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## Death Penalty Is Overturned in Most Cases

■ **Justice:** Study finds courts void executions more than two-thirds of the time. Results fuel debate over capital punishment.

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State and federal courts nationwide have been overturning death sentences in more than two-thirds of all capital cases. And in the vast majority of cases retried, the defendants were not resentenced to death, according to a detailed study released today.

In addition, only one of every 20 condemned prisoners was actually executed and their average wait on death row was nine years, according to the sweeping review by Columbia University law professor James S. Liebman and two associates.

The survey of nearly 4,600 capital cases that went through the state and federal appellate process between 1973 and 1995 is expected to further fuel the growing controversy over the administration of the death penalty in the United States.

Opponents of the death penalty are likely to argue, as does Liebman, the study's principal author, that the findings "reveal a system that is wasteful and broken."

The high percentage of reversals and the time it takes to reach them "imposes terrible costs on taxpayers, victims' families, the judicial system and the wrongly condemned," Liebman said. "This is not a rational system."

Death penalty proponents counter that the figures reflect the care given to death penalty cases so that the ultimate punishment is dispensed fairly.

"You will find more reversals of capital sentences than other sentences [because they are reviewed so closely]," said University of Utah law professor

Paul Cassell. "In some ways, this confirms that the system is working as it should."

Earlier this year, George Ryan, the Republican governor of Illinois, declared a moratorium on executions after a string of wrongly convicted inmates were released from death row in his state. Similar freezes have been urged in several other states, including California, where Cardinal Roger M. Mahony has asked Gov. Gray Davis to stop executions while the fairness of the system is examined.

Although both major-party candidates for president support capital punishment, the issue has generated campaign headlines because Gov. George W. Bush of Texas has presided over 131 executions, more than any governor in history.

The new study found that the primary reasons for the errors leading to death sentence reversals include "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 police or prosecutors who did discover that kind of evidence but suppressed it, again keeping it from the jury."

The authors determined that state courts initially overturned 47% of the death sentences, having found serious legal flaws. Later federal review discovered "serious error"—meaning error serious enough to undermine the reliability of a verdict—in 40% of the remaining cases, resulting in an overall 68% reversal rate nationwide.

### Figures Called Very Troubling

"I was surprised by the magnitude of the numbers and the consistency over time of the numbers," said Stephen A. Saltzburg, a former Justice Department official in the Reagan administration who is now a law professor at George Washington University.

"When you think that less than one-third of the [capital] cases" over a 23-year period were found free of serious error, Saltzburg added, "it must make any fair-minded person wonder what is

wrong with the death penalty system around the country."

Similarly, Sen. Patrick Leahy (D-Vermont), who is both a former prosecutor and a critic of the death penalty, said the figures are very troubling.

"There should be zero tolerance for mistakes, not a 60%-70% tolerance for mistakes," said Leahy, whose death penalty reform legislation will be taken up at a Senate hearing this week. "You certainly could not run a public utility or an airline or a hospital that way."

On the other hand, Josh Marquis, a county prosecutor in Oregon who is on the board of the National District Attorneys Assn., said he does not find the statistics disturbing and draws different conclusions.

"The Supreme Court has set up a system of super due process for the death penalty, so it is not surprising" that there would be a lot of reversals, he said.

In fact, Marquis said, "I would be worried if only 5% of the cases had been reversed," because that would be a sign that the rulings were not being scrutinized closely.

Utah law professor Cassell, a former federal prosecutor and a death penalty supporter, emphasized that in most cases that were reversed, the death sentence was annulled but not the conviction. Moreover, he said, "the study did not claim that a single innocent person had been wrongly executed."

During the presidential campaign, Bush has continually expressed confidence in the fairness of his state's system, saying that he is certain that everyone who has been executed in his state was guilty.

Gerald Kogan, former chief justice of the Florida Supreme Court, does not share that confidence. "Anyone who knows anything about the system knows that every day in the U.S. people are mistakenly convicted of crimes.

"Unfortunately, in a lot of cases, [the mistakes] are not caught," said Kogan, who has prosecuted and defended people accused of murder and served on Florida's high court while 28 people were executed, including serial killer

Ted Bundy—an outcome Kogan supported. The retired jurist is now serving as co-chairman of the bipartisan National Committee to Prevent Wrongful Executions.

Since 1975, 87 inmates have been freed from death rows across the nation because of wrongful convictions for reasons including mistaken identification, prosecutorial misconduct or newly discovered exculpatory evidence, including the results of DNA tests that have led to eight exonerations.

The study released today found high reversal rates throughout the nation: More than 90% of death sentencing states had reversal rates of more than 50%, including Texas at 52%, Florida at 72% and California at 87%.

These "high error rates put many individuals at risk of wrongful executions," according to the report. "Eighty-two percent of the people whose death sentences were overturned by a court due to serious errors and were subsequently retried did not receive" a capital sentence. Moreover, 7% of those retried were found not guilty and released from prison.

#### Thousands of Cases Studied

The authors launched their study in 1995. Of the 5,760 death sentences meted out by juries between 1973 and 1995, the scholars reviewed 4,578 cases that have gone through appeals. They include three stages of review: direct appeals to state courts based on the trial record, and post-conviction reviews by state and federal courts, which deal with issues beyond the trial record including alleged prosecutorial misconduct or incompetent representation by defense lawyers.

The study looked at all death sentence appeals since the start of the modern death sentencing era and available information on eventual retrials. States across the country began implementing new capital statutes after the Supreme Court issued its 1972 decision in *Furman vs. Georgia*, which voided all existing capital punishment statutes and sentences.

The study cites troubling cases from throughout the country in which convictions and death sentences have been reversed. Among them:

\* A Texas case in which an appointed defense lawyer failed to call alibi or expert witnesses and did not seek to impeach a key prosecution witness using her contradictory statements. In reviewing the case of Frederico Martinez-

Macias, a federal appeals court said that Texas had paid the lawyer \$11.84 an hour and the state "got only what it paid for." Subsequently, Martinez-Macias was released after a grand jury concluded that there was not enough evidence to justify indicting him again.

\* An Arizona case in which the prosecutor failed to disclose information revealing that his central witness—who eventually confessed to the murder himself—had a long history of prior crimes and of lying to police. Defendant Paris H. Carriger, who was on death row for 19 years and received a stay five days before his scheduled execution, eventually pleaded no contest to robbery and second-degree murder and was released for time served.

\* An Illinois case in which prosecutors provided misleading information to a grand jury and suppressed exculpatory evidence. Eventually, DNA evidence cleared defendant Verneal Jimerson and three co-defendants and instead implicated four other men in the crime, three of whom eventually confessed. The wrongfully convicted men were pardoned and shared a \$36-million civil settlement for wrongful prosecution.

In recent months, death penalty proponents have maintained that other states did not have problems of the sort unearthed in Illinois, where Gov. Ryan declared the moratorium in January. Ryan acted after revelations in recent years of 13 wrongful capital convictions, including that of Jimerson and his co-defendants.

The newly released study shows Illinois well within the mainstream during the period reviewed; the state's overall reversal rate is 66%, just under the national average of 68%.

Liebman said that the findings puncture the myth that most reversals of death sentences are ordered by federal judges, who have life tenure.

"Of the 2,370 death sentences thrown out due to serious error, 90% were overturned by elected state judges—many of whom were the very judges who imposed the death sentence in the first place; all of whom were directly responsible to the electorate for their actions in death cases; and none of whom, consequently, were disposed to overturn death sentences except for very good reasons," he said.

Liebman and his colleagues—Jeffrey Fagan, a criminologist who is a visiting professor at Columbia Law

School, and Valerie West, a doctoral candidate in sociology at New York University—acknowledged that the study contains some anomalies.

In particular, they cited Virginia, long criticized by death penalty opponents for limiting the appeals of condemned inmates.

#### Virginia Has by Far Lowest Reversal Rate

Virginia, the only state that managed to carry out more than a quarter of the death sentences it imposed over the 23-year study period, had a reversal rate of only 19%, by far the nation's lowest. But that doesn't mean the state was actually doing things right, Liebman said.

Rather, he said the state's reversal rate was a sign that its state appellate courts and the U.S. 4th Circuit Court of Appeals, considered the most conservative in the nation, had "poor error detection."

Death penalty proponents disagree. Cassell said the study shows that the Virginia system "ought to be exported" across the United States because its low reversal rate demonstrates that the state performs well.

Although the study's authors have only preliminary data for 1996 to 1999, they say there are signs of continuing high reversal rates. Additionally, the study shows that in each of the last four years, fewer than 3% of the nation's death row prisoners have been executed.

UC Berkeley law professor Franklin E. Zimring said the low execution rate is one of several findings in the study that illustrate that "we are playing a zero sum game between two things most Americans want: a fair and serious criminal justice system and an active execution process.

"It turns out we may have to choose between those goals," Zimring said. "It may be impossible to have our due process cake and frequent executions as well."

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##### Sorting the Death Row Population

More than two-thirds of the death sentences reviewed by courts between 1973 and 1995 were reversed, according to a new study. Here is a look at the death row population, the percentage of death row inmates executed and the outcome of cases that have been retried or are expected to be retried.

Sources: "A Broken System: Error

Rates in Capital Cases, 1973-95"

**GRAPHIC:**

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