentencing court did not offer the jury an option of sentencing them to true life/LWOP. *See* Kaplan, *supra* note 18, at 55–56.

federal habeas corpus appeal. Even so, the federal habeas corpus appeals process is a lengthy one, and resolution could still be more than a decade away for all of them.

More recently there have been several reversals during the post-conviction review process.[149] Courts have overturned four sentences and one conviction since 2011. In 2015, Michael Allen Johnson's (15 years) conviction and sentence were reversed and remanded for a new trial; Oatney Jr. (18 years) and Van Brumwell (9 years) had their sentences reversed for a new penalty trial that same year. Prior to that, in 2011, Tiner (16 years) had his sentence reversed and a new penalty trial ordered, as did Sparks (17 years) in 2012.[150] Johnson now awaits a new trial to determine whether he is innocent or guilty, while the other four await new trials to determine whether a jury will sentence them to ordinary life, true life/LWOP, or death, or whether their attorneys can make a plea deal with the prosecutors.

Presently, 12 other members of death row are at various stages of their post-conviction review processes, which, based upon current trends, could result in more reversals. One person, Agee (5 years) had his sentence reversed by direct review in 2015 and is currently awaiting an *Atkins* hearing to determine whether he is ineligible for death due to intellectual disability. One person, Reyes-Camarena (19 years), has had his appeals held in abeyance since 2008 due to ongoing kidney dialysis treatment.

The most recent cases, those convicted since 2009, are in different stages of their first direct review with the Oregon Supreme Court.

VII. PROCESS NARRATIVES

While collecting and analyzing data for this study, it became apparent that standard metrics could not fully represent all aspects of the costs associated with administrating Oregon's death penalty. Some relevant data was simply unavailable. In addition, speaking with a range of stakeholders directly involved in the death penalty in Oregon clarified the mechanisms and motivations driving the process from various perspectives. Narratives about several death row

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[149] *Id.* at 57–58.

[150] Johnson's conviction was overturned and a new trial was ordered in 2013 because his attorneys presented an inadequate defense during his initial trial. Oatney Jr's sentence was overturned for resentencing in 2015 because during his trial prosecutors violated his immunity deal. Van Brumwell's sentence was reversed in 2015 because his trial attorney's should have provided a more effective defense. In 2011, Tiner had his death penalty reversed and is awaiting a new sentencing trial because the post-conviction court ruled his defense attorney's failed to call two favorable witness or provide adequate jury instruction. In 2012, Sparks also had his sentence reversed by a post-conviction court because of his trial attorney's failure to undertake an adequate mitigation investigation, and presently he awaits a re-sentencing trial. *See* Aggravated Murder Research Database (2016) (updated Aug 3, 2016) (on file with author).

inmates' cases are also included here to provide some examples of how death penalty cases in Oregon proceed.

A. PROSECUTION

1. *District Attorney Offices*

In the course of our research we were invited to spend two days at the Deschutes County District Attorney's office.[151] There, we interviewed District Attorney (DA) John Hummel, his Chief Deputy DA, Mary Anderson and two other Deputy DAs, Steve Gunnel and Kandy Geis, both of whom have prosecuted aggravated murder cases including cases involved in this study. Additionally, we spent several hours interviewing Clackamas County DA John Foote.[152]

We hoped and intended to visit several counties to interview their prosecutorial teams because DAs' offices do not track direct costs on a case-by-case hourly basis as defense attorneys do. We wanted therefore to gain an understanding of their processes, and to distinguish county-to-county differences. Over a period of three months we sent letters to 29 of the 36 DAs before receiving a letter from the Oregon District Attorneys Association (ODAA) severing our opportunity to conduct further individual interviews.[153] The ODAA letter represents general observations of district attorneys across the state. In this section, we summarize the interviews we were able to undertake, and the observations about the costs and processes of aggravated murder in Oregon, provided by the ODAA.

As discussed above, in Oregon, unlike in many other states, the aggravated murder statute does not require a county district attorney to announce at any point during the pre-trial process whether the state is seeking the death penalty.[154] If the facts and circumstances of a murder are determined to be severe enough to meet the statutory requirements, the prosecutor has the

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[151] Interviews in Deschutes County took place on November 5 and 6 2015.

[152] We interviewed John Foote the DA of Clackamas County at Lewis and Clark Law School on January 29, 2016.

[153] We sent letters on November 18, 2015, December 8, 2015, January 7, 2016, to 29 DAs and followed up with emails and/or phone calls to 15 of the 29 DAs, before receiving the letter from the ODAA dated January 28, 2016 (on file with author). We responded to the ODAA letter by email to the ODAA Board on February 10, 2016, to clarify that we would be unable to interview any other DAs. Kaplan wrote, "Although I have sent letters to 29 DA's between November 18th and January 25th, I am sorry to hear that besides those prosecutors that we have already interviewed, your letter indicates that no other DAs are willing to participate in the study. If this is incorrect, please let me know." Email from Professor Kaplan to the Board of Directors of the ODAA (Feb. 10, 2016) (on file with author). We did not receive a response.

[154] Geis informed us that Deschutes County has an informal policy of making an announcement during pre-trial as to whether they DA is seeking death. Because we were not able to interview other DA's, we were unable to ascertain whether other counties operated similarly.

discretion to charge the defendant with aggravated murder. If convicted, the defendant will face one of three sentences: death, true life/LWOP, or ordinary life. If the sentence is not determined in a plea deal, it is the jury that decides which of the three sentences is appropriate.

Only a jury can decide upon a death sentence in Oregon. Consequently, if a sentence is determined through a bench trial or a plea deal, the sentencing choices are automatically limited to true life/LWOP or ordinary life. According to the ODAA, 94 percent of all Oregon criminal cases result in some sort of plea deal before trial.[155] Plea deals, the ODAA's board of directors wrote in their letter, are "the engine that makes our system work fairly, efficiently and promptly."[156]

All the prosecutors we interviewed were consistent in stating that the plea decisions they make are driven by the facts of the case, the offender, and the statutory requirements. This means that the plea negotiations are often time-consuming. Most decisions are not made until some investigation has been completed. Anderson explained that it is dangerous to start meaningful plea negotiations too early in the process, without the benefit of proper investigation and mitigation evidence. The ODAA letter explained that the process evolves thorough consultation with victims' families, law enforcement, and the prosecution team. In addition, prosecutors seek and consider mitigating evidence presented by the defense. Communication between the two sides is often extensive as discussions involving information-sharing and negotiations proceed.

In its letter, the ODAA was clear that from the perspective of its members, plea bargaining must not be misconstrued as district attorneys leveraging the possibility of death in the interest of exacting a plea. In virtually every criminal case, defendants are facing a more serious sentence than one offered in negotiations. Aggravated murder charges are reserved for the most serious crimes, and consequently these charges carry the possibility of the most serious punishment. This underlying fact forms the conditions in which district attorneys commence negotiations. It is the fundamental nature of criminal negotiation, explained Foote, that a defendant wishes to have a possible sentence or conviction mitigated or reduced. Circumstances dictate how negotiations occur.

For instance, Gunnel explained that in one case, it was a priority for the district attorney to ensure the defendant was put away for life because he felt that the defendant was a very dangerous person. Because the evidence was complex and circumstantial, both the prosecution team and the judge believed it would be preferable to have a bench trial. The defendant agreed to waive a jury trial and leave the case consolidated for a bench trial in exchange for the prosecution's agreement not to seek a death sentence.

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[155] Letter from Board of Directors of the Oregon District Attorney's Association to Professor Aliza Kaplan (Jan. 28, 2016) (on file with author).
[156] *Id.*

Prosecutors can be motivated by many factors in plea negotiations: the cooperation of the defendant; whether the victim's family wants a quick closure to the case; the strength of the evidence; the complexity of the investigation; and/or the facts of the crime. Geis offered an example of one case in which the prosecution was motivated to make a plea deal with a defendant because he cooperated in finding the body, which was very important to the victim's family.

The only time death really comes up, Geis explained, is at the very beginning of the aggravated murder case when the judge asks whether the death penalty is being considered. Initially, the prosecutor says yes, so the judge appoints a death-qualified defense team. This is the only time that death is discussed until the investigation is complete.[157]

When a case begins in Deschutes County, Anderson assigns a prosecutor who has at least five to ten years of experience prosecuting aggravated murder cases. At the beginning of each case, it is a heavy load for the selected prosecutor. He or she spends time investigating the crime scene, coordinating with detectives, and conducting briefings, grand juries, and bail hearings. Ideally, the same prosecutor works on a case from beginning to end, to retain familiarity with the victims and details of the case. To ensure continuity and efficiency, Anderson makes efforts to reassign prosecutors to repeat offenders whose cases they have worked on previously. In addition, Anderson monitors the complexity of each case before deciding whether she should assign a second prosecutor.

After the grand jury and bail hearing, prosecutors spend a significant amount of time in the investigative stage. They search for detailed information about the defendant, such as mitigation evidence, aggravating evidence, and prior criminal history. They also gather information about the victim. According to the ODAA letter, prosecutors find this phase is usually fruitful and leads to a plea without trial. Anderson said that, generally speaking, she finds that defense teams are much more cooperative when they feel they have strong mitigating evidence.

Foote explained that DAs' offices operate in an environment of fiscal responsibility. Their annual budgets are set by the state and are based upon budget requirements from prior years. Unlike the defense costs under OPDS, DAs' offices do not keep track of attorney and paralegal hours worked, nor do they compute costs on a case-by-case basis. When a big case reaches their office, prosecutors and other employees work more hours, but, according to Anderson, their costs remain unaffected. She explained that if a prosecutor assigned to a big case must divert attention away from other cases, the workload is simply delegated to other prosecutors in the office. Anderson noted that aggravated murder cases are not inherently more complex or time-consuming than other types of cases. For example, a complex DUI case could be more time-

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[157] *See supra,* Part III.C, Defense Lawyer Qualifications for Capital Cases.

consuming for her team than a clear cut, simple aggravated murder case. Geis said that child sex cases generally take the most time.

Nevertheless, some aggravated murder cases are exceptionally time-consuming. Gunnel described one case in which he and another prosecutor worked for at least forty hours a week doing legal research for several months in the year leading up to trial, in addition to their regular caseload. In the six months prior to the 47-day trial, Gunnel estimated that he, the other prosecutor, their trial assistants, sheriffs, and detectives worked "overtime, crazy hours," often upwards of eighty hours per week.[158]

While virtually all of these costs fit within the DAs' set annual budgets and impose no additional costs upon the state, such a system does impose a human cost on the individual prosecutors who will often work for months at a time on big cases. The hours are long and, when necessary, may require working seven days a week. This is the nature of the job, according to Foote.

Some cases require additional expenses that exceed the DA's regular office budget. For instance, the prosecution of some cases requires that the office hire experts or specialists in various fields, which can be expensive. They may also need to pay for the travel expenses for witnesses to appear. When costly expenses are incurred, there are additional discretionary funds from which they draw. However, according to Foote, these types of expenses are usually accounted for in the DA's office's annual budget.[159]

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[158] We interviewed Mr. Gunnel on November 5, 2015, in Deschutes County and transcribed his words.

[159] We made public record requests to understand the extent of these additional costs. Included in the record requests were costs for a small selection of cases in our aggravated murder dataset from the three largest counties in the State: Washington, Multnomah, and Clackamas. (Records are on file with the author). Washington County additional expenses were consistently low compared with the records from Multnomah and Clackamas. The only additional expenses involved witness fees. The most expensive case involved one witness who needed to be flown in from out of and another case required an interpreter for $216.00. Multnomah County provided us with additional expenses for ten cases from our dataset. Again, additional costs ranged from $5.32 for a simple case that resulted in a plea bargain, to the Michael A. Davis case that resulted in a death sentence – that case required the county to request an additional $7972.63; the bulk of which was for witness travel, lodging and per diem. The most expensive case was for Theron Dallon Hall, who was sentenced to true life/LWOP after a jury trial. In his case, the county requested $12,372.40, the majority of which went to expert witness fees, travel, and lodging costs. We received records for four cases from Clackamas County. The costs incurred in excess of the regular budget cover travel expenses, fees and other associated costs for both general and expert witnesses; expenses become considerable if witnesses must be flown in from other states and accommodated in hotels with per diems, taxi costs and so forth. The range of costs was significant in Clackamas. Of the four, the most expensive was the fourth resentencing trial for convicted death-row inmate, Dayton Leroy Rogers, whose most recent resentencing trial in 2015 cost the county an additional $12,430.25. This was in

During the pretrial process, both prosecution and defense teams file motions depending on the legal issues that the case implicates. The time it takes to file a motion ranges from 10 minutes, to a year, depending on the unique nature or complexity of the issues involved. A standard motion, often in boilerplate form, such as an alternate jury motion, can quickly be completed by an assistant. Alternatively, an issue that has never before been argued, can be exceptionally challenging and time-consuming. Foote, the ODAA, and the Deschutes team were clear that there was no way to meaningfully compute the time that prosecutors worked on any specific case based solely on the number of motions filed.

The DA's office will often stay involved with a case if there is an appeal, which can be very time-consuming and often frustrating for the office, according to Anderson. If there is a good trial record the appellate team can avoid taking too much of the trial team's time. In Anderson's opinion, post-conviction review can often be more time consuming for the prosecutors than general appeals, because they often need to work with the appellate team on the issues. Future post-conviction review can also impose more work on the prosecutors during trial. Anderson explained that defense attorneys must be diligent to ensure that every possible motion is filed, and objection made so they are not subject to ineffective counsel claims.[160] Because of this, Anderson believes that many defense attorneys create more work for the DAs' offices during the trial by requiring prosecutors to respond to all defense filings.

Foote and the ODAA are openly critical of the defense system in Oregon. Foote said that the OPDS does not operate under the same fiscal controls or transparency as the DAs' offices do. His sense is that over the years there has been a substantial increase in the resources available to defense teams. This has impacted prosecution costs too as they must respond to every challenge presented. The letter from the ODAA calls for more oversight to ensure that state resources are expended wisely.

Finally, when we discussed the problems and complexities of the Oregon death penalty system as it currently operates, the district attorneys that we interviewed had different perspectives. Hummel is personally opposed to the death penalty and considers it a discretionary punishment that he is not required to use. In Deschutes County, when he is faced with an aggravated murder case, he will unofficially tell the defense in advance of trial where the prosecution stands. He thinks a defendant should be on notice, as is the norm in many other areas of Oregon law.

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addition to the labor that Foote's team invested in the case. Whereas, the additional costs incurred in Michael Washington's guilt phase trial were far lower, at $1,272.47 because there was only one set of out of state witness expenses to cover. The least expensive involved a case that resulted in a plea bargain to a true life/LWOP sentence and required only $7.97 in additional expenses for witness fees.

[160] *See infra*, Part IX.B, The Defense.

Foote, however, believes that there are some crimes that a person cannot come back from, crimes for which there is no just punishment. In those cases, he believes death is appropriate. He is frustrated by the death penalty moratorium imposed by the Governor. In Foote's opinion, it merely prevents justice from being served. He believes that death row houses the worst offenders who deserve to be there. Geis has a pragmatic approach to the death penalty in Oregon. She agrees with the death penalty in theory, but, because it is so expensive and provides no closure to victims' families in the current system, she is not so sure it is appropriate now. Finally, Anderson said that, as a prosecutor, her job is to follow the law and apply the statutes. Therefore, she believes her personal opinion is of no consequence.

2. Department of Justice

DOJ invited us to interview Paul Smith, the Deputy Solicitor General of the Appellate Division in Oregon. Smith himself does not directly argue cases, but he manages the lawyers who handle post-conviction review and capital cases, and he participates in case strategy.

DOJ has an internal billing system that captures the costs that attorneys and paralegals use to account for their hours for all of their appeals, post-conviction review, and federal habeas trial work.[161] They have provided us with this data for most of the cases in our database that utilized these resources, which is included in our results.

Generally, DOJ is involved in cases after trial and sentencing. DOJ represents the state in direct appeals, post-conviction review trials and appeals, and federal habeas corpus trials and appeals. Smith explained that occasionally smaller counties request DOJ assistance in handling complex aggravated murder trials because they lack the resources to try them and, in addition to that, DOJ is sometimes involved in informally providing advice to DAs' offices during trial.

Smith explained that on direct appeals most resources expended are attorney time. He estimated that the average total of lawyer hours on an average direct appeal is about 250 hours over its course. The lawyer's work is within a closed universe based upon the existing trial record, so generally DOJ does not incur any additional investigative or expert costs.

The post-conviction review process can be far costlier. A post-conviction review trial might involve considerable independent investigation on the part of DOJ. For instance, claims of ineffective assistance of counsel are common at this stage and require independent investigation; or if DOJ decides to depose defense witnesses then it will need to use investigative resources too.

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[161] The budget for this department, the Division of Criminal Conviction (DCC) is reallocated by the legislature every two years. The billing database does not include costs for experts and other additional expenses incurred.

Smith also explained that from time to time DOJ employs experts. This commonly occurs during an ineffective assistance of counsel claim if the post-conviction review defense attorney argues that the trial defense should have utilized a mental deficiency defense. Costs can also increase when the PCR trial becomes complex because DOJ might bring in a third lawyer as it gets closer to trial.

Most people that work in DOJ's Appellate Division have the same approach whether working on death penalty cases or not—their job is to defend the state's laws. In Smith's opinion, however, of the 40 appellate attorneys currently working at DOJ, there would only be a handful who would be concerned if the death penalty went away.

3. DOJ Budgetary Requirements for 2015–2017 for Death Penalty Cases

Both the appellate and trial divisions of DOJ have requested additional resources and staffing to meet the growing workload being incurred by the number of capital cases moving into post-conviction review and federal habeas corpus litigation.[162] In the Governor's budget, DOJ explains that there are 18 death-row inmates currently in one part of the post-conviction review process and four to six cases starting federal habeas litigation.[163] Federal litigation is of special concern to DOJ because Oregon's capital system has not yet been challenged in federal court, and DOJ expects the examination of the system to be an "exhaustive review" that will be "thorough and demanding."[164] Consequently, DOJ is currently anticipating defense of Oregon's death penalty system will constitute a significant drain on their resources over the next few years.[165] The budget for this department has increased over $5 million from the general fund for 2015–2017 compared to 2013–2015 in order to cover the extra work-load.[166]

B. The Defense

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[162] GOVERNOR'S BUDGET, DEP'T OF JUSTICE, DEF. OF CRIMINAL CONVICTIONS, 8 (2015–2017) http://www.doj.state.or.us/about/pdf/15-17_doj_gb_defense_of_criminal_convictions.pdf.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] In the Governors Report, the DOJ states,

> These federal habeas cases are the first ones challenging the state capital system; consequently, the federal public defender and the federal courts will exhaustively review all aspects of Oregon's legal system as it relates to the capital cases. The Department knows from the experience of other states, especially those under the jurisdiction of the Ninth Circuit Court of Appeals, that the examination of Oregon's system will be thorough and demanding, requiring significant commitment of time and resources to defend the legislative choices in this area. And the federal courts are unlikely to tolerate the length of delay DCC has utilized in the state courts to stretch DCC's available resources. *Id*. at 1.

1. Defense Team

We interviewed Jeff Ellis and Rich Wolf, co-directors of the Oregon Capital Resource Center,[167] to develop an understanding of the processes of the defense team when representing aggravated murder defendants. Ellis and Wolf are both veteran defense attorneys who also individually represent several people on death row. Through both roles, they have an in-depth understanding of Oregon's death penalty.

Ellis believes that the role of the defense attorney in a capital case is to get the death penalty out of the way at the earliest possible opportunity. The first roadblock is to convince the prosecutor that he or she can and should remove the death penalty as a sentencing option from the case without a plea bargain. This complex negotiation requires the attorney to convince the prosecutor to agree that it is not a death case. The attorney can base this on the facts of the crime, whether the defendant played a lesser role in the crime, or if the defendant's culpability is lower for some reason.

The defense team — at its core — constitutes a minimum of two death-qualified attorneys, mitigation specialists, fact investigators, and support staff.[168] Depending on the circumstances of the case, the attorneys will bring in additional experts to serve specific roles. Ellis said that getting the right mitigation specialist hired as soon as possible is crucial. When selecting a mitigation specialist, he considers issues such as cultural competency to ensure the specialist will be able to develop a rapport and trusting relationship with the defendant's family and friends. The mitigation specialist and the attorneys develop the themes of the case cooperatively, so it is important that they stay close during the investigation. There can be tension in the relationship though, because the lawyer is seeking to present arguments on behalf of the defendant as persuasively as possible, while the mitigation specialist's job is to learn everything he or she can about the defendant.

During pre-trial, there are many aspects to the defense attorney's responsibilities. Ellis explained that it is crucial that the attorney develop a trusting relationship with the defendant. It is the attorney's role to make realistic assessments about what are the most probable trial outcomes. Most defendants are not willing to negotiate away their lives by agreeing to a true life/LWOP sentence right away. In addition, the defense team must ensure the most exhaustive and insightful investigation into the defendant's life and into all of his or her frailties, while continually analyzing how to frame the themes of the case.

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[167] The Oregon Capital Resource Center is an agency the state established in 2007 to provide assistance to attorneys when they defend people charged with aggravated murder.

[168] After a district attorney charges a defendant with aggravated murder, the trial court must determine whether they are indigent. If so, the court then notifies the Office of Public Defense Services (OPDS). OPDS immediately assigns a death-qualified attorney to the case, who then assembles a team.

The defense team also spends time at the DA's office trying to work out a deal. Sometimes it can occur through a settlement conference. In these conferences, a judge, who is not assigned to the case, mediates the negotiation of a settlement. Ellis described it as a typical type of mediation, with the defense team in one room and the prosecution team in another. The judge goes between the rooms often encouraging the parties to settle by pointing out weaknesses in their cases. Ellis, who has been in many of these types of negotiations over the years, said this is often an effective method for resolution.

Ellis is often frustrated with the breakdown of negotiations that can lead a case to trial and to the prosecutor actively seeking death. He does not believe that prosecutors necessarily seek death sentences until the last possible moment when all settlement negotiations have failed, but because they are not statutorily forced into making a decision on the matter in pre-trial, death can become important leverage.

Even though the moratorium has been in place for several years, and fewer capital cases have gone to trial, or fewer defendants have been sentenced to death, according to Ellis, no one on the defense side (and certainly no defendants), thinks that the death penalty is less real than it was before. Ellis said, "the death penalty is so arbitrary that each guy fears he is going to be the one who gets it." Nevertheless, there are cases where there is a perception that the DA is not going to seek death, and in those cases, there can be less activity.

Wolf believes that the moratorium has very little impact on day-to-day aggravated murder litigation. He does not think that it affects how prosecutors pursue cases or the jury selection process. Likewise, he thinks that post-conviction review and federal habeas petitions proceed as if there is no moratorium. In fact, the only real change he can think of is that the DOC is not currently training people in the execution procedure.

Ellis does see a difference in how the defense teams file pre-trial motions when they are confident the DA is not actively pursuing death. When attorneys do not think death is likely, they will often file a standard demurrer motion, which is several hundred pages long, consisting of two to three dozen challenges to the death penalty in Oregon. But, if death is more likely, attorneys tend to carefully craft motions to the particularities of their cases, which is obviously more time consuming.

Ellis refuted the suggestion often made by prosecutors, that defense trial attorneys are influenced to object and file additional motions because of concerns of later post-conviction review claims.[169] He believes that it is a common characterization, born out of ignorance. The

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[169] Many post-conviction claims center around whether the defendants 6th amendment right to effective assistance of counsel were violated during pre-trial or at trial. *See Performance Standards for Post-Conviction Representation*, OR. STATE BAR (2016) http://www.osbar.org/_docs/resources/convictionreliefproceedings/cspcrp3.pdf.

perception that defense attorneys take action to cover themselves is wrong on both ends. He explained that it misconstrues the difficulty and complexity of post-conviction review relief to suggest there is a magic bullet motion that you must file, or a frivolous motion that can suddenly be a winning motion later down the road.

Another aspect of the defense team's role is to hire the experts for the case. To get funding, they must make a request to OPDS. The money is in the budget for the public defense system. However, while there is a pool of money, it is limited, and many defense teams compete for it. Consequently, there are standardized costs for certain experts and if an attorney needs to exceed those costs, he or she must make a showing of extraordinary need. In such cases, there is additional review by OPDS before the funds are released. In cases where OPDS is unsure whether the expert assistance and/or costs should be authorized, the OPDS representative will frequently seek the opinion of a highly experienced capital lawyer to assist in determining whether the case requires the additional costs.

If the case goes to trial, there are many additional costs incurred because a death sentence is a possibility. For example, jury selection is a much lengthier and more costly process in a death penalty case than in a non-death penalty case. It requires many more jurors to be summoned and a far more elaborate voir dire process to ensure each juror is willing to sentence someone to death under the certain circumstances. Therefore, because a sentence of death is possible in all aggravated murder trials, costs naturally remain higher relative to non-death eligible trials.

2. The Role of the Oregon Capital Resource Center

Although OPDS notifies the resource center as soon as it assigns an attorney to a case, there is no formal protocol as to when the center gets involved. Wolf focuses on giving trial assistance, and Ellis focuses on giving appeals and post-conviction assistance, although they both stay involved in all parts of the process as needed. Ellis explained the resource center's role is to ensure that defense counsel follow best practices throughout the process. This may only mean that counsel is encouraged to spend more time investigating issues, that is, to look harder, or to ensure they select the most qualified experts based on the particular needs of the case.

If the attorney's efforts to secure a plea deal are unsuccessful, they often come in to try to figure out if there is anything else they can do to make the deal. If a case goes to trial, then Ellis and Wolf will assist by helping the defense team prepare for what will happen in court. Ellis said he and Wolf often play the prosecutor and help with mock cross-examinations of experts and investigators.

Wolf said his role at trial depends on the particular defense team in place. More experienced teams tend to reach out for help more. Wolf often assists with jury selection, ghost-writes motions and helps with strategy. Clients can often be distrustful, so as an outsider, it can be helpful for him to be involved in giving advice. His role can become very important when trial attorneys develop what he calls "trial psychosis"—this is when a defense attorney's evaluation of strategic decisions becomes colored by the feeling that he is going to win. Wolf then helps

make decisions, such as what witnesses to call. He can be the voice of reason. However, because trials are so factually dependent, he believes he is more useful in assisting with long-term strategy rather than details.

During appeals and post-conviction review of capital cases, Ellis takes a pro-active approach. He likes to first get involved in discussions with attorneys to ensure the record is complete. He has a lot of experience in this area, and notes that attorneys often fall short on this. He likes to vet the issues and be involved in drafting the briefs, which includes both identifying and framing issues.

Ellis explained that Oregon, like many states, is focused on its state law and consequently most attorneys think predominantly about framing issues under Oregon law. Ellis has considerable experience in federal court, so he considers it his role to ensure that attorneys discuss the federal constitutional standard, which will be necessary down the road. The appeals process continues in federal court and it is important that federal issues are preserved at the state level to ensure federal courts may hear them.[170]

3. Mitigation Specialists

In Oregon, a mitigation specialist is defined as an investigator with 2000 hours of experience and who has undertaken additional mental health and related trainings. Every aggravated murder defense team requires at least one mitigation specialist.[171] We interviewed two such specialists, Pamela Lundberg Rogers and Carin Connell, who described their own experiences, as well as the general process of mitigation experts.

Once counsel introduces specialists to the defendant, the specialists begin one-on-one meetings to build a rapport. Mitigation specialists spend far more time with the clients than other members of the defense team because they need to gather information about highly personal matters. Thus, the trust-building process between the specialists, the defendant, and witnesses can make the mitigation investigation extraordinarily time consuming.

The specialists begin by tracking down all the individuals who might help them create an in depth understanding of the life history of the defendant. This often requires travel across Oregon and even the rest of the country. The investigation includes interviews with family,

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[170] *See supra*, Part III.B, Oregon's Death Penalty Today: ORS 163.105; *See, e.g.*, Picard v. Connor, 404 U.S. 270, 276; *Ex parte* Hawk, 321 U.S. 114, 116–17 (1944) (per curiam).

[171] OPDS uses the American Bar Association guidelines for death penalty defense requirements. *See* OFFICE OF PUB. DEF. SERVS. REPORT TO THE PUB. DEF. SERVS. COMM'N, DELIVERY OF PUBLIC DEFENSE SERVICES IN DEATH PENALTY CASES 1, 3–4 (June 14, 2007). http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/State/OR_adoption_of_ABA_Guidelines.authcheckdam.pdf.

friends, teachers, lovers, coworkers, caregivers, doctors, and all others who can provide information that may humanize the defendant. Like the defendant, these witnesses often require repeat trips in order to gain trust and to get to the root of the defendant's past.

At the end of the investigation, (commonly lasting about a year), a completed mitigation packet is created, often comprising around 50,000 pages of supporting documents. Mitigation specialists face an emotionally taxing job. They develop an in-depth understanding of the conditions of the defendant's prior life and the circumstances that led to the crime. Both Lundberg Rogers and Connell's experiences as mitigation specialists have led them to support abolishing the death penalty.

C. The Jury

Unless the prosecutor affirmatively declines to seek the death penalty, every empaneled jury in an aggravated murder trial must be made up of people who would be willing, if necessary, to sentence the defendant to death. Thus, the jury selection process is more complex and lengthy in aggravated murder trials than in other types of criminal trials because prospective jurors must be questioned on their views about both guilt and punishment. Jurors are often excused for cause by the court because of their views either for or against capital punishment render them "substantially impaired" and unable to be "impartial."[172] In addition, a much larger jury pool is summoned to accommodate the high number of hardship excusals for people unable to serve on lengthy cases.

In order to get a clearer understanding of the initial steps involved in empaneling a jury for aggravated murder trials, we spoke with the jury manager for Linn County, Karl Neal. According to Neal, murder and aggravated murder trials in most jurisdictions require that a separate group of potential jurors be summonsed apart from the usual set of randomly selected potential jurors used for all other trials. This separate group can number anywhere between a few hundred to 3000, depending on the nature of the case and the county in which the trial takes place. In Linn County, Neal sends out summonses approximately four weeks before jury selection is scheduled to begin. From the original list of summonses, Neal explained that on average, approximately only 20 to 28 percent of those summonsed will appear for jury duty in Linn County. However, this total can vary widely. For instance, in the 2002 aggravated murder trial of Michael A. Davis in Multnomah County, which resulted in a death sentence, 2500 summonses were sent but ultimately 381 jurors deferred their duty, 1398 were excused, and 575 were no shows. On the other end of the spectrum, the jury manager in Barry Richard Dent's 2004 trial, which resulted in a true life/LWOP sentence in Columbia County, summonsed only 400 people of which 200 were no shows.

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[172] *See* Witherspoon v. Illinois, 391 U.S. 510 (1968); State v. Montez, 309 P.2d 564, 574 (Or. 1990).

Selection of the jury is a detailed and strategic process because of the jury's natural importance to the outcome of the trial. The selection process begins with a questionnaire given to the summonsed pool of jurors. These questionnaires are created by the court and by both prosecution and defense counsel. Typically included are generalized questions meant to ascertain a person's suitability to act as an impartial juror — their purpose is to identify anything that would support a challenge for cause.[173] For instance, questions regarding potential relationships with the victim, witnesses or defendant, and whether the person has prior knowledge of the crime may be asked. Challenges resulting from the questionnaires help to expedite the voir dire process of directly examining potential jurors.[174] In Davis' case only 146 people, just over 5 percent of summonsed jurors made it to voir dire — the in person examination of potential jurors during jury selection.[175]

Aggravated murder trials can last for several weeks and if a finding of guilty is returned, the same jurors must also participate in the sentencing phase. According to Neal, aggravated murder trials in Linn County are usually scheduled for between 10 and 21 days; however, past aggravated murder trials in other Oregon counties have lasted for several months, which may, in part, explain the jury pool attrition due to excusals and deferments for economic hardships during the summoning phase.

The 2010 trial of father and son, Bruce and Joshua Turnidge provides an example of a time consuming case. In that case, the jurors were initially summonsed on September 9, 2010. The jury selection process took 11 days prior to the beginning of the trial[176] and the trial spanned from the end of September to early December. Following their convictions, the jurors spent another two weeks until December 22, 2010 in the penalty phase. Ultimately both were sentenced to death.[177]

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[173] ORCP 57 D provides grounds for challenges.

[174] During voir dire both parties will either accept or challenge a venireman (potential juror). There are two types of jury selection challenges as defined and governed by the Oregon Rules of Civil Procedure: (1) for cause, and (2) peremptory. *See* ORCP 57 D.(1)(a)–(g); ORCP 57 D.(2)–(3); ORCP 57 D.(4)(a)–(d). Legitimate challenges for cause are related to the venireman's actual or potential biases, prior knowledge of the crime, or inabilities to perform the duties of a juror. Because bias is an issue of fact, the trial court maintains discretion to permit challenges based on voir dire responses. The Court has held that it is appropriate to question potential jurors about their opinions on the death penalty in capital cases. Morgan v. Illinois, 504 U.S. 719 (1992). Whether a venireman's personal opinion is for or against the death penalty is not automatic grounds for a challenge as long as it is determined that "the prospective juror's views would prevent or substantially impair the performance of the duties of the person if selected as a juror." State v. Wagner, 752 P.2d 1136, 1174 (Or. 1988); *See also* Witherspoon, 391 U.S. 510 (1968).

[175] Aggravated Murder Research Database (2016) (on file with author) (updated Aug 3, 2016).

[176] *Id.*

[177] *Id.*

1. *Jury Fees and Additional Costs*

By statute, all jurors in Oregon are compensated for mileage, transportation, and if necessary lodging expenses.[178] In addition, unless the juror's terms of employment provide for paid jury leave, the state compensates jurors $10 per day of duty. Compensation is raised to $25 per day on and after the third day of service.[179] Further, if a judge orders security for a jury that has been sequestered, the sheriff must provide security at the expense of the county in which the trial is located.[180] Additional costs related to the managing and empaneling of juries are built into courts' operating costs in the general yearly budgets.[181]

D. Oregon Supreme Court and Court of Appeals

Oregon Supreme Court Chief Justice Thomas Balmer, Oregon Court of Appeals Chief Judge Erika Hadlock, and Oregon Court of Appeals Judge Darleen Ortega, separately invited us to interview them to assist with our cost research. All employees at both courts are salaried, so time records are not kept, and neither court bills or keeps track of time by the case or task.

Justice Balmer provided details of the laborious process involved in the mandatory direct reviews that the Oregon Supreme Court undertakes for all cases resulting in a death sentence. To illuminate how much time the Court spends on each death penalty review, he provided us with the approximate amount of time a staff attorney spent on each stage of a recent case and timeline estimates from a variety of recent cases.[182] Justice Balmer explained that at all stages of death penalty review, everyone at the Court acts with extra care, with an awareness that "death is different."[183] Judge Hadlock provided us with an understanding of how the Court of Appeals differs in its process from the Supreme Court, and Judge Ortega provided us with a breakdown of how the Court of Appeals processes appeals from beginning to end.

1. *Death Penalty Direct Reviews in Oregon's Supreme Court*

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[178] OR. REV. STAT. § 10.065.

[179] OR. REV. STAT. § 10.061.

[180] OR. REV. STAT. § 10.125.

[181] *See, e.g.*, *Oregon Judicial Branch: 2015 Annual Report*, OREGON JUDICIAL DEPARTMENT (2015) http://courts.oregon.gov/OJD/docs/OSCA/2015annualReport.pdf.

[182] Memo from Lisa Norris-Lampe, Senior Appellate Staff Attorney at the Oregon Supreme Court, to Professor Aliza Kaplan detailing estimates and averages surrounding the review process (Feb. 8, 2016) (on file with author).

[183] Furman v. Georgia, 408 U.S. 238 (1972).

When a jury sentences a defendant to death at the penalty phase of an aggravated murder trial, it is entered into the record and direct review is automatic.[184] The process starts slowly because the appellate attorney cannot commence writing briefs until after the transcript is complete and agreed upon by both parties. As soon as the Oregon Supreme Court is notified of the direct review filing, it notifies the transcript coordinator so he or she can start the process of collecting the transcript and trial record from the case. Justice Balmer described this as a "voluminous enterprise," frequently taking up to two years to complete. It is particularly time consuming because the coordinator must create a record from both the guilt and penalty phases, which are in essence two separate trials. He estimated that non-death appeals transcripts are settled much faster, usually in less than a year.

During the transcript gathering process, the trial court spends time locating the rest of the record. This includes all the exhibits from the lawyers, which generally include boxes of photographs, maps, blow-ups and other trial materials. The Supreme Court will receive everything except for non-demonstrative physical evidence.[185]

Once the transcript is settled and the Court has received all of the exhibits, it creates the briefing schedule. In a normal non-death penalty appeal, each side has 49 days to file briefs, but a death penalty review follows a special schedule. The Court gives the attorneys 60 days to file their briefs but, unlike regular cases where each side is only permitted one 14-day extension, the Court allows multiple extensions in death penalty cases. The Court also permits much longer briefs; to the best of Justice Balmer's knowledge, the Court has never limited the length of any brief in a death penalty case. Justice Balmer said that briefs are a minimum of 100 pages, but often are well over 200 pages.[186] Defendants will often write their own briefs as well in addition to the briefs filed by their attorneys. Justice Balmer estimated that pro se briefs are generally 50 pages in length. The Court also tries to ensure that the defendant has an opportunity to reply to

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[184] All death sentences entail a penalty phase trial, even if the guilt phase is the result of a plea. This is because only a jury can sentence a defendant to death. Death cases are the only aggravated murder cases that result in a mandatory, automatic review. Cases that go to trial and result in a true life/LWOP or ordinary life start the appeals process in the Oregon Court of Appeals. Those appeals are not automatic and defendant must file. Cases that are negotiated in a plea deal often include an agreement to forego a general appeal. Remedies are then limited to post-conviction appeals.

[185] This has in the past, included items such as stun guns and clothes, but that is rare. They do not usually have custody of weapons.

[186] In our own independent review of death penalty briefs, we discovered that many are upwards of 500 pages long. Appeals records sometimes extend to 1000's of pages of briefs when including amicus briefs and the State's briefs.

the state's brief. Justice Balmer estimated it takes between 12 and 15 months for the briefs, pro se briefs, and reply briefs to be completed.[187]

Once the Court receives the briefs, the justices set up a conference call with the attorneys to see what issues they want to raise at oral argument. Justice Balmer believes it helps the lawyers to have this conversation in advance. Oral arguments are 30 minutes for each side, so both parties tend to discuss the key three or four issues in their case. While the Court has never given more than 30 minutes for oral argument, Justice Balmer said that if there were a number of issues that required hearing, the Court could give more time.

After the Court receives the briefs, a staff attorney is assigned to work on the review. He or she creates a direct review memorandum that is usually 30–40 pages long. Normally, the staff attorney works from both parties' briefs, important parts of the transcript, amicus briefs, and any other pertinent sources. Occasionally, the staff attorney will want to discuss an issue that neither party has focused on. This initial memorandum can take the staff attorney an estimated 65 hours to complete.[188]

After the staff attorney's memorandum is completed, the Court sets a hearing date. There is usually a two-to-four-month period before the oral argument during which the seven justices have time to review all the briefs and other materials.[189] After the oral argument, the next stage in the process is writing the opinion. The assignment of writing the opinion rotates among the justices. The justices share the burden equally because death penalty cases are a huge amount of work. Justice Balmer estimated that over the last five years, the Court has heard one or two direct reviews a year.[190] The selected judge works with a staff attorney and some of the law clerks to write the opinion. This process is slow and normally takes between seven and 13 months after the oral argument, to complete. One staff attorney's work alone was about 310 hours in a recent case.[191]

According to Justice Balmer, if the Court is reversing the sentence, it will only write on the deciding issue unless it determines there is another assignment of error that should be addressed. For instance, if the Court is reversing and remanding for resentencing, there may be

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[187] Memo from Lisa Norris-Lampe, *supra* note 182 (based this number on two recent cases in which both convictions and sentences were at issue).

[188] *Id*. The memo estimates a staff attorney spent 65 hours on a recent case including initial brief review, writing the pre-argument bench memo and oral argument.

[189] *Id.* The memo estimates this based on averages of 2 recent cases.

[190] *Id.* Data included in the memo calculated nine new Supreme Court death penalty cases in the last 5 years. 5 new direct reviews, and 4 more following re-sentencing.

[191] *Id.* In the recent case referred to in the memo, the staff attorney estimated he spent 70 hours drafting the opinion, 90 hours editing it, 20 hours meeting with the assigned justice and other staff and 20 hours preparing related memorabilia. This excludes additional work of clerks and the assigned Justice.

an additional issue that is pertinent to the resentencing. If it is affirming the conviction and death sentence, then it will go through everything, although the justices tend not to write on issues the Court has rejected previously and will only discuss issues it determines are really pivotal in the case. In Oregon, there is no issue the Court is required to address, unlike in some states where proportionality reviews are mandated.[192] Once the opinion is complete, it takes another three or four months before the judgment is issued.

2. *General Appeals and Post-Conviction Appeals in the Oregon Court of Appeals*

i. The "Back-Loaded" System in the Court of Appeals

The Oregon Court of Appeals hears all of the general appeals for non-death aggravated murders, as well as all of the post-conviction review appeals for both death penalty and non-death aggravated murders. Judge Hadlock said that both general appeals and post-conviction review appeals follow the same process as most other cases before the Court and operate on the same timeline.

The Court of Appeals runs on a "back-loaded process," which is different from the Supreme Courts process. All the judges receive the briefs for each case about two to three weeks before the case moves to oral argument. Each judge has his or her own system of review and preparation that generally involves reviewing the briefs and deciding what questions he or she might ask at oral argument. Some judges will have their staff write bench briefs, others not. However, it is unlikely these will be more than summaries. It is very rare that a judge undertakes an independent analysis in any depth before oral arguments. It is usually clear from the briefing which arguments are significant, and at oral argument, the appellate attorneys often immediately tell the Court where the arguments are focused. For the judges, most of the real

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[192] *See e.g.*, DEL. CODE. ANN tit. 11. § 4209(g)(2)(a) (West 2015) ("The Supreme Court shall . . . determine: . . . a. Whether . . . the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases . . . ."); GA. CODE. ANN., § 17-10-35(c)(3) (West 2014) ("[T]he court shall determine: . . . (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."); NH. REV. STAT. ANN § 630:5 XI(c) (2016) ("With regard to the sentence the supreme court shall determine: . . . (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."); OHIO. REV. CODE. ANN. § 2929.05(A) (West 2008) ("[T]he supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.");WASH. REV. CODE. ANN. § 10.95.130(2)(b) (West 2012) ("[T]he supreme court of Washington shall determine: . . . (b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.").

work — that of delving into the record, reading the transcript, and in-depth researching takes place after the oral argument.

Before oral arguments, the judges confer about the cases on the docket. In big cases, such as many of the aggravated murder cases, the judge who is later assigned to write the opinion will be assigned a staff attorney to work on the case. The judge will also have a clerk researching where there might be grounds for reversal, analyzing sources of error, considering where the Court wants to focus, and determining what issues of law may be problematic.

Judge Hadlock does not believe there is any special concern for the judges on the Court of Appeals when working on death cases or other cases that involve long-term incarceration. She said there are many types of cases that can be emotionally grueling. She believes, for many of the judges, the most difficult cases involve crimes against children.

ii. Court of Appeals Process

According to Judge Ortega, the Court of Appeals' high volume of cases affects the way judges on the Court operate in many ways. The judges all must balance managing heavy caseloads with ensuring that they do not miss important issues. The judges are grouped into panels of three, and each panel sits one to three times per month. Each docket is usually about 12 cases, derived from a random assortment of civil, post-conviction, and criminal cases. The panels also have special dockets that come from the public defender's office, where they will hear 20 criminal appeals per day.

There is very little time before the oral argument, and each judge operates independently in his or her preparation. Judge Ortega explained that she puts a cap of one hour on reading the briefs for any one case, although she said that some judges do come in with more extensive notes than she does; but all the judges are on a tight timeline and there is a limit on what they can do before oral argument.

On the day the panels hear cases, the Court allows 30 minutes for each case and will hear them back-to-back until they are complete. Soon after the oral arguments, the judges meet to discuss the cases. Judge Ortega estimated that the panel spends on average about five to ten minutes discussing each case. During that time, the judges must determine whether the case is going to be affirmed without opinion (AWOP) or whether they will write an opinion, which could then result in a reversal or affirmation of the original judgment. This turns on whether any of the

judges has a doubt about whether AWOP is appropriate. If everyone agrees that the case should be AWOPed, then that is the end of the matter.[193]

If the panel decides to write an opinion, the process becomes more time-intensive. Judge Ortega believes that whether a case gets an opinion is often dependent on the nature of the other cases on the same docket. If there are several contentious or meaty cases, then a slightly less contentious case might get AWOPed when on another day it might merit an opinion. Once the judges determine which cases merit opinions, they determine who will write the opinion and assign their own clerks and the panel staff attorneys to begin researching the issues.

Judge Ortega explained that most judges use their clerks to write their draft opinions. As a presiding judge, Judge Ortega has one clerk assigned to her full-time, and her panel of three judges has two full-time staff attorneys that they must share between the three of them. This is a lean staff, and the consequence is that opinions can take well over a year, often two years, to be completed. The general policy in the Court of Appeals is that opinions are written on a "first in, first out" basis. However, if there is a particular reason why a case should be moved up on the calendar, then they will do so. For instance, child custody issues often require a quick resolution. Judge Ortega explained that they rarely move up a death penalty or aggravated murder case, reasoning that, regardless of the outcome, the defendant will be staying in prison.

Judge Ortega's clerk generally writes two opinion drafts per month. It takes at least two weeks, full time, to complete thorough research and analysis of each case. Once the draft is complete, Judge Ortega will spend at least one day re-writing, editing, and analyzing the draft. She will read all the cases and all the particulars of the record that are important. She will spend time discussing it within in her department. Additionally, every week the staff attorneys meet and discuss all the cases in the department to make sure no issues are overlooked.

The judges on the panel meet regularly to read each other's drafts and decide which way they will vote. If a judge disagrees with another judge's draft opinion, that judge can write a separate opinion and see whether the third judge agrees with his or her decision. This can lead to a different outcome. Sometimes, if a judge is concerned about an aspect of an opinion, he or she will write a memo on the subject explaining these concerns or what attention it needs. If a judge thinks that a case requires further work, he or she can refer it to the full Court which meets once a month to discuss the cases that have been referred and decide by vote whether the Court should take them en banc; the judges vote on this.

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[193] The Appellate Court Records Section in Salem informed us by phone that 65% of criminal cases are affirmed without opinion (AWOP). In 2015, the court decided a total of 905 appeals, 587 of which were AWOPed.

Judge Ortega believes that the judges on the Court of Appeals generally do not spend additional energy when a case involves a death sentence or a long imprisonment. The Court's role is to consider the legal arguments at issue in each case, regardless of the circumstances.

VIII. CASE PROFILES

A. Randy Guzek

- Guzek is the longest serving member of Oregon's death row, and he is the youngest person sentenced to death since the death penalty was reintroduced in 1984.
- A jury first sentenced Guzek to death in 1988 for the murder of Ron and Barbara Hauser, when he and two accomplices burglarized their house. He had also previously dated their niece.
- Since the state first sentenced him to death in 1988, the Oregon Supreme Court has reversed his sentence three times and the prosecutor has re-sought a death sentence after each reversal.
- The Oregon Supreme Court reversed Guzek's first death sentence in 1990 because it did not conform with the constitutional standard set by the U.S. Supreme Court in the 1989 case, *Penry v. Lynaugh*. A jury re-sentenced him to death in 1991.
- The Oregon Supreme Court reversed Guzek's second death sentence in 1995 because the prosecution introduced victim impact evidence into his 1991 penalty trial. The Court ruled it was not relevant to his moral culpability. A jury resentenced him to death in 1997.
- The Oregon Supreme Court reversed Guzek's third death sentence in 2004 because the sentencing court did not offer the jury the option of sentencing him to true life/LWOP in his 1997 trial. The option had not been available at his original sentencing in 1988 but the Legislature had since added it as a statutory option. He was resentenced to death by a jury for a fourth time in 2010 after his case went to the U.S. Supreme Court for a ruling upon whether his mother would be permitted to provide an alibi at the sentencing trial that was different from the one he used at his original trial. The Supreme Court ruled against Guzek.
- After twenty-seven years on death row, the Oregon Supreme Court affirmed Guzek's sentence for the first time in November 2015.
- Guzek's appeals process is at its early stages still. His lawyers have recently filed a motion to the Oregon Supreme Court to reconsider, amongst others issues, whether it was unduly prejudicial when the court shackled him and made him wear a stun belt during his most recent sentencing trial.
- The results of our study indicate that Guzek's case has cost at least $3,595,047 (excluding DOC costs) in trial, sentencing, re-sentencing, direct appeals thus far.

B. Isaac Creed Agee

- Agee was 33 when he was sentenced to death in 2011 for the murder of another prison inmate, Antonio Barrantes-Vasquez. James Davenport, Agee's cellmate and co-defendant was sentenced to true life/LWOP.
- Agee was already serving a minimum 40-year sentence for an attempted murder and assault that he committed while high on methamphetamines in 2004.
- The medical examiner determined that blows caused by his co-defendant were the cause of death and that Agee's own participation resulted in superficial injuries.
- Because Oregon had not yet established a standard to determine intellectual disability in death eligible cases, the trial court limited its analysis of whether he was intellectually disabled to his intellectual functioning and did not additionally consider his adaptive functioning in making its decision.
- During the penalty phase, the trial court also refused to allow the defense to enter into evidence the mitigating fact that Agee's co-defendant had pled down to a lesser sentence of true life/LWOP and excluded defense expert diagnoses that Agee was intellectually disabled.
- The Oregon Supreme Court reversed his sentence in 2015 and remanded his case to the trial court for a hearing to determine whether he is ineligible for the death penalty due to his intellectual disability. The hearing must conform with established standards in the psychological community. His hearing is scheduled to occur in 2018.
- Our study indicates that Agee's case has cost at least $718,125 (excluding DOC costs) thus far in trial, sentencing and his first direct appeal.

C. Mark Allan Pinnell

- Pinnell was sentenced to death in 1988 for his part in the robbery and murder of John Ruffner.
- A different jury sentenced his co-defendant, Donald E Cornell, to ordinary life. Cornell was released from prison in 2011.
- In 1991, the Oregon Supreme Court reversed Pinnell's sentence and remanded it to the trial court for resentencing because his penalty phase did not conform to the *Penry v. Limbaugh* constitutional standard.
- After an 18-day resentencing trial, the jury re-sentenced Pinnell to death in 1992.
- The Oregon Supreme Court affirmed Pinnell's death sentence in his second direct review in 1994.
- Once his sentence was affirmed, Pinnell filed a petition for post-conviction review in November of 1994.
- Pinnell filed a clemency petition with then-Governor Barbara Roberts challenging the justice of his death sentence when compared with the sentence of his co-defendant. His co-defendant was convicted with the same facts and criminal background, but had a more experienced lawyer. Because the jury was convinced that the murder was not intentional, they did not convict Cornell of aggravated murder. The governor denied the petition.

- A post-conviction trial was held in 1999, and the court denied Pinnell's petition in 2001.
- Pinnell appealed to the Court of Appeals in 2001 and his sentence was again affirmed in 2006. The Oregon Supreme Court denied his petition for review.
- Having exhausted his state appeals, Pinnell filed a petition for a writ of habeas corpus in federal court in 2007.
- In 2013, Pinnell filed a second clemency petition to Governor John Kitzhaber requesting commutation based upon his severe punishment compared with his co-defendant who was now free. It was denied.
- In August of 2015, with his federal habeas corpus appeal still pending, Pinnell filed a clemency petition with Governor Kate Brown because he was terminally ill. His doctors recommended he be transferred out of death row and into palliative hospice care. The Governor denied the petition.
- At age 67, Pinnell died of severe chronic obstructive pulmonary disease on death row on December 14, 2015.

IX. DISCUSSION & CONCLUSIONS

A. Limitations and Recommendations for Future Studies

There are several limitations to this study that, although noted previously, should be reiterated. First and foremost, the fact that Oregon does not require the prosecution to file a notice indicating whether or not it will seek the death penalty is an extremely important factor, as the absence of such a notice means that, in practice, the death penalty is "on the table" from arraignment until either a plea deal is reached or the end of trial, unless clear characteristics of ineligibility (i.e. severe mental illness or juvenile status) are present. This means that all aggravated murder cases proceed as if the death penalty is an active option, which sets in motion additional, constitutionally mandated protections, that when viewed through an economic lens, are directly tied to a large increase in resources.[194] Because of this practice, our ability to control for costs specific to the death penalty, especially during the early stages of the life of a case, is therefore limited. The lack of a formal filing to seek death most likely results in the inflation of pretrial costs on *all* death-eligible cases, whether they end up being death penalty cases or not. We recommend that stakeholders consider requiring a formal letter of intent to seek the death penalty into the case process for death-eligible cases.

Second, we were able to secure cost-specific data from many sources, including OPDS, DOC, local jails, and DOJ, amongst others. There is, however, a large gap in case-level cost-specific

[194] This drastic increase in resource allocation in death penalty cases is understandable, as the United States Supreme Court has continued to echo support for the "death is different" doctrine. *See* Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. OF CRIM. L., 117–164 (2004).

information from both the courts and local prosecutors and, to a degree, from public defenders and other key stakeholders. This is due, in large part, to record keeping practices within all of these organizations, meaning that they just do not keep case-based cost, time, or effort expenditures. Moreover, where proxy measures might be gathered, we were met with a combination of an inability to gather or provide information because of a lack of resources, and in some cases, an unwillingness to cooperate with our requests. Prosecutors, in particular, told us that because they, unlike OPDS, were held to a set annual budget, they operated in a tightly controlled fiscal environment. Nevertheless, set annual budgets reflect the costs involved in prosecuting death penalty cases because they are based on prior years' requirements. We recommend that these organizations review their record keeping practices and, where appropriate, ask for support to build or upgrade their information management systems. As public resources continue to be strained, it is in the interest of criminal justice organizations operating at every level to be able to describe their budgets and articulate and defend their efforts, empirically.

Third, because of the aforementioned issues with both the process of death penalty cases in Oregon and the gap in some of the data sources, we made the decision to present two separate analyses; one that was the most prospective method given processing in death penalty cases and a second in which we present average costs by present sentence outcome. Within each separate approach, we were able to make comparisons, where data were both available and reliable, to non-death eligible murder cases. It is important to note that in each of these comparisons, we do not capture all of the possible economic costs. Further, within each cost center, we do not capture the full range of factors that influence the expenditure of resources. For example, the estimates that were derived for incarceration costs relied on per-inmate, per-day costs at the institutional level, and do not differentiate costs between security levels. Again, because of the combination of these factors, the final cost estimates are conservative and very likely underestimated.

Last, it is also important that our readers understand that Oregon has a low homicide death rate at 2.4 per 100,000 people. In fact, the state ranks amongst the lowest in the nation.[195] Therefore, our population of cases was limited to those cases that were charged as aggravated murder, followed by those cases where the death penalty was known to be at play, which is a small number to begin with. We do believe, however, that the cases captured in this study are representative of all of the aggravated murder cases that occurred within the timeframe of the study. Likewise, we believe that we captured a sufficient number of cases to gain adequate statistical power. Additionally, we included all cases where there was at least an initial death conviction, as going back to earlier cases allowed us to follow several processes through to

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[195] For homicide death rates, see *Homicide Mortality by State: 2014*, CENTER FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS, http://www.cdc.gov/nchs/fastats/homicide.htm (last visited Sept. 15, 2016).

completion and allow for the estimation of all stages of appeals. Importantly, many of the cases that currently remain on death row have not yet moved through any or all stages of the appeals process. Thus, future studies should not only build on the research presented here, but should continue to gather information on the costs associated with direct, post-conviction, and federal appeals.

B. Summary & Concluding Remarks

The average differences in both non-enumerated measures of effort and economic costs are much greater for aggravated murder cases that result in death sentences than in other aggravated murder cases (non-death cases) in Oregon. There are very clear differences in the scale of effort, as evidenced by the variation in the number of court processes (hearings, filings, judicial orders). In simple terms, there are two to three times the number of court processes occurring in cases that result in death, compared to aggravated murder cases that do not. Even if the baseline economic costs of these processes were equal, per unit, the costs for death penalty cases would be greater.

> Aggravated murder cases that result in death sentences are more complex: More time, more effort, and more resources means more money on average, per case. This is a simple fact.

We provide a breakdown, using two separate methods of categorization, of each of the general cost categories that were analyzed in this study. With the exception of DOC costs, aggravated murder cases that result in death sentences were more expensive in all categories. For DOC figures, we know that those estimations are a result of average age at sentencing—the death sentenced group was about five years older on average—and so they had less time to generate costs in the estimates as a direct result of the current charge (aggravated murder) or subject of this study. We did not weight these costs because in the absence of carrying out the death penalty, DOC will have to absorb the costs for housing offenders for life (which is already occurring in practice), and so in keeping with our conservative estimation strategy, this used as a subtraction to the difference is appropriate here.

As we state above, both of the final estimate models contain conservative estimates, as they both lack data related to several other critical cost-centers, such as prosecution and court costs, as well as additional costs surrounding law enforcement, and local, state, and federal government actors. We found, however, that the cost differences between cases range from about $800,000 to over $1,000,000 not counting DOC costs. When DOC is accounted for, the cost differences range from about $890,000 to $920,000, depending on which case categories are

used. These findings are in line with previous academic studies conducted in Washington, Maryland, and North Carolina.[196]

Additionally, we were able to present some information regarding trends in the differences in costs over the last few decades. In the earlier death penalty cases, many of which have formally concluded, the average costs were much less than current costs. This pattern has an impact on the averages presented in our final models, as the older and less expensive cases have a tendency to reduce the overall average. Again, the final average differences that are reported here are likely underestimated. The limits of such an analysis are discussed in the Findings section above, but the increase in average cost pattern is both clear and significant.

Again, the primary goal of this study was to estimate the economic costs associated with aggravated murder cases that result in death sentences and compare those costs to other aggravated murder cases, the majority of which resulted in some form of a life sentence, in Oregon. There has been no comprehensive empirical study of the economic costs of seeking the death penalty in Oregon. As with previous studies, there are important limitations to consider here. In light of these limitations, and given the weight of the evidence found in the analysis above, we have several conclusions: 1) actual execution is extremely rare, as a vast majority (over 70%) of death convictions have been converted to life sentences; 2) a sentence of death is significantly more expensive than a life sentence, including the costs of incarceration; 3) the average aggravated murder case is already extremely complex, but aggravated murder cases that result in death sentences require two to three times the number of court processes; and, 4) more time, more effort, and more resources, equal more money spent on average, per case.

The many individual interviews we conducted help to provide important context to understanding Oregon's death penalty and its costs. These cases can be complicated and lengthy. For the jurors called to serve on these cases, the diligent prosecutorial, defense and appellate teams that litigate the cases, and the judiciary that resolves them—we can conclude that Oregon's death penalty is intensely time-consuming, expensive, and draining on all those involved in the process.

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[196] *See supra* Part II.B, Prior Studies in Other States.