

information (which we mark with a plus sign (+)) report on a mixture of actions by the relevant state courts *and* the federal courts in the circuit.

In this section, we focus on information generated either by the federal courts alone, or by them in conjunction with state courts.

Table 25 displays the rates of error detected on federal habeas review and overall (state and federal review) by circuit. Figure 33 below compares the circuits' error detection rates on habeas.

**Table 25: Error Rates Detected on Habeas Review
and Overall (State Direct Appeal and Federal Review Combined)
by Federal Circuit/Multi-State Regions**

Circuit	Number Re-viewed on Habeas	Number Re-versed on Habeas	Error Rate Found on Habeas	Overall Error Rate (Region)
Sixth	2	2	100%	100%
Ninth	34	21	62%	78%*
Eleventh	215	108	50%	77%
Tenth	17	8	47%	74%
Seventh	14	6	43%	68%
Fourth	52	8	15%	62%
Fifth	200	63	32%	61%
Third	7	2	29%	55%*
Eighth	58	19	33%	54%
National Composite	599	237	40%	68%

* Does not include state post-conviction information for Washington (9th Cir.) or Delaware (3d Cir.)

Source: HCDB; DADB; Appendix C; DPCen

Figure 33. Rate of Errors Detected on Habeas in Circuits with Over 10 Cases, 1973-95

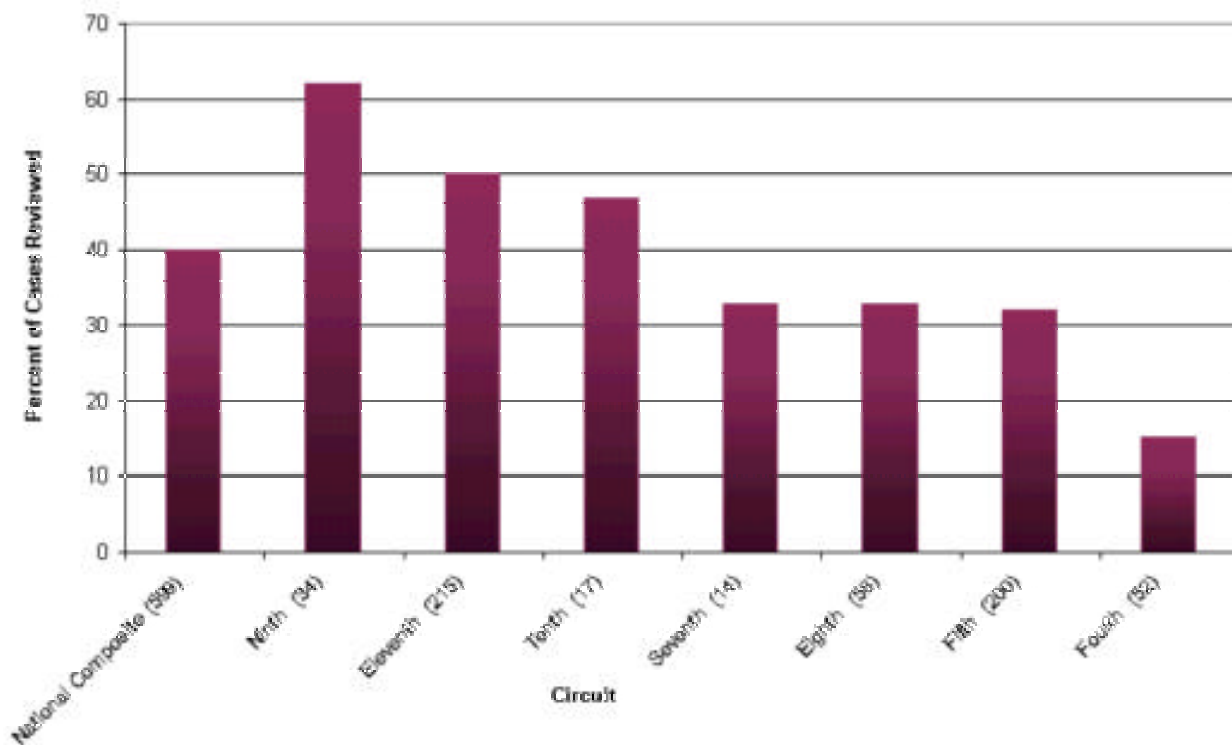


Table 25 and Figure 33 reveal that:

- During the 23-year study period, **7 of the 9 federal death-penalty circuit courts (including the three circuits with the most cases) found serious error in a third or more of the death sentences they reviewed** at the final (federal habeas) inspection stage— notwithstanding that two state court inspections had already occurred.
- **Over half the circuits detected error 40% or more of the time .**
- **The Eleventh Circuit—the nation’s most active capital reviewing federal court** (with jurisdiction over Alabama, Florida and Georgia capital judgments)—**detected error in 50% of the death sentences it reviewed**.
- Even after excluding the Sixth Circuit (which only reviewed two capital judgments), there is much wider variation among the rates of serious error detected by the circuits on federal habeas review *alone* (ranging from 15% to 62%) than the rates of error detected overall by a *combination of state and federal courts* (which only range from 54% to 78%). This indicates, as we have already suggested,²²⁷ that state and federal court review may somewhat compensate for each other, tending to moderate variations that occur when the results of only state court or federal court inspection is considered.
- Although there is substantial variation among circuits, there also—as we already have noted (*see* Table 8 and Figure 8, *supra* pp. 60, 61)—is substantial variation in federal habeas error detection *within* circuits. The Fifth Circuit, for example, finds error in 71% of the Mississippi death sentences it reviews but only 26% of the Texas death sentences it reviews—suggesting that more is at issue in determining error detection rates than a federal court’s uniform disposition with regard to error

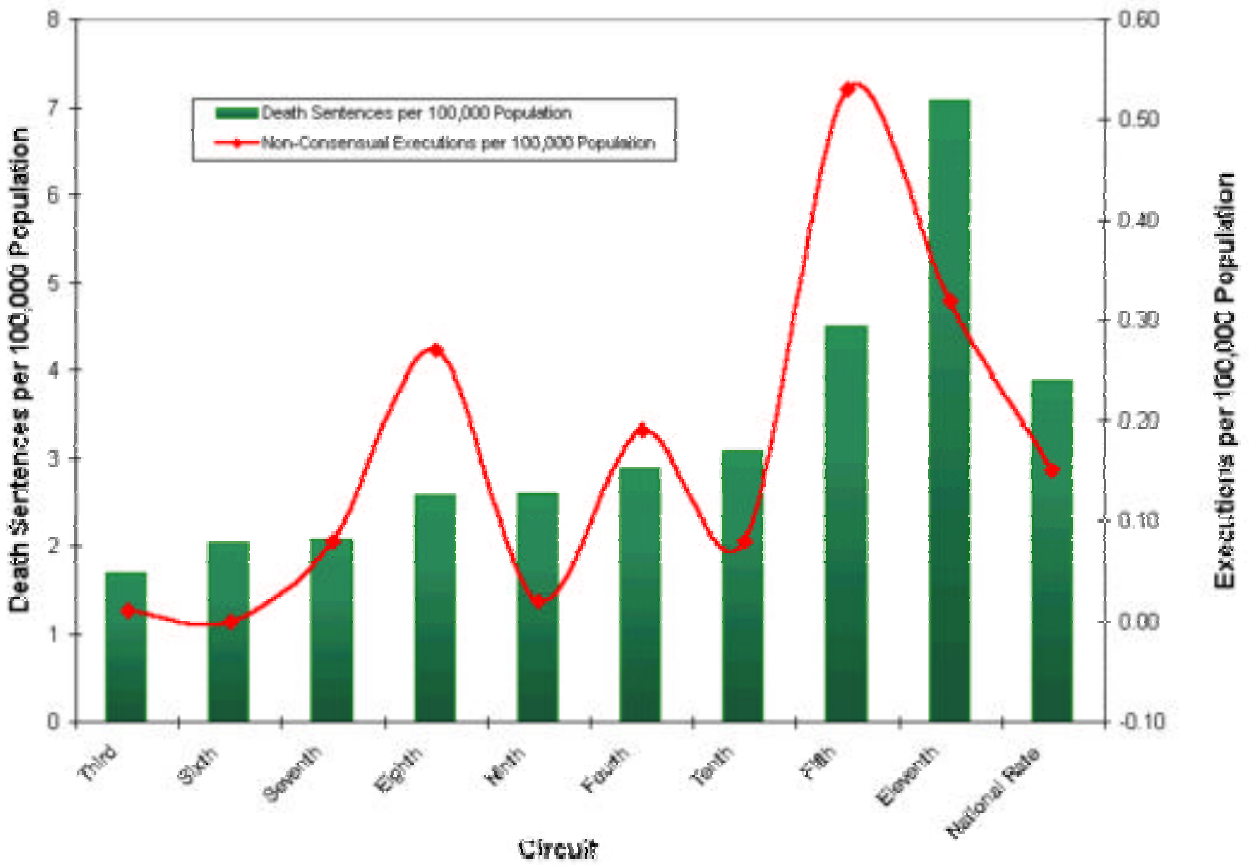
affecting capital sentences.

As did Figure 8 (p. 61) above, Table 25 and Figure 33 identify the Fourth Circuit—with jurisdiction over Virginia, North Carolina, South Carolina and Maryland—as an outlier on the low end of federal habeas corpus error detection. The Fourth Circuit finds error only half as often as the next lowest circuit and just under a third as often as do the other circuits as a whole minus the Fourth.²²⁸ Interestingly, though, as we already have noted (pp. 51, 65-66 above), state courts in three of the four states within the Fourth Circuit—all those save the Virginia courts²²⁹—largely compensate for the Fourth Circuit’s low error detection rate with unusually high direct appeal and state post-conviction error detection rates of their own. Thus, although the Fourth Circuit is way below the other circuits in error detection on *habeas*, when state and federal error detection are combined, the overall rate of error detected in the Fourth Circuit region (62%) is *higher* than the overall rate of error detected in three other regions (the Fifth, Third and Eighth Circuit) and not much lower than the national average (68%). If Virginia (whose Supreme Court rarely detects error) is excluded, the overall error rate for capital judgments from the other three states in the Fourth Circuit region rises to 76%, significantly *above* the national average. The “double whammy” effect noted earlier (p. 66) of distinctly lower error detection rates at the checkpoints operated both by the Virginia Supreme Court and by the U.S. Court of Appeals for the Fourth Circuit thus is a unique feature of Virginia capital judgments.²³⁰

In considering whether Virginia capital judgments are substantially less error prone than all others in the nation or, on the other hand, whether laxer error detection takes place there, the death-sentencing states that surround Virginia and lie within its same federal judicial circuit—Maryland, North Carolina and South Carolina—may be treated as partial “natural controls.”²³¹ Insofar as philosophical, cultural or

historical factors—which probably do not vary much between Virginia and its neighbors—are thought to be the main influences on the amount of expected error in capital judgments, the fact that high capital error rates are consistently found in states bordering Virginia casts doubt on the hypothesis that Virginia capital sentences are starkly less error-prone. For this analysis to show convincingly that Virginia courts are laxer detectors of serious capital error than courts in the surrounding states, there would have to be an explanation for *that* difference among presumably similar states. One such explanation is the unusual extent to which the Virginia courts limit review of capital judgments: (1) enforcing the region’s (and nation’s) strictest procedural default doctrine (the rule permitting even egregious error to be ignored on appeal if it was not objected to at trial); (2) often appointing substandard trial attorneys to represent the indigents who make up 97% of the state’s death row, thus increasing the probability that necessary objections will *not* be made at trial, and thus that appellate review will be cut off; (3) applying a very strict test for reversing capital judgments based on incompetent lawyering (until the Supreme Court overturned Virginia’s test earlier this year²³²; (4) limiting defendants’ ability to petition for a new trial based on innocence to a 21-day period following conviction, the shortest such time-frame in the region (and nation); and (5) failing to provide legal assistance to indigent (meaning nearly all) capital prisoners or funds for it at the state post-conviction phase, thus limiting the capacity of that second inspection (which has proved so important in Maryland, North Carolina, and South Carolina) to detect and correct serious error.²³³ These questions bear further study. We close this section with a circuit comparison documenting the actions of *state officials* within the *states* that are regionally grouped in the respective circuits. Figure 34 compares the circuits based on their component states’ *death sentencing* rates (death sentences per 100,000 population) and *execution* rates (non-consensual executions²³⁴ per 100,000 population).²³⁵

Figure 34. Per Capita Death Sentencing and Per Capita Execution Rates by Circuit, 1973-95



Like their state counterparts,²³⁶ the regional comparisons in Figure 34 show that relatively high *death-sentencing* rates often go hand in hand with relatively low *execution* rates, and vice versa. For example:

- Alabama, Florida and Georgia (the states in the Eleventh Circuit region) impose nearly 60% *more death sentences* per capita than Louisiana, Mississippi, and Texas (the states in the Fifth Circuit region), but carry out 60% *fewer executions*.
- The states in the Eleventh Circuit (Alabama, Florida and Georgia) likewise *sentence* nearly three times as many people to death as Arkansas, Missouri, and Nebraska (in the Eighth Circuit region), but the two regions' *execution* rates are very similar.

As we already have suggested, the impulse to make frequent use of death sentences does not translate into, and may even interfere in some way with, the capacity to do so reliably enough to permit death sentences to pass judicial inspection for serious error and be carried out.

X. Conclusion: A Broken System; the Need for Research into Causes

Over the course of the 23-year study period, **a large majority of death sentences subjected to judicial inspection nationally and in nearly all death-sentencing states were found to be seriously flawed and were reversed by the courts**. The **60% and 70% rates of serious error** that have existed **nationally** and in the **vast majority of states** have obliged courts to provide, and have obliged taxpayers to foot the bill for, **a elaborate and lengthy judicial inspection process**—one that, even so, almost inevitably must **fail to catch and correct some amount of the error that has flooded the system**. As an inevitable result of so many serious errors and the multi-tiered process needed to catch

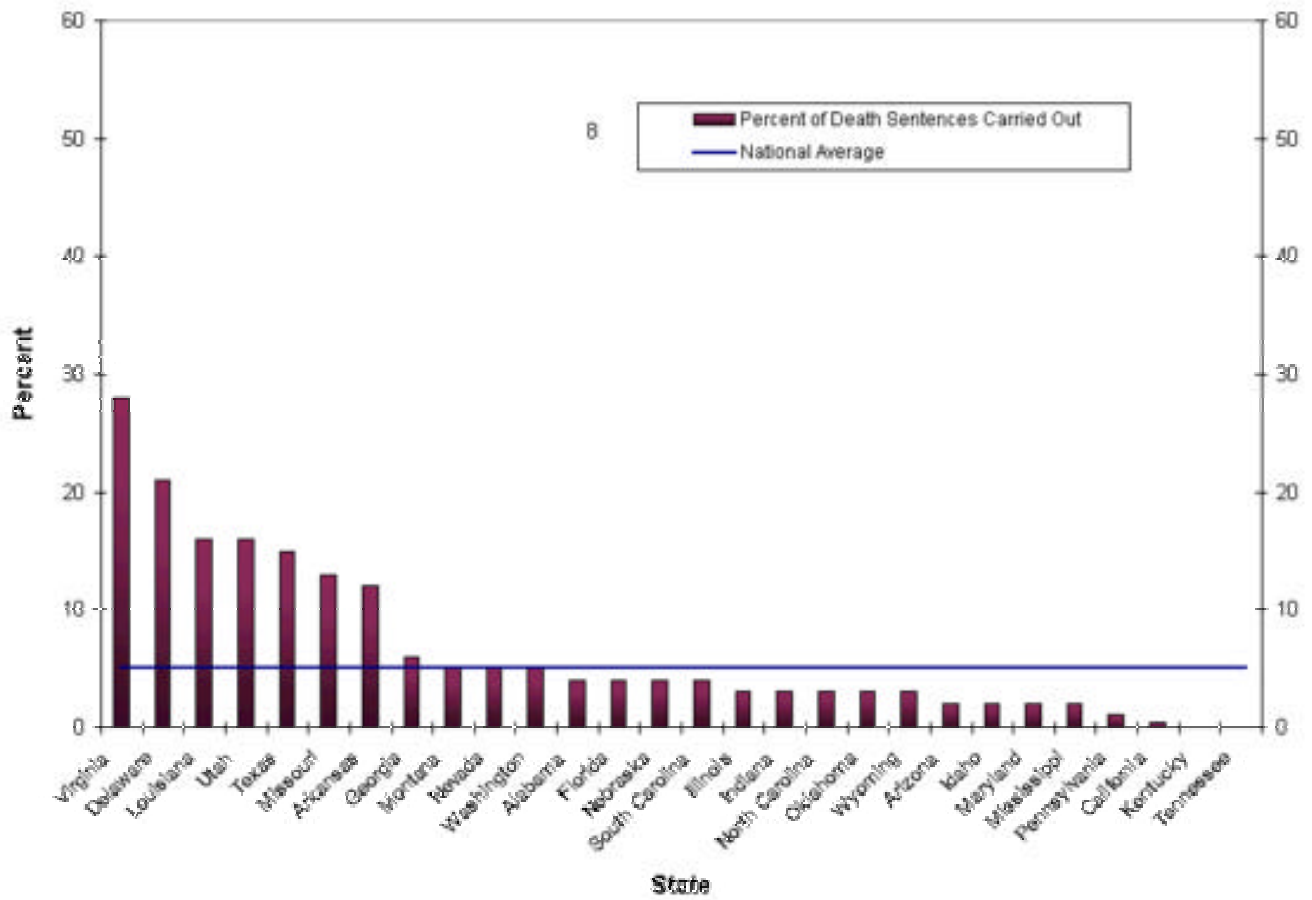
them, it has taken **nearly a decade—more recently, it has taken *over* a decade—for the small number of death sentences that pass inspection to be carried out.**

Very few death sentences succeed, and it takes years to cull out the majority of failures.

So far we have used the rate of serious error detected by state and federal courts as the measure of the success or failure of our capital punishment system. But there is another important measure that bears consideration. Presumably, the most immediate goal of a system of capital punishment is the *execution* of capital sentences. In this light, the most obvious measure of the “success” of our death penalty system—indeed, the most obvious measure of the system’s **sheer *rationality*—is its capacity to translate the death sentences it imposes into executions .**

By this measure, the capital punishment system revealed by our 23-year study is *not* a success, and is not even minimally *rational*. Figure 35 below plots the proportion of the death sentences imposed at *some point* during the 23-year study period that had been carried out by the *end* of that period—comparing the 28-state cohort of capital-sentencing jurisdictions and the national average.²³⁷

Figure 35. Percent Death Sentences Carried Out, All Executions, 1973-95



As Figure 35 reveals:

- **Nationally**, during the study period, **the proportion of death sentences actually carried out was a meager 5.4%, one in nineteen**.
- Given high error rates, and the painstaking review needed to catch it, **well over half of all American death-sentencing states that have been in the business the longest failed to carry out 95% or more of their death sentences**. **Nearly half failed to convert more than 1 in 30 death sentences into executions**. Three-quarters carried out fewer than 7% of their death sentences. The vast majority (86%) carried out 15% or fewer.
- **Only 1 state, Virginia, managed to carry out more than a quarter of the death sentences it imposed over the 23-year study period**—and there is serious question whether it did so only by dint of inferior error detection.²³⁸

* * * * *

Through a variety of measures, our 23 years worth of findings reveal **a capital punishment system collapsing under the weight of its own mistakes**. In so doing, they pose **three principal questions** (and a host of subsidiary ones) that will be the subject of a **second report later this year**:

- *What has remained the same, and what has changed, since 1995?* By all indications examined here, the error-proneness and irrationality documented by our study of **thousands of cases** reviewed by **hundreds of state and federal judges**, in **three separate review processes**, in **34 states across the nation** over the course of nearly a **quarter century** has not somehow evaporated in the succeeding four years.²³⁹ In none of those four years, for example, as in none of

the preceding 23, has the nation managed to execute even **3%** of its death row inmates—and in 1996 and 1998, it executed fewer than **2%** (about the same proportion as it had executed in, *e.g.*, 1984, 1987, 1993 and 1995).²⁴⁰ Indeed, if the recent findings of a variety of media investigations across the nation are any indication, error rates and the consequent confounding of the death penalty system may be getting worse.²⁴¹ In this regard, we hope to explore whether the surge of state and federal court reversals in the last study year (1995) was a harbinger,²⁴² and any other patterns that may appear.

- *What accounts for the generally high rates of serious error that state and federal courts have detected in American capital judgments?* In this Report, we have briefly examined the types of errors that predominate (incompetent lawyering and prosecutorial misconduct leading the way²⁴³); identified differences among the respective states and federal courts—for example, disproportionately low error-detection by the Virginia courts and the U.S. Court of Appeals for the Fourth Circuit; noted the relationship between high error rates and low execution rates (especially rates of death sentences carried out); discovered some potentially suggestive evidence that low execution rates (especially, low rates of death sentences carried out) are associated with high death-sentencing rates; and considered the effect on death-sentencing and execution rates of (1) some demographic factors (finding that homicide rates seem to have *no* effect on death-sentencing and execution rates, and that the size of nonwhite populations may be inversely related to death-sentencing rates but directly related to execution rates) and (2) judicial-contextual factors (finding that political pressure on state judges and that state expenditures on courts may be positively correlated with death-sentencing rates but negatively correlated with the rate at which death

sentences are carried out). These analyses represent our first steps towards the main goal or our next research phase: Identifying the causes of the huge amounts of serious error infecting American capital convictions and sentences.

- *What policy responses are called for?* In advance of these additional efforts to explore the causes of our capital system's error-proneness and irrationality, we have the least to say here about the policy implications of our findings. That, however, will be a third important focus of our next phase of research.

Endnotes

*. An abridged version of this Report will be published in the *Texas Law Review*, October 2000.

1. See, e.g., *Rethinking the Death Penalty*, ABC News Nightline, May 22, 2000 <http://abcnews.go.com/onair/nightline/transcripts/nl000522_trans.html> (“[A] lot of places are rethinking the death penalty. Last week in New Hampshire, the state Legislature voted to abolish capital punishment, although the governor there vetoed the measure. And around the country, people are asking new questions about overzealous prosecutors, incompetent defense lawyers, and . . . DNA testing, which has cleared some people on death row. Nightline[] . . . reports on an old issue, which is the focus of a whole new debate.”); Jonathan Alter & Mark Miller, *A Life or Death Gamble: A New Debate About the Fairness of a Death Sentence*, Newsweek, May 29, 2000 <<http://newsweek.com/nw-srv/printed/us/na/a20098-2000may21.htm>> (noting “a new debate about the fairness of the death penalty”).

2. See, e.g., Ofra Bikel, *The Case for Innocence*, Frontline, PBS, Jan. 11, 2000 <<http://www.pbs.org/wgbh/pages/frontline/shows/case/etc/script.html>>; Barry Scheck, Peter Neufeld & Jim Dwyer Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted (2000).

3. See, e.g., Paul Duggan, *Rising Number of Executions Welcomed, Decried*, Washington Post, Dec. 13, 2000, at A3, available in 1999 WL 30308153; Abraham McLaughlin, *98 Executions in '99 Reignite a Capital Debate*, Christian Science Monitor, Dec. 27, 1999, at 1, available in 1999 WL 5384560.

4. From 1984 to 1991, an average of about 15 men and women were executed each year in the United States. The average rose to about 30 a year between 1992 and 1994, to about 60 in the next four years, and to 98 (the most in a single year since 1951) in 1999. See Linda Greenhouse, *Death Penalty Gets Attention of High Court*, N.Y. Times, Oct. 30, 1999, at A1 (“[T]here were 82 executions in the first 10 months of [1999], a pace unequalled since the early 1950’s.”); NAACP Legal Defense and Educational Fund, *Death Row U.S.A.*, Spring 2000, at 8 [hereinafter, *Death Row U.S.A.*]. Notably, however, two states, Texas and Virginia, have accounted for half the executions in the United States during the last 15 years. See *id.* at 11-22; Frank Green, *Virginia Bucks Death Row Flow*, Richmond Times-Dispatch, March 13, 2000; *infra* note 218. In contrast, several other states with large death row populations—California, Ohio, Pennsylvania, Mississippi and Tennessee, for example—rarely execute more than one person in any year. See *Death Row U.S.A.*, *supra* at 11-22. Moreover, since 1976, the number executed annually in the United States has never exceeded three percent of the nation’s death row population, and stayed continuously within the one-half to two percent range from 1984 to 1998. See *infra* Table 2, Appendix E, at E-3. The likelihood that any death row prisoner will be executed has been, and remains, low.

5. See Dalia Sussman, *Split Decision on Death Penalty*, ABCNEWS.com, Jan 10, 2000 <<http://abcnews.go.com/sections/politics/dailynews/poll00019.html>> (reporting that in an ABCNews.com poll, 64% of Americans say they support the death penalty for people convicted of murder); Frank Newport, *Support for Death Penalty Drops to Lowest Level in 19 Years, Although Still High at 66%*, Gallup News Service, Feb. 24, 2000 <<http://www.gallup.com/poll/releases/pr000224.asp>>. See also David Frum, *The Justice Americans Demand*, N.Y. Times, Feb. 4, 2000, at A29, available in LEXIS, News Library, NYT File (questioning the democratic legitimacy of a moratorium on executions in light of broad popular support for the penalty); Frank Green, *Falwell Opposes a Moratorium*, Richmond Times-Dispatch, Apr. 11, 2000, at B4, available in 2000 WL

5035053 (reporting Rev. Jerry Falwell's disagreement with other conservative evangelical Protestant figures who have called for a moratorium, and Falwell's call for expedited executions); Eugene H. Methvin, *Death Penalty Is Fairer than Ever*, Wall St. J., May 10, 2000, at A26, available in 2000WL-WSJ 3028765 (arguing that lengthy appeals and DNA testing make capital convictions more reliable than ever).

6. Compare Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. Soc. Issues, Summer 1994, at 19, 20 fig. 1, 52 (discussing poll data indicating increasing popular support for the death penalty from 1967 through 1994) with Mark Gillespie, *Public Opinion Supports the Death Penalty*, Gallup News Service, Feb. 24, 1999 <[http://www.gallup.com/poll /releases](http://www.gallup.com/poll/releases)> (noting support for the death penalty has declined about 10 percentage points over the past six years) and Newport, *supra* note 5 (noting a 4 percentage point decline in support for the death penalty in 2000) and Kathy Walt, *Death Penalty Support Plunges to 30-year Low*, Houston Chron., Mar. 15, 1998, at A1 (nationally, opposition to the death penalty grew from 7 percent in 1994 to 26 percent in 1998; in Texas, "support for the death penalty has slipped to its lowest point in more than three decades") and Editorial, *A Moratorium on Killing*, St. Louis Post Dispatch, Dec. 26, 1999, at B2, available in 1999 WO 3062342 ("Could this [rise in opposition to the penalty] be a start of a shift in public opinion . . .?").

For statewide trends in public opinion, see Kathy Barret Carter, *63% of Jerseyans Favor Death Penalty—But Support Drops 9% Since '94 Polls Show*, Star-Ledger (Newark), Oct. 10, 1999, at 25; Death Penalty Information Center, *Recent Poll Findings* (visited May 17, 2000) <<http://www.essential.org/dpic/po.html>> [hereinafter DPIC] (reporting that polls reveal drops in support for the death penalty in Illinois, Kentucky, Michigan, North Carolina, and Virginia); *Death Penalty Support Declines, New Chicago Tribune Poll*, PR Newswire, Mar. 6, 2000 (reporting that public support for death penalty in Illinois fell from 76% in August 1994, to 63% in Mar. 1999, to 58% in 2000); Greg Lucas, *Poll Takes Snapshot of Californians' Views*, S.F. Chron., Jan. 14, 2000, at A20, available in 2000 WL 6472849 ("In California, only 49 percent of those surveyed favor the death penalty compared to 56 percent nationally"); *Support for Death Penalty Slips in Minnesota*, Associated Press, Mar. 21, 2000 (reporting that the number of Minnesotans who favor the death penalty dropped from 73% in 1996 to 57% in 2000); Walt, *supra* (Texas polls; discussed above).

7. See Sussman, *supra* note 5 (in a January 2000 ABCNEWS.com poll in which 64% of Americans said they support the death penalty for murder, the number of supporters dropped to 48% when life without parole was proposed as a sentencing option). State-specific polls reveal similar trends. See, e.g., Carter, *supra* note 6 (reporting that in New Jersey, 63% approval for capital punishment drops to 44% when life without parole is a choice); DPIC, *supra* note 6 & Editorial, *supra* note 6 (noting that among Missouri residents—who, in the abstract, "overwhelmingly support" the death penalty—support for the death penalty drops to 46% when life without parole is an alternative); Lucas, *supra* note 6 (reporting on a recent California poll that asked respondents to choose between death or life without parole as the appropriate punishment for murder: 49% chose death and 47% chose life without parole); Eric Zorn, *Prosecutors Deaf to Outcry Against Death Penalty*, Chi. Trib., Mar. 7, 2000, at 1, available in 2000 WL 3623214 (showing a 15-point drop in support for the death penalty—from 58% to 43%—when life without parole is an option). Forty-two states (including most of the eleven noncapital sentencing states) offer life without parole as a sentencing option. See Editorial, *Rising Doubts on Death Penalty*, USA Today, Dec. 22, 1999, at 17A, available in 1999 WL 6861984.

8. See Jim Yardley, *Texas' Busy Death Chamber Helps Define Bush's Tenure*, N.Y. Times, Jan. 7, 2000, at A1.

9. See *Alabama Looks to Speed Up Executions*, Associated Press, Mar. 3, 2000; Yoji Cole, *Napolitano Wants to Find Ways to Speed Executions*, Ariz. Repub., Feb. 16, 2000, at B7; Sara Rimer, *Florida Passes Bill to Quicken Execution Pace*, N.Y. Times, Jan. 6, 2000, at A1; John Shiffman, *Tennessee May Limit Death Row*

Appeals, Nashville Tennessean, Apr. 10, 2000; *see also Most Oklahomans Favor Death Penalty—Poll Finds Most Want Shorter Appeals Process*, The Oklahoman, Mar. 13, 2000.

Among the states mentioned, only Florida actually adopted speed-up legislation, and it was unanimously invalidated under the state constitution by the Florida Supreme Court. *See* David Cox, *Court Strikes Down GOP's Death Row Appeal Plan*, Florida Sun-Sentinel, Apr. 15, 2000, at 1A (“In a major blow to Gov. Jeb Bush and state Republican leaders, the Florida Supreme Court on Friday unanimously struck down the Legislature's overhaul of the appeals process for Death Row inmates.”).

10. *See* William Claiborne, *Ill. Governor, Citing Errors, Will Block Executions*, Wash. Post, Jan. 31, 2000, at A1, available in 2000 WL 2283005 (“Gov. George H. Ryan (R) has decided to effectively impose a moratorium on the death penalty in Illinois [by indefinitely staying all proposed executions] until an inquiry has been conducted into why more death row inmates have been exonerated than executed since capital punishment was reinstated in 1977. . . . ‘There are innumerable opportunities along the way for serious errors, and the governor wants to take a pause here,’ Ryan's press secretary, Dennis Culloton, said today.”); Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. Times, Feb. 1, 2000, at A1, available in LEXIS, News File (“Citing a ‘shameful record of convicting innocent people and putting them on death row,’ Gov. George Ryan of Illinois today halted all executions in the state, the first such moratorium in the nation). *See also* Steve Mills & Ken Armstrong, *Gov. George Ryan Plans to Block the Execution of Any Death Row Inmate*, Chi. Trib., Jan. 30, 2000, available in 2000 WL 3631638 (citing a March 1999 poll showing that Illinois death row exonerations have prompted 54% of the state's voters to favor and only 37% to oppose a moratorium, notwithstanding majority support for the penalty in the abstract).

11. In 1999, Nebraska's unicameral legislature passed a death penalty moratorium bill co-sponsored by Republican Senator Kermit Brashear and Democrat Senator Ernie Chambers. Governor Mike Johanns vetoed the bill, but the legislature unanimously overrode the veto as to a section of the bill that allocated \$165,000 to study the issue. *See* Robynn Tysyer, *Death Penalty Study OK'd*, Omaha World-Herald, May 28, 1999, available in Westlaw, News File, ALLNEWS database.

12. *See, e.g.*, Ken Armstrong & Steve Mills, *String of Exonerations Spurs Legislative, Judicial Panels to Study Reforms*, Chi. Trib., Nov. 16, 1999, at N8, available in 1999 WL 2932558 (noting that the Illinois General Assembly and Illinois Supreme Court have created four committees to study the death penalty); Bob Chiarito, *House Panel Set to Consider Moratorium on Executions*, Chicago Daily L. Bull. Jan. 26, 2000, at 3, available in Westlaw, News Library, ALLNEWS File; Ryan Keith, *Task Force on Capital Cases Calls for Videotaping of Suspects*, Chi. Trib., Mar. 16, 2000, at M6, available in 2000 WL 3646355; Steve Mills & Ken Armstrong, *Illinois Prosecutors Under Glare at Death Penalty Hearing*, Chi. Trib., Jan. 28, 2000, at N20, available in LEXIS, News File; Evan Osnos & David Heinzmann, *Death Penalty Still an Option*, Chi. Trib., Jan. 31, 2000; Maurice Possley & Ken Armstrong, *Revamp Urged in Handling of Capital Cases*, Chi. Trib., Nov. 4, 1999, at N1, available in 1999 WL 2928957.

13. *See* Moratorium Now! (visited May 16, 2000) <<http://www.quixote.org/ej>>. *See also* Benjamin Wallace-Wells, *States Follow Illinois Lead on Death Penalty*, Boston Globe, Feb. 9, 2000, at A3, available in LEXIS, News File.

[End notes 14 and 15 are omitted]

16. *See* John DiStaso & John Toole, *Death Penalty's Fate Still Up in the Air in Senate*, Manchester Union Leader, Mar. 13, 2000 (noting that on Mar. 9, 2000, New Hampshire's majority-Republican House of

Representatives voted to abolish the death penalty); Robert Anthony Phillips, *N.H. Considers Abolishing Unused Death Penalty* <<http://www.APBnews.com>> (Mar. 10, 2000); *Rethinking the Death Penalty* (Nightline), *supra* note 1 (noting abolition bill's eventual passage by New Hampshire Legislature and veto by Governor).

17. See Brad Cain, *Two Oregon Titans Want Death Penalty Ended*, *The Columbian*, Apr. 7, 2000, at B5 (“[Governor John] Kitzhaber and [former Senator Mark] Hatfield—two of Oregon’s most popular political figures—have lent their names to an effort to ask voters to outlaw capital punishment in November.”).

18. See Jack Elliott Jr., *Death Row-Defense Bills Move Through Legislature*, *Biloxi Sun Herald*, Mar. 2, 2000, at A5, available in LEXIS, News Library, BILSUNH File (discussing proposals in the Mississippi legislature to provide state money to assist smaller Mississippi counties to bear the expense of competent trial and state post-conviction representation in capital cases); Carol Marbin Miller, *State High Court Raises Standard for Death Row Case Lawyers*, *Miami Daily Bus. Rev.*, Nov. 5, 1999, at B1 (discussing the Florida Supreme Court’s adoption of rules setting minimum standards for defense attorneys in capital cases—including at least 9 jury trials in serious or complex matters and at least 2 capital cases—and encouraging trial judges to appoint two defense lawyers in each case). See also Possley & Armstrong, *Revamp Urged*, *supra* note 12, at N1 (reporting that at least a dozen states “have established minimum standards for defense attorneys in capital cases,” which typically “require that at least two attorneys be appointed in capital cases and that they have a certain number of years of experience in trying criminal matters”).

19. See, e.g., Mike Dorning, *Death Penalty Reforms Gain Backers in D.C.*, *Chi. Trib.*, Mar. 31, 2000, at N1 (describing bipartisan support and sponsorship for a House bill—paralleling one proposed by Democratic Sen. Patrick Leahy and Republican Sen. Gordon Smith in the Senate—aimed at improving capital defendants’ access to DNA evidence, adequate representation and other protective procedures); Mike Dorning, *Senator to Propose Death Row Safeguards*, *Chi. Trib.* (Feb. 10, 2000), at N1 (describing federal legislation proposed by Senator Patrick Leahy and others that would, *inter alia*, give states incentives to “require that indigent death penalty defendants be allowed a team of at least 2 court-appointed attorneys” who “meet competency standards set by the U.S. Administrative Office of the Courts”).

20. *ABC This Week* (ABC television broadcast, Apr. 9, 2000) <<http://abcnews.go.com/onair/thisweek/ThisWeekIndex.html>> (roundtable discussion among Sam Donaldson, Cokie Roberts, George Stephanopolous & George Will, focusing on George Will’s column, cited *infra* note 21, and Rev. Pat Robertson’s expression of support for a death penalty moratorium, in which all four panelists agreed with Robertson, prompting Stephanoplous to discern a “really a tectonic shift in the politics of the death penalty”). See also John Harwood, *Bush May Be Hurt by Handling of Death-Penalty Issue*, *Wall St. J.*, Mar. 21, 2000, available in 2000 WL-WSJ 3022420 (noting the “remarkable . . . absence of public protest” when Governor Ryan declared the Illinois moratorium on executions and discerning “a national shift in the politics of capital punishment”); Michael Kroll, *Executioner’s Swan Song?* (Feb. 8, 2000) <http://www.salon.com/news/feature/2000/02/08/death_penalty/index.html> (concluding that Governor Ryan’s decision to suspend the death penalty represents a “public shift”); Bruce Shapiro, *Capital Offense*, *N.Y. Times Mag.*, Mar. 26, 2000 (“But suddenly . . . death-row innocence cases have taken hold of the public mind, and capital punishment itself seems to be approaching a political tipping point.”). See also Mark Hansen, *Death Knell for Death Row?*, *ABA J.*, June 2000, at 40; Steven A. Holmes, *Look Who’s Questioning the Death Penalty*, *N.Y. Times*, Apr. 16, 2000, available in LEXIS, News Library, NYTIMES File (noting a “conservative rethinking” of the death penalty); Johnson, *supra* note 10 (reporting that the issue of wrongful executions “is gaining resonance around the nation, after many years in which it was seen as essentially a dead letter in American politics”); Lucas, *supra* note 6 (stating that recent public opinion polls suggest “that politicians need not be so rigid in their stance and their perception of the public’s

opinion on the use of the death penalty”); Clarence Page, *Close Calls on Death Row Finally Prompting Second Thoughts*, Dallas Morning News, Apr. 16, 2000.

21. In an opinion column discussing a recently published book, *see* Scheck, Neufeld & Dwyer, *supra* note 2, George Will concluded:

You could fill a book with . . . hair-curling true stories of blighted lives and justice traduced [as a result of the capital conviction of innocent defendants]. Three authors have filled one. It should change the argument about capital punishment and other aspects of the criminal justice system. Conservatives, especially, should draw this lesson from the book: Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order.

George F. Will, *Innocent On Death Row*, Wash. Post, Apr. 6, 2000, at A23, available in 2000 WL 2295245.

22. *See* Brooke A. Masters, *Pat Robertson Urges Moratorium On U.S. Executions*, Wash. Post, Apr. 8, 2000, at A1, available in 2000 WL 2295691 (quoting Robertson’s statement that “a moratorium would be appropriate”); *Meet the Press* (NBC television broadcast, May 7, 2000) (interviewing Rev. Pat Robertson, who explained his simultaneous support for the death penalty and for a moratorium on executions); *Robertson Backs Moratorium, Says Death Penalty Used Unfairly*, Chi. Trib. Apr. 8, 2000, at N12, available in 2000 WL 3654070.

23. *See* the views expressed by Fallwell, Frum and Methvin, *supra* note 5 and accompanying text.

24. *See* the views expressed by Robertson, Will and others, *supra* notes 20-22 and accompanying text.

25. Kroll, *supra* note 20.

26. Much of the information reported here is contained in ten data bases. The authors generated four of those data bases; the other six were generated at least in part by others.

The first (electronically stored) data base the authors generated—referred to herein as “**DADB**”—contains information on all 4,578 state capital direct appeals that were finally decided between 1993 and 1995. To be “finally decided” within that time period, the highest state court with jurisdiction to review capital judgments in the relevant state must have taken one of two actions during the study period: (1) affirmed the capital judgment, or (2) overturned the capital judgment (either the conviction or sentence) on one or more grounds. *See also infra* pp. 25-26. (Capital judgments are overturned on direct appeal only on the basis of “serious error,” as defined *infra* note 33; *infra* p.5 & nn.42, 43.) If one of those two actions occurred prior to or during 1995, and the United States Supreme Court thereafter denied certiorari review, the case is included in the study, because the Supreme Court’s action did not affect the finality of the state decision. If the Supreme Court instead *granted* certiorari in a case but did not decide the case before or during 1995, the case is omitted from the study because the Supreme Court’s action withdrew the finality of the decision. DADB contains: the sentencing state; the year; outcome; citation; and subsequent judicial history (rehearing, certiorari) of the decision finally resolving the appeal; and information about the basis for reversal of the capital judgment under review, if a reversal occurred.

The second (electronically stored) data base that the authors generated—referred to herein as “**HCDB**”—contains information on all 599 initial (*i.e.*, nonsuccessive) capital federal habeas corpus cases that were finally decided between 1993 and 1995. To be “finally decided” within that time period, all of the following events must have occurred in the case within the study period: (1) a United States District Court must have (a) denied habeas corpus relief, thereby approving the capital judgment, or (b) granted habeas corpus relief from the capital judgment (either the conviction or sentence) on one or more grounds; (2) if an appeal was timely filed, a United

State Court of Appeals must have taken or approved action (1)(a) or (1)(b); and (3) if certiorari review was timely filed, the United States Supreme Court must have either (a) denied review or (b) granted review and taken or approved action (1)(a) or (1)(b). *See also infra* p.24. (Federal habeas relief from capital judgments is granted only on the basis of “serious error,” as defined *infra* notes 33, 38; *infra* p.5 & nn.42, 43.) HCDB contains: the sentencing state; the timing of the habeas petition and its adjudication at the various stages; the outcome at the various stages; information about the petitioner, lawyers, judges, courts, victim, offense; the aggravating and mitigating circumstances found at trial; procedures used during the habeas review process; and the asserted and the judicially accepted bases for and defenses to habeas relief from the capital judgment was under review.

The third data set generated by the authors is laid out in full in **Appendix C** to this Report. It contains an *incomplete* list of the capital cases in which state post-conviction relief was granted between 1973 and April 2000, and provides available information about citations or other identifying information, the basis for the grant of relief, the outcome on retrial, and timing. A full description of that data set and of the manner in which it was gathered, and its limitations, is set out *infra* Appendix C, pp. C-1 to C-2.

Our fourth and final author-generated data base, **PolPres**, collects information about the constitutional and statutory law governing the selection and retention of judges in each of the 28 capital-sentencing states that we study. It includes information on method of selection and retention of judges, length of judicial terms, frequency of judicial elections, and types of judicial elections (*e.g.*, selection, retention and recall elections).

The first of the data bases relied upon here that was generated at least in part by others —referred to herein as “**DR Cen**”—is a compilation of the information used to produce the NAACP Legal Defense Fund’s quarterly death row census, Death Row U.S.A., *supra* note 4. This data base has the name of all individuals who were on a state death row between 1973 and 1995, the state where their death sentence was imposed, and the sentencing year. Death Row U.S.A. is also our source of information about executions: when and where they occurred and whether they were consensual or non-consensual, as described *infra* notes 31, 208; *infra* p.32 & n.140.

Three additional data sources used here contain information collected by the United States Government. “**US Cen**” is a compilation of information collected by the United States Census Bureau. In order to estimate the racial composition of each state and circuit (region) in our study, we used Unpublished Census data PE-19 1970-79 and three Census Bureau publications: State Estimates by Age, Sex, and Race; Estimates of the Population of States by Age, Sex, Race and Hispanic Origin: 1981 to 1989; and Estimates of the Population of State by Age, Sex, Race and Hispanic Origin: 1990 to 1998. (Figures for 1980 were estimated by averaging 1979 and 1981). “**UCR DB**” is a compilation of information reported in U.S. Dep’t of Justice, FBI Uniform Crime Reporting Program Data [United States]: County Level Arrest and Offense Data, for the years 1973 through 1996. “**Pris Cen**” is a compilation of information collected by the Bureau of Justice Statistics and reported in the Sourcebook of Criminal Justice Statistics for the years 1977 through 1996.

Our penultimate data base—**CtCaLd**—has information for each state in our 28-jurisdiction cohort about the state’s average annual criminal case filings per 1,000 persons in the population for years 1985-1994. These data, and the underlying case load measure, are taken from Inter-University Consortium for Political and Social Research, State Court Statistics 1985-1994 (ICPSR 9266, 1995). Our final data base—**CtExpen**—has information for each of the same 28 states on its average annual court-related expenditures for fiscal years 1982-1992. These data, and the underlying measure, are taken from Expenditure and Employment Data for the Criminal Justice System 1992 (ICPSR 6579, 1993).

27. 408 U.S. 238 (1972).

28. Although the Justice Department collects aggregate data on capital cases by state, its data (1) have only 37 variables, (2) contain no case- or event-specific information, (3) are derived from reports by prison officials who lack information about some individuals under sentence of death who are incarcerated in local jails or for some

other reason are not physically located on death row, and (4) are derived from answers to questions about outcomes that (a) do not distinguish between state and federal court reversals, and (b) provide no information on the reason for a reversal. *See, e.g.*, U.S. Dep't of Justice Bureau of Justice Statistics, Capital Punishment 1998, at 1 <<http://www.ojp.usdoj.gov/bjs/pub/pdf/cp98.pdf>> (Dec. 1999; NCJ 179012) (supporting documentation is available on line) [hereinafter, BJS 1998 Report]. Likewise, although the NAACP Legal Defense Fund's quarterly death row census, *see* Death Row U.S.A., *supra* note 4, lists inmates on death row, it provides very little information about each. *See infra* note 123 (discussing these and other limitations of the data in Death Row U.S.A.).

29. We are now conducting complex multivariate statistical analyses to identify potential causes of those results. We will report on those analyses later in the year.

30. Our study considers only state, not federal, death sentences.

31. DRCen; Death Row U.S.A., *supra* note 4, at 8-22. The figure in the text refers to *all* executions during the study period. For the reasons discussed *infra* pp.32, 41, it often is sensible to consider only the executions that were "non-consensual," meaning that the prisoner availed himself of the full review process before he was executed. The number of non-consensual executions between 1973 and 1995 was 273, or 4.7% of the total number of death sentences.

32. DRCen; DADB. The state direct appellate process is described *infra* pp. 18-19.

33. DADB. In calculating error rates, we count only errors that result in reversal of a capital conviction or sentence. To do so, the error must be "serious" in three respects that render our calculation of "error" conservative. First, to be reversible, error must be *prejudicial*, either because the defendant has actually shown that it probably affected the outcome of his case or because it is the kind of error that almost always has that effect. *See generally* 2 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* §§ 32.1, 32.3, 32.4 (3d ed. 2000) (generally discussing the harmless error doctrine). The vast majority of error that state appellate courts discover is deemed harmless and does *not* result in reversal. In Illinois, for example, in addition to reversing half of the capital judgments it has reviewed, "the Illinois Supreme Court has upheld scores of death sentences while forgiving trial errors that benefited prosecutors, dismissing the errors as harmless." Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, Chi. Trib., Nov. 14, 1999, at 1, available in 1999 WL 2932178. One such case was Anthony Porter's case, in which the Illinois Supreme Court based its harmless findings on the "overwhelming" evidence of Porter's guilt; Porter was later released as innocent when another man confessed to his crime. *Id.* Another study of harmless error found that:

Between 1993 and 1997, there were 167 published opinions in which the Illinois Appellate Court or Illinois Supreme Court found that prosecutors committed some form of misconduct that could be considered harmless. In 122 of those cases—or nearly three out of four times—the reviewing court affirmed the conviction, holding that the misconduct was "harmless."

Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, Chi. Trib., Jan. 14, 1999, at 1, available in 1999 WL 2834609. And in Oklahoma, although at least four convicted murderers have received new trials "based upon appellate findings that [Oklahoma City's District Attorney] broke the rules," that same office has been criticized by courts for similar misconduct in "at least 17 other" cases in which the errors were found to be harmless. Ken Armstrong, 'Cowboy Bob' *Ropes Wins—But at Considerable Cost*, Chi. Trib., Jan. 10, 1999, at N13.

Second, to be reversible, error generally must have been *properly preserved*. Most state direct appeal

courts will not grant relief based on error—no matter how egregious and prejudicial—that the defendant did not properly preserve by way of (1) a timely objection at trial, (2) reiteration in a timely new trial motion at the end of trial, and (3) timely and proper assertion on appeal. *See* 1 Liebman & Hertz, *supra* §§ 7.1a, at 276-77 & n.29, 26.1. This is true even in cases in which the failure to preserve the error was the fault of counsel, not the defendant, and even in many instances in which the lawyer’s mistake resulted from inexperience, incompetence or sheer stupidity, and not a valid exercise of professional judgment. *See* Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 683 (1990); Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 28-30 (1996). Numerous prisoners have been executed despite acknowledged prejudicial errors affecting their convictions and sentences, because they failed to preserve their objections. Examples include the capital prisoners in Gray v. Netherland, 518 U.S. 152, 162-70 (1996); Coleman v. Thompson, 501 U.S. 722, 747-49 (1991); Dugger v. Adams, 489 U.S. 401, 408 (1989); Smith v. Murray, 477 U.S. 527, 533-35 (1986), each of whom had an evidently meritorious constitutional claim that he was capitally convicted or sentenced in violation of the United States Constitution but nonetheless was denied relief in state (and then, as a consequence, federal) court based on his failure to assert the claim at the time or in the manner required by state law and was subsequently executed. *See* Death Row U.S.A., *supra* note 4, at 9-22.

Finally and most obviously, error—no matter how prejudicial—only results in reversal if it is discovered. If it is not discovered, because, for example, the party responsible for it fails to disclose it, *see, e.g., infra* note 98, reversal will not occur and the error will not be deemed “serious” by our measure.

Hundreds of examples of “serious error” found in state post-conviction proceedings are collected in Appendix C *infra*. Dozens of examples of the even narrower category of “serious error” that warrants federal habeas relief are collected in Appendix D *infra*. *See also* cases cited *infra* notes 36, 44, 97-106.

34. The state post-conviction process is described *infra* pp.19-20.

35. Our post-conviction data are set out in Appendix C. For discussion of the incomplete nature of these data, *see infra* n.39; *infra* pp. 26-27, 33-34; *infra* Appendix C, pp. C-1 to C-2.

36. Appendix C; Florida, Georgia, Indiana, Maryland, Mississippi, North Carolina and Tennessee Capital Punishment Report Cards, *infra* Appendix A. We say “at least” in the text for the reasons set out *infra* note 39; *infra* pp.26-27 & n.132, 33-34 & n.152; Appendix C, *infra* pp. C-1 to C-2.

For the reasons stated in Appendix C, p. C-13 n.10, Georgia has used a variety of post-conviction procedures to derail many *more* death sentences than we count as post-conviction reversals (*e.g.*, by ordering hearings on mental retardation (which poses a constitutional bar to execution in Georgia)—that very often never take place, leaving the prisoner with a tacit life sentence).

The category of “serious error” that leads to state post-conviction reversal is narrower than “serious error” at the direct appeal stage, *cf. supra* note 33, because, generally, only properly preserved state and federal constitutional violations that (1) *were not*, and (2) *could not have been* raised on direct appeal can be the basis for state post-conviction reversal. As at the direct appeal stage, moreover, error—no matter how egregious and how much it undermines the accuracy of the capital verdict—never gets corrected at the state post-conviction stage (and thus does not count as “serious error” in our analysis) unless it is discovered and litigated. *See supra* note 33. And given the failure of a number of capital-sentencing states—Virginia, prominent among them—to provide *any* lawyers or funding for them *at all* at the state post-conviction stage, the likelihood that serious error will *not* be discovered and litigated in state post-conviction proceedings is

often very high. *See, e.g.*, American Civil Liberties Union of Virginia, *Unequal, Unfair and Irreversible: The Death Penalty in Virginia* (Apr. 2000) <<http://www.aclu.org/news/2000/n040700a.html>> (visited Apr. 28, 2000) [hereinafter, Virginia Report *infra* notes 232-33 and accompanying text.]

The United States Supreme Court itself occasionally grants relief in capital cases on review of state direct review proceedings. *See, e.g.*, *Yates v. Evatt*, 500 U.S. 391, 411 (1991) (overturning conviction due to prejudicial jury instructions giving the defendant the burden of proof); *Johnson v. Mississippi*, 486 U.S. 578, 585-90 (1988) (overturning death sentence that state prejudicially based on unconstitutional and unreliable aggravating circumstance); ; *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (overturning two death sentences that were imposed absent proof of the constitutional minimum level of criminal culpability required to impose death); *Truesdale v. Aiken*, 480 U.S. 527 (1987) (overturning death sentence imposed after trial court forbade defendant to inform jury of important aggravating information about his demonstrated prospects for rehabilitation). We treat these Supreme Court cases reviewing state post-conviction decisions as findings of serious (in all these cases, federal constitutional) error infecting capital sentences. For many additional examples of “serious error” that was caught and corrected during state post-conviction proceedings, see *infra* Appendix C. *See also* cases cited *infra* notes 97-106.

37. HCDB. “Final review” is defined *supra* note 26; *infra* pp.24-26.

38. HCDB. The definition of “serious error” that warrants reversal in federal habeas corpus proceedings is even narrower than the analogous definitions at the direct appeal stage (which is set out *supra* note 33 and accompanying text) and at the state post-conviction stage (*see supra* note 36). This is because error is only reversible on habeas if it meets the three criteria for “seriousness” on direct appeal—the error must be (1) prejudicial, (2) properly preserved and (3) discovered, *see Liebman & Hertz, supra* note 33, §§ 7.1a, 11.2b, 26.1, 32.1-32.5; *supra* note 33—and if, *in addition*, the error (4) violates the federal Constitution, *see* 28 U.S.C. §§2241(c)(3), 2254(a); (5) not arise the Fourth Amendment exclusionary rule (search and seizure violations, that is, *cannot* be the basis for federal habeas relief), *see Stone v. Powell*, 428 U.S. 465, 495 (1976); (6) in habeas cases litigated in 1989 and after, is not based on a “new rule” of federal law, *see Teague v. Lane*, 489 U.S. 288, 299 (1989), and (7) in habeas cases litigated in 1993 and after, meets an especially high standard of prejudice or “harmful error,” *see Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See generally* Liebman & Hertz, *supra* note 33, §§ 9.1, 9.2, 25.1, 32.1 (discussing constraints (4)-(7) on habeas relief). Dozens of examples of “serious error” warranting federal habeas relief from capital judgments imposed by nearly all of the study states are collected in Appendix D *infra*. *See also* cases cited *infra* notes 97-106, 140.

39. The production-line/product-inspection analogy helps explain how these figures are calculated. The “overall error rate” is the proportion of capital judgments thrown out during the first (state direct appeal) inspection due to serious error, plus the proportion of the original judgments that survive the first inspection but are thrown out at the second (state post-conviction) inspection, plus the proportion of the original judgments that survive both state inspections but are thrown out at the final (federal habeas) stage. The “overall success rate” is the converse. In note 40 *infra*, we use this method to calculate the national composite “overall error rate.”

As we indicate by our use of the phrase “at least” in our narrative, and by our use of the “≥” symbol in the national, state and circuit Report Cards, *see* Appendix A, the “overall error rates” calculated here are in fact *underestimates*. Due to incomplete data, we assume that all death sentences that survived the direct appeal inspection and are not known to have been reversed during the state post-conviction inspection passed muster during that inspection. In fact, many capital judgments affirmed on direct appeal were *pending in*, but had not yet been *finally decided* by, state post-conviction proceedings by the end of the study period. Inflating the denominator in this way—*i.e.*, using the class of cases *available* for review as a proxy for the cases that *actually underwent* final review—leads us systematically to overestimate the success rate and underestimate the error rate.

See infra pp.26-27 & n.132, 33-34 & n.152; *infra* Appendix C, pp. C-1 to C-2.

40. DADB; Appendix C; HCDB. Because 41% of the capital judgments reviewed on state direct appeal were found to be tainted by serious error, only 59% of those judgments were available for state post-conviction review. Because at least 10% (this figure is probably higher, *see supra* note 39; *infra* Appendix C, pp. C-1 to C-2) of that 59%—meaning at least 5.9% of the original pool ($\geq .10 \times .59 = \geq .059$)—failed this second, state post-conviction inspection, the overall rate of error found by *state* courts is 47% (41% + 6%) of the original pool. Then, of the 53% (100%-47% = 53%) of capital judgments that were available for federal habeas review, 40%—meaning 21% of the original pool ($.40 \times .53$)—failed the federal inspection. The “overall error rate” thus is at least 68% of the overall pool (41% + $\geq 6\%$ + 21% = $\geq 68\%$). In other words: *At least 68% of the capital judgments that were fully inspected were found seriously flawed at some stage.*

(We have simplified the above calculation by omitting fractions represented by numbers after the decimal points. In computing overall rates in the various report cards, we included the numbers after the decimal point until the error rate was obtained, at which point we applied the normal rounding convention.)

Our “overall error rate” is *not* the rate of error in the 5,760 death sentences imposed between 1973 and 1995. That number cannot be calculated because, at the end of 1995, many of those death sentences were pending in some court *awaiting* review, but had not yet been *finally* resolved at one of the three inspection stages. This rate instead uses the outcomes of the 4,578 cases in which state direct review occurred during the study period, and the 599 of those cases in which subsequent federal habeas review occurred, together with the 248 known state post-conviction reversals (taken as a proportion of the 2,693 capital judgments that had “cleared” state direct appeal) to calculate the error rate found in capital judgments that were finally reviewed.

41. *See supra* notes 33, 36, 38; *infra* p.5.

42. The data in this Report on the types of “serious error” that led to the reversal of capital judgments come from our study of state post-conviction reversals, set out in Appendix C. *See* State Post-Conviction National Composite Results, *infra* Appendix C, p. C-3. A variety of prejudicial errors in the instructions given to *jurors*—which by legal definition lead to reversal only if they probably affected the outcome of the trial, *see* *Boyde v. California*, 494 U.S. 370, 380 (1994)—account for another 20% of the reversals, and, together with lawyer incompetence and law enforcement misconduct, account for three-fourths of all state post-conviction reversals. When reversals due to demonstrably prejudicial judicial or juror **bias** are added, the total for the four types of claims discussed so far (ineffective assistance of counsel, prosecutorial misconduct, unconstitutional jury instructions and judge/jury bias) reaches 80% of all reversals. *See* State Post-Conviction National Composite Results, *infra* Appendix C, p. C-3.

43. *See, e.g.,* *Williams v. Taylor*, 120 U.S. 1495, 1496 (2000); *Strickler v. Green*, 527 U.S. 263, 264 (1999).

44. *See* State Post-Conviction National Composite Results, *infra* Appendix C, p. C-3. If a capital *conviction* is overturned on appeal or post-conviction review, the defendant may be (1) released for lack of evidence of guilt (as, for example, in the Bowen/Oklahoma, Brown/Florida, Jimerson/Illinois, Nelson/Georgia and Williamson/Oklahoma (among many other) cases summarized in Appendix C and Appendix D); (2) permitted to accept a plea to a lesser offense or to the same offense but a lesser penalty (as in the Carriger/Arizona, Jent & Miller/Florida cases in Appendix C); (3) retried and (a) acquitted (as in the Munson/Oklahoma case summarized in Appendix C and in the Wallace/Georgia case summarized in Appendix D), (b) released upon the jury’s failure to agree on a verdict (as in the Kyles case summarized in Appendix D), (c) reconvicted of a noncapital offense (as in numerous cases in Appendix C and Appendix D), (d) reconvicted of a capital offense but awarded a lesser

sentence (ditto), or (e) reconvicted and resentenced to die. If only the *death sentence* was overturned, the defendant may be (1) offered and accept a plea or other arrangement resulting in a lesser sentence; or (2) subjected to a new sentencing hearing at which the outcome is (a) a lesser sentence or (b) a death sentence. For a listing of outcomes in recent North Carolina cases, see Stephen Dear, *A Death Penalty Cease-Fire for N.C.*, *News & Observer* (Raleigh), Apr. 16, 2000, at A31, available in 2000 WL 3924050:

Last May, a Superior Court [state post-conviction] judge overturned the murder conviction and death sentence of Charles Munsey . . . because it was clear that he was innocent of murder, and that the district attorney who prosecuted him . . . as well as other law officials withheld exculpatory evidence. Tragically, Munsey died . . . awaiting a new trial.

Last summer, a Guilford County prosecutor told a [state post-conviction] hearing judge that he “just plain forgot” about a credible independent witness who could have provided a solid alibi for [death row inmate] Stephen Mark Bishop. Bishop is awaiting a second trial.

In November [1999], Alfred Rivera had been on North Carolina’s death row for two years for a double murder . . . when, in a second trial, a jury acquitted him. The N.C. Supreme Court [on direct appeal] had ordered the new trial, ruling that the trial judge should have allowed jurors to hear testimony that Rivera had been framed by his co-defendants.

[Governor] Hunt commuted the death sentence of Wendell Flowers . . . in December over doubts about his guilt

45. As revealed by the data collected in Appendix C, the post-reversal outcomes in our state post-conviction study were as follows:

Outcomes Following State Post-Conviction Reversals, 1973-April 2000

Sentence Less than Death*	Not Guilty of Capital Crime*	Death Sentence	Total, Outcome Known	Died Awaiting Retrial	Retrial Pending as of 4/2000	Outcome Unknown	Total, All Cases
247	22	54	301	1	37	3	342

*The “Not Guilty of Capital Crime” column, a subset of the “Sentence Less than Death” column, includes individuals as to whom murder charges either were dropped by the prosecutor, dismissed by the trial judge, or rejected by the jury. Individuals who were reconvicted of murder—even noncapital degrees of murder—and were given a sentence other than the death penalty are included in the “Sentence Less than Death” column but not the “Not Guilty of Capital Crime” column.

46. See *supra* note 39; *infra* pp.26-27 & n.132, 33-34 & n.152; *infra* Appendix C, *infra* pp. C-1 to C-2 (all explaining why we say “at least”).

47. DADB; Appendix C; HCDB. See Table 10 and Figure 12, *infra* pp.68, 69. Recently, the regional press has discovered the same patterns our study demonstrates, in a variety of states: California, Florida, Illinois, Nevada, Tennessee, Utah and Washington. See *infra* note 241 (summarizing the journalists’ findings).

48. See *supra* note 10 and accompanying text.

49. See, e.g., *Governor Says He Will Not Impose Moratorium on Executions*, A.P. Newswires, Feb. 15, 2000 (quoting Florida Governor Jeb Bush as stating: “Illinois appears to have a unique problem with the administration of capital punishment. Here in Florida, there is no competent evidence that suggests an innocent person has been wrongly executed.”); Sara Rimer & Raymond Bonner, *Bush Candidacy Puts Focus on Executions*, *N.Y. Times*, May 12, 2000, at A1 (quoting Texas Governor George W. Bush explaining on *Meet the Press* that he did not consider events in Illinois relevant to Texas’s death penalty system because in Illinois, but not in Texas, “‘they’ve had some problems in their courts . . . they’ve had some faulty judgments’”).

50. DADB; Appendix C; HADB. See National Composite and Illinois Report Cards, *infra* Appendix A, pp. A-5, A-25; Figures 6-13 and Tables 4-10, *infra* pp.47, 50, 53, 54, 57, 58, 60, 61, 63, 64, 68, 69, 72, E-5, E-6 (state comparisons).

51. See Figure 3, Table 3, *infra* pp.38, E-4.

52. See Figure 4, Table 3, *infra* pp.39, E-4; *infra* pp.35-37.

53. Data on direct appeal and post-conviction outcomes in noncapital cases are sketchy, but suggest the following conclusions: (1) At the direct appeal stage, serious, or reversible, error is detected in about 12 to 20% of the noncapital criminal judgments that are appealed. (2) Noncapital criminal judgments that are *appealed* make up only a small subset of the criminal convictions that are *obtained*. The vast majority of criminal convictions are a result of bargained guilty pleas, and most convictions based on pleas are not appealed. (By contrast, virtually every capital conviction and sentence is appealed. See *infra* notes 87-88 and accompanying text.) (3) The best available evidence is that serious error is detected in about 3% of the noncapital federal habeas corpus petitions that are filed, and that such petitions are filed by about 3 or 4 out of every 1,000 state prisoners each year. (4) Although there are no similar data for noncapital state post-conviction proceedings, most criminal lawyers believe noncapital error is detected less often there than on federal habeas corpus, and that prisoners are no more likely to seek state post-conviction than federal habeas corpus review. (These conclusions are based on evidence presented in James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. (forthcoming 2000); Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 So. Cal. L. Rev. 2507, 2524 (1993) (“of every thousand person convicted in state prosecutions and committed to custody in any given year, only three to four actually file habeas corpus petitions challenging their custody”); Brief Amicus Curiae of Benjamin Civiletti, et al., in Support of Frank R. West in *Wright v. West*, No. 91-542, 505 U.S. 277 (1992) (filed Mar. 4, 1992), at App. A, Table I & n.1 (providing data on the rate of relief granted to state prisoners from 1963-1981).

Assume, very conservatively, that 70% of all criminal judgments are reviewed on direct appeal, among which 20% (14% of the original pool) are found to contain serious error; that 10% of the cases that were affirmed on direct appeal (*i.e.*, 6% of the original pool) go on to state post-conviction review, at which stage 5% (.3% of the original pool) are found to contain serious error; and that 10% of the cases that were affirmed on direct appeal and were not overturned on state post-conviction (another 6% of the original pool) go on to federal habeas review, at which stage another 5% (.3% of the original pool) are found to contain serious error. Even vastly overestimating the appeal and reversal rates in this way generates only a 15% (14% + .3% + .3% = 14.6%) overall error rate.

54. See, e.g., 142 Cong. Rec. S3362 (daily ed. April 16, 1996) (Sen. Hatch) (“[O]ne of the biggest [Federal habeas corpus] problems [is] looney judges in the Federal courts who basically will grant a habeas corpus petition for any reason at all.”).

With two exceptions (Delaware and Maryland), all of the capital-sentencing states in the 28-state cohort on which most of our analyses focus make their judges stand for election either by the public directly (in 24 of the states) or periodically by the state legislature (in South Carolina and Virginia). See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 776-80 (1995).

55. DADB, Appendix C; HCDB. See National Composite Capital Punishment Report Card, *infra* Appendix A, pp. A-5 o A-6. Because some post-conviction reversals are unknown, see *supra* note 39; *infra* Appendix C, pp. C-1 to C-2, while all federal court reversals are known, the ratio of state to federal reversals is actually higher. On the other hand, we count a handful of United States Supreme Court reversals on certiorari following direct appeal and state post-conviction as, respectively, direct appeal and state post-conviction findings of error. See, e.g., *supra* note 36; *infra* note 93 and accompanying text.

56. See, e.g., *Slack v. McDaniel*, 120 S. Ct. 1595, 1605 (2000); *Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998); Liebman & Hertz, *supra* note 33, §§ 2.4, 30.2.

57. HCDB. See National Composite Capital Punishment Report Card, *infra* p.30 and *infra* Appendix A, p. A-6. Judicial review of the 120 individuals executed in the years 1989-1995 consumed a total of 1274.53 case-years, meaning 10.6 years per case. HCDB. A Justice Department study concludes that the time from death sentence to execution has increased over time to about 11 years for 1998 executions. See BJS 1998 Report, *supra* note 28, at 1.

58. The data underlying Figure 1—taken from DRCen, DADB, Appendix C and HCDB—are displayed in Tables 1, 10 and 28, *infra* p.68; *infra* Appendix E, pp. E-2, E-22.

59. Between 1984 and 1991, there were an average of 15 non-consensual executions each year; that number rose to 27 between 1992 and 1994, to 53 in the succeeding four-year period and then to 88 in 1999. See Death Row U.S.A. *supra* note 4, at 8-22. On the reasons for focusing on non-consensual execution, see *supra* note 31; *infra* p.32& n.140.

60. The data depicted in Figure 2—which are taken from BJS 1998 Study, *supra* note 28; Death Row U.S.A., *supra* note4, at 8-22—are displayed in Table 1, *infra* Appendix E, p. E-2.

61. See Table 2, *infra* Appendix E, at E-3.

62. The proportion of death row executed each year has moved up modestly during the 1990s—albeit at nothing like the rate at which the *number* of executions has risen, and staying mainly within the **1.5% to 2.5%** range. See Table 2, *infra* Appendix E, p. E-3. Even this increase may be the result of swelling numbers of prisoner piled up on death row—as overburdened judicial inspectors, faced with ever-expanding numbers of cases under and awaiting their review, inadvertently miss more serious error, or become more tolerant of it and more often let it through.

63. See *infra* note 190; *infra* pp.51, 59 & n.190, 65, 106-07.

64. For this view, see the statements by Virginia officials quoted in Brooke A. Masters, *A Rush on Va.'s Death Row*, Wash. Post, Apr. 28, 2000, at A1, available in 2000 WL 19606141 (presenting the arguments of Virginia officials who attribute the pronounced discrepancy between Virginia and other states to Virginia's prosecutorial

restraint and narrow sentencing statutes).

65. For a report taking this position, see Virginia Report, *supra* note 36 (discussed *infra* p.107).
66. For this purpose, 1989 was an average year. See BJS 1998 Report, *supra* note 28, at 12, tbl. 12.
67. See *id.* at 13, app. tbl. 1.
68. See *id.*
69. See *id.*
70. *Id.* at 1, 14 & app. tbl. 2; Death Row U.S.A., *supra* note 4, at 1.
71. BJS 1998 Report, *supra* note 28, at 1, 14 & app. tbl. 2; Death Row U.S.A., *supra* note 4, at 1. (The 6,700 figure used here covers the 1973-1999 period, and includes an estimate of death sentences imposed in 1999, which is not covered by the Justice Department's 1998 report.)

Returning to our 1989 example, the 13 executions by 1998 of individuals sentenced to die in 1989 represent only **1 in 20** of the 263 people condemned in 1989.
72. See BJS 1998 Report, *supra* note 28, at 13, app. tbl. 1; *id.* at 6, tbl. 5.
73. See *supra* Part II, pp.3-14.
74. The trial, incarceration and execution of sentence in capital cases cost from \$2.5 to \$5 million dollars per inmate (in current dollars), compared to less than \$1 million for each killer sentenced to life without parole. See, e.g., Aaron Chambers, *Resources a Concern in Death Penalty Reform*, Chi. Daily L. Bull., Apr. 24, 1999, at 19, available in Westlaw, News Library, CHIDLB file (estimating that a capital case costs \$5.2 million from pretrial proceedings to execution); Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1268, 1268-70 (1985); Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 STUDIES L., POL. & SOC. 71, 78 (1993) (reporting a \$3.2 million cost per execution in Florida, and Kansas' rejection of the death penalty because of the cost); Paul W. Keve, *The Costliest Punishment—A Corrections Administrator Contemplates the Death Penalty*, Federal Probation, Mar. 1992, at 11; Duncan Mansfield, *The Price of Death Penalty? Maybe Millions*, A.P. Newswires, Mar. 26, 2000, available in Westlaw News Library, APWIRE file (estimated \$1 to \$2 million cost per Tennessee execution); David Noonan, *Death Row Cost Is a Killer: Capital Cases Can't Be Handled Fairly and Affordably, Critics Claim*, N.Y. Daily News, Oct. 17, 1999, at 27, available in 1999 WL 23488045 (giving cost of prosecuting and defending New York capital cases at the trial phase, in a period during which only five capital sentences were imposed (from 1994 to 1999), as \$68 million); A. Wallace Tashima, *A Costly Ultimate Sanction*, The Los Angeles Daily J., June 20, 1991 (cost per execution to California taxpayers is \$4 to \$5 million).
75. When post-trial review costs are factored in, the cost comparison between capital and noncapital cases is something like \$24 million dollar per executed prisoner, compared to \$1 million for each inmate serving a sentence of life without possibility of parole. See S.V. Date, *The High Price of Killing Killers*, Palm Beach Post, Jan. 4, 2000, at 1A, available in 2000 WL 7592885. See also Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts, With Their Lives at Stake*, Chi. Trib., Nov. 15, 1999, at N1, available in 1999 WL 2932352 ("in Illinois,

the resources rallied on appeal often dwarf those summoned to keep a defendant off Death Row in the first place”); Armstrong & Mills, *Justice Derailed*, *supra* note 33, at N1 (discussing the “staggering” costs of capital case reversals and exonerations in Illinois: “Taxpayers have not only had to finance multimillion-dollar settlements to wrongly convicted Death Row inmates—[Dennis] Williams alone received \$13 million from Cook County—but also have had to pay for new trials, sentencing hearings and appeals in more than 100 cases where a condemned inmate’s original trial was undermined by some fundamental error.”).

76. *Cf.* Maurice Possley & Ken Armstrong, *The Flip Side of a Fair Trial*, Chi. Trib., Jan. 11, 1999, at N1 and Maurice Possley & Ken Armstrong, *Prosecution on Trial in DuPage*, Chi. Trib., Jan. 12, 1999, at 1 (study of effects of prosecutorial misconduct in Illinois homicide and capital cases, concluding that “the reversals exact a toll on victims and their families who are forced to come back to court, reopening sometimes barely healed emotional wounds”).

77. *See supra* p.4; National Composite State Post-Conviction Results, *infra* Appendix C, p. C-3.

78. For example, see Armstrong & Mills, *Justice Derailed*, *supra* note 33:

Capital punishment in Illinois is a system so riddled with faulty evidence, unscrupulous trial tactics and legal incompetence that justice has been forsaken, a *Tribune* investigation has found. . . .

The findings reveal a system so plagued by unprofessionalism, imprecision and bias that they have rendered the state’s ultimate form of punishment its least credible.

79. *See* Figure 35, *infra* p. 111; Tables 28 and 29, *infra* Appendix E, pp. E-22, E-23.

80. *See supra* Figure 2, p.13.

81. *See* Dan Rather, *Dead Wrong: Did the State of Texas Execute an Innocent Man?*, CBS 60 Minutes II, Apr. 12, 2000 <<http://cbsnews.cbs.com/now/story/0,1597,182812-412.shtml>> (visited May 17, 2000) (contending that there is strong evidence that Jerry Lee Hogue, whom Texas executed in 1998, was innocent). Between 1972 and the beginning of 1998, 68 people were released from death row on the grounds that their convictions were faulty, and there was too little evidence to retry the prisoner. *See* Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 L. & CONTEMP. PROB. 125, 130-32 (1998); Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 COOLEY L. REV. 907, 916 (1996) . As of this writing (May 2000), the number of inmates released from death row as factually or legally innocent apparently has risen to 87, including nine released in 1999 alone. *See* Frank Green, *Question of Life or Death: Illinois Exonerations Spark a Debate*, *Richmond Times-Dispatch*, Apr. 2, 2000, at A1, available in 2000 WL 503442.

82. *See* Scheck, Neufeld & Dwyer, *supra* note 2, at 172-92 (attributing the conviction of the innocent in large part to incompetent lawyers and prosecutorial suppression of evidence—the two most common errors detected in the reversals discussed in this study, *see supra* p. 5; National Composite State Post-Conviction Results, *infra* Appendix C, p. C-3).

83. *Cf.* Ken Armstrong & Steve Mills, *Flawed Murder Cases Prompt Calls for Probe*, Chi. Trib., Jan. 24, 2000, at N1, available in 2000 WL 3629579 (reporting that Illinois paid \$36 million to settle lawsuits by four men who were wrongly convicted of murder, and two of whom were sentenced to die); Sasha Abramsky, *Trial by Torture*,

Mother Jones, March 3, 2000 (\$1 million paid to civil rights plaintiffs who were tortured into confessing to (and then being falsely convicted of) capital crimes); Laurie Goering, *Florida Lets Speed Govern Executions*, Chi. Trib. Feb. 28, 2000, at 1, available in 2000 WL 3640614 (noting that Florida paid \$1 million in damages for falsely incarcerating two inmates on death row for 12 years); Paul M. Valentine, *Maryland to Give Cleared Man \$300,000*, Wash. Post, June 23, 1994, at B1, available in 1994 WL 2426459.

84. See Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice*, Chi. Trib. Jan. 13, 1999, at N1, available in 1999 WL 2834238 (detailing how, 12 years after the “Ford Heights 4” were falsely convicted in Chicago (two capitally) of two rape-murders, and five years *before* the four were exonerated following several judicial decisions ordering a new trial, one of the actual perpetrators still at large suffocated a third woman to death in a vacant apartment near the scene of the earlier crimes); Brooke Masters, *Lucky Release from Behind Bars*, Wash. Post, Apr. 28, 2000, at A23 (discussing David Vasquez’s incarceration in Virginia for a capital murder he did not commit, and the murder spree on which the real killer embarked in the meantime).

85. See *supra* note 21 (discussing George Will’s conclusion that innocent men and women have been executed); *supra* note 33 (discussing how close the Illinois Supreme Court came to missing the miscarriage of justice in Anthony Porter’s case).

All the implications of our findings that we discuss in text are poignantly illustrated by a recent article in the *Seattle Times* about Seattle murder victim, Esther Vinikow. After prosecutors said they would consider the views of the victims’ family before deciding whether to seek the death penalty against the alleged killer, Robert Wentz, a reporter interviewed Ms. Vinikow’s children:

Like most Americans, Esther Vinikow's children support the death penalty. But they say Wentz, if found guilty, should not be executed. Not because whoever killed her doesn't deserve it, but because it takes too long and costs too much.

To Jerome Vinikow, 58, Esther Vinikow's only son, the death penalty seems to only protract the tragedy “As long as he's away permanently, I'm not sure . . . ,” he trails off. “If he does get the death penalty, and it's 10 to 12 years of waiting, I don't know what good that does.”

In many ways, the family's misgivings reflect a growing national impatience and unease about capital punishment. In the aftermath of a tragedy, they have become drawn into a discussion that provides no easy answers.

Superior Court trials cost taxpayers an average of \$388,680. State and federal appeals of death-penalty cases take an average of 11 years, according to a recent study by state Supreme Court Justice Richard Guy. That's eroded public confidence in the justice system, Guy said.

But polls also suggest growing unease about capital punishment, particularly after several death-row inmates in Illinois were released when new evidence proved their innocence.

The decades it takes to execute an inmate may have saved lives, notes Jerome Vinikow That possibility should not be lost in the rush for justice. “I'm not against the death penalty. I used to wonder why it took 10 or 12 years, but it's obvious when you see all the mistakes in Illinois, you have to be careful,” he said.

. . . .

At first, [the victim's daughter, Dolores] Beck-Schwartz, 62, of Putnam Valley, N.Y., wanted whomever a jury convicted to be put to death. It seemed an appropriate punishment for someone who took the life of such a defenseless, gentle person, she said.

But Beck-Schwartz had second thoughts when she considered the years that pass between trial and execution—if the sentence isn't overturned along the way. “If it happened within a year, I'm fine with that. But if it dragged on year after year, it won't make it any easier,” she said. “It won't bring her back. It won't make me feel better.”

Alex Fryer, *Victim's Family Wrestles Death-Penalty Issue*, Seattle Times, May 14, 2000, <<http://archives.seattletimes.com/cgi-bin/texis/web/vortex/display?slug=deth14m&date=20000514&query=vinikow>>.

86. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 874-80 (1983); *Gregg v. Georgia*, 428 U.S. 153, 204-06 (1976); *Furman*, 408 U.S. 238.

87. *Whitmore v. Arkansas*, 495 U.S. 149, 174 & n.1 (1990) (citing statutes).

88. See *id.* at 174-75 (“since the reinstatement of capital punishment in 1976, only one person, Gary Gilmore, has been executed without any appellate review of his case”).

89. See generally Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only 'The Appearance of Justice,'* 87 J. CRIM. L. & CRIMINOLOGY 130, 131-33 (1996); Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. COLO. L. REV. 813, 816-17 (1999).

90. For a brief overview of the direct appellate process with citations to other works, see Liebman & Hertz, *supra* note 33, § 3.4a, at 177-79.

91. See *supra* notes 33, 36, 38; *supra* p.5 & nn.42, 43.

92. See Liebman & Hertz, *supra* note 33, at 178 (recommending the filing of certiorari petitions, particularly in capital cases). By making certiorari the prisoner's last opportunity to raise novel federal claims, the Supreme Court has strongly encouraged prisoners, especially ones under sentence of death, to file certiorari petitions. See *id.*, § 25.1, at 940-41.

93. See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 1898 (1999) (reversing capital conviction); *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) (affirming capital conviction); *Mu'Min v. Virginia*, 500 U.S. 415, 421 (1991) (affirming capital sentence); *Enmund v. Florida*, 458 U.S. 782 (1982) (reversing capital sentence).

94. See, e.g., *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997); *Stringer v. Balck*, 503 U.S. 222, 226 (1992).

95. The Supreme Court's certiorari jurisdiction is limited to federal questions, which in criminal cases almost always means federal constitutional questions. See 28 U.S.C. § 1257.

96. See 28 U.S.C. §§ 2254(b), 2254(c); *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1731-33 (1999).

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97. *See generally* Liebman & Hertz, *supra* note 33, § 7.1b, at 290-92, § 7.2e, at 314-17 & n.87, §§ 20.3e, 26.3b (providing examples and citing other sections of the treatise with additional examples).
98. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 441-45 (1995) (overturning conviction based on prosecutorial suppression of evidence demonstrating, among other things, that the eyewitnesses who confidently identified petitioner at trial as the attacker had originally described a different perpetrator and had only focused on petitioner as a result of suggestive photo arrays).
99. *See, e.g.*, Amadeo v. Zant, 486 U.S. 214 (1988) (holding that prosecutor's failure to make public his instructions to the jury commissioner to under-represent African-Americans on the jury venire provided "cause" for the habeas petitioner's failure to make a jury challenge in a timely manner).
100. *See, e.g.*, Williams v. Withrow, 507 U.S. 680, 688 (1993) (violations of the right to counsel "would often go unremedied" if left to review at trial and on direct review"); other authority cited in Liebman & Hertz, *supra* note 33, § 25.4, at 969-70 n.42.
101. *See, e.g.*, Liebman & Hertz, *supra* note 33, § 26.3b, at 1093-94 & n.28.
102. *See, e.g.*, People v. Fields, 690 N.E.2d 999 (Ill. 1998).
103. *See, e.g.*, Porter v. State, 723 So.2d 191 (Fla. 1998); Suarez v. State, 604 So.2d 488 (Fla. 1992); People v. Fields, 690 N.E.2d 999 (Ill. 1998).
104. *See, e.g.*, Williams v. Taylor, 120 S. Ct. 1495 (2000); State v. Freeman, 605 So.2d 1258 (Ala. Crim. App. 1992).
105. *See, e.g.*, Turpin v. Todd, 519 S.E.2d 678 (Ga. 1999); Simants v. State, 277 N.W.2d 217 (Neb. 1979).
106. *See, e.g.*, Liebman & Hertz, *supra* note 33, § 26.3b, at 1090-92 & n.27.
107. *See* Case v. Nebraska, 381 U.S. 336 (1965) (granting certiorari to consider whether a constitutional right to state post-conviction review exists, but dismissing the grant after Nebraska adopted a comprehensive state post-conviction review scheme). *But cf.* Murray v. Giarratano, 492 U.S. 1, 10-11 (1989) (plurality opinion) ("State collateral proceedings are not constitutionally required . . ."); Pennsylvania v. Finley, 481 U.S. 551, 554-55 (1989) (plurality opinion) (similar). *See generally* Liebman & Hertz, *supra* note 33, § 7.1b.
108. *See* 28 U.S.C. §§ 2254(d), 2254(e)(1) (providing a laxer standard of review for certain kinds of claims that were "adjudicated on the merits" in state court proceedings).
109. *See* Liebman & Hertz, *supra* note 33, § 3.5a, at 179-80, § 6.1 & n.1 (citing authority).
110. *See* McFarland v. Scott, 512 U.S. 1256, 1261 (1994) (Blackmun, J., dissenting from the denial of certiorari) ("State habeas corpus proceedings are a vital link in the capital review process, not the least because all federal habeas claims first must be adequately raised in the state court ... [to avoid being denied in federal court] as procedurally defaulted or waived . . ."); Coleman v. Balkcom, 451 U.S. 949, 956-57 (1981) (Rehnquist, J., dissenting from denial of certiorari) (describing typical post-trial course of proceedings in capital cases, which includes a state post-conviction petition); Liebman & Hertz, *supra* note 33, §§ 6.4c, 7.1a, 7.1b, 7.2f (describing counsel's legal and ethical obligations in regard to pursuing state post-conviction remedies in capital

cases).

111. *See generally* Liebman & Hertz, *supra* note 33, §§ 3.5a(6), 6.1, 6.2, 7.1.

112. *See, e.g.*, Rimer, *supra* note 9, at A1, A9 (describing new state post-conviction procedures recently adopted in Florida but then invalidated, *see supra* note 9, that, *inter alia*, gave capital prisoners 180 days after the filing of their direct appeal brief to file a state post-conviction petition; barred all claims that were or could have been raised at trial or on direct appeal; forbade extensions of time, even if delays were the result of the state’s illegal withholding of exculpatory evidence or a court’s failure to compel legally required disclosure of public records; barred successive petitions unless they were based on previously undiscoverable evidence establishing a constitutional violation and the prisoner’s factual innocence; and imposed strict time limits on the adjudication of state post-conviction and public records act petitions). *See generally* Liebman & Hertz, *supra* note 33, § 3.3b nn.9-12 (discussing “unitary review” procedures).

113. *See* Liebman & Hertz, *supra* note 33, § 3.5a(6).

114. *See id.*, § 6.4 & n.13.

115. *See supra* note 36.

116. *See* 28 U.S.C. §§ 2241-2254.

117. *See id.* § 2243; Rules 2, 3 of the Rules Governing § 2254 Cases.

118. *See* 28 U.S.C. § 2253; Barefoot v. Estelle, 463 U.S. 880, 892-93 (1983); Liebman & Hertz, *supra* note 33, § 34.4.

119. *See* Liebman & Hertz, *supra* note 33, §§ 39.1, 39.3c.

120. *See* 28 U.S.C. § 2251; Liebman & Hertz, *supra* note 33, §§ 13.1, 13.2.

121. *See supra* note 33. Some state capital prisoners file, and in rare instances secure the stay of execution needed to allow them to litigate, a second or “successive” federal habeas petition after their first petitions are denied. *See* 28 U.S.C. § 2244; Liebman & Hertz, *supra* note 33, §§ 28.1-28.4. For the reasons given *infra* note 126, this study only considers error detected during initial federal habeas proceedings.

122. An early and very preliminary count of cases is reported in Memorandum to Senator Joseph F. Biden, Chairman, Senate Judiciary Committee from James S. Liebman (July 15, 1991), reprinted in Statement of John J. Curtin, Jr., President of the American Bar Association, and of James S. Liebman, Professor of Law, Columbia University School of Law and Member, ABA Task Force on Death Penalty Habeas Corpus, on behalf of the American Bar Association, Hearings before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary of the U.S. House or Rep. Concerning Fairness and Efficiency in Habeas Corpus Adjudication, 102d Cong., 1st Sess (July 17, 1991).

123. *See* Death Row U.S.A., *supra* note 4. By combining the data on LDF reports produced periodically over the period from 1973 to 1995, one can collect the name of and a small amount of information (*e.g.*, race of defendant and race and number of victims) about all individuals who have been incarcerated on death row for at least some period of time between those dates. Although helpful, the LDF census did not narrow our case-

gathering task very much, because it contains nearly 6000 individuals who were on death row at some point during the period, the vast majority of whom have never had their cases reviewed on federal habeas corpus (many having received relief or still being in the process of seeking relief in the state courts), and because the information—a name and a state, *e.g.*, Charles Williams of Georgia— often leads to many false positives in follow-up computer research. *See also supra* note 28.

124. *See supra* p.3 & nn.28-29.

125. HCDB. Habeas corpus cases typically become final upon the Supreme Court’s denial of a petition for certiorari either by the prisoner or by the state challenging an adverse decision of a U.S. Court of Appeals. Many more such denials are announced by the Court on the first Monday in October than on any other day, because that is when the Court generally rules on cases that have accumulated over the summer months when the Court is not in session. We accordingly chose the first Monday in October, 1995, as our termination point.

126. Although we collected data on the published outcomes of capital *successive* habeas litigation during our study period, in addition to the outcomes of all *initial* federal habeas corpus petitions that were finally adjudicated during the study period, our data on successive petitions are incomplete. (Many successive-petition cases are never published, and they are difficult to find.) Our data indicate, however, that grants of habeas review and relied based on successive petitions are rare, but not nonexistent. Grants of successive petitions include *Smith v. Singletary*, 61 F.3d 815 (11th Cir. 1995); *Aldridge v. Dugger*, 925 F.2d 1320 (11th Cir. 1991); *Booker v. Dugger*, 922 F.2d 633 (11th Cir. 1991); *Songer v. Wainwright*, 769 F.2d 1488 (11th Cir. 1985); *Schlup v. Bowersox*, No. 4:92CV443 JCH (E.D. Mo. 1997). For these reasons, we only report here the results of *initial* habeas corpus proceedings. In this respect, as well as others noted elsewhere, *see supra* notes 33, 36, 39; *infra* pp.26-27 & n.132; *infra* Appendix C, pp. C-1 to C-2, C-13 n.10, our calculation of rates of serious error is conservative and omits some judicial findings of even egregious error. (Because the standards for successive habeas litigation have always been very stringent, *see Liebman & Hertz, supra* note 33, ch.28, it is *only* in the case of egregious error that relief is granted at this stage.)

127. *See* Table 8 and Figure 8, *infra* pp.60, 61.

128. *See infra* note 190; *infra* pp.62-66 & n.198 (presenting some data on this question).

129. *See supra* note 26.

130. DADB. *See supra* notes 33, 36, 38; *supra* p.5 & nn.42, 43 (defining “serious error”).

131. *See* cases collected in Appendix C *infra*. In some states, even appellate post-conviction decisions are not generally published or available on line, as in Tennessee prior to 1985 and Nevada and Texas to this day.

132. It is possible to get a rough sense of how *much* we have overestimated the denominator (by treating all cases *available* for review as if they actually *were* finally reviewed), by considering three facts. First, one out of five cases available for state *direct review* during the study period was not finally decided at that stage during that period. *See infra* pp. 32-33; National Composite Capital Punishment Report Card, *infra* pp.29 & Appendix A, p. A-5. Second, cases often are pending for longer periods on state post-conviction review than on state direct appeal, because the former, but not the latter, include evidentiary and multi-court proceedings. Third, only 22% (599) of the 2,693 cases that cleared state direct appeal during the study period also cleared state post-conviction and completed federal habeas review during the study period. *See* National Composite Capital Punishment Report

Card, *infra* pp.29 & *infra* Appendix A, p. A-5.

If, say, 30% (*i.e.*, 809) of the 2,693 cases *available* for state post-conviction review were not decided during that period, which would leave a balance of 1,884 cases decided during the period, the state post-conviction reversal rate, which we very conservatively estimate as 10%, would rise to 13% (still fairly conservatively estimated), and the national overall rate of error would rise to 70%.

133. The state report cards themselves are collected in Appendix A, *infra*.

134. The federal judicial circuit/regional report cards are collected in Appendix B, *infra*.

135. DRCen. *See supra* p.3.

136. DADB. Georgia imposed the nation's first post-*Furman* death sentence on Chester Thomas Akins in early May 1973, about six weeks after Governor Jimmy Carter signed the state's post-*Furman* death-penalty statute into law. Six months later, the state supreme court overturned Akins' death sentence. *See Akins v. State*, 202 S.E.2d 62 (Ga. 1973).

137. *See Akins v. State*, 202 S.E.2d 62 (Ga. 1973) (discussed *supra* note 136).

138. Death Row U.S.A., *supra* note 4, at 10.

139. *See Ramsey Clark, Spenkelink's Last Appeal*, 229 Nation 385 (1979).

140. *See supra* notes 33, 36, 38; *supra* p.5 & nn.42, 43. Of the 313 executions between 1973 and 1995, 273 (87.2%) were non-consensual and 40 (12.8%) were consensual. *See Death Row U.S.A.*, *supra* note 4, at 8-22. One might hypothesize that individuals who contemplate ending their appeals and being executed do so in large part because of a belief that their capital judgments are error free, hence that their appeals are fruitless. If that were the actual motivation for consented-to executions, and if, in addition, death row inmates' evaluations of their chances on appeal were accurate, it would make sense to treat non-consensual executions the same as others. The available evidence is inconsistent with these conjectures, however. Numerous examples exist of men who nearly were executed after they initially gave up their appeals, then changed their minds and had their death sentences—in some cases, *multiple* death sentences—overturned. *See, e.g.*, *Potts v. Kemp*, 814 F.2d 1512 (11th Cir. 1987) (reinstating, in pertinent part, *Potts v. Zant*, 734 F.2d 526, 529-30, 535-35 (11th Cir. 1984) (overturning multiple capital convictions of prisoner who previously came within days of being voluntarily executed, then decided at the last minute to pursue his appeals, based on trial court's failure to instruction the jury on essential elements of capital murder, and based on the prosecutor's inaccurate statements in closing argument that "prior decisions of the state supreme court mandated the imposition of the death penalty in this case")); *Vickers v. Ricketts*, 798 F.2d 369, 373 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (overturning conviction of prisoner who came within days of being voluntarily executed, then changed his mind, because the jury instructions at his trial kept the jurors from considering a lesser included offense supported by evidence); *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982) (overturning capital conviction of prisoner who originally attempted to end his appeals, then changed his mind, because the jury at his trial was instructed that he had the burden of proving a critical element of capital murder). *See generally Liebman & Hertz, supra* note 33, § 4.2 (discussing factors other than likelihood of success on appeal that lead condemned inmates to give up their appeals and ask to be executed).

141. DRCen. All of these death sentences were imposed by state courts.

142. *See* Death Row U.S.A. , *supra* note 4, at 8-22.

143. The three levels of judicial inspection are described *supra* pp. Part V, pp.18-22.

144. *See supra* pp.4-5 & nn.39, 40.

145. DADB. *See supra* note 26; *supra* pp.25-26 (defining “final review”).

146. DRCen; DADB. Death sentences imposed (5760) - death sentences finally reviewed on direct appeal (4578) = death sentences awaiting direct review (1182).

Death sentences awaiting direct review (1182) ÷ death sentences imposed (5760) = percentage awaiting direct appeal (21%).

147. DADB. *See supra* note 33 (defining “serious error,” meaning in this context, only error that was discovered, preserved and prejudicial).

Additional information on most of the direct appeal decisions discussed here is contained in the state report cards in Appendix A *infra*. Appendix A contains state report cards for the 28 states with at least one federal habeas corpus decision. Direct appeal information for the remaining 6 capital-sentencing states is as follows:

**Direct Appeal Reversal Rates in States in Which No Capital Judgments
Had Completed Federal Habeas Review by End of Study Period**

State	Number of Death Sentences	Number Reversed/ Number Reviewed On Direct Appeal	Percent Reversed on Direct Appeal
Colorado	16	7/8	88
Connecticut	4	3/3	100
New Jersey	43	33/38	87
New Mexico	9	2/8	25
Ohio	183	30/125	24
Oregon	32	28/32	88
Total	287	103/214	48

148. DADB. Number reviewed (4578) - number reversed (1885) = number carried forward to next inspection stage (2693).

149. DADB. The vast majority of capital prisoners who remain alive seek state post-conviction review. *See supra*

note 100 and accompanying text. Some number of prisoners die of natural causes or foul play, *see, e.g.*, BJS 1998 Report, *supra* note 28, or forgo state post-conviction review and volunteer to be executed, *see supra* notes 31; *supra* p.32 & n.140 and accompanying text.

150. DADB. Number reviewed (4364) - number reversed (1782) = number carried forward to next inspection stage (2582).

151. *See supra* note 39; *supra* pp. 26-27 & n.132; *infra* Appendix C, pp. C-1 to C-2.

152. The number of known reversals is set out in the “Number Reversed on Post-Conviction” row within the “**Error Rates/State Post-Conviction**” section of each report card. Because it is not possible to obtain information on all state post-conviction reversals, *see supra* note 39; *supra* pp. 26-27 & n.132; *infra* Appendix C, pp. C-1 to C-2, these figures are reported with the “≥” symbol.

153. The number of capital judgments moving forward from state direct appeal to state post-conviction is listed in the last row of the “**Error Rates/State Direct Appeal**” section of each report card.

154. *See supra* note 39; *supra* pp. 26-27 & n.132; *infra* Appendix C, pp. C-1 to C-2.

155. Appendix C; DRCen; DADB. *See supra* note 132.

156. Appendix C; DRCen; DADB. Following the same procedure used to (*under*)estimate the state post-conviction reversal rate (in which we use the number of capital judgments *available* for state post-conviction review as a rough proxy for the number of capital judgments *actually* reviewed at that stage), *see supra* note 39; *supra* pp. 26-27 & n.132, 33-34 & n.152; *infra* Appendix C, pp. C-1 to C-2, we calculate this figure by taking the sum of the reversals at the state direct appeal and state post-conviction stages as a proportion of the total number of capital judgments reviewed on direct appeal. In the national composite report card, we use the figures for the 28-state cohort of states with cases furthest along in the review process: $(1782 + 248) \div 4364 = .47$.

157. Actually, the first Monday in October 1995. *See supra* note 125.

158. *See supra* note 26 and *supra* p.24 (defining “finally review”).

159. HCDB. *See supra* notes 33, 38 (defining “serious error,” meaning, in this context, that the error was: discovered, preserved, prejudicial, not based on an invalid search and seizure, violated the U.S. Constitution, and (in the post-1988 cases) not based on “new law”).

160. *See supra* pp. 4-5 & nn.39, 40 (discussing the calculation of these rates, and showing how the 68% overall error rate for the nation was calculated). The error and success rates in brackets are for only the state direct appeal and federal habeas stages; the nonbracketed numbers include state post-conviction reversals, as well.

161. DADB; DRCen; Appendix C; HCDB. As is shown in brackets on the national report card, if only the (first) state direct appeal and the (third) federal habeas stages are considered, the combined national error rate was 64% and the combined success rate was 36%. Although our information on cases at those two stages is more accurate than our information about the state post-conviction stage, the information that *is* available on the intermediate stage provides a reliably conservative estimate of what took place there. *See supra* note 39; *supra* pp. 26-27 &

n.132; *infra* Appendix C, pp. C-1 to C-2. For this reason, we usually focus on the more comprehensive, three-stage “overall” rates.

162. The data in Figure 3—drawn from DADB, HCDB—are presented in Table 3, *infra* Appendix E, p. E-4.

163. *See supra* note 39; *supra* pp. 26-27 & n.132; *infra* Appendix C, pp. C-1 to C-2.

164. The data in Figure 4, which are compiled from Appendix C, are also displayed in Table 3, *infra* Appendix E, p. E-4.

165. This figure is likely to be more meaningful when only cases from a single state are considered.

166. DRCen; DADB; National Composite Capital Punishment Report Card, *supra* p.29 & *infra* Appendix A, p. A-5.

167. *See* Table 2, *infra* Appendix E, p. E-3.

168. HCDB; Death Row U.S.A., *supra* note 4, at 8-22.

169. HCDB.

170. *See supra* note 31; *supra* p.32.

171. *See infra* notes pp. 78-87.

172. DRCen; UCRDB; USCen.

173. Death Row U.S.A., *supra* note 4, at 8-22; UCRDB; USCen.

174. DRCen; Death Row U.S.A., *supra* note 4, at 8-22; UCRDB; USCen.

175. USCen.

176. UCRDB.

177. UCRDB; USCen.

178. PrisCen. This category of information and the next are omitted from the national, but presented in the state and regional, report cards.

179. PrisCen.

180. USCen.

181. *See, e.g.*, James Eisenstein & Herbert Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (1977); Martha Myers and Suzette Talarico, *The Social Contexts of Sentencing* (1987).

182. See PolPres. See also Bright & Keenan, *supra* note 54, at 76-80 (describing types of judicial elections); *supra* note 54 (listing study states with judicial elections); *infra* note 221 (political pressure on judges).

183. This measure is from Stanley & Niemi, *Vital Statistics on American Politics 1997-1998* (1999).

184. CtCaLd.

185. CtExpen.

186. See Virginia Report, *supra* note 36 (taking this position in regard to Virginia).

187. See *supra* note 64 (newspaper article quoting Virginia law enforcement officials taking this view).

188. See *supra* note 39; *supra* pp. 26-27 & n.132; *infra* Appendix C, pp. C-1 to C-2. Data on the number of cases available for state post-conviction review in each state is found in the “Number Forward to State Post-Conviction” category of each state’s report card, *infra* Appendix A. We derive that number from DRCen and DADB. The number of state post-conviction reversals, also provided on each report card, is computed from the data in Appendix C.

189. The narrow category of error sufficiently egregious to qualify as “serious” and “reversible” at the federal habeas stage is described *supra* note 38.

190. On one interpretation, there are actually *four* anomalies among the non-asterisked states on Figure 7. Although 16 of the 20 non-asterisked states fall in the range of two-thirds to 1.5 times the national 40% rate of error, four states—North Carolina, Missouri, South Carolina and Virginia—are below half the national average. (As we noted, however, even compared to other anomalies, Virginia is an anomaly, at 15% of the national average.)

The status of Virginia and Missouri here may seem to support the hypothesis (*see supra* note 64 and accompanying text) that both states have lower rates of serious capital error than other states, because low error rates are detected at successive state and federal inspection points. Although possibly valid for Missouri, this hypothesis is confounded as to Virginia by a striking fact about that state and the other federal habeas outlying states besides Missouri: All are states in which the availability of federal habeas relief is largely controlled by the United States Court of Appeals for the Fourth Circuit, which, as we show elsewhere, has markedly lower error detection rates than the other federal circuit courts. See Figures 8 and 33, *infra* pp.61, 104; Table 25, *infra* p.103; *infra* p.106. (By contrast, the Eighth Circuit Court of Appeals, which presides over Missouri habeas cases, does not consistently detect low rates of serious capital error. Contrasting with the 15% rate of serious error it finds in Missouri capital judgments is the 48% rate of serious error it finds in Arkansas judgments.) Given the Fourth Circuit’s consistent and pronounced inclination to find low error rates in *all* capital judgments it reviews—including capital judgments from states (Maryland, North Carolina, and South Carolina) whose own courts find exceptionally *high* rates of serious error in those states’ capital judgments, *see* Table 6, Figure 6, *supra* pp.53, 54; *supra* p.55; *infra* pp.66 & n.198, 106-07—the Fourth Circuit’s discovery of low rates of serious error in Virginia cases provides little confirmation of the low-error-rate hypothesis, and little disproof of the lax-error-detection hypothesis.

191. See *supra* note 54.

192. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2470 (1996).

193. The data underlying Figure 9—compiled from DADB and HCDB—are displayed in Tables 4 and 7, *supra* pp. 47, 57.

194. The data underlying Figure 10—compiled from DRCen, Appendix C and HCDB—are displayed in Tables 6 and 7, *supra* pp.53, 57.

195. Figure 10 is the more informative of the two charts because it permits us to compare *all* relevant state judicial behavior to all relevant federal judicial behavior. See *supra* note 161.

196. The two measures, again, are (1) how much error judges (here, state vs. federal judges) detect when reviewing capital judgments from the same state; and (2) how much error judges (state vs. federal) find *relative to the amount of error found in capital judgments from other states*.

197. See *supra* notes 161, 195.

198. See also *supra* p.51. The Fourth Circuit's low rates of error detection in capital (and, especially, *Virginia* capital) cases are well known. See, e.g., Green, *Virginia Bucks Death Row Flow*, *supra* note 4; Masters, *A Rush on Va.'s Death Row*, *supra* note 64.

The courts of another state in the Fourth Circuit, Maryland, also have very high capital error-detection rates. See Table 6, *supra* p.53; Figure 6, *supra* pp.51, 54. Although Maryland's federal habeas reversal rate appears to be high as well, the state had only a small number of habeas cases reviewed during the study period, and all were decided at the federal *district court* level, with the Fourth Circuit court of appeals never becoming involved. See HCDB.

In contrast to the courts of Maryland, North Carolina and South Carolina, it is less likely that the Louisiana, Florida and Alabama courts have ratcheted up their error detection to compensate for predictably low error detection by the Fifth Circuit (in reviewing Louisiana capital judgments) and the Eleventh Circuit (in reviewing Florida and Alabama capital judgments). Unlike the Fourth Circuit's *uniformly* low error-detection, the Fifth Circuit and Eleventh Circuits error-detection rates vary state to state, and are quite high for some states (respectively, Mississippi and Georgia). See Table 8, *supra* p.60; Figure 8, *supra* p.6. This variance suggests that the Fifth and Eleventh Circuit courts are sensitive to differences in the amounts of error infecting the cases they review, see *supra* pp.59-60, and thus that it is those two *federal* courts (and not the *state* courts) that are doing the compensating, based on how relatively error-prone or error-free they find capital judgments from each of the states within their jurisdiction.

199. See *supra* pp.4-5 & nn.39, 40.

200. See *supra* note 161, explaining why we sometimes report reversal rates for state direct appeal and federal habeas corpus, excluding state post-conviction, and on other occasions report the overall rates for all three stages.

201. Two states from our cohort of 28, Delaware and Washington, are omitted from this analysis because state post-conviction information is not available for them. Both in any event have less than three federal habeas cases, making them relatively unreliable targets of comparison.

202. Kentucky, Maryland and Tennessee have 100% error rates, but only small numbers of final federal habeas cases (2, 3 and 1 respectively).

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203. See sources cited *supra* note 10.
204. See *supra* note 49.
205. The data underlying Figure 13 are displayed in Tables 6, 7 and 10, *supra* pp.53, 57, 68.
206. See *supra* note pp.40-41; National Composite Capital Punishment Report Card, *supra* p.30 & *infra* Appendix A, p. A-6.
207. The same information—taken from DRCen; Death Row U.S.A., *supra* note 4, at 8-22—is in Table 11, *infra* Appendix E, p. E-7.
208. By non-consensual executions, we mean ones occurring after the prisoner insisted upon and received full judicial review. For further explanation of the difference between consensual and non-consensual executions and the reasons for looking at the latter, and for some data about the relative frequency of each type of execution, see *supra* note 31; *supra* Op.32 & n.140, 41.
209. Two of the study states (Idaho and Pennsylvania) have yet to have a post-1973 non-consensual execution.
210. The same information—from DRCen and Death Row U.S.A., *supra* note 4, at 8-22—is in Table 12, *infra* Appendix E, p. E-8.
211. See *supra* notes 31, 140, 208.
212. The same information—from DRCen and DADB—is in Table 13, *infra* Appendix E, p. E-9.
213. See *supra* pp.40-41.
214. The data underlying all the comparisons in this section—which come from DRCen, Death Row U.S.A., *supra* note 4, UCRDB, USCen, PrisCen—are displayed in Tables 14-19, *infra* Appendix E, pp. E-10 to E-15. Tables 14, 15, and 16 compare states' *death sentencing* rates, respectively, per homicides, population and prison population. Tables 17, 18, and 19 then make the same comparisons of the respective states' non-consensual *execution* rates.
215. Variations are not quite as great per prison population, suggesting that some part of the variation in death-sentencing and execution rates per homicides and population is due to variable punitiveness among the states.
216. Similarly, Nevada and Idaho are among the top three states when it comes to the proportion of homicides that result in death sentences, but both states are in the very bottom cohort of states when it comes to the proportion of their death sentences that are validated on judicial review and result in executions. See also *infra* note 238. (Nevada and Idaho are also among the top four states when it comes to the proportion of their prison population under sentence of death, but they are in the very bottom category of states when it comes to executions.) Conversely, Virginia and Louisiana are in the top four states when it comes to the proportion of their prison population that they execute but in the bottom cohort of states when it comes to the proportion of their prison population that is under sentence of death.

217. See Jason DeParle, *Abstract Death Penalty Meets Real Execution*, *N.Y. Times*, Sept. 28, 1991, § 4, at 2 (discussing a period in 1987 when Louisiana executed eight men in 11 weeks and was “so enthusiastic about capital punishment that a legal newspaper dubbed it ‘Death Mill, U.S.A.’”).

(Notes continue on the next page)

218. During the 1990s, Texas and Virginia have consistently executed about as many individuals as all the other states combined:

**Total Number of Executions Compared to
Executions by Texas and Virginia**

Year	Total Executions	TX, VA Executions
1991	14	7
1992	31	16
1993	38	22
1994	31	16
1995	56	26
1996	45	11
1997	74	45
1998	68	34
1999	98	49
Total	455	226 (49.7%)

Death Row U.S.A., *supra* note 4, at 11-19. See Green, *Virginia Bucks Death Row Flow*, *supra* note 4; Masters, *A Rush on Va.’s Death Row*, *supra* note 64; *supra* note 4.

219. The relevant states’ average homicides rate per 100,000 population during the 23-year study period—taken from UCRDB, USCen—are in Table 20, *infra* Appendix E, p. E-16. See *supra* pp.43 (explaining how average homicide rates are calculated). As Table 20 demonstrates, average homicide rates varied greatly among death-sentencing states during the study period, ranging from 3.28 per 100,000 population in Utah to 15.19 per 100,000 population in Louisiana.

220. Average percent nonwhite populations for our 28-state cohort during the 23-year study period—taken from USCen—are set out in tabular form in Table 21, *infra* Appendix E, p. E-17.

221. A number of authorities (1) have noted instances in which elected judges’ careers were positively or negatively affected by whether their prior actions on the bench had seemed (respectively) sympathetic to, or

skeptical about, capital punishment, and (2) have concluded that political pressure is likely to skew capital decision making by state court judges. *See, e.g.*, *Harris v. Alabama*, 513 U.S. 504, 519-20 & n.5 (1995) (Stevens, J., dissenting) (“The ‘higher authority’ to whom present-day capital judges may be ‘too responsive’ is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess fealty to the death penalty. . . . The danger [is] that they will bend to political pressures when pronouncing sentence in highly publicized capital cases.”); Bright & Keenan, *supra* note 54, at 760 (“Decisions in capital cases have increasingly become campaign fodder in both judicial and nonjudicial elections. The focus in these campaigns has been almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions. Judges have come under attack and have been removed from the bench for their decisions in capital cases—with perhaps the most notable examples in states with some of the largest death rows and where the death penalty has been a dominant political issue. Recent challenges to state court judges in both direct and retention elections have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court.”); Coyne & Entzroth, *supra* note 33, at 13 (“The death penalty and politics . . . are inseparable,” particularly because “the vast majority of judges who preside over capital cases must answer to the electorate” and because “judges are far less likely to . . . take . . . tough action if they must run for reelection or retention every few years” (quoting ABA, Report of the Comm’n on Professionalism, 112 F.R.D. 243, 293 (1986)); Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urb. L.J. 239 (1994).

222. Tables 22, 23 and 24—set out *infra* Appendix E, pp. E-18 to E-20—compare the 28 study states in regard to, respectively, electoral pressure on judges, court expenditures per capita, and court caseloads per capita.

223. We developed the political pressure measurement ourselves, using statutory information about how judges are elected and retained in the various states. *See supra* note 26. We are fairly confident about the quality of the underlying data. The other measures come from state-self-reported data, *see id.*, the accuracy and computational-comparability of which we are less sure of.

224. *See* sources cited *supra* note 221.

225. This proposal (were it supported by the data) would *not* call for spending less on *each* death sentence obtained. Rather, it would call for spending less *overall*, by seeking and securing fewer death sentences *overall*. The spending on each death sentence that *is* obtained might actually *increase*.

226. Included are report cards on the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.

227. *See supra* note 190; *supra* pp.14, 51, 59 & n.190, 65-66 & n.198.

228. Not counting the Fourth Circuit, federal courts found serious error in 229 (42%) of 547 death sentences reviewed.

229. *See supra* Table 6 and Figure 6, *supra* pp.53, 54; *supra* pp. 51, 65-66 & nn.190, 198.

230. Outside the Fourth Circuit, the only other state where there are relatively low state and federal error detection rates—although not nearly as low (in either case) as in Virginia—is Missouri, which falls within the jurisdiction of the U.S. Court of Appeals for the Eighth Circuit. *Cf. supra* note 190.

231. Without changing this analysis, one could expand it to the two other death-sentencing states that border Virginia, but are not in the same federal judicial circuit: Kentucky and Tennessee. (West Virginia and the District of Columbia do not have the death penalty.)

232.

233.

234. *See supra* note 31; *supra* p.32 & n.140; *supra* note 208 (explaining the reasons for focusing on non-consensual executions).

235. Tables 26 and 27—derived from DRCen and Death Row U.S.A., *supra* note 4, and set out *infra* Appendix E, p. E-27—compare the federal circuit courts based on, respectively, their component states’ death-sentencing and execution rates per 100,000 population.

236. *See* Figures 19-22, *supra* pp.82-84, 86.

237. Figure 35 is based on the information—taken from DRCen and Death Row U.S.A., *supra* note 4—in Table 28, *infra* Appendix E, p. E-22. Figure 35 and Table 28 look at *all* executions, both consensual and non-consensual. For the reasons discussed *supra* note 31; *supra* pp.32 & n.140, 41, a better measure of success might be the proportion of death sentences carried out *non-consensually*. For that information, in tabular and graphic form, see Table 29 and Figure 36, *infra* Appendix E, pp. E-23 to E-24.

(Notes continue on the next page)

238. *See supra* pp.14, 51, 59 & n.190, 65-66 & n.198, 105-07.

Comparing Figure 35 to Figure 19, *supra* p. 82, helps confirm a point made above—that the path to more executions is *not*, as one might expect, more death sentences. *See supra* pp.82-87. A comparison of Figures 35 and 19 reveals that:

- Six of the top 11 (of 28) states when it comes to death sentences per 1,000 homicides, including the top 4 states, are in the *bottom* half of the states when it comes to percent of death sentences carried out after full review:

State	Rank in Death Sentences per 1,000 Homicides	Rank in Percent Death Sentences Carried Out Following Full Review
Wyoming	1 (of 28)	16 (of 28)
Idaho	2	23
Nevada	3	26
Arizona	4	20
Oklahoma	6	19
Mississippi	11	18

- On the other hand, of the top 5 states when it comes to percent of death sentences carried out after full review are in the bottom 11 states in regard to death sentences per 1,000 homicides:

State	Rank in Percent Death Sentences Carried Out	Rank in Death Sentences per 1,000 Homicides Following Full Review
Virginia	1 (of 28)	22 (of 28)
Louisiana	2	25
Texas	3	18
Missouri	5	20

239. See *supra* pp.12-13 & Figure 2, 35-37.

240. See Table 1, *infra* Appendix E, p. E-2.

241. States in which recent press accounts have linked high capital error rates and the state’s incapacity to make its death penalty work in a rational fashion include:

California: See Paul Elias & Rinat Fried, *A Failure to Execute*, The Recorder, Dec. 15, 1999, at 1 (“Since 1978, when . . . California . . . reinstituted the death penalty, 647 men and women have been sentenced to death. Only [seven] have been executed. [Over] four times as many California death row inmates have died in San Quentin of causes other than execution. Fifty-seven sentences have been overturned.”); Howard Mintz, *Slow Death: The Capital Punishment Gridlock in California*, San Jose Mercury News, Mar. 12, 2000, at A1, available in Westlaw, News Library, SJMERCURY file (reporting that between 1992 and 2000, California’s death row grew from 350 to about 550 inmates, but it only executed 7 men; in the same period, state courts overturned approximately 10 death sentence, and federal courts overturned 13).

Florida: Rene Stutzman, *High Court Puts Death Cases Back into Play: Errors Were Found in 10 of 12 Capital Punishment Cases Reviewed this Year*, Orlando Sentinel, Aug. 24, 1999, at D1, available in 1999 WL 2829798 (in the first eight months of 1999, the Florida Supreme Court found trial errors requiring retrial, resentencing, or imposition of a life sentence in 83% of the first-time death penalty appeals it has reviewed; the figure for all of 1998 was 77% (20/26)).

Illinois:

An Illinois Supreme Court ruling on Friday pushed the number of death-penalty cases in Illinois that have been reversed for a new trial or sentencing hearing to 130—exactly half the total of those capital cases that have completed at least one round of [state] appeals, according to a *Tribune* analysis.

Ken Armstrong & Christi Parsons, *Half of State’s Death-Penalty Cases Reversed*, Chi. Trib., Jan. 22, 2000, at 1, available in 2000 WL 3629108.

Nevada: See Sean Whaley, *Nevada’s Death Row History Criticized*, Las Vegas Rev.-J., Feb. 7, 2000, at 1B, available in Westlaw, News Library, LV-RJ-C file (finding that since 1979, 8 Nevada Death Row inmates have been executed (all but one consensually, *i.e.*, in advance of full judicial review, see *Death Row U.S.A.*, *supra* note 4, at 8-22); since 1993, the same number, 8, have had their capital judgments reversed by the state and federal

courts, among whom 3 (as of this writing, 4, see Brendan Riley, *Emotional Mazzan Released*, Las Vegas Rev.-J., May 7, 2000, at 1) were thereupon released from prison).

Tennessee: Duncan Mansfield, *The Price of Death Penalty? Maybe Millions*, AP Newswires, Mar. 26, 2000, available in Westlaw, News Library, APWIRE file (“Tennessee, with 97 people on death row [who have accumulated over at least 23 years] is [still awaiting] its first execution since 1960.”).

Utah: See Lee Davidson, *Death Row the End?: Most Get Out Alive*, Deseret News (Salt Lake City), Dec. 13, 1999, at B1, available in 1999 WL 26543645 (noting that since Utah reinstated the death penalty in 1973, 16 prisoners have left the state’s death row, 6 by execution and 10 (63%) because their convictions or sentences were overturned by the courts).

Washington: See, e.g., Mike Carter, *Court Orders Retrial in 1986 Kitsap Rape-Murder Case*, Seattle Times, July 15, 1999, at B1, available in 1999 WL 6282738 (noting that 7 Washington State capital sentences were overturned in 8 years, at a time when there were a total of only 14 men on Washington’s death row, see BJS 1998 Report, *supra* note 28, app. tbl. 2).

242. See *supra* pp. 36-38 & Figure 3.

243. See *supra* p.5; State Post-Conviction National Composite Results, *infra* Appendix C, p.C-3..