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A Broken System, Part II:

**Why There Is So Much Error in
Capital Cases, and
What Can Be Done About It**

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Executive Summary

A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It

There is growing awareness that serious, reversible error permeates America's death penalty system, putting innocent lives at risk, heightening the suffering of victims, leaving killers at large, wasting tax dollars, and failing citizens, the courts and the justice system.

Our June 2000 Report shows how often mistakes occur and how serious it is: 68% of all death verdicts imposed and fully reviewed during the 1973-1995 study period were reversed by courts due to serious errors.

Analyses presented for the first time here reveal that 76% of the reversals at the two appeal stages where data are available for study were because defense lawyers had been egregiously incompetent, police and prosecutors had suppressed exculpatory evidence or committed other professional misconduct, jurors had been misinformed about the law, or judges and jurors had been biased. Half of those reversals tainted the verdict finding the defendant guilty of a capital crime as well as the verdict imposing the death penalty. 82% of the cases sent back for retrial at the second appeal phase ended in sentences less than death, including 9% that ended in *not guilty verdicts*.

Part II of our study addresses two critical questions: Why does our death penalty system make so many mistakes? How can these mistakes be prevented, if at all? Our findings are based on the most comprehensive set of data ever assembled on factors related to capital error—or other trial error.

Our main finding indicates that if we are going to have the death penalty, it should be reserved for the worst of the worst: **Heavy and indiscriminate use of the death penalty creates a high risk that mistakes will occur.** The more often officials use the death penalty, the wider the range of crimes to which it is applied, and the more it is imposed for offenses that are not highly aggravated, the greater the risk that capital convictions and sentences will be seriously flawed.

Most disturbing of all, we find that **the conditions evidently pressuring counties and states to overuse the death penalty and thus increase the risk of unreliability and error include race, politics and poorly performing law enforcement systems.** Error also is linked to overburdened and underfunded state courts.

MAIN FINDING

The higher the rate at which a state or county imposes death verdicts, the greater the probability that each death verdict will have to be reversed because of serious error.

- The overproduction of death penalty verdicts has a powerful effect in increasing the risk of error. Our best analysis predicts that:
 - Capital error rates more than *triple* when the death-sentencing rate increases from a quarter of the national average to the national average, holding other factors constant.
 - When death sentencing increases from a quarter of the national average to the highest rate for a state in our study, the predicted increase in reversal rates is *six-fold*—to *about 80%*.

In particular, the more often states impose death sentences in cases that are not highly aggravated, the higher the risk of serious error.

- At the federal habeas stage, the probability of reversal grows substantially as the crimes resulting in capital verdicts are less aggravated. For each additional aggravating factor, the probability of reversal drops by about 15%, when other conditions are held constant at their averages. Imposing the death penalty in cases that are not the worst of the worst is a recipe for unreliability and error.

Comparisons of particular counties' and states' capital-sentencing and capital-error rates illustrate the strong relationship between frequent death sentencing and error. For example:

- Among counties with 600 or more homicides and five or more death sentences during the study period, ten had the highest death-sentencing rates: Pima County (Tucson), Arizona; suburban Baltimore County, Maryland; Clark County (Las Vegas), Nevada; Pinellas County (St. Petersburg), Florida; Oklahoma (City), Oklahoma; Maricopa County (Phoenix), Arizona; Hamilton County (Cincinnati), Ohio; Hillsborough County (Tampa), Florida; Polk County, Florida; and Muscogee County, Georgia. These counties had an average capital error rate of 71% at the first and last appeal stages, and eight of them put a total of 16 people on death row who were later found not guilty. The ten comparable capital counties with the lowest death-sentencing rates are San Francisco, California; Richmond, Virginia; Fulton County (Atlanta), Georgia; Essex County (Newark), New Jersey; St. Louis City, Missouri; Pulaski County (Little Rock), Arkansas; Bernalillo County (Albuquerque), New Mexico; Davidson County (Nashville), Tennessee; Jackson County (Kansas City), Missouri; and Prince George's

County (suburban Washington), Maryland. These counties had an average error rate of 41%, and none sentenced anyone to death during the study period or since who was later found not guilty.*

* Table 16, Page 304.

- All but one of the 10 states with the highest death-sentencing rates during the 23-year study period had overall capital reversal rates at or above the average rate of 68%.

PRESSURES ASSOCIATED WITH OVERUSE OF THE DEATH PENALTY

Four disturbing conditions are strongly associated with high rates of serious capital error. Their common capacity to pressure officials to use the death penalty aggressively in response to fears about crime and regardless of how weak any particular case for a death verdict is, may explain their relationship to high capital error rates.

- **The closer the homicide risk to whites in a state comes to equaling or surpassing the risk to blacks, the higher the error rate.** Other things equal, reversal rates are *twice as high* where homicides are most heavily concentrated on whites compared to blacks, than where they are the most heavily concentrated on blacks.
- **The higher the proportion of African-Americans in a state—and in one analysis, the more welfare recipients in a state—the higher the rate of serious capital error.** Because this effect has to do with traits of the population at large, not those of particular trial participants, it appears to be an indicator of crime fears driven by racial and economic conditions.
- **The lower the rate at which states apprehend, convict and imprison serious criminals, the higher their capital error rates.** Predicted capital error rates for states with only 1 prisoner per 100 FBI Index Crimes are about 75%, holding other factors constant. Error rates drop to 36% for states with 4 prisoners per 100 crimes, and to 13% for those with the highest rate of prisoners to crimes. Evidently, officials who do a poor job fighting crime also conduct poor capital investigations and trials. Well-founded doubts about a state's ability to catch criminals may lead officials to extend the death penalty to a wider array of weaker cases—at huge cost in error and delay.
- **The more often and directly state trial judges are subject to popular election, and the more partisan those elections are, the higher the state's rate of serious capital error.**

ADDITIONAL FINDINGS

Heavy use of the death penalty causes delay, increases cost, and keeps the system from doing its job. High numbers of death verdicts waiting to be reviewed paralyze appeals.

Holding other factors constant, the process of moving capital verdicts from trial to a final result seems to come to a halt in states with more than 20 verdicts under review at one time.

Poor quality trial proceedings increase the risk of serious, reversible error. Poorly funded courts, high capital and non-capital caseloads, and unreliable procedures for finding the facts all increase the chance that serious error will be found. In contrast, high quality, well-funded private lawyers from out of state significantly increase a defendant's chance of showing a federal court that his death verdict is seriously flawed and has to be retried.

Chronic capital error rates have persisted over time. Overall reversal rates were high and fairly steady throughout the second half of the 23-year study period, averaging 60%. When all significant factors are considered, state high courts on direct appeal—where 79% of the 2349 reversals occurred—found significantly more reversible error in recent death verdicts than in verdicts imposed earlier in the study period. Other things equal, direct appeal reversal rates were increasing 9% a year during the study period.

State and federal appeals judges cannot be relied upon to catch all serious trial errors in capital cases. Like trial judges, appeals judges are susceptible to political pressure and make mistakes. And the rules appeals judges use to decide whether errors are serious enough to require death verdicts to be reversed are so strict that egregious errors slip through. We study four illustrative cases in which *the courts approved the convictions and death sentences of innocent men despite a full set of appeals.** *These case studies show that judges repeatedly recognized that the proceedings were marred by error but affirmed anyway because of stringent rules limiting reversals.*

SUMMARY EXPLANATION

The lower the rate at which a state imposes death sentences—and the more it confines those verdicts to the worst of the worst—the less likely it is that serious error will be found. The fewer death verdicts a state imposes, the less overburdened its capital appeal system is, and the more likely it is to carry out the verdicts it imposes. The more often states succumb to pressures to inflict capital sentences in marginal cases, the higher is the risk of error and delay, the lower is the chance verdicts will be carried out, and the greater is the temptation to approve flawed verdicts on appeal. Among the disturbing sources of pressure to overuse the death penalty are political pressures on elected judges,

* We study the cases of Lloyd Schlup, Earl Washington, Anthony Porter and Frank Lee Smith. See pp. 25-36.

well-founded doubts about the state’s ability to convict serious criminals, and the race of the state’s residents and homicide victims.

METHODS

We employ an array of statistical methods to identify factors that predict where and when death verdicts are more likely to be found to be seriously flawed, and to assure that the analyses are comprehensive, conservative and reliable: We use several statistical methods with different assumptions about the arrangement of capital reversals and reversal rates to ensure that results are driven by relationships in the data, not statistical methods. We analyze reversals at each separate review stage and at all three stages combined. We use multiple regression to analyze the simultaneous effect on reversal rates of important general factors (state, county, year and time trend) and specific conditions that may explain error rates. We examine factors operating at the state, county and case level. And we check for consistency of results across analyses to determine which factors and sets of significant factors are the most robust and warrant the most confidence.

POLICY OPTIONS

The harms resulting from chronic capital error are costly. Many of its evident causes are not easily addressed head-on (e.g., the complex interaction of a state’s racial make-up, its welfare burden and the efficacy of its law enforcement policies). And indirect remedies are unreliable because they demand self-restraint by officials who in the past have succumbed to pressures to extend the death penalty to cases that are not highly aggravated. As a result, some states and counties may conclude that the only answer to chronic capital error is to stop using the death penalty, or to limit it to the very small number of prospective offenses where there is something approaching a social consensus that only the death penalty will do.

In other states and counties, a set of carefully targeted reforms based upon careful study of local conditions might seek to achieve the central goal of limiting the death penalty to “the worst of the worst”—to defendants who can be shown without doubt to have committed an egregiously aggravated murder without extenuating factors. Ten reforms that might help accomplish this goal are:

- Requiring proof beyond *any* doubt that the defendant committed the capital crime.
- Requiring that aggravating factors substantially outweigh mitigating ones before a death sentence may be imposed.
- Barring the death penalty for defendants with inherently extenuating conditions—mentally retarded persons, juveniles, severely mentally ill defendants.

- Making life imprisonment without parole an alternative to the death penalty and clearly informing juries of the option.
- Abolishing judge overrides of jury verdicts imposing life sentences.
- Using comparative review of murder sentences to identify what counts as “the worst of the worst” in the state, and overturning outlying death verdicts.
- Basing charging decisions in potentially capital cases on full and informed deliberations.
- Making all police and prosecution evidence bearing on guilt vs. innocence, and on aggravation vs. mitigation available to the jury at trial.
- Insulating capital-sentencing and appellate judges from political pressure.
- Identifying, appointing and compensating capital defense counsel in ways that attract an adequate number of well-qualified lawyers to do the work.

CONCLUSION

Over decades and across dozens of states, large numbers and proportions of capital verdicts have been reversed because of serious error. The capital system is collapsing under the weight of that error, and the risk of executing the innocent is high. Now that explanations for the problem have been identified and a range of options for responding to it are available, the time is ripe to fix the death penalty, or if it can't be fixed, to end it.

Evidence of Widespread Concerns About Error in Capital Cases and Support for Reforms Similar to Those Discussed in *A Broken System, Part II*

The overwhelming evidence of the death penalty's chronic systemic failure has been widely recognized. Illinois's Governor George Ryan has suspended executions pending a comprehensive study of the death penalty. Maryland and Nevada came close to halting executions in 2001 while completing broad studies that are underway there as in seven other states and the U.S. Department of Justice. Staunch death penalty supporters agree that "we are witnessing today a true crisis of confidence in the death penalty in the United States" and that "evidence of trouble is everywhere." (Indiana University Law Professor Joseph Hoffmann, July 2001). They share the fear that, "if statistics are any indication, the system may well be allowing some innocent defendants to be executed." (Supreme Court Justice Sandra Day O'Connor, July and Oct. 2001).

Strong death penalty supporters have recently endorsed the goal of limiting the death penalty to highly aggravated cases. "There is a growing acknowledgment generally that the death penalty should be reserved for the worst of the worst." (Clatsop County, Oregon District Attorney Joshua Marquis, quoted in the *Washington Post*, Sept. 2001). Or as Virginia Governor James Gilmore said recently, the death penalty should be "reserved only for the worst possible cases." (CNN, Aug. 2001).

Death penalty supporters have also endorsed a variety of reforms that might help achieve this goal:

- Last year, the legislatures of Arizona, Connecticut, Florida, Missouri, and North Carolina and the Supreme Court of Tennessee banned executing mentally retarded persons. The U.S. Supreme Court ordered briefs on the legality of the same practice, which it upheld 12 years ago. 18 states now ban the practice.
- Death penalty supporters called for a "higher threshold" of certainty about guilt before defendants subject to the death penalty can be convicted (Governor Frank Keating, Oklahoma, National Press Club, June 2001) or for other reforms "making it absolutely certain that the accused is indeed the killer" and that "the death penalty is not used when the evidence is merely circumstantial." (John Podhoretz, *New York Post* column, June 2001).
- A leading capital prosecutor has advised state's attorneys to "eliminate knee-jerk [capital-charging] decisions" by using "written policies for deciding whether to seek the death penalty in murder cases" and "capital-case committees," and has recommended that "before deciding whether to seek the death penalty, prosecutors should [invite] defense attorneys to submit mitigation packets—information on a defendant's mental state and upbringing that could evoke sympathy at trial." (Joe Birkett, President of the Association of Government Attorneys in Capital Litigation, as summarized by the *Seattle Post-Intelligencer*, Aug. 2001).
- The Innocence Protection Act which calls for improved defense representation and access to evidence of innocence in capital cases has strong bipartisan support in both Houses of

Congress, including from Senators Gordon Smith (R-Or.), Susan Collins (R-Me.) and John Warner (R-Va.), and from Representatives John Boehner (R-OH), Jennifer Dunn (R-WA), Lindsey Graham (R-SC), Ray LaHood (R-IL), George Nethercutt (R-WA), Rob Portman (R-OH), and Joe Scarborough (R-FL)—all death penalty supporters.

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VII. Summary and Interpretation of Results: The Strongest Predictor of Serious Capital Error Is Aggressive Use of the Death Penalty, Extending to Weakly Aggravated Homicides, in Response to Political, Race-Related and Law-Enforcement-Related Fears and Pressures

A. Summary of Methods

Parts IV-VI of this Report describe the results of 19 separate statistical analyses of state- and county-level factors related to high state and county rates of reversible capital error, and of case-level factors associated with a probability of federal habeas reversal of death verdicts. The analyses use a variety of statistical techniques, including classic logistic, over-dispersed binomial logistic and over-dispersed Poisson logarithmic regression analyses to identify factors that explain why some states and counties have more capital error than others and why some capital verdicts are reversed on federal habeas review and others are not. To assure that they are comprehensive, conservative and reliable, the analyses:

- use a variety of statistical methods with different assumptions about the arrangement of the condition being studied—capital reversals and reversal rates—to ensure that it is relationships in the data, not statistical methods, that drive the results;
- analyze reversals and reversal rates at each of three stages of court review of capital verdicts—state direct appeal, state post-conviction and federal habeas—and at the three stages combined;
- use different methods to analyze the simultaneous effect on reversals and reversal rates of important general factors, such as state, county, year and time trend, and specific conditions that may explain capital reversals and reversal rates;
- examine explanatory factors operating at the state, county and case level;
- were all subjected to tests for statistical significance, variance left unexplained, fit between predicted and actual results, and effect size; and
- were tested for consistency within analyses and across analyses to determine which form of analysis, which individual factors identified as statistically significant, and which interlocking sets of significant factors are the most robust and warrant the most confidence.

The 19 regression analyses were supplemented with two sets of case studies, each of which broadened the focus from serious, reversible capital error, to another kind of serious error: the capital conviction and sentencing of people later shown to be innocent of a capital crime. The first set of case studies examine why full sets of reviewing courts at all three review stages *approved* the execution of four innocent men who thereafter were saved only by the fortuitous, eve-of-execution discovery of exculpatory DNA, the reinterpretation of an exonerative video tape after a decade of apparently minor discoveries cumulated to discredit false testimony that had emarginated the tape at the original trial, and an actual perpetrator's confession to intrepid college students taking part in a class project.⁶⁹⁷ The second set of analyses examines the capital-error records (including for convicting and condemning people later shown to be not guilty) of paired sets of American counties with similar numbers of homicides but different rates of using the death penalty.⁶⁹⁸

Our basic approach in using this array of statistical methods and case studies, explanatory factors and controls, and diagnostic tests was to start with one analysis reflecting our best judgment about the most reliable way to study conditions associated with serious, capital error (Analyses 1), then systematically to address possible objections to that analysis with alternative methods that evaluate or avoid the objection. Our choice of results to treat as worthy of attention and analysis, and to carry forward to this section's interpretation of all results as a whole, is conservative: Unless there is a substantial basis for confidence in a result, given the methods used to reach it, its statistical significance, its performance on the other diagnostic tests, its consistency with results of other analyses and its consistency with logic and experience, we omitted it from further consideration. We use the same approach here in analyzing the factors and interpretations that have survived this gauntlet of tests and comparisons.

As we show in *Broken System, Part I*, and in Part III of this Report, high rates and amounts of serious, reversible capital error have broken the nation's death penalty system. We begin here with our single, principal conclusion about the condition most strongly and consistently associated with high rates and amounts of reversible capital error:

- *The more aggressively officials use the death penalty—the more often they use it and the more frequently they apply it to homicides that are not highly aggravated—the greater is the risk that any death verdict they impose will be seriously flawed.*

We also reach **five supporting conclusions grounded in the study results that expand our understanding of the principal conclusion:**

- *Several conditions that are strongly associated with serious capital error have a common tendency to increase pressure on officials to use the death penalty aggressively:*
 - *the risk of homicide to the entire community, especially when the risk to politically influential citizens approaches or exceeds that to other citizens—as measured here by how close the homicide risk to whites comes to equaling or surpassing the homicide risk to blacks;*
 - *crime fears associated with racial and possibly economic conditions—as measured here by the proportion of the population that is African-American, and by the amount of spending and number of residents on welfare;*
 - *well-founded doubts about the ability of the state's law-enforcement system to deal effectively with crime through arrest, conviction and incarceration; and*
 - *state trial judges' susceptibility to being harmed politically if their capital rulings do not conform to popular sentiment.*
- *Overuse of the death penalty causes harms beyond serious, reversible error, including cost, delay and the system's inability to achieve its most basic goals.*
- *Poor quality trial proceedings—which are in part a function of heavy use of the death penalty—also appear to increase the risk of serious, reversible error.*
- *After controlling for other factors, conditions leading to capital reversals at the state direct appeal stage of review—which accounts for 79% of all reversals—have gotten substantially worse over time, given the strong association between later verdicts and higher reversal rates. The same may be true at the other review stages. There is no reliable evidence that conditions creating serious capital error have improved over time.*

- ***State and federal reviewing judges are themselves susceptible to political pressure and mistake, and thus are not a reliable substitute for careful and accurate capital trials.***

The principal conclusion and most of the supporting conclusions are obvious implications of strong and consistent study results requiring little interpretation. The first and last supporting conclusions rely additionally on logic and experience. We are confident in the reliability of all of these conclusions and their strength and sufficiency as bases for changes in policy. All of them inform our sense of urgency about the need for serious policy reforms. The principal conclusion drives most of the policy suggestions in Part VIII below.

B. Principal Conclusion: Heavy Use of the Death Penalty Extending Beyond Highly Aggravated Homicides Substantially Increases the Risk of Serious Capital Error

Recently, the *Washington Post* quoted a statement by Joshua Marquis, District Attorney of Clatsop County, Oregon, and a Board Member of the National District Attorneys Association, that “[t]here is a growing acknowledgment generally that the death penalty should be reserved for the worst of the worst.”⁶⁹⁹ A few weeks earlier, Virginia’s Governor, James Gilmore, expressed the same sentiment on CNN: The death penalty should be “reserved only for the worst possible cases.”⁷⁰⁰ **The state-, county- and case-level results underlying our major finding reveal the wisdom of these views, and the need to enforce the “worst of the worst” principle strictly in order to bring serious capital error under some sort of control.**

1. High state-level capital-sentencing and high capital-error rates.

States vary widely in how often they punish homicides with death. During the 23-year study period from 1973 to 1995, 34 active capital states imposed death verdicts in one or more of those years, totaling 519 sets of states and years. **The average rate of death verdicts imposed in all 519**

states and years was 18 per 1000 homicides. But rates ranged from about 1 death verdict per 1000 homicides (*e.g.*, in Illinois in 1977) to 208 in Idaho in 1982.

Figure 11, p. 121 above, compares states based on how often they used the death penalty during the entire study period. **Death-sentencing rates per 1000 across that period homicides ranged:**

- from *less than 5* in Connecticut, Colorado and New Mexico, and *between 5 and 10* in Maryland, New Jersey and Washington;
- to *around 10* in California, Kentucky and Louisiana, and *around 12* in Illinois, Indiana, and Virginia;
- to from *32 to 37* in Alabama, Florida and Montana, and *around 45* in Arizona, Delaware, Nevada and Oklahoma;
- to *60* in Idaho.

The most consistent finding of our 19 analyses is that these **disparities in capital-sentencing rates are strongly associated with disparities in capital-error rates. The more death verdicts jurisdictions impose per 1000 homicides, the more likely it is that any single death verdict they impose will later be reversed due to serious capital error.** This is a significant finding of:

- our main regression Analysis 1;⁷⁰¹
- most of the 17 confirming state and county regression analyses;⁷⁰²
- analyses of all three review stages combined,⁷⁰³ and of two of the three review stages individually,⁷⁰⁴ with supporting results from our case-level study of the remaining (federal habeas) stage;⁷⁰⁵

- analyses designed to explain county reversal rates, as well as state reversal rates;⁷⁰⁶
- analyses identifying explanatory conditions operating and measurable at the county level—death-sentencing rates being the main, significant county-level explanation for county reversal rates⁷⁰⁷—as well as analyses identifying explanatory conditions operating and measurable at the state level;⁷⁰⁸ and

our county case studies of capital-sentencing and capital-error rates.⁷⁰⁹

This explanatory factor has a large predicted effect on rates of serious capital error.

Analysis 1—the most complete analysis of our detailed data on capital reversal rates⁷¹⁰—predicts that capital-error rates will increase from less than 15% to more than 75% as death-sentencing rates rise from the lowest to the highest levels among states and years in our study, holding other explanatory factors at their averages.⁷¹¹ Predicted increases in error rates are especially steep around the average death-sentencing rate, meaning small changes in death-sentencing practices within the range where most states operate are predicted to have large payoffs in terms of reduced capital error.⁷¹²

Table 18, p. 344 below, ranks the 34 states based on the degree of risk each faces from six conditions associated with higher rates of serious capital error. The risk posed by all but one factor, holding other factors constant at their averages, is based on the results of main Analysis 1A.⁷¹³ The comparative risk posed to each state is based on each state’s weighted average value on the relevant condition during the study period, with weights assigned based on the state’s yearly contribution to the pool of capital verdicts being studied.⁷¹⁴ In addition to each state’s rank and weighted average value on each factor, Table 18 indicates whether the capital error rate Analysis 1 predicts for the state based on the explanatory factor is above or below the predicted 34-state average error rate based on that factor (holding other factors constant at their averages), and *how far*—how many percentage points—above or below the 34-state average each state’s predicted error rate falls.

In using Table 18, a strong caveat is in order. Because the data in each column are based on a single explanatory factor, holding other factors constant at their averages, and because our results indicate that capital error rates are a function of several significant factors, and also because of the statistical methods used to generate the information there, **Table 18 is most appropriately used to identify conditions in each state that pose a particularly large risk of serious capital error and might be an important target of reform efforts there. No single column in Table 18, nor the table as a whole, may appropriately be used to assign a particular overall predicted reversal rate to a given state.**

Column A in Table 18, p. 344 below, compares states' predicted risk of capital error based on their capital-sentencing rates, holding other factors constant at their averages. **Based only on states' death-sentencing rates**—and with the above caveat in mind—**Analysis 1A indicates that:**

- **The states with the highest weighted average number of death sentences per 1000 homicides—Idaho and Delaware—are at risk of capital error rates 23 percentage points higher than the 34-state average, and as much as 45 percentage points higher than the error rates predicted for the lowest death-sentencing states.**
- States in the next cohort in terms of their risk of serious capital error given their high death-sentencing rates are Utah, Wyoming, Nevada, Oregon, Oklahoma and Arizona—which are at risk of capital error rates from 10 to 18 percentage points above the predicted 34-state average rate.
- Three states prominently associated with the death penalty in the public mind because of their high numbers of *executions*—Texas, Virginia and Louisiana—face a lower risk of error based on this factor—suggesting that their relative success in carrying out the death verdicts they impose may be due in part to their comparatively low death-sentencing rates and thus their lower expected reversal rates. (“Success” in this regard is only relative, however, given that no state carried out even 30% of its verdicts during the study period, and the national average was 5%.⁷¹⁵)

Table 18: States' Rank, and Difference from Predicted 34-State Average Error Rate, Based on Six Explanatory Factors, Holding Other Factors at the 34-State Average*

A
B

C

State	Death-Sentencing Rate Per 1000 Homicides			Proportion of Blacks in State Population			Homicide Risk to Whites Relative to Blacks		
	Rank	Value	Difference from 34-State Avg. Error Rate	Rank	Value	Difference from 34-State Avg. Error Rate	Rank	Value	Difference from 34-State Avg. Error Rate
Connecticut	34	5.5	-21.6%	19	8.3	-6.9%	21	.170	-2.7%
Kentucky	22	16.9	-7.0%	23	7.1	-8.7%	5	.280	+1.2%
Maryland	27	14.2	-9.6%	6	23.7	+5.9%	20	.190	+2.2%
Tennessee	21	18.4	-5.7%	11	15.7	+0.7%	18	.230	-0.4%
Mississippi	15	27.0	+0.2%	1	35.2	+11.0%	6	.270	+0.9%
Oregon	6	53.2	+11.1%	30	1.6	-22.2%	23	.170	-2.9%
California	31	10.1	-14.3%	21	7.5	-8.2%	9	.250	+0.3%
New Jersey	26	14.2	-9.6%	14	12.9	-1.7%	24	.170	-3.0%
Idaho	2	113.8	+22.9%	33	.6	-28.2%	32	.070	-9.1%
Montana	9	43.5	+7.9%	34	.5	-29.5%	33	.001	-29.4%
Georgia	18	24.3	-1.4%	4	26.6	+7.3%	12	.250	+0.2%
Arizona	8	47.7	+9.4%	27	3.0	-17.3%	10	.250	+0.3%
Alabama	11	38.9	+6.0%	5	25.3	+6.7%	13	.240	-0.1%
Colorado	32	8.5	-16.4%	25	3.9	-14.9%	11	.250	+0.3%
Washington	33	5.8	-20.9%	28	3.0	-17.4%	22	.170	-2.7%
Wyoming	4	64.0	+14.1%	31	1.2	-23.9%	34	.001	-29.4%
Florida	12	32.7	+3.3%	13	13.7	-1.0%	17	.230	-0.3%
Oklahoma	7	49.7	+10.0%	22	7.2	-8.6%	8	.260	+0.7%
Indiana	23	16.6	-7.3%	20	7.7	-7.9%	29	.130	-5.1%
Arkansas	17	25.3	-0.8%	10	16.2	+1.1%	19	.210	-1.1%
North Carolina	16	26.9	+0.1%	7	22.0	+5.0%	7	.270	+0.8%
Nebraska	10	41.4	+7.1%	26	3.2	-16.8%	31	.080	-8.8%
Nevada	5	55.4	+11.8%	24	6.6	-9.5%	14	.230	-0.2%
South Carolina	13	28.0	+0.8%	3	29.8	+8.8%	2	.340	+2.8%
Utah	3	81.7	+17.9%	32	.7	-27.3%	28	.130	-5.1%
Louisiana	24	15.0	-7.9%	2	29.8	+8.8%	16	.230	-0.3%
Illinois	28	14.0	-9.8%	12	14.7	-0.2%	25	.150	-3.8%
Pennsylvania	14	27.5	+0.5%	18	9.1	-5.9%	27	.140	-4.6%
Texas	25	15.8	-8.0%	15	11.9	-2.7%	3	.330	+2.8%
Missouri	20	19.0	-5.3%	16	10.7	-4.0%	30	.120	-5.4%
Delaware	1	116.4	+23.2%	9	16.7	+1.4%	4	.280	+1.2%

New Mexico	30	12.0	-11.9%	29	2.1	-20.2%	1	.590	+7.7%
Ohio	19	23.9	-1.7%	17	10.5	-4.2%	26	.150	-4.0%
Virginia	29	13.4	-10.3%	8	18.8	+3.0%	15	.230	-0.2%

Table 18: States' Rank, and Difference from Predicted 34-State Average Error Rate, Based on Six Explanatory Factors, Holding Other Factors at the 34-State Average*

D

E

F

State	Rate of Arrest, Conviction & Incarceration per Crime (Higher Value = Less Error)			Political Pressure on State Judges from Selection Method			Per Capita Spending on State Courts (Higher Value = Less Error)		
	Rank	Value	Difference from 34-State Avg. Error Rate	Rank	Value	Difference from 34-State Avg. Error Rate	Rank	Value	Difference from 34-State Avg. Error Rate
Connecticut	31	6.3	-8.3%	32	3	-15.5%	34	3.1	-4.5%
Kentucky	22	5.0	-2.3%	15	7	+2.6%	8	1.4	+2.0%
Maryland	23	5.1	-2.8%	2	8	+8.0%	29	2.5	-2.8%
Tennessee	15	4.0	+4.2%	23	6	-2.5%	21	2.1	-1.2%
Mississippi	33	6.7	-9.5%	26	5	-7.3%	11	1.5	+1.5%
Oregon	7	3.1	+12.1%	2	8	+8.0%	22	2.1	-1.2%
California	13	3.7	+5.9%	26	5	-7.3%	24	2.2	-1.7%
New Jersey	14	3.9	+4.5%	23	6	-2.5%	30	2.6	-3.2%
Idaho	11	3.5	+7.5%	2	8	+8.0%	6	1.3	+3.1%
Montana	2	2.5	+18.8%	15	7	+2.6%	4	1.0	+4.9%
Georgia	21	5.0	-2.2%	2	8	+8.0%	3	0.9	+5.9%
Arizona	12	3.7	+6.6%	15	7	+2.6%	13	1.5	+1.3%
Alabama	30	6.1	-7.6%	2	8	+8.0%	16	1.6	+0.8%
Colorado	3	2.5	+18.6%	15	7	+2.6%	23	2.2	-1.5%
Washington	4	2.5	+18.1%	2	8	+8.0%	28	2.4	-2.5%
Wyoming	8	3.1	+11.3%	2	8	+8.0%	20	1.9	-0.5%
Florida	10	3.5	+7.9%	15	7	+2.6%	15	1.6	+1.0%
Oklahoma	24	5.3	-4.1%	2	8	+8.0%	18	1.8	+0.2%
Indiana	16	4.4	+1.3%	2	8	+8.0%	9	1.4	+1.9%
Arkansas	19	4.8	-1.0%	15	7	+2.6%	5	1.1	+4.5%
North Carolina	27	5.9	-6.4%	15	7	+2.6%	33	3.0	-4.4%
Nebraska	5	2.5	+17.7%	2	8	+8.0%	1	0.6	+9.7%
Nevada	28	5.9	-6.6%	2	8	+8.0%	31	2.7	-3.3%
South Carolina	32	6.7	-9.5%	30	4	-11.6%	14	1.5	+1.3%
Utah	1	1.5	+33.7%	2	8	+8.0%	2	0.9	+5.9%
Louisiana	25	5.4	-4.3%	30	4	-11.6%	17	1.7	+0.4%
Illinois	9	3.2	+10.9%	26	5	-7.3%	19	1.8	+0.0%
Pennsylvania	20	4.8	-1.1%	23	6	-1.5%	26	2.2	-1.8%
Texas	17	4.4	+0.9%	15	7	+2.6%	10	1.5	+1.6%
Missouri	18	4.6	+0.0%	26	5	-7.3%	7	1.4	+2.1%

Delaware	34	8.2	-14.0%	32	3	-15.5%	27	2.3	-1.9%
New Mexico	6	2.9	+14.1%	1	9	+13.5%	12	1.5	+1.4%
Ohio	26	5.8	-6.0%	2	8	+8.0%	25	2.2	-1.7%
Virginia	29	6.0	-7.2%	34	2	-18.9%	32	2.7	-3.3%

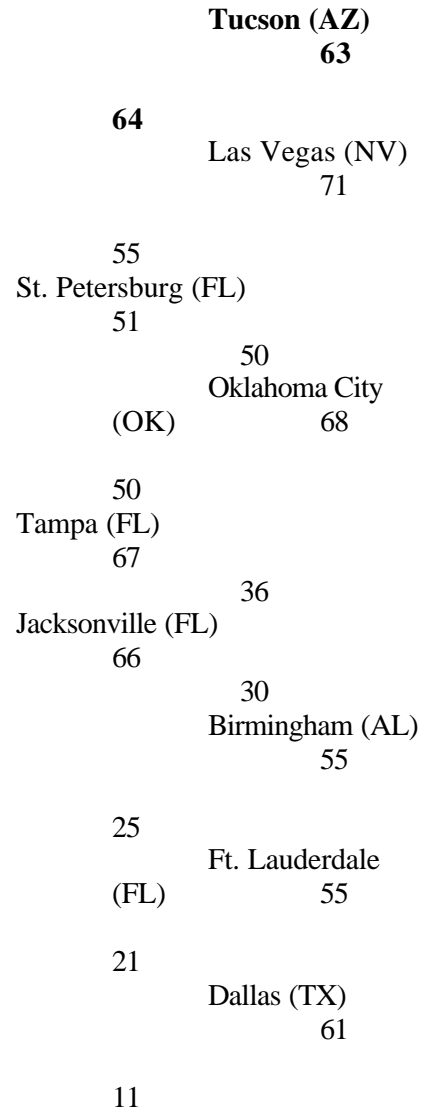
* Data on all explanatory factors in this table are based on [Analysis 1A](#), except for the data on per capita spending on state courts, which are based on [Analysis 3A](#).

2. High county-level capital-sentencing and high capital-error rates.

The above discussion focuses on *state* differences in capital-sentencing and capital-error rates. **Similar disparities exist at the county level. Most counties in most active capital states imposed *no* death verdicts in particular study years.**⁷¹⁶ Those localities may be contrasted with the six American cities that imposed over 100 death verdicts, and the nine additional cities that imposed between 50 and 100 verdicts, during the study period—listed in Table 19 below in order of death-sentencing rates, to show the wide variation even among high death-sentencing cities. Even here, however, the influence of states is felt. The top city in each cohort is in Arizona. Five of the top 15 death-sentencing localities measured in this way are located in Florida.

Table 19: Cities with More than 100, and with 50-100, Death Verdicts, 1973-1995, by Death Sentencing Rate per 1000 Homicides⁷¹⁷

<u>City</u>	<u># Death Verdicts</u>
<u>Homicides</u>	<u>Rate/1000</u>
Phoenix (AZ)	114
	41
Philadelphia (PA)	127
	27
Houston (TX)	190
	19
Miami (FL)	103
	15
Chicago (IL)	138
	11
Los Angeles (CA)	150
	8



Variation in county capital-sentencing rates is the rule, not the exception. Death-sentencing rates for counties with five or more death verdicts during the study period⁷¹⁸ ranged from:

- 0 per 1000 homicides in, *e.g.*, Denver (0 out of 1057 homicides) and Baltimore City (0 out of 2933 homicides);
- 3 per 1000 in St. Louis City, Shreveport, and Dayton;
- 4 per 1000 in Newark (NJ) and Atlanta; and
- 5 per 1000 in San Francisco and Richmond (VA);

to:

- *40 to 49* per 1000 in Phoenix, Cincinnati, Montgomery (AL), Columbus (MS), DuPage County (IL), and four Florida counties;⁷¹⁹
- *50 to 59* per 1000 in Oklahoma City, Las Vegas, Reno, suburban Baltimore County and eight Florida counties;⁷²⁰
- *60 to 75* per 1000 in Tucson, two other Arizona counties, and five additional Florida counties;⁷²¹
- *90 to 200* per 1000 in Kent County (DE), Lexington County (part of Columbia, SC), Randall County (part of Amarillo, TX), Coos Bay (OR), Carson City (NV), six Georgia counties, five Alabama counties, one additional Arizona county and four additional Florida counties;⁷²² and
- *267* per 1000 homicides in Missouri's capital, Jefferson City.⁷²³

Included on this list of high capital-sentencing counties are Nevada's three most populous counties with nearly 90% of the state's population, five of Arizona's six most populous counties with 85% of its population, and 21 of Florida's 67 counties with over a quarter of its population.⁷²⁴

As recent commentaries have highlighted, these and other death-sentencing disparities from one locality to the next often occur within the same state.⁷²⁵ Examples are in Table 20 below (sources: DRCen, Vital Statistics).

**Table 20: Examples of High and Low Death-Sentencing Counties in the Same State
(Death Verdict per 1000 Homicides Indicated in Parentheses)**

<u>Relatively High Death- Sentencing City/County City/County</u>	vs.	<u>Relatively Low Death- Sentencing City/County</u>
California:		Redding/Shasta (62)
		San Francisco (5)
Modesto/Stanislaus (35)		Los Angeles (8)
Bakersfield/Kern (23)		Richmond/Contra Costa (9)
Florida		Pensacola/Escambia (55)
		Palm Beach (12)
		St. Petersburg/Pinellas (50)
		Miami/Dade (15)
Tampa/Hillsborough (36)		Gainesville/Alachua (15)
Georgia		Atlanta suburbs/Gwinnett (47)
		Atlanta/Fulton (4)
		Atlanta suburbs/Cobb (36)
		Augusta/Richmond (10)
		Columbus/Muscogee (33)
		Macon/Bibb (13)
Maryland:		Baltimore suburbs/Baltimore County (56)
		Baltimore City (0)
		Washington suburbs/Prince George's (6)
Missouri:		Jefferson City/Cole (267)
		St. Louis City (3)
St. Louis suburbs/Jefferson (46)		Kansas City (Jackson) (6)
St. Louis suburbs/St. Louis County (26)		
Oklahoma:		Muskogee (52)
		Tulsa (16)
Oklahoma City (50)		
Ohio		Akron/Summit (54)
		Dayton/Montgomery (3)
Cincinnati/Hamilton (40)		Columbus/ Franklin (16)

Oregon Coos Bay (94)
 Portland/Multnomah (13)

Pennsylvania: Scranton/Lackawanna (76)
 Pittsburgh/Allegheny (12)

Philadelphia suburbs/Bucks (33)
 Philadelphia suburbs/Delaware (12)

Philadelphia (27)

So. Carolina: Columbia (pt.)/Lexington (93)
 Columbia (pt.)/Richland
 (9)

Charleston (23)
 Greenville (11)

Tennessee: Johnson City (pt.)/Washington (88)
 Nashville/Davidson (6)
 Chattanooga/Hamilton (28)

Texas: Lubbock (20)
 Austin/Travis (10)

Corpus Christi/Nueces (20)
 Dallas (11)

Houston/Harris (19)
 Galveston (11)

Virginia: Danville City (53)
 Richmond (5)

As is true of state-level death-sentencing disparities, these **county-level disparities are associated with county-level capital error rates**. Our county case studies above⁷²⁶ and several of our regression analyses (Analyses 7-10 and 18)⁷²⁷ indicate that **the more death verdicts per homicides a county imposes, the higher its capital-error rates are likely to rise. This county factor operates independently of, and in addition to, the effect of state death-sentencing rates.**

3. Low or modest aggravation and a high case-level probability of reversal.

Analyses 1-5 and 7-18 and the county case studies thus lead to the conclusion that **excessive use of the death penalty is associated with high rates of capital error**. A final study, Analysis 19 of case-level federal habeas outcomes, helps answer a question this conclusion poses: Excessive by what measure? Given that the probability of error, reversals and retrials is decreased by less frequent, more judicious capital-sentencing, how should policy makers and officials go about narrowing the category of potentially capital cases?

Analysis 19 finds that **the cases that present the greatest risk of federal habeas reversal, and thus that policy makers and officials would be best advised to exclude from death-eligibility, are those in which the degree of aggravation, offset by mitigation, is not high.**⁷²⁸ As the case for death gets weaker—*i.e.*, as aggravation net of mitigation or the quality of the evidence decreases—the probability of reversal due to serious error rises. Holding other factors at their average, Analysis 19 predicts that **the probability of federal habeas reversal due to serious capital error decreases by 15% or more for each additional statutory or supplemental aggravating circumstance in the case, and increases by 15% for each additional mitigating factor in the case.**⁷²⁹ As indicated by the decisions of federal habeas judges—and, on this common sense point, there is no reason to expect judges at other stages to evaluate serious capital error

differently—*uses of the death penalty are excessive, creating a high risk of serious capital error, when they extend the penalty to cases that are not very highly aggravated.*

Our principal conclusion thus strongly supports the statements of District Attorney Marquis and Governor Gilmore quoted above: **Jurisdictions that reserve the death penalty for only the very worst offenses do the best job of avoiding serious, capital error and the risks and costs that go with it. By contrast, states and counties that use the death penalty aggressively (*i.e.* relatively more often per every 10, 100 or 1000 homicides) and extend it to homicide offenses that are not extremely aggravated, are likely to have the worst records of serious, capital error.**

Our analyses also indicate that the harmful effect of a propensity to overuse the death penalty in cases that are not highly aggravated occurs at the level where capital-sentencing policy is made, not where policy is applied. Federal habeas reversals are most common in close or marginal cases judged by the amount of aggravation net of mitigation—*i.e.*, in non-highly aggravated cases that get swept into the capital net by broad death-sentencing *policies*—rather than in especially egregious cases where *case-level* pressures to sentence capitally might be highest.⁷³⁰ This suggests that **it is state or local policies setting a low threshold of seriousness or aggravation for the kinds of crimes that trigger capital prosecutions and verdicts, and not pressures to use the death penalty in particular cases, that are most associated with high rates and amounts of error.**

C. Supporting Conclusions

1. **High capital-error rates are associated with four conditions that create pressure to use the death penalty in weakly**

aggravated cases where the risk of error is great—high crime rates, low punishment rates, race and politics.

For many policy purposes it is enough to conclude based on reliable and consistent study findings that **heavy use of the death penalty is associated with high capital-error rates**. But our regression analyses reveal **four additional factors associated with high rates of serious capital error whose common attributes suggest something more about the forces leading to heavy capital sentencing and a high risk of error**. High capital error rates are significantly related to:

- **well-founded doubts about the ability of state law enforcement policy and officials to deal effectively with crime;**
- **state judges' susceptibility to being harmed politically, given how they are selected and promoted, if their rulings do not conform to popular sentiment;**
- **the homicide risk to whites, particularly when that risk approaches or exceeds the high risk of homicide that African-Americans typically face; and**
- **the size of the state's black community relative to its overall population (and to a lesser extent the proportion of its population receiving welfare).**

As we develop below, each of these factors is a potential indicator of the threat of crime felt by politically influential members of the community, or of the pressure on capital policy makers and officials to respond forcefully to that threat. We conclude that **each factor is an indicator of the pressure felt by capital jurisdictions and officials to respond to influential citizens' fear of serious crime by extending the death penalty to cases where its use is not warranted by the especially aggravated nature of the offense and instead invites serious error**. After discussing each factor, we address attributes they share that invite the extension of the death penalty to weakly aggravated cases where the need to commit error to secure a death verdict is high.

a. **Well-founded doubts about the ability of state law enforcement policy and officials to deal effectively with crime.**

Main Analysis 1 and nearly all other analyses find that **states which arrest, convict and punish fewer serious criminals (as indicated by the number of incarcerated criminals per 100 FBI Index Crimes) have significantly higher capital-error rates.**⁷³¹ This relationship is highly significant, and the size of its predicted effect on capital reversal rates is large. **Typically, predicted capital reversal rates (holding other factors constant) increase 5- to 7-fold as rates of apprehending, convicting and imprisoning serious criminals fall from their highest to their lowest levels among states in our study.**⁷³² In the same way as poorly funded and overburdened *court* systems generate more serious capital error (as we discuss below⁷³³), **ineffective state law enforcement systems—those with the worst records of arresting, convicting and incarcerating serious criminals—are the most likely to conduct seriously flawed investigations, prosecutions and trials of capital charged defendants.**

When considered with our principal finding, this result supports a further conclusion. The less effective law enforcement is at capturing, prosecuting and punishing criminals, the more pressure is likely to be placed on officials to do more to fight crime. This is especially the case when the crime that people and neighborhoods fear is homicide, and when those in fear have the political influence to translate their concerns into public action. One response such political pressure invites is expanded use of the death penalty as a visible demonstration of officials' intolerance for crime and their commitment to punishing it severely. Because expanding the death penalty costs little at first—although eventually it triggers lengthy appeals that often end in costly reversals and retrials—and because that response is available to any jurisdiction, no matter how poor its crime-fighting capacity may be, expanding the death penalty is an especially attractive response by states

with the worst crime-fighting records. Where pressures generated by well-founded doubts about the effectiveness of state law enforcement systems trigger expanded death sentencing, our principal finding predicts that higher capital error rates will result as officials cast the capital net more widely, pulling in more cases where the evidence of a highly aggravated crime is weak.⁷³⁴ **Lower crime-fighting competence thus is associated both with heightened pressures to expand the death penalty in response to ineffectively controlled crime, and with lower competence in investigating and prosecuting those progressively weaker capital cases. The mutually reinforcing effect is the one our study documents: Higher rates and amounts of serious capital error.**⁷³⁵

Column D in Table 18, p. 345 above, compares states based on their rates of arresting, convicting and incarcerating criminals per 100 FBI Index Crimes, and based on whether and by how much the capital reversal rates this factor predicts for each state diverge from the average reversal rate predicted for all 34 states. States with the lowest law enforcement scores and the highest risk of error considering only this factor are Utah, Montana and several other western states. Nebraska, Illinois and Florida round out the top 10 states with the highest predicted capital error rates based on this factor alone. According to our best analysis, **states in this low-law-enforcement category risk capital error rates anywhere from 8 to 34 percentage points higher than the 34-state average—and 22 to 48 percentage points higher than the state with the best record in this one regard.**

Comparing state risk rankings based on this factor to rankings based on high death-sentencing emphasizes the caveat given above.⁷³⁶ Although Colorado and Washington are at the high end of the spectrum of risk based on this low-law-enforcement factor, they are at the low end of the risk spectrum when it comes to their death-sentencing rates. The opposite is true of Delaware,

Alabama, and Nevada, which have a relatively low risk of capital error judged by their law enforcement record, but a high risk of error based on their death-sentencing rates. Because our analyses reveal that all these factors are important, it is inappropriate to base an assessment of a state's overall proneness to capital error on state comparisons that are attentive to only one factor. What these figures instead identify are different high-risk factors for each state, which could become a focus of local reforms. **Given that nearly all states have disturbingly high (50%-plus) overall capital error rates,⁷³⁷ all have room for improvement, whether or not they do comparatively well on one or another measure.**

b. State judges' susceptibility to being harmed politically if their rulings do not conform to popular sentiments.

Another study finding identifies a political mechanism through which public fears about crime, and doubts about the effectiveness of a state's response to it, can pressure officials into adopting policies that increase capital error. This result is found in main [Analysis 1](#), and in confirming analyses of all three review stages combined, and the state direct appeal and federal habeas stages by themselves.⁷³⁸ **States, and counties in states, with judicial selection methods that make judges more vulnerable to political discipline if their rulings are not consistent with popular sentiment have higher capital-error rates.⁷³⁹ In other words, courts in states that directly elect judges from the outset—or subject judges to more frequent, more often contested and more partisan elections—more often produce seriously flawed capital verdicts than courts**

whose judges are insulated from direct political influence from voters and contributors .

This finding is important. **It reveals a way in which politically influential members of the public who are threatened by serious crime and doubt the effectiveness of their state's response to it can pressure policy makers to demonstrate their resolve to respond the problem aggressively—including by extending the death penalty to more cases where the risk of error is greater.** Judges, however, are not the only actors whose decisions affect the breadth of the state's death penalty. Governors, legislators, attorneys general and district attorneys also have an important impact on death-sentencing policy.⁷⁴⁰ Unfortunately, the effect of political pressures on those officials is harder to demonstrate statistically, because doing so requires measurable variation among states in the kinds of political pressure their officials feel, and there is little variation from state to state in how and how often they select governors, legislators, attorneys general and district attorneys.⁷⁴¹ Thus, the sizeable effect of judicial selection techniques on capital error rates—**2- to 6-fold increases in predicted error rates as selection methods change from placing the least to the most political pressure on state judges** (other factors held constant)⁷⁴²— probably underestimates the effect of all types of political pressures on all capital officials.

Column E in Table 18, p. 345 above, compares states based on the amount of political pressure their judicial selection techniques put on state judges, and based on the difference between the reversal rate for each state that is predicted by this factor alone, and the average rate it predicts for all 34 states. Because there are only nine possible scores on the political pressure index—only eight of which actually apply to any of the 34 study states—a number of states are in a tie for most rankings.⁷⁴³ Only two states are tied with no other: Virginia, with the lowest rank on this risk factor, given that its judges are appointed,⁷⁴⁴ and New Mexico, with the highest rank. **This top ranking in terms of the pressure on judges to conform their rulings to public sentiment puts New Mexico**

at risk of capital error rates 14 percentage points higher than the 34-state average. The 13 states with judicial selection techniques that place the next highest level of political pressures on their judges—including, for example, Alabama, Georgia, Oklahoma and Ohio—are at risk of capital error rates 8 percentage points above the 34-state average, based on this factor. **On the other hand, judicial selection techniques that immunize state judges entirely from regular or potential elections by the public at large are associated with predicted capital reversal rates nearly 20 percentage below the 34-state average, and over 30 percentage points below the predicted reversal rates of states that put judges under the most pressure to conform their rulings to popular sentiment.**

c. A high risk of homicide to politically influential citizens.

By taking each state's homicide rate among whites and dividing it by the state's homicide rate among blacks, it is possible to determine whether—and how closely—the homicide risk to whites in each state approaches the typically high homicide rates that afflict African-Americans communities in this nation. Put another way, this factor compares states based on whether homicides there mainly threaten blacks, or whether the homicide risk also falls fairly heavily on whites.⁷⁴⁵

In main Analysis 1, and in most other analyses, **the greater the share of the homicide risk that is borne by whites relative to blacks, the higher the state's rate of serious capital error.**⁷⁴⁶ **Effect size is mode rate. Holding other factors at their averages, predicted reversal rates double or triple across the spectrum of conditions among states and years in our study.**⁷⁴⁷

Likewise, Column C of Table 18, p. 344 above, shows that in our best analysis this factor predicts capital reversal rates for New Mexico that are 17 percentage points higher than the predicted

reversal rate for Nebraska, given that in New Mexico the risk that a white person will be killed by homicide comes the closest to equaling the risk that a black person will be killed by homicide (the white risk is 60% of the black risk), while in Nebraska the homicide risk faced by whites is only 8% as high as the risk faced by blacks.⁷⁴⁸ At p. 365 below, we explain why the share of the homicide risk borne by whites as opposed to blacks may have an even bigger predicted impact on reversal rates, when the interaction of that factor and the racial makeup of the general population is considered.

In a minority of analyses, high homicide rates by themselves are significantly associated with high error rates, over and above the effect of a high homicide risk to whites relative to blacks.⁷⁴⁹ In some other analyses, homicide rates by themselves were significantly associated with error rates *until* the white-compared-to-black homicide rate was introduced, at which point the white/black homicide rate was significant (and fit and other diagnostic measures improved), and homicide rates by themselves became non-significant. Similarly, in nearly all analyses, the homicide rate exclusively among whites was not as powerful a predictor of error rates as the homicide threat to whites compared to blacks.⁷⁵⁰ This reveals that, although high homicide rates by themselves predict high capital error rates, a better predictor of high error rates is the *distribution* of the risk of homicide between whites and blacks—more specifically, whether the homicide risk to whites approaches or surpasses that to blacks (in which case capital error rates are higher), or on the other hand, whether blacks bear the brunt of the homicide risk (in which case capital error rates are lower).

We included this factor based on strong evidence in a number of studies, and the recent conclusions of two highly regarded legal scholars representing a wide spectrum of political views, that law enforcement officials are more responsive to the threat of crime to white as opposed to

black communities.⁷⁵¹ These observers offer two explanations for their findings. The first is that law enforcement officials and policy makers pay more attention to the law enforcement needs of affluent and politically influential people and communities, and less attention to people and communities with fewer resources and political influence, because the latter groups are less organized, have fewer resources and less time to devote to the civic and political mobilization needed to secure the attention of law enforcement officials or to fund contributions to political campaigns, and have lower social status. In this view, African-American communities are one of a number of communities that tend on average to be less organized and wealthy and to have lower status with officials, and thus are less well served by law enforcement policy and officials. Because reliable data are kept on the race of crime victims, but not always on other indicators of low political influence, it is easier to detect and measure under-enforcement of the criminal laws in the black than in other, similar communities.

The other explanation is that race discrimination leads officials to pay less attention to the threat of crime to blacks as opposed to whites, explaining why the race of victims strongly predicts how well they are served by law enforcement policies and officials. There is substance to both explanations. For our purposes it is unnecessary to choose between them.

A central finding of these prior studies is that, after controlling for degree of aggravation and other variables, death verdicts are substantially more likely for homicides against white victims than for those against black victims.⁷⁵² This finding predicts that jurisdictions with a relatively large homicide risk to whites, or to members of other influential communities that tend to get more law enforcement attention, are likely to have higher per-homicide rates of capital *prosecution* and *sentencing*. But why would states with a relatively high homicide risk to whites have significantly higher rates of serious *error* in those verdicts?

Our study's principal finding suggests and answer to this question: Jurisdictions that use the death penalty more often per homicide have higher capital error rates. The strong association between high error rates and greater use of the death penalty predicts that conditions prompting aggressive use of the death penalty may also be associated with high error rates.⁷⁵³ This, then, helps explain why states in which a relatively heavy share of the homicide risk is borne by whites as well as blacks have higher capital error rates. The greater the share of the homicide threat borne by whites or other politically influential communities, the more pressure officials may feel to broaden the death penalty to demonstrate a resolve to deal forcefully with homicides. Resolve is just as vividly demonstrated when the death penalty is used for weakly aggravated homicides as when it is limited to highly aggravated cases—indeed, it may be *more* vividly demonstrated when aggravation is weak. And in any event, in any given jurisdiction, there are likely to be many more medium-range than extremely aggravated cases through which to demonstrate a determination to fight crime. **Expanded capital sentencing in response to crime fears thus invites capital verdicts in weakly aggravated cases where the probability of serious error is the greatest.**

A homicide risk that is not borne almost entirely by blacks, and also falls fairly heavily on whites, thus appears to pressure officials to set a low threshold on when the death penalty can be imposed. Low capital thresholds in turn prompt high capital error rates, by inviting prosecutions where the offense is not “the worst of the worst”—where the evidence of an offense warranting the death penalty is weak enough that corner-cutting and other errors may be needed to assure a death verdict.

There is one sense in which our study qualifies the conventional wisdom about the link between race and the death penalty. The conventional understanding might suggest that, given the link some studies have found between the race of the victim of a particular murder and an increased

probability of a death sentence, our finding of a link between higher death-sentencing rates and higher error rates would lead to higher error rates in death verdicts imposed for homicides against white victims. As we show above, however, capital error occurs just as often in black-victim as in white-victim cases.⁷⁵⁴ This is part of a pattern of results indicating that high capital-error rates are mainly associated with broad capital-sentencing policies, not individual decisions in particular (*e.g.*, white-victim, or especially aggravated) cases.⁷⁵⁵ **Once factors like high concentrations of homicides in politically influential communities lead to aggressive capital laws and policies, those policies—and associated increases in capital error—evidently affect defendants of all races equally. The people most adversely affected by broad capital-sentencing policies and resulting error thus are defendants of *all races* who happen to be tried in jurisdictions with high death-sentencing rates, and particularly defendants of all races as to whom the evidence of an offense warranting the death penalty is the *weakest*.**⁷⁵⁶

The results discussed here and in the previous section have a further implication. As a matter of principle, law enforcement officials must do everything the law permits to lessen the threat of homicide to all residents of the jurisdiction. Our regression results reveal that **expanded use of the death penalty against an ever-widening set of homicides is *not* an effective strategy because it increases the likelihood of mistake, including that innocent people are caught in the net and perpetrators go free. Nor is it a strategy the law permits, because it multiplies reversible capital error. Nor, finally, is it a strategy designed to protect all communities because it is more responsive to concentrations of homicide in the white community.** The results in the previous section reveal **an alternative strategy for lowering the homicide threat that *is* an effective response to crime, is permitted by law, and protects all communities. Rather than applying the death penalty to an ever-expanding set of arrested suspects for whom the**

evidence of an offense aggravated enough to warrant the death penalty is fairly weak, the better strategy is to leave the death penalty focused on “the worst of the worst” and to divert the resources saved by a more judicious use of the death penalty to apprehending, convicting and incarcerating a wider array of perpetrators of a broader set of serious crimes.

d. Large numbers of African-Americans and welfare recipients.

In main Analysis 1, and nearly all supporting analyses, **the larger the proportion of a state’s population that is African-American, the larger the state’s rate of serious capital error.**⁷⁵⁷ **At the federal habeas stage, the same thing is true of the proportion of the state’s population receiving welfare and its per capita cost.**⁷⁵⁸ Effect size is considerable. In our main analysis, predicted capital error rates more than quadruple as the size of the black population rises from its lowest to its highest levels among states in our study, holding other factors constant.⁷⁵⁹ Likewise, in our federal habeas regression, predicted reversal rates more than quadruple as welfare recipients and costs rise from their lowest to highest levels among study states and year.⁷⁶⁰

Reflecting another pattern noted above, the relevant capital policies seem to be related to the proportion of African-Americans in the *state*, not the county, population. No analysis of county-level factors—not even Analysis 7, which omitted state-level factors, giving county-level factors the greatest opportunity to explain reversal rates—revealed any significant relationship between proportion of blacks in a county’s population and its capital reversal rates.

We explain above why there is no clear link between the proportion of blacks in the state population and the number of black state policy makers, judges, prosecutors, jurors and the like, and why those conditions are unlikely to explain high capital error rates.⁷⁶¹ Instead, given that the explanatory condition is the racial makeup of the state’s overall population, not that of participants

at particular trials or even of the county where the crime and trial took place,⁷⁶² and given extensive research documenting powerful, inaccurate stereotypes linking contact with African-Americans to a perceived threat of violent crime,⁷⁶³ we conclude that the size of a state's African-American population is a strong indicator of the intensity of crime fears among politically influential citizens. Like the race of homicide victims discussed just above, **this racial factor is a powerful indicator of the pressure officials face to respond forcefully to crime. This explains why the factor strongly predicts high capital-error rates, which are strongly associated with the broad and indiscriminate use of the death penalty that can occur when officials face pressure to expand the penalty as a forceful demonstration of their resolve to fight crime .**

As we note above, **the problem is not with officials who are determined to fight crime.**⁷⁶⁴ **The problem is with expanded and indiscriminate use of the death penalty, which is not an effective solution to the problem. When that response is adopted, the result is not more successful law enforcement, but instead a greatly increased risk of serious capital mistake, reversal and costly retrials. At the extreme—as has demonstrably occurred on just short of 100 occasions in the modern death-sentencing era—it means convicting the innocent, while actual killers remain at large.**⁷⁶⁵

We reach this conclusion sadly, given what it suggests about race relations. But we reach it with confidence. To begin with, the conclusion follows from those above. Higher death-sentencing rates are associated with higher capital error rates—with the biggest risk factor being the indiscriminate extension of the penalty to cases where aggravation levels are not extremely elevated. And high error rates are linked to two indicators of crime fears among politically influential individuals that can pressure officials to extend the death penalty to weakly aggravated cases as a way of demonstrating a firm resolve to fight crime: (1) low rates of apprehension,

conviction and incarceration of serious criminals, and (2) a high risk of homicide borne by whites as well as blacks. It is an unfortunate but demonstrated fact that the race of people in the community is yet another, powerful indicator of crime fears, given the association people report and display between the race of people they encounter and a perceived threat of violent crime.⁷⁶⁶ This association is partly based on actual crime and homicide rates, which are higher among African-American and poor communities than among others.⁷⁶⁷ But as the literature demonstrates, the association is also due to stereotypes that lead people to greatly overestimate the threat of cross-racial violent crime.⁷⁶⁸ (In fact, most crime occurs among members of the same race, community and class.⁷⁶⁹) Our analyses provide important new evidence of this effect. When examined separately, higher homicide rates indeed have the same relationship to higher reversal rates as our two racial measures of the actual and perceived threat of homicide. But when all these factors are examined together, it is the racial measures and not homicide rates themselves that are significantly and powerfully related to serious capital error. The condition related to pressure to use the death penalty that most strongly predicts high capital error rates thus is not the actual threat of homicide (the homicide rate), but instead the perceived as well as actual threat of homicide to whites and other influential residents from African-Americans and poor people.⁷⁷⁰ Given the linkage between the size of the black (and the poor) population and the perceived threat of crime, and given our consistent finding that indicators of crime fears predict high rates of capital error, it is reasonable to explain the strong association between capital error rates and the size of the black (and poor) population as another instance of the effect on capital error rates of the real and perceived threat of crime.

Second, our analyses of factors that increase the risk of capital error reveal that the size of the black population is significantly connected to two other recognized indicators of the intensity of

fears of crime, particularly among politically influential citizens. We already have noted the relationship between homicide rates and the relative size of the black population as potential explanations for reversal rates. Those two factors are correlated, given the relatively higher rate of homicide committed by blacks than by whites. And tested separately, both factors are significantly associated with capital-error rates. But when tested together, the size of the black population remains a powerful predictor of capital error rates, while the homicide rate is no longer significant.⁷⁷¹ From this we conclude that it is not so much the actual rates of homicide as a perceived threat of homicides by blacks that is associated with higher capital-error rates.

High African-American populations also interact with another established indicator of crime fears among politically influential citizens—the distribution of homicide risk between whites and blacks. In main Analysis 1, and in several other analyses of state and county error rates, **states with a combination of homicide risks concentrated relatively heavily on whites compared to blacks and large black populations relative to the total population had significantly higher capital error rates than either of the two factors by itself or the two together would predict.**⁷⁷² This indicates that the two factors have a similar effect on reversal rates that is magnified when both are present. Given a strong consensus about the pressure the threat of crime to the white community puts on law enforcement officials to respond forcefully to crime,⁷⁷³ and given the interaction of that factor and the relative size of the black population, it is reasonable to understand all three effects (each factor by itself and the two together) as indicators of crime fears that put pressure on officials to broaden the availability of the death penalty, and in the process increase capital error rates.

Column B in Table 18, p. 344 above, ranks states based on their weighted average proportion during the study period of residents who were African-American. Column B then compares states based on the difference between the reversal rate predicted for each state, and the

34-state average predicted reversal rate, based on this factor alone, holding other factors at their average. As Column B shows, **main Analysis 1A predicts that states with large black populations such as Mississippi and South Carolina are at risk of capital error rates over 10 percentage points higher than the average predicted reversal rate, and as much as 40 percentage points higher than predicted reversal rates in states with low African-American populations .**

As we just pointed out, in main Analysis 1A and in a majority of others, the explanation for high reversal rates based on the racial makeup of the general population, and the separate explanation based on the racial makeup of homicide victims, interact: **States where blacks make up a higher proportion of the population *and* where the homicide risk to whites comes the closest to equaling the (typically higher) homicide risk to blacks have an especially high risk of serious capital error.** Predicted reversal rates cannot reliably be calculated for interaction effects of this sort, but the states may be ranked based on their comparative risk from this factor, as is done in the accompanying note. States that are most at risk from this factor, holding others constant at their average, are South Carolina, Mississippi, Louisiana, Georgia, Alabama, North Carolina, Delaware, Maryland, Virginia and Texas. Appropriately assessing the risk from each of the two racial factors requires that the risk from the interaction of the two also be considered.⁷⁷⁴

* * * * *

States for which these racial factors create an especially high risk of serious capital error cannot very well change their demographic profile, and thus may wonder how they can reduce the risk of error. As we develop above, however, it is not the demographic realities, but the pressures they create to apply the death penalty broadly, including in cases that are not highly aggravated, that appear to be linked to a high risk of serious capital error. And as we develop in Part VIII below,

therefore, there are ways in which capital-sentencing policy may be changed to decrease the incentive and capacity to impose the death penalty in cases that are not highly aggravated where the risk of error is great. The main point for now is to catalogue the risk factors for each state as a prelude to the policy discussion below.

- e. **Summary: conditions with a common capacity to pressure policy makers to extend the death penalty to cases that are not highly aggravated, where the risk of error is great.**

The four factors discussed here have **two common attributes which explain why they invite policies that extend the death penalty to cases that are not highly aggravated, where the risk of error is high.** First, the fears and pressures the four factors create seem to operate at the level at which state and county capital-sentencing policy is made—*i.e.*, where the threshold level of aggravation sufficient to trigger a capital prosecution and sentence is set for all cases—rather than at the level where policy is applied to particular cases.⁷⁷⁵ **The higher the level of government at which policy is set, and the broader and more divorced the decision is from particular cases, the less likely it is that the policy will be sensitive to the nuances of aggravating and mitigating circumstances in individual cases, and the greater the chance that the policy will encompass less aggravated cases.**

Second, all four conditions reflect either generalized fears about serious crime, or the capital system's vulnerability to pressures generated by such fears. Some of the fears and pressures are empirically well-founded—those based on high homicide rates and low rates of apprehending and punishing criminals. Others are less justifiable, or even illegitimate—the influence of political considerations on judicial outcomes, and the role of race in gauging the threat of crime. What is crucial, however, is that all four factors prompt fears and pressures that are far removed from the facts and circumstances of each case and invite responses—including broadened use of the death

penalty— that demonstrate officials’ intolerance for crime in general, and not just for offenses where close inspection of the circumstances and evidence reveal high levels of aggravation.

Particularly in states with poor crime-fighting records, a desire to demonstrate a determination to fight crime is no less well-served— and may even be better served—by a threshold level of evidence and aggravation for the death penalty that sweeps in marginal cases where the evidence is weak and where as a result the risk of error is large.

Our findings indicate that **it is not every additional use of the death penalty, but only those uses where the crime is not “the worst of the worst,” that especially enhance the risk of serious capital error. The four factors discussed here encourage this indiscriminate use of the penalty.** So may other conditions that are harder to measure, such as political pressure on district attorneys.⁷⁷⁶ The relationship between high death-sentencing rates and high capital-error rates thus serves as a residual explanation for capital error rates, which captures the effect of pressures to use the death penalty broadly that, unlike the four pressures discussed here, cannot be measured more directly.⁷⁷⁷

2. Aggressive use of the death penalty is also linked to heavy court congestion and delay.

Main Analysis 1 and most supporting analyses find **a significant relationship between high numbers of capital verdicts awaiting appeal and low rates of progress in moving capital verdicts through the system either to approval and execution, or reversal.**⁷⁷⁸ Effect size is large. Analysis 1 predicts that **the process of moving capital verdicts from trial to a decisive result on appeal essentially comes to a halt in states with 20 or more capital verdicts awaiting review at one time.**⁷⁷⁹

This finding is predictable: **Capital verdicts caught in the review process cannot serve the purpose for which they were imposed—and those that are flawed cannot be corrected.** The findings have added significance in conjunction with our principal finding that higher death-sentencing rates lead to higher rates of serious capital error. Higher rates of death verdicts also mean *more* death verdicts, each of which makes an inordinate contribution to court congestion, and even a fairly small number of which can effectively clog and close down the system.⁷⁸⁰ States with fewer death verdicts not only limit the risk that any verdict will be found seriously flawed, but also increase the probability that verdicts that are not flawed will get through the review process quickly.

The table in note 788 below compares states based on their weighted average number of death verdicts awaiting review at one of the three review stages during the study period.⁷⁸¹ **States vary substantially in this regard, from California with an average of about 27 capital verdicts awaiting review each year, and Texas, Florida, Pennsylvania and Ohio with average capital backlogs of 12 to 18, to Nebraska, Montana, Washington, Connecticut and Wyoming, with fewer than 1 backlogged capital case on average.**

Consideration of this factor reveals a hidden cost of the current capital system. Delayed appeals limit the amount of completed review, generating lower numbers of reversals.⁷⁸² Delayed appeals also lead to lower *rates* of reversal. First, when reversal rates are calculated as proportions of all imposed verdicts, lower rates of review automatically mean lower reversal rates—even if verdicts remain equally flawed—because there are fewer outcomes of *any* sort.⁷⁸³ Although that rate is not the true error rate, which is the number of reversals as a proportion of *reviewed*, not imposed, verdicts,⁷⁸⁴ members of the public sometimes mistakenly think that fewer reversals per imposed verdicts means fewer errors.⁷⁸⁵ Second, reversals take a year or two longer than affirmances to occur at the federal habeas stage, artificially increasing the number of affirmances and decreasing

the number of reversals that have occurred as of any moment, which in turn artificially decreases the error rate.⁷⁸⁶ Third, our regression results suggest that large backlogs of delayed appeals sometimes pressure appellate courts into approving verdicts that otherwise would be found seriously flawed, further lowering reversal and error rates.⁷⁸⁷ **This means that states like California, Texas, Florida, Pennsylvania and Ohio, have fewer reversals and lower reversal rates (as a proportion of imposed verdicts)—and appear to have lower error rates (as a proportion of reviewed verdicts) than otherwise would be true—because capital verdicts move so slowly through their appeals process. From the perspective of these states’ reversal records, their inefficiency becomes a *saving grace* because it lowers their numbers and rates of reversals. But from the perspective of victims and communities seeking finality, taxpayers financing costly appeals, and wrongly convicted and sentenced defendants needing redress, that inefficiency is costly.**

The reverse holds for states like Nebraska, Montana, Washington and Connecticut. They are *penalized* for having efficient review systems: Although their reversal records accurately reflect the amount of error in their capital verdicts, those records are comparatively worse than the records of states like California, Texas and Florida, where delay artificially deflates reversals. Based on this factor alone, holding other factors at their averages, our regression analyses predict very high reversal rates for Nebraska, Montana, Washington, and Connecticut. But that prediction is based entirely on these states’ admirably *low* backlogs of pending appeals, which keep them from taking advantage of delayed appeals to obscure their true error rates.⁷⁸⁸

3. Overburdened and underfunded courts are associated with a high risk of capital error.

In main Analysis 1, and in most other analyses of capital error found at the three review stages combined, **a combination of high numbers of capital verdicts awaiting review and high per capita rates of court cases of all types awaiting decision is significantly related to high capital error rates.**⁷⁸⁹ In analyses of the initial, direct appeal review stage—where nearly 80% of capital reversals occur—**low per capita funding on the courts is also related to high capital error rates.**⁷⁹⁰ For states with below average funding for their courts, effect size is large: **Relatively small decreases in direct funding below the 34-state average of about \$1.80 per capita are associated with steep predicted increases in the amount of serious capital error state high courts discover on direct appeal, holding other factors constant.**⁷⁹¹

These findings indicate that **state court systems with below average operating budgets—or what may be the same thing, with too many capital and non-capital cases to process reliably with available resources—tend to produce more flawed capital verdicts. High proportions of flawed verdicts and the high reversal rates associated with them lead, in turn, to high retrial rates— further burdening the courts, and generating more error, more work for appellate courts, and more reversals and retrials.**

Results of particular cases reveal the same thing. **At the two phases of review where data are available, the largest single reason why courts reverse capital verdicts is egregiously incompetent representation of capital defendants by mainly state-funded lawyers—prompting close to 40% of all state post-conviction reversals, and close to 30% of all federal habeas reversals.**⁷⁹² **The main reason inexperienced, unskilled and untrained lawyers are often the only ones who seek capital trial assignments—the most demanding assignments lawyers can**

receive—and the main reason the performance of even conscientious appointed capital lawyers is often below par, is the low level of compensation and reimbursement for expenses (investigators, mental health exams, DNA testing and the like) that is available in most states.⁷⁹³ Because funds for capital trial lawyers and for necessary support services often come out of state court operating budgets, it is not surprising that our aggregate-level analyses reveal a link between financially strapped state courts and high rates of capital error.

Case-level Analysis 19 of federal habeas outcomes also reveals a link between poor quality state court proceedings and high capital reversal rates. **State court denials of evidentiary hearings on review of claimed capital errors are associated with a higher probability that federal habeas courts will reverse capital verdicts.**⁷⁹⁴ One reason state courts decline to hold hearings is that they cannot afford the accompanying costs: reimbursement of counsel for indigent prisoners, witness and court reporter fees, and salaries for judges, court clerks and security personnel.

Resources available for capital trials are a function of two conditions: the funds and personnel available to process capital cases, and the number of cases to be processed. This explains why high rates of serious capital error are linked to low funding for capital courts *and* high numbers of capital and other cases to process. This in turn reveals how closely this supporting conclusion is tied to our principal conclusion: **More capital prosecutions and sentences lead to more strain on the system, more delay and more serious error.**

Column F of Table 18, p. 346 above, compares states based on their weighted average direct expenditures on their court systems.⁷⁹⁵ States vary substantially in this latter regard, from less than \$1 of direct court funding per capita on average in Nebraska, Utah and Georgia, to over \$3 of court funding per capita on average in Connecticut. Although as we note above, this explanatory factor has only a modest effect for differences in spending levels at or above the 34-state average, *below-*

average funding of courts adds as many as 10 percentage points to predicted capital reversal rates, holding other factors constant.⁷⁹⁶

Our measure of the effect of high backlogs of capital and non-capital cases awaiting disposition by the courts is an “interaction” effect for which predicted reversal rates cannot be accurately calculated. The states, however, can be compared based on the extent to which the combination of high capital and non-capital caseloads increases their risk of serious capital error. That comparison, in the attached note, reveals that **this factor poses an especially high risk to five states: Texas, Illinois and Pennsylvania and especially California and Florida.**⁷⁹⁷

4. **Controlling for other factors, more recent death verdicts are much more likely to be reversed on state direct appeal than earlier verdicts; there is no reliable evidence that the quality of death verdicts has improved much since the early 1980s.**

Figures 2A and 2B, pp. 55-56 above, reveal that after fluctuating in the 1970s, capital reversal rates for the three review stages combined were high (50%- or 60%-plus) and fairly stable from the early 1980s through the end of the study period. Those charts plus Figures 2C-3B, pp. 57-58 and 60-61 above, and a figure in our earlier Report, reveal the same stability from the early 1980s forward for direct appeal and federal habeas reversal rates but suggest that state post-conviction reversal rates may have risen somewhat in that period.⁷⁹⁸ Our regression analyses ask a different question about changes over time: *Beyond the effect of other significant factors*, have error rates increased or decreased in a statistically significant way during the study period? What this inquiry measures is the influence of forces that are not captured by specific explanatory factors in the analysis but whose effect is time-sensitive and thus is registered by a general measure of patterns of change over time. The question this factor poses is **whether forces other than those**

captured by the specific explanatory factors in the analysis drove reversal rates higher or lower than they would have been had the specific factors been the only ones at work.

Our first conclusion is that in all of our analyses that calculate reversal rates as a proportion of imposed, rather than reviewed, death verdicts, a force with a downward effect on reversal rates over time *is* at work. That force, however, is not related to changing amounts of *error* over time, but to changing amounts of *unfinished appeals*. Appeals that were not completed as of the end of the study period artificially depress reversal rates, because fewer finished appeals means fewer outcomes of any sort, including reversals, as a proportion of imposed verdicts.⁷⁹⁹ Because the later a death verdict was imposed, the more likely it is that the verdict did not finish being reviewed by the end of the study period, later verdicts are automatically associated with lower reversal rates as a proportion of imposed death verdicts. Because this relationship between later verdicts and lower reversal rates holds true for flawed, as well as unflawed, capital verdicts—the relationship is sensitive to whether review occurred, not whether flaws were discovered when it occurred—**the use of time trend as an explanatory factor nicely controls for the effect of *delay* (unfinished appeals),⁸⁰⁰ but does not gauge changing rates of *error* over time.**⁸⁰¹

The downward influence of delay on reversal rates over time is exacerbated in federal habeas cases where reversals due to serious error take longer to occur than affirmances.⁸⁰² As a result, flawed verdicts are under-represented among verdicts finally reviewed by the study end date, and over-represented among verdicts remaining to be finally reviewed on that date, with the bias affecting later cohorts of verdicts more than earlier ones, because higher proportions of later verdicts were still awaiting final review as of the study's end date.

These delay-driven biases against counting reversals and (in the latter case) in favor of counting affirmances guide the interpretation of significant changes in reversal rates over time:

- In analyses calculating reversal rates as proportions of imposed verdicts in which reversal rates decline over time, the result cannot be interpreted with any precision. We know that at least some of the decline is due to the delay-related, error-neutral effects just described. But we cannot say how much of the decline is attributable to delay. It could be that, apart from the effect of other factors, improvements in the quality of death verdicts are also causing reversal rates to decline over time—adding an error-related decline in reversal rates on top of the delay-related decline just discussed. But it could just as easily be that, after accounting for other factors, later verdicts were actually *more* flawed than earlier ones—thus counteracting some of the delay-driven decline in reversal rates that otherwise would have appeared. Thus:
 - When reversal rates calculated as a proportion of imposed verdicts drop significantly over time, it is impossible to determine whether that drop is entirely delay-related or is also affected by changes in error over time.
 - On the other hand, in analyses of reversal rates calculated as proportions of imposed verdicts in which reversal rates do not drop significantly over time, it is likely that an *increase* in error over time (after controlling for other factors) has occurred. In that event, it is only increasing error rates over time (after accounting for other factors) that can have counteracted the delay-related biases that otherwise would have caused reversal rates to decline significantly over time.
- Declining reversal rates at the federal habeas stage are also difficult to interpret. At least some part of that decline is due to systematically longer delays in federal habeas review of flawed verdicts than in habeas review of unflawed verdicts. This again makes it impossible to tell whether error-related decreases or increases in flawed verdicts reaching that stage are adding to or counteracting the delay-related decline.
- Analyses of relationships between later verdicts and reversal rates calculated as proportions of *reviewed* (as opposed to imposed) death verdicts at review stages other than the habeas stage are subject to no delay-related biases. Reversal rates in these analyses are not sensitive to delay because delay affects the base number of death verdicts (the number reviewed) as much as the number reversed.⁸⁰³ Nor do flawed verdicts take systematically more or less time to be reviewed at stages other than the federal habeas stage. As a result, any changes in reversal rates over time that these analyses find are reliable indications of the size and direction of changes in error rates that are not captured by other factors in the analysis.

Analyzed under these guidelines, our analyses reveal the following:

•After the effect of all other factors on error rates is accounted for, state high court judges on direct appeal found substantially higher rates of serious, reversible error in recent death verdicts than in earlier ones. Analyses 3, 4 and 10 reliably evaluate the relationship between the year death verdicts were imposed and the amount of serious reversible error found at the state direct appeal stage, without any delay-related bias. All three analyses find that, after accounting for other important factors, **the later a death verdict was imposed, the higher the**

probability that it would be reversed on state direct appeal based on a finding of serious error. The result is highly significant, and the upward effect on reversal rates of a verdict's having been imposed later rather than earlier in the study period is large. **Holding other explanatory factors at their averages, Analysis 3 predicts a 9-fold increase in direct appeal reversal rates over 23 years (from about 9% to about 80%).**⁸⁰⁴ This finding is important because state direct appeal is the only stage that reviews nearly all death verdicts, and it accounted for about 8 of every 10 reversals during the study period.⁸⁰⁵

•In order to make the best use of our data on capital reversal rates, it was necessary in many of our analyses to measure reversal rates as proportions of imposed verdicts.⁸⁰⁶ Most analyses also included the federal habeas stage as at least one of the review phases being studied. As a result, most of our analyses are affected by both delay-related, error-neutral biases noted above.⁸⁰⁷ And two studies of the federal habeas stage were affected by the second bias, but not the first.⁸⁰⁸ As those biases would predict, later verdicts were associated with lower reversal rates in a number of these analyses.⁸⁰⁹ Contrary to expectations, however, the size of the effect was fairly small.⁸¹⁰ And in three analyses, there was no statistically significant relationship between later verdicts and lower reversal rates.⁸¹¹ These latter results suggest what our direct appeal studies found: that **there is an upward trend over time in the amount of serious error that is not accounted for by the other factors in the analysis**, which partially—and in some analyses entirely—neutralizes the downward force of the two delay-related biases discussed above.⁸¹²

Given these circumstances, our regression analyses modestly enhance what the raw

trend of reversal rates over time—depicted in Figures 2A-3B—tells us about the effect on

reversal rates of the passage of time. Those analyses are most informative as to the state

direct appeal stage, because it is only at that stage that they provide a relatively accurate

picture, undistorted by the effect of delay, of the relationship between the passage of time

and the amount of serious error discovered by the courts after accounting for other factors.

Those analyses show that **after controlling for other factors, death verdicts imposed**

later in the study period were substantially more likely to be reversed at the state

direct appeal stage—where nearly four-fifths of all capital reversals occurred during

the period—than verdicts imposed earlier in time. Our best analysis predicts that, if

other factors had remained constant at their averages, direct appeal reversal rates would have risen 9% per year during the 23-year study period.

Other significant factors did not, of course, remain constant at their averages, and reversal rates in fact were fairly steady during the latter half the study period.⁸¹³ What increased over time, therefore, is the amount of error found on direct appeal that is not accounted for by the specific explanatory factors we have identified, and instead is registered by our general measure of time trend. This suggests that **reforms aimed at alleviating the specific conditions that our analyses have shown to be significantly related to reversals may have less effect than is desired because of the influence of other factors—picked up in our analyses by our measure of time trend—that are associated with increasing amounts of capital error over time.**

What we can say with confidence based on these results is that:

- Overall capital reversal rates remained high and fairly steady from the early 1980s through the end of the study period, averaging about 60% of the verdicts reviewed each year.**

- There is no evidence that conditions causing high capital error rates are curing themselves over time.**

- Most disturbingly, at the direct appeal stage, factors beyond those specifically identified by our regression analyses are linked to increasing amounts of serious error over time.**

5. Reviewing courts do not effectively keep serious mistakes from being made or death verdicts from being carried out.

State direct appeal and post-conviction courts and federal habeas courts are the capital system's quality control inspectors, whose job it is to detect seriously flawed death

verdicts imposed at trial and to send them back to be retooled or scrapped. Our analyses examine the outcomes of thousands of these inspections mainly to identify causes of serious flaws at trial. But the analyses also shed light on the effectiveness of the inspection system. Such systems have two goals—to catch individual mistakes before they cause unintended harms, and to feed back information and sanctions to those who made the mistakes—particularly information and sanctions focused on *patterns* of problems—so that error does not occur in the future. This sections concludes that the review process is not a failsafe method of achieving either of these goals. We begin with the second.

a. The review process fails to keep high rates and amounts of serious error from recurring.

The capital review system fails utterly to keep serious mistakes from being repeated. Rates of serious capital error were disturbingly high during the entire 23-year study period— with an overall rate for the period of 68% that remained around 60% even in the last years of the study.⁸¹⁴ Although there is some evidence suggesting (among other possible conclusions) that the burden of catching error has shifted somewhat from federal courts at the third inspection stage to state courts at the first and second stages,⁸¹⁵ **there is no reliable evidence that rates and amounts of error have declined substantially since the early 1980s.**⁸¹⁶ **Moreover, for nearly two decades, the rate at which people sentenced to die have thereafter been exonerated has been fairly steady at 1 innocent death row inmate for every 7 or 8 people executed.**⁸¹⁷ Nor—at least apart from last year’s incipient and scattered reforms⁸¹⁸—is there any evidence of ameliorative changes since the study period that were designed to, or can be expected to, lead to lower rates of serious error in capital cases. Instead, as we note above, the most important changes

in the years between 1995 and 2000 were designed to substantially *decrease* the level of scrutiny and feedback that appellate courts give to the capital trial process, and that federal reviewing courts give to state reviewing courts.⁸¹⁹

For this reason alone, **the capital system is broken**. This is best illustrated by asking whether decades of 50%-plus rates of serious error would be tolerated in any other public or private enterprise in this country. If goods coming off the production lines at Ford Motor Co., General Dynamics or Dell were so seriously flawed that they had to be sent back for repair or scrap 68% of the time, it is doubtful the enterprise would last a year—and it is certain that investors, regulators and consumers would shut down the operation long before its failures went on for decades.⁸²⁰ The same is true of 50%-plus rates of serious error in public operations, such as issuing social security checks, constructing schools or air traffic control. Nor would it be any consolation that the enterprise's chronic failures have not yet killed any innocent people—at least so far as can be proved.⁸²¹ **Meticulous inspections or not, it is simply unreasonable—especially over the course of decades—to continue tolerating:**

- the *costs* of operating consistently failing enterprises and having to fund multiple overlapping inspections systems and repairs;**
- the *delays* that complex, redundant and painstaking inspections require;**
- the *inconveniences and injuries* that people suffer from persistently faulty products and outcomes; and**
- the *risk* that a day of reckoning will arrive when inspections fail, and when a seriously flawed product or system causes an innocent person's death.**

It thus is clear that **the capital review process fails as a means of feeding back information and, where necessary, sanctions on defense and government lawyers, law**

enforcement officers, and judges who conduct flawed capital trials. The first reason for this failure, as a number of investigative journalists have recently documented, is that appellate courts understand their role as examining each case separately. They accordingly keep no aggregate data about how frequently they reverse death verdicts due to errors committed by particular lawyers and law offices, police officers and police forces and lower court judges. And they entirely pass over many errors they find as non-prejudicial, harmless or waived—even where those errors contribute to patterns of abuse that previously or subsequently have resulted in reversals. As a result, although court decisions in fact often reveal egregious patterns of error by particular defense lawyers, prosecuting offices, police forces, and trial judges, those patterns rarely are noticed, much less sanctioned in any way, by reviewing courts. Consequently, problems can fester for years.⁸²²

In addition, a review process taking 12 years on average before executions occur is unlikely to be an effective way of informing, instructing or disciplining the actors responsible for flaws the review process finds. As investigative news reports also have recently documented, by the time the capital review process is finished and a reversal occurs, the offending trial-level actors have usually moved on to other jobs.⁸²³ In most cases, moreover, trial-level actors do not have to defend flawed capital trial verdicts on appeal, because that task is handed over by defense lawyers to new appellate lawyers in a different office, and is handed over by local prosecutors to lawyers in the state attorney general's office. In neither case do the new lawyers have authority to discipline trial-level actors whose mistakes the later lawyers must defend. Instead, appellate lawyers for the state are often blamed for having “lost” the case on appeal when the verdict is reversed.⁸²⁴

Nor, as those same reports have shown, do court reversals ever lead to bar discipline for lawyers, loss of jobs for law enforcement officers or other state employees, or sanctions for judges who repeatedly commit serious error.⁸²⁵ Rather the only “sanction” imposed is an order to retry the case—typically handed down many years after the fact. For all these reasons, **nearly the entire cost of the review process and its outcome is borne, not by the trial-level actors who committed the errors in the first place, but by taxpayers spread throughout the entire state (who fund the state court system and state attorney general’s office) and throughout the entire United States (who fund the federal court system and the lawyers who represent indigent capital defendants in those courts).** Because local taxpayers do not have to bear most of the costs of the mistakes local officials make, they have little reason to discipline local officials for their mistakes by voting them out of office. And because the state and federal taxpayers who do foot the bill are removed from the local situation, they typically have no idea what is happening and, if they do, have no recourse against the responsible officials.

Our study provides evidence of **disturbing ways in which the chronically failing capital system may actually reward actors who are responsible for many of its flaws.** Our principal finding is that excessive death-sentencing is the most crucial source of serious capital error. An important supporting finding is that serious error is especially common in states where judicial selection techniques give judges strong incentives to conform their rulings to popular sentiment. Together, these findings suggest that judges and probably other officials⁸²⁶ benefit politically from each additional death verdict they are at least partly responsible for securing, including in weak or marginal cases where the probability of reversal is great. Particularly given that most of the costs of curing the resulting errors fall

on others, the clear incentive the system gives officials is to cast the net of capital punishment law and policy still wider, pulling in progressively weaker cases in which the likelihood of error is progressively higher. Added to this is the fact that higher numbers of death verdicts mean more delays on appeal, which in turn tends to dampen and obscure reversal and reversal rates and to delay the point when the case will be sent back for retrial⁸²⁷—further weakening any disciplining force of reversals when they finally come.

An analogous process affects the work of skilled capital defense lawyers—mainly from out-of-state civil rights organizations and law firms—whom our study shows have the greatest success in overturning seriously flawed capital verdicts at the final, federal habeas stage of review.⁸²⁸ Because there are so few of these lawyers and so few resources to fund their work—a problem Congress and the states made worse when they shut down the “capital case resource centers” in 1995⁸²⁹—these lawyers cannot handle the thousands of capital trials taking place all over the country each year, and instead can only intervene at the last stage of review after state court reversals and review delays have narrowed the number of pending cases to a manageable number. Given how often their clients’ death verdicts are overturned due to persistent flaws in capital verdicts, it is not surprising that these lawyers work hard to preserve a robust three-stage review process in which they are largely responsible for the last stage. Nor is it surprising that they are mistrustful of promises to trade meaningful trial-level improvements, which thus far have not materialized, for limits on post-trial review that by themselves will make things worse.⁸³⁰ As understandable as these views are, however, they have the same counterproductive effect as the actions of the opposing camp. They divert good lawyers from the trial phase, leaving poor lawyers to contribute to high death-sentencing and high error rates, and they preserve the lengthy

review process that the weak trial system requires. In other words, **they keep a broken system going, for decades, chronically generating too many death verdicts—most of which, as a result, are seriously flawed and unreliable—which in turn require an expensive review process that is so delayed that it stymies execution of valid verdicts and so overburdened it misses egregious mistakes.**⁸³¹

b. The review process does not catch all serious mistakes.

Our results also indicate that **the capital review process has not achieved the other goal of an inspection process: catching flawed products before they harm innocent people.** Our case studies of some of the death row inmates shown to be innocent after judges at all three review stages had *approved* their verdicts for execution reveal that **the judicial inspection process has failed on several occasions to catch the most serious capital error of all—the conviction and capital sentencing of an innocent man or woman.**⁸³² Of the 99 death row inmates who have been exonerated during the modern death-sentencing era, over 60% had their capital verdicts approved by at least one set of appellate courts.⁸³³

Our results also help explain why appellate courts fail to catch even the most egregious capital errors. In each case study of an innocent man approved for execution by a full complement of state and federal courts, the courts took note of the questionable procedures later shown to have put an innocent man on death row and even acknowledged doubts about the reliability of the resulting verdict. Nevertheless, the courts refused to overturn the verdicts because the innocent defendant was unable to satisfy the strict standards for proving that he pleaded the claim properly at trial and on appeal, and that the acknowledged errors in his case had “prejudiced” him.⁸³⁴

Our regression analyses in turn reveal evidence that reviewing courts sometimes set the bar to reversal high in response to political pressures and a desire to avoid the controversy that frequently accompanies reversals but almost never accompanies affirmances.⁸³⁵ In addition to the political pressures discussed above to impose death verdicts at trial in cases that are not highly aggravated, where error rates are the highest,⁸³⁶ our results provide evidence of pressures to approve death verdicts on appeal despite the presence of error that renders the verdicts unreliable:

- The more political pressure imposed on judges by a state's method of selecting—which usually means *electing*—judges, the higher is the risk that capital trial verdicts imposed in the state will be seriously flawed.⁸³⁷ State judicial selection techniques have the strongest association with the discovery of reversible error at the federal habeas stage, where the judges are appointed and life-tenured and thus are immune to the pressures generated by state judicial selection techniques (Analysis 6). The association between the discovery of error and state selection methods is somewhat weaker but still close to significant at the state direct appeal stage, where pressure on elected judges triggered by particularly notorious capital cases is moderated by the passage of time between the commission of the crime and the appellate ruling and by the fact that most constituents of appellate judges come from communities besides the one where the verdict under review was imposed and thus are not as interested in how the court decides the case (Analyses 3, 4, 10). There is *no* evident relationship between judicial selection techniques and the discovery of error by state post-conviction judges, who usually are the same trial judges who imposed the death verdict in the first place, and who face the most direct political pressure from cases under review because *all* their constituents come from the community where the crime occurred (Analysis 5).⁸³⁸ This suggests that **political pressures that are associated with high rates of error at trials supervised by elected judges may also keep the same judges from correcting errors during subsequent state post-conviction proceedings, and may discourage elected high court judges from reversing verdicts on direct appeal.**

- As is revealed by main Analysis 1 and a wide array of confirming analyses (Analyses 2-5, 7-18), **state direct appeal judges and state post-conviction judges are significantly more likely to find serious error and reverse death verdicts imposed in more urbanized and populous states and counties, and less likely to reverse verdicts imposed in less urbanized and populous places.** Analysis 6 reveals the opposite pattern for **federal habeas judges, who are more likely to find serious error and reverse death verdicts from less urbanized and populous states and less likely to reverse those from relatively urbanized and populous states.**⁸³⁹ These opposing patterns are additional evidence of political pressures on

state reviewing judges to affirm verdicts that, apart from such pressures, would be reversed due to serious flaws. Urban areas have more homicides and impose more death verdicts, any one of which is not very likely to make a strong and lasting impression on most local citizens. By contrast, less densely populated areas have a smaller number of homicides, each of which—and any death verdict imposed for it—is likely to be well known and important to many local citizens.⁸⁴⁰ Over the long run, therefore, reversing rural or small-town death verdicts is likely to be more controversial than reversing urban death verdicts, especially for state judges who face direct electoral discipline for locally unpopular decisions.⁸⁴¹ **At the two state stages of review, the predictable result of a desire to avoid locally controversial reversals is fewer reversals of verdicts from less populous areas than of verdicts from urban areas.** This result helps explain why the flawed verdicts found at the final federal habeas review stage—by appointed, life-tenured judges who are relatively isolated from local political pressures—are disproportionately from more rural states. More generally, **it helps explain why the proportion of flawed verdicts found at each successive review stage does not shrink—as otherwise should occur in a properly functioning series of inspections—and instead why almost as high a proportion of flawed verdicts is found at the final capital inspection stage as at the first stage: 40%.**

→ The table in the appended note ranks states based on their population size and density and indicates the difference this factor makes, holding other factors constant, in whether states have above-average or below-average reversal rates. As the table reveals, when other factors are held constant at their average, states with low population density are prone to reversal rates as much as 30 percentage points below the 34-state norm when the reversal rates being explained are mainly those of state judges who are especially likely to suffer adverse political consequences from reversing death verdicts imposed in rural communities.⁸⁴²

- All analyses of reversals taking place at only the state direct appeal stage and at only the state post-conviction stage show that state courts with large backlogs of cases are more likely to affirm death verdicts than courts without such backlogs (*Analyses 3, 4, 5 and 10*).⁸⁴³ This suggests that **pile-ups of cases awaiting review, and associated delays and controversy, pressure state judges to move cases along as quickly as they can, including by affirming verdicts that in calmer times would be found to be seriously flawed.** Again, analyses of reversals taking place at only the federal habeas stage, where life-tenured judges are less susceptible to local political pressures show no similar effect.⁸⁴⁴

- These results validate the explanation for federal court review of state court decisions famously given by Alexander Hamilton in *The Federalist Papers*. Federal court review of state decisions, Hamilton wrote, helps assure “an inflexible execution of the national laws” by national courts immune from “a local spirit” that sometimes compromises decisions of local courts. This is especially so, he wrote, when the national laws are designed to bar “arbitrary methods of prosecuting pretended offenses, and arbitrary punishment upon arbitrary convictions.”⁸⁴⁵ But the fact that

federal judges are relatively immune from *local* political pressures does not make the final, federal review stage a firewall against *all* political influence on the review process. On the contrary, case-level Analysis 19 of federal habeas decisions provides evidence that **federal reviewing judges are influenced by national political pressures associated with the process by which they are appointed and promoted. Holding other factors constant at their average, Analysis 19 predicts that the probability that a capital verdict will be reversed rises or falls as much as one-third depending upon whether the review is by judges mainly appointed by Republican Presidents or by judges mainly appointed by Democratic Presidents.**⁸⁴⁶

•Analysis 19 also provides strong evidence that reviewing federal habeas judges are forced to serve as replacement sentencers, to screen out the many death verdicts induced at trial as a result of excessively broad death-sentencing policies.⁸⁴⁷ Even so, **federal review is not a failsafe check on excessive, error-prone death-sentencing**, given federal judges' susceptibility to political pressure, and given the proneness of the strict rules those judges apply to let some, even very serious, errors slip through.⁸⁴⁸

Reviewing judges thus are demonstrably incapable of curing all of the flawed verdicts imposed at capital trials. This is so in part because reviewing judges are susceptible to political pressures to affirm flawed death verdicts analogous to the pressures trial judges and other trial-level officials face to impose flawed verdicts in the first place—pressures that call for a forceful response to serious crime in general, but are divorced from the strength of the evidence and circumstances supporting a death verdict in particular cases.

c. The probability that innocent people have been executed is high.

As we discuss above, it is impossible to know how many innocent people have been capitally convicted, sentenced and executed—in part because officials are permitted to withhold DNA samples and other crucial information needed to determine the scope of the problem. The best researchers and policy makers can do, therefore, is to use available evidence to estimate the *risk* that innocent people have been executed.⁸⁴⁹ Our conclusion on

that question is the same as the one Justice Sandra Day O'Connor reached in addressing bar groups last summer and this fall: **“If statistics are any indication, the system may well be allowing some innocent defendants to be executed.”**⁸⁵⁰

The best evidence we have been able to assemble based on counts, regression studies and case studies of the results of all three stages and each separate stage of court inspection of 4500 capital verdicts imposed in 34 states and 1000 counties across 23 years is as follows:

- 50%-plus rates of reversible error across nearly all states and years;**⁸⁵¹
- strong indications, using multiple measures, that the errors causing these reversals are serious;**⁸⁵²
- deep-seated and disturbing racial and political factors that are strongly associated with that error;**⁸⁵³
- reviewing judges' inability to catch serious error even when it has caused an innocent person to be convicted and condemned;**⁸⁵⁴
- reviewing judges' susceptibility to pressures to approve flawed capital verdicts;**⁸⁵⁵ and
- high reversal rates persisting from the first to the last review stage, as opposed to the steadily shrinking rates of discovered error needed to instill confidence in the efficacy of inspection processes.**

Other analyses show that for every 7 or 8 death row inmates who are executed, another inmate in line to be executed is proven to be factually or legally innocent.⁸⁵⁶ Moreover, among the events helping to save innocent inmates before being executed were a documentary film maker's accidental discovery of flaws in one case while examining another; an investigation by college students as a class project in a second case; a police clerk's accidental release of a suppressed file in a third case; and a burglary at a prosecutor's

office in a fourth—**fortuities that cannot be relied upon to keep miscarriages from occurring.**⁸⁵⁷

Together, these findings convince us that the probability that an innocent person has been executed during the modern death-sentencing era is high. The findings also convince us that lesser but still serious harms are rampant in the capital system, including the execution of individuals who were guilty of some offense but not one for which the law allows the death penalty.

D. Higher-Risk and Lower-Risk States, Given this Analysis

1. Connecticut and Colorado Compared to Florida, Georgia, Texas and Alabama.

As we warn above, Table 18 cannot not give a full picture of the risk of serious capital error that states face based on the factors our regression analyses identify.⁸⁵⁸ The table analyzes the effect of each factor while holding other factors at their 34-state average. It thus does not measure the combined effect of all factors operating simultaneously. In addition, Table 18 does not account for three general factors our regression analyses consider—year, state and time trend—which gauge the influence of still other forces that are not studied directly but are associated with the location and timing of the relevant death verdicts and reversals. Subject to these limitations, however, it is possible very generally to associate a particularly high risk of error with a few states that fall fairly consistently on the high-end of the risk spectrum—and to compare those states to ones that more consistently fall towards the low end of the risk spectrum. In doing so, we consider the six important factors in Table 18 and the four additional factors addressed in the tables in notes 774, 788, 797 and 842.⁸⁵⁹

As a review of Table 18 and the accompanying tables makes clear, most states' 10 risk rankings are widely distributed across the spectrum from first (most risk of high capital

reversal rates) to 34th (least risk of high reversal rates). In most cases, therefore, the information in Table 18 and the accompanying tables suggests particular areas where each state might focus policy attention without providing a strong basis for distinguishing the state from any other. In a small number of cases, however, states' risk rankings fall fairly uniformly towards one end of the risk spectrum or the other. On the low side, for example, are Connecticut and Colorado. Based on average conditions across the 23-year period,⁸⁶⁰ and on analyses of each of the 10 risk factors, holding other factors constant at their averages:

•Seven of Connecticut's 10 risk rankings place it in the bottom half of the 34 states in terms of the probability of serious capital error, including four rankings in the bottom five of 34. Most importantly, given our principal finding above, **Connecticut is ranked last in terms of the risk of error posed by its (low) capital-sentencing rate.** Thus, although Connecticut was one of four states with 100% reversal rates during the study period, that rate is based on a total of only two decisions and does not provide a fair estimate of the state's risk of serious capital error over the long haul. Our analyses suggest that Connecticut capital verdicts pose less of a risk of serious error than verdicts in most other states.

•Six of Colorado's risk rankings are in the bottom half of all states, with an additional ranking on the border between the top and bottom half (17 out of 34).⁸⁶¹ Colorado is ranked third-to-last in terms of the risk of error posed by its capital-sentencing rates. Colorado's reversal rate during the study period was 75%—based on only four decisions, three ending in reversals.

Connecticut and Colorado may be contrasted to Florida, Georgia, Texas and Alabama. Based on average conditions across the 23-year period,⁸⁶² and on analyses of each of the 10 risk factors, holding other factors constant at their averages:

•Eight of Florida's 10 risk rankings place it in the top half of states based on its predicted risk of serious capital error, including two placing it in the top five among the 34 states. A ninth ranking is on the border between the top and bottom halves of the 34 states (18 out of 34). The only ranking out of 10 on which Florida has a substantially *below* average risk of capital reversals is the result of its large backlog of capital appeals awaiting review—the third highest backlog in the country. As we note above, delay in the review process has the perverse effect of lowering reversal rates.⁸⁶³ Adding to concerns about the risk of serious capital error in Florida:

- The state's death-sentencing rate is 12th highest out of 34.
- Three of the top ten counties in the nation with the highest death-sentencing numbers and rates are Florida counties.⁸⁶⁴
- Florida has had more people removed from its death row following findings that they were not guilty than any other state.⁸⁶⁵

Florida's overall capital reversal rate during the study period was 75%.

•Seven of Georgia's 10 risk rankings put it in the top half of all states in terms of the predicted risk of serious error. Four rankings put it the *top five* of all states. Georgia is the only state among the 34 that is not in the bottom 10 states on at least one risk factor. And its lowest ranking (21 out of 34⁸⁶⁶) is due to its above-average number of death verdicts that are stuck in the appeals process awaiting final review. Working modestly in Georgia's favor, its death-sentencing rate ranks only 18th out of 34. **Georgia's overall capital reversal rate during the study period was 80%.**

•Seven of Texas's 10 risk rankings are in the top half of the 34 states. Two are in the top five. As in the case of Florida and Georgia, the factor on which Texas ranks the lowest in terms of predicted reversals is a result of its high backlog of capital cases awaiting review—the second highest in the nation. Also moderating predicted reversal rates is Texas's relatively low death-sentencing rate—25th out of 34. **During the study period, Texas had an overall capital reversal rate of 51%.** Although high in absolute terms, this rate is towards the low end compared to other states. See Figures 1A and 1B, pp. 50-51 above. One important line of inquiry for Texas, given its high rankings on most risk factors, is whether—as some have recently claimed—its relatively low capital reversal rates are due to excessively lax state court review of capital verdicts.⁸⁶⁷ Other explanations are Texas' high backlog of verdicts awaiting review, which tends to depress reversal rates, and the state's relatively low death-sentencing rate.

•Six of Alabama's 10 risk rankings place it in the top half of the 34 states. Three risk rankings place it in the top five among the 34 states. During the study period, Alabama's death-sentencing rate was 11th in the nation. **Alabama's overall reversal rate during the study period was 77%.**

2. Virginia.

As is discussed above, Virginia has extremely low capital reversal rates.⁸⁶⁸

Compared to other states with cases decided at all three review stages during the study period, Virginia's 17% overall reversal rate—the product of the lowest state direct appeal reversal rate in the country *and* the lowest federal habeas reversal rate in the country—is more than two standard deviations below the mean. Two theories have been offered to explain Virginia's low reversal rates—uniquely high-quality death verdicts or, on the other hand, uniquely low-quality court review.⁸⁶⁹ Our findings suggest that the truth lies in

between those two poles. In fact, **Virginia's rankings on the 10 risk factors tend to cluster around the two poles of fairly low, and fairly high, risk of serious capital error:**

- On the one hand, **Virginia falls among the *bottom* five states in terms of its risk of serious capital error in four of the ten risk categories** in Table 18 and the allied tables. Chief among these low-risk categories is **Virginia's death-sentencing rate, the sixth lowest in the nation.** Virginia also ranks low in terms of the political pressure put on state judges through the electoral process, and given the state's relatively strong record of apprehending and punishing serious criminal—both of which tend to relieve pressure to use the death penalty as a stop-gap response to ineffective law enforcement strategies.⁸⁷⁰

- On the other hand, **on three of the remaining six risk factors, Virginia ranks in the *top* ten among the 34 study states**—including with respect to the two racial factors that pose a high risk of capital error. The state ranks eleventh on still another factor.

Based on the factors our study identifies as important, we conclude that **the risk of serious capital error in Virginia is, on the whole, fairly moderate, but that the risk is not low enough to explain the state's extremely low reversal rates.** Our findings tend to confirm those of the State's Joint Legislative Audit and Review Commission, which recently concluded a year long study of the state's death penalty ordered by the state legislature. The Review Commission concluded that federal and state judges' adherence to strict rules limiting review for serious error in capital cases, and the state high court's narrow review of

the appropriateness of death sentences in particular cases, may have let stand the convictions and sentences of some death row inmates who did not receive proper trials.⁸⁷¹ **We, too, conclude that lax state and federal court review of Virginia death verdicts has probably depressed the state's *reversal* rate below its actual rate of serious capital error.**

IX. Conclusion

This Report picks up where our June 2000 report left off: The death penalty in this country is a broken system that is of rising concern to many Americans. The public places great demands on the death penalty and yet has become increasingly aware that, as currently imposed, the penalty is a costly failure that does not serve the purposes for which it was established and risks taking the lives of innocent people. (See Part I above.)

Our earlier report documented these costs and risks. It showed that serious error is widespread and chronic. This is true no matter how conservatively one counts the number of judicially reversible mistakes the death penalty system makes. A review of our methods in this Report shows that we defined serious mistakes cautiously and counted them so conservatively that we excluded a number of death verdicts imposed on people who were innocent.⁸⁷² Even defined this narrowly, capital error rates were 50% or more in nearly all death-sentencing states and years. Because such error keeps death verdicts from being carried out,⁸⁷³ this finding means that most states have *failure* rates above 50%. Nationally, the average failure rate is a nearly 70%; and capital verdicts in many states and counties fail at rates of 80%, 90% and even 100%. Over the 23-year course of our study from 1973 to 1995, barely 5% of the 5800 death verdicts that were imposed were carried out. During that period, the average time from death sentence to execution was 9 years. Today, given the exacting review needed to catch so much error, that delay averages 12 years. (See Parts III.A and B.)

Each one of the thousands of capital errors identified by state courts (which found 90% of the errors) and federal courts (which found the rest) is serious. This is true because each error stymies the execution of sentence at a cost of years of delay and hundreds of

thousands or even millions of dollars in litigation costs. But it is more fundamentally true because reversible error is, by its very nature, serious error. Especially given the strong pressures on reviewing judges to approve even admittedly flawed verdicts, and given the strong bias of the rules governing court review towards approving verdicts, reversible error:

- nearly always undermines the reliability of the verdict that the defendant committed a crime that was aggravated enough to warrant death as a punishment;
- often risks the execution of people who are innocent of the crime or at least of the death penalty; and
- always frustrates the demands and expectations of the public who adopted the death penalty, the taxpayers who pay for it and the victims who directly rely on it.

We have taken it as a research imperative, therefore, to identify the conditions and practices that are significantly linked to, and predict the occurrence of, serious capital error. (See Parts III-C-E.)

The central object of this study is to discover information of use in answering two questions. Why is there so much error in capital cases? Can anything be done to solve the problem or at least to moderate the amount of serious error?

We use a two-part method for conducting this research. First, we design and carry out a single multiple regression analysis that makes the best use of our detailed data about factors that may predict where and when capital error rates are likely to be high. Then, we verify the reliability and results of this “best” analysis using a wide variety of alternative regression techniques, diagnostic tests for evaluating methods and results, categories of reversal rates being explained, and potentially explanatory factors operating at the state, county and case levels. (See Part IV.)

The bulk of this Report is a detailed presentation of the results of:

- our main multiple regression analysis of explanations for the higher and lower rates of serious capital error in each of the 34 death-sentencing states that were active during the 23-year study period in each of the years in which they were active (see Parts VA, B, E);
- seven follow-up regression analyses of those same state reversal rates—including ones examining only reversals at the state direct appeal, state post-conviction and federal habeas stages of review—to make sure our results reflect actual relationships in the data and are not products of particular research methods (see Parts VA-E);
- 10 additional follow-up regression analyses of state-level and county-level explanations for different error rates in the 1002 active death-sentencing *counties* during each of the 23 years when they were active—including a study of counties in the three most active death-sentencing states during the study period (Florida, Georgia and Texas) (see Parts VIA-F);
- case studies comparing rates of serious error, and rates of sentencing innocent defendants to die, in high and low death-sentencing counties (see Part VI.G.);
- detailed case studies of four innocent individuals who were sentenced to die and whose capital verdicts were *approved* at all three review stages (see Part III.B.7.c); and
- a comprehensive case-level study of factors that predict reversals as opposed to affirmances of the 600 federal habeas verdicts that were fully reviewed during the period (see Part VII).

Based on these results we reach several overarching conclusions about conditions that predict the existence and high rates of serious capital error (see Part VIII):

- Studying the problem of serious capital error using statistical and other techniques identifies a number of factors that predict high numbers or rates of capital reversals and are:
 - *statistically significant*, meaning there is only a small probability that they are the result of chance, as opposed to actual relationships between capital error and the identified explanations for it;
 - *reliable* in that they satisfy a number of diagnostic tests in most cases;
 - *linked to sizeable differences in predicted rates of serious capital error*, because, holding other factors constant at their averages, a fairly small change in a explanatory condition is associated with a fairly large increase or decrease in the amount or rates of serious error;

→ each part of a *strong and coherent overarching explanation* for serious capital error.

•For the most part, the conditions our analyses link to sizeable differences in rates and amounts of serious capital error are *capital-sentencing policies*—how often, in response to what pressures, and in what broad classes or categories of cases, are death sentences sought and imposed—not traits of particular officials, jurors, lawyers, defendants or victims.

•**The principal conclusion of all of our analyses is that heavy use of the death penalty, especially when it sweeps in cases where the evidence supporting a capital verdict is not substantial, is a leading predictor of serious capital error.**

States and counties that use the death penalty more often per 1000 homicides are significantly more likely to have substantially higher rates of serious capital error than other jurisdictions. In particular, cases with low levels of aggravation that are swept into the capital category by jurisdictions' broad capital-sentencing policies and low capital-sentencing thresholds are prime candidates for serious, reversible error. Heavy use of the death penalty also leads to court congestion and delay in processing capital appeals.

•Four other conditions strongly predict high rates of serious capital error. Each is either a measure of fears about serious crime, or a mechanism through which those fears can generate political pressure on officials to respond forcefully to crime, including through increased use of the death penalty. Some of those fears are based on actual crime and punishment rates. Others, more disturbingly, are sensitive to politics and race. We conclude that the tendency of all four conditions to heighten pressure to use the death penalty helps explain their link to high rates and amounts of serious capital error. The four conditions are:

→ the homicide threat to politically influential communities—measured by comparing the rates at which whites and blacks are victimized by homicides;

→ well-founded doubts about the ability of state law enforcement policies and officials to respond effectively to the problem of serious crime—measured by the rate at which serious criminals are apprehended, convicted and incarcerated;

→ state judges' susceptibility to negative political consequences if they do not conform their rulings in capital cases to popular sentiments—measured by the extent to which judicial selection techniques place state judges at risk of political discipline for unpopular rulings; and

→ the size of African-American and poor communities, which some influential citizens and officials evidently associate with higher rates of serious crime.

•Underfunded and overburdened court systems—another consequence in part of high death-sentencing rates—also increase the risk of serious capital error.

- Reviewing courts do not effectively keep serious errors from occurring or keep all unreliable death verdicts from being carried out.

→ The review process fails totally to prevent serious error from recurring.

→ It does not catch all, including some of the most serious, mistakes.

→ As a result, the probability that innocent people have been executed is high.

- There is no reliable evidence that the conditions causing serious, reversible error have improved over time, and strong evidence that some of those conditions have gotten worse.

Having identified these death-sentencing policies that predict serious, reversible error in capital cases—and the political, economic and racial pressures that generate those policies—we next consider the reform options they suggest for addressing the chronically exorbitant amounts and rates of that error that have characterized the capital system for decades (Part VIII).

It is unlikely that policy changes can do more than moderate the problem of chronically high rates and amounts of serious capital error, the ill effects of error on the effective functioning of the death penalty system and the risk error creates of executing the innocent. This is because the same state and local policy makers who developed the aggressive death-sentencing thresholds and practices that so strongly predict serious error would have to be relied upon to adopt and maintain effectively ameliorative policies. And it is also because those policy makers will continue to face the same or growing fears about serious criminal behavior, and the same financial constraints and racially sensitive political pressures, that led them to adopt the risky policies in the first place.

In some states and counties, the costs and frustration levels associated with the death penalty may be so high that only a comprehensive solution to the problem of chronic capital error and its attendant costs and risks will suffice. In those places, the available options are to stop using the death penalty altogether, or to limit its use to a small number of offenses that are so highly aggravated that there is close to a social consensus that only the death penalty will serve.

For jurisdictions that prefer to explore more incremental solutions, at least in the short run, our study findings suggest **10 policy options for moderating serious capital error**:

- requiring proof beyond any doubt that the defendant committed the capital crime;
- requiring that aggravating factors substantially outweigh mitigating ones before a death sentence may be imposed;
- barring the death penalty for defendants with inherently extenuating conditions—mentally retarded persons, juveniles, severely mentally ill defendants;
- making life imprisonment without parole an alternative to the death penalty and clearly informing juries of the option;
- abolishing judge overrides of jury verdicts imposing life sentences;
- using comparative review of murder sentences to identify what counts as “the worst of the worst” in the state, and overturning outlying death verdicts;
- basing charging decisions in potentially capital cases on full and informed deliberations;
- making all police and prosecution evidence bearing on guilt vs. innocence, and on aggravation vs. mitigation available to the jury at trial;
- insulating capital-sentencing and appellate judges from political pressure; and
- identifying, appointing and compensating capital defense counsel in ways that attract an adequate number of well-qualified lawyers to do the work.

Approaches that would likely magnify the amount of serious error are :

- cutting back further on the scope of review of capital verdicts, which would likely increase the ill-effects of chronic error and invite more error;
- making piecemeal additions to the list of qualifying aggravating circumstances;
- shifting to the state the full costs of local capital prosecutions; and, most importantly
- doing nothing.

The very last point is the most important one. Over decades and across dozens of states, large numbers and proportions of capital verdicts have been reversed because of serious error. The capital system is collapsing under the weight of that error, and the risk of executing the innocent is high. Now that explanations for the problem have been identified, and a range of options for responding to it are available, the time has come to fix the death penalty, or end it.

Part II.B.7.c of Report, pp. 25-35:

C. Four Illustrative Cases in Which Stringent Rules Limiting Reversals Led Courts to Approve the Capital Verdicts of Innocent Men Despite a Full Set of Appeals.

How can innocent men and women be convicted of a capital crime and sentenced to die? And how can the mistakes escape detection by multiple courts that approved the prisoners' execution? Four typical cases provide an answer: **The courts define error serious enough to require reversal so cautiously and under-inclusively that they often hold known errors—even ones that put innocent people on death row—to be harmless, not prejudicial or waived.** Because we use the same judgments to define serious error, our counts of error are also cautious and under-inclusive.

i. Lloyd Schlup was convicted and sentenced to die by Missouri for killing another inmate in prison. After the Missouri Supreme Court on direct appeal, the trial court and Missouri Supreme Court a second time on state post-conviction, and a United States District Court and the United States Court of Appeals on habeas rejected his claims that errors in his case had led to his conviction for a crime another prisoner committed, thus clearing him to be executed, a prison videotape and a guard's testimony about the time of the events revealed by the tape confirmed, as Schlup had always said, that he was in another part of the prison when the killing occurred. Fourteen years after his arrest, Schlup agreed to a settlement of the case so his conviction of capital murder could be withdrawn.

How did three levels of reviewing courts approve this miscarriage—leading A Broken System to count Schlup's verdict among the 32% in which no serious error occurred? The answer lies in the harmless error, no-prejudice and waiver rules noted above. On direct appeal, Schlup objected to the admission of photos supposedly showing that a

guard who falsely identified Schlup as the assailant could see the site of the killing from his guard station. The photos had not been “authenticated” by anyone who could say they showed the view of the crime scene from the guard post, rather than from a different vantage point. Authentication is a legal requirement some call a technicality, and the Missouri Supreme Court treated it as such: “The fact that Maylee [the guard who said Schlup was the killer] . . . did not testify that the photos depicted his exact vantage point,” the court said, although an error, was harmless, so that “[t]he trial court did not abuse its discretion in admitting the photographs.” The Missouri Supreme Court then concluded—as the jurors also apparently did—that the photos strongly “corroborate[d] Maylee’s testimony by demonstrating that he could have witnessed the murder from his station.”⁸⁷⁴ In fact, the photographs did not show what Maylee could see from his post; contrary to his trial testimony, the guard could not and did not see Schlup at the scene. But because of the Missouri high court’s reluctance to reverse based on “technical” error, Maylee’s flawed identification sent a man to death row for a crime someone else committed.

This same treatment of uncorrected (and so, by us, uncounted) error continued on state post-conviction review. There, the Missouri Supreme Court chose to ignore another, this time *non-technical*, error because it was not “prejudicial.” The known error was the prosecutor’s “fail[ure] to disclose exculpatory evidence” tending to show the defendant’s innocence. State lawyers failed to reveal that the warden of the prison where the killing occurred “had evidence that another individual may have committed the murder, and the warden [told police] he did not believe appellant would intentionally hurt someone.” Although prosecutors are required to disclose exculpatory evidence, their failure to do so is ignored if the defendant fails to show that the prosecutors’ withholding of exculpatory

evidence probably changed the trial outcome. Applying this exception, the Missouri high court chose to ignore the error, calling mere “rumor” the warden’s belief about what occurred in his prison and the information making him think another man was the killer.⁸⁷⁵ The warden was correct, of course. But the courts refused to cure the error (and we did not count it) for lack of “prejudice.”⁸⁷⁶

The same thing happened on federal habeas review. There, Schlup showed that his trial lawyer incompetently failed to interview or call three known alibi witnesses. The court did not dispute that the lawyer failed to give Schlup decent legal help, but the court chose to ignore the error because it was not shown to be prejudicial. Accepting the lawyer’s claim—though he never talked to the three witnesses—that their testimony that Schlup was not near the killing would be “repetitive or . . . damaging,” the court ruled that Schlup had not shown that the denial of his right to counsel had probably led to the wrong outcome. As a result, the error went uncorrected by all three stages of court review (and uncounted by us), and the three alibi witnesses went unnoticed by the judicial system until the videotape and supporting testimony finally showed that Schlup was with those witnesses, away from the killing, when it occurred.

The procedure Schlup used to prove he was not guilty after all three regularly available review stages failed him no longer exists. Congress decided to abolish it in 1996.⁸⁷⁷

It is in the nature of valid innocence claims like Schlup’s that they can be proved only through successive litigation in which testimony at each prior stage is revealed to be false by newly discovered evidence that became relevant for the first time when the false testimony was given. Since 1996, therefore, it has been in the nature of valid innocence claims like Schlup’s that existing court review mechanisms cannot be relied upon to reveal innocence.

ii. *Earl Washington's* death verdict is also counted by us as error-free because it was affirmed at all three stages of court review. A recent press account describes Washington's conviction and death sentence, despite his innocence:

"Did you stab a woman in Culpeper?" the state police detective asked. The illiterate farm worker nodded.

"Was this woman white or black?"

"Black."

A few questions later, Special Agent C. Reese Wilmore tried again. "Was she white or black?"

This time Earl Washington Jr. said, "White." That answer launched the biggest mistake ever made by Virginia's judicial system—and landed Washington on death row.

It wasn't until Oct. 2 [2000]—17 years after that police interview—that new DNA tests cleared Washington of the 1982 rape and slaying of Rebecca Lynn Williams. Recent interviews with Washington and Williams's widower as well as dozens of police officers, judges and lawyers involved in the case turned up warnings that went unheeded along the way:

* Police and prosecutors moved forward with a case based almost entirely on a statement full of inconsistencies from an easily persuaded, somewhat childlike special-education dropout. Washington told investigators he "stuck her . . . once or twice," but Williams bled to death from 38 stab wounds. He said she was alone. But there was a baby in a playpen and a toddler roaming the small apartment. The defense made no mention of most of these inconsistencies during the trial.

* A judge ruled that the statement was admissible after hearing from a state mental health expert that a man with an IQ of 69 was competent to waive his rights to a lawyer during initial questioning—even though Washington still doesn't know what the words "waive" and "provided" mean.

* No eyewitness or physical evidence put Washington at the scene. His blood type did not match a semen stain, and police instructed the state lab not to test key hair evidence. A judge rejected defense efforts to test the hair, and the defense lawyers never told the jury about the mismatched blood types.

* Six courts rejected the inmate's claims of innocence, *including a panel of federal judges who determined that Washington's trial attorney had failed to meet minimal standards but upheld the conviction anyway*. Virginia's appeals judges . . . ruled that Washington's confession was properly admitted and the blood evidence was inconclusive.

* * * * *

In October, Gov. James S. Gilmore III (R) pardoned Washington after more sophisticated genetic testing found no trace of him at the scene.

* * * * *

Although state officials have reopened the investigation, Williams's widower, Clifford, feels betrayed by Culpeper authorities, who assured him that Washington was the right man and now won't talk to him, he says.

"What do they have to hide? Why won't they talk about it?" he asked in a recent interview. "I went for nearly 18 years believing Washington did it. Now I don't know what to think."⁸⁷⁸

According to another news report:

Genetic material found on Williams's battered body did not match [Washington], her [the victim's] husband or any man in the state's DNA data bank of convicted felons. But lab tests done on a blue blanket at the crime scene found the DNA of a convicted rapist [who was never punished for the 18-year-old offense], Gov. Gilmore said in a statement.⁸⁷⁹

These accounts again show that the court standards for judging serious error—the same ones we use here and in *A Broken System*—were too forgiving to spot the errors leading to Washington's false conviction. Answers to more specific questions about the case compel the same conclusion.

How could the courts have ruled that a retarded man, whose memory of the events clashed with the known facts on several crucial points, could understand his rights and validly confess? Here is what the Virginia Supreme Court said:

On appeal, the defendant argues . . . that he made no waiver of his right to counsel [when he made his alleged confession] on May 22, 1983, and that he was, in any event, incapable of making a voluntary and intelligent waiver of his constitutional rights. . . . These contentions lack merit. The record clearly shows that on at least three occasions . . . [Washington] gave his questioners clear indications that he understood and waived his rights, both orally and in writing.⁸⁸⁰

Washington's inexperienced trial lawyer had a copy of a blood report showing that all the semen evidence at the crime scene had a blood type *different* from Washington's. He

decided the report wasn't important and never told the jury about it.⁸⁸¹ At first, the U.S.

Court of Appeals thought this might be incompetent representation, and ordered a hearing:

[Washington's] allegation [that his lawyer was incompetent] was supported by 2 affidavits. One, by an . . . expert in the field, opined that the laboratory reports of the blood type and PGM [enzyme] type of the semen stains, as compared to Washington's, excluded Washington as the depositor of the semen. The other, by his trial counsel . . . stated that counsel had received the laboratory reports but did not recognize their arguably exculpatory nature.

The district court rejected this claim of ineffective assistance without an evidentiary hearing on alternative grounds: that counsel's conduct, as alleged, did not fall outside the range of acceptable professional conduct, and that in any event there was no reasonable probability that the outcome of the proceeding would have been different but for the challenged conduct. . . .

If, as Washington alleged, his counsel failed to offer available evidence which in a significant way drew his factual guilt in issue, counsel's performance obviously fell below an objective standard of reasonable professional conduct, unless some cogent tactical or other consideration justified it. . . . The allegation that the laboratory reports indicated Washington's blood type as O with PGM type of 2-1 whereas four samples of the semen stains on the blanket from the crime scene showed blood type A with PGM type of 1, was undisputed. The allegation that this disparity of types indicated that Washington could not have been the depositor of the semen in the stains was supported by the . . . affidavit of a . . . qualified expert that was not disputed by opposing expert opinion or other evidence.

* * * * *

[As for the ruling that] there was no reasonable probability, given the evidence of Washington's guilt, that the result of the proceeding would have been different had the challenged conduct not occurred, . . . we believe the district court could not properly make that assessment without an evidentiary hearing . . . [Unless shown otherwise at a hearing] . . ., the exculpatory quality of the forensic evidence . . . made it reasonably probable that had it been laid before the jury, it would at the least have created in that body a reasonable doubt as to guilt or resulted in the recommendation of a lesser sentence reflecting that doubt.

[T]he evidence of guilt presented to the jury . . . was not without its difficulties The evidence consisted essentially of a confession obtained by interrogation almost a year after the crime, from a mildly retarded person upon whom suspicion had not earlier focused during the crime's investigation, and who was not indeed suspected when the critical

interrogation which elicited his inculpatory statement was commenced, apparently blindly, while he was in custody in connection with an unrelated crime.⁸⁸²

After holding a hearing, the lower court ruled that the lab report indeed showed the semen stains did not match Washington, but concluded that the lawyer's error in failing to tell the jury about the report should be ignored because it was *not prejudicial*. On appeal, the higher court agreed—revealing the strictness of the courts' (and our) definition of error serious enough to require reversal:

We cannot say the district court erred in concluding that petitioner was not prejudiced by [his lawyer's failure to introduce] the forensic evidence. ... Even assuming that petitioner had presented the stained blanket and his experts at trial, the prosecution still had a strong case against petitioner [based on "Washington's confession to the crime"]. . . . [G]iven the case's strength, we cannot say that inconclusive forensic evidence would have overcome it.⁸⁸³

iii. Anthony Porter is another retarded victim of a flawed capital trial who spent 17 years on (Illinois's) death row for a crime another man committed. His death verdict also was upheld at all three stages of court review, and so is counted by us as error-free. But as the courts knew all along, Porter's trial was in fact marred by two major problems—a biased juror and an incompetent lawyer. The courts held the errors unimportant given the supposedly strong evidence of guilt.

On his first appeal, Porter pointed out that one of the jurors who voted to convict and condemn him had failed to tell the judge, when asked directly, that she knew the mother of one of the murder victims. Once on the jury, the woman urged the other 11 to "vote guilty right then . . . before any discussion was had on the evidence." The Illinois Supreme Court

ruled there was no prejudice because Porter’s trial lawyer showed only that the juror “knew the victim’s mother as someone who attended the same church that she attended,”⁸⁸⁴ but did not show that “the relationship between the juror and the victim’s mother” was close. When Porter’s new lawyer, on his second appeal, supplied the missing information—that the juror and the victim’s mother were good friends—the court again chose to ignore the error, saying the error was waived by the first lawyer’s incompetent failure to discover the information.⁸⁸⁵

That incompetence went even further. Due to a dispute with Porter over his fee, the lawyer refused to interview or call five witnesses (including three close relatives of the victims) who said a man named Alstory Simon had killed the victims in a fight over drugs. Without disagreeing that the lawyer incompetently failed to investigate evidence identifying a different killer, the second reviewing court ruled the error *non-prejudicial*—again showing how narrow the courts’ (and our) measure of serious error is:

Even assuming counsel performed incompetently in not generating the proposed testimony, sufficient prejudice did not result to support the claim. . . .

Prejudice is measured by looking at findings unaffected by error and accounting for the error’s effect on remaining findings to answer whether the decision would “reasonably likely” have been different. The assessment “must exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification,’ and the like.” The showing of prejudice must be a strong one. [That standard was not met here, because t]he evidence against defendant [Porter] was considerable.⁸⁸⁶

Both errors again went unremedied at the federal habeas stage of review. As for the biased juror and several other errors, the federal district court wrote:

Porter[’s lawyer] did not [properly] raise several of his asserted grounds for relief in the Illinois courts . . . ; as such, those arguments are procedurally barred. “In all cases in which a state prisoner has defaulted his federal claims in state court . . . , federal habeas review of the claims is barred .” . . . Under these standards, the following claims now raised by Porter are procedurally barred: use of allegedly perjured testimony, use of constitutionally unfair procedures, and denial of an adequate hearing on the extent of juror bias⁸⁸⁷

As for his trial lawyer’s incompetent failure to interview five witnesses who identified Alstory Simon as the killer, the federal district court again illustrated how difficult it is to show that even clearly below-standard lawyering is prejudicial enough to be reversible error (and, thus, to be counted by us as serious error). To overturn a capital conviction, the court said, a

“defendant must show that there is a probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” . . . [D]eficient performance, by itself, “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Porter has not made the requisite showing . . . [because he] was convicted by a jury which heard considerable evidence that Porter committed the crimes.⁸⁸⁸

A federal appellate court agreed, rejecting Porter’s claim that he was prejudiced by his lawyer’s admitted incompetence with a rhetorical question that speaks volumes about how hard it is to satisfy the courts’ (and our) test for serious, reversible error:

Porter asserts that his counsel should have presented evidence that Alstory Simon and Inez Johnson were responsible for murdering Green and Hilliard. Porter has offered a number of affidavits and sworn statements by people in the neighborhood stating, among other things, that Simon and Johnson went to the park that night with Green and Hilliard, that Simon had just been released from the penitentiary and had a financial dispute with Hilliard regarding drug dealing, that Hilliard was seen arguing in the park that night with a man who was not Porter, . . . that Simon threatened someone who asked Johnson what had happened at the park[, and that Inez Johnson had been overheard admitting that she and Simon committed the killings]. None of this evidence was offered at trial, although the State concedes that Simon and Johnson were in the park with [the victims] at some point on the night of the murders.

... [But h]ow much credence can we reasonably give to third-hand information when it contradicts two eyewitnesses and a police officer who put Porter right at the scene of the crime?⁸⁸⁹

These decisions cleared the way for Porter's execution, which was hours away when he received an emergency reprieve on the ground that he might be too retarded to understand why he was being executed. In the ensuing pause, some Northwestern undergraduate students, as a class project, tracked down Alstory Simon in Milwaukee where he had fled after Porter's arrest. The result—when someone finally followed-up on the leads Porter's lawyer had incompetently ignored—was Simon's taped confession to the killings. Porter was released. Simon pleaded guilty to killing the two people,⁸⁹⁰ and is believed to have killed a third person after Porter's arrest.⁸⁹¹

The *Chicago Tribune's* report on the Porter case again illustrates how high the courts (and thus *A Broken System*) set the bar for establishing serious, reversible error in capital cases:

It took two days to put Anthony Porter behind bars and send him on his way to Illinois' Death Row. It took nearly 17 years to set him free.

Between those bookends of Porter's incarceration, the criminal justice system failed him at several critical turns, according to police and court records as well as interviews.

When initially investigating the crime, for instance, police never seriously considered other suspects, and they discounted Porter's alibi.

Witnesses who could have exonerated him lied, although some say they were coerced by police. And others who knew the real details of the crime kept silent, even when they knew an innocent man faced execution.

Although the justice system is supposed to ensure that everyone—even the destitute—is provided an attorney to defend himself, the reality is that Porter's lack of financial resources meant he received only the most basic defense, even though he was facing the most serious punishment.

By his trial attorney's own admission, efforts on Porter's behalf were spare. . . .

After Porter’s conviction, judges in state and federal courts—including the U.S. Supreme Court—turned away more than a half-dozen of Porter’s appeals and other filings, dismissing arguments raised on grounds ranging from ineffective counsel to claims of innocence.

* * * * *

[A]s Porter’s case moved through the courts, Chicago police and the Cook County state’s attorney’s office saw their work validated. Questions of innocence were denied by higher courts, and the procedural appeals were turned away. An appeal that examined whether a juror was biased was unsuccessful.

“We had good claims,” said Daniel Sanders, Porter’s appellate attorney. “It’s just because of the tough rules in the court that we kept losing.”⁸⁹²

iv. Frank Lee Smith’s recent exoneration for a 1985 Florida rape-murder followed the same distressing pattern, but with a tragic twist:

DNA evidence has exonerated Death Row inmate Frank Lee Smith of the rape and murder of an 8-year-old Broward County girl.

But he died 11 months ago.

Another man, Eddie Lee Mosley, is now the main suspect in Shandra Whitehead’s 1985 death, police and prosecutors said. DNA tests have also linked Mosley to the murder of another Fort Lauderdale child . . . police said Thursday. . . .

Smith died of cancer on Jan. 30 while his attorneys and family fought to prove his innocence. . . . The victory that came with this week’s FBI release of the DNA test results was bittersweet, said . . . the Tallahassee attorney hired by Smith’s family to try to clear his name.

“The state prosecutors had resisted testing while Frank Lee Smith was alive and pursuing his appeals,” said the attorney “Once he was dead, they relented and became more cooperative about letting us get the tests done.”

* * * * *

Smith’s sister . . . and his aunt . . . broke down and cried earlier this week when they heard that DNA tests conducted by the FBI had exonerated him.

“They knew from the very beginning he was innocent,” [the lawyer] said. The family believed in Smith’s innocence, he said, because he was convicted on such scant evidence—the word of a witness who later recanted and said she was pressured by police⁸⁹³

The Florida Supreme Court also recognized flaws in Smith’s trial and the weakness of the evidence against him. But the court relied on the harmless error, no-prejudice and waiver rules, and the strict standards for court relief to affirm Smith’s capital conviction and sentence—which in turn required us to count Smith’s verdict as error free. In its opinion, the Florida high court wrote:

Appellant . . . argues that there were repeated instances of prosecutorial misconduct which cumulatively denied him a fair trial. All but one of these claimed instances are procedurally barred by the failure to object at trial. . . . In the one instance clearly brought to the trial judge’s attention, . . . a relative of appellant claimed she had seen the prosecutor in the hallway coaching an identification witness by identifying the appellant for the witness. The trial judge inquired into the matter and found the relative’s testimony incredible. We see no abuse of discretion.

Appellant argues that the trial court erred in calling a court witness on request of the state which [indicated that the court] vouch[ed] for [the witness’s] credibility Although we have disapproved of calling such witnesses as court witnesses, the error here was harmless. [It was true t]he witness exhibited a hazy recall of non-essential particulars of previous statements . . . [but] on the critical point of his testimony, he unequivocally [but, we now know, falsely] identified appellant in court as the man he had seen on the street just prior to the crimes and as the man he had previously identified in photographic and live lineups.

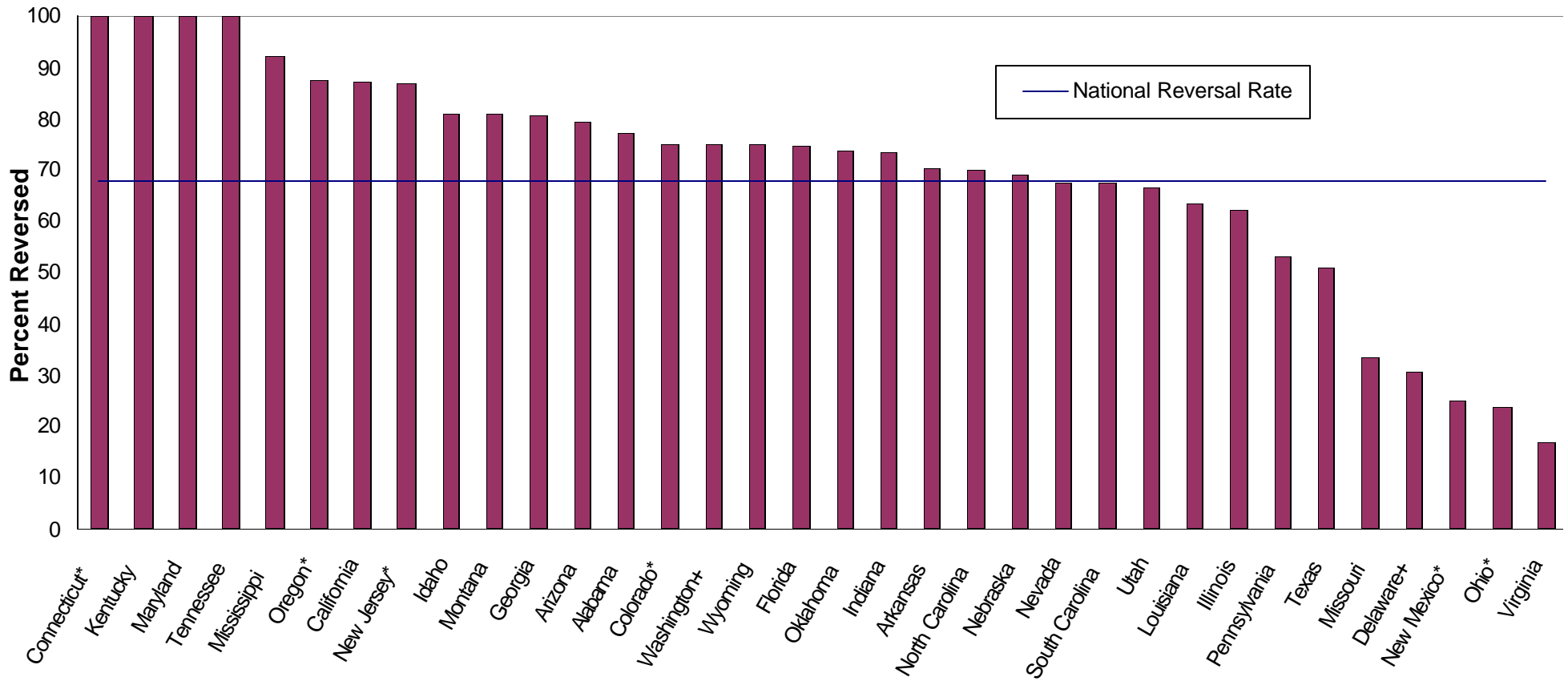
Appellant argues that the evidence is insufficient to support the convictions because it is largely circumstantial and is not inconsistent with a reasonable hypothesis of innocence. . . . In support, appellant argues that the eyewitness testimony placing him at the crime scene is questionable. This argument was made to the jury and obviously it found the testimony credible. . . . It is not for us to substitute our judgment for that of the jury.⁸⁹⁴

* * * * *

As these cases show, **state and federal courts do not reverse death verdicts for weak or technical reasons. Instead, their decisions (and thus our test for serious error) run in the opposite, highly cautious direction: Absent clear proof of error with a**

proven effect on the verdict, even doubts about guilt do not lead courts to reverse capital verdicts.

Figure 1B. Combined Reversal Rate for Completed Stages of Review, 1973-95⁺



From pp. 294-95 of Report:

**Table 13A. Capital Error Rates in *Top-Third* Death-Sentencing Counties*
With Highest Number of (986-1361) Homicides, 1973-1995⁺**

County (City), State	Death Verdicts / 1000 Homicides	Homi- cides	Death Verdicts	Error Rate [†]	# Not Guilty	% Not Guilty
Pima (Tucson), AZ	64	986	63	71%	1	1.6
Clark (Las Vegas), NV	55	1,288	71	64%	2	2.8
Pinellas (St. Petersburg), FL	50	1,018	51	89%	0	0
Oklahoma (City), OK	50	1,361	68	75%	3	4.4
<i>All 4 Counties</i>	<i>54</i>	<i>4,653</i> <i>avg.</i> <i>1,163</i>	<i>253</i> <i>avg. 63</i>	<i>75%(a</i> <i>vg)</i>	<i>6</i>	<i>2.4</i>

Notes to Tables 13A-C

* Top-third counties are the 81 counties, among the 244 counties with five or more death verdicts, that have the highest rates of death verdicts to homicides. Bottom-third counties are the 81 counties, among the 244 counties with five or more death verdicts, that have the lowest rates of death verdicts to homicides.

⁺ Death verdicts, homicides and death-sentencing rates ((death verdicts/homicides) x 1000) are those occurring during the portion of the 1973-1995 period when the state in which the county is located had a valid post-*Furman* capital statute. See supra note 595.

[†] Error rates are the overall capital reversal rates at the state direct appeal and federal habeas stages. See supra note 597.

Sources: DRCen, DADB, HCDB, Vital Statistics.

**Table 13B. Capital Error Rates in *Bottom-Third* Death-Sentencing Counties*
with Comparable Number of (950-1400) Homicides, 1973-1995⁺**

County (City), State	Death Verdicts / 1000 Homicides	Homi- cides	Death Verdicts	Error Rate [†]	# Not Guilty	% Not Guilty
DeKalb (sub. Atlanta), GA	17	1,065	18	100%	0	0
Fresno, CA	14	1,256	18	40%	0	0
Mecklenburg (Charlotte), NC	14	1,013	14	64%	0	0
Santa Clara (San Jose), CA	13	1,161	15	22%	0	0
Jefferson (Louisville), KY	12	1,201	15	53%	0	0
Allegheny (Pittsburgh), PA	12	1,145	14	64%	0	0
Travis (Austin), TX	10	975	10	44%	0	0
Contra Costa, CA	9	1,015	9	0%	0	0
Pulaski (Little Rock), AR	7	1,157	8	60%	0	0
Davidson (Nashville), TN	6	1,323	8	29%	0	0
Prince George's (sub. Washington), MD	6	1,074	6	50%	0	0
Richmond, VA	5	1,071	5	17%	0	0
<i>All 12 Counties</i>	<i>10</i>	<i>13,456</i> <i>avg. 1,121</i>	<i>140</i> <i>avg. 12</i>	<i>45%</i> <i>(avg)</i>	<i>0</i>	<i>0</i>

Table 13C. Bottom-Four Death-Sentencing Counties*⁺

County (City), State	Death Verdicts / 1000 Homicides	Homi- cides	Death Verdicts	Error Rate [†]	# Not Guilty	% Not Guilty
Pulaski (Little Rock), AR	7	1,157	8	60%	0	0
Davidson (Nashville), TN	6	1,323	8	29%	0	0
Prince George's (sub. Washington), MD	6	1,074	6	50%	0	0
Richmond, VA	5	1,071	5	17%	0	0

All 4 Counties

6

4,625
avg. 1,156

27
avg.7

39%
(avg)

0

0

From pp. 297-99 of Report:

**Table 14A. Capital Error Rates in *Top-Third* Death-Sentencing Counties*
With Next Highest Number of (238-612) Homicides, 1973-1995⁺**

County (City), State	Death Verdicts 1000 Homicides	Homi- cides	Death Verdicts	Error Rate [†]	# Not Guilty	% Not Guilty
Pasco (sub. Tampa-St. Petersburg), FL	72	279	20	100%	2	10
Robeson (Lumberton), NC	62	340	21	76%	0	0
Baltimore County (suburbs), MD	56	612	34	100%	1	2.9
Bay (Panama City), FL	55	238	13	83%	0	0
Escambia (Pensacola), FL	55	513	28	87%	1	3.6
Horry (Myrtle Beach), SC	54	261	14	82%	0	0
Brevard (Melbourne), FL	50	482	24	54%	1	4.2
Volusia (Daytona Beach), FL	49	546	27	44%	0	0
<i>All 8 Counties</i>	55	3,271 <i>avg. 409</i>	181 <i>avg. 23</i>	78% <i>(avg.)</i>	5	2.8

Notes to Tables 14A-C

* Bottom-third counties are the 81 counties, among the 244 counties with five or more death verdicts, that have the lowest rates of death verdicts to homicides. Top-third counties are the 81 counties, among the 224 counties with five or more death verdicts, that have the highest rates of death verdicts to homicides.

⁺ Death verdicts, homicides and death-sentencing rates ((death verdicts/homicides) x 1000) are those occurring during the portion of the 1973-1995 period when the state in which the county is located had a valid post-*Furman* capital statute. See supra note 595.

[†] Error rates are the overall capital reversal rates at the state direct appeal and federal habeas stages. See supra note 597.

Sources: DRCen, DADB, HCDB, Vital Statistics.

**Table 14B. Capital Error Rates in *Bottom-Third* Death-Sentencing Counties*
with Comparable Number of (200-700) Homicides, 1973-1995⁺**

County (City), State	Death Verdicts / 1000 Homicides	Homi- cides	Death Verdicts	Error Rate [†]	# Not Guilty	% Not Guilty
Lauderdale, MS	20	246	5	80%	0	0
Lucas (Toledo), OH	20	498	10	17%	0	0
Lubbock, TX	20	609	12	60%	0	0
Buncombe (Asheville), NC	19	259	5	50%	0	0
Lafayette, LA	19	265	5	25%	0	0
Jefferson (Pine Bluff), AR	18	327	6	100%	0	0
Ventura, CA	18	545	10	14%	0	0
Brazoria, TX	18	273	5	33%	0	0
Cumberland (Fayetteville), NC	18	602	11	63%	1	9
Calcasieu (Lake Charles), LA	18	330	6	100%	0	0
Knox (Knoxville), TN	18	499	9	100%	0	0
Clayton (suburban Atlanta), GA	18	279	5	80%	0	0
Seminole (Orlando), FL	18	335	6	33%	1	17
Virginia Beach, VA	18	335	6	0%	0	0
St. Lucie, FL	18	395	7	71%	0	0
Wichita (Falls), TX	17	287	5	80%	0	0
Santa Barbara, CA	17	287	5	0%	0	0
Douglas (Omaha), NE	17	658	11	68%	0	0
Franklin (Columbus), OH	16	497	8	17%	0	0
Fayette (Lexington), KY	16	315	5	40%	0	0
Tulare, CA	16	515	8	25%	0	0
Bell (Killeen), TX	15	388	6	67%	0	0
Alachua (Gainesville), FL	15	388	6	20%	0	0

Spartenburg, SC	15	453	7	50%	0	0
Gaston (Gastonia), NC	14	347	5	33%	0	0

Table 14B (cont'd). Capital Error Rates in *Bottom-Third* Death-Sentencing Counties* with Comparable Number of (200-700) Homicides, 1973-1995⁺

County (City), State	Death Verdicts / 1000 Homicides	Homi- cides	Death Verdicts	Error Rate [†]	# Not Guilty	% Not Guilty
Gregg (Longview), TX	14	348	5	75%	0	0
Bibb (Macon), GA	13	595	8	56%	0	0
Fairfax (sub. Washington), VA	13	376	5	14%	0	0
Hidalgo (McAllen), TX	12	409	5	50%	0	0
Delaware (sub. Philadelphia), PA	12	491	6	0%	0	0
Greenville, SC	11	555	6	40%	0	0
Camden, NJ	11	559	6	100%	0	0
Guilford, NC	11	564	6	60%	0	0
Galveston, TX	11	664	7	44%	0	0
Richland (Columbia), SC	9	634	6	40%	0	0
Salt Lake, UT	8	655	5	20%	0	0
<i>All 36 Counties</i>	<i>15</i>	<i>15,782</i> <i>avg. 438</i>	<i>239</i> <i>avg. 6.6</i>	<i>48%</i> <i>(avg.)</i>	<i>2</i>	<i>.8</i>

Table 14C. *Bottom-Eight* Death-Sentencing Counties*⁺

County (City), State	Death Verdicts / 1000 Homicides	Homi- cides	Death Verdicts	Error Rate	# Not Guilty	% Not Guilty
Hidalgo (McAllen), TX	12	409	5	50%	0	0
Delaware (sub. Philadelphia), PA	12	491	6	0%	0	0
Greenville, SC	11	555	6	40%	0	0
Camden, NJ	11	559	6	100%	0	0
Guilford, NC	11	564	6	60%	0	0

Galveston, TX	11	664	7	44%	0	0
Richland (Columbia), SC	9	634	6	40%	0	0
Salt Lake, UT	8	655	5	20%	0	0
<i>All 8 Counties</i>	<i>10</i>	<i>4,531</i>	<i>47</i>	<i>44%</i>	<i>0</i>	<i>0</i>
		<i>avg. 566</i>	<i>avg. 6</i>	<i>(avg.)</i>		

Table 16: Overall Error Rates and Death-Sentencing Rates for All Counties With 600 or More Homicides, 1973-1995*

County (City), State	Overall Reversal Rate (Dir. App. + Fed. Hab. Stage)	Death-Sentencing Rate (for every 1000 homicides)	Homicides
Baltimore County (suburbs), MD	100%	56	612
Orange, CA	100%	20	1738
De Kalb (suburban Atlanta), GA	100%	17	1065
Tulsa, OK	100%	16	794
San Bernardino, CA	100%	15	1950
Lake, IN	100%	15	1500
Richmond (Augusta), GA	100%	10	705
Pinellas (St. Petersburg), FL	89%	50	1018
Multnomah (Portland), OR	88%	13	760
Essex (Newark), NJ	88%	4	1905
Chatham (Savannah), GA	85%	22	787
Maricopa (Phoenix), AZ	84%	41	2782
Broward (Ft. Lauderdale), FL	84%	21	2599
Hinds (Jackson), MS	81%	24	907
Polk, FL	78%	35	894
Oklahoma (City), OK	75%	50	1361
El Paso, TX	73%	18	734
Orleans (New Orleans), LA	73%	9	3126
Hillsborough (Tampa), FL	72%	36	1839
Fulton (Atlanta), GA	71%	4	3314
Pima (Tucson), AZ	71%	64	986
Orange (Orlando), FL	71%	32	1241
Douglas (Omaha), NE	68%	17	658
Dade (Miami), FL	67%	15	6936
Dallas, TX	67%	11	5682
East Baton Rouge, LA	67%	11	857

Muscogee (Columbus), GA	66%	33	607
Clark (Las Vegas), NV	64%	55	1288
Meckleburg (Charlotte), NC	64%	14	1013
Allegheny (Pittsburgh), PA	64%	12	1145
Cumberland (Fayetteville), NC	63%	18	602
Lubbock, TX	60%	20	609
San Diego, CA	60%	10	2322
Pulaski (Little Rock), AR	60%	7	1157
Cook (Chicago), IL	57%	11	12586
Jefferson, LA	56%	16	869
Mobile, AL	56%	28	1298

— VS. —

County (City), State	Overall Reversal Rate (Dir. App. + Fed. Hab. Stage)	Death-Sentencing Rate (for every 1000 homicides)	Homicides
Jefferson (Birmingham), AL	55%	25	2161
Tarrant (Ft. Worth), TX	54%	16	2636
Jefferson (Louisville), KY	53%	12	1201
Duval (Jacksonville), FL	51%	30	2232
Palm Beach, FL	50%	12	1461
St. Clair (Belleville), IL	50%	7	945
Prince George's (sub. Wash.), MD	50%	6	1074
Bexar (San Antonio), TX	48%	13	3275
Travis (Austin), TX	44%	10	975
Galveston, TX	44%	11	664
Fresno, CA	40%	14	1256
Richland (Columbia), SC	40%	9	634
San Francisco, CA	40%	5	1444
Los Angeles, CA	37%	8	17998
St. Louis County (suburbs), MO	37%	26	1387
Kern (Bakersfield), CA	36%	23	961
Jefferson (Beaumont), TX	35%	26	685
Jackson (Kansas City), MO	33%	6	1827
Harris (Houston), TX	32%	19	9829
Riverside, CA	31%	18	1477
Sacramento, CA	29%	22	1329

Davidson (Nashville), TN	29%	6	1323
Philadelphia, PA	25%	27	4698
Cuyahoga (Cleveland), OH	24%	22	2053
Shelby (Memphis), TN	23%	14	2219
Santa Clara (San Jose), CA	22%	13	1161
Nueces (Corpus Christi), TX	20%	20	770
Salt Lake, UT	20%	8	655
Bernalillo (Albuquerque), NM	20%	6	814
Marion (Indianapolis), IN	18%	10	1433
San Joaquin (Stockton), CA	17%	12	769
Richmond, VA	17%	5	1071
Hamilton (Cincinnati), OH	8%	40	727
Alameda (Oakland), CA	0%	15	2010
Contra Costa, CA	0%	9	1015
St Louis (City), MO	0%	3	2306.00

* Includes only counties with five or more death verdicts during the study period. Sources: DRCen, DADB, HCDB, Vital Statistics.

END NOTES

- ⁶⁹⁷ See supra pp. 25-35.
- ⁶⁹⁸ See supra pp. 287-306 & Tables 10-16.
- ⁶⁹⁹ Brooke A. Masters, Executions Decrease For the 2nd Year: Va., Texas Show Sharp Drops Amid A National Trend, Wash. Post, Sept. 6, 2001.
- ⁷⁰⁰ A Governor's Role in Death Penalty Cases, Burden of Proof with Greta Van Susteren, CNN, Aug. 21, 2001, www.CNN.Com/Burden.
- ⁷⁰¹ See supra pp. 166-68, 183-84.
- ⁷⁰² See supra pp. 166-68, 183-84, 197, 214, 224, 239-42, 252, 256-57, 269, 271, 274, 280-81 (significant to highly significant in Analyses 2-5, 7-15, 18; just barely above significance in Analyses 16 and 17).
- ⁷⁰³ See supra pp. 166-68, 183-84, 224, 239-42, 252, 256-57, 269, 271, 274, 280-81 (Analyses 1, 2, 7-9, 11-15; 18; just barely above significance in Analyses 16 and 17).
- ⁷⁰⁴ See supra pp. 197, 214 (Analyses 3-5).
- ⁷⁰⁵ See supra pp. 319-23 (Analysis 19).
- ⁷⁰⁶ Regarding state reversal rates, see supra pp.166-68, 183-84, 197, 214, 224, 239-42,(Analyses 1-4, 14, 15). Regarding county reversal rates, see supra pp. 252, 256-57, 269, 271, 274, 280-81 (Analyses 7-13, 18; just above the .05 significance level in Analyses 16 and 17).
- ⁷⁰⁷ See supra pp. 250, 265-66, 272, 281.
- ⁷⁰⁸ See supra pp. pp. 166-68, 183-84, 224, 239-42, 252, 256-57, 269, 271, 274, 280-81 (compare Analyses 7-13, 16-18 to Analyses 1-5, 8-17).
- ⁷⁰⁹ See supra pp.287-306.
- ⁷¹⁰ See supra pp. 86-98.
- ⁷¹¹ See supra pp. 183-84 & Figures 27A-D.
- ⁷¹² See, e.g., supra pp. 183-84 & Figures 27A-D, 197, 205 (Figures 35A, 35B), 229 (Figure 41C), 260 (Figures 43C, 43D), 271 & n.550.
- ⁷¹³ In one case, discussed below, we examine rankings and predicted reversal rates based on direct appeal Analysis 3A.

⁷¹⁴ Each state's weighted average for each factor is calculated using the following formula: $((\text{number of death sentences in year } x^1) \times (\text{factor value in year } x^1)) + ((\text{number of death sentences in year } x^2) \times (\text{factor value in year } x^2)) + \dots + ((\text{number of death sentences in year } x^n) \times (\text{factor value in year } x^n)) \div \text{total number of death verdicts in years } x^1 \text{ through } x^n$.

⁷¹⁵ See supra pp. 70-73 & Figure 6.

⁷¹⁶ See supra pp. 246-49 & Figures 42A, 42B. A majority of counties in 59% (20) of the 34 capital states imposed no death sentences during the study period.

⁷¹⁷ The data are for the counties in which each city is located. Where county and city names differ, the county names are Maricopa (Phoenix), Harris (Houston), Dade (Miami), Cook (Chicago), Clark (Las Vegas), Pinellas (St. Petersburg), Hillsborough (Tampa), Duval (Jacksonville), Jefferson (Birmingham), and Broward (Ft. Lauderdale). Sources for this table are DRCen, DADB, HCDB, Vital Statistics.

⁷¹⁸ Two exceptions to this caveat are Shreveport, Louisiana and Dayton, Ohio, which had fewer than five death verdicts during the study period.

⁷¹⁹ The Florida counties are Leon, Marion, St. Johns and Volusia.

⁷²⁰ The Florida counties are Bay, Brevard, Escambia, Martin, Okaloosa, Pinellas, Putnam and Indian River.

⁷²¹ The additional Arizona counties are Yavapai and Yuma. The five additional Florida counties are Bradford, Citrus, Columbia, Pasco and Taylor.

⁷²² The Georgia counties are Cook, Douglas, Jones, Meriwether, Seminole and Wayne. The Alabama counties are Blount, Coffee, Colbert, Monroe and Talladega. The Arizona county is Mohave. The Florida counties are Hernando, Santa Rosa, Sumter and Union.

⁷²³ The rates set out here are for the counties in which listed cities are located. Where that name is different from the listed city, the counties are as follows, in the order of locales listed in text: Shreveport (Cado Parish, LA), Dayton (Montgomery County, OH), Newark (Essex County, NJ), Atlanta (Fulton County, GA), Kansas City (Jackson, MO), Nashville (Davidson, TN), Albuquerque (Bernalillo, NM), Las Vegas (Clark County, NV), Reno (Washoe County, NV), suburban Baltimore (Baltimore County, MO), Akron (Summit County, OH), Jefferson City (Cole County, MO).

⁷²⁴ These counties are listed supra notes 719-22.

⁷²⁵ For recent articles contrasting relatively high death-sentencing areas like Houston, Philadelphia, suburban Baltimore County, Danville, Virginia, Columbus and Baldwin County, Georgia and Cincinnati with relatively low death-sentencing areas like Dallas, Pittsburgh, Baltimore City, Richmond, Virginia, Atlanta, and Columbus, Ohio, see 100 Colum. L. Rev., supra note 153, at 2068-69 n.114. See also Brooke A. Masters, Death Penalty, Location Are Linked in Va. Study: Execution Sought Most Often in Suburbs, Wash. Post, Dec. 11, 2001 ("Suburban prosecutors are significantly more likely to seek capital murder indictments and ask juries for a death sentence than their counterparts in rural and urban areas, the Joint Legislative

Audit and Review Commission concluded after a year-long study. . . . The Virginia study concluded that prosecutors in medium-density jurisdictions, such as Prince William County and Danville City, sought the death penalty in 45 percent of possibly capital cases, compared with 16 percent in urban areas such as Richmond and Norfolk and 34 percent in rural areas.”); Lise Olsen, *One Killer, Two Standards*, *Seattle Post-Intelligencer*, August 7, 2001:

Location determines the odds that a criminal will face execution.

Since capital punishment was reinstated in Washington in 1981, it has been used as a prosecution tool in only half the state: 20 of 39 counties. . . .

Within our state, there are huge variations. In 20 years, Yakima County Prosecutor Jeff Sullivan has never taken a capital case to trial—though his county has one of the state's highest murder rates. Yakima, Skagit, Cowlitz and Chelan are all examples of medium-sized counties where the death penalty has never been imposed.

Compare that with Pierce County. As prosecutor for 12 years, John Ladenburg sought the death penalty 21 times before leaving office last year—about twice as often as other prosecutors statewide.

⁷²⁶ See *supra* pp. 287-306 & Tables 10-16; Appendix B.

⁷²⁷ See *supra* pp. 250, 265-66, 272, 281.

⁷²⁸ See *supra* pp. 319-20 & n.639.

⁷²⁹ See *supra* pp. 313, 319-20, 328, 330, 333.

⁷³⁰ See *supra* pp. 322-24. See also 157-59, 160-63, 165-66.

⁷³¹ See *supra* pp. 168, 185-86, 197, 226-27, 256-57, 268-69, 271, 274. This result was reached by all studies of state-level factors related to state and county capital error rates at all three review stages combined and at the state direct appeal stage (*Analyses 1-4, 8-17*). Although we express the finding in the text as one about state reversal rates in states with poor law enforcement records, the finding also applies to county reversal rates in such states.

⁷³² See *supra* pp. 185-86, 197, 206, 226-27, 232, 256-57, 262, 271 & n. 274, 277 & n. 55, & Figures 28A-D, 36A, 36B, 41G, 43K, 43L, 44F.

⁷³³ See *infra* pp. 370-72.

⁷³⁴ See *supra* pp. 165-66, 168-69, 185, 210, 225-26, 243, 266, 321-22, 335, 349-50.

⁷³⁵ Both a general explanation for high error rates (heavy use of the death penalty) and a related specific explanation (concerns about the ineffectiveness of the state's response to serious crime, triggering heavier use of the penalty) can be significant at the same time, if (1) there are multiple reasons for heavy death-sentencing, and (2) some reasons are more closely linked to error than others. In that event, an indicator of the intensity of one of the important reasons for heavy use of the penalty leading to error (*e.g.*, evidence that non-capital law-enforcement strategies are ineffective) will only partly explain high error rates, leaving the rest to be explained

by indicators of the other important pressures, or by a general measure of *all* pressures to use the death penalty (*e.g.*, high death-sentencing rates). Below, we explain why the four separate pressures to use the death penalty addressed in this and the next three sections may be particularly conducive to high rates of capital error, and thus why it is not every additional use of the death penalty, but only the penalty's use in weakly aggravated cases, that increases error rates. See *infra* pp. 359-60, 367.

⁷³⁶ See *supra* p. 343.

⁷³⁷ See *supra* pp. 51 (Figure 1B).

⁷³⁸ See *supra* pp. 169-70, 187-88, 198, 217-18, 227, 258, 269, 271, 274 (Analyses 1-4, 6, 8-17). In regard to direct appeal Analyses 3 and 4 in which this result fell just barely above the .05 level ($p = .06$), see *supra* note 486.

⁷³⁹ See *id.*

⁷⁴⁰ See *supra* pp. 119-20, 133.

⁷⁴¹ See *supra* pp. 169 & n.369.

⁷⁴² See *supra* pp. 187-88, 199, 207, 217-18, 221, 227, 232, 258, 262, 271 & n.554, 274, 277, & Figures 29A-D, 37A, 37B, 40C-1, 40C-2, 41H, 43I, 43J, 44E.

⁷⁴³ See *supra* pp. 69-70 & n.370.

⁷⁴⁴ Virginia in fact got only the second lowest score that is possible on the index, namely, a score of 2. But that was the lowest score among the 34 study states. None of the 34 study states scored a 1, because none uses gubernatorial or nonpartisan appointment procedures in addition to immunizing judges entirely from regular or at least retention or recall elections.

⁷⁴⁵ The formula for calculating this factor is white homicide victims per 100,000 whites ÷ black homicide victims per 100,000 blacks. As is discussed *supra* p. 160 & n.341, the homicide rate among blacks is usually higher than among whites. In most cases, that is, this factor compares states based on how much lower the white homicide rate is than the black homicide rate—or, conversely, how closely the white homicide rate approaches the black homicide rate.

⁷⁴⁶ See *supra* pp. 159-61, 181-82, 196, 213-14, 225-26, 257, 269, 271, 274. This result was reached by analyses studying state and county capital error rates at all three review stages combined and at the state direct appeal stage separately (Analyses 1-4, 8-17). This factor was just above the .05 significance level in our single-stage analysis of the state post-conviction stage, where, in addition, there was a significant relationship between higher reversal rates and higher homicide rates among whites (apart from any comparison to the homicide rate among blacks) (Analysis 5).

⁷⁴⁷ See *supra* pp. 181-82, 196, 204, 213-14, 225-26, 231, 257, 262, 269, 271 & n.552, 274, 276, & Figures 26A-D, 34A, 34B, 41F-1, 41F-2, 43G, 43H, 44D.

⁷⁴⁸ Although a few other states have much lower predicted reversal rates, their extremely low black populations lead us to exclude them from the comparison made in text.

⁷⁴⁹ See supra pp. 224-26, 253, 280 (Analysis 7, 15 and 18). See also supra p. 213 (significance of homicide victimization rate among whites in Analysis 5).

⁷⁵⁰ The one exception was Analysis 5, in which the white homicide rate by itself was a slightly better predictor of error rates at the state post-conviction stage than the white/black homicide rate. See supra pp. 213-14.

⁷⁵¹ See Cole, supra note 337; Kennedy, supra note 337; other sources cited supra notes 337, 338, 358, 360. See also sources cited supra notes 349-51, 353, 354.

⁷⁵² See sources cited supra note 337, 338.

⁷⁵³ See supra note 735 (discussing conditions under which not only high death-sentencing rates themselves, but also particular pressures to increase death-sentencing rates, could both be significant).

⁷⁵⁴ See supra pp. 157-59, 160-63, 165-66 & Table 6.

⁷⁵⁵ See supra pp. 322-24, 351.

⁷⁵⁶ The relevant policies appear to be related to the *statewide* distribution of the risk of homicide among whites and blacks, not to its local distribution. In no analysis of county-level factors—not even Analysis 7, which omitted state-level factors, giving county-level factors the maximum opportunity to explain reversal rates—was there any significant relationship between the countywide distribution of the homicide risk between whites and blacks and county reversal rates.

⁷⁵⁷ See supra pp. 157-59, 179, 196, 224, 257, 269, 271, 274. This result is reached by all our analyses of state factors associated with state and county reversal rates at all three review stages combined and at the state direct appeal review stage by itself (Analyses 2-4, 8-17).

⁷⁵⁸ See supra pp. 217 (Analysis 6).

⁷⁵⁹ See supra pp. 179-80, 196, 203, 224, 257, 261, 271 n.551, 274, 276 & Figures 25A-25D, 33A-33D, 41D-1, 41D-2, 43E, 43F, 44C.

⁷⁶⁰ See supra pp. 217, 220 & Figure 40B (Analysis 6). Like other effects, these ones appear to operate at the level where policy is made, not at the level of individual cases. Capital verdicts imposed on black defendants are no more likely to be overturned due to serious error than those imposed on white or other defendants. See supra pp. 157-59 & Table 6. (Because nearly all capital defendants are poor, but information on how poor is not kept by officials, differences in error rates linked to the economic status of capital defendants cannot be studied.)

⁷⁶¹ See supra pp. 163-65.

⁷⁶² See supra pp. 157-59 & Table 6, 160-63; supra note 760.

⁷⁶³ This research is collected supra notes 358, 360.

⁷⁶⁴ See supra p. 361.

⁷⁶⁵ See supra pp. 5 & n.77, 24-35 & nn.134, 146, 148; supra p. 80 & n.227.

⁷⁶⁶ See sources cited supra notes 358, 360.

⁷⁶⁷ See, e.g., supra p. 160 & n.341.

⁷⁶⁸ See sources cited supra note 358.

⁷⁶⁹ See id.

⁷⁷⁰ See supra pp. 224-26, 266, 285, 336.

⁷⁷¹ See id.

⁷⁷² This factor was significant to highly significant in Analyses 1, 2, 8-10, 12, and 13 and fell just above the .05 significance level in Analyses 4, 11 ($p = .056$), and 14. See supra pp. 162-63, 226, 257, 269, 271.

⁷⁷³ See sources cited supra notes 337, 338.

⁷⁷⁴ States' Rank and Value Based on Interaction of Race of Population and of Homicide Victims

State	Interaction of Race of Population and of Homicide Victims
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	Rank	Value
Connecticut	21	0.014
Kentucky	16	0.020
Maryland	8	0.046
Tennessee	11	0.036
Mississippi	2	0.094
Oregon	29	0.003
California	18	0.019
New Jersey	15	0.022
Idaho	32	0.001
Montana	34	0.000

Georgia	4	0.066
Arizona	27	0.007
Alabama	5	0.060
Colorado	26	0.010
Washington	28	0.005
Wyoming	33	0.000
Florida	13	0.030
Oklahoma	17	0.019
Indiana	25	0.010
Arkansas	12	0.034
North Carolina	6	0.059
Nebraska	30	0.002
Nevada	20	0.016
South Carolina	1	0.100
Utah	31	0.001
Louisiana	3	0.070
Illinois	14	0.022
Pennsylvania	23	0.013
Texas	10	0.040
Missouri	22	0.013
Delaware	7	0.047
New Mexico	24	0.012
Ohio	19	0.016
Virginia	9	0.044

Source: Analysis 1A

⁷⁷⁵ See supra pp. 157-59, 160-63, 165-66, 322-24, 351, 360-61 & n.756, 362 & n.760.

⁷⁷⁶ See supra pp. 169 & n.369, 356.

⁷⁷⁷ See supra note 735.

⁷⁷⁸ See supra pp. 153, 173, 194, 212, 253, 257, 269, 271, 273, 280 (Analyses 1-5, 7-18).

⁷⁷⁹ See supra p. 173-74 & Figures 22A, 22B. See also pp. 201, 229, 260, 276 (Figures 22A-D, 31A, 31B, 41A, 43A, 43B, 44A). In several analyses, high per capita filings of court cases of all types operate similarly. Effect size is too small to warrant additional attention, however. See supra pp. 154, 174, 176, 223, 229, 258, 263 & Figures 23A-D, 41B, 43N.

⁷⁸⁰ See supra pp. 90, 173-75 & Figures 22A-D.

⁷⁸¹ See supra p. 342 & n.714.

⁷⁸² See supra pp. 89-90, 153-54, 173-74, 212, 223, 351.

⁷⁸³ See supra pp. 89-91, 99, 140-42 & Table 4, 154-56, 177, 194-95, 213, 216-17, 258-59.

⁷⁸⁴ See supra pp. 20-21, 88-89, 172, 183, 194-95, 343 & n.713.

⁷⁸⁵ See, e.g., supra p. 21 & n.116.

⁷⁸⁶ See supra 91-93 & Figure 10, 140-42, 155, 216-17, 177, 193, 328-30, 336.

⁷⁸⁷ See supra pp. 194, 257.

⁷⁸⁸ The table below reports state rankings, and the difference between their predicted reversal rates based only on their capital backlogs, holding other factors at their averages. As is discussed in the text, the high reversal rates predicted for states with low capital backlogs (*e.g.*, Nebraska), and the low predicted reversal rates for states with large backlogs and delays in capital appeals (*e.g.*, California) occurs because of the perverse tendency of delay to depress reversal rates. Because this factor does not accurately reflect the risk of error—and instead reflects the effect of delay—we report its results here, rather than in Table 18.

States' Rank, and Comparison to Predicted 34-State Average Error Rate,
Based on Capital Backlogs (Analysis 1A), Holding Other Factors at the 34-State Average

State	Backlog of Capital Appeals (Higher Value = Lower Review Rate = Lower Reversal Rate)		
	Rank	Value	Difference from 34-State Avg. Error Rate
Connecticut	4	0.8	+40.7%
Kentucky	16	2.8	+30.7%
Maryland	6	1.1	+38.9%
Tennessee	23	5.4	+19.0%
Mississippi	14	2.3	+33.2%
Oregon	12	1.8	+35.3%
California	34	26.9	-10.7%
New Jersey	9	1.4	+37.4%
Idaho	13	1.9	+34.8%
Montana	2	0.5	+41.9%

Georgia	21	4.0	+25.1%
Arizona	25	6.5	+14.4%
Alabama	27	7.9	+9.5%
Colorado	8	1.3	+37.8%
Washington	3	0.5	+41.7%
Wyoming	5	0.8	+40.4%
Florida	32	17.6	-7.5%
Oklahoma	26	6.9	+13.1%
Indiana	17	2.9	+29.9%
Arkansas	7	1.1	+38.8%
North Carolina	29	9.9	+3.9%
Nebraska	1	0.4	+42.1%
Nevada	22	4.4	+23.1%
South Carolina	19	3.5	+27.4%
Utah	11	1.6	+36.4%
Louisiana	15	2.4	+32.3%
Illinois	28	8.7	+7.0%
Pennsylvania	31	14.6	-4.6%
Texas	33	18.5	-8.1%
Missouri	24	5.7	+17.8%
Delaware	18	3.2	+28.7%
New Mexico	10	1.5	+36.7%
Ohio	30	12.4	-1.4%
Virginia	20	3.8	+25.7%

Source: Analysis 1A.

⁷⁸⁹ See supra pp. 170, 227, 269, 272, 273-74 (Analyses 1, 2, 11-17).

⁷⁹⁰ See supra pp. 199-200 (Analyses 3, 4).

⁷⁹¹ See supra pp. 199-299, 209 & Figures 39A, 39B (Analyses 3 and 4). See also supra p. 54 & n.194.

⁷⁹² See supra p. 41.

⁷⁹³ See infra pp. 413-18. For citation and discussion of numerous government, bar association, judicial and press reports thoroughly documenting the relationship between low funding levels and incompetent capital lawyering, and the especially high demands that capital

cases place on lawyers and legal support services, see 100 Colum. L. Rev., supra note 153, at 2102-10 & nn.175-91.

⁷⁹⁴ See supra pp. 314-15.

⁷⁹⁵ See supra p. 342 & n.714.

⁷⁹⁶ See supra pp. 199-200 & Figures 39A, 39B.

⁷⁹⁷ States' Value and Rank, Holding Other Factors Constant, for Interaction of Backlog of Capital Appeals and General Court Caseloads

State	Interaction of Backlog of Capital Appeals and General Court Caseloads
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	Rank	Value
Connecticut	13	-0.2
Kentucky	27	-1.6
Maryland	11	0.8
Tennessee	10	0.9
Mississippi	21	-0.9
Oregon	22	-0.9
California	1	69.0
New Jersey	12	0.7
Idaho	28	-1.6
Montana	15	-0.3
Georgia	9	1.9
Arizona	33	-3.5
Alabama	24	-1.3
Colorado	19	-0.8
Washington	14	-0.3
Wyoming	20	-0.8
Florida	2	54.5
Oklahoma	17	-0.5
Indiana	30	-1.9
Arkansas	18	-0.6
North Carolina	6	4.4

Nebraska	16	-0.4
Nevada	34	-4.2
South Carolina	29	-1.8
Utah	25	-1.5
Louisiana	26	-1.5
Illinois	4	12.9
Pennsylvania	5	12.3
Texas	3	20.5
Missouri	8	2.0
Delaware	32	-3.3
New Mexico	23	-1.1
Ohio	31	-2.7
Virginia	7	4.3

Source: [Analysis 1A](#).

⁷⁹⁸ See supra pp. 52-61 & Figures 2C, 2D, 3A, 3B; *Broken System, Part I*, supra note 101, at 38, Figure 3.

⁷⁹⁹ As long as some proportion of imposed death verdicts are flawed, and as long as reversal rates are calculated by taking the number of reversals as a proportion of all imposed verdicts (reversals divided by imposed verdicts), any drop in the number of finally reviewed verdicts will drive down reversal rates, because fewer of the flawed verdicts will be available to be reversed while the number of imposed verdicts stays the same. The numerator (reviewed and reversed verdicts) shrinks while the denominator (imposed verdicts) stays the same, causing the rate to drop.

⁸⁰⁰ See supra pp. 89-90, 97, 99, 152-53, 154-56.

⁸⁰¹ See supra pp. 89-91, 99, 140-42 & Table 4, 154-56, 177, 194-95, 213, 216-17, 258-59.

⁸⁰² See supra pp. 20-21, 91-93 & Figure 10, 140-42, 155, 177, 193, 216-17, 328-30, 336, 353, 369.

⁸⁰³ In that event, delay affects the denominator as much as the numerator. See supra note 799.

⁸⁰⁴ See supra pp. 194-95, 202, 258-59, 263 & Figures 32A, 32B, 43Q. See also supra pp. 20-21, 88-89, 172, 173, 352-53. Effect size for [Analysis 3](#) is graphed in Figure 32A, p. 202. [Analysis 4](#) likewise predicts and 8-fold increase in error rates over the study period (Figure 32B, p. 202). When county as opposed to state reversal rates are analyzed, the predicted increase in reversal rates over the 23-year period is 3-fold (Figure 43Q, p. 263).

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- ⁸⁰⁵ See supra note 194.
- ⁸⁰⁶ See supra pp. 89-91.
- ⁸⁰⁷ See supra pp. 89-91, 99, 140-42 & Table 4, 154-56, 177, 194-95, 213, 216-17, 258-59, 372-75.
- ⁸⁰⁸ See supra pp. 216-17, 328-30 (Analyses 6, 19).
- ⁸⁰⁹ See supra pp. 154-56, 213, 216-17, 253, 258-59, 280 (Analyses 1, 2, 5-7, 11, 12, 18).
- ⁸¹⁰ See supra pp. 177-78 & Figures 24A-D (Analyses 1A, 1B, 2A, and 2B). See also the effect-size estimates in Appendix G for Analyses 5, 7, 11 and 12 (infra pp. G-7, G-9, G-13, G-14) and supra pp. 280 and n.577 for a discussion of the low effect size for this factor in Analysis 18.
- ⁸¹¹ See supra pp. 259, 271 & n.548, 264 (Figure 43P) (discussing and displaying the results of Analyses 8, 9 and 13, in which there was no significant relationship between error rates and the passage of time).
- ⁸¹² See supra pp. 259, 271.
- ⁸¹³ See supra pp. 54, 57, 58 & Figures 2C and 2D.
- ⁸¹⁴ See supra pp. 52-53 & Figure 2A; *A Broken System, Part I*, supra note 101, at 38, Figure 3.
- ⁸¹⁵ See supra pp. 65, 67 (Figure 5), 245 & nn.499, 500..
- ⁸¹⁶ See supra pp. pp. 52-53 & Figure 2A. See also supra pp. 89-91, 99, 140-42, 154-56, 177, 194-95, 213, 216-17, 258-59, 351-52.
- ⁸¹⁷ See supra p. 24.
- ⁸¹⁸ See supra pp. 1-5.
- ⁸¹⁹ See supra pp. 63-64 & nn.202-03.
- ⁸²⁰ See Editorial, State's Record in Death Cases Cause for Study, Tallahassee Dem., Dec. 14, 2001:

If an automaker led the industry in recalls, then spun the bad news as proof of excellent self-regulation, consumers would be skeptical. The automaker might deserve kudos for its efforts to rectify problems, but the high recall rate still would indicate a serious problem. A responsible company would identify the deficiency before so many recalls were required.

That's why it's so difficult to understand the reasoning of Florida death penalty advocates who resist calls for a moratorium to thoroughly examine the administration of justice in capital cases.

In 2000, nine death sentences in Florida were overturned, the highest number in the nation, according to a U.S. Department of Justice report released Tuesday. Yet, defenders of the system insist that such statistics prove the system works, since defendants in those cases aren't executed—at least until they're retried without legal error.

That's of no small consequence, of course, but Florida's high rate of overturned capital convictions remains troubling. It alone warrants a temporary suspension of executions—as Gov. George Ryan of Illinois ordered in his state—so problems in the process can be identified and fixed.

⁸²¹ See *supra* pp. 6-7 (explaining why it is much harder in the capital than in these other areas to tell whether egregious harm has occurred—including because officials are permitted to withhold and destroy evidence on the question).

⁸²² Classic treatments of this problem in the *Chicago Tribune* are: Ken Armstrong & Steve Mills, *Flawed Murder Cases Prompt Calls for Probe*, *Chi. Trib.*, Jan. 24, 2000; Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, *Chi. Trib.*, Jan. 14, 1999 (detailing patterns of error by Illinois police officers, prosecutors, and judges that went unnoticed and unremedied by reviewing judges), and Ken Armstrong, *“Cowboy Bob” Ropes Wins—But at Considerable Cost*, *Chi. Trib.*, Jan. 10, 1999 (same, Oklahoma City prosecutors). For other examples, see Sara Rimer & Raymond Bonner, *Texas Lawyer's Death Row Record a Concern*, *N.Y. Times*, June 11, 2000 (same, Texas defense lawyer); Shiffman, *supra* note 102 (Tennessee courts' failure to review comparative information kept in capital cases, which has sat in files, entirely unused, for 30 years); 100 *Colum. L. Rev.*, *supra* note 153, at 2089-91 n.151 (various sources discussing pattern of misconduct in capital cases by police at particular Chicago precinct house), 2094-95 n.160 (Armstrong & Possley discussing Chicago prosecutor; Hunt discussing Cincinnati prosecutors; Rosenberg, discussing Philadelphia prosecutors), 2101 n.173 (Armstrong & Possley, discussing New Orleans police and prosecutors), 2104 n.178 (various sources discussing continued appointment of bar-disciplined capital defense lawyers), 2119-29 7 nn.227-33 (esp 231). See also notes 123, 160 (tendency of judges in Illinois, Ohio and Texas to pass over error, as “harmless”); *infra* note 941 (additional examples of repeated appointment of same poorly prepared defense lawyers in Texas and elsewhere).

⁸²³ These reports are collected and discussed in 100 *Colum. L. Rev.*, *supra* note 153, at 2119-29.

⁸²⁴ See *id.* at 2120-21.

⁸²⁵ See *id.* at 2121-27.

⁸²⁶ See *id.* at 2078-82 & nn.137-40 (citing numerous examples of susceptibility of prosecutors to political pressures in potentially capital cases); *supra* pp. 169, 187.

⁸²⁷ See *supra* pp. 194, 257, 368-69.

⁸²⁸ See *supra* pp. 315-18.

⁸²⁹ See supra p. 63 & n.202.

⁸³⁰ See supra pp. 63-64.

⁸³¹ See supra pp. 70-80.

⁸³² See, e.g., supra pp. 25-35 (four cases studies).

⁸³³ See supra pp. 5 n.77, 24.

⁸³⁴ See supra pp. 25-35.

⁸³⁵ See supra pp. 37-38.

⁸³⁶ See supra pp. 319-24.

⁸³⁷ See supra pp. 169-70, 187-88, 198, 217-18, 227, 258, 269, 271, 274, 354-56.

⁸³⁸ See supra pp. 198-99, 212, 217-18, 227, 230, 240 n.486, 336.

⁸³⁹ See supra pp. 218-19, 236. See also infra note 876 (cataloguing studies in which this factor was significant and had considerable—in some cases quite large—effect size).

⁸⁴⁰ By “more” and “less” homicides and death verdicts, we mean numerically, not per homicide.

⁸⁴¹ See supra pp. 218-19, 236.

⁸⁴² States’ Rank, and Comparison to Predicted 34-State Average Error Rate, Based on Population Size and Density, Other Factors at the 34-State Average

State	Population Size and Density		
	Rank	Value	Difference from 34-State Avg. Error Rate
Connecticut	8	0.92	+4.5%
Kentucky	19	0.15	-6.8%
Maryland	7	0.94	+4.7%
Tennessee	14	0.39	-3.4%
Mississippi	22	-0.30	-12.8%
Oregon	27	-0.53	-15.6%
California	1	1.62	+14.9%

New Jersey	2	1.61	+14.8%
Idaho	31	-1.50	-25.6%
Montana	33	-1.96	-29.1%
Georgia	13	0.42	-3.0%
Arizona	26	-0.48	-15.0%
Alabama	20	0.12	-7.2%
Colorado	24	-0.39	-14.0%
Washington	17	0.16	-6.7%
Wyoming	34	-2.26	-31.1%
Florida	6	1.15	+7.9%
Oklahoma	21	-0.25	-12.1%
Indiana	12	0.60	-0.4%
Arkansas	25	-0.45	-14.7%
North Carolina	10	0.64	+0.2%
Nebraska	28	-1.01	-20.9%
Nevada	32	-1.59	-26.3%
South Carolina	18	0.16	-6.7%
Utah	29	-1.14	-22.2%
Louisiana	15	0.25	-5.4%
Illinois	5	1.16	+8.0%
Pennsylvania	3	1.29	+10.0%
Texas	9	0.82	+2.9%
Missouri	16	0.23	-5.6%
Delaware	23	-0.34	-13.2%
New Mexico	30	-1.30	-23.7%
Ohio	4	1.24	+9.2%
Virginia	11	0.62	0.0%

Source: Analysis 1A.

⁸⁴³ See supra pp. 194, 201, 212, 257.

⁸⁴⁴ See supra pp. 194, 257.

⁸⁴⁵ The Federalist, No. 83, at 499 and No. 81, at 486 (Clinton Rossiter ed. 1961).

⁸⁴⁶ See supra pp. 333-34.

⁸⁴⁷ See supra pp. 321-24.

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- ⁸⁴⁸ See supra pp. 25-25, 321-24.
- ⁸⁴⁹ See supra pp. 6-7.
- ⁸⁵⁰ See supra pp. 1-2 & n.3, 4-5 & n.69.
- ⁸⁵¹ See supra p. 11.
- ⁸⁵² See supra pp. 350-66.
- ⁸⁵³ See supra pp. 37-69.
- ⁸⁵⁴ See supra pp. 24-25.
- ⁸⁵⁵ See supra pp. 16 & n.100, 194, 198-99, 212, 217-18, 227, 230, 257, 240 n.486, 336, 382-84.
- ⁸⁵⁶ See supra pp. 5 n.70, 24.
- ⁸⁵⁷ See 100 Colum. L. Rev. supra note 153, at 2050-51 n.84 (collecting sources); supra pp. 25-35.
- ⁸⁵⁸ See supra pp. 343, 353-54. This is true even when Table 18 is supplemented by the information in the tables in notes 774, 788, 797 and 842 above.
- ⁸⁵⁹ See supra notes 774, 788, 797, 842.
- ⁸⁶⁰ See supra note 714.
- ⁸⁶¹ Moreover, as is noted above, Connecticut's and Colorado's highest "risk" ranking is, perversely, a result of how few delays the two states have in processing capital appeals, as is reflected by their low backlogs of pending capital appeals. See supra pp. 382-84 & n.797. As we develop above, delays in reviewing capital verdicts decrease the number of reversals (because there are fewer outcomes of any sort) and depress reversal rates measured as proportions of imposed verdicts (for the same reason). Large backlogs of pending capital appeals also seem to make reviewing courts more willing to tolerate error that would lead to reversal if the courts had fewer cases backed-up awaiting review. See supra pp. 194, 257, 382-84. As a result, states like Connecticut and Colorado where reversal rates are solely a function of error, and are not confounded by delay, are at "risk" of having higher reversal rates than states such as California, Florida and Texas, where the number and rate of reversals are held down by low rates of decided appeals.
- ⁸⁶² See supra note 714.
- ⁸⁶³ See supra pp. 194, 257, 382-84; supra note 861.
- ⁸⁶⁴ See supra pp. 303-04 & Table 16.
- ⁸⁶⁵ See Innocence and the Death Penalty, supra note 77.

⁸⁶⁶ Georgia has two rankings of 21 out of 34.

⁸⁶⁷ See sources cited *supra* notes 160, 165. See also Editorial, Harmful Error—Criminal Appeals Court Eroding Justice for all Texans, *Houston Chron.*, Jan. 21, 2002 (“The Texas Criminal Court of Appeals is the state’s highest authority on criminal justice matters. In recent years, a majority of the court’s jurists have demonstrated an affectionate tolerance of incompetent judging and lawyering In an opinion earlier this month, the court ruled that a defendant facing execution has no right to have a competent lawyer handle his appeal.”).

⁸⁶⁸ See *supra* pp. 68-69.

⁸⁶⁹ See *id.*

⁸⁷⁰ See *supra* pp. 341-45, 354-56.

⁸⁷¹ These Review Commission’s findings are discussed in note 30 above.

⁸⁷² See *supra* pp. 14-35.

⁸⁷³ See *supra* pp. 79-80 & Figure 9.

⁸⁷⁴ *State v. Schlup*, 724 S.W.2d 236, 241-42 (Mo. 1987).

⁸⁷⁵ *Schlup v. State*, 758 S.W.2d 715, 717 (Mo. 1988).

⁸⁷⁶ *Schlup v. Armontrout*, 941 F.2d 631, 639 (8th Cir. 1991).

⁸⁷⁷ *Schlup* used a procedure allowing a small class of prisoners with newly discovered evidence to file a “successive” petition raising claims of error that courts at the three regularly available review stages had previously denied. (Because successive petitions are not available as of right, our study did not count reversals occurring through this procedure. See *supra* pp. 19.) *In 1996, Congress forbade all such successive petitions.* See 28 U.S.C. § 2244(b).

⁸⁷⁸ Brooke A. Masters, *Missteps On Road To Injustice; In Va., Innocent Man Was Nearly Executed*, *Wash. Post*, Dec. 1, 2000, at A1.

⁸⁷⁹ Brooke A. Masters, *DNA Clears Inmate in 1982 Slaying*, *Wash. Post*, Oct. 3, 2000, at A1.

⁸⁸⁰ *Washington v. Commonwealth*, 323 S.E.2d 577, 585-86 (Va. 1984).

⁸⁸¹ See Masters, *Missteps on Road to Injustice*, *supra* note 133.

⁸⁸² *Washington v. Murray*, 952 F.2d 1472, 1477-78 (4th Cir. 1991).

⁸⁸³ *Washington v. Murray*, 4 F.3d 1285, 1290 (4th Cir. 1993).

⁸⁸⁴ *State v. Porter*, 489 N.E.2d 1329, 1335-36 (Ill. 1986).

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- ⁸⁸⁵ State v. Porter, 647 N.E.2d 972, 975-76 (Ill. 1995).
- ⁸⁸⁶ Id. at 974-75.
- ⁸⁸⁷ Id.
- ⁸⁸⁸ United States ex rel. Porter v. Warden, 1996 WL 167340 (N.D. Ill. Apr 4, 1996) (quoting Strickland v. Washington, 466 U.S. 668, 691, 694 (1984)).
- ⁸⁸⁹ Porter v. Gramley, 112 F.3d 1308, 1313 (7th Cir. 1997).
- ⁸⁹⁰ Tom Ragan, Years After Death Row Travesty, Killer Gets Due, Chi. Trib. Sept. 8, 1999, at M1.
- ⁸⁹¹ See Steve Mills, Simon Also Suspected in Milwaukee Slaying, Chi. Trib., Mar. 10, 1999, at 1.
- ⁸⁹² Steve Mills, Porter Case Had Wrongs at Each Turn, Chi. Trib., Feb. 12, 1999, at 1.
- ⁸⁹³ Shannon O'Boyle, Paula McMahon & Ardy Friedberg, Death Row Prisoner Dies; Now DNA Test Clears Him, South Florida Sun-Sentinel (Ft. Lauderdale Fla.), Dec. 15, 2000, at 1A.
- ⁸⁹⁴ Smith v. State, 515 So.2d 182, 183-84 (Fla. 1987).