

## Executive Summary

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

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

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

Our central findings are as follows:

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

undermining the reliability of the outcome—in **40%** of the *remaining* sentences.

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

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

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

Erroneously trying capital defendants the first time around, operating the multi-tiered inspection process needed to catch the mistakes, warehousing thousands under costly death row

conditions in the meantime, **and having to try two out of three cases again** is irrational.

This report describes the extent of the problem. A subsequent report will examine its causes and their implications for resolving the death penalty crisis.

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# **A Broken System: Error Rates in Capital Cases, 1973-1995**\*

**by James S. Liebman, Jeffrey Fagan & Valerie West**

**June 12, 2000**

## **I. Introduction**

A new debate over the death penalty is raging in the United States.<sup>1</sup> Until now, the focus of that debate has been the fairness of particular capital convictions and sentences. This Report addresses a different and broader question: **the reliability—indeed, the bare rationality—of the death penalty system as a whole.** It asks whether the mistakes and miscarriages of justice known to have been made in individual capital cases<sup>2</sup> are isolated, or common? The answer provided by our study of 5,760 capital sentences and 4,578 appeals is that **serious error**—error substantially undermining the reliability of capital verdicts— has reached **epidemic proportions** throughout our death penalty system. **More than two out of every three capital judgments reviewed by the courts during the 23-year study period were found to be seriously flawed.**

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

Two-thirds support, however, represents a steady *decline* from the four-fifths of the population that supported the penalty only six years ago, leaving support for capital punishment at a 20-year low.<sup>6</sup> When life without parole is proposed as an alternative, support for the penalty drops even more—often below a majority.<sup>7</sup> Grants of executive clemency reached a 20-year high in 1999.<sup>8</sup>

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

In the same period, however:

- The Republican Governor of Illinois, with support from a majority of the electorate, declared a moratorium on executions in the state.<sup>10</sup>
- The Nebraska Legislature did the same. Although the governor vetoed the legislation, the Legislature appropriated money for a comprehensive study of the even-handedness of the state's exercise of capital punishment.<sup>11</sup> Similar studies have since been ordered by the Chief Justice, task forces of both houses of the state legislature and the Governor of Illinois,<sup>12</sup> and also the Governors of Indiana and Maryland and the Attorney General of the United States.<sup>13</sup>
- Serious campaigns to abolish the death penalty are under way in New Hampshire<sup>16</sup> and (with the support of the Governor and a popular former Republican Senator) in Oregon.<sup>17</sup>
- The Florida Supreme Court and Mississippi Legislature have recently acted to improve the quality of counsel in capital cases,<sup>18</sup> and bills aiming to do the same and to improve capital prisoners' access to DNA evidence have been introduced in both houses of the United States Congress, with bipartisan sponsorship.<sup>19</sup>
- Observers in the *Wall Street Journal*, *New York Times Magazine*, and *Salon* and on *ABC This Week* see "a tectonic shift in the politics of the death penalty."<sup>20</sup> In April 2000 alone, George Will<sup>21</sup> and Rev. Pat Robertson—both strong death penalty supporters—expressed doubts

about the manner in which government officials carry out the penalty in the United States, and Robertson advocated a moratorium on *Meet the Press*.<sup>22</sup>

Fueling these competing initiatives are two beliefs about the death penalty. One is that death sentences move too slowly from imposition to execution, undermining deterrence and retribution, subjecting our criminal laws and courts to ridicule, and increasing the agony of victims.<sup>23</sup> The other is that death sentences are fraught with error, causing justice too often to miscarry, and subjecting innocent and other undeserving defendants—mainly, the poor and racial minorities—to execution.<sup>24</sup>

Some observers attribute these seemingly conflicting events and opinions to “America’s schizophrenia—we believe in the death penalty, but shrink from it as applied.”<sup>25</sup> These views may not conflict, however, and Americans who hold *both* may not be irrational. It may be that capital sentences spend too much time under review *and* that they are fraught with disturbing amounts of error. Indeed, it may be that **capital sentences spend so much time under and awaiting judicial review precisely because they are so persistently and systematically fraught with alarming amounts of error.** That is the conclusion to which we are led by a study of all 4,578 capital sentences that were finally reviewed by state direct appeal courts, 248 state post-conviction reversals of capital judgments, and all 599 capital sentences that were finally reviewed by federal habeas corpus courts between 1973 and 1995.<sup>26</sup>

## II. Summary of Central Findings

In *Furman v. Georgia*<sup>27</sup> in 1972, the Supreme Court reversed all existing capital statutes and death sentences. The modern death-sentencing era began the next year with the implementation of

new capital statutes designed to satisfy *Furman*. Unfortunately, no central repository of detailed information on post-*Furman* death sentences exists.<sup>28</sup> In order to collect that information, we undertook a painstaking search, beginning in 1991 and accelerating in 1995, of all published state and federal judicial opinions in the U.S. conducting direct and habeas review of *state* capital judgments, and many of the available opinions conducting state post-conviction review of those judgments. We then (1) checked and catalogued all the cases the opinions revealed, and (2) collected hundreds of items of information about each case from the published decisions and the NAACP Legal Defense Fund's quarterly death row census, and (3) tabulated the results.<sup>29</sup>

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

- Between 1973 and 1995, approximately **5,760** death sentences were imposed in the U.S.<sup>30</sup> Only **313 (5.4%; one in 19)** of those resulted in an execution during the period.<sup>31</sup>
- Of the 5,760 death sentences imposed in the study period, **4,578 (79%)** were finally reviewed on "direct appeal" by a state high court.<sup>32</sup> Of those, **1,885 (41%; over two out of five)** were thrown out because of "serious error," *i.e.*, error that the reviewing court concludes has seriously undermined the reliability of the outcome or otherwise "harmed" the defendant.<sup>33</sup>
- Nearly all of the remaining death sentences were then inspected by state post-conviction courts.<sup>34</sup> Our data reveal that state post-conviction review is an important source of review in states such as Florida, Georgia, Indiana, Maryland, Mississippi, North Carolina, and Tennessee.<sup>35</sup> In Maryland, at least **52%** of capital judgments reviewed on state post-conviction during the study period were overturned due to serious error; the same was true

of at least **25%** of the capital judgments that were similarly reviewed in Indiana, and at least **20%** of those reviewed in Mississippi.<sup>36</sup>

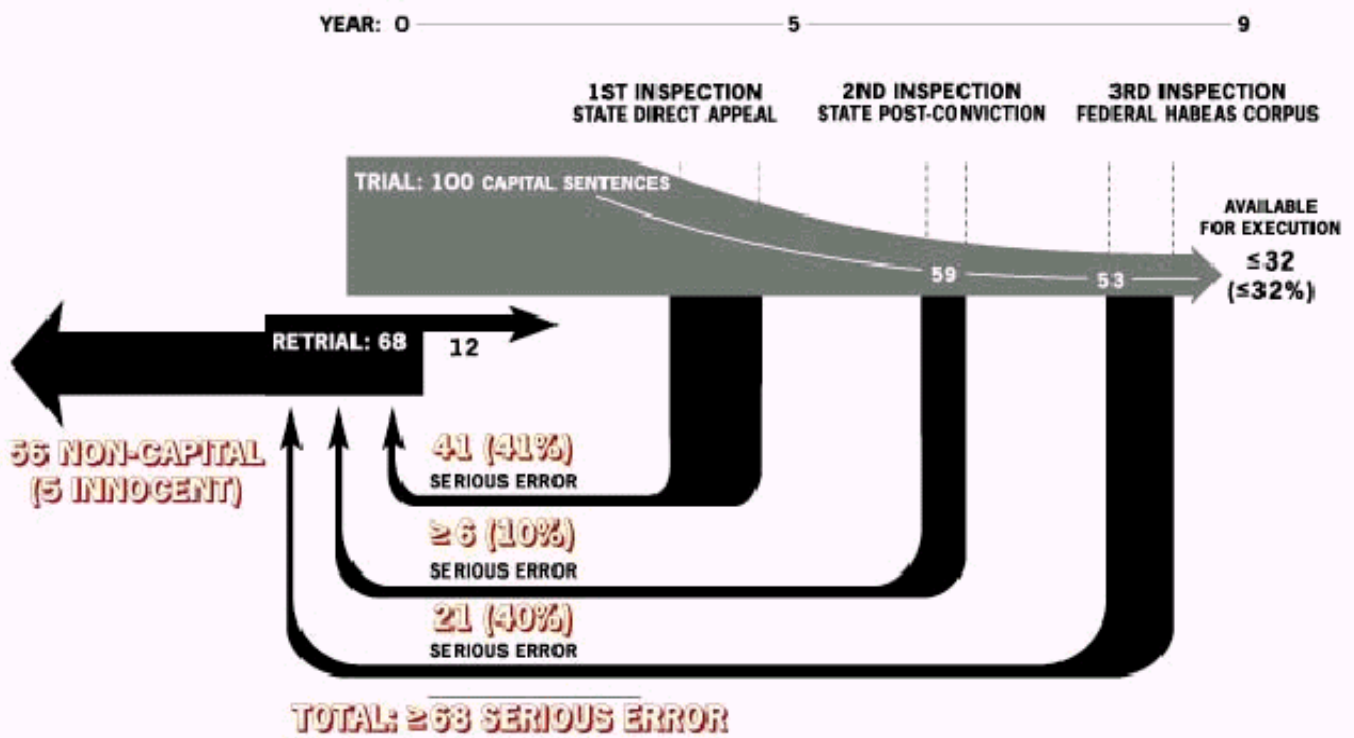
- Of the death sentences that survived state direct and post-conviction review, **599** were finally reviewed in a first habeas corpus petition during the 23-year study period.<sup>37</sup> Of those 599, **237 (40%; two out of five)** were overturned due to serious error.<sup>38</sup>
- The “**overall success rate**” of capital judgments undergoing judicial inspection, and its converse, the “**overall error-rate,**” are crucial factors in assessing the effectiveness of the capital punishment system. The “overall *success* rate” is the proportion of capital judgments that underwent, and *passed*, the three-stage judicial inspection process during the study period. The “overall *error* rate” is the reverse: the proportion of fully reviewed capital judgments that were *overturned* at one of the three stages due to serious error.<sup>39</sup> **Nationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%.**<sup>40</sup>
- “Serious error” is error that **substantially undermines the reliability of the guilt finding or death sentence imposed at trial.**<sup>41</sup> Each instance of that error warrants public concern. **The most common errors are (1) egregiously incompetent defense lawyering** (accounting for **37%** of the state post-conviction reversals), and **(2) prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty** (accounting for another **16%—19%**, when all forms of law enforcement misconduct are considered).<sup>42</sup> As is true of other violations, these two count as “serious” and warrant

reversal *only* when there is a reasonable probability that, but for the responsible actor's miscues, the **outcome of the trial would have been different.**<sup>43</sup>

- The seriousness of these errors is also revealed by what happens on retrial, when the errors are cured. In our state post-conviction study, an astonishing **82% (247 out of 301) of the capital judgments that were reversed were replaced on retrial with a sentence less than death, or no sentence at all.**<sup>44</sup> In the latter regard, **7% (22/301) of the reversals for serious error resulted in a determination on retrial that the defendant was not guilty of the capital offense.**<sup>45</sup>
- The result of **very high rates of serious, reversible error** among capital convictions and sentences, and **very low rates of capital reconviction and resentencing**, is the **severe attrition of capital judgments**. As is illustrated by the flow chart below:
  1. For every 100 death sentences imposed and reviewed during the study period, **41 were turned back** at the state direct appeal phase because of serious error. Of the 59 that got through that phase to the second, state post-conviction stage, **at least**<sup>46</sup> **10%—meaning 6 more of the original 100—were turned back** due to serious flaws. And, of the 53 that got through that stage to the third, federal habeas checkpoint, **40%—an additional 21 of the original 100—were turned back** because of serious error. All told, at least **68 of the original 100 were thrown out because of serious flaws**, compared to only 32 (or less) that were found to have passed muster—**after** an average of **9-10 years** had passed.

2. And among the individuals whose death sentences were overturned for serious error, 82% (56 in our example) were found on retrial **not** to have deserved the death penalty, including **7% (5)** who were *found innocent of the offense*.

## THE ATTRITION OF CAPITAL JUDGEMENTS



- High error rates pervade American capital-sentencing jurisdictions, and are geographically dispersed. Among the 26 death-sentencing jurisdictions with at least one case reviewed in both the state and federal courts and as to which information about all three judicial inspection stages is available:
  1. **24 (92%)** have overall error rates of **52% or higher**;
  2. **22 (85%)** have overall errors rates of **60% or higher**;
  3. **15 (61%)** have overall error rates of **70% or higher**.
  4. Among other states, Maryland, Georgia, Alabama, Mississippi, Indiana, Oklahoma, Wyoming, Montana, Arizona, and California have overall error rates of **75% or higher**.<sup>47</sup>
- It sometimes is suggested that Illinois, whose governor declared a moratorium on executions in January 2000 because of a spate of death row exonerations there,<sup>48</sup> generates “uniquely” flawed death sentences.<sup>49</sup> Our data dispute this suggestion: **The overall rate of serious error found to infect Illinois capital sentences (66%) actually is slightly lower than the nationwide average (68%).**<sup>50</sup>
- High error rates have persisted for decades. **A majority** of all cases reviewed in **20 of the 23 study years**—including in 17 of the last 19 years—were found seriously flawed. In **half** of the years studied, the error rate was **over 60%**. Although error rates detected on state direct appeal and federal habeas corpus dropped some in the early 1990s, they went back up in 1995<sup>51</sup>. The amount of error detected on state post-conviction has apparently *risen*

*throughout* the 1990s.<sup>52</sup>

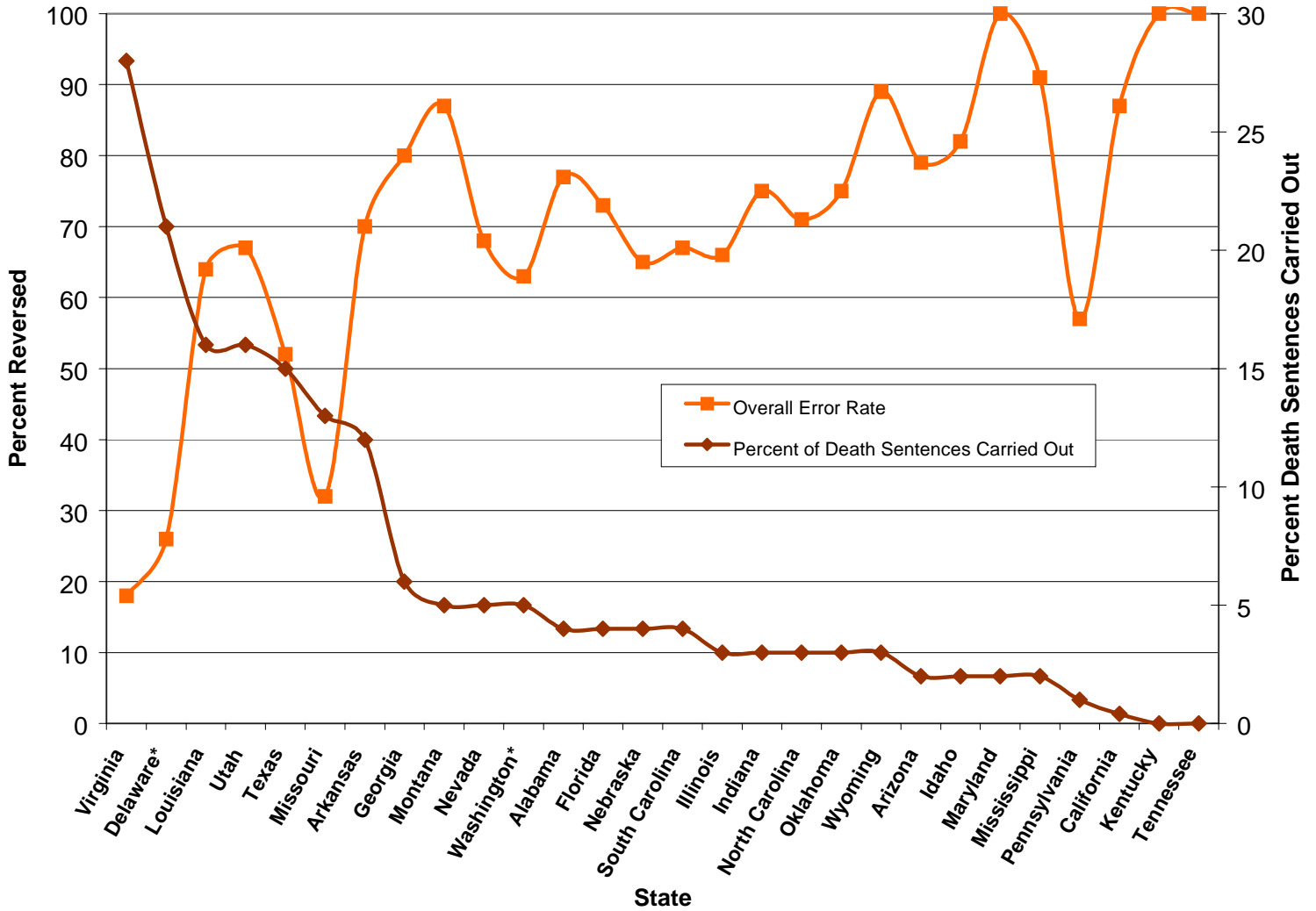
- The **68% rate of *capital* error** found by the three stage inspection process is **much higher than the error rate of less than 15%** found by those same three inspections **in *noncapital* criminal cases.**<sup>53</sup>
- Appointed federal judges are sometimes thought to be more likely to overturn capital sentences than state judges, who almost always are elected in capital-sentencing states.<sup>54</sup> In fact, state judges are the first and most important line of defense against erroneous death sentences. They found serious error in and reversed **90% (2,133 of the 2,370)** capital sentences that were overturned during the study period.<sup>55</sup>
- Under current state and federal law, capital prisoners have a legal right to one round of direct appellate, state post-conviction and federal habeas corpus review.<sup>56</sup> **The high rates of error found at *each* stage—including even at the *last* stage—and the persistence of high error rates *over time* and *across the nation*, confirm the need for multiple judicial inspections.** Without compensating changes at the front-end of the process, the contrary policy of cutting back on judicial inspection makes no more sense than responding to the insolvency of the Social Security System by forbidding it to be audited.
- Finding all this error takes time. Calculating the amount of time using information in published decisions is difficult. Only a small percentage of direct appeals decisions report the sentence date. By the end of the habeas stage, however, a larger proportion of sentencing dates is reported in one or another decision in the case. Accordingly, it is possible to get a

good sense of timing for only the 599 cases that were finally reviewed on habeas corpus.

Among those cases:

1. It took an average of **7.6 years** after the defendant was sentenced to die to complete federal habeas consideration in the 40% of habeas cases in which reversible error was found.
  2. In the cases in which no error was detected at the third inspection stage and an execution occurred, **the average time between sentence and execution was 9 years**. Matters did not improve over time. **In the last 7 study years (1989-95), the average time between sentence and execution rose to 10.6 years.**<sup>57</sup>
- High rates of error, and the time consequently needed to filter out all that error, frustrate the goals of the death penalty system. Figure 1 below compares the overall rate of error detected during the state direct appeal, state post-conviction, and federal inspection process in the 28 states with at least one capital case in which both inspections have been completed (the orange line), to the percentage of death sentences imposed by each state that it has carried out by execution (the red line).<sup>58</sup> In general, **where the rate of serious reversible error in a state's capital judgments reaches 55% or above (as is true for the vast majority of states), the state's capital punishment system is effectively stymied—with its proportion of death sentences carried out falling below 7%.**

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



The recent rise in the number of executions<sup>59</sup> is not inconsistent with these findings. Instead of reflecting improvement in the *quality* of death sentences under review, the rising number of executions may simply reflect how many *more* sentences have piled up for review. If the error-induced pile-up of cases is the *cause* of rising executions, their rise provides no proof that a cure has been found for disturbingly high error rates. To see why, consider a factory that produces 100 toasters, only 32 of which work. The factory's problem would not be solved if the next year it made 200 toasters (or added 100 new toasters to 100 old ones previously backlogged at the inspection stage), thus doubling its output of working products to 64. With, now, 136 duds to go with the 64 keepers, the increase in the latter would simply mask the persistence of crushing error rates.

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

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

**executions to rise.**<sup>62</sup> As in our factory example, rising output does not indicate better products, and instead seems to mask the opposite.

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

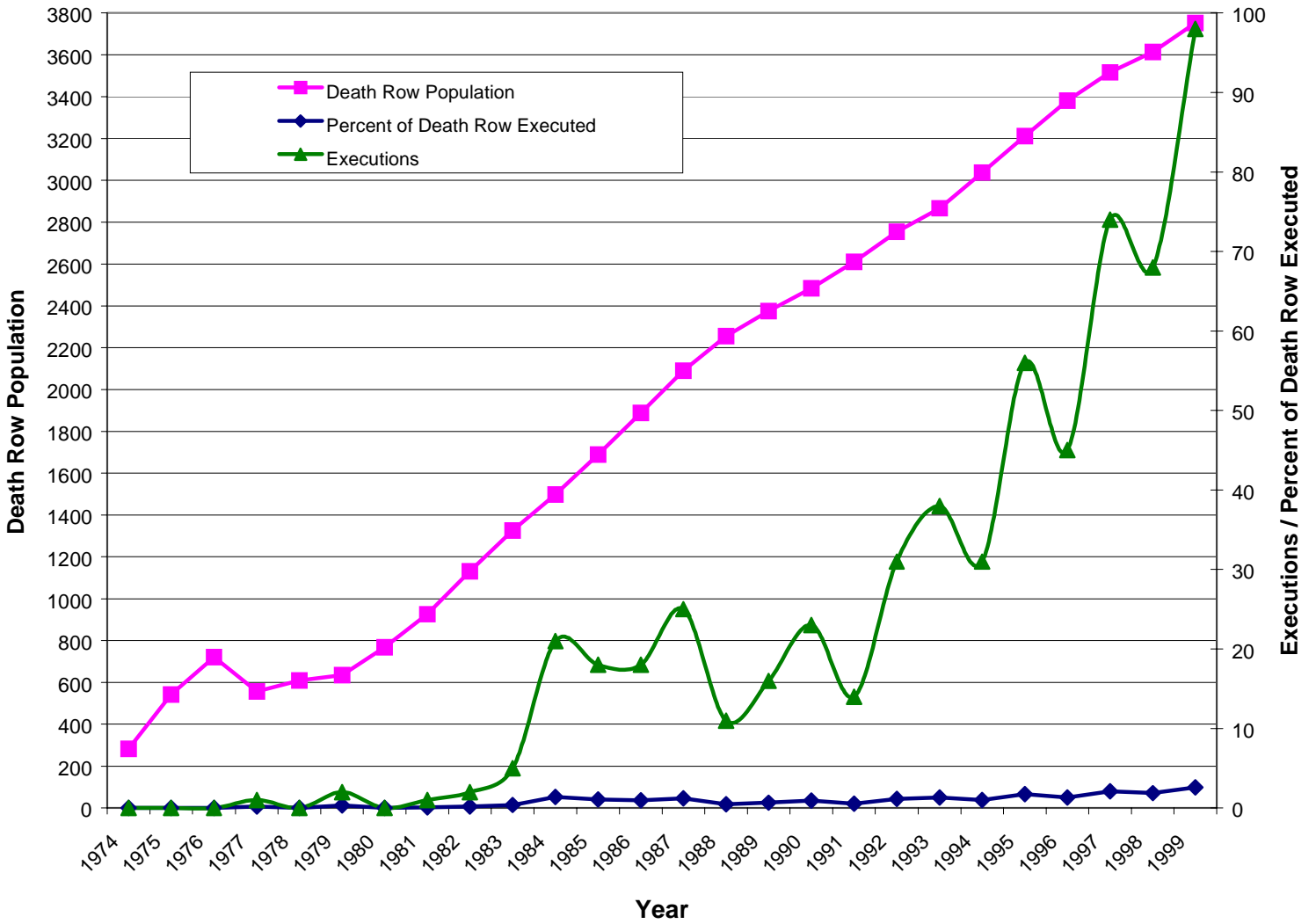


Figure 1, p. 11 above, illustrates another finding of interest that recurs throughout this Report: The pattern of capital outcomes for the State of **Virginia** is highly anomalous, given the State's **high execution rate (nearly double that of the next nearest state, and 5 times the national average)** and its **low rate of capital reversals (nearly half that of the next nearest state, and less than one-fourth the national average)**. The discrepancy between Virginia and other capital-sentencing states on this and other measures<sup>63</sup> presents an important question for further study: Are Virginia capital judgments in fact half as prone to serious error as the next nearest state and 4 times better than the national average?<sup>64</sup> Or, on the other hand, are its courts more tolerant of serious error? We will address this issue below and in a subsequent report.<sup>65</sup>

### **III. Confirmation from a Parallel Study**

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

- Included in the Justice Department study is a report of the outcome as of the end of 1998 of the 263 death sentences imposed in 1989.<sup>66</sup> A final disposition of only 103 of the 263 death sentences had been reached nine years later.<sup>67</sup> Of those 103, 78 (76%) had been overturned by a state or federal court. Only 13 death sentences had been carried out.<sup>68</sup> So, for every **one** member of the death row class of 1989 whose case was finally reviewed and who was executed as of 1998, **six** members of the class had their cases overturned in the courts.
- Because of the intensive review needed to catch so much error, 160 (61%) of the 263 death sentences imposed in 1989 were still under scrutiny nine years later.<sup>69</sup>

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

#### IV. Implications of Central Findings

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

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

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

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

*millions of dollars per case.*<sup>75</sup>

- Many of the resources currently consumed by the capital system are not helping the public, or victims,<sup>76</sup> obtain the valid death sentences for egregious offenses that a majority support. Given that nearly 7 in 10 capital judgments have proven to be seriously flawed, and given that 4 out of 5 capital cases in which serious error is found turn out on retrial to be more appropriately handled as non-capital cases (and in a sizeable number of instances, as non-murder or even *non-criminal* cases),<sup>77</sup> it is hard to escape the conclusion that large amounts of resources are being wasted on cases that should never have been capital in the first place.
- Public faith in the courts and the criminal justice system is another casualty of high capital error rates.<sup>78</sup> When most capital-sentencing jurisdictions carry out fewer than 6% of the death sentences they impose,<sup>79</sup> and when the nation as a whole never executes more than 2.6% of its death population in a year,<sup>80</sup> the retributive and deterrent credibility of the death penalty is low.
- When condemned inmates turn out to be *innocent*<sup>81</sup>—an error that is different in its consequences, but is *not* evidently different in its causes, from the other serious error discussed here<sup>82</sup>—there is no accounting for the cost: to the wrongly convicted;<sup>83</sup> to the family of the victim, whose search for justice and closure has been in vain; to later victims whose lives are threatened—and even taken—because the real killers remain at large;<sup>84</sup> to the public's confidence in law and legal institutions; and to the wrongly *executed*, should justice miscarry at trial, and should reviewing judges, harried by the amount of error they

are asked to catch, miss one.<sup>85</sup>

**If what were at issue here was the fabrication of toasters (to return to our prior example), or the processing of social security claims, or the pre-takeoff inspection of commercial aircraft—or the conduct of *any other* private- or public-sector activity—neither the consuming and the taxpaying public, nor managers and investors, would for a moment tolerate the error-rates and attendant costs that dozens of states and the nation as a whole have tolerated in their capital punishment system *for decades*. Any system with this much error and expense would be halted immediately, examined, and either reformed or scrapped.**

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

\* \* \* \* \*

The remainder of this Report more fully describes our findings. Part V describes the review process for capital sentences. Part VI describes our study methodology. Parts VII, VIII and IX more thoroughly document and display our findings about the frequency with which reversible error is found in capital judgments in the United States between 1973 and 1995, and the time taken to find those errors. Part VII examines relevant factors at the national level. Part VIII does so using comparative analyses of the 28 capital-sentencing states in which at least one case had advanced through the entire post-sentence inspection process. And Part IX does the same thing, comparing the

8 federal judicial circuits and corresponding regions into which they are divided. After presenting a variety of information, Parts VII, VIII and IX preliminarily address the potential causes of so much error in capital sentencing. Finally, Part X briefly describes the more sophisticated analyses we will undertake in the next phase of our study (to be published in the Fall) to set the stage for proposed reforms.

## **V. The Capital Review Process**

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

### **A. First Inspection: State Direct Appeal**

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

intermediate court of criminal appeals, and then to the state supreme court.<sup>90</sup> Reversal of a capital conviction or sentence on direct appeal requires a showing of "serious error" as defined earlier.<sup>91</sup>

In nearly all cases in which the direct appeal decision runs entirely against the defendant, he or she seeks certiorari in the United States Supreme Court.<sup>92</sup> Although in the vast majority of cases, the Supreme Court denies review, it occasionally undertakes merits review and either affirms or reverses.<sup>93</sup> Certiorari proceedings are typically understood to be a part of the direct review, or pre-finality, stage of a criminal case,<sup>94</sup> and they are treated that way here. If the Supreme Court reversed a capital conviction or sentence on direct review of the state high court's decision, we counted that decision as a direct-appeal finding of serious (indeed, in all such cases, federal constitutional<sup>95</sup>) error.

#### **B. Second Inspection: State Post-Conviction**

In order to seek federal habeas review of a constitutional claim, the prisoner must have exhausted at least one full round of state judicial remedies for the claim.<sup>96</sup> There are certain kinds of claims that cannot easily be exhausted at trial and on direct appeal because the defendant cannot discover or adequately litigate the facts or the legal principles supporting the claims at trial or on direct appeal.<sup>97</sup> This sometimes occurs (1) because a police officer, prosecutor or other state actor has suppressed the relevant facts (which may itself have violated the Constitution, as when the suppressed facts show the defendant is innocent,<sup>98</sup> or may keep the defendant from establishing the violation of some other principle, as when police suppressed evidence that they coerced the defendant into confessing, or when the prosecutor hid his efforts to keep African-Americans off of criminal juries<sup>99</sup>); (2) because the agent of the violation was the defendant's own trial or direct

appeal attorney (as in the case of ineffective assistance of counsel), thus preventing the defendant from recognizing or fairly litigating the claim;<sup>100</sup> (3) because the evidence establishing the claim was not reasonably available to the defense at the time of trial or appeal for some other reason<sup>101</sup> (as when counsel later discovers that the trial judge was corrupt<sup>102</sup> or biased,<sup>103</sup> that a juror lied during the jury selection process,<sup>104</sup> or that the bailiff secretly lobbied the jury to convict or condemn<sup>105</sup>); or (4) because the legal rule establishing the claim did not exist at the time of trial or appeal and the rule applies “retroactively” to the prisoner’s case.<sup>106</sup>

Because the Supreme Court has suggested that states are constitutionally required to provide adequate state post-conviction remedies for federal constitutional claims that cannot properly be pursued at trial and on direct appeal,<sup>107</sup> and because federal habeas law rewards states when they *do* provide such remedies,<sup>108</sup> all states now do so.<sup>109</sup> State capital prisoners seeking to preserve their access to federal habeas review accordingly are obliged to exhaust those remedies, and the professional obligation of capital attorneys to subject their clients’ convictions and sentences to searching scrutiny compels them to pursue state post-conviction review in nearly all capital cases.<sup>110</sup>

State post-conviction review takes a variety of forms under a variety of names (*e.g.*, habeas corpus, coram nobis, extraordinary motion for new trial, and state post-conviction procedures acts). Traditionally, such proceedings have taken place after the completion of state direct appeal and have entailed the filing of a petition for review with the judge who presided over the original trial, and the appeal of any adverse rulings up to an intermediate state appellate court and then to the state high court.<sup>111</sup> More recently, an increasing number of states (1) have adopted “unitary appeal” procedures

that require direct appeal and state post-conviction proceedings to take place nearly simultaneously,<sup>112</sup> and/or (2) have required prisoners to commence state post-conviction proceedings in a state intermediate or high court that either can grant or deny state post-conviction relief once and for all, or can remand the case to a trial court to take evidence. In most states, state post-conviction review is limited to claims that were not and could not have been raised on direct appeal and that arise under state or federal *constitutional law*.<sup>113</sup>

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

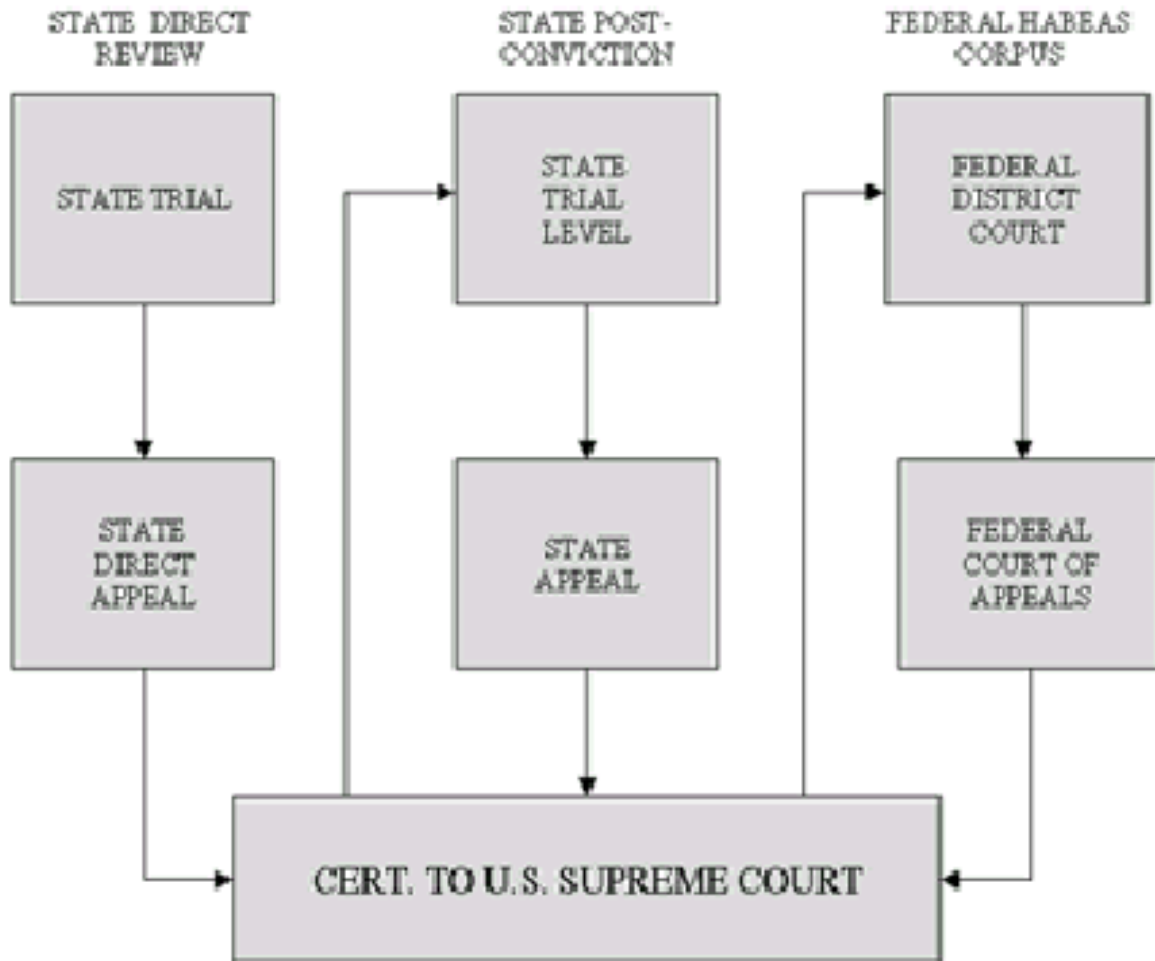
### **C. Third Inspection: Federal Habeas Corpus**

Because federal habeas corpus practice is controlled by federal statute,<sup>116</sup> it is far more uniform across states than are direct appeal and state post-conviction proceedings. Habeas proceedings begin with the filing of a petition in a United States District Court in the state in which the defendant was convicted and is incarcerated.<sup>117</sup> If relief is denied, and if (but only if) the prisoner can show that his petition presents a substantial constitutional claim, he may appeal the denial to a federal circuit court,<sup>118</sup> and if the district court opinion is affirmed and a stay of execution is available, he may petition the Supreme Court for certiorari.<sup>119</sup> Although habeas proceedings at the district court level are a matter of statutory right, stays of execution are not, thus limiting capital habeas proceedings to cases in which the prisoner can secure a federal stay of execution based on

a substantial constitutional claim.<sup>120</sup> Habeas relief is limited to a category of “serious error” that is even narrower than the analogous of category of “serious” direct-appeal error.<sup>121</sup>

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

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



## **VI. The Study**

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

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

earlier inspection stages.<sup>124</sup>

During 1996, 1997 and 1998, the senior authors developed, tested and revised a study instrument, developed and fine-tuned a set of research protocols, assembled and trained a series of law student researchers to collect the information called for by the study information, periodically checked and rechecked their completed forms, and in this way collected data on 599 initial federal habeas corpus cases and 173 second or successive federal habeas corpus cases. The research protocol called for researchers first to identify the "final federal habeas corpus decision" (the decision of the last and highest federal court to finally resolve the merits of the habeas application), then to identify all other available state and federal decisions addressing the same capital judgment (*i.e.*, either the capital conviction, sentence or both), and then to extract from each of those decisions a variety of information that was then coded onto the research instrument. Beginning in 1997 and continuing through 1999, the information on the study instrument in each case was entered into a data base and again checked and rechecked.

We collected the results of all federal habeas corpus decisions that became "final" between January 1, 1973 and October 2, 1995.<sup>125</sup> By "final," we mean that (1) the highest federal court to which the case has been timely brought either by the filing of a petition or an appeal has finally ruled on the validity of the capital judgment (meaning both the conviction and death sentence), (2) the time for reconsideration or rehearing by that court has passed, and (3) the time for U.S. Supreme Court review has passed without that Court's choosing to review the decision or, if it did choose to review it, with its own final merits decision having been rendered. Here again, a finding of "serious error"

is made only if the capital conviction, the capital sentence, or both were overturned due to prejudicial, reversible error.<sup>126</sup>

Early on, it appeared that a major factor in determining outcomes in federal habeas cases was the state that imposed the capital judgment under review. For example, although judges of the same (Eleventh) federal circuit court reached nearly all of the final federal habeas decisions in cases from Florida, Alabama and Georgia, their reversal rates in cases emanating from each of those three states were quite different (respectively, 37%, 45%, and 65%), suggesting that there was something about each particular state's death sentences that made them more or less error-prone.<sup>127</sup> To study this possibility, we collected information (in 1997 through 1999) about how states differ in regard to their demography, law, politics, judicial organization and funding, death-sentencing history and the like.

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

capital direct appeal decisions in the study period, then collected a small set of information about each case from published opinions that our search identified.

We collected the results of all direct appeal decisions that became “final” between January 1, 1973 and December 31, 1995. By “final,” we mean that (1) the highest state court with jurisdiction over the appeal had finally ruled on the validity of the judgment (meaning both the conviction and death sentence), (2) the time for reconsideration by that court had passed, and (3) the U.S. Supreme Court did not review the decision or, if it did review it, had rendered a final merits decision by the end of 1995.<sup>129</sup> A finding of “serious error” was made if reversible error was found and the capital conviction, sentence or both were overturned.<sup>130</sup>

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

For these reasons, as is more fully described in the introduction to Appendix C, we limited our collection of state post-conviction data to a list of known state post-conviction *reversals* of capital judgments in the study states in which capital cases had progressed significantly beyond the direct appeal stage by the end of 1995. This list, set out in full in Appendix C, enables us to derive an interesting, though incomplete, picture of the rates of error detected by state post-conviction courts in reviewing death sentences. To do so, we make three obviously inaccurate, but reliably *conservative*, assumptions: First we assume that we have a *complete* list of capital state post-conviction reversals due to serious error that occurred during the study period. In fact, our list is incomplete, although it probably contains most such reversals. Second, we assume that every capital case that was *available* for state post-conviction review because it had “cleared” direct appeal during the 1973-1995 study period was *finally decided* on state post-conviction during that period. In fact, many of the “available” cases were *not* finally decided and were still being litigated on state post-conviction as of the end of 1995. Taken together, these two assumptions lead to a third assumption—that every capital judgment that was available for state post-conviction review and is not known to have been reversed due to serious error during the study period was affirmed. Calculating error rates in this manner systematically *underestimates* those rates (and overstates success rates) by (1) underestimating the numerator (the number of serious errors found, which we have undercounted) and (2) *overstating* the denominator (the number of cases *finally reviewed* for serious error, for which we have substituted the obviously larger number of cases *available* for review).<sup>132</sup> Accordingly, our estimates of the rate of serious error found on state post-conviction review are

understated and conservative.

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

## **VII. The National Capital Punishment Report Card**

In this Part, we present a “national composite capital-sentencing report card.” The report card describes a variety of information, including the error rates found to characterize, and the time needed to review, death sentences in capital states during the study period. This Part also explains the two-page report card format that we use to report state, federal judicial circuit and regional as well as national data. (In Part VIII below, we present state-by-state comparisons of the information on state report cards for the 28 death-sentencing states in which at least one final direct appeal and federal habeas decision occurred during the 1993-1995 period.<sup>133</sup> In Part IX below, we present similar comparisons of information on the federal judicial circuit court/regional report cards.<sup>134</sup>)

The national capital-sentencing report card is set out below. It combines information about the rates of error detected on direct appeal of capital judgments imposed in all **34** death-sentencing states in which at least one state capital direct appeal was completed during the 1973-1995 study period. Our 34-state cohort is: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. Because capital cases in six states (Colorado, Connecticut, New Jersey, New Mexico, Ohio and Oregon) had not advanced far, or at all, into the state post-conviction stage of review, and no case from those states had completed federal habeas review, the bulk of the composite data—those covering the state post-conviction and federal habeas stages and the “overall rates”—omit these states and focus on what we call our **28**-state cohort.

## National Composite Capital Punishment Report Card, 1973-1995

### History (34 States)

First Death Sentence	1973
First Direct Appeal	1973
First Consensual Execution	1977
First Non-Consensual Execution	1979

### Sentences and Executions (34 States)

Total Number of Death Sentences	5,760
Total Number of Executions	313
Percentage of Death Sentences Carried Out	5%

### Error Rates

#### State Direct Appeal (34 States)

Number Reviewed on Direct Appeal	4,578
Number Reversed on Direct Appeal	1,885
Percentage Reversed on Direct Appeal	41%
Number Awaiting Direct Appeal	1,182
Percentage Awaiting Direct Appeal	21%
Number Forward to State Post-Conviction	2,693

#### State Direct Appeal (28 States)

Number Reviewed on Direct Appeal	4,364
Number Reversed on Direct Appeal	1,782
Percentage Reversed on Direct Appeal	41%
Number Forward to State Post-Conviction	2,582

#### State Post-Conviction (28 States)

Number Reviewed on Post-Conviction	Unknown
Number Reversed on Post-Conviction	≥248
Percentage Reversed on Post-Conviction	≥10%

Number Forward to Federal Habeas Corpus	Unknown
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**State Direct Appeal and State Post-Conviction Combined (28 States)**

Overall Rate of Error Found by State Courts	≥47%
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**Error Rates (Continued)**

**Federal Habeas Corpus (28 States)**

Number Reviewed on Habeas	599
Number Reversed on Habeas	237
Percentage Reversed on Habeas	40%

**Overall Rates Including [and Excluding] State Post-Conviction (28 States)**

Overall Error Rate	68% [64%]
Overall Success Rate	32% [36%]

**Time (28 States)**

Time From First Death Sentence to First Non-Consensual Execution	6
Average Time from Sentence to Execution	9
Average Time from Sentence to Final Federal Relief	7.6

**Sentencing and Execution Rates (34 States )**

	Death States	Whole Nation
Death Sentences per 1000 homicides	14.90	12
Death Sentences per 100,000 pop.	3.9	2.46
NC Executions per 1000 homicides	.68	.54

**Demographic Information (34 States)**

	Death States	Whole Nation
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Average Population	181,374,347	237,905,964
Average Homicides	16,860	21,197
Average Homicides Rate per 100,000 Population	9.3	9
Percentage Population Non-White	19%	20%

Sources: DRCen; Death Row U.S.A., Winter 2000; DADB; HCDB; Appendix C; UCRDB; USCen

The National Composite Capital Punishment Report Card contains six categories of information for either the 34 capital-sentencing states in which at least one capital judgment had been finally reviewed on state direct appeal during the study period, or for the 28 of those states in which at least one capital judgment was finally reviewed on federal habeas during the study period. Because the same six categories appear on all of the succeeding report cards—along with a seventh category in the state report cards—this section describes the types of information that all seven categories contain, then discusses the actual national composite results for each category.

#### A. Capital-Sentencing History

In the “History” category of each report card is information about the years in which four important capital-sentencing events occurred in the jurisdiction or set of jurisdictions in question following the Supreme Court’s invalidation of all preexisting capital statutes and sentences in *Furman v. Georgia*.<sup>135</sup> The requisite information for the *nation as whole* (in this case comprised of the 34-state cohort of capital-sentencing jurisdictions) as revealed by the top category in the National Report Card is as follows:

- The **first post-*Furman* death sentences** were meted out in **1973**.<sup>136</sup>
- The **first post-*Furman* state direct appeal decision** finally determining the legality of a post-*Furman* death sentence also occurred in **1973**.<sup>137</sup>
- The **first post-*Furman* execution** of any sort (Gary Gilmore’s consented-to execution by the State of Utah) was in **1977**.<sup>138</sup>
- The **first “non-consensual” execution after *Furman***—*i.e.*, the first time an American

jurisdiction carried out a post-*Furman* capital judgment that had passed inspection by all available levels of judicial review—was in **1979**, when Florida executed John Spenkelink.<sup>139</sup>

We focus on non-consensual, as well as all, executions because we are interested in error rates, and only non-consensual executions reveal the inspection system's conclusion that the death sentence is free of "serious error" as defined above.<sup>140</sup>

### **B. Sentences and Executions**

This section reports the number of death sentences imposed, the number of executions carried out, and executions as a proportion of death sentences in each jurisdiction or group of jurisdictions. Nationally, during the years 1973-1995, 34 American jurisdictions imposed **5,760 death sentences**<sup>141</sup> and carried out **313 executions**.<sup>142</sup> In other words, **only 5% of the death sentences imposed were carried out**.

### **C. Error and Success Rates**

The third section of the report cards identifies (1) the rates of serious, reversible error discovered at each level of judicial inspection,<sup>143</sup> (2) the overall error rate, meaning the proportion of capital judgments undergoing judicial inspection that were thrown out before reaching the end of the inspection process,<sup>144</sup> and, conversely, (3) the overall success rate, meaning the proportion of capital judgments found after full review to be *free* of serious error. In the "overall rates" category, we give the error and success rates considering all three judicial inspections and also, in brackets, the rates considering only the direct appeal and federal habeas inspections. Nationally, our data reveal that:

- **Direct appeal.** State courts in 34 capital-sentencing jurisdictions finally reviewed 4,578 death sentences on direct appeal during 1973-1995.<sup>145</sup> Because 5,760 death sentences were imposed during that period, this figure reveals that 1,182—or **21%**—**of the death sentences were awaiting direct appellate review at the end of the study period.**<sup>146</sup> Of the 4,578 capital judgments finally reviewed on direct appeal, **1,885—or 41%—were overturned based on serious error.**<sup>147</sup> This means that 2,693 death sentences<sup>148</sup> from 34 jurisdictions passed the first judicial inspection and were available to be reviewed at the second, state post-conviction stage of review.<sup>149</sup> Many of our subsequent analyses focus on the 28 capital-sentencing jurisdictions in which a full complement of review procedures took place in at least one capital case between 1973 and 1995. On the national report card, therefore, we calculate the direct appeal error rates a *second* time for just the 28 states. That analysis reveals **the same 41% rate of serious error** detected at that stage (1,782 capital judgments overturned due to serious error, out of 4,364 reviewed at that stage), and shows that 2,582 capital judgments from the 28-state cohort passed the first judicial checkpoint and were available for state post-conviction review.<sup>150</sup>
- **State post-conviction.** As is discussed above and in Appendix C, our state post-conviction data include only known state post-conviction reversals during the 23-year study period; it does not contain information about the number of state post-conviction proceedings that actually were *completed* during that period.<sup>151</sup> For that reason, each report card lists as “*Unknown*” both the “Number Reviewed on Post-Conviction” (*i.e.*, the number of capital

judgments that went forward to state post-conviction review and were finally reviewed there), and also the “Number Forward [from State Post-Conviction] to Federal Habeas Corpus.” What we *are* able to calculate is the known reversals<sup>152</sup> as a proportion of the number of capital judgments moving forward from state direct appeal to state post-conviction in our 28-state cohort of capital-sentencing jurisdictions.<sup>153</sup> Although we report this calculation as the rate of error discovered on state post-conviction—*i.e.*, as the “Percentage Reversed on [State] Post-Conviction”—we in fact *underestimate* that error rate by a substantial amount, because we take the known reversals as a percentage of the cases *available* for review, rather than as a proportion of the cases *actually* reviewed, during the study period.<sup>154</sup> That underestimation accounts for our use of the “≥” symbol in this row of each report card and our use of the phrase “at least” in discussing that row. Nationally, for the relevant 28 study states, there were at least **248** state post-conviction reversals due to serious error during the study period, so that **serious error was found in more than—probably *significantly* more than—10% of the cases reviewed at that stage.**<sup>155</sup> Although state post-conviction proceedings are not generally thought to be major sources of post-sentencing reversals of seriously flawed capital judgments, in fact **there were more state post-conviction findings of reversible error infecting American capital judgments (248) than there were analogous federal habeas findings (237).**

- **State direct appeal and state post-conviction combined.** This item in the national report card indicates the combined rates of error found at the two **state court** checkpoints.

Nationally, state courts as a whole found **47%—nearly one out of every two—**capital judgments they reviewed to be infected with serious error.<sup>156</sup>

- **Federal habeas corpus.** Between 1973 and 1995,<sup>157</sup> federal habeas courts with jurisdiction over prisoners in capital-sentencing states around the nation **finally reviewed**<sup>158</sup> **599 death sentences.** They **overturned 237—or 40%—of those sentences based on serious error.**<sup>159</sup>
- **Overall rates:** This portion of the report card gives the overall error (and success) rates, meaning the proportion of capital judgments from the relevant jurisdiction or set of jurisdictions that underwent full judicial inspection and were found to have (and to be free of) serious error.<sup>160</sup> Overall, between 1973 and 1995, **less than one-third—32%—of all death sentences passing through the nation’s state and federal judicial inspection system were cleared of serious error. Conversely, over two-thirds—68%—were thrown out because of serious error.**<sup>161</sup>

The information presented thus far make this a useful place to discuss **error rates over time.** Earlier, in discussing Figure 2, pp. 12-13 above, we touched on patterns of capital error and success rates over time. There, we noted that, although executions have been on the rise since 1988, the principal cause of that rise seems to be the steady increase in the number of individuals piled up on death row who are potentially available to be executed, and not any sharp increase in the success rate of capital judgments. Figures 3 and 4 below look at patterns over a longer period of time, beginning in 1973.

Figure 3 below depicts the rates of error detected on state direct appeal, federal habeas

corpus, and in those two stages combined, by year, from 1973 to 1995.<sup>162</sup> (The first two years for which we plot the rate of error found on federal habeas review are 1978 and 1980, because no capital habeas proceedings were completed before 1978 or during 1979.) Figure 3 reveals the following about error rates detected over time during the first (state direct appeal) and third (federal habeas) inspection stages:

- From the 1970s through 1982, when relatively few cases were under review, rates of error detected on state direct appeal and federal habeas review were extremely volatile and high.
- As of 1983, as larger numbers of capital judgments came under review at both stages, error rates stabilized, and they remained relatively stable throughout the remainder of the period.

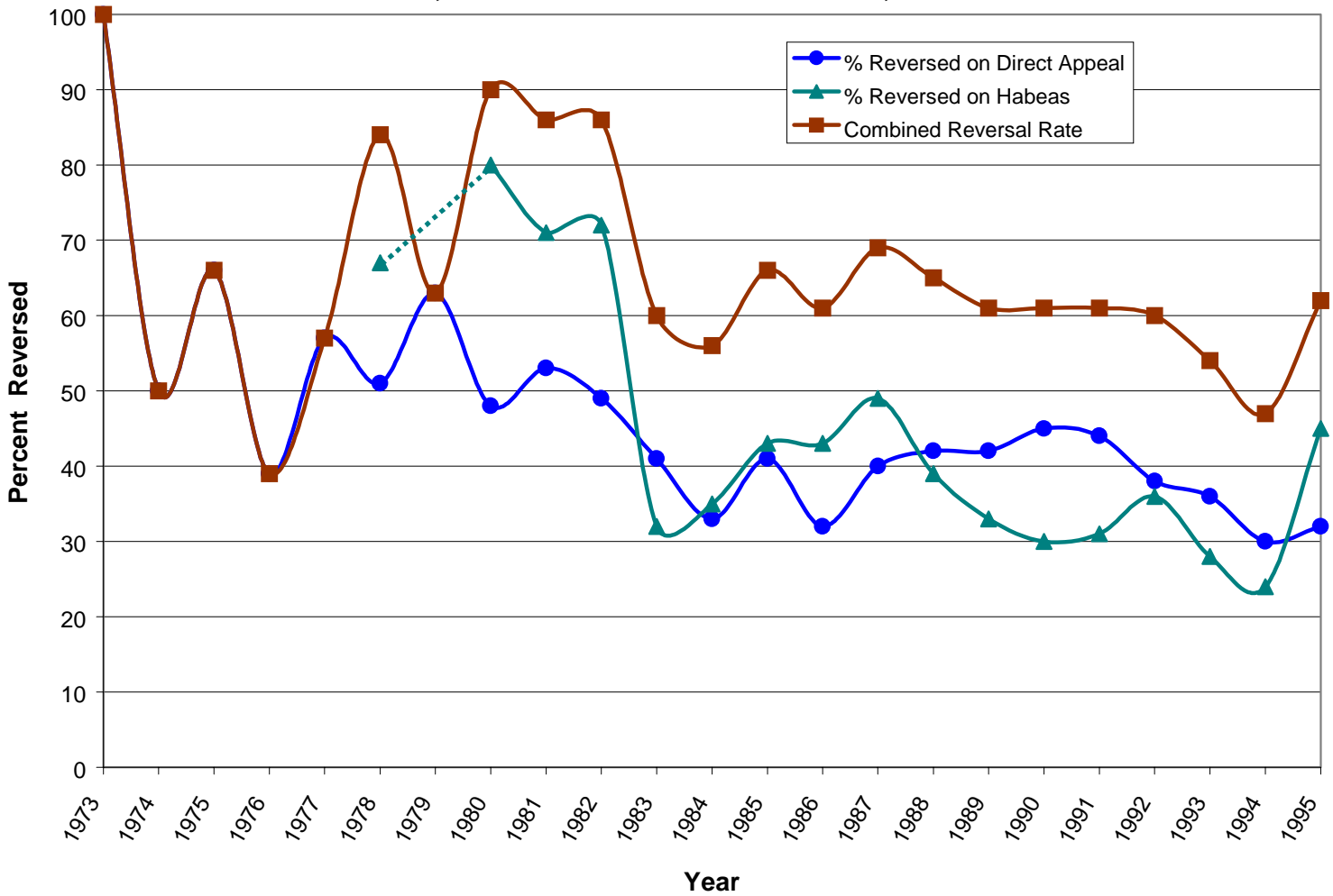
Thus, **during the final 13 study years (1983-1995):**

1. **Capital-sentencing error rates found on state direct appeal across the nation consistently remained within the 30% to 45% range.**
2. With the exception of three years (two with a lower rate; one with a higher rate), **capital error rates found on federal habeas review stayed within that same 15-point range.**
3. With one exception, the **combined error rates detected at those two stages stayed consistently within the 54% to 69% range.**
4. Broadly speaking: while the error rate found on federal habeas modestly dipped during the 1987-1991 period, the error rate found on state direct appeal (affecting a much larger pool of cases) modestly rose during that same period. Both rates dipped

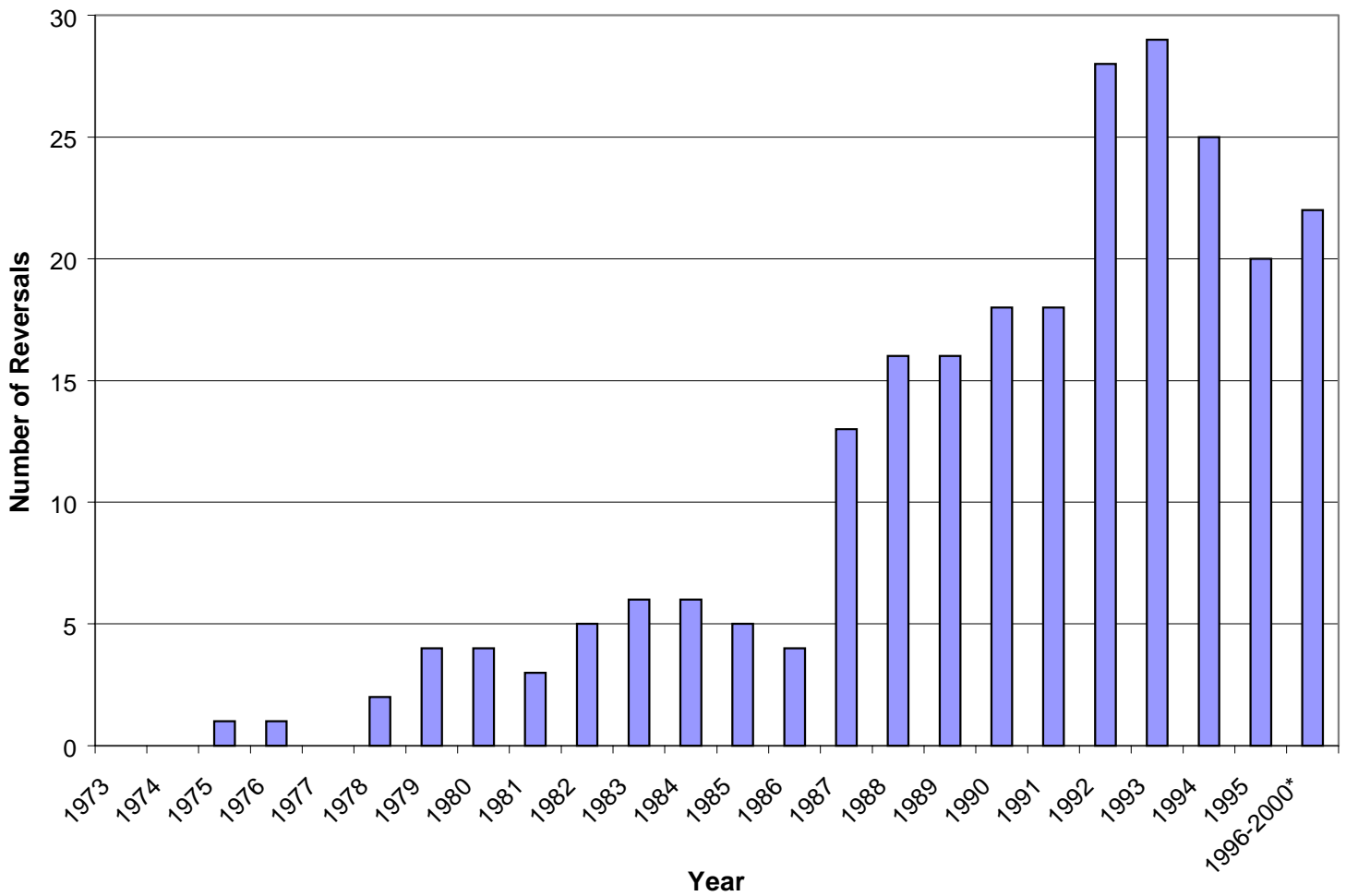
some during the years 1992 through 1994, then rose sharply in 1995.

Figure 3 is incomplete because it does not contain rates of serious error found, by year, at the state post-conviction stage, nor thus any *overall* reversal rate, by year, for the three inspection stages as a whole. Rates of serious error detected during state post-conviction review cannot be calculated because only data on the number of *reversals*—but not on the total number of cases *decided*, and thus the reversal *rate*—are available by year for the state post-conviction stage.<sup>163</sup> The next chart, however —Figure 4—provides some information about state post-conviction error rates over time, revealing that in the same years when a modest downward trend in federal habeas reversal rates was occurring (1987-1994), **a marked increase in state post-conviction reversals occurred.**<sup>164</sup> If we assume (though we can't know for certain) that the number of capital state post-conviction cases finally decided during the 1985-1994 period was fairly steady, then an increase in the error rate detected at the state post-conviction stage would have occurred and offset the decrease in the federal habeas reversal rate. Making that assumption leads to an estimate of **the overall rate of error detected by all three judicial inspections during the 1988-1994 period of roughly 60-65%.**

**Figure 3: Error Rates Detected on State Direct Appeal, Federal Habeas, and the Two Combined, 1973-95**



**Figure 4. Known State Post-Conviction Reversals, 1973-2000**



#### **D. Length of Time of Review**

This section of each report card provides information for the relevant jurisdiction or set of jurisdictions on (1) the number of years that elapsed between the state's first death sentence and its first non-consensual execution (not necessarily in the same case); (2) the average number of years it took death sentences to proceed through the three-stage inspection process to execution in the small proportion of cases in which an execution took place; and (3) the average time from death sentence to federal habeas reversal in the 10% of cases in which reversal occurred at the third (federal habeas) checkpoint, as opposed to taking place at one of the earlier (state court) checkpoints. The national report card reveals the following about the length of time required to identify the high amounts of error described above:

- Nationally, 6 years passed between the imposition of the first death sentence and the first non-consensual execution.<sup>165</sup>
- We don't know how much time was required for judicial inspection of death sentences at the direct appeal and state post-conviction stages. One of the report-card categories discussed above—the percentage of death sentences awaiting direct appellate review as of the end of 1995—does, however, suggest the extent to which the direct appeal stage is a bottleneck in the review process. Nationally, **21% of all death sentences imposed between 1973 and 1995 were still awaiting a state direct appeal decision as of 1995.**<sup>166</sup> That 21% (1,182 death sentences) represents close to **five years' worth of death sentences backed up at the direct appeal stage** as of the end of 1995, at the average annual rate of 250 death sentences

imposed per year.<sup>167</sup> This suggests that, as of 1995, an average of about 5 years was elapsing between imposition of a death sentence and the end of state direct appeal—and thus that **about half of the time required for the *entire* review process was being consumed by the first, state direct appeal inspection.**

- **In the minority of cases in which death sentences passed the three-stage inspection and were carried out by execution, the average time, nationally, from sentence to execution was 9 years.** In the last 9 study years (1987-1995), by which point the pile-up on death row was substantial (*see* Figure 2, p.12 above), the average time from sentence to execution had **increased to 10.6 years.**<sup>168</sup>
- **In cases in which serious error was detected during the third, federal habeas review, the average time from sentence to federal reversal was 7.6 years.**<sup>169</sup>

#### **E. Capital-Sentencing and Execution Rates**

The report cards next answer two questions. (1) How often does the relevant jurisdiction or set of jurisdictions impose death sentences? To answer this question, we consider death sentences as a proportion of three populations: per 1,000 homicides, per 100,000 population, and (in the state report cards, but not the national one) per 1,000 incarcerated inmates in the jurisdiction. (2) How often (relative to homicides, population and prison population) does the jurisdiction execute offenders? Because we are interested in success rates, we consider only “non-consensual” executions, *i.e.*, ones based on capital judgments that have been fully reviewed and found to be free of serious error.<sup>170</sup> Because not all states have the death penalty, our national report card computes

these figures for the nation as a whole and for our 34-state cohort.

These numbers are most useful for the comparative purposes to which we put them below.<sup>171</sup>

Providing a national baseline for those comparisons, the capital-sentencing and execution rates for the nation as a whole, and for the 34 death-sentencing states that decided at least one direct appeal during the study period, are as follows:

- For the 34 capital-sentencing states, an average of 14.9 death sentences were imposed for every 1,000 homicides during the study period. For the same states, an average of 3.9 death sentences were imposed for every 100,000 people during the same period.<sup>172</sup>
- Because so few death sentences actually result in executions, the execution rates determined by each of these population categories are much lower. During the study period, death-sentencing states carried out an average of: .68 executions for every 1,000 homicides; and .15 executions for per 100,000 persons.<sup>173</sup>
- Comparing the last two points reveals that during the study period, **death states capitally sentenced 22 times more defendants per 1,000 homicides than they executed. And they sentenced 26 times more defendants per 100,000 population, than they executed.**
- For the whole nation during the study period, an average of: (1) 12 death sentences were imposed for every 1,000 homicides; (2) 2.46 death sentences were imposed for every 100,000 people; and (3) .54 non-consensual executions were carried out for every 1,000 homicides.<sup>174</sup>

## **F. Demographic Factors**

The demographic information reported in the sixth report card category reveals the population pools against which each jurisdiction's number of death sentences and executions are compared to determine sentencing and execution rates. They also provide bases for distinguishing among states and thus, potentially, for explaining variations among states in terms of the capital error rates detected on direct appeal and habeas corpus inspection. At the national level we again report data for the 34 death states as well as for the nation at large.

"Average population" is the relevant jurisdiction's yearly average population from 1973-1995. For the whole nation, the average population during the study period was 237,905,964. For the 34 death states, it was 181,374,347.<sup>175</sup>

"Average homicides" are the total number of homicides from 1973-1995 divided by 23, the number of years in our study. For the whole nation, the average number of homicides each year during the study period was 21,197. For the 34 death penalty states, it was 16,860.<sup>176</sup> Comparing this and the last category reveals that death-sentencing states account for about 76% of the nation's population and about 80% of its homicides.

Homicides per population establishes a jurisdiction's homicide rate. By "average homicides/average population," we mean the number of homicides per year for every 100,000 persons in the jurisdiction, averaged over the population during the study period. For the whole nation, average homicides/average population during the study period was 9. For the 34 death

sentencing states, it was 9.3.<sup>177</sup> This again reveals that homicide rates are slightly higher in death-sentencing than in nondeath-sentencing states.

“Average prison admissions” means the average number of persons admitted each year to the state’s prisons during the study period.<sup>178</sup>

“Average prison population” means the jurisdiction’s average population over study period.<sup>179</sup>

We also report here the percentage of each jurisdiction’s population during the study period that was nonwhite, which for the nation as a whole was 20% and for the 28 study states was 19%.<sup>180</sup>

#### **G. Court Factors: The Context of State Court Decision Making**

In the state (but not the national and circuit/regional) report cards, we report four measures of the social and political contexts in which judges make decisions. Contextual measures such as those analyzed here have been shown in empirical studies to help explain variation in sentencing from county to county within states and across states.<sup>181</sup> We consider them here to see whether they can help explain state variations in capital-sentencing error rates, and also in capital-sentencing and execution rates themselves.

The “political pressure” index measures the extent to which state judges are subject to electoral scrutiny and discipline. Although nearly all the state judges in our study are subject to election at some point if they wish to remain in office, the forms and frequency of elections differ in ways that are likely to increase or decrease the extent to which judges are put at political risk because of the capital outcomes produced in their courts (meaning, at the trial level, whether the

verdict was death or life and, at the appellate level, whether a death sentence under review was affirmed or reversed). The index considers whether judges initially are elected or appointed, whether judicial elections are partisan, the length of judges' terms of office, and whether judges' continuation in office is determined by contested or retention elections.<sup>182</sup>

The "party competition index" is a composite of the vote share of each party in state gubernatorial elections from 1968-1996.<sup>183</sup>

Our penultimate ("state court criminal caseload") item reports the yearly average number of criminal case filings in each jurisdiction from 1985-1994 per 1,000 people in the population.<sup>184</sup> We include this figure to test the hypothesis that high criminal caseloads may in some way affect the quality of state-court capital judgments.

Finally, aiming to test a similar hypothesis having to do with available judicial resources, we report each state's average annual court-related expenditures during the fiscal years 1982-1992.<sup>185</sup>

## **VIII. State Comparisons**

Appendix A to this Report presents capital punishment report cards for each jurisdiction in our 28-state cohort, arranged alphabetically. Observers and policymakers in each state may find their state's report card to be interesting in and of itself. The report cards are especially informative, however, when used comparatively. With the help of a number of tables and figures, this section undertakes a variety of state-by-state comparisons.

### **A. Rates of Serious Error Found on State Direct Appeal**

Table 4 and Figure 5 below compare the rates of capital error discovered on direct appeal during the 23-year study period in each of the 28 study states to the rates in the other states and to the national composite of 41%. Table 4 and Figure 5 show that **at the first state inspection stage, elected high court judges in a large majority (64%) of American capital-sentencing states found that over a third of their states' capital judgments were seriously flawed.** In well over half the study states, state high court judges found serious error in 40% or more of their capital judgments. The error rate found on direct appeal was *50% or more in a quarter of American death-penalty jurisdictions.*

**Table 4: Percent of Capital Judgments Reviewed on Direct Appeal  
 in Which Reversible Error Was Found, 1973-1995**

State	Percent Reversed on Direct Appeal
National Composite	41
1. Wyoming	67
2. Mississippi	61
2. North Carolina	61
4. Alabama	55
5. South Carolina	54
6. Maryland	53
7. Kentucky	50
8. Florida	49
9. Oklahoma	48
10. Louisiana	46
11. Washington	45
12. Arizona	42
12. Idaho	42
12. Montana	42
15. Arkansas	40
16. Illinois	39
17. Georgia	35
17. Utah	35
19. Indiana	32
20. California	31
20. Texas	31
22. Nevada	30
23. Nebraska	29
23. Tennessee	29
25. Pennsylvania	28
26. Delaware	26
27. Missouri	17
28. Virginia	10

Source: DADB

**Figure 5. Percent of Death Sentences Reversed on State Direct Appeal, 1973-95**

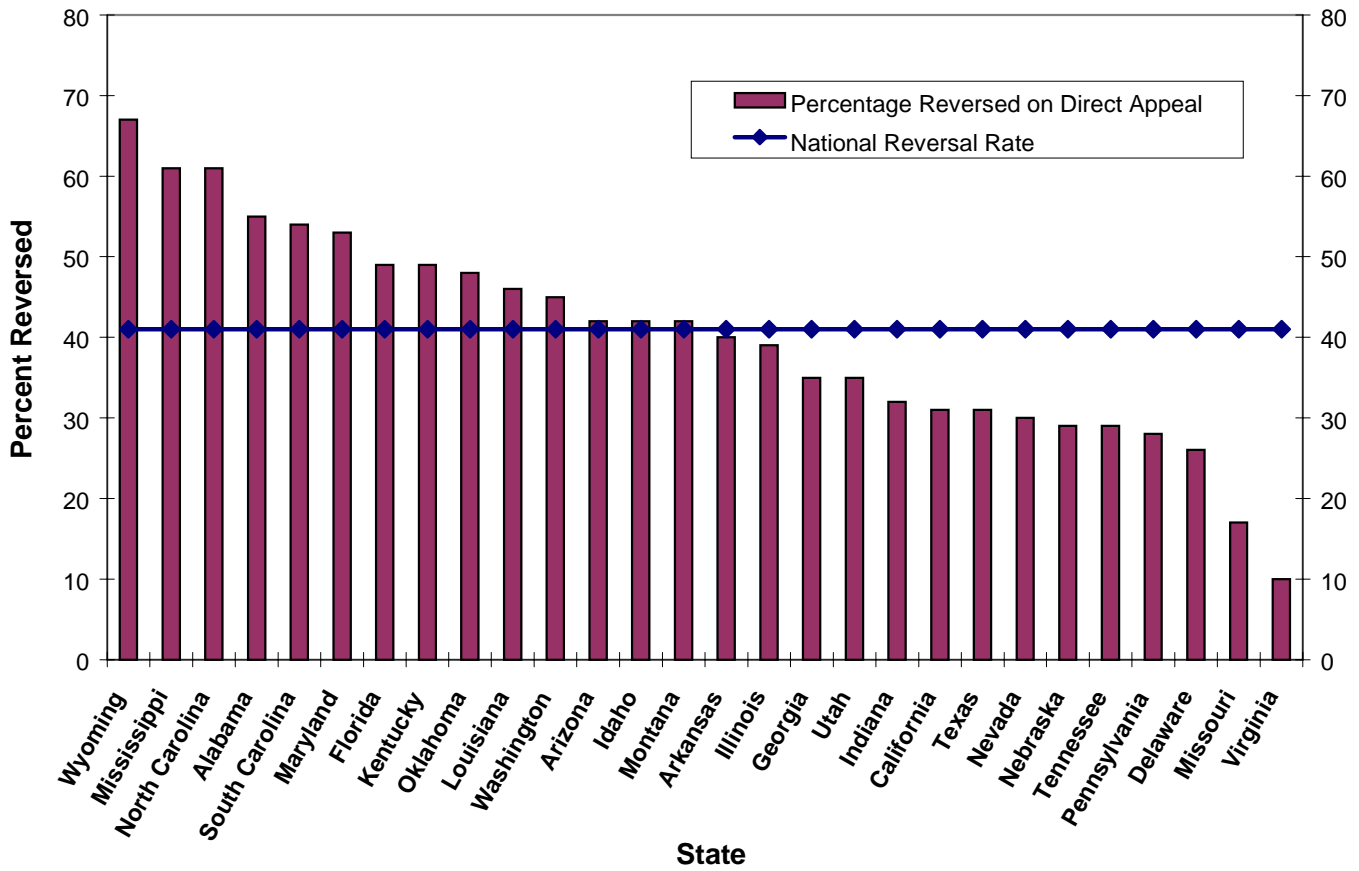


Table 4 and Chart 5 identify two states whose records are so different from others as to raise questions about why: Missouri's high court finds error only 17% of the time—9 percentage points less often than the next lowest state (after which the distribution of states becomes more continuous). And the Virginia Supreme Court finds error only 10% of the time—7 percentage points below Missouri, 16 percentage points below where the distribution becomes continuous, and 31 percentage points below the national average. All other states range from two-thirds (67%) to just over 1.5 times the national average of 41%; by contrast, Missouri's rate is only 40%, and Virginia's is less than 25%, of the national average. A question for further study is whether the fact that all other state high courts discover serious error in anywhere from 26% to 67% of their capital judgments provides a reason to question the care with which the Missouri and Virginia high courts screen for such error, given that they find it only 17% and 10% of the time,<sup>186</sup> or whether capital judgments in those states are substantially less prone to error than capital judgments everywhere else.<sup>187</sup>

#### **B. Rates of Serious Error Found on State Post-Conviction**

Table 5 below reveals what we know about the comparative amounts and rates of serious capital error found during state post-conviction review proceedings. As we have noted, the available data do not permit an accurate determination of the rates of error *actually* found in *decided* cases, because there is no accurate count of those cases. The data do, however, enable us to derive a *systematically underestimated* proxy for that state post-conviction reversal rate by taking the (incomplete) number of state post-conviction reversals we have been able to identify as a proportion of the cases that were *available* for state post-conviction review (whether or not they actually

completed that review) during the study period.<sup>188</sup> Table 5 presents that (under)estimated rate of error found on state post-conviction in each state.

**Table 5: Known State Post-Conviction Reversals, 1973-1995, By State**

State	Known Number of State Post-Conviction Reversals	Reversals as % of Cases Available for State Post-Conviction Review*
National Composite	248	10
1. Maryland	14	52
2. Wyoming	1	33
3. Indiana	13	25
4. Utah	3	23
5. Mississippi	11	20
6. South Carolina	10	18
7. Florida	64	17
7. Tennessee	13	17
9. Nebraska	2	13
10. Georgia	24	12
11. Arizona	12	10
11. North Carolina	9	10
13. Alabama	11	9
13. Montana	1	9
15. Nevada	5	8
16. Illinois	10	7
16. Louisiana	4	7
18. Texas	22	6
19. Idaho	1	5
20. Arkansas	2	4
20. California	7	4
20. Missouri	3	4
23. Virginia	3	3
24. Oklahoma	2	2
25. Pennsylvania	1	1
26. Kentucky	0	0
Delaware	unknown	unknown
Washington	unknown	unknown

\*This column does *not* report the proportion of capital judgments *actually reviewed* on state post-conviction that were reversed due to serious error, because that information is not available. It instead reports the reversals known to have occurred (despite the difficulty of collecting data) as a percentage of *all* of the capital judgments that were available to

be reviewed (almost all of which eventually complete state post-conviction review, but many of which had not completed that review (*i.e.*, they instead were *awaiting* final review) at the end of the study period. This table thus undercounts the actual number and rate of reversals on state-post conviction . *See infra* Appendix C, pp. C-1 to C-2.

Source: Appendix C; DRCen; DADB

Table 5 shows the following:

- State post-conviction review is an important source of review in some states, including Florida, Georgia, Indiana, Maryland, Mississippi, North Carolina, and Tennessee. In Maryland, at least **52%** of capital judgments reviewed on state post-conviction during the study period were overturned due to serious error; the same was true of at least **25%** of the capital judgments that were similarly reviewed in Indiana, and at least **20%** of those reviewed in Mississippi.
- Table 5 is especially revealing when the *post-conviction* reversal-rate rankings it assigns to particular states are compared to their *direct appeal* reversal-rate rankings in Table 4 (p. 47). That comparison identifies a number of states in which high error rates are found at *both* state court review stages. Of particular interest are three southeastern states—South Carolina, North Carolina and Maryland, all of which fall within the jurisdiction of the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit Court”), based in Richmond, Virginia. All three of those states (and, most especially Maryland and South Carolina) rank fairly high on *both* state direct appeal *and* state post-conviction reversal rates. In this regard, they contrast sharply with the one remaining state within the jurisdiction of the federal Fourth Circuit Court—Virginia—which falls in the very *bottom* cohort of states in regard to error detection at *both* state review stages.
- Other states in which relatively high rates of error manifest themselves at both the state direct appeal and state post-conviction stage are Wyoming and Mississippi (both falling within the

top fifth of states in terms of capital error rates found at both state court inspection stages) and Florida, which ranks seventh and eighth on the two error rates.

- Falling in the bottom rank insofar as error detection by both sets of state courts is concerned, in addition to Virginia, are California, Missouri, and Pennsylvania.
- By contrast, in some states, close scrutiny at one state-review stage seems to compensate for less exacting scrutiny at another. In Indiana and Tennessee, for example, relatively low error-detection rates on direct appeal (the states are ranked 19<sup>th</sup> and 23<sup>rd</sup>, respectively, in terms of their reversal rates at that stage) are partly offset by high error-detection rates on state post-conviction (where the states are ranked 3<sup>rd</sup> and 7<sup>th</sup>, respectively). Georgia, Nebraska and Utah also fit this pattern.
- The inverse pattern—high direct appeal, but low state post-conviction, error-detection rates—characterizes states such as Kentucky and Oklahoma.

### **C. Rates of Serious Error Found on State Direct Appeal *and* State Post-Conviction**

Table 6 and Figure 6 below display the *combined* rates of error detected in the two *state-court* inspection phases.

**Table 6: State-by-State Comparisons of Rates of Error Detected  
 by All State Courts (State Direct Appeal and State Post-Conviction)**

State	Percent Reversed in State Courts, Overall*
National Composite	47%
1. Wyoming	78%
2. Maryland	77%
3. Mississippi	69%
4. North Carolina	65%
5. South Carolina	62%
<b>6. Alabama</b>	59%
7. Florida	58%
8. Kentucky	50%
8. Louisiana	50%
8. Utah	50%
8. Oklahoma	50%
12. Indiana	49%
13. Arizona	48%
13. Montana	47%
15. Idaho	44%
16. Arkansas	43%
16. Georgia	43%
16. Illinois	43%
19. Tennessee	41%
20. Nebraska	38%
21. Nevada	35%
21. Texas	35%
23. California	33%
24. Pennsylvania	29%
25. Missouri	20%
26. Virginia	13%
Delaware	unknown
Washington	unknown

\*This column does *not* report the proportion of capital judgments *actually reviewed* in state court that were reversed due to serious error, because the post-conviction information needed to make that calculation is not known. Instead, it reports the reversals known to have occurred (despite the difficulty of collecting state post-conviction data) as a percentage of *all* of the capital judgments that were available to be reviewed on state direct appeal or state post-conviction (almost all

of which were *eventually* reviewed on state post-conviction but many of which were not *finally* reviewed (*i.e.*, they were as yet undecided and *awaiting* final review) at that stage at the end of the study period. The actual state court reversal rate thus is higher in most or all instances. *See infra* Appendix C, pp. C-1 to C-2.

Source: DADP; Appendix C; DRCen

**Figure 6. Percent of Death Sentences Reversed on State Direct Appeal or State Post-Conviction, 1973-95**

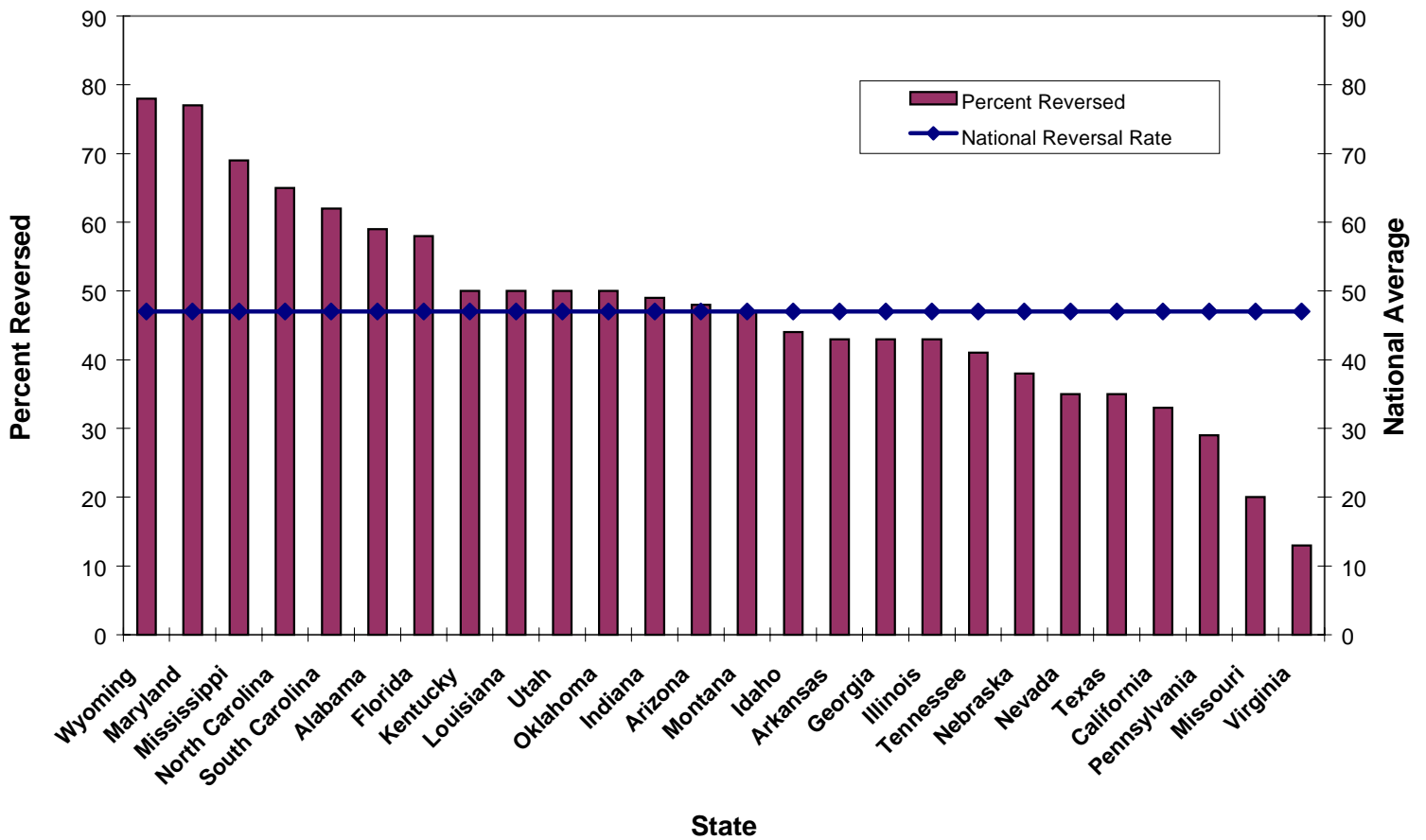


Table 6 and Figure 6 reveal the extent of serious error detected by state courts as a whole.

The results are remarkable:

- **Even before any federal courts become involved, state courts across the country find serious error in close to *half* (at least 47%) of the capital judgments that reach their two checkpoints.**
- **State courts found capital error rates of 40% or more in *five-sixths* of the death-penalty states. They found serious error in 60% or more of the capital judgments in a *fifth* of those states.**
- A number of the states in the nation's "death belt" (where most American death sentences are imposed and the largest death rows exist) have some of the nation's highest rates of serious capital-sentencing error—by the lights of the *states' own elected judges*: **Florida at 58%; Alabama at 59%; South Carolina at 62%; North Carolina at 65%; Mississippi at 69%; and Maryland at 77%.**
- As in other analyses, **Virginia is a distinct anomaly.** Its courts' capital error-detection rate during the study period was less than a third the national average, and 35% below the next nearest state, Missouri—which itself has an error-detection rate 31% below the next lowest state, after which the differences among states are small.

#### **D. Rates of Serious Error Found on Federal Habeas Review**

Table 7 and Figure 7 below compare the rates of error detected on federal habeas corpus review of death sentences in the 28 capital-sentencing jurisdictions with at least one completed

federal habeas proceeding during the study period. As discussed above, virtually all capital judgments reviewed on federal habeas had previously been given *two* state court inspections: one on state direct appeal (at which 41% of the judgments reviewed were thrown out) and a second on state post-conviction (after which, the state courts together had thrown out 47% of the capital judgments they reviewed).

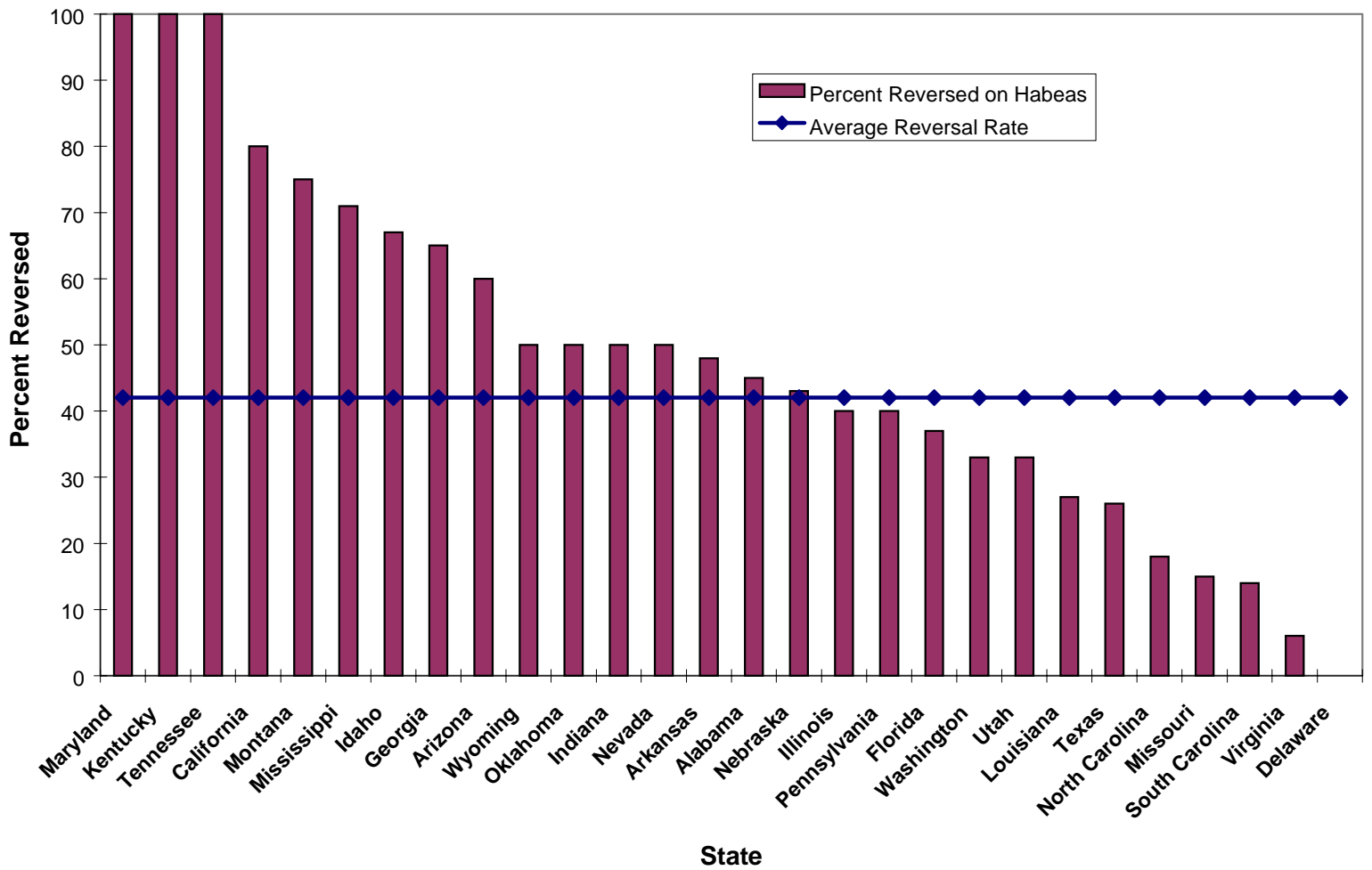
**Table 7: Percent of Capital Judgments Reviewed on Federal Habeas Corpus  
 in Which Reversible Error Was Found, 1973-1995**

State	Percent Reversed on Habeas Corpus
National Composite	40
Kentucky*	100
Maryland*	100
Tennessee*	100
California	80
Montana	75
Mississippi	71
Idaho*	67
Georgia	65
Arizona	60
Indiana	50
Nevada	50
Oklahoma	50
Wyoming*	50
Arkansas	48
Alabama	45
Nebraska	43
Illinois	40
Pennsylvania	40
Florida	37
Utah*	33
Washington*	33
Louisiana	27
Texas	26
North Carolina	18
Missouri	15
South Carolina	14
Virginia	6
Delaware*	0

\* States with three or fewer completed federal habeas cases during the study period.

Source: HCDB

**Figure 7. Percent of Death Sentences Reversed on Federal Habeas Review, 1973-95**



Although Table and Figure 7 include all 28 states, our narrative analysis here puts aside the states (indicated with an asterisk) with three or fewer federal habeas cases during the study period. Among the 20 capital-sentencing states that had a substantial number of their capital judgments reviewed on federal habeas during the study period:

- **Federal courts found serious error<sup>189</sup> in 40% of the capital judgments they reviewed at this *third* inspection point.**
- **In two-fifths of the study states, federal courts detected error rates of 50% or more at this third inspection.**
- **Virginia is again an anomaly in this analysis. The 6% error-detection rate among Virginia capital habeas cases is well under *half* that of the *next lowest state* (South Carolina at 14%), and is exactly 15% of the *national average*.<sup>190</sup>**

Table 7 and Figure 8 below reveal an important fact about federal habeas review, which undermines two frequent, but contradictory, criticisms of federal judges. According to one criticism, unelected federal judges tend to oppose the death penalty, prompting them to *overturn* capital judgments whenever they can.<sup>191</sup> According to the opposed view, federal judges—especially since appointees of Presidents Reagan and Bush became a majority in the mid-1980s—are ideologically “conservative” and prone to *uphold* state-imposed death sentences at every turn.<sup>192</sup> Our data suggest that federal judges are more discerning and sensitive to context than either view claims. Thus, the same judges on the same federal circuit court often find very *different* rates of reversible error in capital judgments they review depending on the state of origin of the judgments in question. This

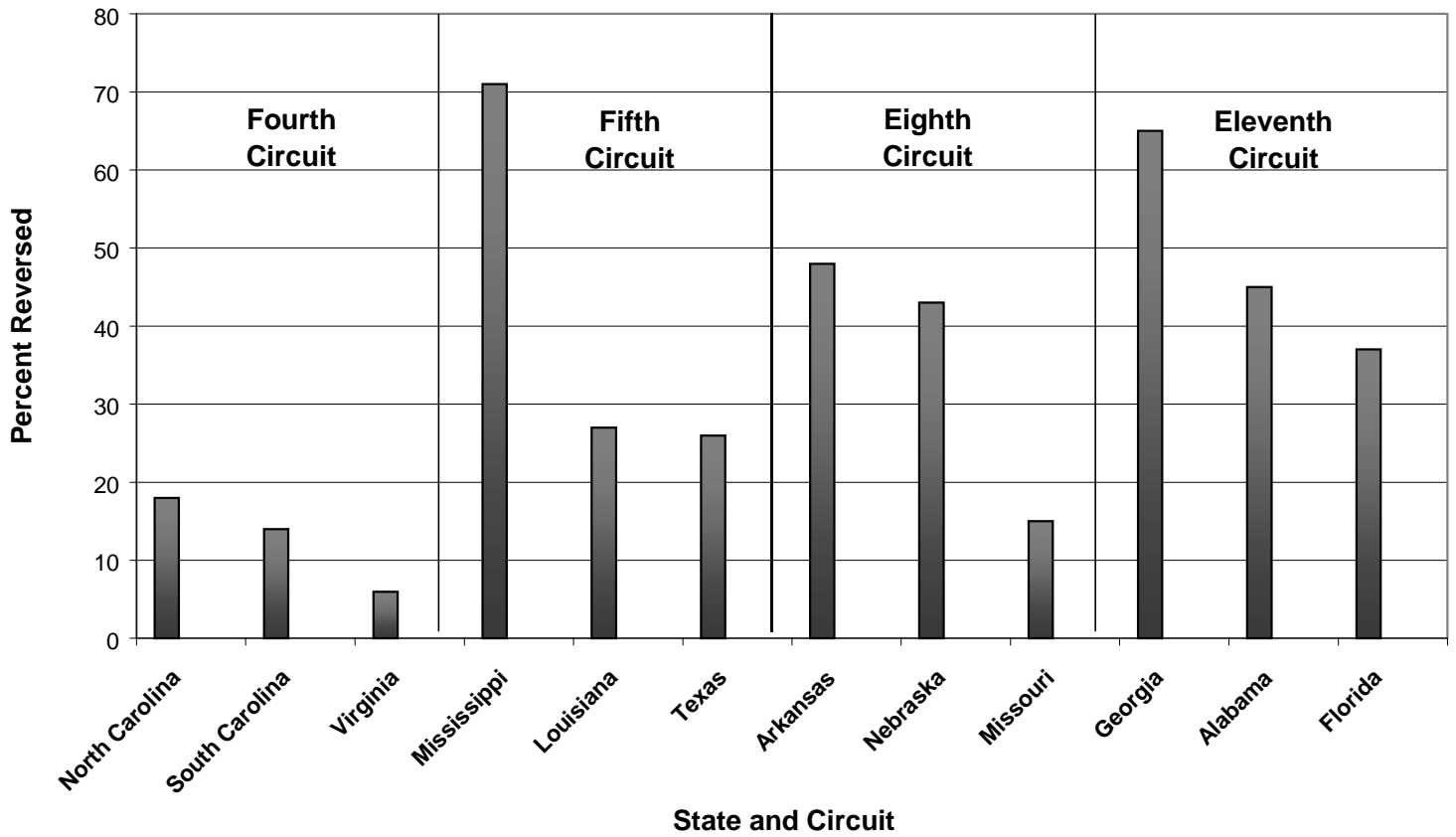
suggests that factors specific to each states' capital judgments have more of an effect of federal judges' behavior in capital habeas cases than the judges' ideological dispositions. Table 8 and Figure 8 below compare the rates of error that 4 federal circuit courts found in capital judgments imposed by states subject to their jurisdiction during the study period.

**Table 8: Error Rates, by Selected States, Found by Federal Circuit Courts on Habeas Review, 1973-1995**

Circuit State	% Capital Judgments Reversed on Habeas
Fourth Circuit North Carolina South Carolina Virginia	18 15 6
Fifth Circuit Mississippi Louisiana Texas	71 27 26
Eighth Circuit Arkansas Nebraska Missouri	48 43 15
Eleventh Circuit Georgia Alabama Florida	65 45 37

Source: HCDB

**Figure 8. Percent of Capital Sentences Reversed on Federal Habeas by State and Circuit, 1973-95**

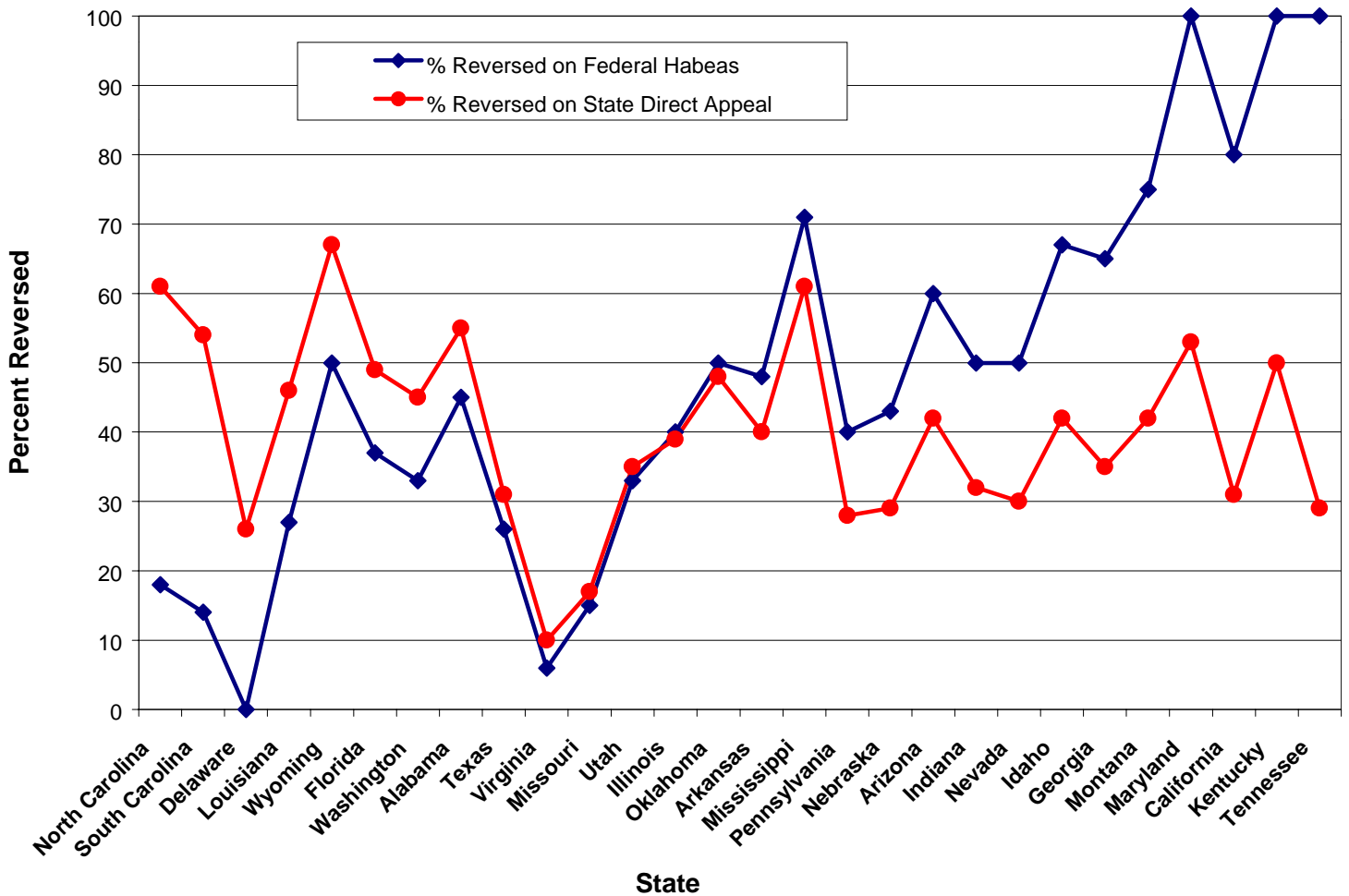


### **E. Rates of Serious Error Found by State Versus Federal Courts**

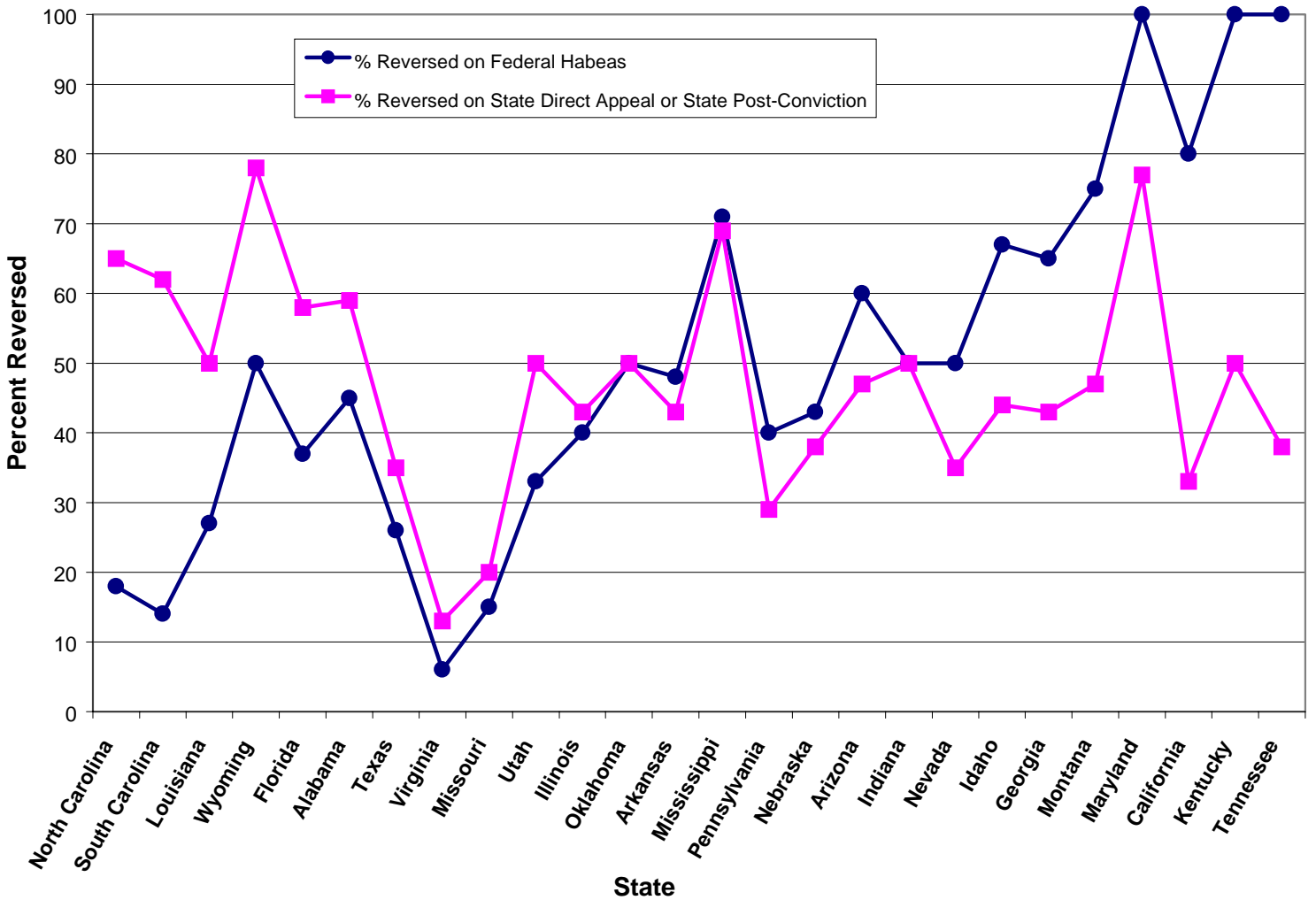
Figures 9 and 10 below compare the rates at which state courts in each of the study jurisdictions found serious error in that state's capital judgments to the corresponding rates for federal courts. Figure 9 compares the rate of serious capital error that was found for each state by its courts on *direct appeal* to that found by federal courts on *habeas review*.<sup>193</sup> Figure 10 makes a similar comparison of the rate of serious capital error found for each state by its courts on *both* state direct appeal *and* state post-conviction review to the corresponding serious-error rate found by federal courts on habeas.<sup>194</sup>

Figures 9 and 10 arrange the states by the extent of the *difference* between the rates of serious capital error found on *state* versus *federal* review. On the left side of each chart are states as to which *state* courts found more serious capital error than federal courts. On the right side are states as to which *federal* courts found more serious error than state courts. In between are states as to which state and federal courts found similar rates of capital error.

**Figure 9. Percent of Capital Judgments Reversed on State Direct Appeal and Federal Habeas, 1973-95**



**Figure 10. Percent of Capital Judgments Reversed on State Direct Appeal or State Post-Conviction and on Federal Habeas, 1973-95**



Especially when we put to one side the (asterisked) states that had too few capital habeas reviews to permit analysis, both charts reveal a strong degree of similarity between the rates of capital-sentencing error detected by state and federal courts in each state (i.e., in how close together the two lines are). More important is the **even stronger degree of similarity between state and federal courts' judgments about the various state's comparative rates of capital-sentencing error** (i.e., in how closely each line's upward and downward ticks as it moves from one state to the next are paralleled by the other line's upward and downward ticks). What Figures 9 and 10<sup>195</sup> thus suggest is that state and federal courts examining the same pools of capital judgments generally find—and react similarly to—the same relative levels of serious capital-sentencing error. In plain English: **Where state courts find comparatively high, low or average rates of error in a particular jurisdiction's capital judgments relative to error rates found elsewhere, so do the federal courts reviewing the same jurisdiction's capital cases.** Figures 9 and 10 thus refute the notion that elected *state* judges as a group react differently to the possibility of error in capital cases from the way that *federal* judges react as a group. In fact **state and federal judges' reactions to capital error** on both these measures of comparative amounts of error<sup>196</sup> **are very much in sync.**

That said, it is interesting to consider the relatively small numbers of states that fall on the left and the right edges of the chart where the state and federal error-detection lines diverge. In doing so, we focus on Figure 10 (the more informative of the two charts<sup>197</sup>) and on the (non-asterisked) states with sufficient numbers of federal habeas cases.

One interpretation of Figure 10 is that the courts of North Carolina, South Carolina, Louisiana, Florida and Alabama—the states on the left side of the chart—are doing the lion’s share of error detection for capital judgments in those states, leaving significantly less error to be detected by the relevant federal courts. Alternatively, the courts of those five states may have increased their level of vigilance to compensate for what they perceive (based, *e.g.*, on past experience and (more probably) on information transmitted by lawyers) to be unusually lax error-detection by the federal courts. This latter interpretation might explain the North and South Carolina courts’ robust error-detection in capital cases. Both states fall within the United States Court of Appeals for the Fourth Circuit, which has by far the lowest capital-error detection rate of any federal judicial circuit in the country.<sup>198</sup>

The corresponding interpretation for Georgia, Montana and California—on the *right* side of the chart—is that federal courts have taken the lead error-detection role as to capital judgments from those states to compensate for low *state* court error-detection.

The hypotheses offered in the preceding two paragraphs present important questions for future research.

We conclude our discussion of Figure 10 by again noting a discrepancy between Virginia and the other states. Unlike almost every other state (Missouri, again, and Texas are in an intermediate category) Virginia’s state-review “square” *and* its federal-review “circle” are *both* located at the very bottom of the chart. In this respect, the Virginia courts may be contrasted to those of the other states in the Fourth Circuit, which are discussed on pp. 51 and 65 above: unlike the courts of the

neighboring states, there is no evidence that Virginia's courts have tried to compensate for very low error detection by the Fourth Circuit. Quite the contrary, Virginia courts have the lowest error-detection rates of the 28 study states. As a consequence of simultaneously low state and federal error detection, the rate of error detected in Virginia capital judgments is both extremely, and unusually, low.

**F. Overall Rates of Serious Error Found on State Direct Appeal, State Post-Conviction, and Federal Habeas Corpus**

Tables 9 and 10, and corresponding Figures 11 and 12, compare the various study states based on their **overall rates of serious capital-sentencing error** (*i.e.*, the rates of serious error found during full state and federal court review<sup>199</sup>). Table 9 and Figure 11 consider only the first (state direct appeal) and third (federal habeas) review stages.<sup>200</sup> A more comprehensive picture is provided by Table 10 and Figure 12, which include, in addition, what we know about the second, state post-conviction stage. For that reason, we display and discuss Table 10 and Figure 12 here. Table 9 and Figure 11 are in Appendix E (pp. E-5 and E-6).

**Table 10: Overall Error Rates, by State, 1973-1995**  
*Including State Post-Conviction*

State	Overall Error Rate, Including State Post-Conviction*
1. Kentucky*	100%
1. Maryland*	100%
1. Tennessee*	100%
4. Mississippi	91%
5. Wyoming*	89%
6. California	87%
6. Montana	87%
8. Idaho	82%
9. Georgia	80%
10. Arizona	79%
11. Alabama	77%
12. Indiana	75%
12. Oklahoma	75%
14. Florida	73%
15. North Carolina	71%
16. Arkansas	70%
17. Nevada	68%
18. South Carolina	67%
18. Utah*	67%
20. Illinois	66%
21. Nebraska	65%
22. Louisiana	64%
23. Pennsylvania	57%
24. Texas	52%
25. Missouri	32%
26. Virginia	18%
Delaware*	unknown
Washington*	unknown

\* States with three or fewer federal habeas cases.

Sources: DADB; Appendix C; DRCen; HCDB

**Figure 12. Combined Error Rate on State Direct Appeal, State Post-Conviction and Federal Habeas, 1973-95**

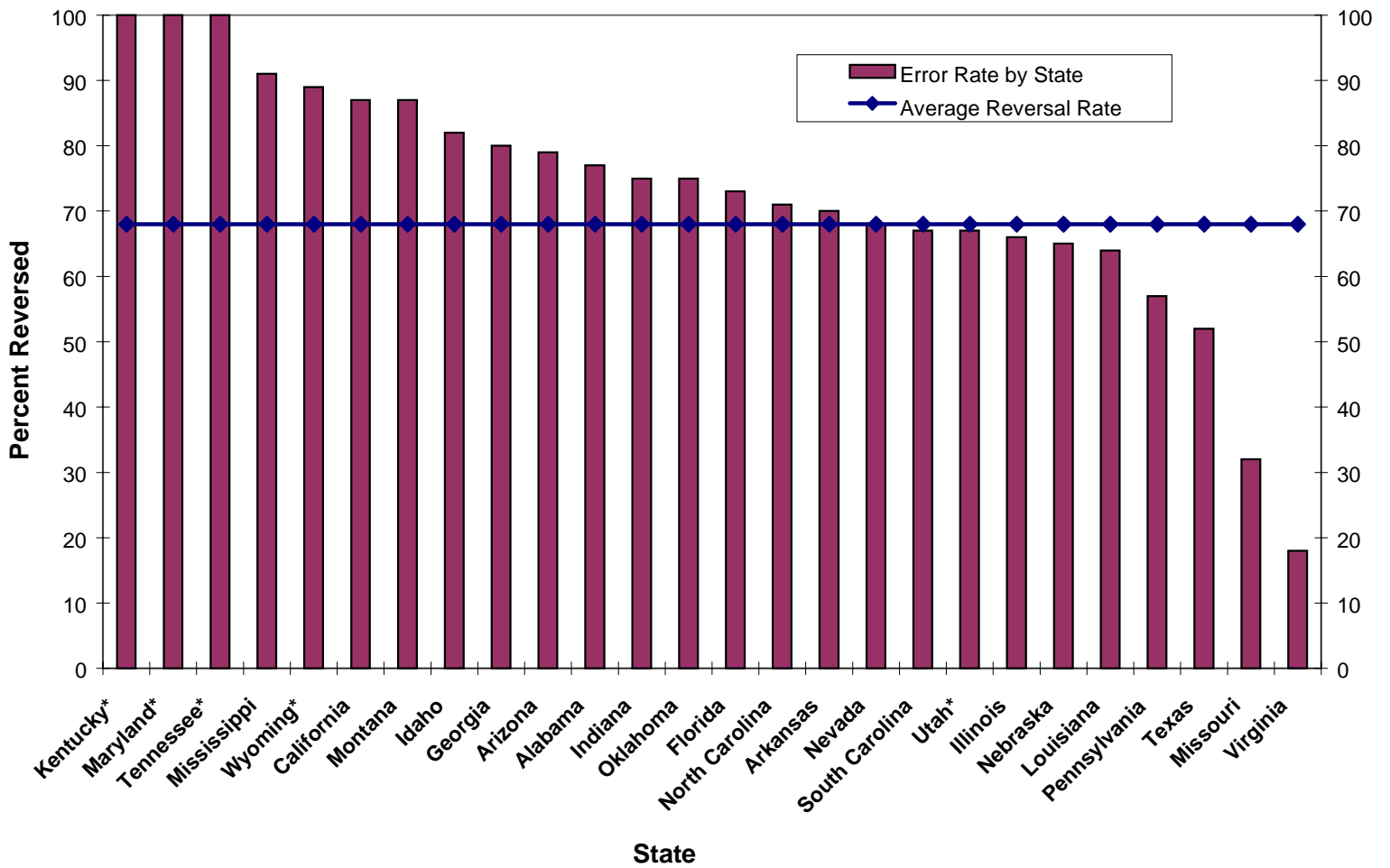


Table 10 and Figure 12 reveal that:

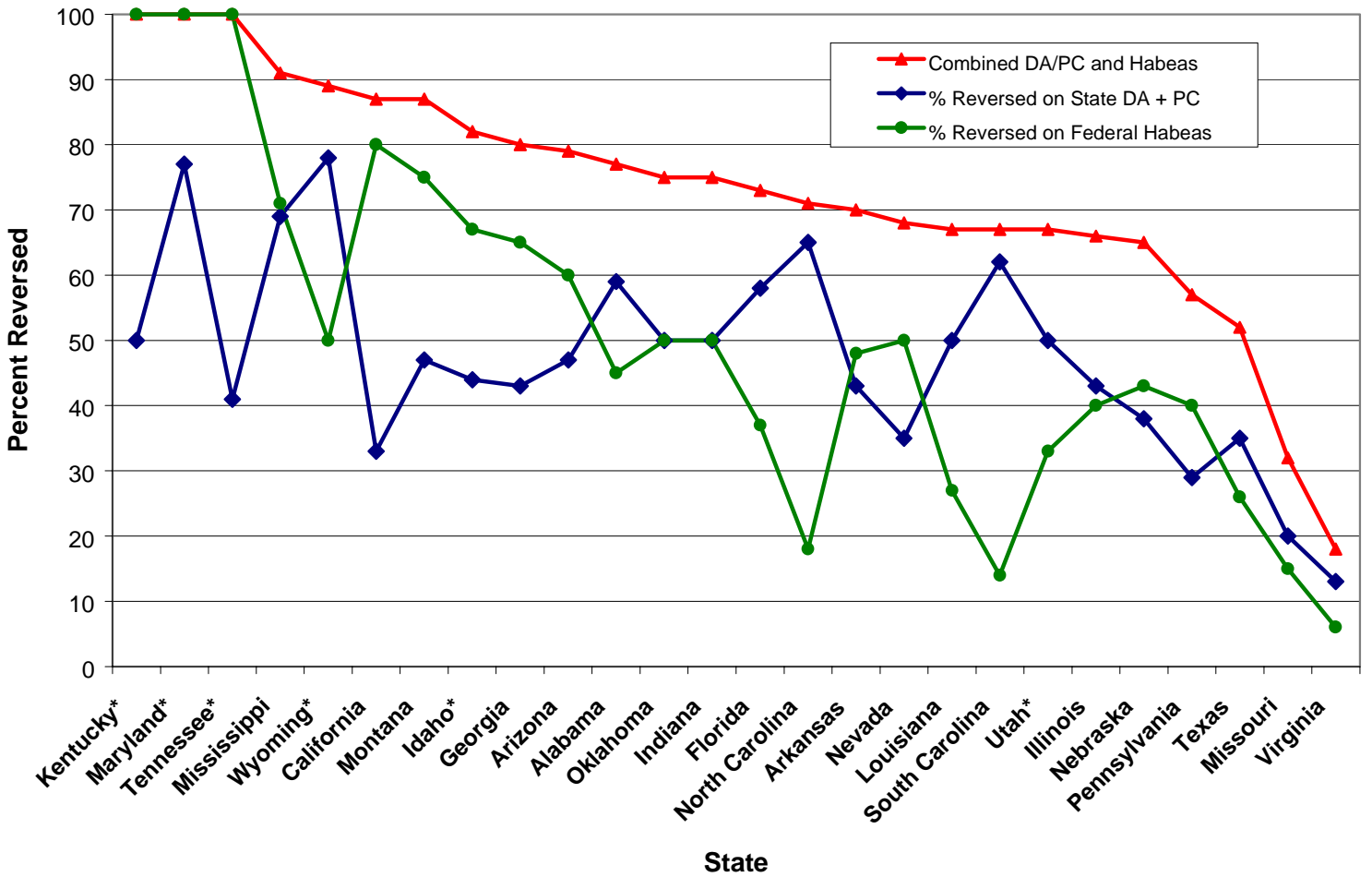
- **For the study states as a whole, the overall rate of serious error was 68%.**<sup>201</sup>
- **Overall error rates vary enormously, from 18% in Virginia to 91% in Mississippi.**<sup>202</sup>
- **All but two states (Virginia and Missouri) had overall error rates of 52% or higher.**  
**All but four states (those two, plus Texas and Pennsylvania) had overall error rates of 64% or higher.**
- Put the other way around, **only two states out of 26 produced capital judgments that passed inspection for serious error more than half the time.**
- **Numerous states, in all sections of the country—including Alabama, Arizona, California, Georgia, Indiana, Mississippi, Montana and Oklahoma—had error rates of three-quarters or more, with Mississippi's being more than 9 out of 10 (a success rate of less than 1 in 10).**
- As noted above, the Governor of Illinois cited evidence of high rates of serious error in Illinois capital judgments, and particularly a spate of exonerations of innocent men released from death row, as the reason for declaring a moratorium on executions there.<sup>203</sup> This prompted other policymakers, including the Governors of Florida and Texas, to suggest that actions in Illinois are not relevant elsewhere, because high error rates are unique to Illinois.<sup>204</sup>  
**In fact, the rate of error detected by state and federal courts in Illinois capital sentences, 66%—while high in absolute terms—is not at all unique. On the contrary, the Illinois error rate is very close to, and a bit *lower than*, the national average of 68%.**

- As one would expect from our previous discussion, and as Figure 12 demonstrates, Virginia is a distinct outlier here, falling almost literally “off the charts” on the low side of error detection. Virginia’s overall rate of detected error is barely half that of the next closest state (Missouri, which itself is much lower than all the other states), and barely a quarter the national rate. In technical terms, Virginia’s overall-error detection rate is nearly 3 standard deviations below the mean (2.88).

Figure 13 below plots (1) the combined state direct appeal and state post-conviction reversal rates, (2) the federal habeas reversal rate, and (3) the overall error rate that is a composite of the other two.<sup>205</sup> Figure 13 illustrates three points that (for the most part) we have discussed above:

- **High overall error rates across most states.**
- **Similar state and federal patterns of error detection in most states**, with some exceptions where high state court error detection compensates for low federal court error detection (*e.g.*, North and South Carolina state courts compensating for the federal Fourth Circuit), and *vice versa* (*e.g.*, the federal Ninth and Eleventh Circuits compensating for low state court error detection in California and Georgia, respectively).
- Virginia’s outlier status.

**Figure 13. Overall Error Rate (Including State Post-Conviction) and Reversal Rate by Type of Review, 1973-95**



### **G. Length of Time of Review**

The multiple inspections needed to detect all this error take time—a 23-year average of about 9 years if the outcome is execution (with that figure rising to 10.6 years in the latter third of the study period), and 7.6 years if the outcome is reversal on habeas corpus.<sup>206</sup> Figures 14-16 below provide a variety of perspectives on the length of time required to cleanse capital judgments of chronically high rates of error.

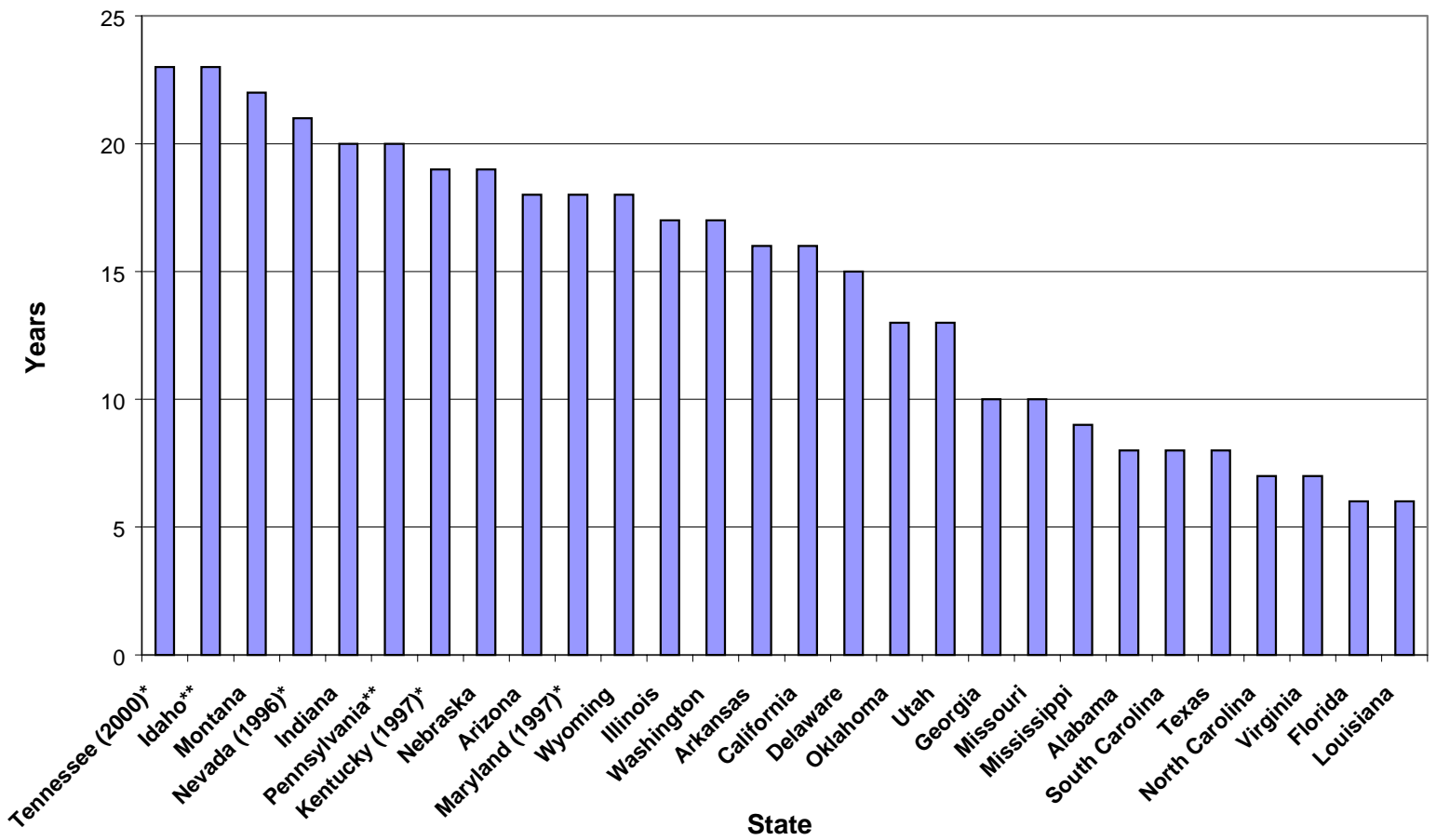
Figure 14<sup>207</sup> below compares states on the basis of how many years elapsed between each state's first death sentence and its first non-consensual<sup>208</sup> execution (not necessarily in the same case):

- **In 16 (57%) of the 28 study states, it took (or will take<sup>209</sup>) 15 or more years to get from the state's first death sentence to its first execution following full review.**
- **In 71% of the states it took 10 or more years.**

Figure 15<sup>210</sup> compares the 23 study states in which at least one execution (consensual or non-consensual) took place between 1973 and 1995 based on the amount of time that elapsed, on average, between the same prisoner's death sentence and execution. Subject to missing data, and the fact that the table counts consensual executions, which causes it to understate the time needed for full review,<sup>211</sup> Figure 15 reveals that:

- **In the vast majority of states, executions took place on average 7 or more years after death sentences during the study period.**
- **In over two-thirds of the states, executions took place an average of 9 or more years after the death sentence was imposed.**

**Figure 14. Years from First Death Sentence to First Nonconsensual Execution, 1973-2000**



**Figure 15. Average Years from Death Sentence to Execution, 1973-95**

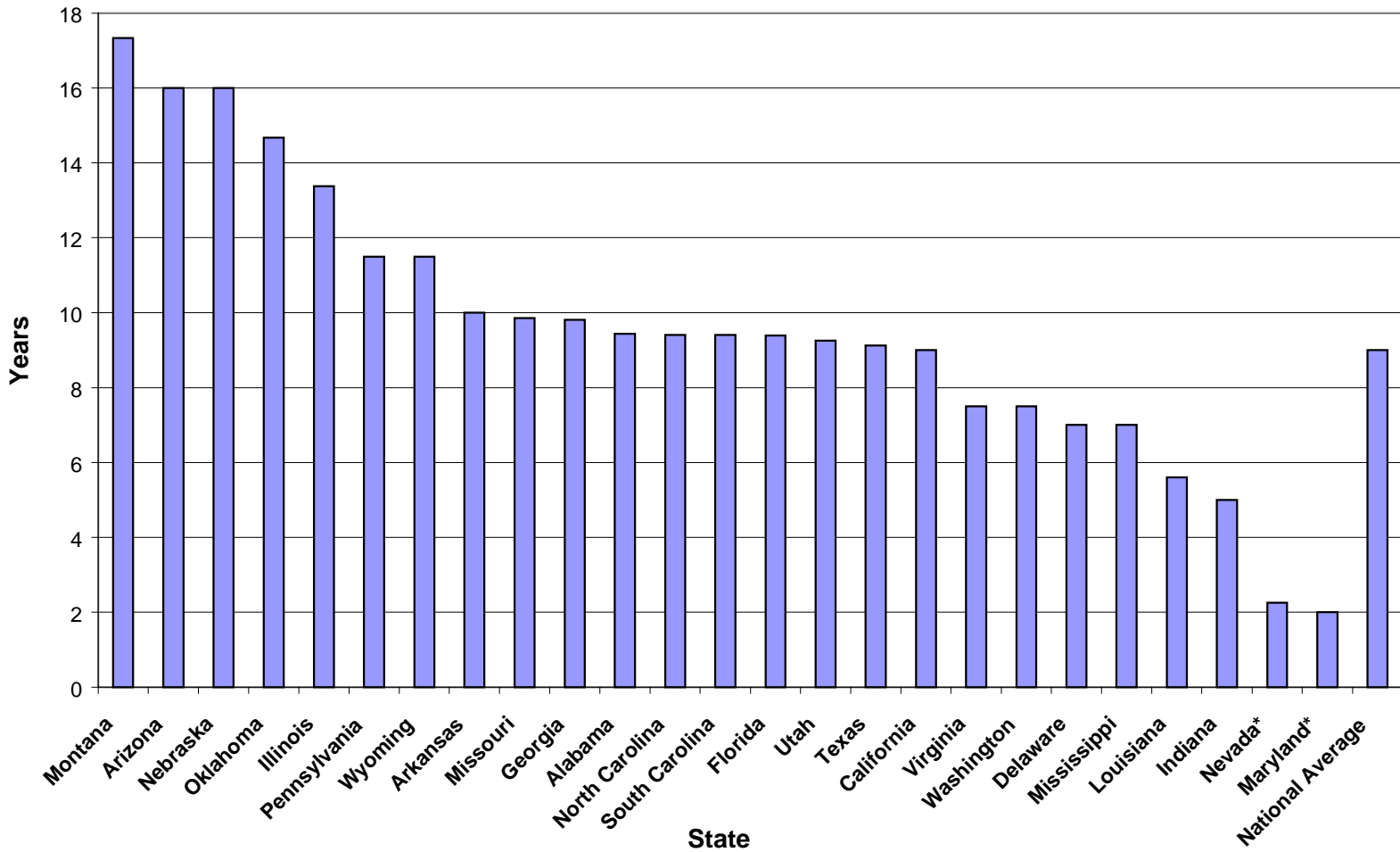
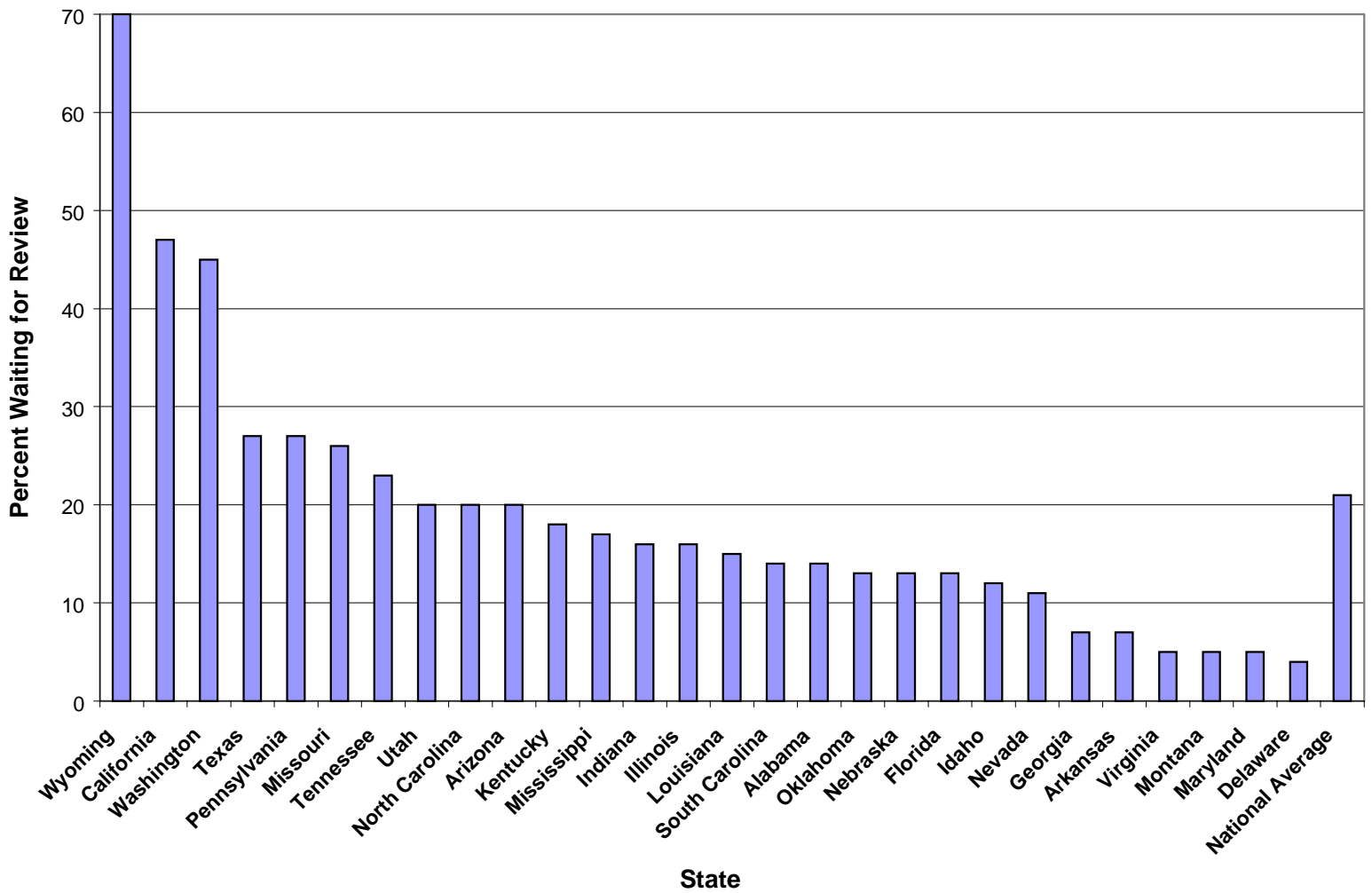


Figure 16<sup>212</sup> below compares states based on the proportion of their 1973-1995 death sentences that were awaiting direct review in 1995. As is discussed above, this comparison provides a rough measure of the extent to which state direct appeal is a bottleneck in the inspection process.<sup>213</sup> Nationally, 21% of capital sentences imposed between 1973 and 1995—about 5-years-worth of death sentences—were awaiting direct appeal in 1995:

- In over a third of the 28 states, 20% or more of all post-*Furman* death sentences were backed up at the state direct appeal stage 23 years after *Furman*.
- In three of the nations most prolific capital-sentencing states, Texas, Pennsylvania and California, the 1995 log-jam of cases awaiting state direct appeal contained (respectively) 27%, 27% and 47% of the state's post-1972 cases. In Washington and Wyoming, the 1995 logjam contained 45 and 70% of the post-*Furman* cases.
- Of note, although the federal Ninth Circuit Court of Appeals is sometimes blamed for holding up executions in the states within its jurisdiction, the three states in that circuit with the largest death rows—California, Arizona and Washington—were all in the top cohort of states as of 1995 in terms of the proportion of cases bottled up in the *state* courts awaiting direct appeal.

**Figure 16. Percentage of 1973-95 Death Sentences  
Awaiting Direct Review as of 1995**

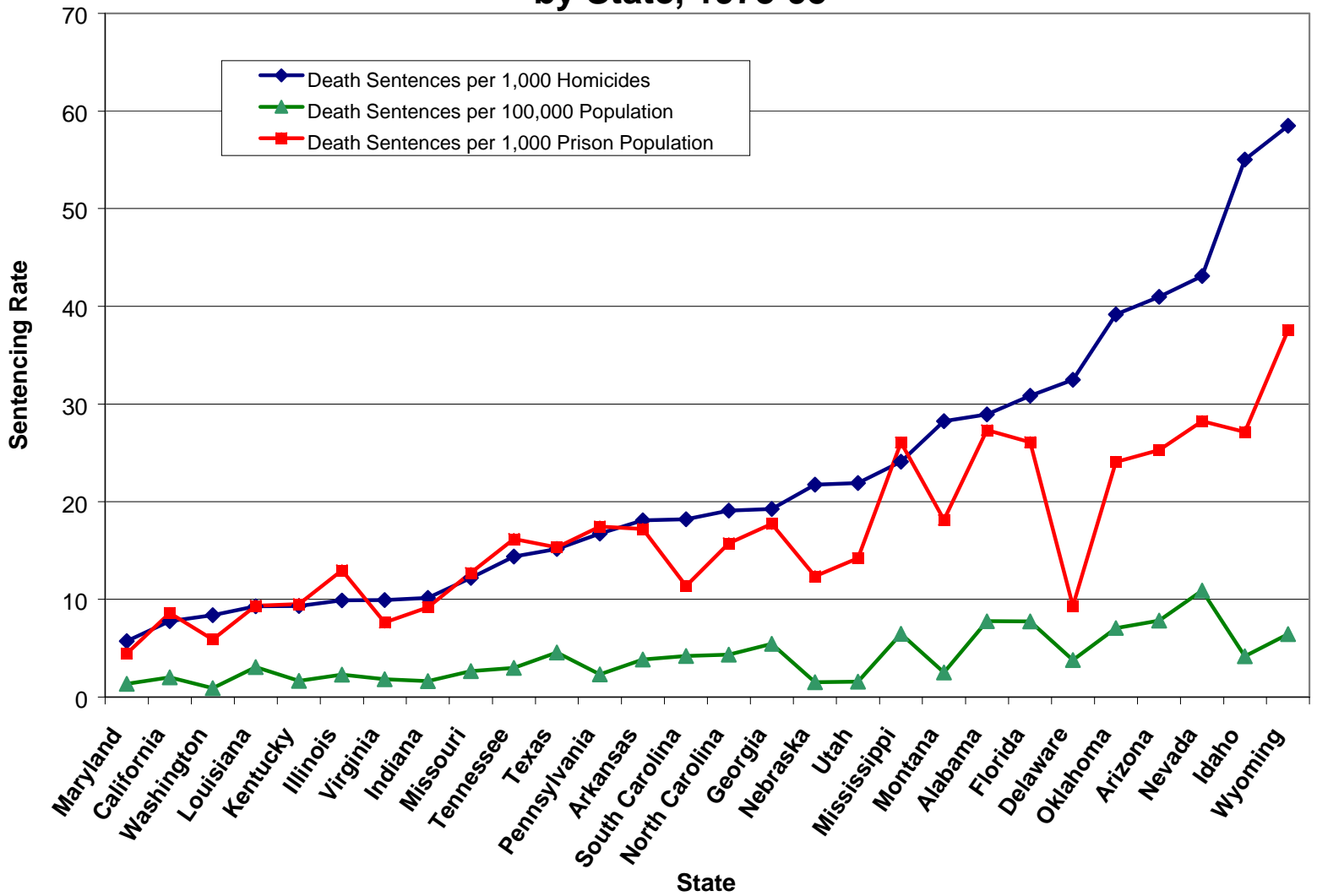


## H. Capital-Sentencing and Execution Rates, and the Two Compared

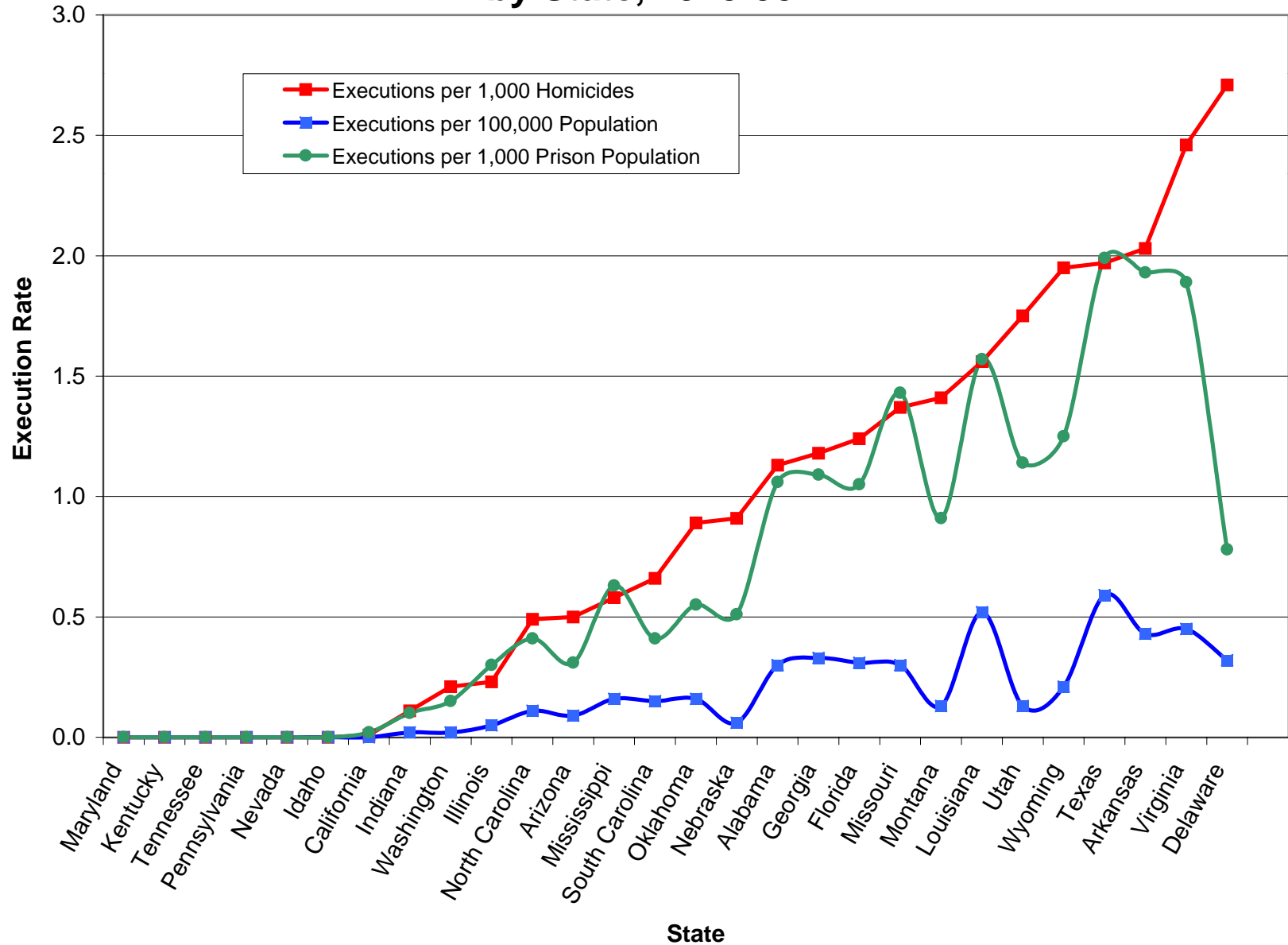
This section compares states to each other based on (1) how many death sentences they impose “per capita” and (2) how many executions they carry out “per capita.” We use three different per capita measures—sentences and executions per 1,000 homicides, per 100,000 population, and per 1,000 prison population.<sup>214</sup> The middle measure is particularly interesting, given the expectation that the number of death sentences each jurisdiction imposes and carries out would be responsive to the number of homicides committed there. This section also asks whether, as one would expect, states that undertake to capitally *sentence* more offenders per capita than other states also *execute* more people per capita.

Figure 17 below compares states based on their *death sentencing* rates per 1,000 homicides, per 100,000 population and per 1,000 prisoners. Figure 18 below compares states based on their *non-consensual execution* rates per the same three populations.

**Figure 17. Per Capita Death Sentencing Rates  
by State, 1973-95**



**Figure 18. Per Capita Non-Consensual Executions  
by State, 1973-95**

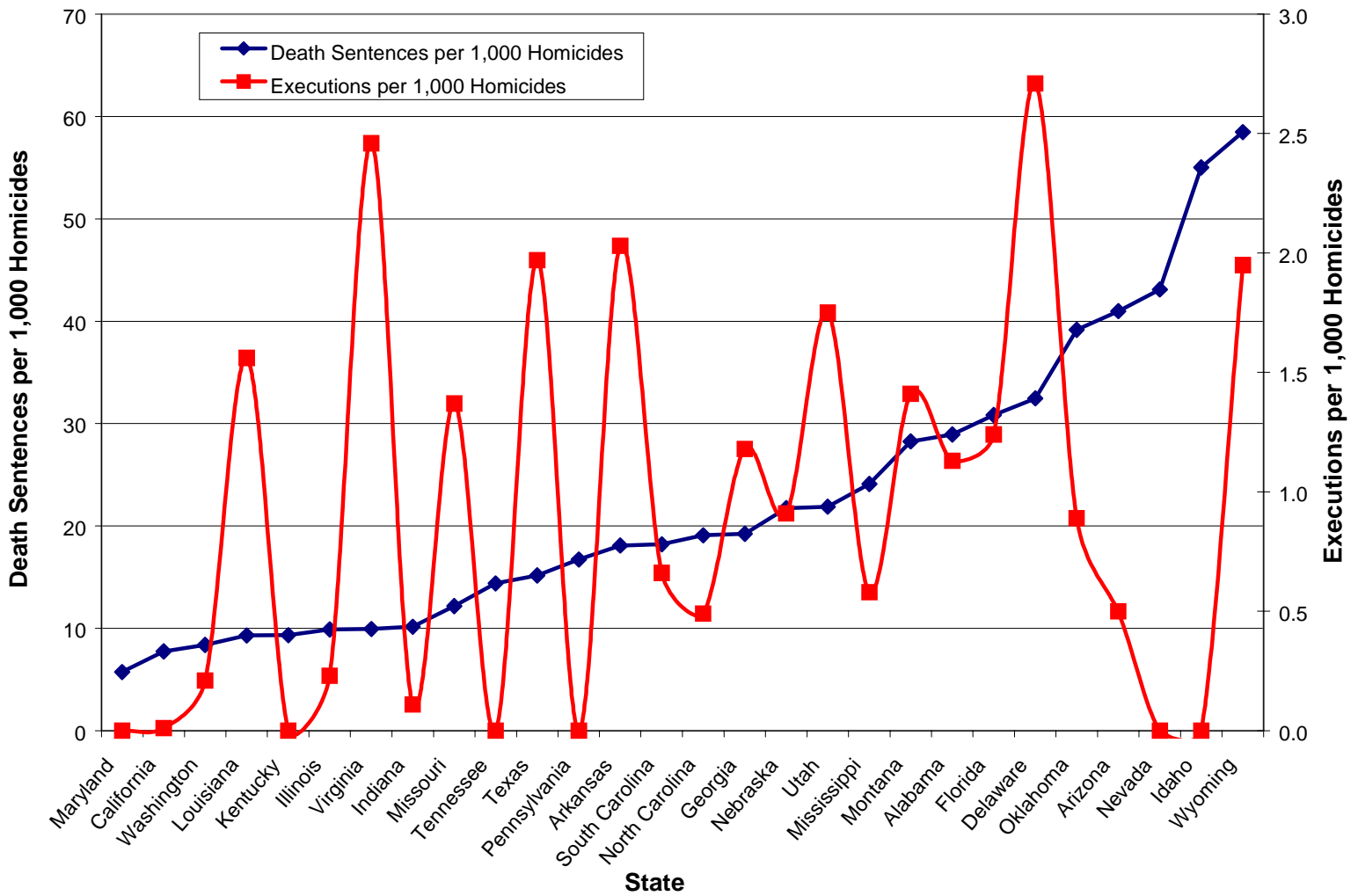


Figures 17 and 18 reveal huge variations among states in both their death-sentencing rates and their execution rates measured per homicides and per population:<sup>215</sup>

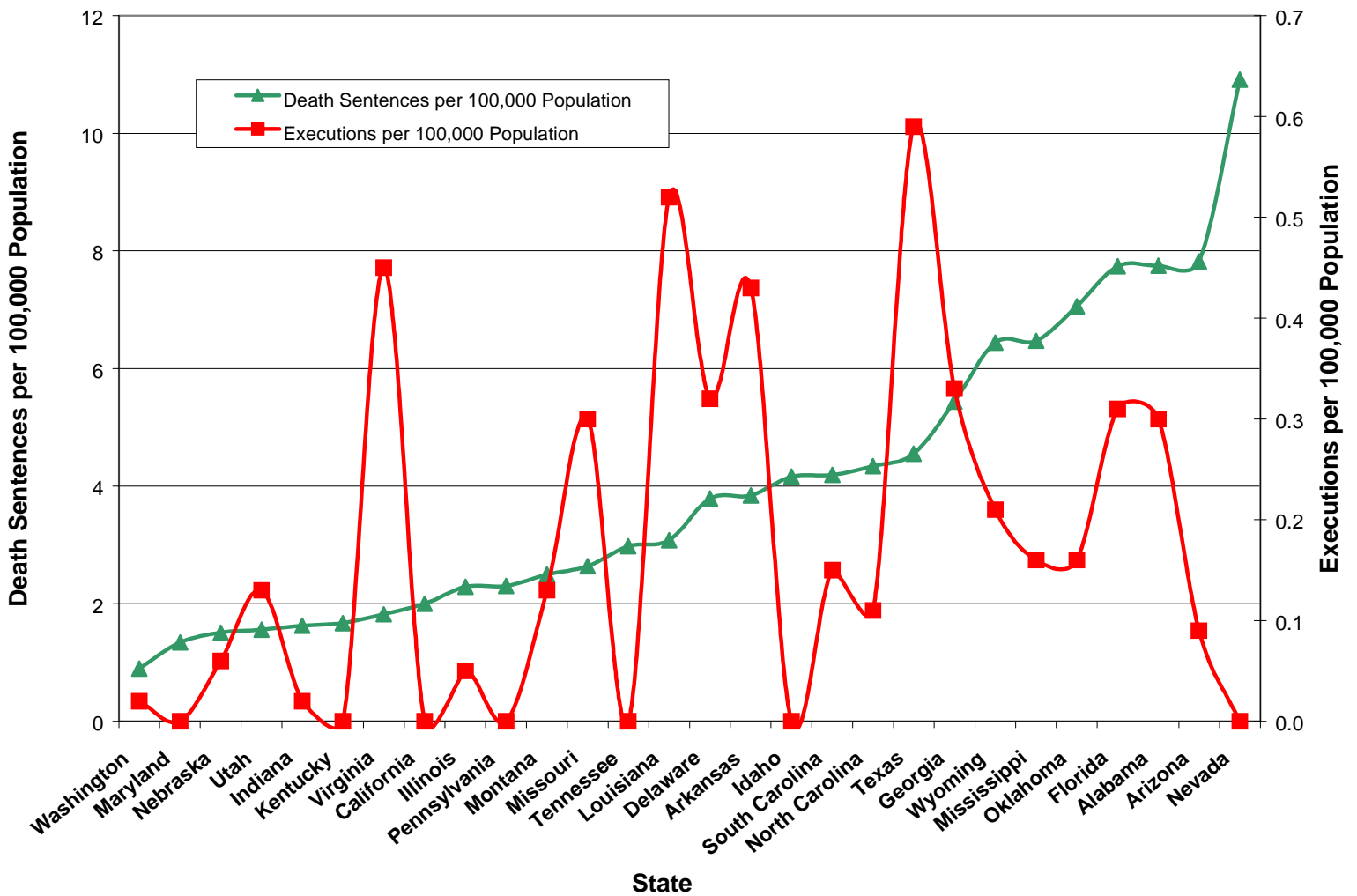
- Measured against both populations, **some death-sentencing states have death-sentencing rates that are 10 times those in other death sentencing states.**
- In Wyoming, for example, nearly 6% of all homicides result in a death sentence—over four times the national average for death-sentencing states. In Maryland, less than six-tenths of 1% of homicides lead to a death sentence.
- Nevada condemns nearly 11 people out of every 100,000—about three times the national average for death-sentencing states. Washington State does so to less than 1 person out of every 100,000.
- Similar disparities characterize the execution rates in the various death-sentencing jurisdictions.
- The disparities among states in death sentences and executions per 1,000 homicides are particularly interesting, revealing the absence of what one would expect to be a consistent relationship between homicides and capital punishment.

Figures 19-21 below consider whether high (or low) death-sentencing rates (per homicide, per population or per prisoners) translate, as one would expect, into high (or low) execution rates.

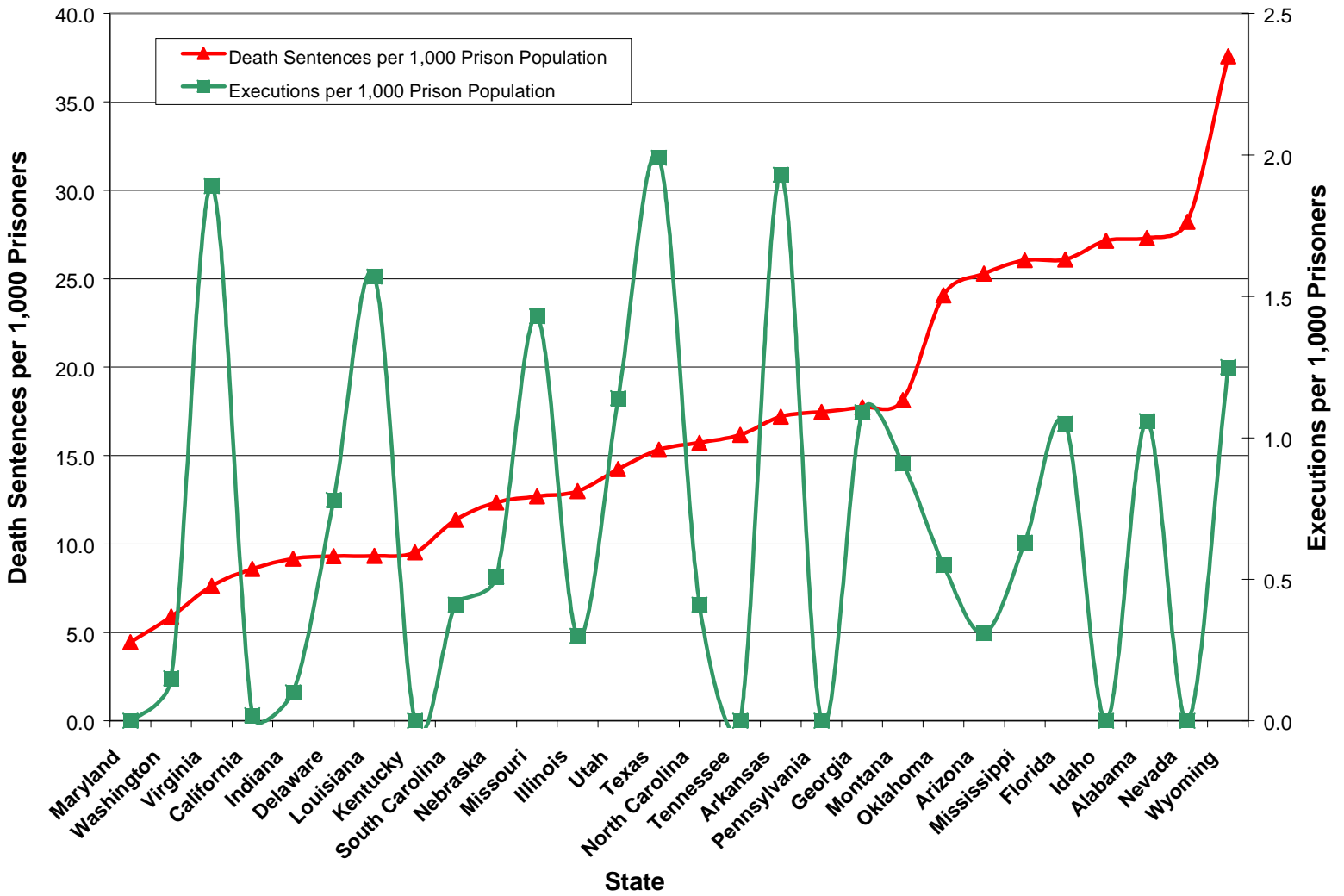
**Figure 19. Death Sentences and Executions  
per 1,000 Homicides by State, 1973-95**



**Figure 20. Death Sentences and Executions per 100,000 Population by State, 1973-95**



**Figure 21. Death Sentences and Executions  
per 1,000 Prisoners, 1973-95**



Judging from figures 19-21, **there is no relationship between death-sentencing and execution rates**. When states are arranged in order of their death sentences per capita, the line representing their executions per capita fluctuates wildly and randomly:

- Idaho, Nevada, Arizona and Oklahoma rank **2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 6<sup>th</sup>** (and range from 3 to 4 times the national average) when it comes to how often homicides result in death sentences. Those same states, however, are **tied for 23<sup>rd</sup>, tied for 24<sup>th</sup>, 17<sup>th</sup>, and 14<sup>th</sup>** among 28 states (near or well below the national average) when it comes to how often homicides result in execution.
- On the other hand, Texas, Virginia and Louisiana rank **18<sup>th</sup>, 22<sup>nd</sup>, and 25<sup>th</sup>** in death sentences per homicide (ranging from slightly above, down to two-thirds, the national average) but **4<sup>th</sup>, 2d, and 7<sup>th</sup>** in executions per homicide (ranging from over twice to nearly four times the national average).<sup>216</sup> Thus, the three states most associated in the public's mind with executions— Louisiana, which was the nation's execution capital in the late 1980s,<sup>217</sup> and Texas and Virginia which claimed that distinction in the 1990s<sup>218</sup>—did not attain that status by *sentencing* disproportionately large numbers of people to death row. Instead, they have done so by translating *below-average* death-sentencing rates into above-average execution rates.

Figure 22 below asks a related question: Are states that are most likely to punish homicides with death also most likely to translate death sentences into executions?

**Figure 22. Per Capita Death Sentences and Percent Death Sentences Carried Out, 1973-95**

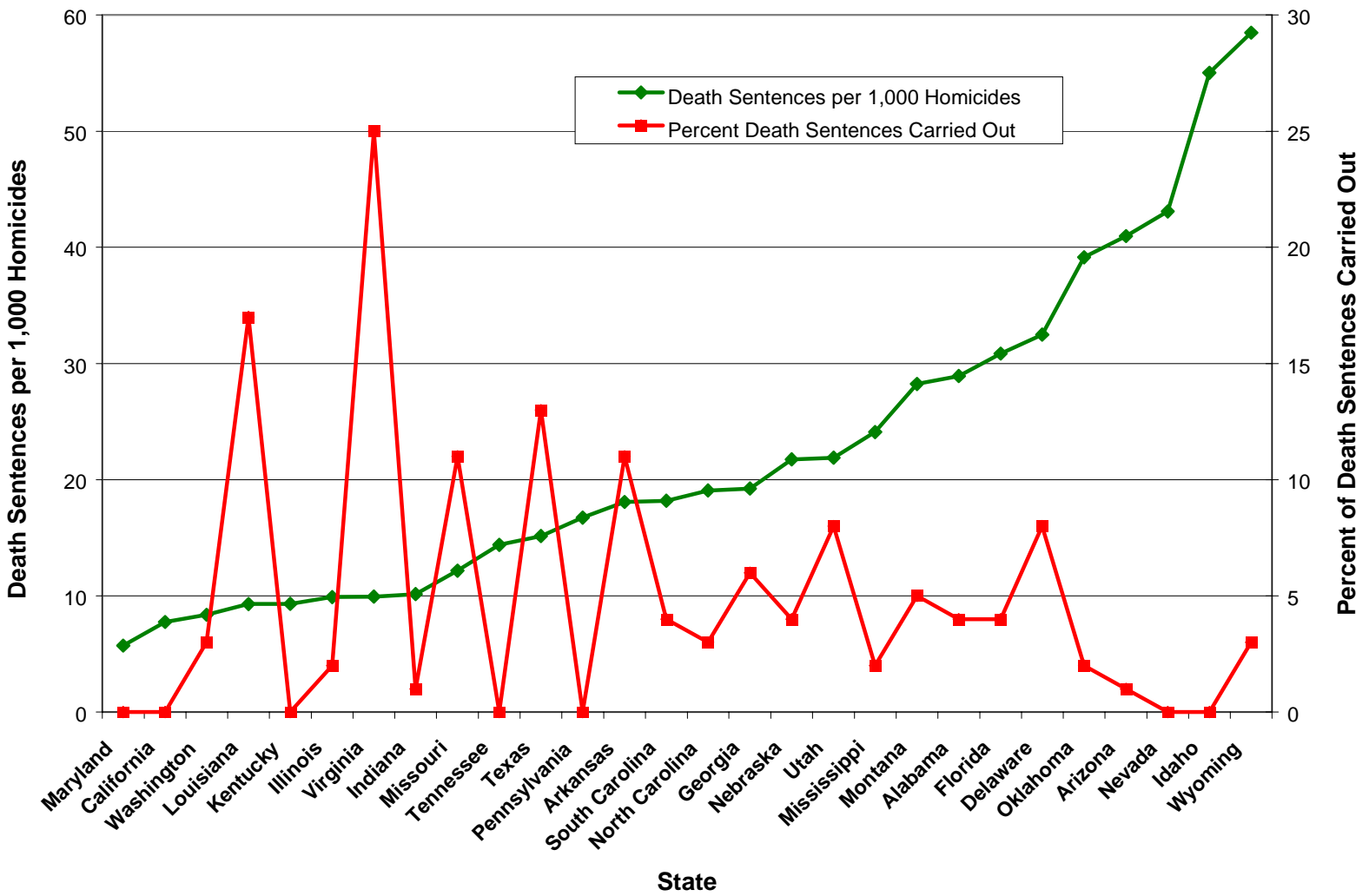


Figure 22 reveals no relationship between death sentencing and execution rates. Indeed, for nearly half the states—Louisiana, Virginia, Missouri, and Texas (with comparatively low death-sentencing but high death-sentences-carried-out rates) and Wyoming, Idaho, Nevada, Arizona, Oklahoma, Florida, Alabama, and Mississippi (with comparatively high death sentencing rates but low death-sentences-carried-out rates), the relationship is the inverse: the more frequently states sentence killers to die, the less frequently they execute them, and vice versa.

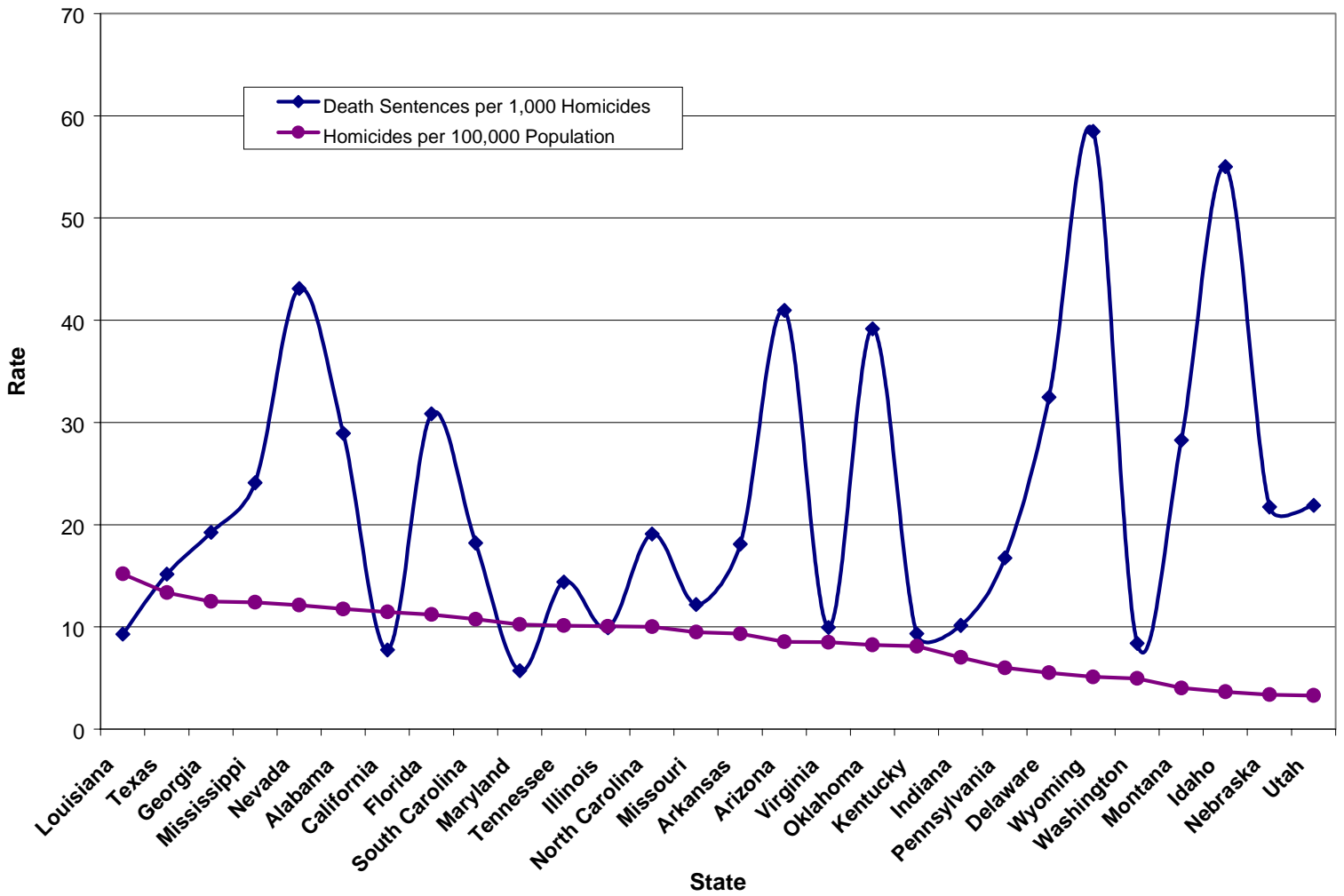
Overall, therefore, it seems clear that a powerful disposition to sentence offenders to die does *not* go hand in hand with a strong capacity to carry out the death sentences that are imposed. Figuring out why this is so is a question we will address in a subsequent report. Our analysis so far, however, suggests one place to look for the source of the discrepancy: the disturbingly high rates of capital-sentencing error that we document above.

### **I. Demographic Factors**

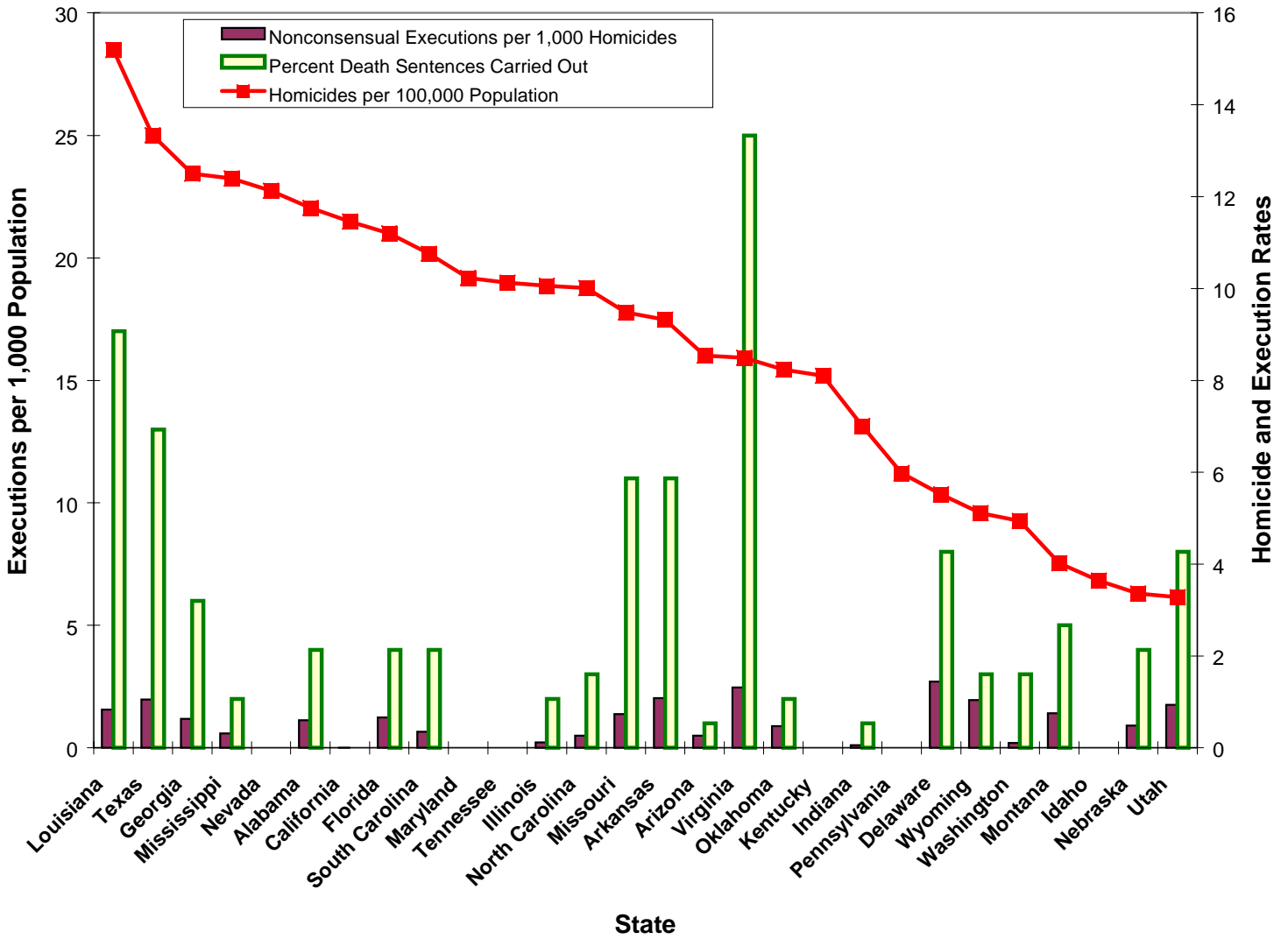
This section considers two other possible explanations for the frequency with which states sentence individuals to die, and the frequency with which they carry out the capital sentences they impose. The first is violent crime—measured by each state’s homicide rate per 100,000 population.<sup>219</sup> The second is race—based on the proportion of each state’s population that is non-white.<sup>220</sup>

Figures 23 and 24 below consider the relationship between homicide rates per 100,000 population and, respectively, capital-sentencing and execution rates.

**Figure 23. Death Sentencing Rates Per 1,000 Homicides and Per Capita Homicide Rates, 1973-95**



**Figure 24. Execution Rate and Homicide Rate, 1973-95**



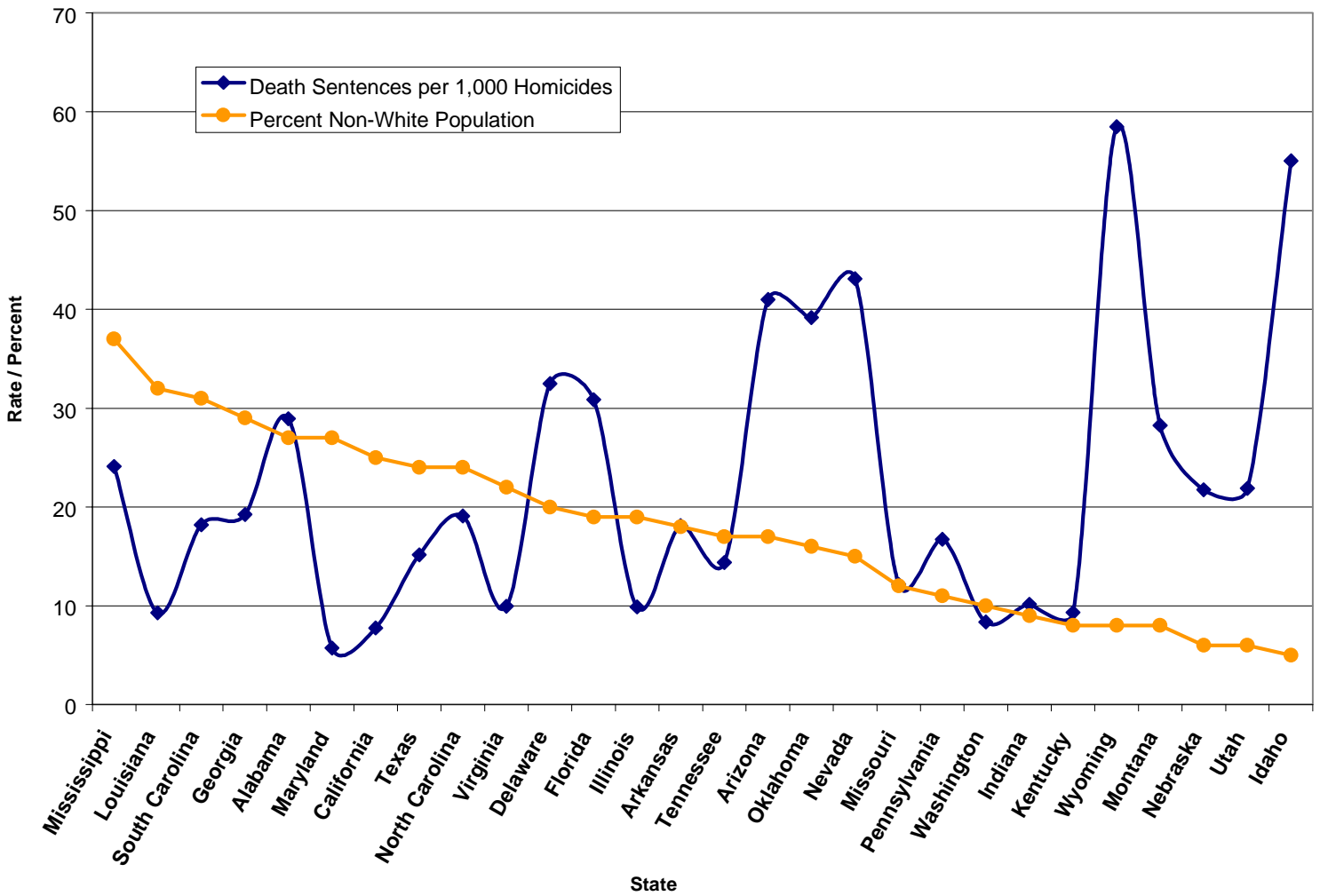
If there is any relationship at all between homicide and capital-sentencing rates (a matter requiring more sophisticated analysis), Figure 23 suggests that it is weak and inverse. Figure 24 asks whether variations in rates of serious crime, as measured by homicides per 100,000 population, can explain variations in execution rates, or vice versa. Figure 24's decisive answer is that there is *no* such relationship between a state's serious crime rate and its willingness or capacity to execute its citizens.

Turning to the issue of race, Figure 25 below compares capital-sentencing states' relative death-sentencing rates (per 1,000 homicide) to their percent nonwhite population.

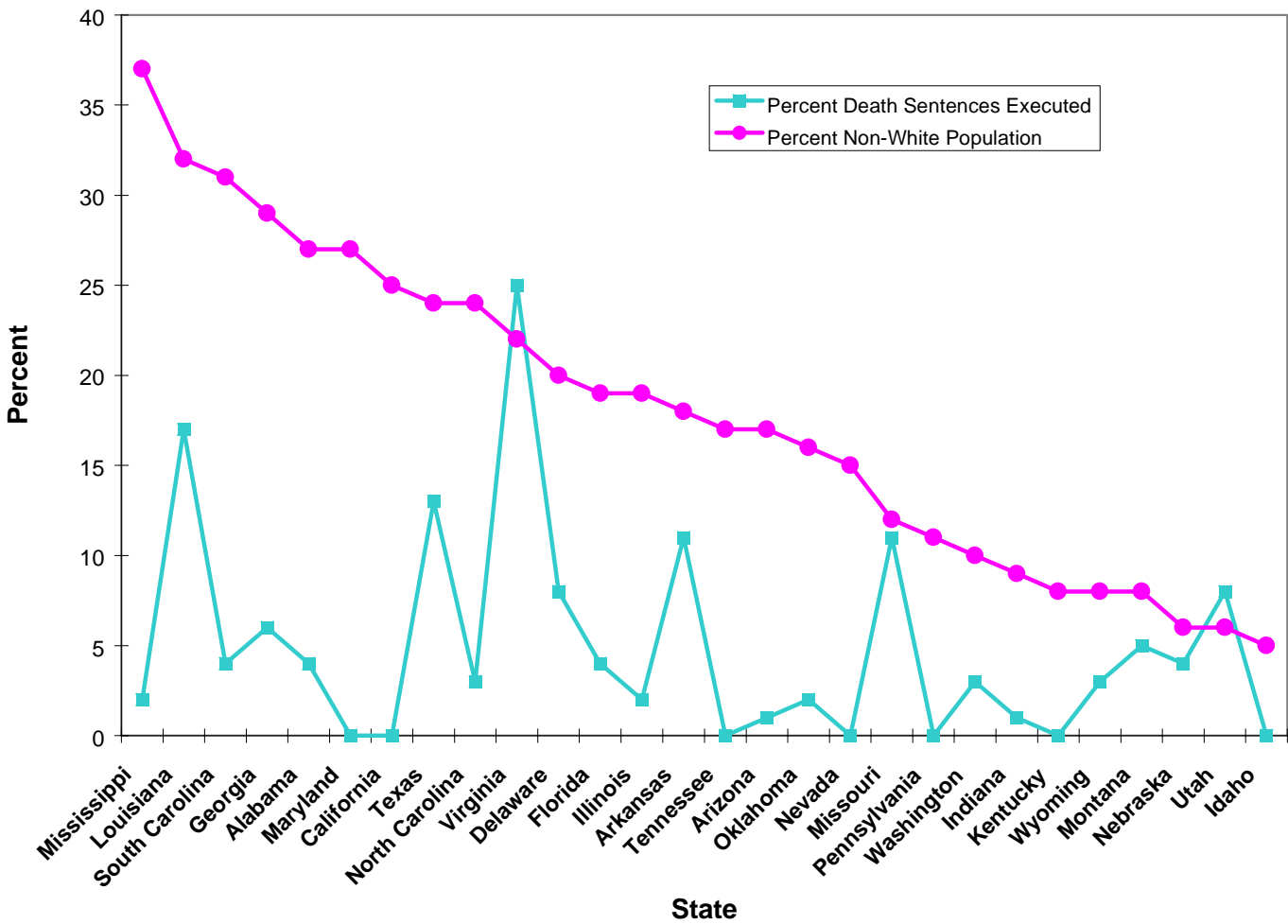
Surprisingly, perhaps, this chart suggests that proportionately larger minority populations are associated with somewhat lower death-sentencing rates, and vice versa. Figure 25 also reveals the sharp variation among capital-sentencing states in terms of the proportion of their populations that are nonwhite, ranging from 5% in Idaho (which, incidently, has a very high death sentencing rate per homicide) to 37% in Mississippi (where the death-sentencing rate per homicide is relatively low).

Figure 26 below considers whether race influences *execution*, as opposed to *death-sentencing*, rates. Here, the relationship is weaker than in Figure 25, and runs in the opposite direction: Although states with larger proportions of racial minorities tend to capitally sentence less often than states with proportionately smaller minority populations, those same states tend to carry out relatively *more* of the death sentences they impose.

**Figure 25. Per Capita Death Sentencing Rate  
and Percent Non-White Population**



**Figure 26. Percent of Death Sentences Carried Out and Non-White Population**

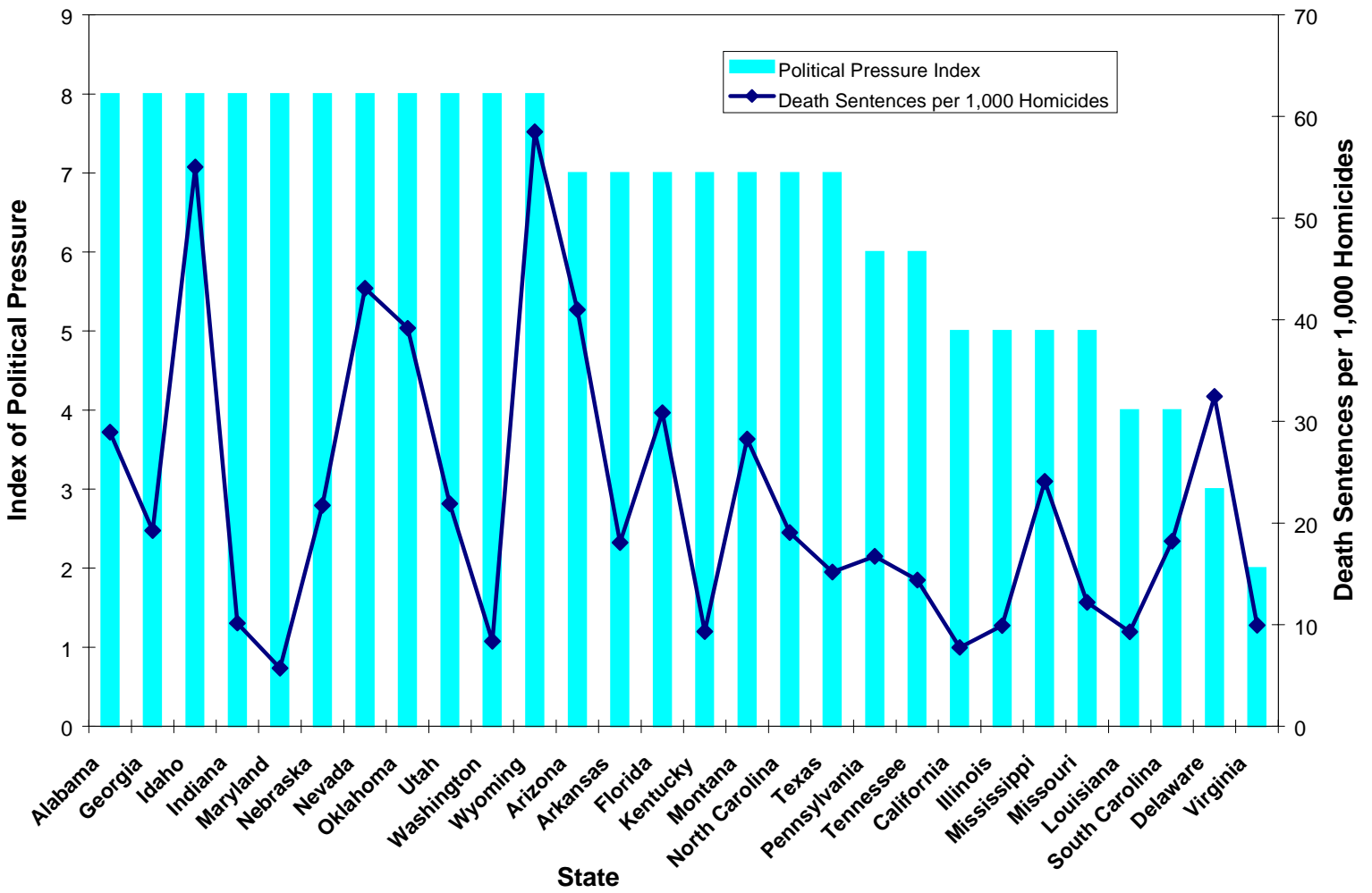


## **J. Court Factors**

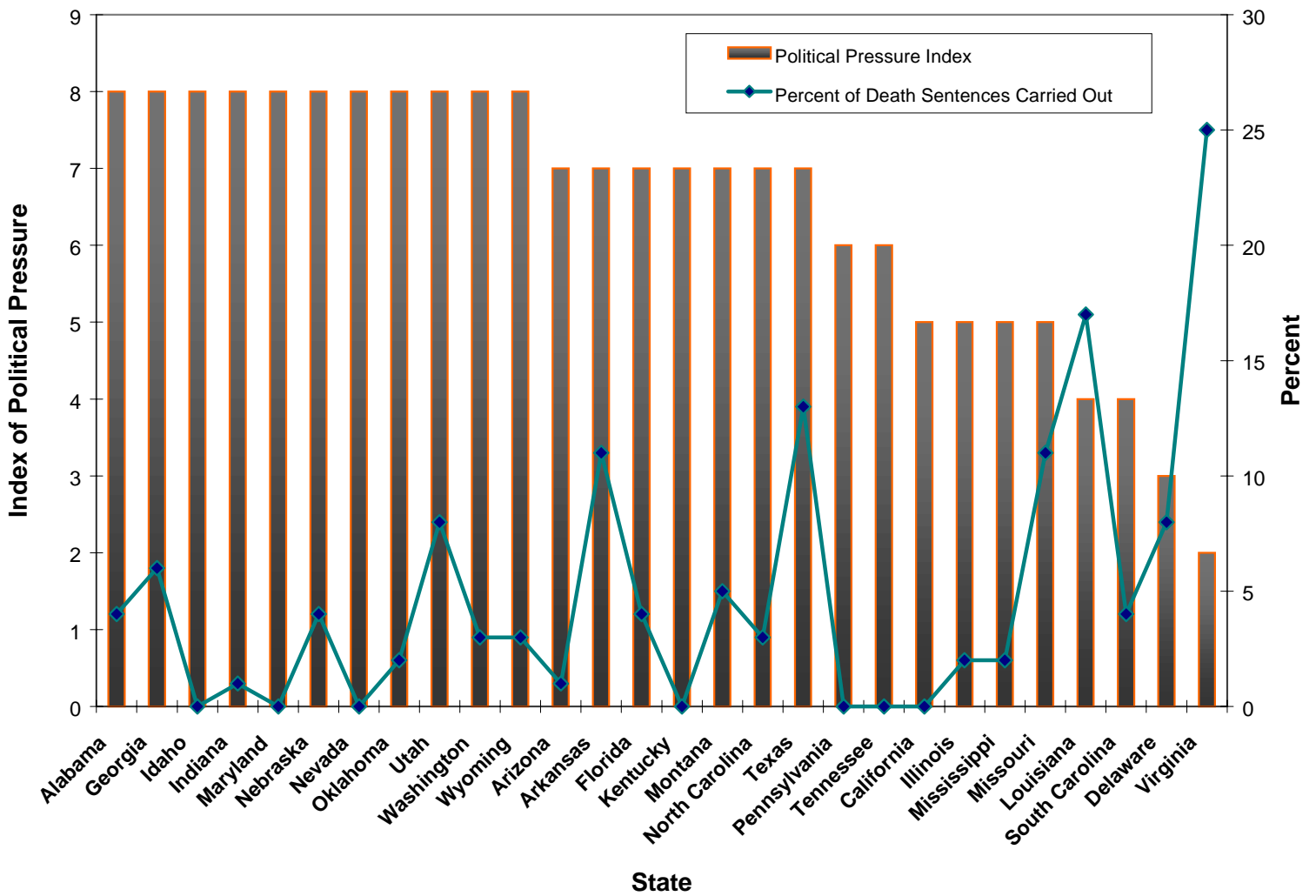
Here, we consider whether differences among states' judicial systems account for the marked variability in their capital-case error rates, death-sentencing rates, and execution rates. Relevant, reliable, and comparable state-court contextual data are difficult to obtain. For purposes of this initial report, we have developed three comparative measures: "political pressure" (the extent to which state sentencing and appellate judges are subject to electoral discipline for actions they take as judges<sup>221</sup>), judicial workloads (which we measure by comparing the various states' criminal court caseloads per 1,000 persons during the relevant period) and judicial resources (comparing the dollars the respective states spent on their courts per capita during the relevant period).<sup>222</sup> The details of each of these measures are described at pp. 44-45 above.<sup>223</sup>

Figure 27 and Figure 28 below consider the impact of political pressure on, respectively, death-sentencing and execution (more specifically, death-sentences-carried-out) rates. Because error rates and the rates at which death sentences are carried out are so highly correlated (*see* Figure 1, *supra* p. 11), the latter chart is also a rough measure of the relationship between political pressure and capital error rates.

**Figure 27. Political Pressure and  
Death Sentencing Rate, 1973-95**



**Figure 28. Political Pressure and Percent of Death Sentences Carried Out, 1973-95**

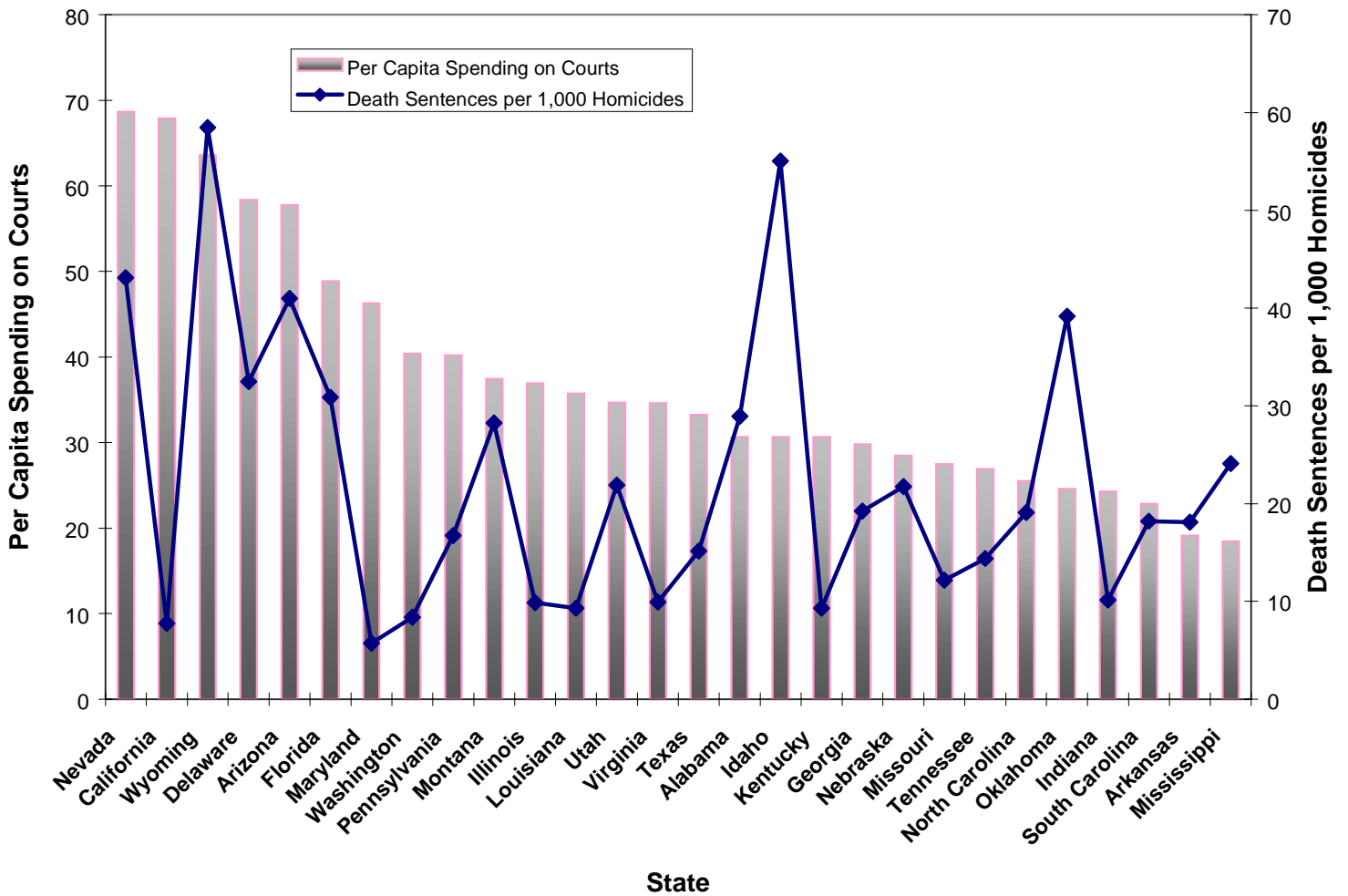


Figures 27 and 28 reveal a curious and potentially significant pattern: In general, the more electoral pressure a state's judges are under, the *higher* the state's death-sentencing rate, but the *lower* the rate at which it carries out its death sentences. Assuming a causal relationship, this suggests that political pressure tends to *impel* judges—or to create an environment in which prosecutors and jurors are impelled—to *impose* death sentences, but then tends to *interfere* with the state's capacity to carry out the death sentences that are imposed.

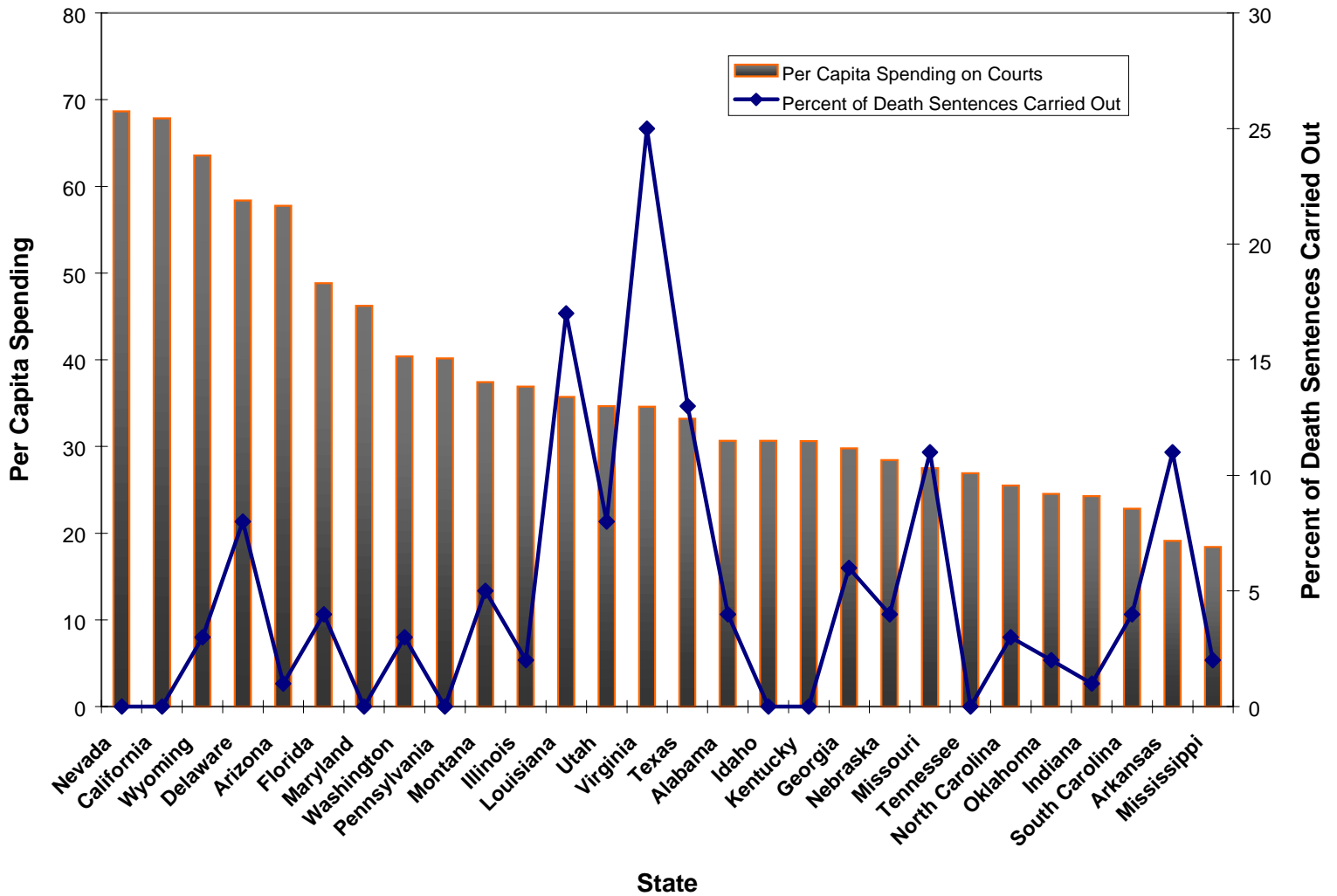
Whether it is fair to infer a causal relationship here and, if so, what might account for that relationship is a question for further research. One hypothesis is suggested by possible relationships between high death-sentencing rates and high error rates, and between the latter and low execution rates: Public opinion may place a premium on obtaining death sentences.<sup>224</sup> If so, a desire to curry favor with voters may lead elected prosecutors and judges to cut corners in an effort to secure that premium— simultaneously causing death-sentencing rates, *and error rates*, to increase. In that event, high rates of reversible error would explain why high political-pressure states, after imposing so disproportionately *many* death sentences—making so many errors in the process—end up carrying out so disproportionately *few* of their death sentences. These are questions for further research.

Figures 29 and 30 below relate, respectively, states' death-sentencing rates, and the rates at which they carry out death sentences, to their per capita court expenditures.

**Figure 29. Per Capita Spending on Courts and Per Capita Death Sentencing Rates, 1973-95**



**Figure 30. Per Capita Spending on Courts and Percent of Death Sentences Carried Out, 1973-95**



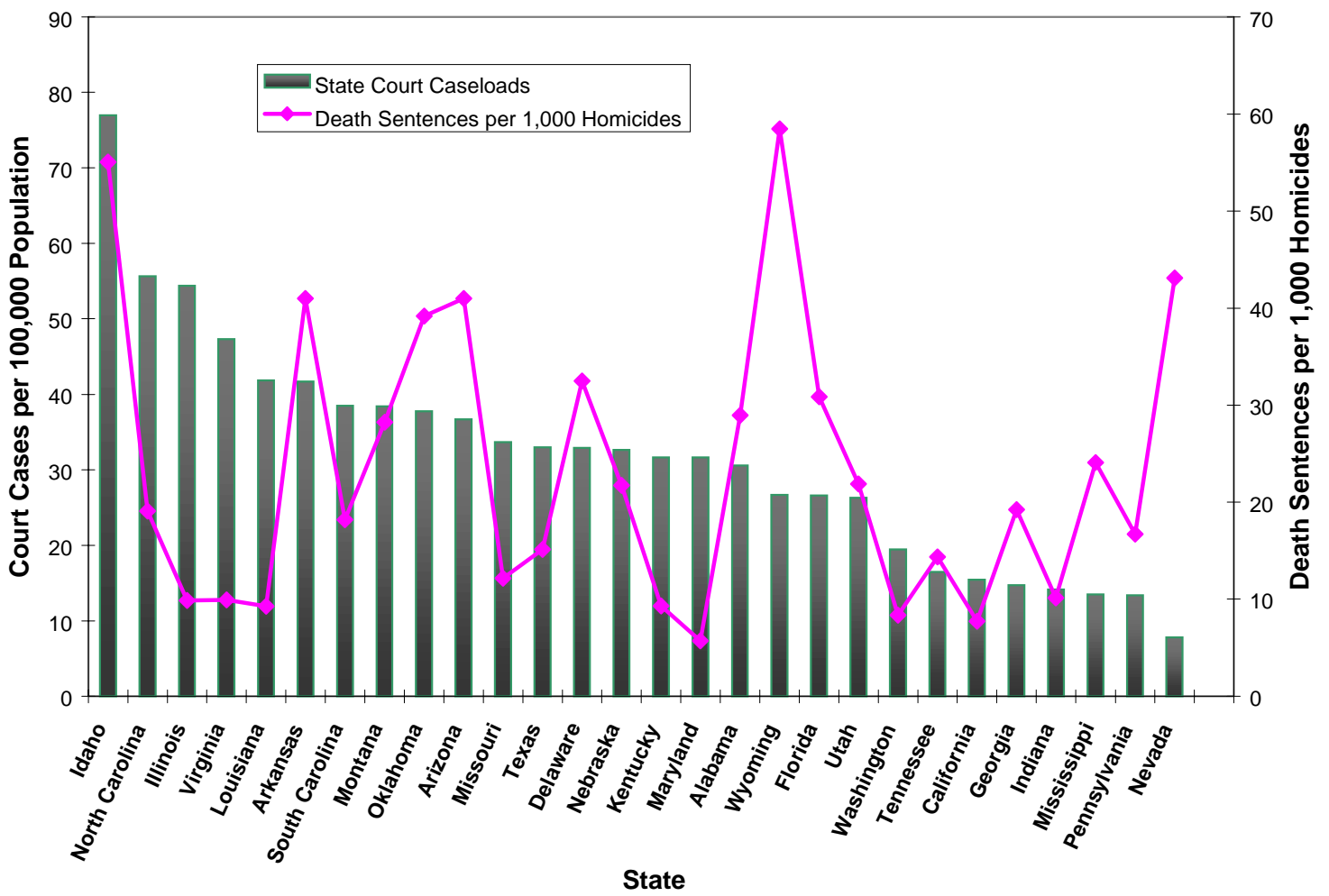
With some exceptions, Figure 29 appears to indicate that comparatively high expenditures on courts are associated with relatively high death-sentencing rates. It is difficult to know what to make of this relationship, especially because capital cases are themselves costly and thus may partly account for high expenditures. It may be, however, that states whose courts have substantial amounts of resources are more capable of handling capital cases—and thus do so more often—than states with less well-funded courts.

As was the case when we looked at capital punishment and political pressure, the relationship between capital punishment and spending reverses when we move from analyzing death *sentencing* rates to rates of death sentences *carried out*: Figure 29 shows a *direct* relationship between court expenditures and death sentencing (the higher the one is, the higher the other tends to be); by contrast, Figure 30 shows a weak *inverse* relationship between court expenditures and death sentences carried out—as states' spending on their courts increases, the proportion of the death sentences imposed that are carried out tends to decrease. The cause of that relationship (if any exists) is unclear. If, however, it were the case that the processing of death cases is itself responsible for significantly driving up court expenditures, then Figures 29 and 30 might suggest that spending relatively large sums to secure relatively large numbers of death *sentences* has little pay off—and, indeed, is counterproductive—when it comes to securing *executions*. If so, the policy alternative of spending less by securing fewer death sentences<sup>225</sup>—each of which, however, is more likely to be carried out—would be indicated.

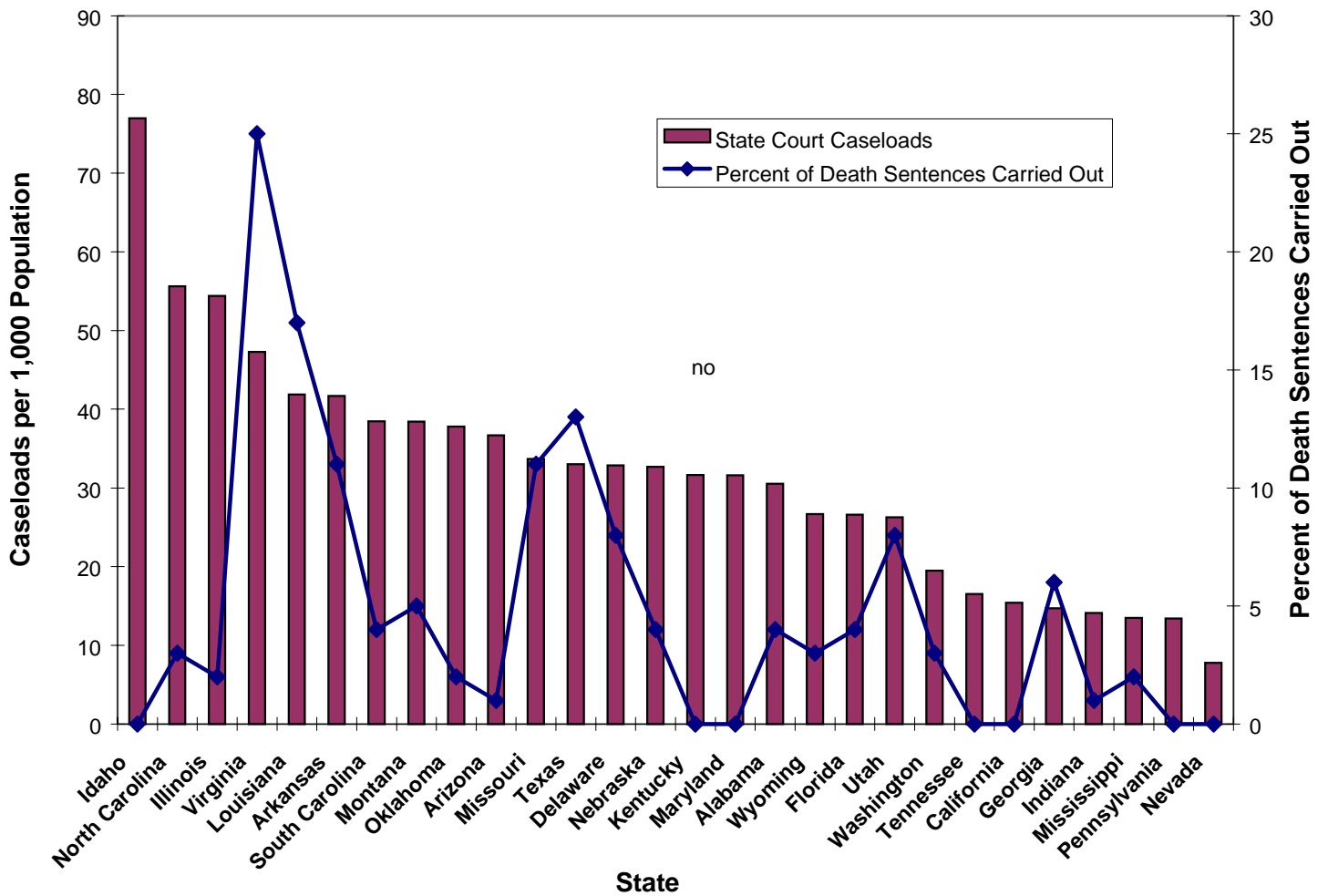
Figures 31 and 32 below consider the relationship between state court caseloads and,

respectively, death sentencing rates and the rate of death sentences carried out.

**Figure 31. State Court Caseloads and Death Sentencing Rates per 1,000 Homicides**



**Figure 32. State Court Caseloads and Percent of Death Sentences Carried Out, 1973-95**



Judging from Figure 31, there is no relationship between how many cases per capita state courts handle and the rate at which those courts impose death sentences. Figure 32 does, however, suggest a weak relationship between court caseloads and death sentences carried out: As per capita caseloads drop, the rate of death sentences carried out also tends to drop. One might hypothesize that states with smaller courts (ones with lower caseloads) are more likely to generate seriously flawed death sentences at the *trial* level, thus depressing the rate at which their death sentences are carried out. Alternatively, state *appellate* courts with lower caseloads may be superior error *detectors*, thus (given high error rates across all states) accounting for lower rates of executions—or, in this scenario, lower rates of *flawed* executions. Further research is called for.

## **IX. Federal Circuit Court and Regional Comparisons**

Appendix B contains report cards for the nine federal judicial circuits that conducted federal habeas corpus review of state death sentences during the 1973-1995 study period.<sup>226</sup> Those circuits reviewed between 2 (Sixth Circuit) and 215 (Eleventh Circuit) death sentences in that period

Referring to these tables as *Federal Circuit* report cards is at times misleading, because much of the information in them considers results generated by *state courts* or other state actors in the states (noted at the top of on each report card) that are grouped in that circuit. For purposes of the latter sorts of information, these are actually *regional* report cards, which aggregate the results of actions by a variety of *state* actors in multiple states in particular segments of the nation. Only the three items falling within the “Federal Habeas Corpus” category of each report (which we have

marked with a number sign (#)) report the results of actions exclusively by the *federal* courts in the relevant circuit. An additional six rows of information (which we mark with a plus sign (+)) report on a mixture of actions by the relevant state courts *and* the federal courts in the circuit.

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

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

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

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

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

Source: HCDB; DADB; Appendix C; DPCen

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

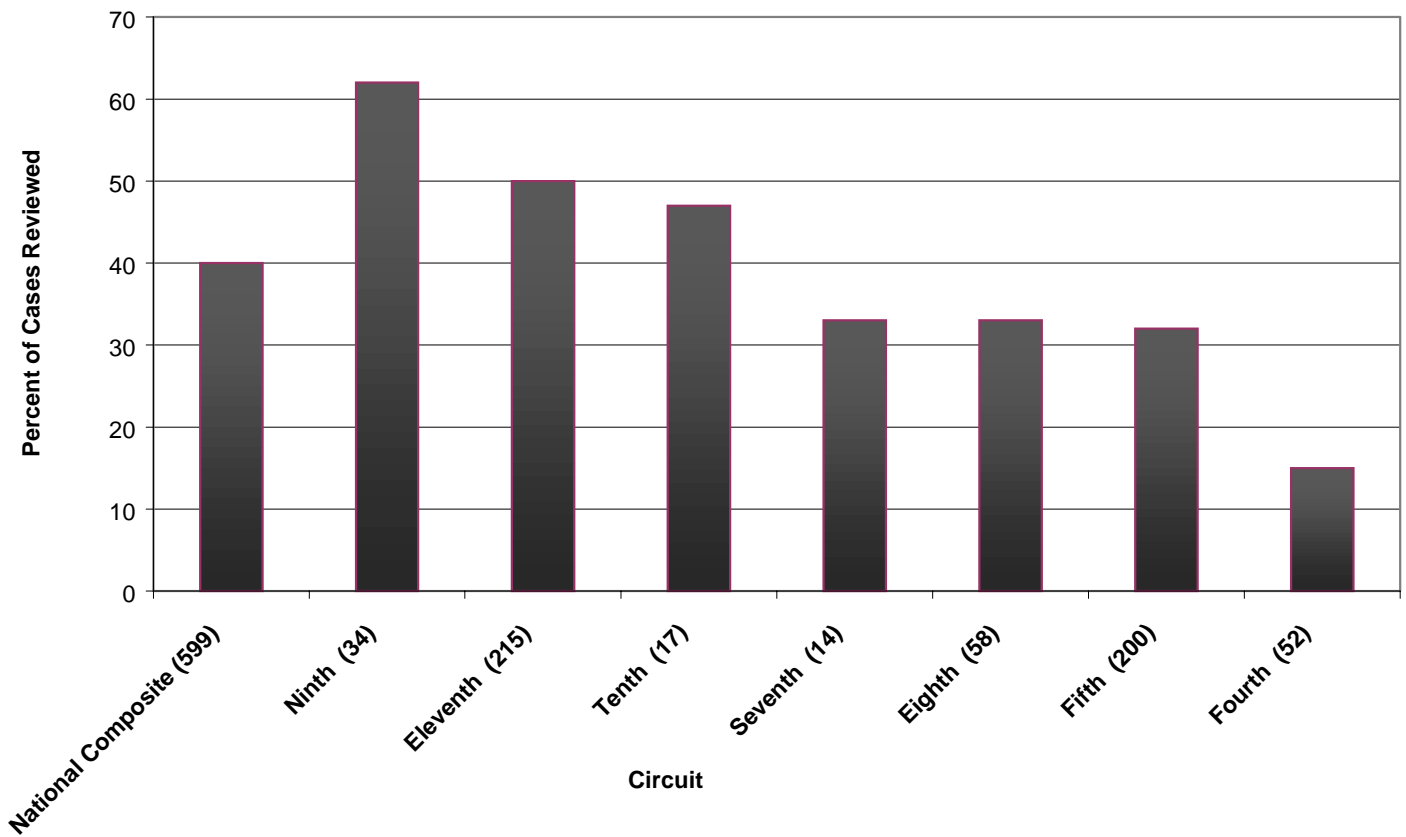


Table 25 and Figure 33 reveal that:

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

that more is at issue in determining error detection rates than a federal court's uniform disposition with regard to error affecting capital sentences.

As did Figure 8 (p. 61) above, Table 25 and Figure 33 identify the Fourth Circuit—with jurisdiction over Virginia, North Carolina, South Carolina and Maryland—as an outlier on the low end of federal habeas corpus error detection. The Fourth Circuit finds error only half as often as the next lowest circuit and just under a third as often as do the other circuits as a whole minus the Fourth.<sup>228</sup> Interestingly, though, as we already have noted (pp. 51, 65-66 above), state courts in three of the four states within the Fourth Circuit—all those save the Virginia courts<sup>229</sup>—largely compensate for the Fourth Circuit's low error detection rate with unusually high direct appeal and state post-conviction error detection rates of their own. Thus, although the Fourth Circuit is way below the other circuits in error detection on *habeas*, when state and federal error detection are combined, the overall rate of error detected in the Fourth Circuit region (62%) is *higher* than the overall rate of error detected in three other regions (the Fifth, Third and Eighth Circuit) and not much lower than the national average (68%). If Virginia (whose Supreme Court rarely detects error) is excluded, the overall error rate for capital judgments from the other three states in the Fourth Circuit region rises to 76%, significantly *above* the national average. The “double whammy” effect noted earlier (p. 66) of distinctly lower error detection rates at the checkpoints operated both by the Virginia Supreme Court and by the U.S. Court of Appeals for the Fourth Circuit thus is a unique feature of Virginia capital judgments.<sup>230</sup>

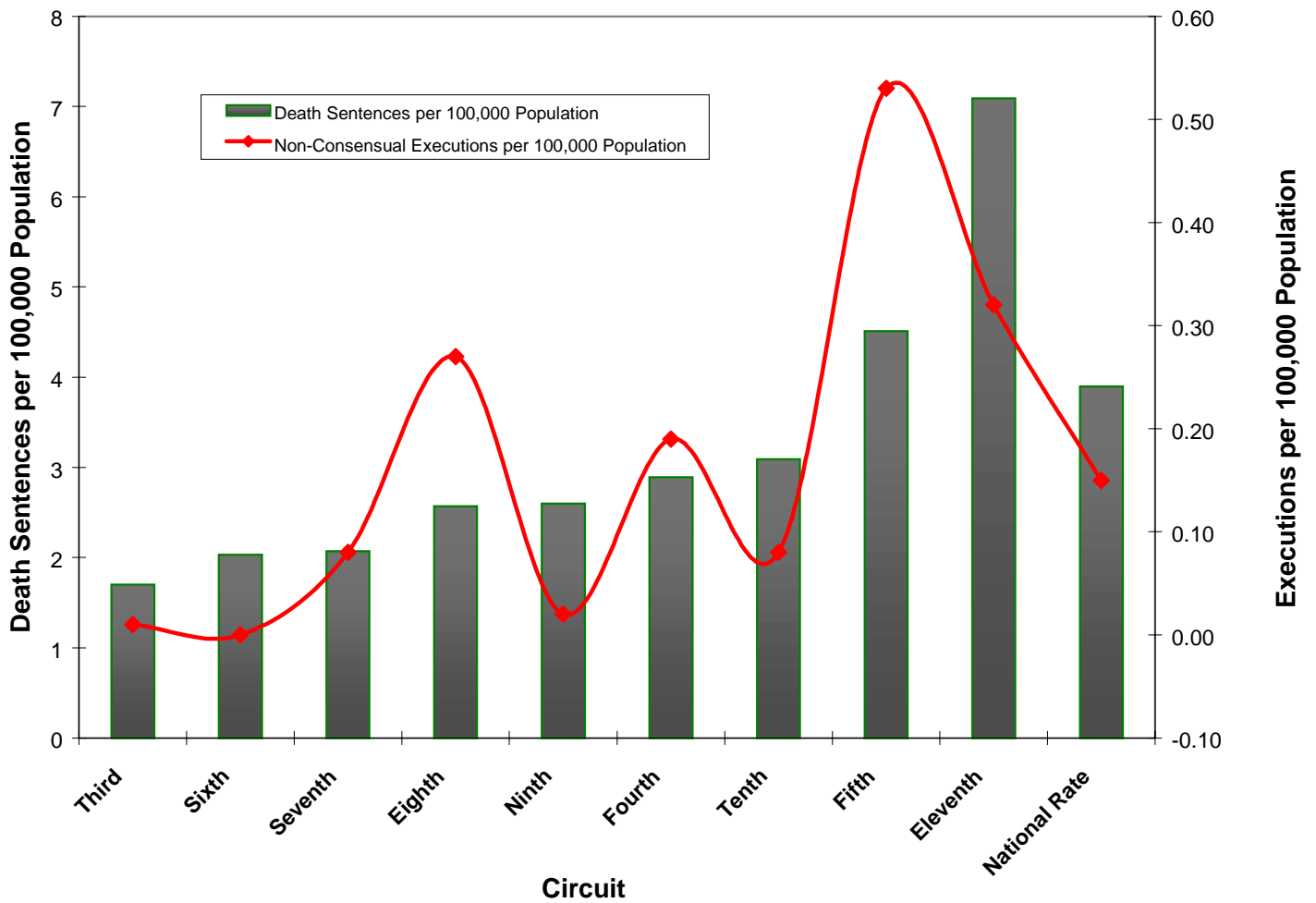
In considering whether Virginia capital judgments are substantially less error prone than all

others in the nation or, on the other hand, whether laxer error detection takes place there, the death-sentencing states that surround Virginia and lie within its same federal judicial circuit—Maryland, North Carolina and South Carolina—may be treated as partial “natural controls.”<sup>231</sup> Insofar as philosophical, cultural or historical factors—which probably do not vary much between Virginia and its neighbors—are thought to be the main influences on the amount of expected error in capital judgments, the fact that high capital error rates are consistently found in states bordering Virginia casts doubt on the hypothesis that Virginia capital sentences are starkly less error-prone. For this analysis to show convincingly that Virginia courts are laxer detectors of serious capital error than courts in the surrounding states, there would have to be an explanation for *that* difference among presumably similar states. One such explanation is the unusual extent to which the Virginia courts limit review of capital judgments: (1) enforcing the region’s (and nation’s) strictest procedural default doctrine (the rule permitting even egregious error to be ignored on appeal if it was not objected to at trial); (2) often appointing substandard trial attorneys to represent the indigents who make up 97% of the state’s death row, thus increasing the probability that necessary objections will *not* be made at trial, and thus that appellate review will be cut off; (3) applying a very strict test for reversing capital judgments based on incompetent lawyering (until the Supreme Court overturned Virginia’s test earlier this year<sup>232</sup>); and limiting defendants’ ability to petition for a new trial based on innocence to a **21-day** period following conviction, the shortest such time-frame in the region (and nation).<sup>233</sup> These questions bear further study.

We close this section with a circuit comparison documenting the actions of *state officials*

within the *states* that are regionally grouped in the respective circuits. Figure 34 compares the circuits based on their component states' *death sentencing* rates (death sentences per 100,000 population) and *execution* rates (non-consensual executions<sup>234</sup> per 100,000 population).<sup>235</sup>

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



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

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

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

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

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

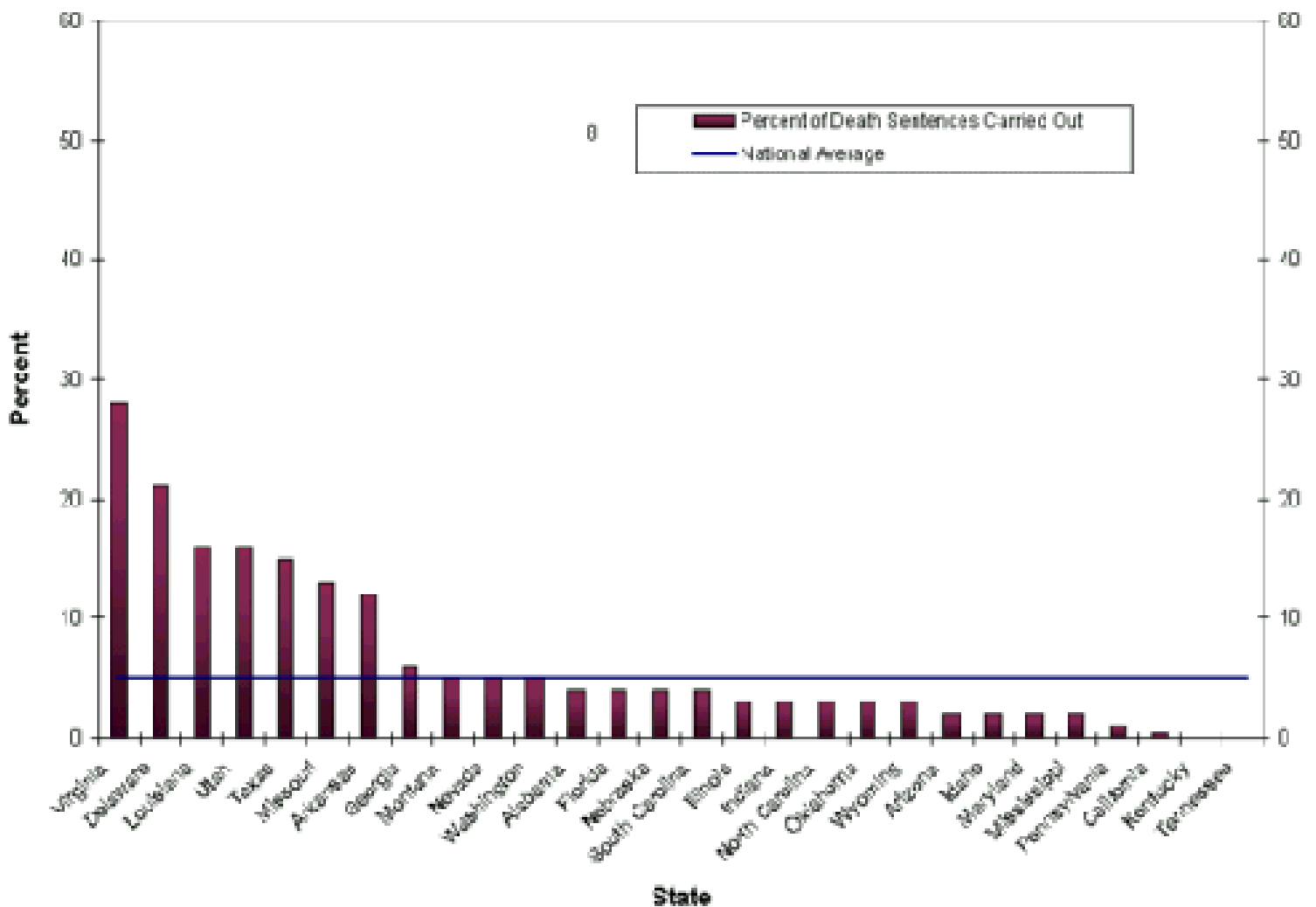
needed to catch them, it has taken **nearly a decade—more recently, it has taken *over a decade—***  
**for the small number of death sentences that pass inspection to be carried out.**

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

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

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

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



As Figure 35 reveals:

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

\* \* \* \* \*

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

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

example, as in none of the preceding 23, has the nation managed to execute even **3%** of its death row inmates—and in 1996 and 1998, it executed fewer than **2%** (about the same proportion as it had executed in, *e.g.*, 1984, 1987, 1993 and 1995).<sup>240</sup> Indeed, if the recent findings of a variety of media investigations across the nation are any indication, error rates and the consequent confounding of the death penalty system may be getting worse.<sup>241</sup> In this regard, we hope to explore whether the surge of state and federal court reversals in the last study year (1995) was a harbinger,<sup>242</sup> and any other patterns that may appear.

- *What accounts for the generally high rates of serious error that state and federal courts have detected in American capital judgments?* In this Report, we have briefly examined the types of errors that predominate (incompetent lawyering and prosecutorial misconduct leading the way<sup>243</sup>); identified differences among the respective states and federal courts—for example, disproportionately low error-detection by the Virginia courts and the U.S. Court of Appeals for the Fourth Circuit; noted the relationship between high error rates and low execution rates (especially rates of death sentences carried out); discovered some potentially suggestive evidence that low execution rates (especially, low rates of death sentences carried out) are associated with high death-sentencing rates; and considered the effect on death-sentencing and execution rates of (1) some demographic factors (finding that homicide rates seem to have *no* effect on death-sentencing and execution rates, and that the size of nonwhite populations may be inversely related to death-sentencing rates but directly related to execution rates) and (2) judicial-contextual factors (finding that political pressure

on state judges and that state expenditures on courts may be positively correlated with death-sentencing rates but negatively correlated with the rate at which death sentences are carried out). These analyses represent our first steps towards the main goal or our next research phase: Identifying the causes of the huge amounts of serious error infecting American capital convictions and sentences.

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

## END NOTES

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

1. See, e.g., *Rethinking the Death Penalty*, ABC News Nightline, May 22, 2000 <[http://abcnews.go.com/onair/nightline/transcripts/nl000522\\_trans.html](http://abcnews.go.com/onair/nightline/transcripts/nl000522_trans.html)> (“[A] lot of places are rethinking the death penalty. Last week in New Hampshire, the state Legislature voted to abolish capital punishment, although the governor there vetoed the measure. And around the country, people are asking new questions about overzealous prosecutors, incompetent defense lawyers, and . . . DNA testing, which has cleared some people on death row. Nightline[] . . . reports on an old issue, which is the focus of a whole new debate.”); Jonathan Alter & Mark Miller, *A Life or Death Gamble: A New Debate About the Fairness of a Death Sentence*, Newsweek, May 29, 2000 <<http://newsweek.com/nw-srv/printed/us/na/a20098-2000may21.htm>> (noting “a new debate about the fairness of the death penalty”).

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

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

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

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

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(questioning the democratic legitimacy of a moratorium on executions in light of broad popular support for the penalty); Frank Green, *Falwell Opposes a Moratorium*, Richmond Times-Dispatch, Apr. 11, 2000, at B4, available in 2000 WL 5035053 (reporting Rev. Jerry Falwell's disagreement with other conservative evangelical Protestant figures who have called for a moratorium, and Falwell's call for expedited executions); Eugene H. Methvin, *Death Penalty Is Fairer than Ever*, Wall St. J., May 10, 2000, at A26, available in 2000WL-WSJ 3028765 (arguing that lengthy appeals and DNA testing make capital convictions more reliable than ever).

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

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

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

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of the eleven noncapital sentencing states) offer life without parole as a sentencing option. *See* Editorial, *Rising Doubts on Death Penalty*, USA Today, Dec. 22, 1999, at 17A, available in 1999 WL 6861984.

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

9. *See* *Alabama Looks to Speed Up Executions*, Associated Press, Mar. 3, 2000; *Yoji Cole, Napolitano Wants to Find Ways to Speed Executions*, Ariz. Repub., Feb. 16, 2000, at B7; Sara Rimer, *Florida Passes Bill to Quicken Execution Pace*, N.Y. Times, Jan. 6, 2000, at A1; John Shiffman, *Tennessee May Limit Death Row Appeals*, Nashville Tennessean, Apr. 10, 2000; *see also* *Most Oklahomans Favor Death Penalty—Poll Finds Most Want Shorter Appeals Process*, The Oklahoman, Mar. 13, 2000.

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

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

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

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

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available in LEXIS, News File; Evan Osnos & David Heinzmann, *Death Penalty Still an Option*, Chi. Trib., Jan. 31, 2000; Maurice Possley & Ken Armstrong, *Revamp Urged in Handling of Capital Cases*, Chi. Trib., Nov. 4, 1999, at N1, available in 1999 WL 2928957.

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

[End notes 14 and 15 are omitted]

16. See John DiStaso & John Toole, *Death Penalty's Fate Still Up in the Air in Senate*, Manchester Union Leader, Mar. 13, 2000 (noting that on Mar. 9, 2000, New Hampshire's majority-Republican House of Representatives voted to abolish the death penalty); Robert Anthony Phillips, *N.H. Considers Abolishing Unused Death Penalty* <<http://www.APBnews.com>> (Mar. 10, 2000); *Rethinking the Death Penalty* (Nightline), *supra* note 1 (noting abolition bill's eventual passage by New Hampshire Legislature and veto by Governor).

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

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

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

20. ABC This Week (ABC television broadcast, Apr. 9, 2000) <<http://abcnews.go.com/onair/thisweek/ThisWeekIndex.html>> (roundtable discussion among Sam Donaldson, Cokie Roberts, George

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

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

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

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

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

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

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

25. Kroll, *supra* note 20.

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

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

The second (electronically stored) data base that the authors generated—referred to herein as “**HCDB**”—contains information on all 599 initial (*i.e.*, nonsuccessive) capital federal habeas corpus cases that were finally decided between 1993 and 1995. To be “finally decided” within that time period, all of the following events must have occurred in the case within the study period: (1) a United States District Court must have (a) denied habeas corpus relief, thereby approving the capital judgment, or (b) granted habeas corpus relief from the capital judgment (either the conviction or sentence) on one or more grounds; (2) if an appeal was timely filed, a United State Court of Appeals must have taken or approved action (1)(a) or (1)(b); and (3) if certiorari review was timely filed, the United States Supreme Court must have either (a) denied review or (b) granted review and taken or approved action (1)(a) or (1)(b). *See also infra* p.24. (Federal habeas relief from capital judgments is granted only on the basis of “serious error,” as defined *infra* notes 33, 38; *infra* p.5 & nn.42, 43.) HCDB contains: the sentencing state; the timing of the habeas petition and its adjudication at the various stages; the outcome at the various stages; information about the petitioner, lawyers, judges, courts, victim, offense; the aggravating and mitigating circumstances found at trial; procedures used during the habeas review process; and the asserted and the judicially accepted bases for and defenses to habeas relief from the capital judgment was under review.

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

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

The first of the data bases relied upon here that was generated at least in part by others—referred to herein as “**DRCen**”—is a compilation of the information used to produce the NAACP Legal Defense Fund’s quarterly death row census, *Death Row U.S.A.*, *supra* note 4. This data base has the name of all individuals

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who were on a state death row between 1973 and 1995, the state where their death sentence was imposed, and the sentencing year. Death Row U.S.A. is also our source of information about executions: when and where they occurred and whether they were consensual or non-consensual, as described *infra* notes 31, 208; *infra* p.32 & n.140.

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

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

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

28. Although the Justice Department collects aggregate data on capital cases by state, its data (1) have only 37 variables, (2) contain no case- or event-specific information, (3) are derived from reports by prison officials who lack information about some individuals under sentence of death who are incarcerated in local jails or for some other reason are not physically located on death row, and (4) are derived from answers to questions about outcomes that (a) do not distinguish between state and federal court reversals, and (b) provide no information on the reason for a reversal. *See, e.g.*, U.S. Dep’t of Justice Bureau of Justice Statistics, Capital Punishment 1998, at 1 <<http://www.ojp.usdoj.gov/bjs/pub/pdf/cp98.pdf>> (Dec. 1999; NCJ 179012) (supporting documentation is available on line) [hereinafter, BJS 1998 Report]. Likewise, although the NAACP Legal Defense Fund’s quarterly death row census, *see* Death Row U.S.A., *supra* note 4, lists inmates on death row, it provides very little information about each. *See infra* note 123 (discussing these and other limitations of the data in Death Row U.S.A.).

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

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

31. DRCen; Death Row U.S.A., *supra* note 4, at 8-22. The figure in the text refers to *all* executions during the study period. For the reasons discussed *infra* pp.32, 41, it often is sensible to consider only the executions

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that were “non-consensual,” meaning that the prisoner availed himself of the full review process before he was executed. The number of non-consensual executions between 1973 and 1995 was 273, or 4.7% of the total number of death sentences.

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

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

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

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

Second, to be reversible, error generally must have been *properly preserved*. Most state direct appeal courts will not grant relief based on error—no matter how egregious and prejudicial—that the defendant did not properly preserve by way of (1) a timely objection at trial, (2) reiteration in a timely new trial motion at the end of trial, and (3) timely and proper assertion on appeal. *See* 1 Liebman & Hertz, *supra* §§ 7.1a, at 276-77 & n.29, 26.1. This is true even in cases in which the failure to preserve the error was the fault of counsel, not the defendant, and even in many instances in which the lawyer’s mistake resulted from inexperience, incompetence or sheer stupidity, and not a valid exercise of professional judgment. *See* Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 683 (1990); Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 28-30 (1996). Numerous prisoners have been executed despite acknowledged prejudicial errors affecting

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their convictions and sentences, because they failed to preserve their objections. Examples include the capital prisoners in *Gray v. Netherland*, 518 U.S. 152, 162-70 (1996); *Coleman v. Thompson*, 501 U.S. 722, 747-49 (1991); *Dugger v. Adams*, 489 U.S. 401, 408 (1989); *Smith v. Murray*, 477 U.S. 527, 533-35 (1986), each of whom had an evidently meritorious constitutional claim that he was capitally convicted or sentenced in violation of the United States Constitution but nonetheless was denied relief in state (and then, as a consequence, federal) court based on his failure to assert the claim at the time or in the manner required by state law and was subsequently executed. See *Death Row U.S.A.*, *supra* note 4, at 9-22.

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

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

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

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

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

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

The category of “serious error” that leads to state post-conviction reversal is narrower than “serious error” at the direct appeal stage, *cf. supra* note 33, because, generally, only properly preserved state and federal constitutional violations that (1) *were not*, and (2) *could not have been* raised on direct appeal can be the basis for state post-conviction reversal. As at the direct appeal stage, moreover, error—no matter how egregious and how much it undermines the accuracy of the capital verdict—never gets corrected at the state post-conviction stage (and thus does not count as “serious error” in our analysis) unless it is discovered and litigated. See *supra* note 33. And given the failure of a number of capital-sentencing states—Virginia, prominent among them—to provide *any* lawyers or funding for them *at all* at the state post-conviction stage, the likelihood that serious error will *not* be discovered and litigated in state post-conviction proceedings is often very high. See, *e.g.*, American Civil Liberties Union of Virginia, *Unequal, Unfair and Irreversible: The Death Penalty in Virginia* (Apr. 2000) <<http://www.aclu.org/news/2000/n040700a.html>> (visited Apr. 28, 2000) [hereinafter, Virginia Report]

The United States Supreme Court itself occasionally grants relief in capital cases on review of state direct review proceedings. See, *e.g.*, *Yates v. Evatt*, 500 U.S. 391, 411 (1991) (overturning conviction due to prejudicial jury instructions giving the defendant the burden of proof); *Johnson v. Mississippi*, 486 U.S. 578, 585-90 (1988) (overturning death sentence that state prejudicially based on unconstitutional and unreliable

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aggravating circumstance); ; *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (overturning two death sentences that were imposed absent proof of the constitutional minimum level of criminal culpability required to impose death); *Truesdale v. Aiken*, 480 U.S. 527 (1987) (overturning death sentence imposed after trial court forbade defendant to inform jury of important aggravating information about his demonstrated prospects for rehabilitation). We treat these Supreme Court cases reviewing state post-conviction decisions as findings of serious (in all these cases, federal constitutional) error infecting capital sentences. For many additional examples of “serious error” that was caught and corrected during state post-conviction proceedings, see *infra* Appendix C. See also cases cited *infra* notes 97-106.

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

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

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

As we indicate by our use of the phrase “at least” in our narrative, and by our use of the “≥” symbol in the national, state and circuit Report Cards, see Appendix A, the “overall error rates” calculated here are in fact *underestimates*. Due to incomplete data, we assume that all death sentences that survived the direct appeal inspection and are not known to have been reversed during the state post-conviction inspection passed muster during that inspection. In fact, many capital judgments affirmed on direct appeal were *pending in*, but had not yet been *finally decided* by, state post-conviction proceedings by the end of the study period. Inflating the denominator in this way—*i.e.*, using the class of cases *available* for review as a proxy for the cases that *actually underwent* final review—leads us systematically to overestimate the success rate and underestimate the error rate. See *infra* pp.26-27 & n.132, 33-34 & n.152; *infra* Appendix C, pp. C-1 to C-2.

40. DADB; Appendix C; HCDB. Because 41% of the capital judgments reviewed on state direct appeal were

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

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

Our “overall error rate” is *not* the rate of error in the 5,780 death sentences imposed between 1973 and 1995. That number cannot be calculated because, at the end of 1995, many of those death sentences were pending in some court *awaiting* review, but had not yet been *finally* resolved at one of the three inspection stages. This rate instead uses the outcomes of the 4,578 cases in which state direct review occurred during the study period, and the 599 of those cases in which subsequent federal habeas review occurred, together with the 248 known state post-conviction reversals (taken as a proportion of the 2,693 capital judgments that had “cleared” state direct appeal) to calculate the error rate found in capital judgments that were finally reviewed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Assume, very conservatively, that 70% of all criminal judgments are reviewed on direct appeal, among

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

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

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

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

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

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

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

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

60. The data depicted in Figure 2—which are taken from BJS 1998 Study, *supra* note 28; Death Row U.S.A., *supra* note 4, at 8-22—are displayed in Table 1, *infra* Appendix E, p. E-2.

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

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

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

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

65. For a report taking this position, see Virginia Report, *supra* note 36 (discussed *infra* p.107).

66. For this purpose, 1989 was an average year. See BJS 1998 Report, *supra* note 28, at 12, tbl. 12.

67. See *id.* at 13, app. tbl. 1.

68. See *id.*

69. See *id.*

70. *Id.* at 1, 14 & app. tbl. 2; Death Row U.S.A., *supra* note 4, at 1.

71. BJS 1998 Report, *supra* note 28, at 1, 14 & app. tbl. 2; Death Row U.S.A., *supra* note 4, at 1. (The 6,700 figure used here covers the 1973-1999 period, and includes an estimate of death sentences imposed in 1999, which is not covered by the Justice Department's 1998 report.)

Returning to our 1989 example, the 13 executions by 1998 of individuals sentenced to die in 1989 represent only **1 in 20** of the 263 people condemned in 1989.

72. See BJS 1998 Report, *supra* note 28, at 13, app. tbl. 1; *id.* at 6, tbl. 5.

73. See *supra* Part II, pp.3-14.

74. The trial, incarceration and execution of sentence in capital cases cost from \$2.5 to \$5 million dollars per inmate (in current dollars), compared to less than \$1 million for each killer sentenced to life without parole. See, e.g., Aaron Chambers, *Resources a Concern in Death Penalty Reform*, Chi. Daily L. Bull., Apr. 24, 1999, at 19, available in Westlaw, News Library, CHIDLB file (estimating that a capital case costs \$5.2 million from pretrial proceedings to execution); Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death*

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*Penalty*, 18 U.C. DAVIS L. REV. 1268, 1268-70 (1985); Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 STUDIES L., POL. & SOC. 71, 78 (1993) (reporting a \$3.2 million cost per execution in Florida, and Kansas' rejection of the death penalty because of the cost); Paul W. Keve, *The Costliest Punishment—A Corrections Administrator Contemplates the Death Penalty*, Federal Probation, Mar. 1992, at 11; Duncan Mansfield, *The Price of Death Penalty? Maybe Millions*, A.P. Newswires, Mar. 26, 2000, available in Westlaw News Library, APWIRES file (estimated \$1 to \$2 million cost per Tennessee execution); David Noonan, *Death Row Cost Is a Killer: Capital Cases Can't Be Handled Fairly and Affordably*, *Critics Claim*, N.Y. Daily News, Oct. 17, 1999, at 27, available in 1999 WL 23488045 (giving cost of prosecuting and defending New York capital cases at the trial phase, in a period during which only five capital sentences were imposed (from 1994 to 1999), as \$68 million); A. Wallace Tashima, *A Costly Ultimate Sanction*, The Los Angeles Daily J., June 20, 1991 (cost per execution to California taxpayers is \$4 to \$5 million).

75. When post-trial review costs are factored in, the cost comparison between capital and noncapital cases is something like \$24 million dollar per executed prisoner, compared to \$1 million for each inmate serving a sentence of life without possibility of parole. See S.V. Date, *The High Price of Killing Killers*, Palm Beach Post, Jan. 4, 2000, at 1A, available in 2000 WL 7592885. See also Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts, With Their Lives at Stake*, Chi. Trib., Nov. 15, 1999, at N1, available in 1999 WL 2932352 (“in Illinois, the resources rallied on appeal often dwarf those summoned to keep a defendant off Death Row in the first place”); Armstrong & Mills, *Justice Derailed*, *supra* note 33, at N1 (discussing the “staggering” costs of capital case reversals and exonerations in Illinois: “Taxpayers have not only had to finance multimillion-dollar settlements to wrongly convicted Death Row inmates—[Dennis] Williams alone received \$13 million from Cook County—but also have had to pay for new trials, sentencing hearings and appeals in more than 100 cases where a condemned inmate’s original trial was undermined by some fundamental error.”).

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

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

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

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

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

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

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

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

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

83. Cf. Ken Armstrong & Steve Mills, *Flawed Murder Cases Prompt Calls for Probe*, Chi. Trib., Jan. 24, 2000, at N1, available in 2000 WL 3629579 (reporting that Illinois paid \$36 million to settle lawsuits by four men who were wrongly convicted of murder, and two of whom were sentenced to die); Sasha Abramsky, *Trial by Torture*, Mother Jones, March 3, 2000 (\$1 million paid to civil rights plaintiffs who were tortured into confessing to (and then being falsely convicted of) capital crimes); Laurie Goering, *Florida Lets Speed Govern Executions*, Chi. Trib. Feb. 28, 2000, at 1, available in 2000 WL 3640614 (noting that Florida paid \$1 million in damages for falsely incarcerating two inmates on death row for 12 years); Paul M. Valentine, *Maryland to Give Cleared Man \$300,000*, Wash. Post, June 23, 1994, at B1, available in 1994 WL 2426459.

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

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

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

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

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

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

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

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

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

. . . .

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

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

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

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

87. *Whitmore v. Arkansas*, 495 U.S. 149, 174 & n.1 (1990) (citing statutes).
88. *See id.* at 174-75 (“since the reinstatement of capital punishment in 1976, only one person, Gary Gilmore, has been executed without any appellate review of his case”).
89. *See generally* Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only ‘The Appearance of Justice,’* 87 J. CRIM. L. & CRIMINOLOGY 130, 131-33 (1996); Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. COLO. L. REV. 813, 816-17 (1999).
90. For a brief overview of the direct appellate process with citations to other works, see Liebman & Hertz, *supra* note 33, § 3.4a, at 177-79.
91. *See supra* notes 33, 36, 38; *supra* p.5 & nn.42, 43.
92. *See* Liebman & Hertz, *supra* note 33, at 178 (recommending the filing of certiorari petitions, particularly in capital cases). By making certiorari the prisoner’s last opportunity to raise novel federal claims, the Supreme Court has strongly encouraged prisoners, especially ones under sentence of death, to file certiorari petitions. *See id.*, § 25.1, at 940-41.
93. *See, e.g.*, *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 1898 (1999) (reversing capital conviction); *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) (affirming capital conviction); *Mu’Min v. Virginia*, 500 U.S. 415, 421 (1991) (affirming capital sentence); *Enmund v. Florida*, 458 U.S. 782 (1982) (reversing capital sentence).
94. *See, e.g.*, *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997); *Stringer v. Balck*, 503 U.S. 222, 226 (1992).
95. The Supreme Court’s certiorari jurisdiction is limited to federal questions, which in criminal cases almost always means federal constitutional questions. *See* 28 U.S.C. § 1257.
96. *See* 28 U.S.C. §§ 2254(b), 2254(c); *O’Sullivan v. Boerckel*, 119 S. Ct. 1728, 1731-33 (1999).
97. *See generally* Liebman & Hertz, *supra* note 33, § 7.1b, at 290-92, § 7.2e, at 314-17 & n.87, §§ 20.3e, 26.3b (providing examples and citing other sections of the treatise with additional examples).
98. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 441-45 (1995) (overturning conviction based on prosecutorial suppression of evidence demonstrating, among other things, that the eyewitnesses who confidently identified petitioner at trial as the attacker had originally described a different perpetrator and had only focused on petitioner as a result of suggestive photo arrays).
99. *See, e.g.*, *Amadeo v. Zant*, 486 U.S. 214 (1988) (holding that prosecutor’s failure to make public his instructions to the jury commissioner to under-represent African-Americans on the jury venire provided “cause” for the habeas petitioner’s failure to make a jury challenge in a timely manner).

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100. *See, e.g., Williams v. Withrow*, 507 U.S. 680, 688 (1993) (violations of the right to counsel “would often go unremedied” if left to review at trial and on direct review”); other authority cited in Liebman & Hertz, *supra* note 33, § 25.4, at 969-70 n.42.
101. *See, e.g., Liebman & Hertz, supra* note 33, § 26.3b, at 1093-94 & n.28.
102. *See, e.g., People v. Fields*, 690 N.E.2d 999 (Ill. 1998).
103. *See, e.g., Porter v. State*, 723 So.2d 191 (Fla. 1998); *Suarez v. State*, 604 So.2d 488 (Fla. 1992); *People v. Fields*, 690 N.E.2d 999 (Ill. 1998).
104. *See, e.g., Williams v. Taylor*, 120 S. Ct. 1495 (2000); *State v. Freeman*, 605 So.2d 1258 (Ala. Crim. App. 1992).
105. *See, e.g., Turpin v. Todd*, 519 S.E.2d 678 (Ga. 1999); *Simants v. State*, 277 N.W.2d 217 (Neb. 1979).
106. *See, e.g., Liebman & Hertz, supra* note 33, § 26.3b, at 1090-92 & n.27.
107. *See Case v. Nebraska*, 381 U.S. 336 (1965) (granting certiorari to consider whether a constitutional right to state post-conviction review exists, but dismissing the grant after Nebraska adopted a comprehensive state post-conviction review scheme). *But cf. Murray v. Giarratano*, 492 U.S. 1, 10-11 (1989) (plurality opinion) (“State collateral proceedings are not constitutionally required . . . .”); *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1989) (plurality opinion) (similar). *See generally Liebman & Hertz, supra* note 33, § 7.1b.
108. *See* 28 U.S.C. §§ 2254(d), 2254(e)(1) (providing a laxer standard of review for certain kinds of claims that were “adjudicated on the merits” in state court proceedings).
109. *See Liebman & Hertz, supra* note 33, § 3.5a, at 179-80, § 6.1 & n.1 (citing authority).
110. *See McFarland v. Scott*, 512 U.S. 1256, 1261 (1994) (Blackman, J., dissenting from the denial of certiorari) (“State habeas corpus proceedings are a vital link in the capital review process, not the least because all federal habeas claims first must be adequately raised in the state court . . . [to avoid being denied in federal court] as procedurally defaulted or waived . . . .”); *Coleman v. Balkcom*, 451 U.S. 949, 956-57 (1981) (Rehnquist, J., dissenting from denial of certiorari) (describing typical post-trial course of proceedings in capital cases, which includes a state post-conviction petition); Liebman & Hertz, *supra* note 33, §§ 6.4c, 7.1a, 7.1b, 7.2f (describing counsel’s legal and ethical obligations in regard to pursuing state post-conviction remedies in capital cases).
111. *See generally Liebman & Hertz, supra* note 33, §§ 3.5a(6), 6.1, 6.2, 7.1.
112. *See, e.g., Rimer, supra* note 9, at A1, A9 (describing new state post-conviction procedures recently adopted in Florida but then invalidated, *see supra* note 9, that, *inter alia*, gave capital prisoners 180 days after the filing of their direct appeal brief to file a state post-conviction petition; barred all claims that were or could have been raised at trial or on direct appeal; forbade extensions of time, even if delays were the result of the

state's illegal withholding of exculpatory evidence or a court's failure to compel legally required disclosure of public records; barred successive petitions unless they were based on previously undiscoverable evidence establishing a constitutional violation and the prisoner's factual innocence; and imposed strict time limits on the adjudication of state post-conviction and public records act petitions). *See generally* Liebman & Hertz, *supra* note 33, § 3.3b nn.9-12 (discussing "unitary review" procedures).

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

114. *See id.*, § 6.4 & n.13.

115. *See supra* note 36.

116. *See* 28 U.S.C. §§ 2241-2254.

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

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

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

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

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

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

123. *See* *Death Row U.S.A.*, *supra* note 4. By combining the data on LDF reports produced periodically over the period from 1973 to 1995, one can collect the name of and a small amount of information (*e.g.*, race of defendant and race and number of victims) about all individuals who have been incarcerated on death row for at least some period of time between those dates. Although helpful, the LDF census did not narrow our case-gathering task very much, because it contains nearly 6000 individuals who were on death row at some point during the period, the vast majority of whom have never had their cases reviewed on federal habeas corpus (many having received relief or still being in the process of seeking relief in the state courts), and because the information—a name and a state, *e.g.*, Charles Williams of Georgia—often leads to many false positives in

follow-up computer research. *See also supra* note 28.

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

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

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

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

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

129. *See supra* note 26.

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

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

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

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

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

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

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

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

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

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

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

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

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

generally Liebman & Hertz, *supra* note 33, § 4.2 (discussing factors other than likelihood of success on appeal that lead condemned inmates to give up their appeals and ask to be executed).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

161. DADB; DRCen; Appendix C; HCDB. As is shown in brackets on the national report card, if only the (first) state direct appeal and the (third) federal habeas stages are considered, the combined national error rate was 64% and the combined success rate was 36%. Although our information on cases at those two stages is more accurate than our information about the state post-conviction stage, the information that *is* available on the intermediate stage provides a reliably conservative estimate of what took place there. *See supra* note 39; *supra* pp. 26-27 & n.132; *infra* Appendix C, pp. C-1 to C-2. For this reason, we usually focus on the more comprehensive, three-stage “overall” rates.

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

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

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

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

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

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

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

169. HCDB.

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

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

172. DRCen; UCRDB; USCen.

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

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

175. USCen.

176. UCRDB.
177. UCRDB; USCen.
178. PrisCen. This category of information and the next are omitted from the national, but presented in the state and regional, report cards.
179. PrisCen.
180. USCen.
181. *See, e.g.*, James Eisenstein & Herbert Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (1977); Martha Myers and Suzette Talarico, *The Social Contexts of Sentencing* (1987).
182. *See* PolPres. *See also* Bright & Keenan, *supra* note 54, at 76-80 (describing types of judicial elections); *supra* note 54 (listing study states with judicial elections); *infra* note 221 (political pressure on judges).
183. This measure is from Stanley & Niemi, *Vital Statistics on American Politics 1997-1998* (1999).
184. CtCaLd.
185. CtExpen.
186. *See* Virginia Report, *supra* note 36 (taking this position in regard to Virginia).
187. *See supra* note 64 (newspaper article quoting Virginia law enforcement officials taking this view).
188. *See supra* note 39; *supra* pp. 26-27 & n.132; *infra* Appendix C, pp. C-1 to C-2. Data on the number of cases available for state post-conviction review in each state is found in the “Number Forward to State Post-Conviction” category of each state’s report card, *infra* Appendix A. We derive that number from DRCen and DADB. The number of state post-conviction reversals, also provided on each report card, is computed from the data in Appendix C.
189. The narrow category of error sufficiently egregious to qualify as “serious” and “reversible” at the federal habeas stage is described *supra* note 38.
190. On one interpretation, there are actually *four* anomalies among the non-asterisked states on Figure 7. Although 16 of the 20 non-asterisked states fall in the range of two-thirds to 1.5 times the national 40% rate of error, four states—North Carolina, Missouri, South Carolina and Virginia—are below half the national average. (As we noted, however, even compared to other anomalies, Virginia is an anomaly, at 15% of the national average.)
- The status of Virginia and Missouri here may seem to support the hypothesis (*see supra* note 64 and accompanying text) that both states have lower rates of serious capital error than other states, because low error

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

191. *See supra* note 54.

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

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

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

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

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

197. *See supra* notes 161, 195.

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

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

In contrast to the courts of Maryland, North Carolina and South Carolina, it is less likely that the

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

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

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

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

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

203. *See* sources cited *supra* note 10.

204. *See supra* note 49.

205. The data underlying Figure 13 are displayed in Tables 6, 7 and 10, *supra* pp.53, 57, 68.

206. *See supra* note pp.40-41; National Composite Capital Punishment Report Card, *supra* p.30 & *infra* Appendix A, p. A-6.

207. The same information—taken from DRCen; Death Row U.S.A., *supra* note 4, at 8-22—is in Table 11, *infra* Appendix E, p. E-7.

208. By non-consensual executions, we mean ones occurring after the prisoner insisted upon and received full judicial review. For further explanation of the difference between consensual and non-consensual executions and the reasons for looking at the latter, and for some data about the relative frequency of each type of execution, see *supra* note 31; *supra* 0p.32 & n.140, 41.

209. Two of the study states (Idaho and Pennsylvania) have yet to have a post-1973 non-consensual execution.

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210. The same information—from DRCen and Death Row U.S.A., *supra* note 4, at 8-22—is in Table 12, *infra* Appendix E, p. E-8.

211. *See supra* notes 31, 140, 208.

212. The same information—from DRCen and DADB—is in Table 13, *infra* Appendix E, p. E-9.

213. *See supra* pp.40-41.

214. The data underlying all the comparisons in this section—which come from DRCen, Death Row U.S.A., *supra* note 4, UCRDB, USCen, PrisCen—are displayed in Tables 14-19, *infra* Appendix E, pp. E-10 to E-15. Tables 14, 15, and 16 compare states' *death sentencing* rates, respectively, per homicides, population and prison population. Tables 17, 18, and 19 then make the same comparisons of the respective states' non-consensual *execution* rates.

215. Variations are not quite as great per prison population, suggesting that some part of the variation in death-sentencing and execution rates per homicides and population is due to variable punitiveness among the states.

216. Similarly, Nevada and Idaho are among the top three states when it comes to the proportion of homicides that result in death sentences, but both states are in the very bottom cohort of states when it comes to the proportion of their death sentences that are validated on judicial review and result in executions. *See also infra* note 238. (Nevada and Idaho are also among the top four states when it comes to the proportion of their prison population under sentence of death, but they are in the very bottom category of states when it comes to executions.) Conversely, Virginia and Louisiana are in the top four states when it comes to the proportion of their prison population that they execute but in the bottom cohort of states when it comes to the proportion of their prison population that is under sentence of death.

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

(Notes continue on the next page)

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

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

Year	Total Executions	TX, VA Executions
1991	14	7

1992	31	16
1993	38	22
1994	31	16
1995	56	26
1996	45	11
1997	74	45
1998	68	34
1999	98	49
Total	455	226 (49.7%)

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

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

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

221. A number of authorities (1) have noted instances in which elected judges' careers were positively or negatively affected by whether their prior actions on the bench had seemed (respectively) sympathetic to, or skeptical about, capital punishment, and (2) have concluded that political pressure is likely to skew capital decision making by state court judges. *See, e.g.*, *Harris v. Alabama*, 513 U.S. 504, 519-20 & n.5 (1995) (Stevens, J., dissenting) ("The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess fealty to the death penalty. . . . The danger [is] that they will bend to political pressures when pronouncing sentence in highly publicized capital cases."); Bright & Keenan, *supra* note 54, at 760 ("Decisions in capital cases have increasingly become campaign fodder in both judicial and nonjudicial elections. The focus in these campaigns has been almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions. Judges have come under attack and have been removed from the bench for their decisions in capital cases—with perhaps the most notable examples in states with some of the largest death rows and where the death penalty has been a dominant political issue. Recent challenges to state court judges in both direct and retention elections have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court."); Coyne & Entzroth, *supra* note 33, at 13 ("The death penalty and politics . .

are inseparable,” particularly because “the vast majority of judges who preside over capital cases must answer to the electorate” and because “judges are far less likely to . . . take . . . tough action if they must run for reelection or retention every few years” (quoting ABA, Report of the Comm’n on Professionalism, 112 F.R.D. 243, 293 (1986)); Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urb. L.J. 239 (1994).

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

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

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

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

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

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

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

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

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

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

232. *See Williams v. Taylor*, 120 S. Ct. 1495 (2000).

233. *See Virginia Report*, *supra* note 36, at 11-37; Green, *Virginia Bucks Death Row Flow*, *supra* note 4; Masters, *A Rush on Va.’s Death Row*, *supra* note 64.

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

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

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

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

(Notes continue on the next page)

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

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

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

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

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

State	Rank in Percent Death Sentences Carried Out	Rank in Death Sentences per 1,000 Homicides
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**Following Full Review**

Virginia	1 (of 28)	22 (of 28)
Louisiana	2	25
Texas	3	18
Missouri	5	20

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

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

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

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

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

**Illinois:**

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

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

**Nevada:** *See* Sean Whaley, *Nevada's Death Row History Criticized*, Las Vegas Rev.-J., Feb. 7, 2000, at 1B, available in Westlaw, News Library, LV-RJ-C file (finding that since 1979, 8 Nevada Death Row inmates have been executed (all but one consensually, *i.e.*, in advance of full judicial review, *see* Death Row U.S.A., *supra* note 4, at 8-22); since 1993, the same number, 8, have had their capital judgments reversed by the state and federal courts, among whom 3 (as of this writing, 4, *see* Brendan Riley, *Emotional Mazzan Released*, Las

Vegas Rev.-J., May 7, 2000, at 1) were thereupon released from prison).

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

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

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

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

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