

Testimony of
Mr. James S. Liebman

June 18, 2002

Thank you Mr. Chairman and members of the Committee for inviting me to testify on the important bills before the Committee today. My testimony focuses on the need to improve the quality of legal representation in state capital trials. My remarks are based in part on a comprehensive study by a team of Columbia University researchers on the amount of serious, reversible error that is found in state capital verdicts, the demonstrable causes of serious capital error, and ways to avoid that error. We began our study eleven years ago, in order to answer a question posed to us by then Chairman Biden of this Committee. I am pleased once again to make study findings available to the Committee.

Five findings are especially pertinent to the bills before the Committee.

First, state death penalty verdicts are fraught with reversible error. During the 23-year period from 1973 to 1995, American states imposed 5826 state capital verdicts. Among those verdicts that were finally inspected for error by state and federal courts during that period, 68% were found to contain reversible error and had to be sent back for retrial. The 68% figure is conservative; the actual rate maybe higher. And there is evidence that in some states, at least -- Pennsylvania and Virginia being good examples -- the rate of reversible error has climbed since 1995.

Second, reversible error is serious error. About 90% of the reversals were by state judges who risk being voted out of office if they reverse without a very good reason. Over half of the remaining judges voting to reverse were appointed by Republican Presidents with strong law-and-order agendas. At the two of three review stages where we have data, nearly 80% of the reversals were because of four clearly serious violations: egregiously incompetent defense lawyers, prosecutorial suppression of evidence of innocence or mitigation, misinstruction of juries, and biased judges and jurors. Half the reversals at those stages were for errors that undermined the reliability of the verdict that the defendant committed capitally aggravated murder. The other half undermined the accuracy of the decision to take the defendant's life. On retrial where we have data, curing the errors that led to reversal produced a different, non-capital outcome 82% of the time. In 9% of the retrials, curing the error led to an acquittal.

Third, the review process is so overwhelmed by the number of serious capital mistakes that it cannot catch them all. We conducted four cases studies of innocent men who were sentenced to die, and whose capital verdicts were approved for execution by all three sets of state and federal reviewing courts -- leaving it to college students in one case and a posthumous DNA test in another to demonstrate the defendants' innocence. In each case, reviewing state and federal courts recognized the weakness of the evidence against the defendant, and also identified error in the case, but affirmed the verdict nonetheless based on strict waiver rules and prejudice standards that courts have been forced to adopt to enable them to cope with the large amount of error they find.

Fourth, and more important than any particular number or percent, the result of so many errors and reversals is that the death penalty system cannot achieve its law enforcement goals. Even people who calculate error rates different from ours using highly dubious assumptions, still

conclude that the capital reversal rate is over 50%. On average over decades, the states only manage each year to execute about 1.5% of the thousands of prisoners on their death rows. Even over our entire 23-year study period, only 5% of imposed capital verdicts were carried out. Indeed, the typical, usual outcome of a death penalty verdict in this nation is that it will be reversed, and that it will be replaced on retrial with a non-capital verdict or an acquittal. That fruitless process will take from 5 to 15 years to occur. And, after accounting for the money spent on the vast majority of death verdicts that are reversed and never carried out, the best available estimate -- for Florida -- of the system's cost per each execution that does occur is \$23 million above and beyond the cost of life without parole. The cost in frustration and anguish for crime victims and survivors is immeasurable.

Fifth, at the very core of all of these costs -- in unreliability, delay, frustration and dollars -- is a single problem: the absence at many state capital trials of adequately trained and compensated defense lawyers. The single most common reason for capital reversals at the state post-conviction and federal habeas stages of review--accounting for over a third of the reversals at those stages--is egregiously incompetent defense lawyering. Based on a comprehensive set of statistical analyses of the conditions in states and counties that lead to reversible capital error, we found that states that spend the least on their capital trial courts -- and compensation of defense lawyers is an important part of the funding picture -- have higher rates of capital reversals at the direct appeal stage than states that spend more on capital trial courts. We also found that, everything else equal, death row inmates with the best compensated lawyers are about 60% more likely than other prisoners to win habeas corpus relief.

But more important than all these results is our finding that the single most important predictor of high capital reversal rates is how frequently states and counties impose the death penalty per 1000 homicides. The more frequently states and counties impose death sentences per 1000 homicides, the more likely it is that any given death verdict they impose will be reversed due to serious error and (at the county level) that the verdict will turn out to have been imposed on an innocent person. In other words, states and counties with a scattershot approach to capital sentencing -- ones that impose the penalty in weak as well as strong cases -- have much higher error and innocence rates than jurisdictions that reserve the death penalty for the very worst of the worst offenders. This finding is important because the single most effective way to weed out weak cases, and leave only the worst of the worst to for death sentences, is through a well-trained and well-compensated defense lawyer's adversarial testing of the reliability of the state's case for conviction and a death sentence.

Put simply, investing in highly competent and well-compensated defense lawyers, who adequately perform their crucial screening job at the front-end of the capital system, will very likely pay for itself several times over in decreased reversals, retrials, delays, frustrations and expense at the back end of the process.

These findings provide support for important aspects of each of the bills before the Committee: the study provisions in Senator Feingold's, Senator Feinstein's and Chairman Leahy's bills; the compensation provisions of Senator Specter's bill; the ongoing monitoring of the quality of defense work in Senator Feinstein's bill; the enforceability provisions in Senator Specter's and Senator Leahy's bill; and the independent appointing authority in the Chairman's bill. Whatever the precise provisions, however, the overriding goal should be clear. Following the lead of the federal death penalty system and of states such as Colorado, Kentucky, Indiana, and New York, the goal should be to develop and provide adequate compensation for a stable, competent capital defense bar that is available to every capital-sentencing county in every capital-sentencing state

in the nation.

The Indiana experience is particularly telling in this regard. After facing the same kinds of capital error problems that have plagued the rest of the nation, Indiana adopted high standards for capital defense lawyers, and compensation and support service-provisions very like those, for example, in Senator Specter's bill. The results are the ones our study findings would predict: Fewer capital prosecutions have been brought; the prosecutions that have succeeded have more often been reserved for the worst of the worst offenses; confidence in the reliability of the resulting capital verdicts has increased; and the overall cost of the system appears to have declined.

I very much appreciate the Committee's efforts to address this crucial cause of the breakdown of the nation's death penalty system, and for inviting me to testify.

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APPENDIX

A Broken System:

Error Rates in Capital Cases,

1973-1995

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Executive Summary

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

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

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

Our central findings are as follows:

- Nationally, during the 23-year study period, the overall rate of prejudicial error in the American capital punishment system was 68%. In other words, courts found serious, reversible error in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during the period.
- Capital trials produce so many mistakes that it takes three judicial inspections to catch them -- leaving grave doubt whether we do catch them all. After state courts threw out 47% of death sentences due to serious flaws, a later federal review found "serious error"--error undermining the reliability of the outcome--in 40% of the remaining sentences.
- Because state courts come first and see all the cases, they do most the work of correcting erroneous death sentences. Of the 2,370 death sentences thrown out due to serious error, 90% were overturned by state judges--many of whom were the very judges who imposed the death sentence in the first place; nearly all of whom were directly beholden to the electorate; and none of whom, consequently, were disposed to overturn death sentences except for very good reason. This does not mean that federal review is unnecessary. Precisely because of the huge amounts of serious capital error that state appellate judges are called upon to catch, it is not surprising that a substantial number of the capital judgments they let through to the federal stage are still seriously flawed.
- To lead to reversal, error must be serious, indeed. The most common errors--prompting a majority of reversals at the state post-conviction stage--are (1) egregiously incompetent defense lawyers who didn't even look for--and demonstrably missed--important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who did discover that kind of evidence but suppressed it, again keeping it from the jury. [Hundreds of examples of these and other serious errors are collected in Appendix C and D to this Report.]

- High error rates put many individuals at risk of wrongful execution: 82% of the people whose capital judgments were overturned by state post-conviction courts due to serious error were found to deserve a sentence less than death when the errors were cured on retrial; 7% were found to be innocent of the capital crime.
- High error rates persist over time. More than 50% of all cases reviewed were found seriously flawed in 20 of the 23 study years, including 17 of the last 19. In half the years, including the most recent one, the error rate was over 60%.
- High error rates exist across the country. Over 90% of American death-sentencing states have overall error rates of 52% or higher. 85% have error rates of 60% or higher. Three-fifths have error rates of 70% or higher.
- Illinois (whose governor recently declared a moratorium on executions after a spate of death-row exonerations) does not produce atypically faulty death sentences. The overall rate of serious error found in Illinois capital sentences (66%) is very close to--and slightly lower than--the national average (68%).
- Catching so much error takes time--a national average of 9 years from death sentence to the last inspection and execution. By the end of the study period, that average had risen to 10.6 years. In most cases, death row inmates wait for years for the lengthy review procedures needed to uncover all this error. Then, their death sentences are reversed.
- This much error, and the time needed to cure it, impose terrible costs on taxpayers, victims' families, the judicial system, and the wrongly condemned. And it renders unattainable the finality, retribution and deterrence that are the reasons usually given for having a death penalty. Erroneously trying capital defendants the first time around, operating the multi-tiered inspection process needed to catch the mistakes, warehousing thousands under costly death row conditions in the meantime, and having to try two out of three cases again is irrational. This report describes the extent of the problem. A subsequent report will examine its causes and their implications for resolving the death penalty crisis.

A Broken System, Part II:

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

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February 11, 2002

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Alexander Kiss Executive Summary

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

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

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

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

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

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

MAIN FINDING

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

- The overproduction of death penalty verdicts has a powerful effect in increasing the risk of error. Our best analysis predicts that:

- Capital error rates more than triple when the death-sentencing rate increases from a quarter of the national average to the national average, holding other factors constant.

- When death sentencing increases from a quarter of the national average to the highest rate for a state in our study, the predicted increase in reversal rates is six-fold--to about 80%.

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

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

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

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

County (Newark), New Jersey; St. Louis City, Missouri; Pulaski County (Little Rock), Arkansas; Bernalillo County (Albuquerque), New Mexico; Davidson County (Nashville), Tennessee; Jackson County (Kansas City), Missouri; and Prince George's County (suburban Washington), Maryland. These counties had an average error rate of 41%, and none sentenced anyone to death during the study period or since who was later found not guilty.

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

PRESSURES ASSOCIATED WITH OVERUSE OF THE DEATH PENALTY

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

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

ADDITIONAL FINDINGS

Heavy use of the death penalty causes delay, increases cost, and keeps the system from doing its job. High numbers of death verdicts waiting to be reviewed paralyze appeals. Holding other factors constant, the process of moving capital verdicts from trial to a final result seems to come to a halt in states with more than 20 verdicts under review at one time.

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

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

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

SUMMARY EXPLANATION

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

METHODS

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

determine which factors and sets of significant factors are the most robust and warrant the most confidence.

POLICY OPTIONS

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

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

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

CONCLUSION

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