



## **Oregon Department of Justice**

Ellen F. Rosenblum, Attorney General

**2023 Joint Committee on Ways & Means  
Public Safety Subcommittee Presentation  
January 26, 2023**



# **Department of Justice Defense of Criminal Convictions**

**Presenters: Steve Lippold, Chief Counsel  
Trial Division**

**Ben Gutman, Solicitor General  
Appellate Division**

**William O'Donnell  
Chief Financial Officer**



# Program Summary

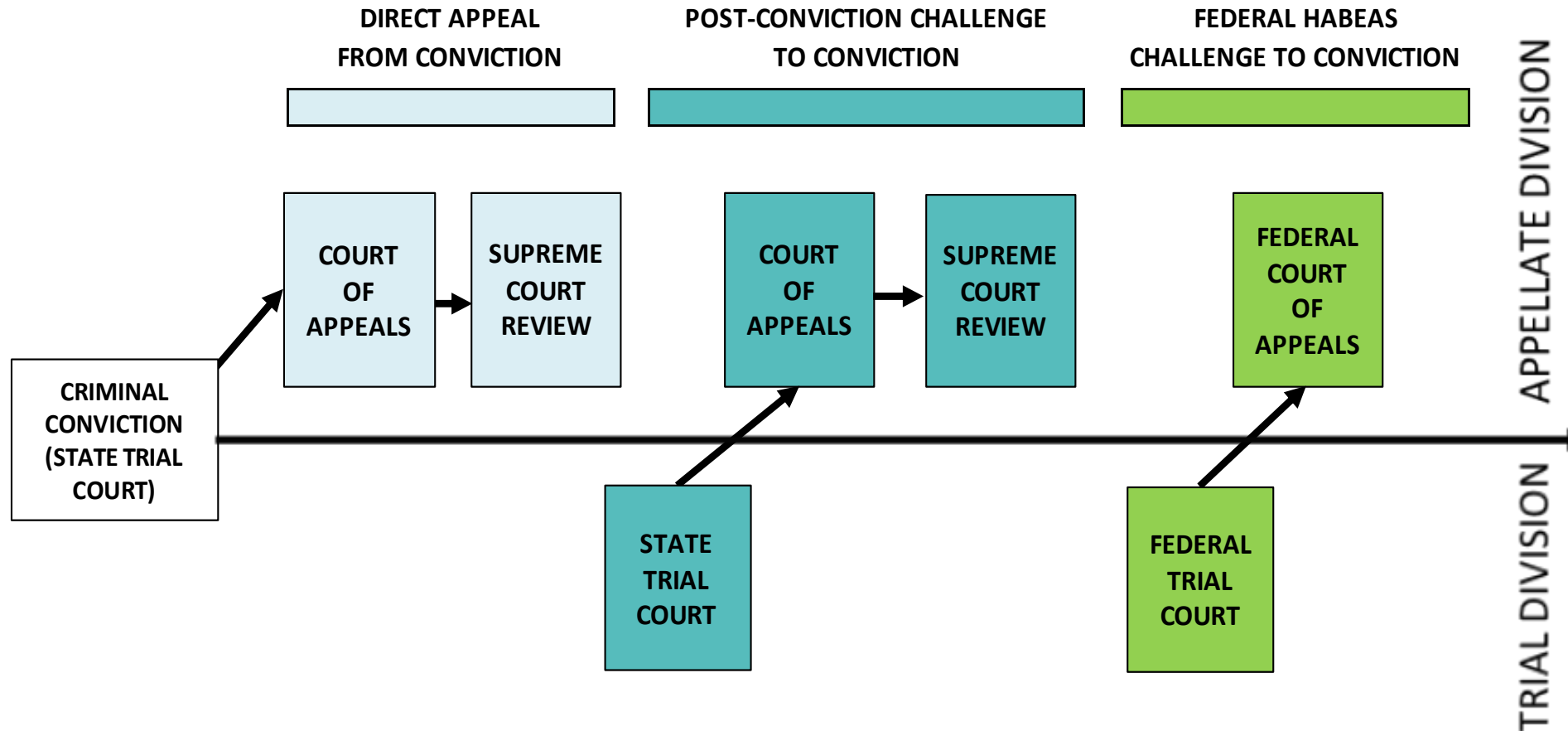
## Mission

- Defend convictions and sentences that state's prosecutors properly obtained
- Work to secure just outcomes when challenges have merit

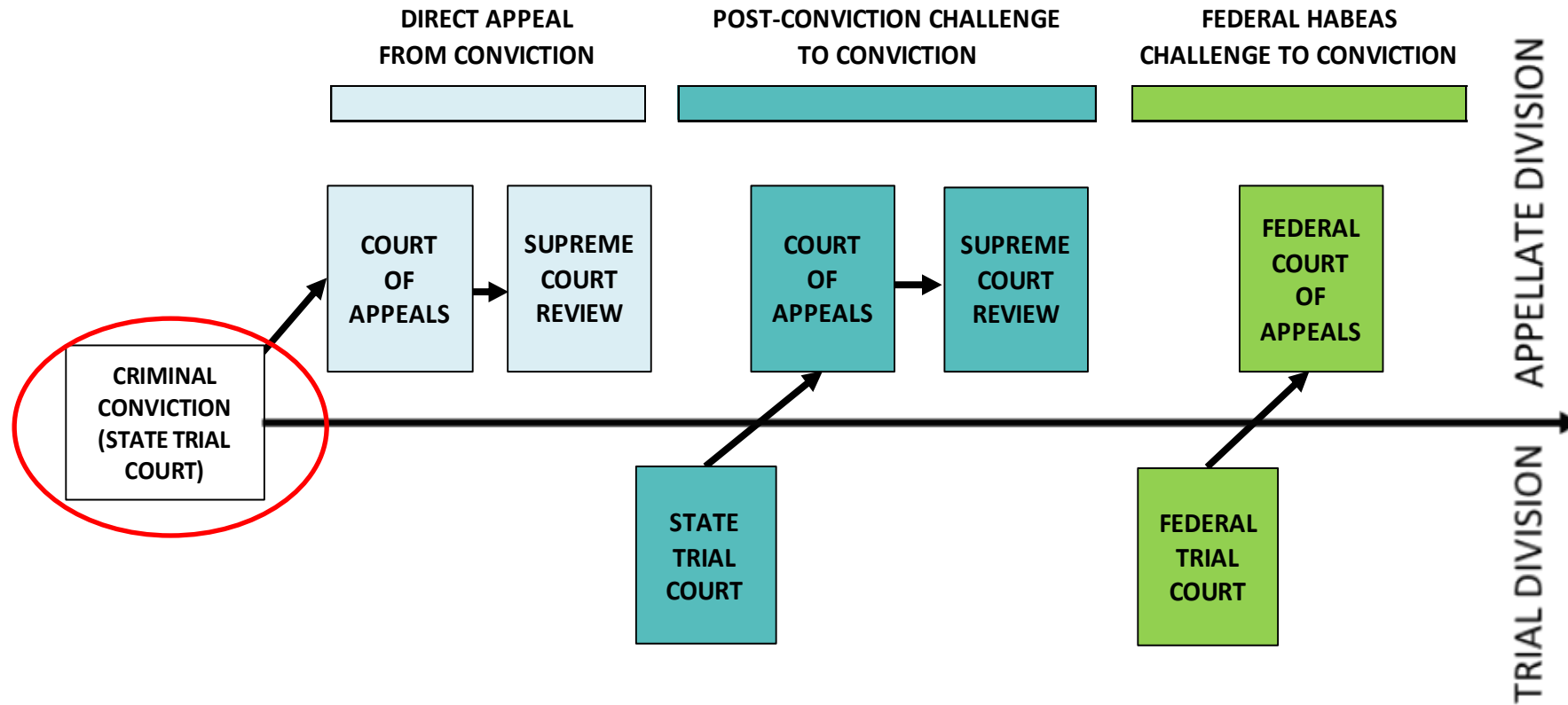
**This is a mandated caseload**



# Overview of the Process



# Overview of the Process



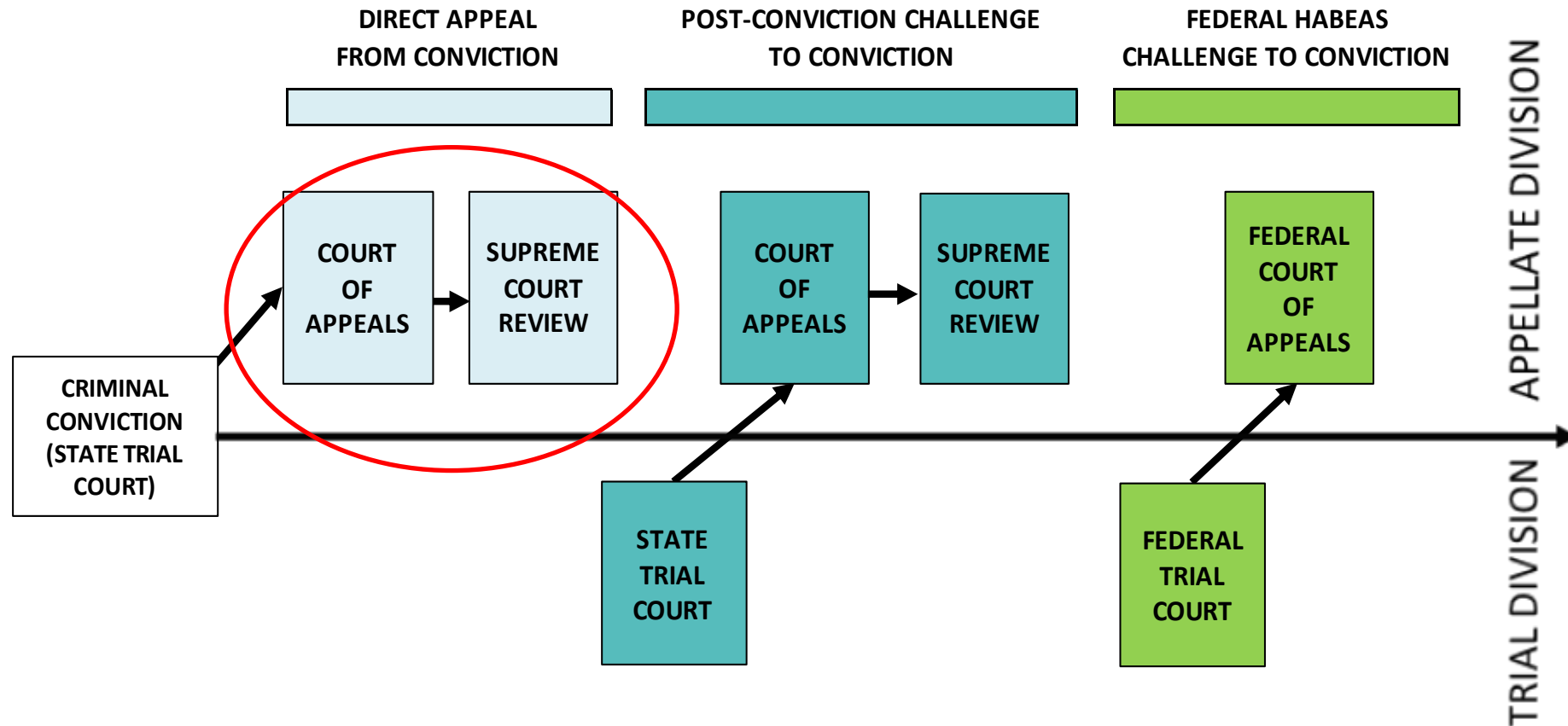
# Overview of the Process

## Criminal conviction

- Charges brought by a prosecutor (typically DA)
- If acquitted, that is the end of the case
- If convicted, could be sentenced to probation, jail, or prison
- Automatic right of appeal



# Overview of the Process



# Overview of the Process

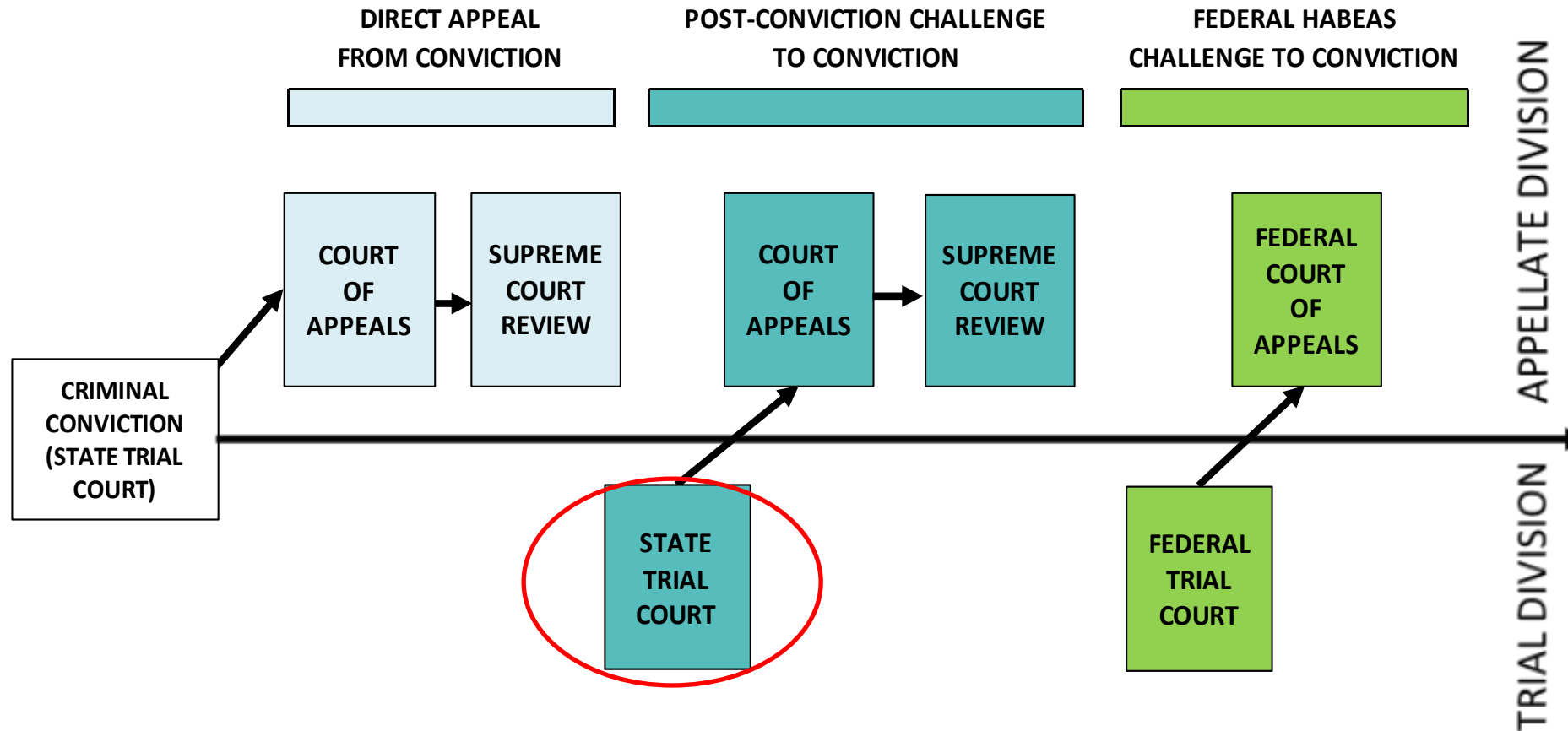
## Direct appeals

- Challenge to any ruling by trial court (sufficiency of evidence, evidence rulings, jury instructions, etc.)
- Court of Appeals can affirm (uphold conviction or sentence) or reverse
- If reversed, result could be dismissal of charges, new trial, or new sentencing proceeding
- Either party may ask for discretionary review by Oregon Supreme Court or U.S. Supreme Court





# Overview of the Process



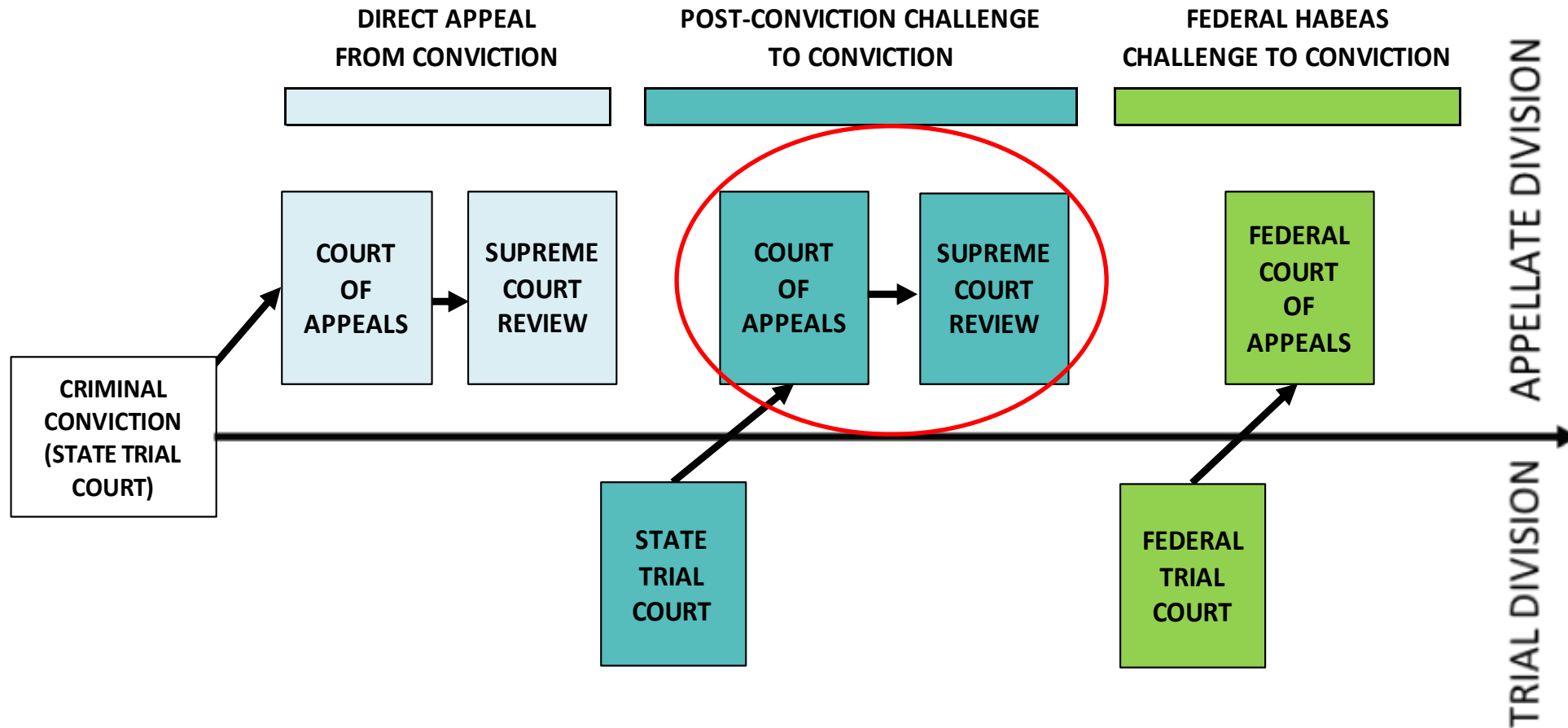
# Overview of the Process

## Post-conviction review

- New case in trial court
- Constitutional issues that could not be raised on direct appeal
  - Adequacy of defense counsel
  - Nonunanimous juries before law changed
- DOJ Trial Division handles if petitioner in prison; DA handles if not



# Overview of the Process



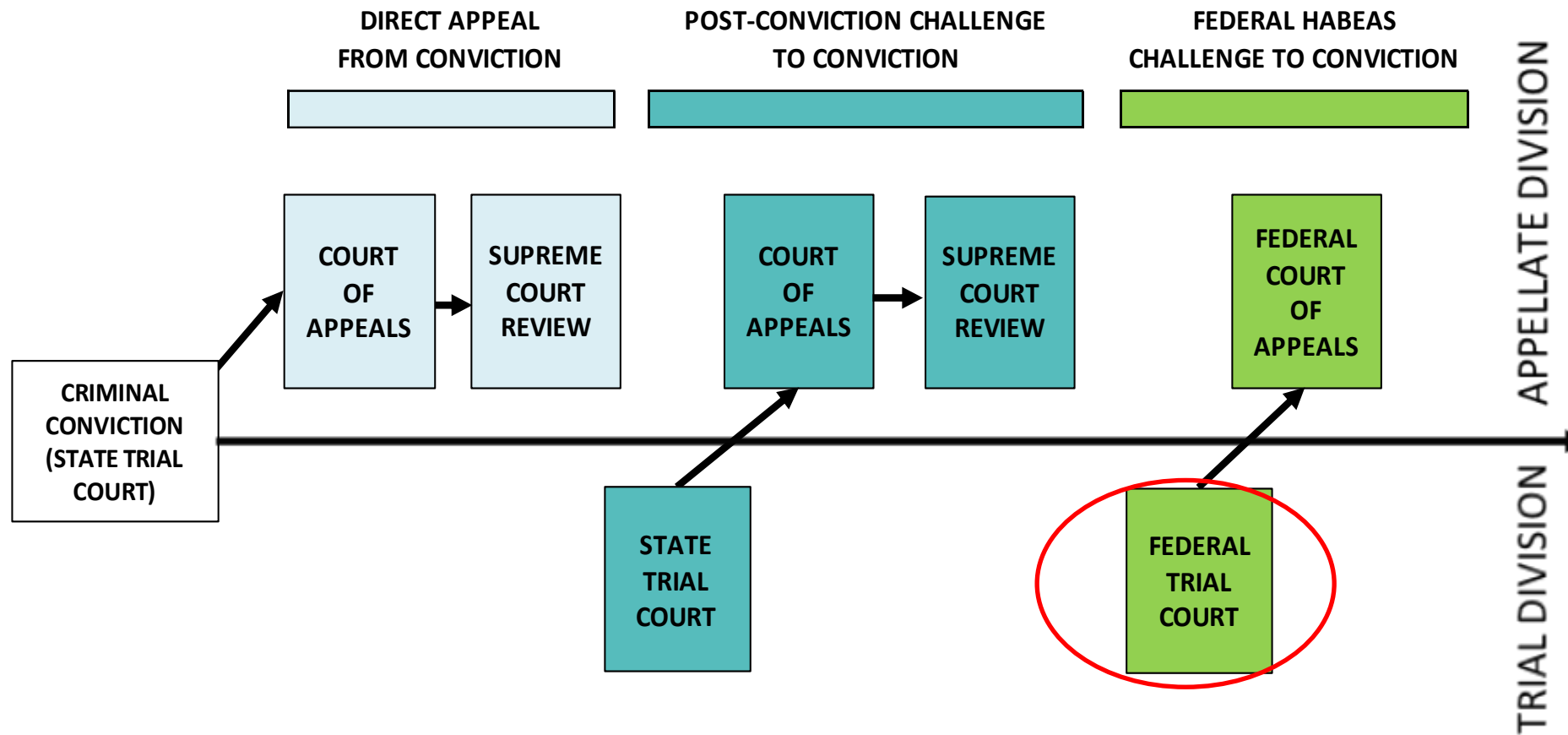
# Overview of the Process

## Post-conviction appeals

- Challenges to ruling of post-conviction trial court
- Appeal as of right to Court of Appeals; discretionary review by Supreme Court
- All handled by DOJ Appellate Division



# Overview of the Process



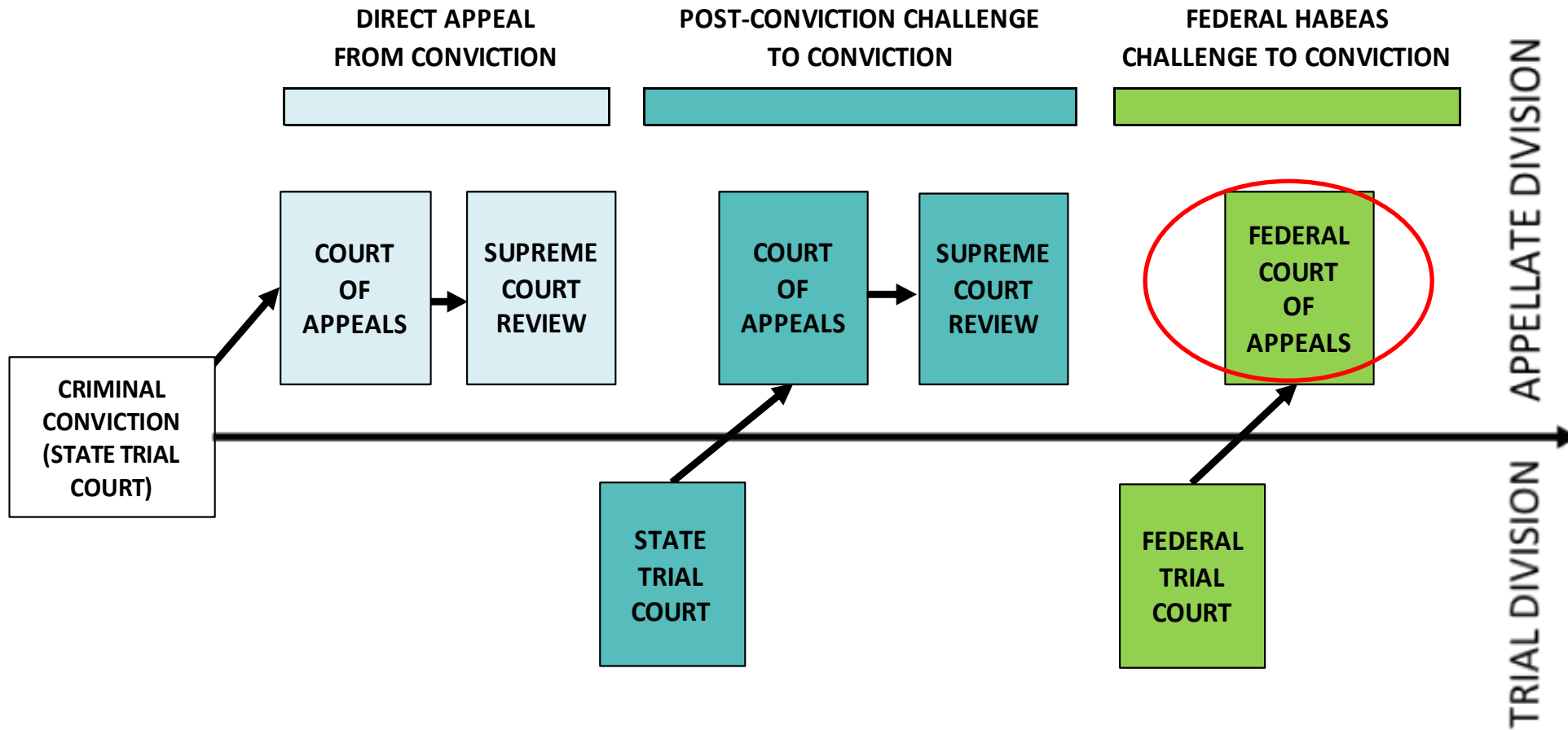
# Overview of the Process

## Federal habeas review

- Federal constitutional challenges to conviction or sentence
  - Constitutionality of criminal law
  - Adequacy of defense counsel
  - Constitutional challenges to trial procedures
- Brought in federal district court



# Overview of the Process



# Overview of the Process

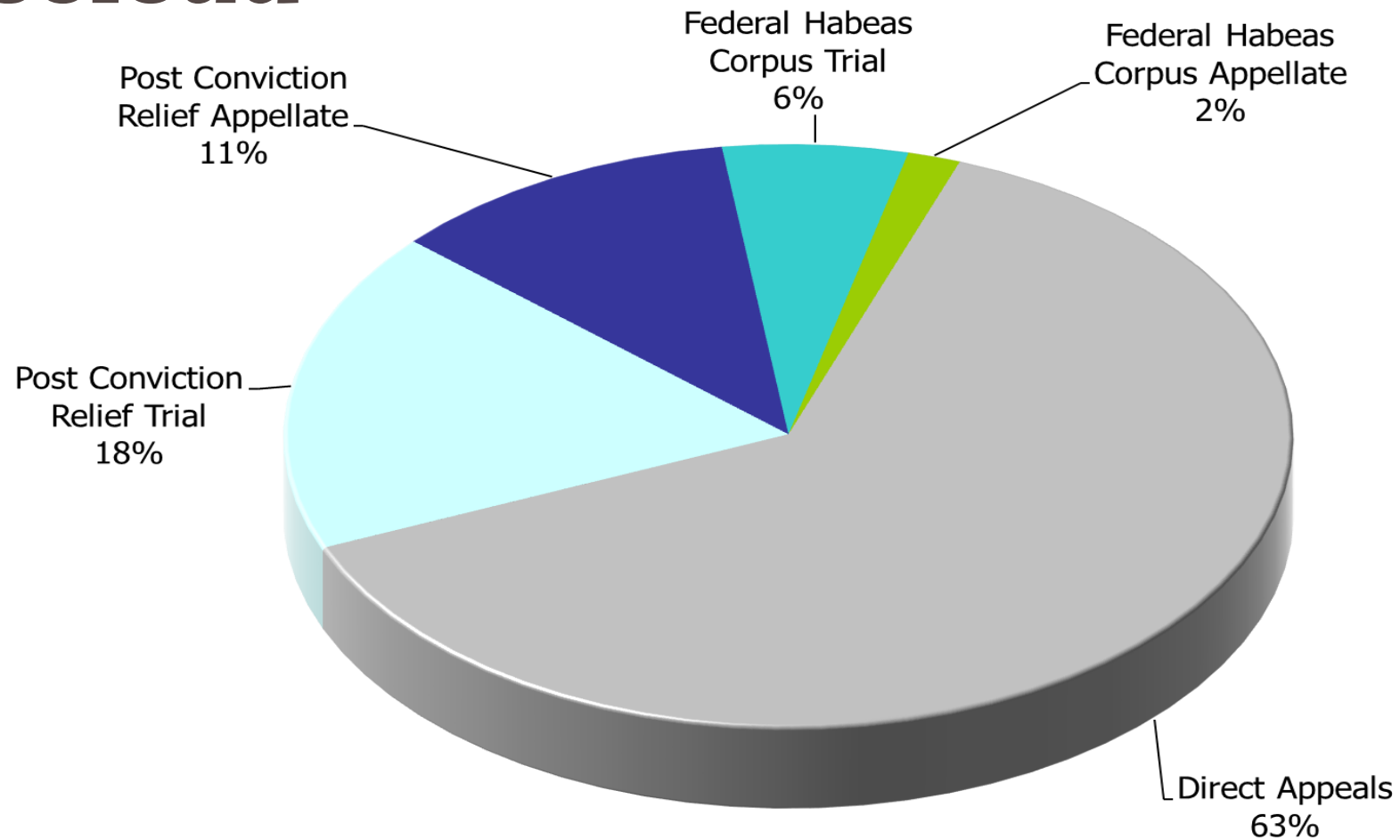
## Federal habeas appeals

- Challenges to federal district court's ruling on habeas petition
- U.S. Court of Appeals for the Ninth Circuit





# Caseload



Includes approximately 1,400 cases/year



# Recent changes in the law

## Nonunanimous juries

- ***Apodaca v. Oregon*** (1972): Sixth Amendment allows nonunanimous juries in state court
- ***Ramos v. Louisiana*** (U.S. Sup. Ct. 2020): Sixth Amendment requires unanimous jury

## Implementation

- 470+ cases on direct appeal reversed and sent back for new trials
- Working with courts and opposing counsel to expedite decisions on remaining disputes (e.g., unanimous verdicts, no jury poll)



# Recent changes in the law

## Nonunanimous juries (continued)

- ***Watkins v. Ackley*** (Or. Sup. Ct. 2022): State statute requires new trials in cases that were final before *Ramos* was decided

## Implementation

- Conceding relief for post-1989 convictions where there is a clear record of only nonunanimous verdict(s)
- Continuing to litigate disputed claims
  - Cases with unanimous and nonunanimous verdicts
  - Cases with no jury poll; juror contact
  - Cases with no jury trial (e.g., guilty plea)
  - Convictions that became final before 1989



# Ramos/Watkins Cases in Trial Court

- Purely Ramos cases: post-1989 convictions where there is a clear record of only nonunanimous verdict(s) – 73 cases
- Cases in which some counts were decided by a unanimous jury and some counts were decided by a nonunanimous jury – these cases need to be sorted out – 124 cases
- Ineffective legal defense counsel – 6 cases
- Cases that did not involve a jury verdict – defendant made a plea deal or agreed to a bench trial because they believed a nonunanimous jury would convict them – 166 cases
- Cases in which there is no record of whether the verdict was unanimous or nonunanimous – 27 cases



# Ramos/Watkins Consequences

- Convictions by nonunanimous juries may be returned to District Attorneys for new trial or release of the defendant.
- Defendants may remain incarcerated due to unanimous conviction on other counts.
- Sentence modified.
- Defendants that served time based on conviction by a nonunanimous jury and released may file suit against the state for **wrongful conviction**.



# Recent changes in the law

## Capital cases

- ***State v. Bartol*** (Or. Sup. Ct. 2021): Death penalty unconstitutional if not eligible under current law
  - Effectively invalidate death penalty in almost all pending capital cases
- Governor Brown commuted all pending death sentences to life without the possibility of parole
- Cases continue as non-capital (but still enormously complex) litigation if person is seeking a new trial or lower sentence





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# Trial Division



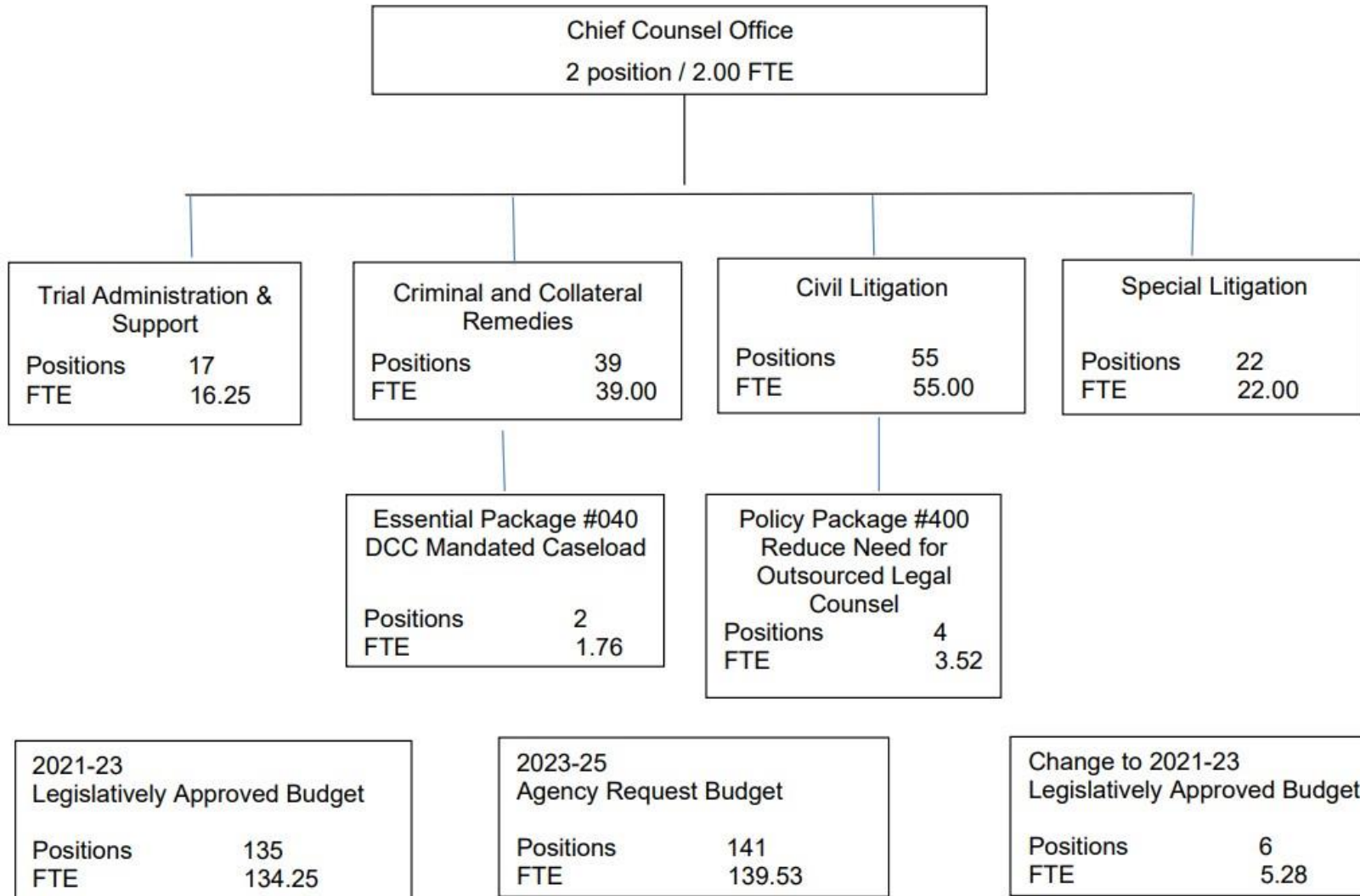
# Program Summary

- The Trial Division defends the State when it is sued for money damages or someone petitions the court to order the State to take or refrain from action.
- **If the State does not appear in the case, or fails to respond to a motion, a judgment can be entered in favor of the opposing party.**





## Trial Division



# Trial Division – DCC Resources

- 39 of 135 Positions devoted to Defense of Criminal Convictions.
- \$16.47 million budget for DCC work.
- Nearly 1,600 cases for the 23-25 biennium.
  - Post Conviction Trial
  - Federal Habeas Trial
  - PSRB – Psychiatric Security Review Board
- Approximately 65,000 hours of work for the 23-25 biennium.





**Oregon Department of Justice**

Ellen F. Rosenblum, Attorney General

# Appellate Division



Department of Justice – Appellate Division

# Mission

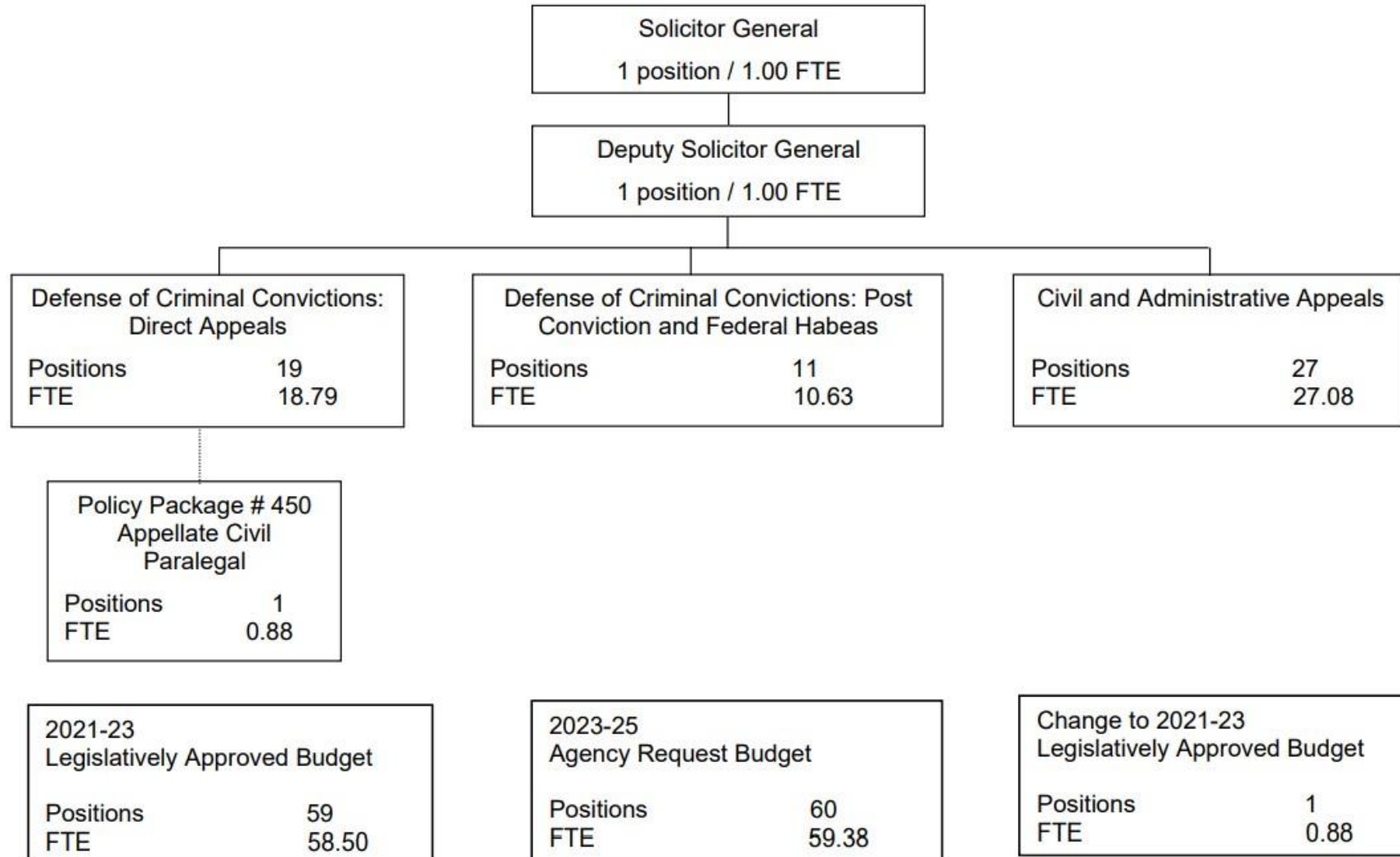
## Represent the State's interests in appellate courts:

- Oregon Supreme Court
- Oregon Court of Appeals
- Federal Courts of Appeals
- U.S. Supreme Court

Decisions from these courts set statewide (or nationwide) precedent



# Appellate Division



# Appellate Division – DCC Resources

- 30 of 59 Positions devoted to Defense of Criminal Convictions.
- \$15.16 million budget for DCC work.
- Approximately 2,700 cases for the 23-25 biennium.
  - Direct Appeals
  - Post Conviction Appeals
  - Federal Habeas Appeals
  - DA Advice
  - Publications
  - Mandamus
  - Sex Offender Registry
- Approximately 89,000 hours of work for the 23-25 biennium.



# Program Summary

## Write briefs and argue cases in:

- Oregon Court of Appeals
  - State is a party in every criminal and post-conviction case
- Oregon Supreme Court
  - State is a party in about two-thirds of cases
- Federal appellate courts

**Conduct trials** in capital post-conviction cases



# DCC Key Performance Measure

- Percentage of Defense of Criminal Convictions (DCC) cases briefed with 182 days.
- FY 2022 – 60%
- The COVID-19 pandemic caused all kinds of court delays that created bottlenecks and other operational changes. While the target percentage of 85% was not attained, all briefs were filed within deadlines due to the courts providing approval for time extensions to both the defense bar and to DOJ.







**Oregon Department of Justice**

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# DCC Budget Forecasting



Department of Justice

# DCC Budget History

<u>Biennium</u>	<u>Actual Cases</u>	<u>Actual Hours</u>	<u>DCC Expenses</u>
2013-15	4,861	121,852	\$17,774,160
2015-17	4,607	121,552	\$19,711,849
2017-19	4,693	128,051	\$21,655,767
2019-21	4,819	139,279	\$27,362,357

<u>Biennium</u>	<u>Estimated Cases</u>	<u>Est Hours</u>	<u>Est DCC Expenses</u>
2021-23	4,449	153,892	\$37,241,951
2023-25	4,511	154,517	\$37,393,114*

\*Estimated at current legal rate.



# DCC Caseload Data

- History to DCC Caseload analyzed from 2013-15 biennium forward to present day
- 20 DCC Case Categories for tracking in DOJ system
- For each Case Category, we track data for:
  - Actual cases each biennium
  - Billable Hours for each case category
  - Billable Dollars for each case category
  - Average Hours for each case category
- Active Trends in Caseload – Upward or downward

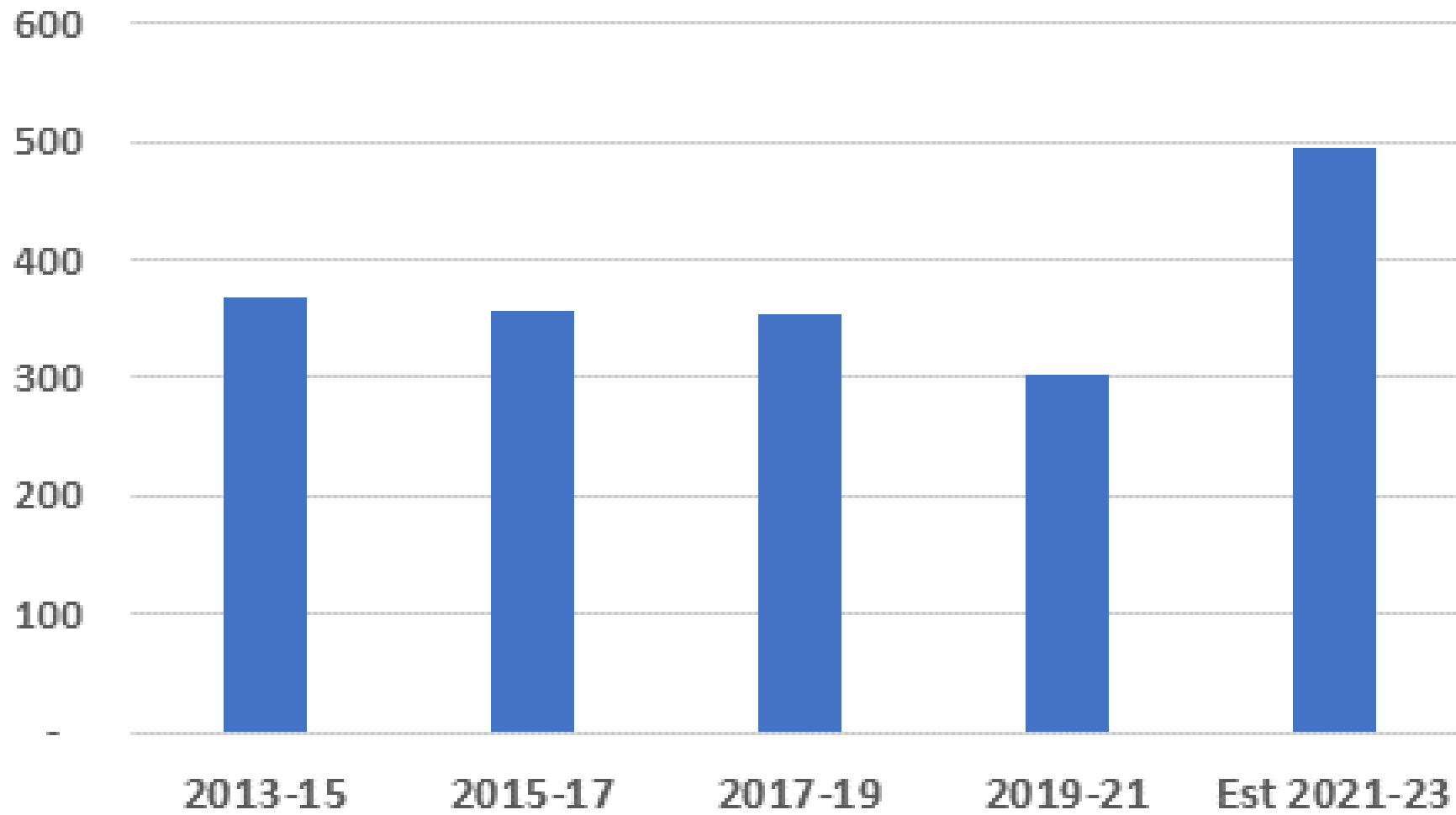


# Forecasting Methodology

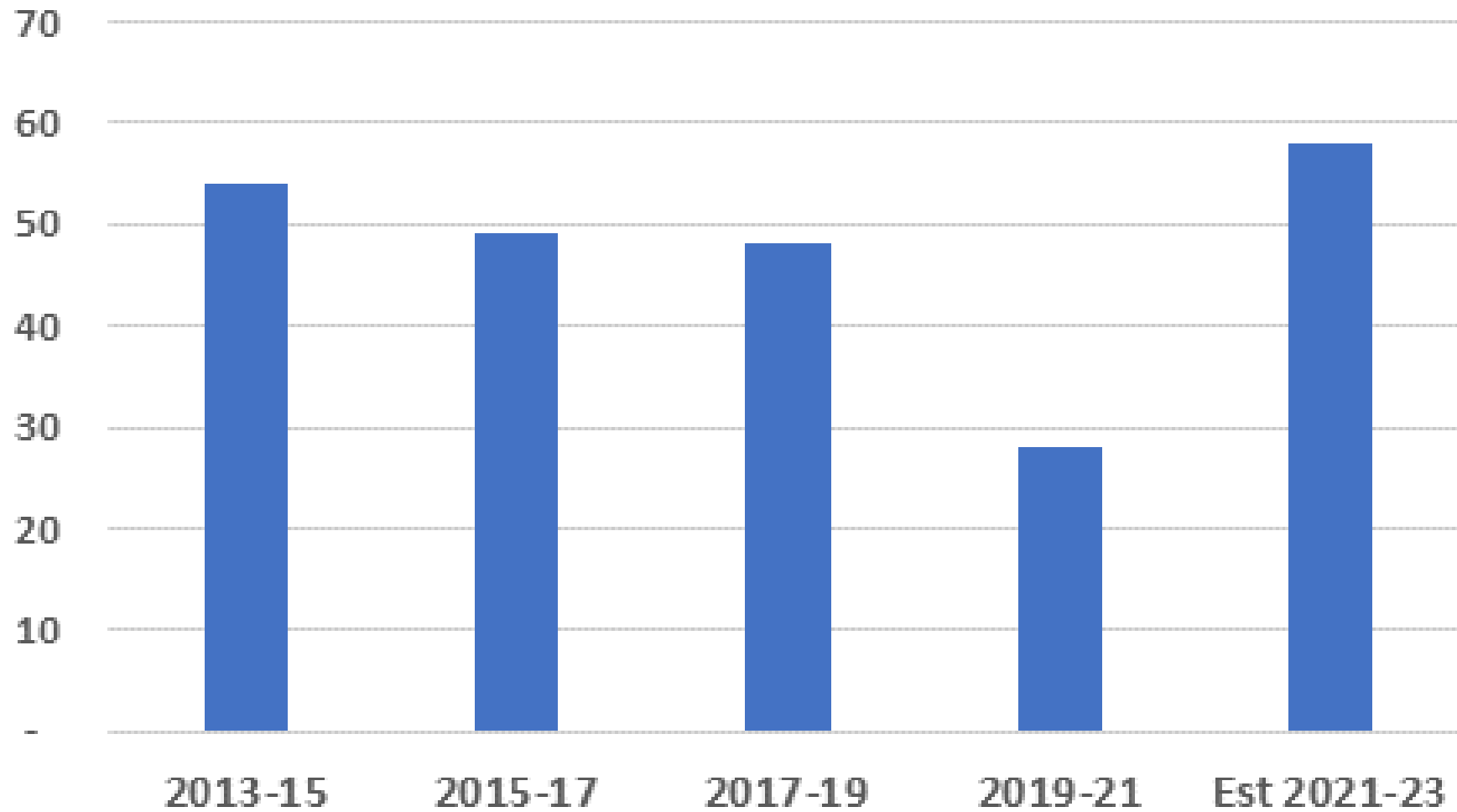
- 10 Year History of the Case Type reveals upward or downward trends.
- Recent workload numbers provide more relevant information that confirms trends or signals a change in the trend or a new trend.
- Division current workloads, court system information, and future expectations.
- Historic average hours per case type serve as a basis for average hours on projected caseload and that translates into projected billable hours.
- Billable hours are the basis for billable dollars.
- Identifying variances between actual v. projected to update projections during the biennium and for the next biennium.



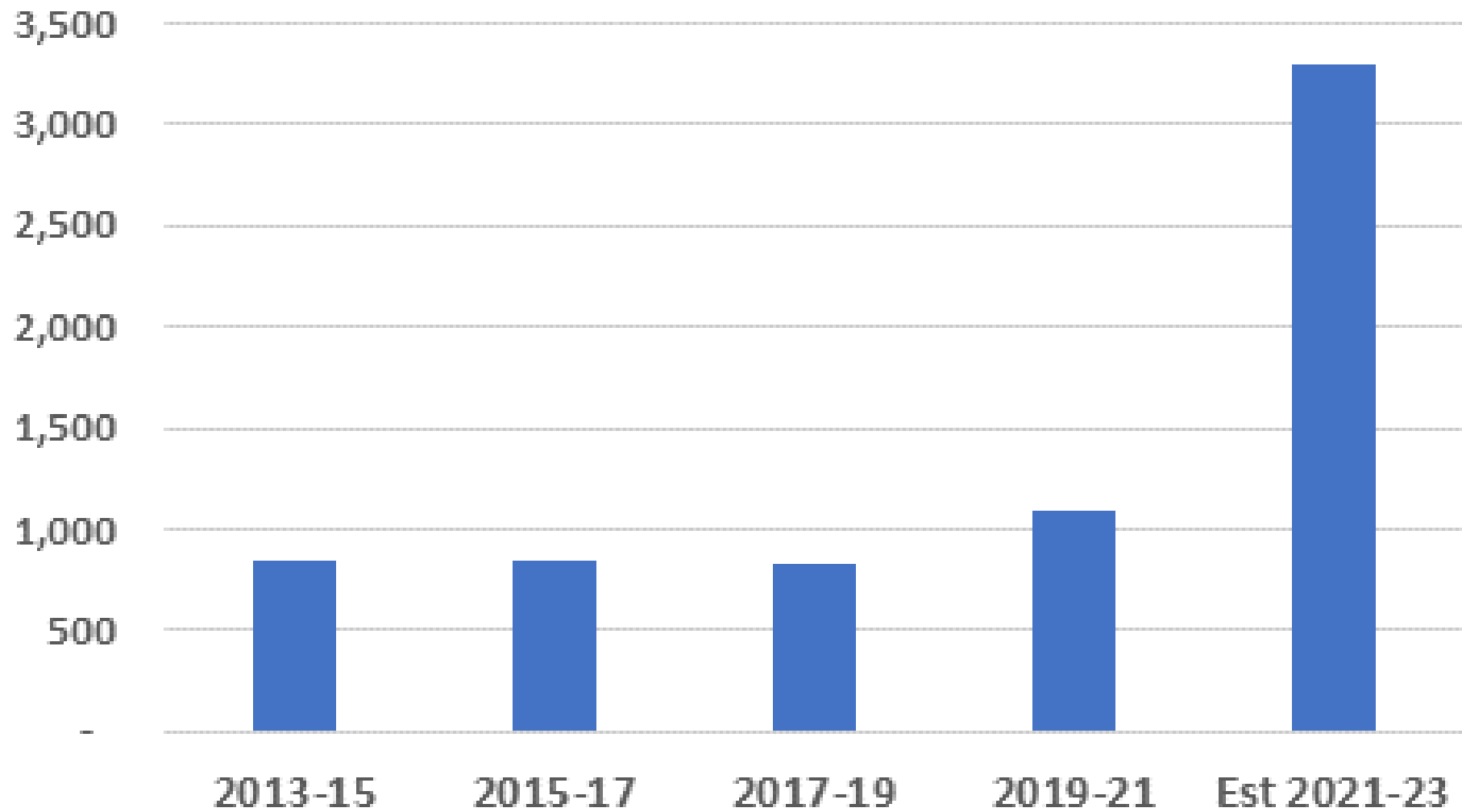
## 137600 - Federal Habeas Corp Cases - Trial



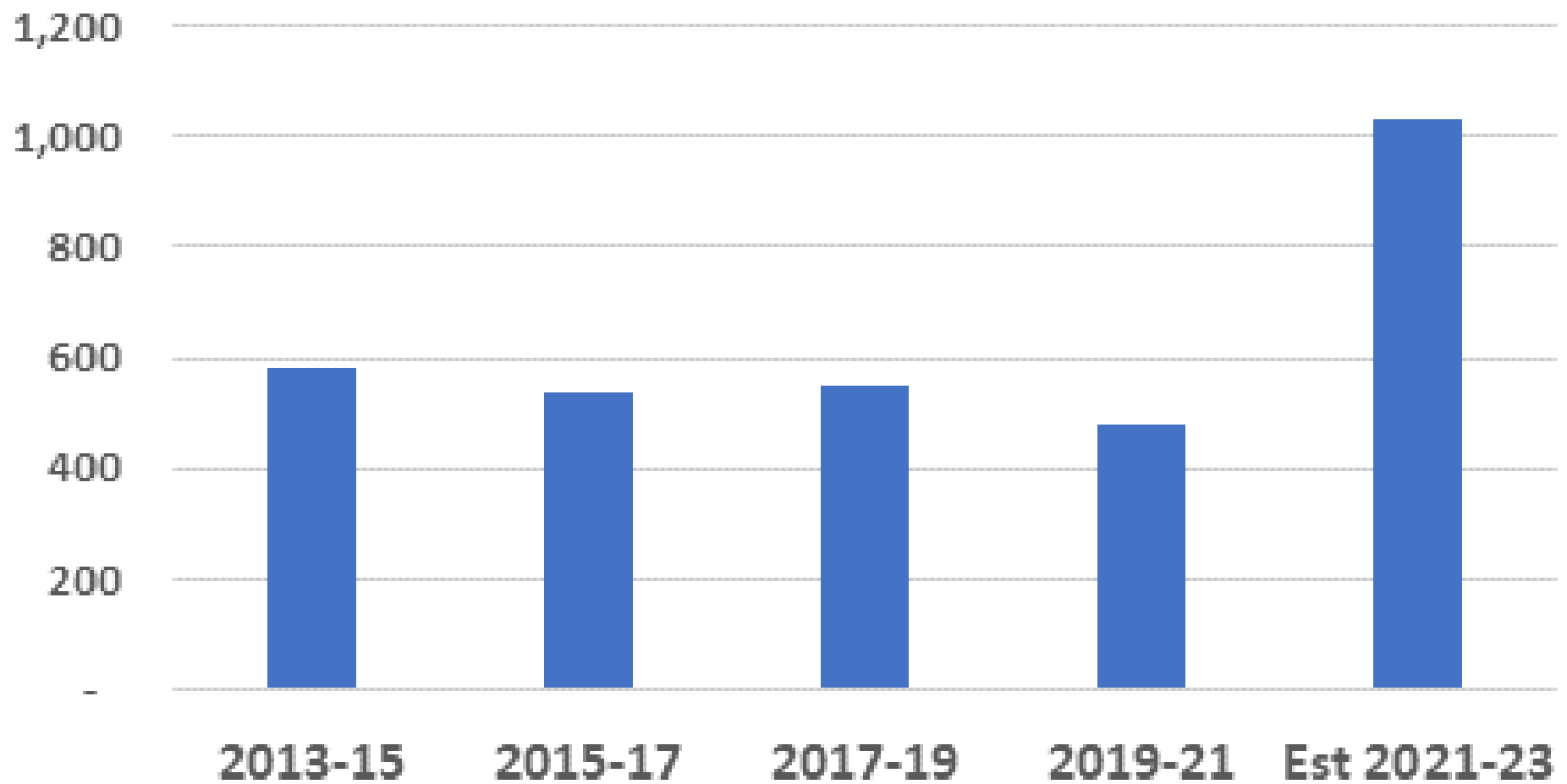
## 137603 - Federal Habeas Appeals



## 137610 - Post Conviction Trial Cases

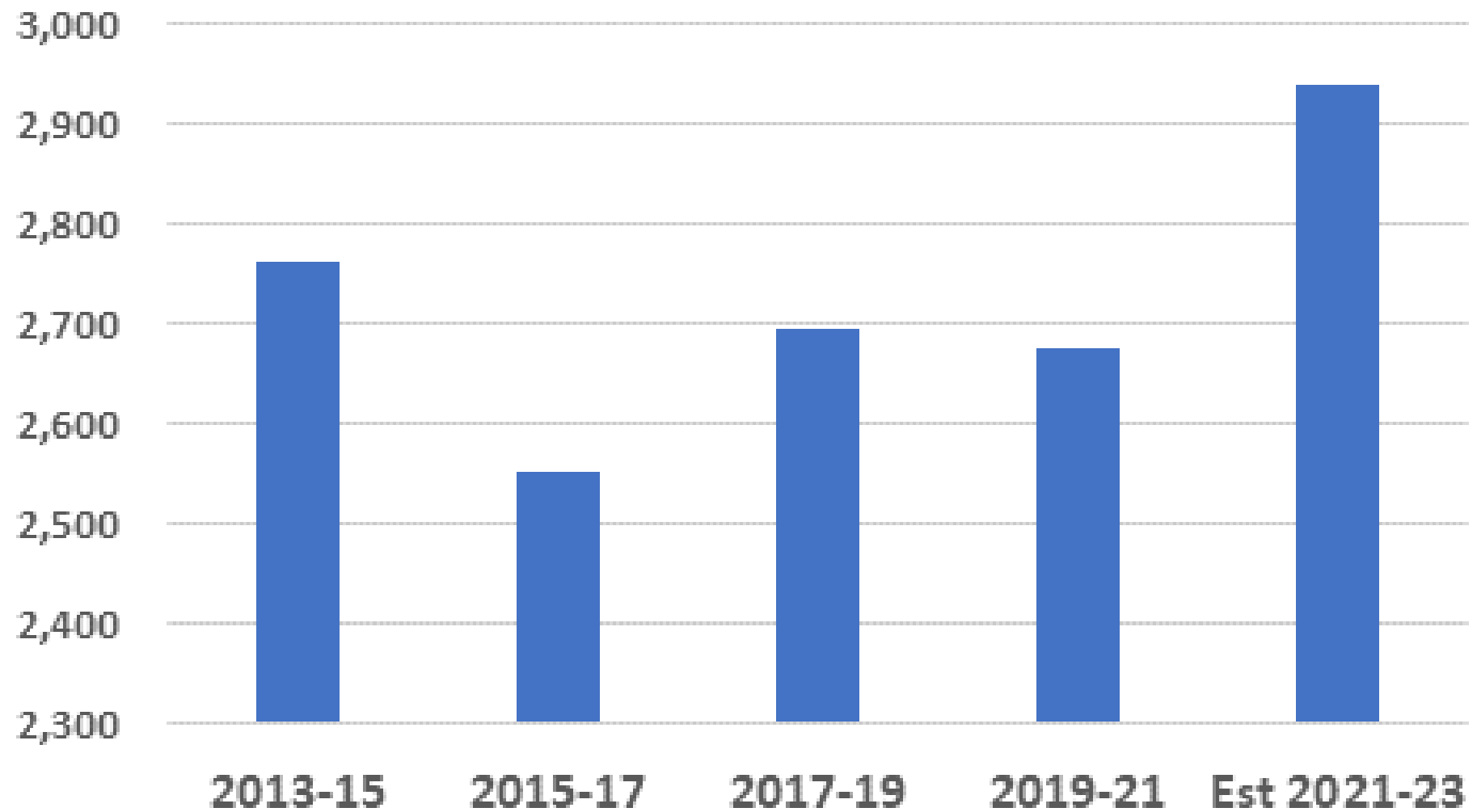


## 137613 - Post Conviction Appeals Cases - Appellate





## 137620 - Direct Appeals Cases - Appellate





# Questions?

