



A Broken System: Error Rates in Capital Cases, 1973-1995^{*}

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I. Introduction

A new debate over the death penalty is raging in the United States.¹ Until now, the focus of that debate has been the fairness of particular capital convictions and sentences. This Report addresses a different and broader question: **the reliability—indeed, the bare rationality—of the death penalty system as a whole.** It asks whether the mistakes and miscarriages of justice known to have been made in individual capital cases² are isolated, or common? The answer provided by our study of 5,760 capital sentences and 4,578 appeals is that **serious error**—error substantially undermining the reliability of capital verdicts—has reached **epidemic proportions** throughout our death penalty system. **More than two out of every three capital judgments reviewed by the courts during the 23-year study period were found to be seriously flawed.**

Americans seem to be of two minds about the death penalty.³ In the last several years, executions have risen steeply, reaching a 50-year high.⁴ Two-thirds of the public support the penalty.⁵

Two-thirds support, however, represents a steady *decline* from the four-fifths of the population that supported the penalty only six years ago, leaving support for capital punishment at a 20-year low.⁶ When life without parole is proposed as an alternative, support for the penalty drops even more—often below a majority.⁷ Grants of executive clemency reached a 20-year high in 1999.⁸

In 1999 and 2000, Governors, attorneys general and legislators in Alabama, Arizona, Florida, and Tennessee have fought high-profile campaigns to speed up and increase the number of executions.⁹



In the same period, however:

- The Republican Governor of Illinois, with support from a majority of the electorate, declared a moratorium on executions in the state.¹⁰
- The Nebraska Legislature did the same. Although the governor vetoed the legislation, the Legislature appropriated money for a comprehensive study of the even-handedness of the state's exercise of capital punishment.¹¹ Similar studies have since been ordered by the Chief Justice, task forces of both houses of the state legislature and the Governor of Illinois,¹² and also the Governors of Indiana and Maryland and the Attorney General of the United States.¹³
- Serious campaigns to abolish the death penalty are under way in New Hampshire¹⁶ and (with the support of the Governor and a popular former Republican Senator) in Oregon.¹⁷
- The Florida Supreme Court and Mississippi Legislature have recently acted to improve the quality of counsel in capital cases,¹⁸ and bills aiming to do the same and to improve capital prisoners' access to DNA evidence have been introduced in both houses of the United States Congress, with bipartisan sponsorship.¹⁹
- Observers in the *Wall Street Journal*, *New York Times Magazine*, and *Salon* and on *ABC This Week* see "a tectonic shift in the politics of the death penalty."²⁰ In April 2000 alone, George Will²¹ and Rev. Pat Robertson—both strong death penalty supporters—expressed doubts about the manner in which government officials carry out the penalty in the United States, and Robertson advocated a moratorium on *Meet the Press*.²²

Fueling these competing initiatives are two beliefs about the death penalty. One is that death sentences move too slowly from imposition to execution, undermining deterrence and retribution, subjecting



our criminal laws and courts to ridicule, and increasing the agony of victims.²³ The other is that death sentences are fraught with error, causing justice too often to miscarry, and subjecting innocent and other undeserving defendants—mainly, the poor and racial minorities—to execution.²⁴

Some observers attribute these seemingly conflicting events and opinions to “America’s schizophrenia—we believe in the death penalty, but shrink from it as applied.”²⁵ These views may not conflict, however, and Americans who hold *both* may not be irrational. It may be that capital sentences spend too much time under review *and* that they are fraught with disturbing amounts of error. Indeed, it may be that **capital sentences spend so much time under and awaiting judicial review precisely because they are so persistently and systematically fraught with alarming amounts of error.** That is the conclusion to which we are led by a study of all 4,578 capital sentences that were finally reviewed by state direct appeal courts, 248 state post-conviction reversals of capital judgments, and all 599 capital sentences that were finally reviewed by federal habeas corpus courts between 1973 and 1995.²⁶

II. Summary of Central Findings

In *Furman v. Georgia*²⁷ in 1972, the Supreme Court reversed all existing capital statutes and death sentences. The modern death-sentencing era began the next year with the implementation of new capital statutes designed to satisfy *Furman*. Unfortunately, no central repository of detailed information on post-*Furman* death sentences exists.²⁸ In order to collect that information, we undertook a painstaking search, beginning in 1991 and accelerating in 1995, of all published state and federal judicial opinions in the U.S. conducting direct and habeas review of *state* capital judgments, and many of the available opinions conducting state post-conviction review of those judgments. We then (1) checked and catalogued all the



cases the opinions revealed, and (2) collected hundreds of items of information about each case from the published decisions and the NAACP Legal Defense Fund's quarterly death row census, and (3) tabulated the results.²⁹

Nine years in the making, our central findings thus far are these:

- Between 1973 and 1995, approximately **5,760** death sentences were imposed in the U.S.³⁰ Only **313 (5.4%; one in 19)** of those resulted in an execution during the period.³¹
- Of the 5,760 death sentences imposed in the study period, **4,578 (79%)** were finally reviewed on “direct appeal” by a state high court.³² Of those, **1,885 (41%; over two out of five)** were thrown out because of “serious error,” *i.e.*, error that the reviewing court concludes has seriously undermined the reliability of the outcome or otherwise “harmed” the defendant.³³
- Nearly all of the remaining death sentences were then inspected by state post-conviction courts.³⁴ Our data reveal that state post-conviction review is an important source of review in states such as Florida, Georgia, Indiana, Maryland, Mississippi, North Carolina, and Tennessee.³⁵ In Maryland, at least **52%** of capital judgments reviewed on state post-conviction during the study period were overturned due to serious error; the same was true of at least **25%** of the capital judgments that were similarly reviewed in Indiana, and at least **20%** of those reviewed in Mississippi.³⁶
- Of the death sentences that survived state direct and post-conviction review, **599** were finally reviewed in a first habeas corpus petition during the 23-year study period.³⁷ Of those 599, **237 (40%; two out of five)** were overturned due to serious error.³⁸
- The “**overall success rate**” of capital judgments undergoing judicial inspection, and its converse, the “**overall error-rate**,” are crucial factors in assessing the effectiveness of the capital punishment



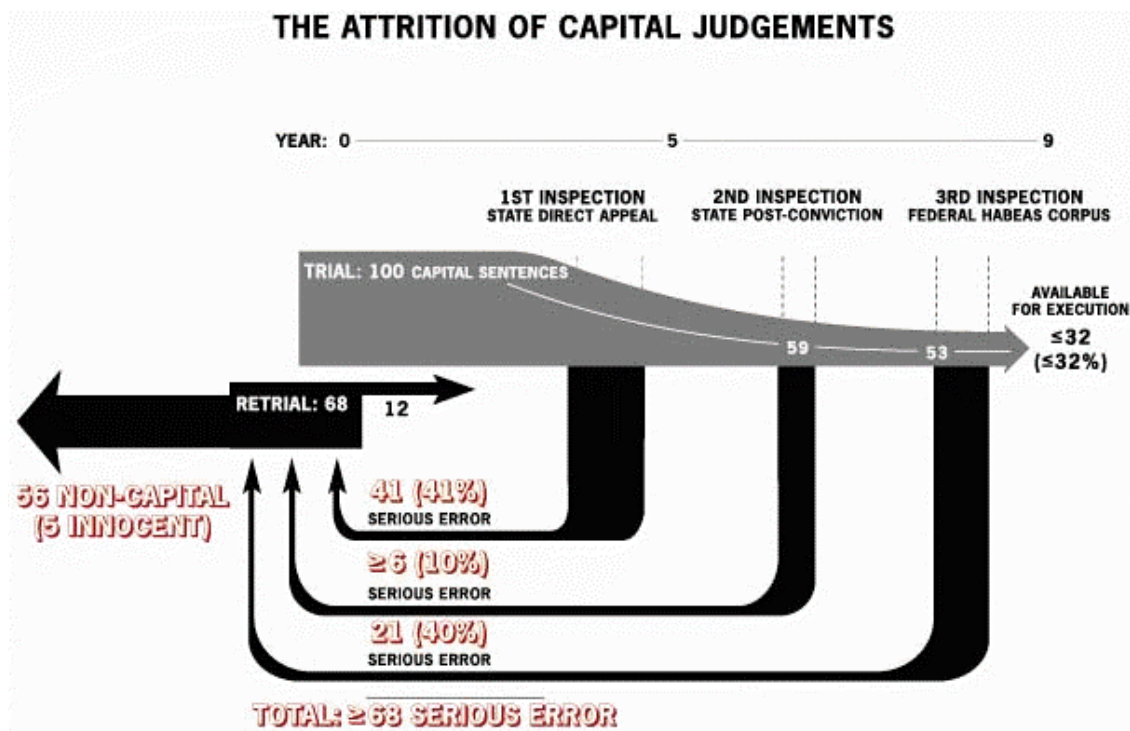
system. The “overall *success* rate” is the proportion of capital judgments that underwent, and *passed*, the three-stage judicial inspection process during the study period. The “overall *error* rate” is the reverse: the proportion of fully reviewed capital judgments that were *overturned* at one of the three stages due to serious error.³⁹ **Nationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%.**⁴⁰

- “Serious error” is error that **substantially undermines the reliability of the guilt finding or death sentence imposed at trial.**⁴¹ Each instance of that error warrants public concern. **The most common errors are (1) egregiously incompetent defense lawyering** (accounting for 37% of the state post-conviction reversals), and **(2) prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty** (accounting for another 16%—19%, when all forms of law enforcement misconduct are considered).⁴² As is true of other violations, these two count as “serious” and warrant reversal *only* when there is a reasonable probability that, but for the responsible actor’s miscues, the **outcome of the trial would have been different.**⁴³
- The seriousness of these errors is also revealed by what happens on retrial, when the errors are cured. In our state post-conviction study, an astonishing **82% (247 out of 301) of the capital judgments that were reversed were replaced on retrial with a sentence less than death, or no sentence at all.**⁴⁴ In the latter regard, **7% (22/301) of the reversals for serious error resulted in a determination on retrial that the defendant was not guilty of the capital offense.**⁴⁵
- The result of **very high rates of serious, reversible error** among capital convictions and



sentences, and **very low rates of capital reconviction and resentencing**, is the **severe attrition of capital judgments**. As is illustrated by the flow chart below:

1. For every 100 death sentences imposed and reviewed during the study period, **41 were turned back** at the state direct appeal phase because of serious error. Of the 59 that got through that phase to the second, state post-conviction stage, **at least⁴⁶ 10%—meaning 6 more of the original 100—were turned back** due to serious flaws. And, of the 53 that got through that stage to the third, federal habeas checkpoint, **40%—an additional 21 of the original 100—were turned back** because of serious error. All told, at least **68 of the original 100 were thrown out because of serious flaws**, compared to only 32 (or less) that were found to have passed muster—**after** an average of **9-10 years** had passed.
2. And among the individuals whose death sentences were overturned for serious error, 82% (56 in our example) were found on retrial **not** to have deserved the death penalty, including **7% (5) who were *found innocent of the offense***.





- High error rates pervade American capital-sentencing jurisdictions, and are geographically dispersed. Among the 26 death-sentencing jurisdictions with at least one case reviewed in both the state and federal courts and as to which information about all three judicial inspection stages is available:
 1. **24 (92%)** have overall error rates of **52% or higher**;
 2. **22 (85%)** have overall errors rates of **60% or higher**;
 3. **15 (61%)** have overall error rates of **70% or higher**.
 4. Among other states, Maryland, Georgia, Alabama, Mississippi, Indiana, Oklahoma, Wyoming, Montana, Arizona, and California have overall error rates of **75% or higher**.⁴⁷
- It sometimes is suggested that Illinois, whose governor declared a moratorium on executions in January 2000 because of a spate of death row exonerations there,⁴⁸ generates “uniquely” flawed death sentences.⁴⁹ Our data dispute this suggestion: **The overall rate of serious error found to infect Illinois capital sentences (66%) actually is slightly lower than the nationwide average (68%).**⁵⁰
- High error rates have persisted for decades. A **majority** of all cases reviewed in **20 of the 23 study years**—including in 17 of the last 19 years—were found seriously flawed. In **half** of the years studied, the error rate was **over 60%**. Although error rates detected on state direct appeal and federal habeas corpus dropped some in the early 1990s, they went back up in 1995⁵¹. The amount of error detected on state post-conviction has apparently *risen throughout* the 1990s.⁵²
- The **68% rate of capital error** found by the three stage inspection process is **much higher than the error rate of less than 15%** found by those same three inspections in **noncapital criminal**



cases.⁵³

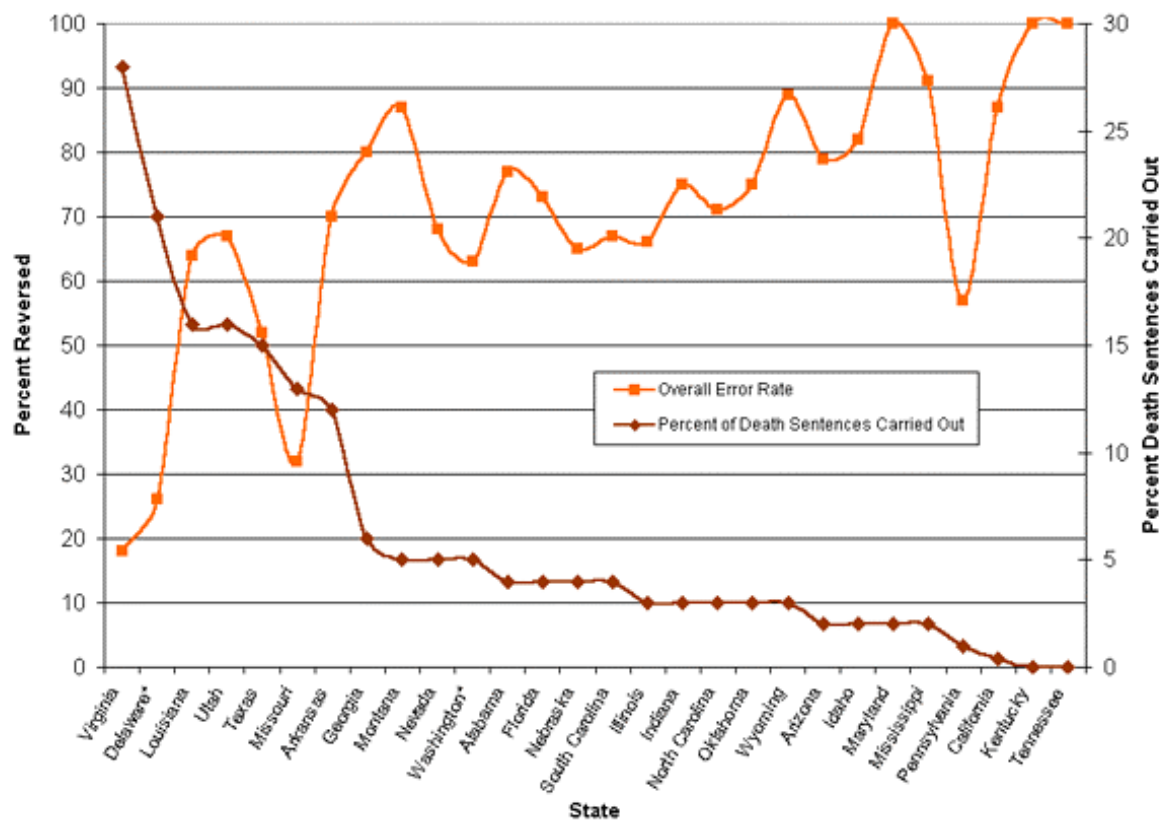
- Appointed federal judges are sometimes thought to be more likely to overturn capital sentences than state judges, who almost always are elected in capital-sentencing states.⁵⁴ In fact, state judges are the first and most important line of defense against erroneous death sentences. They found serious error in and reversed **90% (2,133 of the 2,370)** capital sentences that were overturned during the study period.⁵⁵
- Under current state and federal law, capital prisoners have a legal right to one round of direct appellate, state post-conviction and federal habeas corpus review.⁵⁶ **The high rates of error found at each stage—including even at the last stage—and the persistence of high error rates over time and across the nation, confirm the need for multiple judicial inspections.** Without compensating changes at the front-end of the process, the contrary policy of cutting back on judicial inspection makes no more sense than responding to the insolvency of the Social Security System by forbidding it to be audited.
- Finding all this error takes time. Calculating the amount of time using information in published decisions is difficult. Only a small percentage of direct appeals decisions report the sentence date. By the end of the habeas stage, however, a larger proportion of sentencing dates is reported in one or another decision in the case. Accordingly, it is possible to get a good sense of timing for only the 599 cases that were finally reviewed on habeas corpus. Among those cases:
 1. It took an average of **7.6 years** after the defendant was sentenced to die to complete federal habeas consideration in the 40% of habeas cases in which reversible error was found.



2. In the cases in which no error was detected at the third inspection stage and an execution occurred, **the average time between sentence and execution was 9 years**. Matters did not improve over time. **In the last 7 study years (1989-95), the average** time between sentence and execution **rose to 10.6 years**.⁵⁷
- High rates of error, and the time consequently needed to filter out all that error, frustrate the goals of the death penalty system. Figure 1 below compares the overall rate of error detected during the state direct appeal, state post-conviction, and federal inspection process in the 28 states with at least one capital case in which both inspections have been completed (the orange line), to the percentage of death sentences imposed by each state that it has carried out by execution (the red line).⁵⁸ In general, **where the rate of serious reversible error in a state's capital judgments reaches 55% or above (as is true for the vast majority of states), the state's capital punishment system is effectively stymied—with its proportion of death sentences carried out falling below 7%**.



Figure 1. Overall Error Rate and
Percent of Death Sentences Carried Out, 1973-95





The recent rise in the number of executions⁵⁹ is not inconsistent with these findings. Instead of reflecting improvement in the *quality* of death sentences under review, the rising number of executions may simply reflect how many *more* sentences have piled up for review. If the error-induced pile-up of cases is the *cause* of rising executions, their rise provides no proof that a cure has been found for disturbingly high error rates. To see why, consider a factory that produces 100 toasters, only 32 of which work. The factory's problem would not be solved if the next year it made 200 toasters (or added 100 new toasters to 100 old ones previously backlogged at the inspection stage), thus doubling its output of working products to 64. With, now, 136 duds to go with the 64 keepers, the increase in the latter would simply mask the persistence of crushing error rates.

The decisive question, therefore, is not the *number* of death sentences carried out each year, but the *proportion*. And as Figure 2 below shows.⁶⁰

- In contrast to the annual *number* of executions (the middle line in the chart), **the proportion of death row inmates executed each year** (the bottom line) **has remained remarkably stable—and extremely low**. Since post-*Furman* executions began in earnest in 1984, **the nation has executed an average of about 1.3% of its death row inmates each year**; in no year has it ever carried out more than **2.6 percent—or 1 in 39**—of those on death row.⁶¹
- Figure 1 thus suggests that **executions are increasing, not because of improvements in the quality of capital judgments, but instead because so many more people have piled up on death row that, even consistently tiny proportions of people being executed—because of consistently prodigious error and reversal rates—are prompting the number of executions to rise**.⁶² As in our factory example, rising output does not indicate better products, and instead



seems to mask the opposite.

Figure 2. Persons on Death Row and Percent and Number Executed, 1974-99

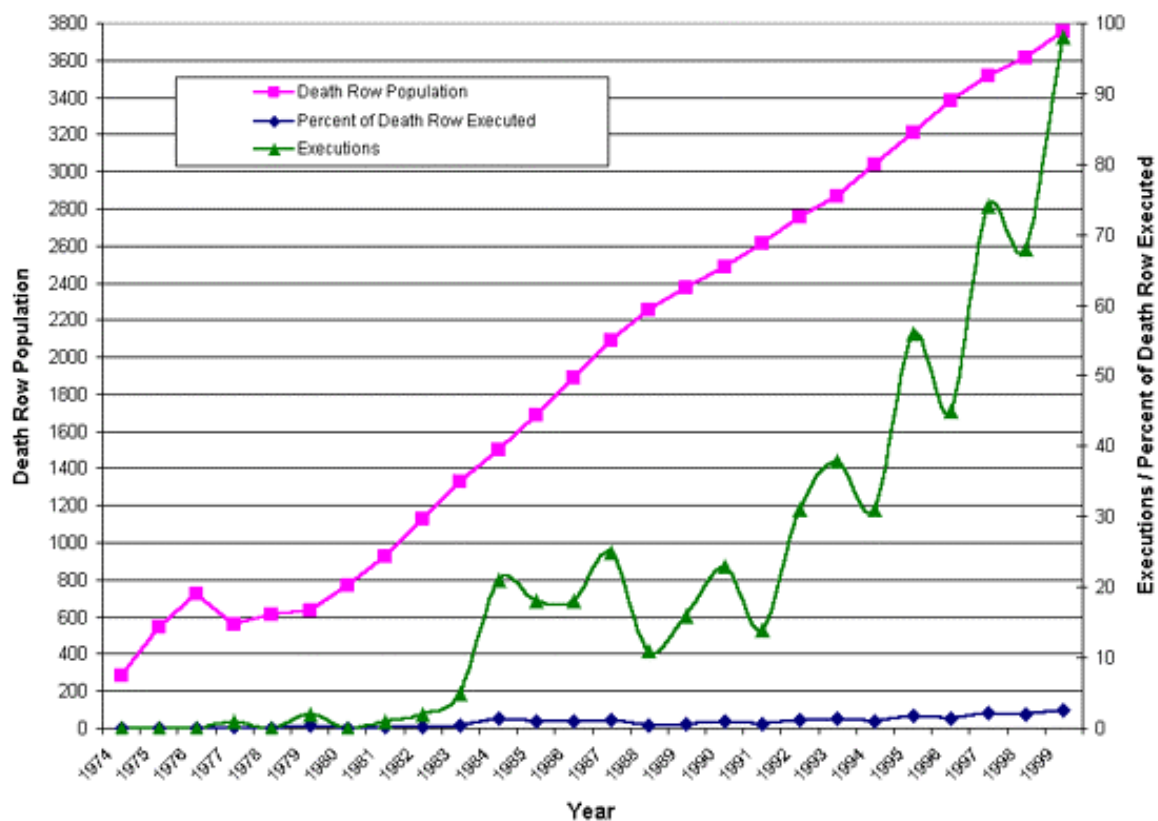


Figure 1, p. 11 above, illustrates another finding of interest that recurs throughout this Report: The pattern of capital outcomes for the State of **Virginia** is highly anomalous, given the State's **high execution rate (nearly *double* that of the next nearest state, and 5 times the national average)** and its **low rate of capital reversals (nearly *half* that of the next nearest state, and less than *one-fourth* the national average)**. The discrepancy between Virginia and other capital-sentencing states on this and other measures⁶³ presents an important question for further study: Are Virginia capital judgments in fact half as prone to serious error as the next nearest state and 4 times better than the national average?⁶⁴ Or, on the other hand, are its courts more tolerant of serious error? We will address this issue below and in a subsequent report.⁶⁵

III. Confirmation from a Parallel Study

Results from a parallel study by the U.S. Department of Justice suggest that our **32%**, or **one-in-three**, figure for valid death sentences actually overstates the chance of execution:

- Included in the Justice Department study is a report of the outcome as of the end of 1998 of the 263 death sentences imposed in 1989.⁶⁶ A final disposition of only 103 of the 263 death sentences had been reached nine years later.⁶⁷ Of those 103, 78 (76%) had been overturned by a state or federal court. Only 13 death sentences had been carried out.⁶⁸ So, for every **one** member of the death row class of 1989 whose case was finally reviewed and who was executed as of 1998, **six** members of the class had their cases overturned in the courts.
- Because of the intensive review needed to catch so much error, 160 (61%) of the 263 death sentences imposed in 1989 were still under scrutiny nine years later.⁶⁹



- The approximately 3,600 people on death row today have been waiting an average of 7.4 years for a final declaration that their capital verdict is error-free—or, far more probably, that it has to be scrapped because of serious error.⁷⁰
- Of the approximately 6,700 people sentenced to die between 1973 and 1999, only 598—**less than one in eleven**—were executed.⁷¹ About four times as many had their capital judgments overturned or gained clemency.⁷²

IV. Implications of Central Findings

To help appreciate these findings, consider a scenario that might unfold immediately after any death sentence is imposed in the U.S. Suppose the defendant, or a relative of the victim, asks a lawyer or the judge, “What now?”

Based on almost a quarter century of experience in thousands of cases in 28 death-sentencing states in the U.S. between 1973 and 1995, a responsible answer would be: “*The capital conviction or sentence will probably be overturned due to serious error. It’ll take nine or ten years to find out, given how many other capital cases being reviewed for likely error are lined up ahead of this one. If the judgment is overturned, a lesser conviction or sentence will probably be imposed.*”⁷³

As anyone hearing this answer would probably conclude as a matter of sheer common sense, all this error, and all the time needed to expose it, are extremely burdensome and costly:

- Capital trials and sentences cost more than noncapital ones.⁷⁴ Each time they have to be done over—as happens 68% of the time—that difference grows exponentially.
- The error-detection system all this capital error requires is itself a huge expense—apparently



*millions of dollars per case.*⁷⁵

- Many of the resources currently consumed by the capital system are not helping the public, or victims,⁷⁶ obtain the valid death sentences for egregious offenses that a majority support. Given that nearly 7 in 10 capital judgments have proven to be seriously flawed, and given that 4 out of 5 capital cases in which serious error is found turn out on retrial to be more appropriately handled as non-capital cases (and in a sizeable number of instances, as non-murder or even *non-criminal* cases),⁷⁷ it is hard to escape the conclusion that large amounts of resources are being wasted on cases that should never have been capital in the first place.
- Public faith in the courts and the criminal justice system is another casualty of high capital error rates.⁷⁸ When most capital-sentencing jurisdictions carry out fewer than 6% of the death sentences they impose,⁷⁹ and when the nation as a whole never executes more than 2.6% of its death population in a year,⁸⁰ the retributive and deterrent credibility of the death penalty is low.
- When condemned inmates turn out to be *innocent*⁸¹—an error that is different in its consequences, but is *not* evidently different in its causes, from the other serious error discussed here⁸²—there is no accounting for the cost: to the wrongly convicted;⁸³ to the family of the victim, whose search for justice and closure has been in vain; to later victims whose lives are threatened—and even taken—because the real killers remain at large;⁸⁴ to the public's confidence in law and legal institutions; and to the wrongly *executed*, should justice miscarry at trial, and should reviewing judges, harried by the amount of error they are asked to catch, miss one.⁸⁵

If what were at issue here was the fabrication of toasters (to return to our prior example), or the processing of social security claims, or the pre-takeoff inspection of commercial aircraft—



or the conduct of *any other* private- or public-sector activity—neither the consuming and the taxpaying public, nor managers and investors, would for a moment tolerate the error-rates and attendant costs that dozens of states and the nation as a whole have tolerated in their capital punishment system *for decades*. Any system with this much error and expense would be halted immediately, examined, and either reformed or scrapped.

The question this Report poses to taxpayers, public managers and policymakers, is whether that same response is warranted here, when what is at issue is not the content and quality of tomorrow's breakfast, but whether society has a swift and sure response to murder, and whether thousands of men and women condemned for that crime in fact deserve to die.

* * * * *

The remainder of this Report more fully describes our findings. Part V describes the review process for capital sentences. Part VI describes our study methodology. Parts VII, VIII and IX more thoroughly document and display our findings about the frequency with which reversible error is found in capital judgments in the United States between 1973 and 1995, and the time taken to find those errors. Part VII examines relevant factors at the national level. Part VIII does so using comparative analyses of the 28 capital-sentencing states in which at least one case had advanced through the entire post-sentence inspection process. And Part IX does the same thing, comparing the 8 federal judicial circuits and corresponding regions into which they are divided. After presenting a variety of information, Parts VII, VIII and IX preliminarily address the potential causes of so much error in capital sentencing. Finally, Part X briefly describes the more sophisticated analyses we will undertake in the next phase of our study (to be published in the Fall) to set the stage for proposed reforms.



V. The Capital Review Process

This phase of our study asks what state and federal courts discovered when they inspected capital convictions and sentences imposed during the 23-year study period. In a later phase, we will consider some candidate causes of the evidently irrational patterns of error that those courts have detected. In order to frame these questions, we first describe the capital-inspection process whose results we are studying.

A. First Inspection: State Direct Appeal

In *Furman v. Georgia* and later cases, the Supreme Court suggested that state high courts were required to review all death sentences on direct review.⁸⁶ As a consequence, the law of nearly all states requires that capital judgments be automatically appealed.⁸⁷ And as a matter of fact, virtually all capital judgments *are* appealed.⁸⁸ In all but two of our study states, that appeal ran directly from the trial court to the highest court in the state with criminal jurisdiction, which is typically the state supreme court or, as in Oklahoma and Texas, a “court of criminal appeals.”⁸⁹ In Alabama and Ohio, there were two rounds of appeals in the state direct review process—first to an intermediate court of criminal appeals, and then to the state supreme court.⁹⁰ Reversal of a capital conviction or sentence on direct appeal requires a showing of “serious error” as defined earlier.⁹¹

In nearly all cases in which the direct appeal decision runs entirely against the defendant, he or she seeks certiorari in the United States Supreme Court.⁹² Although in the vast majority of cases, the Supreme Court denies review, it occasionally undertakes merits review and either affirms or reverses.⁹³ Certiorari proceedings are typically understood to be a part of the direct review, or pre-finality, stage of a criminal case,⁹⁴ and they are treated that way here. If the Supreme Court reversed a capital conviction or sentence on direct review of the state high court’s decision, we counted that decision as a direct-appeal finding of



serious (indeed, in all such cases, federal constitutional⁹⁵) error.

B. Second Inspection: State Post-Conviction

In order to seek federal habeas review of a constitutional claim, the prisoner must have exhausted at least one full round of state judicial remedies for the claim.⁹⁶ There are certain kinds of claims that cannot easily be exhausted at trial and on direct appeal because the defendant cannot discover or adequately litigate the facts or the legal principles supporting the claims at trial or on direct appeal.⁹⁷ This sometimes occurs (1) because a police officer, prosecutor or other state actor has suppressed the relevant facts (which may itself have violated the Constitution, as when the suppressed facts show the defendant is innocent,⁹⁸ or may keep the defendant from establishing the violation of some other principle, as when police suppressed evidence that they coerced the defendant into confessing, or when the prosecutor hid his efforts to keep African-Americans off of criminal juries⁹⁹); (2) because the agent of the violation was the defendant's own trial or direct appeal attorney (as in the case of ineffective assistance of counsel), thus preventing the defendant from recognizing or fairly litigating the claim;¹⁰⁰ (3) because the evidence establishing the claim was not reasonably available to the defense at the time of trial or appeal for some other reason¹⁰¹ (as when counsel later discovers that the trial judge was corrupt¹⁰² or biased,¹⁰³ that a juror lied during the jury selection process,¹⁰⁴ or that the bailiff secretly lobbied the jury to convict or condemn¹⁰⁵); or (4) because the legal rule establishing the claim did not exist at the time of trial or appeal and the rule applies "retroactively" to the prisoner's case.¹⁰⁶

Because the Supreme Court has suggested that states are constitutionally required to provide adequate state post-conviction remedies for federal constitutional claims that cannot properly be pursued at trial and on direct appeal,¹⁰⁷ and because federal habeas law rewards states when they *do* provide such



remedies,¹⁰⁸ all states now do so.¹⁰⁹ State capital prisoners seeking to preserve their access to federal habeas review accordingly are obliged to exhaust those remedies, and the professional obligation of capital attorneys to subject their clients' convictions and sentences to searching scrutiny compels them to pursue state post-conviction review in nearly all capital cases.¹¹⁰

State post-conviction review takes a variety of forms under a variety of names (*e.g.*, habeas corpus, coram nobis, extraordinary motion for new trial, and state post-conviction procedures acts). Traditionally, such proceedings have taken place after the completion of state direct appeal and have entailed the filing of a petition for review with the judge who presided over the original trial, and the appeal of any adverse rulings up to an intermediate state appellate court and then to the state high court.¹¹¹ More recently, an increasing number of states (1) have adopted "unitary appeal" procedures that require direct appeal and state post-conviction proceedings to take place nearly simultaneously,¹¹² and/or (2) have required prisoners to commence state post-conviction proceedings in a state intermediate or high court that either can grant or deny state post-conviction relief once and for all, or can remand the case to a trial court to take evidence. In most states, state post-conviction review is limited to claims that were not and could not have been raised on direct appeal and that arise under state or federal *constitutional* law.¹¹³

Most capital prisoners also seek U.S. Supreme Court review on certiorari of adverse state post-conviction proceedings, which the Supreme Court (very) occasionally grants.¹¹⁴ In the event that the Court does so, and grants relief, our classification scheme counts that decision as part of the state post-conviction inspection phase.¹¹⁵



C. Third Inspection: Federal Habeas Corpus

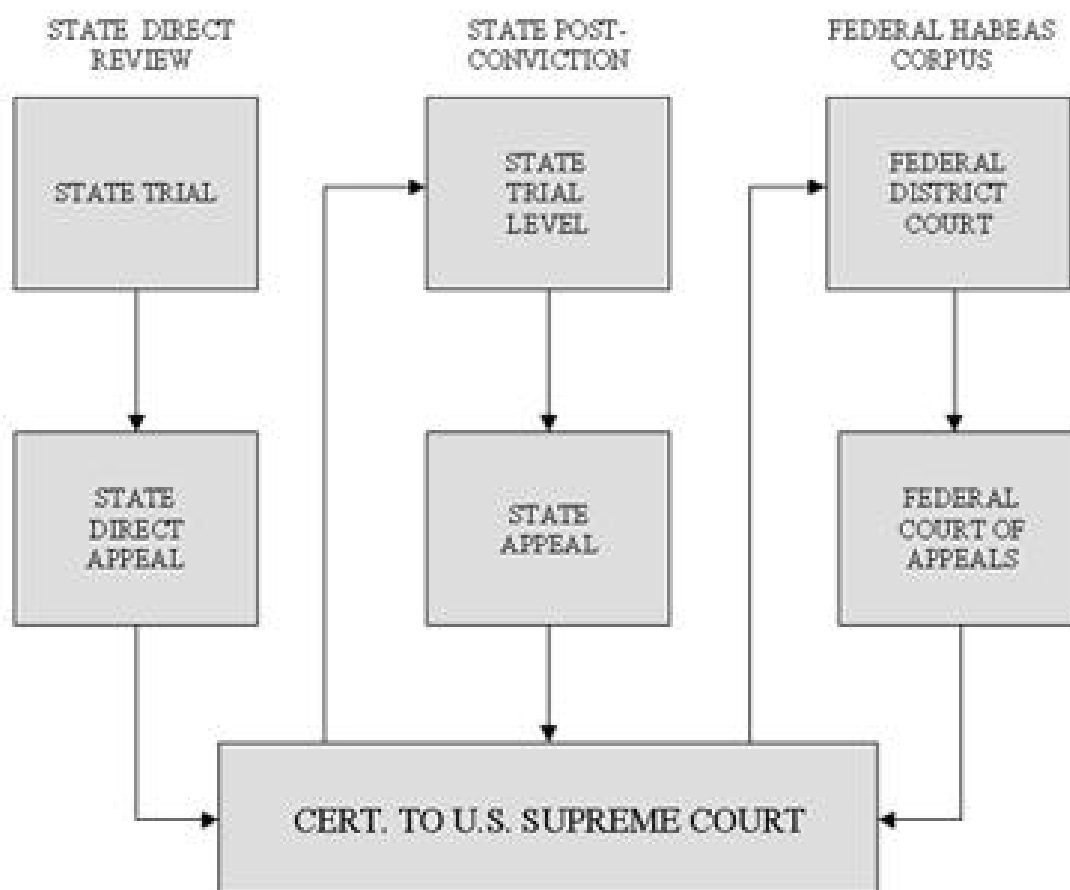
Because federal habeas corpus practice is controlled by federal statute,¹¹⁶ it is far more uniform across states than are direct appeal and state post-conviction proceedings. Habeas proceedings begin with the filing of a petition in a United States District Court in the state in which the defendant was convicted and is incarcerated.¹¹⁷ If relief is denied, and if (but only if) the prisoner can show that his petition presents a substantial constitutional claim, he may appeal the denial to a federal circuit court,¹¹⁸ and if the district court opinion is affirmed and a stay of execution is available, he may petition the Supreme Court for certiorari.¹¹⁹

Although habeas proceedings at the district court level are a matter of statutory right, stays of execution are not, thus limiting capital habeas proceedings to cases in which the prisoner can secure a federal stay of execution based on a substantial constitutional claim.¹²⁰ Habeas relief is limited to a category of “serious error” that is even narrower than the analogous of category of “serious” direct-appeal error.¹²¹

A stylized depiction of the post-trial review process in capital cases that we are studying here is set out below.



THE CAPITAL CRIMINAL PROCESS: TRIAL THROUGH STATE AND FEDERAL POST-CONVICTION





VI. The Study

This study began in 1991 when the Chair of the Senate Judiciary Committee asked the lead author of this Report to calculate the frequency of relief in capital habeas corpus cases.¹²² Simply identifying the relevant cases turned out to be a monumental task, because there is no single repository of capital habeas corpus decisions either nationally or even (especially at the time) in most death-sentencing states, and keyword searches of reported cases are substantially under-inclusive (because some decisions that are capital are not identified as such) and over-inclusive (because many cases in which a death sentence was not imposed either began as capital cases or refer to capital cases). Working with volunteer law student assistants, therefore, the senior author undertook a painstaking search for capital habeas cases relying on (1) the NAACP Legal Defense Fund's (LDF's) quarterly death row census,¹²³ (2) computerized and book research, and (3) a series of conversations with staff members of state death penalty resource centers and other local death penalty lawyers who were familiar with some of the cases and death row inmates in their states.

In late 1995, the study was expanded from a simple count of cases and their outcomes to a search for information that might help explain why relief is granted in so many capital habeas cases. In that year, a team with social scientific expertise was assembled, and began collecting approximately 1300 items of information about each case—relating to defendants, victims, offenses, evidence, lawyers, judges, timing, claims, defenses, court procedures, and the like. We soon determined that the only reasonably accessible source of this kind of information was published judicial decisions of federal habeas courts themselves and of state courts when they denied relief at earlier inspection stages.¹²⁴

During 1996, 1997 and 1998, the senior authors developed, tested and revised a study instrument,



developed and fine-tuned a set of research protocols, assembled and trained a series of law student researchers to collect the information called for by the study information, periodically checked and rechecked their completed forms, and in this way collected data on 599 initial federal habeas corpus cases and 173 second or successive federal habeas corpus cases. The research protocol called for researchers first to identify the “final federal habeas corpus decision” (the decision of the last and highest federal court to finally resolve the merits of the habeas application), then to identify all other available state and federal decisions addressing the same capital judgment (*i.e.*, either the capital conviction, sentence or both), and then to extract from each of those decisions a variety of information that was then coded onto the research instrument. Beginning in 1997 and continuing through 1999, the information on the study instrument in each case was entered into a data base and again checked and rechecked.

We collected the results of all federal habeas corpus decisions that became “final” between January 1, 1973 and October 2, 1995.¹²⁵ By “final,” we mean that (1) the highest federal court to which the case has been timely brought either by the filing of a petition or an appeal has finally ruled on the validity of the capital judgment (meaning both the conviction and death sentence), (2) the time for reconsideration or rehearing by that court has passed, and (3) the time for U.S. Supreme Court review has passed without that Court’s choosing to review the decision or, if it did choose to review it, with its own final merits decision having been rendered. Here again, a finding of “serious error” is made only if the capital conviction, the capital sentence, or both were overturned due to prejudicial, reversible error.¹²⁶

Early on, it appeared that a major factor in determining outcomes in federal habeas cases was the state that imposed the capital judgment under review. For example, although judges of the same (Eleventh) federal circuit court reached nearly all of the final federal habeas decisions in cases from Florida, Alabama

and Georgia, their reversal rates in cases emanating from each of those three states were quite different (respectively, 37%, 45%, and 65%), suggesting that there was something about each particular state's death sentences that made them more or less error-prone.¹²⁷ To study this possibility, we collected information (in 1997 through 1999) about how states differ in regard to their demography, law, politics, judicial organization and funding, death-sentencing history and the like.

An early hypothesis in this regard was that the rate of error found by federal habeas proceedings might be related to the rate of error found in state direct appeals—either because lax state inspections might impose extra work on later federal ones (suggesting an inverse relationship between error rates found at the two stages), or because excessive amounts of error might overwhelm judges at the first checkpoint, permitting considerable remaining error to slip through and be caught (if at all) by judges at a later checkpoint (suggesting a more direct relationship between error rates found at the two stages).¹²⁸ To test this hypothesis, we collected information about each state's capital direct appeal outcomes—prompting our second major study, covering the approximately 4,600 state direct appeal decisions during the 1973-1995 study period. Working back and forth from the LDF death row census and computerized legal research data bases, we compiled a list of all capital direct appeal decisions in the study period, then collected a small set of information about each case from published opinions that our search identified.

We collected the results of all direct appeal decisions that became “final” between January 1, 1973 and December 31, 1995. By “final,” we mean that (1) the highest state court with jurisdiction over the appeal had finally ruled on the validity of the judgment (meaning both the conviction and death sentence), (2) the time for reconsideration by that court had passed, and (3) the U.S. Supreme Court did not review the decision or, if it did review it, had rendered a final merits decision by the end of 1995.¹²⁹ A finding of



“serious error” was made if reversible error was found and the capital conviction, sentence or both were overturned.¹³⁰

Substantially later in the process, we began collecting data on state post-conviction outcomes. Those data are especially hard to find. Unlike state direct appeal decisions and appellate-level federal habeas decisions, which almost always are published in capital cases, state post-conviction decisions often are not published, even in capital cases. This is particularly so because state post-conviction review often begins—and when it leads to reversal, ends—in trial courts that almost never publish their decisions.¹³¹ Nor is there any central repository of information about when and where capital state post-conviction petitions are *pending*, making it difficult to ascertain (1) the number of state post-conviction cases that actually were *decided* at that stage during the study period (as opposed to the number that were *available* for resolution at that stage, because they had “cleared” state direct appeal) and, thus, (2) the proportion of *actually decided* cases in which “serious error” was found.

For these reasons, as is more fully described in the introduction to Appendix C, we limited our collection of state post-conviction data to a list of known state post-conviction *reversals* of capital judgments in the study states in which capital cases had progressed significantly beyond the direct appeal stage by the end of 1995. This list, set out in full in Appendix C, enables us to derive an interesting, though incomplete, picture of the rates of error detected by state post-conviction courts in reviewing death sentences. To do so, we make three obviously inaccurate, but reliably *conservative*, assumptions: First we assume that we have a *complete* list of capital state post-conviction reversals due to serious error that occurred during the study period. In fact, our list is incomplete, although it probably contains most such reversals. Second, we assume that every capital case that was *available* for state post-conviction review



because it had “cleared” direct appeal during the 1973-1995 study period was *finally decided* on state post-conviction during that period. In fact, many of the “available” cases were *not* finally decided and were still being litigated on state post-conviction as of the end of 1995. Taken together, these two assumptions lead to a third assumption—that every capital judgment that was available for state post-conviction review and is not known to have been reversed due to serious error during the study period was affirmed. Calculating error rates in this manner systematically *underestimates* those rates (and overstates success rates) by (1) underestimating the numerator (the number of serious errors found, which we have undercounted) and (2) *overstating* the denominator (the number of cases *finally reviewed* for serious error, for which we have substituted the obviously larger number of cases *available* for review).¹³² Accordingly, our estimates of the rate of serious error found on state post-conviction review are understated and conservative.

Analysis of the data collected in our habeas corpus and direct appeal studies began in earnest in mid-1999 and continues at this writing, along with analyses of our newer, state post-conviction data. This Report presents the findings of our initial analyses. These focus on the basic operation and outcomes of the post-trial system for reviewing capital judgments: How many and what proportion of death sentences were reviewed at each of the three inspection stages during the study period—nationally, in each capital-sentencing state, and in each federal judicial circuit and corresponding geographic region? How much error was found, and by whom? How long did the process take? How do states compare in their sentencing and execution rates and along other dimensions that might help explain differences in the frequency of capital-sentencing error?