

A Broken System:

Error Rates in Capital Cases, 1973-1995

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Executive Summary

There is a growing bipartisan consensus that flaws in America's death-penalty system have reached crisis proportions. Many fear that capital trials put people on death row who don't belong there. Others say capital appeals take too long. This report—the first statistical study ever undertaken of modern American capital appeals (4,578 of them in state capital cases between 1973 and 1995)—suggests that *both* claims are correct.

Capital sentences do spend a long time under judicial review. As this study documents, however, **judicial review takes so long precisely *because* American capital sentences are so persistently and systematically fraught with error that seriously undermines their reliability.**

Our 23 years worth of results reveal a death penalty system collapsing under the weight of its own mistakes. They reveal a system in which lives and public order are at stake, yet for decades has made more mistakes than we would tolerate in far less important activities. They reveal a system that is wasteful and broken and needs to be addressed.

Our central findings are as follows:

- Nationally, during the 23-year study period, **the overall rate of prejudicial error in the American capital punishment system was 68%**. In other words, courts found **serious, reversible error in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during the period.**
- Capital trials produce **so many mistakes** that it takes three judicial inspections to catch them — leaving **grave doubt whether we *do* catch them all**. After state courts threw out **47%** of death sentences due to serious flaws, a later federal review found “serious error”—error undermining the reliability of the outcome—in **40%** of the *remaining* sentences.

- Because state courts come first and see *all* the cases, they do most the work of correcting erroneous death sentences. Of the **2,370 death sentences** thrown out due to serious error, **90%** were overturned by **state judges**—many of whom were the very judges who imposed the death sentence in the first place; nearly all of whom were directly beholden to the electorate; and none of whom, consequently, were disposed to overturn death sentences except for very good reason. This does not mean that federal review is unnecessary. Precisely *because* of the huge amounts of serious capital error that state appellate judges are called upon to catch, it is not surprising that a **substantial number of the capital judgments they let through to the federal stage are still seriously flawed**.
- To lead to reversal, error must be serious, indeed. The most common errors—prompting a **majority of reversals** at the state post-conviction stage—are (1) **egregiously incompetent defense lawyers who didn't even look for—and demonstrably missed—important evidence that the defendant was innocent or did not deserve to die;** and (2) **police or prosecutors who *did* discover that kind of evidence but *suppressed* it, again keeping it from the jury.** [Hundreds of examples of these and other serious errors are collected in Appendix C and D to this Report.]
- High error rates put many individuals at risk of wrongful execution: **82%** of the people whose capital judgments were overturned by state post-conviction courts due to serious error were found to deserve a sentence **less than death** when the errors were cured on retrial; **7% were found to be innocent of the capital crime.**
- High error rates persist over time. More than **50%** of all cases reviewed were found seriously

flawed in **20 of the 23 study years**, including 17 of the last 19. In **half** the years, including the **most recent one**, the error rate was **over 60%**.

- High error rates exist across the country. **Over 90%** of American death-sentencing states have overall error rates of **52% or higher**. **85%** have error rates of **60% or higher**. **Three-fifths** have error rates of **70% or higher**.
- Illinois (whose governor recently declared a moratorium on executions after a spate of death-row exonerations) does not produce atypically faulty death sentences. **The overall rate of serious error found in Illinois capital sentences (66%) is very close to—and slightly lower than—the national average (68%)**.
- Catching so much error takes time—a national average of **9 years** from death sentence to the last inspection and execution. By the end of the study period, that average had risen to **10.6 years**. **In most cases, death row inmates wait for years for the lengthy review procedures needed to uncover all this error. Then, their death sentences are reversed.**
- This much error, and the time needed to cure it, impose **terrible costs on taxpayers, victims' families, the judicial system, and the wrongly condemned. And it renders unattainable the finality, retribution and deterrence that are the reasons usually given for having a death penalty.**

Erroneously trying capital defendants the first time around, operating the multi-tiered inspection process needed to catch the mistakes, warehousing thousands under costly death row conditions in the meantime, **and having to try two out of three cases again** is irrational.

This report describes the extent of the problem. A subsequent report will examine its causes and

their implications for resolving the death penalty crisis.

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