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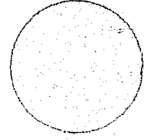

Three papers on

Understanding Reversible Error in Criminal Appeals

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Final Report

National Center for State Courts

Understanding Reversible Error in Criminal Appeals

Final Report

Submitted to the State Justice Institute

by

National Center for State Courts

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The project's written work products have gone through multiple reviews. A distinguished advisory committee as well as colleagues at the National Center for State Courts and elsewhere generously have given their time in evaluating the work products and in suggesting ways to improve the substance, organization, and presentation of the research results and their implications. In addition to the advisory committee, these individuals include the Honorable F. Bruce Bach, the Honorable Sylvia Bacon, Pamela Casey, George Cole, Thomas Davies, Victor Flango, Geoff Gallas, John Goerdt, Clifton Grandy, Thomas Henderson, William McLain, David Rottman, and Todd Stickle. We have tried to translate their advice and criticisms into more-readable reports.

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Introduction

Appeals are the vehicle by which appellate courts supervise the trial process, correcting errors by reversing or modifying trial court decisions. Yet, despite the central nature of this error-correction function and the importance of appellate review in assuring the integrity of the criminal appeals process, little attention has been paid to the outcomes of first-level appeals courts.

This project sought to begin to fill that gap in our knowledge by examining criminal appeals in five courts—the California Court of Appeal, Third District, in Sacramento; the Colorado Court of Appeals; the Appellate Court of Illinois, Fourth District, in Springfield; the Maryland Court of Special Appeals; and the Rhode Island Supreme Court.

The research had two objectives. The first was to assist the development of judicial education programs by exploring the existence and nature of cross-court patterns to the errors identified by appellate courts. The second was to examine criminal appeals more broadly in terms of the offenses and trial court proceedings involved, the issues raised, and the range of outcomes. This report presents the project's major papers. They are:

- "Understanding Reversible Error in Criminal Appeals: Executive Summary." This paper is an overview of key aspects of the research.
- "Identifying Reversible Error in Criminal Appeals: Implications for Judicial Education." This paper discusses the significance of the research results for judicial education and training.
- "Toward Understanding Criminal Reversals." This paper presents research results on the composition and outcomes of criminal appeals.

We believe these papers make three contributions to the judicial administration community. First, they provide the only comparative data set on the

outcomes of first-level criminal appeals. They thus provide the first opportunity for judges, lawyers, researchers, and the public to examine, to dissect, and to think systematically about this aspect of appellate courts. Second, the identification of particular cross-court patterns in the nature of errors resulting in reversals leads to specific implications for trial court education. Simply stated, the examination of both the composition and the character of criminal appeals and the nature of error reveals many cross-court similarities that had not been thought to exist before. Finally, the research has established and applied a comparative methodology for examining error in criminal appeals. As a result, courts across the country can draw on that methodology to develop their own systems for collecting, analyzing, and interpreting data on the outcomes of appeals.

Looking to the future, the policy research agenda can profitably be targeted at several issue areas that build on the current research. They are as follows:

- The current five-court examination of criminal reversals should be broadened to include additional courts, additional years, and civil appeals. The purpose of the future inquiry should be to determine if the current results are consistent across more courts and over longer periods of time. Finally, there is a need to determine what parallel patterns exist among civil cases on appeal.

- The organization and effectiveness of indigent defense representation at the appellate level should be examined. The research reveals considerable differences in the structure of defense representation. A number of states are currently reexamining how indigent defense representation is organized at the appellate level. Others are expressing renewed concerns about the effectiveness of public defender systems.

- Sentencing issues on appeal deserve systematic empirical investigation. For the past several years, many states have experienced fundamental changes in sentencing laws with the adoption of sentencing commissions, sentencing guildelines, and alternative forms of determinate sentencing. Many observers assert that these sorts of reforms do not add to the burden of appellate courts and that with the adoption of appropriate case law, appellate review of sentencing can be accomplished with minimum difficulty. Those assertions are contradicted by the evidence from this project and a previous study on the management of criminal appeals. As a result, appellate courts are engaged in the review of sentences without the benefit of any systematic empirical research on the frequency, type, and outcomes of sentencing issues. Because sentencing issues arise in an appreciable proportion of cases, even in states with indeterminate sentencing laws, appellate review of sentencing issues warrants a national-scope investigation.

Paper I

Understanding Reversible Error in Criminal Appeals:

Executive Summary

One of the critical functions of appellate courts is to supervise the trial process, correcting errors by reversing or modifying decisions of the trial courts. Despite the importance of appellate review in assuring the integrity of the criminal appeals process, there has been virtually no systematic examination to determine the patterns of outcomes, either within or across courts.

Where do criminal appeals come from in terms of the trial court proceeding being challenged, the offenses involved, and the issues raised? What are the outcomes of criminal appeals? Are successful appeals associated with certain configurations of proceedings and issues? What kinds of errors are being made in the trial courts? Answers to these questions are essential to efforts to enhance the effectiveness of the trial process and to inform our understanding of cases on appeal. In response, the National Center for State Courts (NCSC) has undertaken a study of these questions with data collected from five state appellate courts hearing first-level criminal appeals.* The remainder of this paper highlights the essential aspects of that research. The significance of the research results for

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* We looked at four intermediate appellate courts—the California Court of Appeal, Third District, in Sacramento; the Colorado Court of Appeals; the Appellate Court of Illinois, Fourth District, in Springfield; and the Maryland Court of Special Appeals—and one court of last resort in a jurisdiction without an intermediate appellate court (Rhode Island Supreme Court). In each, we looked at all defense appeals resolved on the merits within a set time frame—two years in Rhode Island (1983-1984) because of its small caseload and one year in each of the others (1983 in Sacramento and Springfield, 1985 in Colorado and Maryland). Original writs and government appeals were excluded, and discretionary appeals were included only to the extent that the court accepted an appeal for hearing on the merits. In every court, the docket and the court's decision document were examined; briefs were examined in all courts except Maryland. The data set consists of just under 1,750 appeals in which almost 3,800 issues were raised and considered by the appellate court.

judicial education and training is discussed in the following paper, "Identifying Reversible Error in Criminal Appeals: Implications for Judicial Education." Detailed research results on the composition and outcomes of criminal appeals are presented in the final paper, "Toward Understanding Criminal Reversals."

The Landscape of Appeals

At the most general level, the research confirms the utility of a comparative approach to understanding court operations and their improvement. Few striking differences emerge across the five courts in terms of the composition of appeals. The differences that exist can be largely explained by differences in each court's jurisdiction and underlying state law. For example:

Trial Court Proceedings. In each court, the majority of appeals follow trial convictions. However, on average, one-quarter of the appeals come from nontrial proceedings, including guilty pleas, revocations of probation, denials of postconviction relief, and a handful of miscellaneous proceedings. Where state law permits direct appeals from pleas of guilty and denials of postconviction relief, their numbers can be quite large (e.g., over 40 percent of the appeals in Sacramento followed guilty pleas).

Most Serious Offense. Homicides and other crimes against the person constitute just over half of all appeals; 20 percent consist of property crimes. There is relatively little variation from this distribution across the five courts.

Sentence. The large plurality, if not majority, of appeals in each jurisdiction is in cases with sentences of five years or less. Sentences in excess of 20 years are seen, on average, in less than 20 percent of the appeals.

Issues Raised. The frequency with which issues were raised is quite similar from court to court. In appeals following jury trials, the most frequent challenges are to rulings on the introduction of evidence or testimony (43 percent), sufficiency of the evidence (35 percent), and jury instructions (30 percent).

Counsel. One of the most visible differences across states is in the structure of defense representation. The courts vary in the extent to which a public

defender provided indigent defense representation and in the frequency of retained counsel.

Winning and Losing on Appeal

The conventional wisdom is that with free appeals there is little incentive not to appeal, and, as a result, a large number of criminal appeals are meritless, if not frivolous. Given that perspective, one might not expect to find a great many successful appeals. In fact, the overall affirmance rate for the five courts is 79.4 percent. Four of the courts (all but Rhode Island) are within plus-or-minus two percentage points of that figure (78.6, 79.3, 79.3, and 81.7 percent); Rhode Island's affirmance rate was 70.8 percent.

As seen in **Table 1**, instances in which a conviction or judgment were overturned and the case either remanded for a new trial or the charges dismissed were quite infrequent. Acquittals constituted only 1.9 percent of all appeals and only 9.4 percent of all nonaffirmances or "winners." In no jurisdiction did acquittals occur in as many as 4 percent of all appeals. A remand with the possibility of retrial was more likely—6.6 percent of all appeals and 31.9 percent of all winners.

Defendants had the most success in obtaining a new sentencing hearing or a corrected sentence entered by the appellate court. These constitute 7.3 percent of all appeals and 35.3 percent of all winners. Defendants obtain some relief in an

Table 1
Percentage Distribution of Alternative Outcomes
Five-Court Pattern

Appeal Outcomes	Percent all Appeals	Percent Nonaffirmances
Affirmed	79.4	—
Reversed	20.6	100.0
Acquittal	1.9	9.4
New trial	6.6	31.9
Resentencing	7.3	35.3
Other	4.8	23.4

additional 4.8 percent of the appeals; many of these are appeals with multiple convictions where at least one conviction is affirmed.

What Accounts for the Outcomes?

The literature suggests a number of factors to explain outcomes—including the trial court proceeding (trial versus nontrial), the type of offense or the seriousness of the sentence, and the type of defense counsel. However, the five-court data show no strong relationship between these factors and appeal outcomes. There are essentially no differences in outcomes between appeals from trials and those from nontrial proceedings. Appeals from each type of proceeding win about the same in total, with trials winning somewhat more frequently.

Although frequency of winning does not appear to vary greatly by offense, the relationship between sentence and outcome is more complicated. Specifically, appeals at each end of the incarceration spectrum (those with little or no incarceration and those with sentences in excess of 20 years) show the lowest affirmance rates. "Winning big" (i.e., an acquittal or a new trial) occurs most frequently in appeals with the least serious sentence; appeals involving the longest sentences show the highest percentage of "winning little" (i.e., resentencing or other modification). Yet these relationships are very weak statistically. That is, while there is a gross difference in the affirmance rates between appeals involving long versus shorter sentences, one cannot predict whether a case will be affirmed or reversed by looking at its sentence length. Similarly, there is virtually no difference in outcome by counsel.

Issues, Error, and Outcomes

Much more closely related to outcomes is the nature of the issues raised on appeal. As seen in **Table 2**, the appeals courts identified 267 prejudicial errors affecting other than the sentencing hearing or the sentence in jury trial cases. Quantitatively, just over 20 percent of the errors related to rulings on the admission or exclusion of evidence; instructions accounted for 13.5 percent, sufficiency of the evidence 12 percent. However, as Table 2 also indicates, some issues are more successful than others in resulting in reversible error.

The "success rate" among different issues can be estimated by dividing the number of times a particular type of error is found by the total number of times the issue is raised. According to Table 2, the success rate appears in large measure to

be inversely related to the relative frequency with which an issue is raised. That is, the most frequently raised issues have lower error rates than less frequently raised ones.

Substantively, error seemed to fall into three broad categories, although specific case precedents differ from court to court. Those categories are:

- perennial problems arising from the context in which they are raised. Evidentiary questions raised during the examination of witnesses at trial are a classic example.

- issues that result from new areas of litigation. Trial judges have problems with new areas until law and procedure become settled. Where these problems will occur is hard to predict, but when they occur they exist across courts with each jurisdiction having wrinkles on the basic theme. This is seen in sex offenses involving child victims where every jurisdiction has reversals as a result of the trial judge's decisions permitting testimony on the veracity of the child victim. Another example involves questions regarding the admissibility of roadside sobriety tests in prosecutions for driving under the influence or driving while impaired.

Table 2
Reversible Error by Issue

Issue	Percentage of all Error Associated with Issue	Success Rate
Admission/exclusion of evidence	20.6%	7.7%
Instructions	13.5	9.7
Procedural or discretionary ruling	13.1	7.8
Sufficiency of the evidence	12.0	5.8
Merger of offenses	10.5	51.9
Suppression of evidence, statements, or identification	10.5	8.4
Ineffective assistance/waiver of counsel	6.0	12.9
Other constitutional claims (double jeopardy, speedy trial)	4.9	11.5
Jury selection or deliberation	3.4	8.8
Statutory interpretation or application	2.2	19.4
Plea	2.2	15.0
Prosecutorial misconduct	1.1	1.9
	100%	

N=267

- inattention or lack of deliberation. Error in many instances appeared less the result of the idiosyncratic nature of state law than of the trial judge's failure to follow established rules or procedures. These included the failure to afford allocution before sentencing and to provide notice before a revocation hearing.

An Emerging Issue—Sentencing Error

The research reveals a growing trend that warrants separate treatment. This is the emergence of sentencing issues as a problem, regardless of the jurisdiction's particular sentencing law. Sentencing issues were raised in one-quarter of the appeals, and it appears that sentencing issues are not simply "add-on" issues to appeals that would otherwise have been filed; a great number of appeals were filed raising only sentencing issues. In addition, sentencing issues have a high error rate. In fact, when sentencing is raised, the courts find error 25 percent of the time.

The appeals raised a wide range of issues relating to the sentence and the sentencing hearing, not simply disparity claims. Sentencing issues included enhancements (aggravating factors warranting a departure from the guidelines or the computation of the time enhancement); mitigating factors; the imposition of consecutive as opposed to concurrent terms; problems with the conduct of the sentencing hearing, including the denial of allocution; and the trial judge's illegal considerations (e.g., pleaded not guilty). Although the nature of the error differed across the five courts, even in Rhode Island, which has indeterminate sentencing, sentencing issues had a 38.5 percent error rate.

Where Do We Go from Here?

Need for Monitoring

The fundamental importance of the outcomes of criminal appeals calls for individual appellate courts to monitor their own performance for internal feedback purposes and to enhance their role in supervising the trial process. A significant by-product of this monitoring would be the ability to track issues in the appellate court.

Need for Information

Without systematic information, the appellate court can neither perform its internal monitoring function nor supervise the trial court process effectively. For this reason, the administrative office of the state courts and the appellate court staff

need to incorporate information on the outcomes of criminal appeals and the characteristics of the appeals (lower court proceeding, offense, sentence) into their management information systems.

Need for Education

Because one in every four appeals finds error, there is room for improving trial court performance. Perhaps not every error can be averted, but there is evidence that an appreciable portion of the error is reducible.

The methodology used in the current research can be used by individual states to assess their particular needs for judicial education. In addition, the use of a common methodology and uniform categories can shed light on relevant similarities and differences in error patterns, suggesting possible ways to avoid or reduce error as well as highlighting mutual areas of concern.

Paper II

Identifying Reversible Error in Criminal Appeals:

Implications for Judicial Education

Judicial educators must focus their efforts where they are most needed. But how does one determine where the need exists? From our perspective, the decisions of first-level appeals courts, which have trial court error correction as a primary function, provide a way to identify difficulties for trial courts that might be addressed by education.

On the individual level, a reversal tells us that the trial judge erred in the specific case from which the appeal is taken. In the aggregate, appellate court decisions disclose the extent to which trial judges within a jurisdiction are committing error and which errors are occurring. By focusing on several courts, one can clarify the extent to which errors are idiosyncratic to a single jurisdiction's law or illustrate difficulties shared by trial judges in different settings. Understanding reversals, thus, has implications for the improved performance of individual judges, trial courts, and the judicial system, especially if there are commonalities across courts.[1]

Systematic information on outcomes, even in a single appeals court, is rarely available; cross-court appellate data are virtually unknown. The National Center for State Courts is responding to this gap in our knowledge by examining reversible error in criminal appeals in five first-level appeals courts.[2]

This paper explores the findings of that research as they bear on the development of education programs for trial court judges hearing criminal appeals. The research findings themselves are set forth in the companion paper, "Toward Understanding Criminal Reversals." In the sections that follow, this paper presents descriptive information on three basic issues: (1) the frequency of various kinds of error and where errors are concentrated; (2) the nature of error patterns across courts; and (3) the existence of special issues warranting discussion and increased

attention. On the basis of this information, we offer a set of implications to guide those involved in developing and carrying out judicial education programs. These implications highlight the benefits of a common methodology for assessing the need for judicial education, potential topics to be covered, and the information needed to inform educational programs.

The Landscape of Criminal Appeals

At the most general level, this research demonstrates the positive value of a comparative approach toward understanding court operations and their improvement. There were few intercourt differences in the composition of appeals. The differences that do exist are explainable largely by particular aspects of each court's jurisdiction and underlying state law. For example:

- In every court, the majority of appeals followed trial convictions. However, on average one-quarter of the appeals came from nontrial proceedings, including guilty pleas, revocations of probation, denials of postconviction relief, and a handful of miscellaneous proceedings. Where state law permits direct appeals from pleas of guilty and denials of postconviction relief, their numbers can be quite large (e.g., over 40 percent of the appeals in Sacramento followed guilty pleas).

- Homicides and other crimes against the person constitute just over half of all appeals; 20 percent consist of property crimes. There is relatively little departure from these figures in any of the five courts.

- The large plurality if not the majority of appeals in every jurisdiction is in cases with sentences of five years or less. Sentences in excess of 20 years are seen, on average, in less than 20 percent of the appeals.

Paralleling the similarity in the composition of appeals is a striking similarity in outcomes. The overall modification rate for all five courts is 20.6 percent. The four intermediate appellate courts are within plus-or-minus two percentage points of that figure (21.4, 20.7, 20.7 and 19.3 percent). Rhode Island's single-tier appellate structure may account for its higher modification rate (29.2 percent).

Using the modification rate as a measure of error, we found that 8.5 percent of the criminal appeals have errors serious enough to warrant overturning all convictions in those cases. Appellate courts found additional errors leading to the modification of the trial court action in another 12.1 percent of the appeals. Finally,

in an additional 5 percent of the affirmed appeals, the appeals court found errors that it held to be harmless.[3]

What Do the Errors Look Like?

In the 1,750 cases examined, the appeals courts identified 267 prejudicial errors (out of almost 3,800 issues raised) affecting other than the sentencing hearing or the sentence. Although specific case precedents differ from court to court, error seemed to fall into several broad categories:

- perennial problems arising from the context in which they are raised. Evidentiary questions raised during the examination of witnesses at trial are a classic example.

- issues that result from new areas of litigation. Trial judges have problems with new areas until law and procedure become settled. Where these problems will occur is hard to predict, but when they occur, they exist across courts, with each jurisdiction having wrinkles on the basic theme. This is seen in sex offenses involving child victims where every jurisdiction had reversals as a result of the trial judge's decisions permitting testimony regarding the veracity of the child victim. Another example involves questions regarding the admissibility of roadside sobriety tests in prosecutions for driving under the influence or driving while impaired.

- inattention or lack of deliberation. Error in many instances appeared less the result of the idiosyncratic nature of state law than of the trial judge's failure to follow established rules or procedures. These included the failure to afford allocution before sentencing and to provide notice before a revocation hearing.

A detailed breakdown of the errors by issue is shown in **Table 1.**

We looked at the court's opinion to further categorize the 267 errors. Although specific case precedents differed, there is a commonality to the issues that cause trial judges problems. In this section, we discuss the six issue types with the highest number of errors.

(1) *Evidentiary* errors (20.6 percent) fell in three areas. Errors occur most frequently during the government's direct examination and involve (in decreasing order of frequency) character testimony, opinion evidence (problems both with expert testimony and opinions proffered by nonexperts), evidence of uncharged acts and prior convictions, and hearsay in general.

Errors in limiting defendant's cross-examination are less frequent. These involve attempts to explore possible witness bias, to develop the defense's alternative theory of the case, and to explore the capacity of witnesses to recollect (impairment at event by alcohol, drugs, or age). There are few errors in refusing a defense proffer.

(2) *Instructional* errors (13.5 percent) also fell into three broad areas. The most frequent are errors in the instructions the judge gives regarding the substantive elements of an offense. The offenses involved, however, were uncommon in our sample—e.g., manufacture of drugs for sale and giving away a controlled substance—and not offenses for which standard or pattern instructions existed.

The second source of instructional error is a refused defense proffer involving an alternative defense theory, lesser included or nonincluded offenses, or defenses. There are also errors in more general instructions (given or refused), for example, regarding the credibility of alibi witnesses, complicity, the need for juror unanimity, and presumptions regarding the veracity of witnesses.

(3) *Procedural and Discretionary Rulings* (13.1 percent). The only pattern to these errors is that there is no easy categorization of them. The errors identified by the appeals courts cover a broad spectrum of trial court rulings, including allowing the government to amend charging documents, ordering the transfer of juvenile defendants, joining offenses or defendants, refusing to grant continuances, and the adequacy of notice before revocation hearings.

Table 1
Frequency of Type of Error in Nonsentence-related Issues

Issues	Number of Issues	Percentage of all Error Associated with Issue
Admission/exclusion of evidence	55	20.6
Instructions	36	13.5
Procedural or discretionary rulings	35	13.1
Sufficiency of the evidence	32	12.0
Merger of offenses	28	10.5
Suppression of evidence, statements, or identification	28	10.5
Ineffective assistance/waiver of counsel	16	6.0
Other constitutional claims (double jeopardy, speedy trial)	13	4.9
Jury selection or deliberation	9	3.4
Statutory interpretation or application	6	2.2
Plea voluntariness	6	2.2
Prosecutorial misconduct	3	1.1
	267	100.0%

(4) *Sufficiency of evidence* errors (12.0 percent) are not concentrated in cases involving particular kinds of offenses. They are found in such major or common offenses as involuntary manslaughter, aggravated assault, rape, and attempted murder as well as in such less common ones as drug manufacture, nuisance, perjury, rogue and vagabond, and theft by deception.

(5) *Merger of Offenses* (10.5 percent). Multiple convictions arising out of the same fact patterns are problematic in all courts, and especially regarding the merger of lesser-included offenses. The greatest number of problems occur in sex offenses and involve whether such offenses as assault with intent to rape, battery, assault, and unlawful restraint were merged into a rape conviction. Homicides represent the second-largest category, with problems in felony-murder prosecutions the most common setting. Merger of convictions into armed robbery also causes problems. The remaining errors include the relationship of such less frequently seen offenses as intimidation and mob action.

(6) *Suppression* (10.5 percent). Most of the errors here involved the failure to suppress tangible evidence, most commonly in drug prosecutions. Errors regarding the admissibility of defendant's statements or identification of the accused are considerably less frequent.

There are other types of errors. Their individual numbers are not large, and there does not appear to be any systematic distribution to the cases in which they are raised. "Constitutional problems" are infrequent and cut across a divergent range of topics—waiver of jury trial, waiver of counsel, speedy trial, and double jeopardy. There are also questions regarding the representativeness of a jury, a defendant's standing to challenge a search, and the authority of the attorney general to prosecute a specific offense. Only a few, such as preemption of state law, the validity of administrative warrant procedures, and venue requirements, appear to be rooted in the unique features of a jurisdiction's law or procedure.

Although errors occurred in all kinds of proceedings, the nature of the errors differs somewhat. In jury trials, most errors involve evidentiary rulings and instructions. In nonjury trials, the more frequent errors involve the sufficiency of the evidence, the denial of suppression of tangible evidence or defendant's statements, and other constitutional challenges (e.g., speedy trial, double jeopardy, statute of limitations, interpretation of law). In appeals from guilty pleas, the plea taking itself is not the major source of error. Rather, it is the underlying suppression and other procedural rulings (including waiver of jury trial). In probation revocation proceedings, the sufficiency of the evidence of violation is the major error, although notice requirements and trial judge bias also result in reversals.

Some issues may have more errors because they are the most frequently raised issues on appeal. However, it is possible that some issues that are raised

infrequently are almost always the basis for reversals. Table 2 presents the relative rate of error for each issue (success rate). This is obtained by dividing the number of times error is found in a given issue area by the total number of times the issue is raised. The error rate is variable. Prosecutorial misconduct has a very low error rate; the courts find reversible error in less than 2 percent of the times that issue is raised. On the other hand, the court found error in over half the challenges to the merger of offenses. In fact, the error rate is inversely related to the relative frequency with which an issue is raised. The more frequently raised issues (e.g., challenges to evidentiary rulings, to the sufficiency of the evidence, to instructions) generally have a lower error rate than the less frequently raised ones (e.g., statutory interpretation).

An Emerging Issue—Sentencing Error

The research reveals a growing trend that warrants separate treatment: the emergence of sentencing issues as a problem, regardless of the jurisdiction's sentencing law. Sentencing issues are raised in one-quarter of the appeals, and it

Table 2
Frequency of Type of Error in Selected Nonsentence Issue Areas

Issue	Percentage of all Error Associated with Issue	Success Rate
Admission/exclusion of evidence	20.6%	7.7%
Instructions	13.5	9.7
Procedural or discretionary ruling	13.1	7.8
Sufficiency of the evidence	12.0	5.8
Merger of offenses	10.5	51.9
Suppression of evidence, statements, or identification	10.5	8.4
Ineffective assistance/waiver of counsel	6.0	12.9
Other constitutional claims (double jeopardy, speedy trial)	4.9	11.5
Jury selection or deliberation	3.4	8.8
Statutory interpretation or application	2.2	19.4
Plea voluntariness	2.2	15.0
Prosecutorial misconduct	1.1	1.9
	100%	
	N=267	

appears that sentencing issues are not simply "add-on" issues to appeals that would otherwise have been filed; a great number of appeals are filed raising only sentencing issues. In addition, sentencing issues have a high error rate. In fact, when sentencing is raised, the courts find error 25 percent of the time.

The appeals raise a wide range of issues relating to the sentence and the sentencing hearing, not simply disparity claims. Sentencing issues include enhancements (aggravating factors warranting a departure from sentencing guidelines or the computation of enhancements); mitigating factors; the imposition of consecutive as opposed to concurrent terms; problems with the conduct of the sentencing hearing, including the denial of allocution; and the trial judge's illegal considerations (e.g., pleaded not guilty).

The pattern of error on sentencing issues differed across the five courts. But even in Rhode Island, which has indeterminate sentencing, sentencing issues had a 38.5 percent error rate. The sentencing issue raised in the Rhode Island appeals is a "traditional" one, the imposition of consecutive rather than concurrent terms, especially after revocation of probation.

Sentencing issues in Sacramento have an error rate of almost 30 percent. Errors are concentrated in three areas—basis for enhancements, credit for time served, and the imposition of consecutive sentences.

In Springfield, sentencing issues have a 15 percent error rate. Although the state has determinate sentencing, with mandatory minimums for many offenses, the main error concerns the amount of restitution ordered, crediting of time in custody against an imposed fine, and other credit for time in custody.

In Maryland, sentencing issues had a 25 percent error rate. The main errors involve illegal sentences, the denial of allocution, and questions regarding imposition of mandatory minimums.

Finally, only in Colorado, where the error rate for sentencing issues was 23 percent, do the major issues relate to disparity and excessiveness.

Discussion and Implications

The research findings are relevant to judicial education programs aimed at improving court performance. In this concluding section, we recapitulate the major findings and suggest the implications these findings have for those involved in developing judicial education programs.

- ***Finding 1.*** There are substantial similarities across the five courts in their caseloads, the issues raised, and the distribution of outcomes. These differences are largely explainable and understandable in jurisdiction-specific terms.

- *Finding 2.* There is also a substantial similarity across courts in the nature of the error found in trial court proceedings. Error does not appear to be the result of differences in underlying precedents or procedures or in the idiosyncracies of individual judges.

The broadest implication of these two findings is that existing education programs can be enhanced by applying a systematic methodology for identifying and analyzing the kinds of errors that occur in specific issue areas. Errors need not be identified by anecdotal evidence, personal observations, and intuition. Systematic evidence can be used to establish a firm empirical foundation on the pattern of errors that occur within individual courts, across courts, and over time.

The second implication is that the current research methodology can be used by individual states to identify particular sources of errors within general categories. For example, the methodology can inform individual jurisdictions as to what segment of evidentiary issues concern some particular matter.

Further, by using a common methodology and uniform categories, judges from different jurisdictions who are attending educational programs can discuss relevant similarities and differences in their respective error patterns. For example, it could be illuminating for a jurisdiction that has a high incidence of error within jury instructions to learn how and why another jurisdiction has few such errors.

For all of these implications, the underlying theme is that a common data collection system and a common set of data elements enable educational programs to be built around systematic information instead of relying on subjective judgments and selective recall as to where errors occur.

In addition to these implications, which indicate that there is room for systematic evidence to support judicial education, there are implications from this project for the potential content of educational programs.

- *Finding 3.* The relative frequency of error is not strongly related to the nature of the trial court proceeding. Error is just as likely to be found in nontrial and posttrial proceedings. Hence, an implication is that education programs should not limit their focus to trial proceedings but should also address nontrial matters, including probation violation hearings, plea takings, and sentencing.

- *Finding 4.* The relative frequency of error is not strongly related to the underlying offense or the severity of the sentence. This implies that there is no obvious scenario to target. Education must focus on the circumstances of the error itself rather than exclusively on particular high profile cases.

- *Finding 5.* Across courts we found error in new areas of litigation, problems caused until law or procedure becomes settled. While the specific error cannot always be predicted and prevented, one implication is that one can expect new areas of law to be problematical. Potential problem areas can be anticipated and addressed through such activities as informal introductions to new laws and the prompt preparation of pattern instructions when changes are made to the criminal code.

Across courts, some issues will always cause problems because of the context in which they are raised. Evidentiary questions raised during the examination of witnesses are a classic example. When the parties anticipate a difficult evidentiary ruling, they will ask for a ruling in limine; here a judge can deliberate before the trial begins. Most of the time, however, evidentiary or testimonial problems emerge from the moment, the product of the flow of the questioning. Hence, the judge cannot recess and research an issue.

Some error, on the other hand, appears more the result of a lack of deliberate action on the part of the judge. For example, the incidence of instructional error could be reduced by more careful assessment of the sufficiency of the evidence to justify an instruction on the defense theory. Similarly, sentencing errors could be reduced by a judge's following a more careful methodology in adhering to sentencing guidelines and law. Educational efforts, thus, should not overlook routine proceedings and the need to reinforce a trial judge's bench skills.

All five findings and the corresponding implications have been derived from a systematic examination of criminal appeals. These data, drawn from five courts over a limited time period, do not speak to all courts for all times. That the composition of appeals may change over time is illustrated by the high volume of appeals from pleas of guilty and those raising sentencing issues, types of appeals not seen in the past.[4] Yet the information is indispensable to understanding the patterns of reversals and errors.

Hence, a basic question is whether the type of information gathered for this study is currently available or accessible to trial judges and judicial educators. With respect to caseload composition and appeal outcomes, apart from a handful of studies conducted over the last decade by scholars, virtually all that exists are informally collected numbers pulled together by curious appellate and trial judges. Issue frequency and outcome information are even less available. It is unrealistic to expect individual trial courts to collect systematic information on appeals. Most first-level appeals courts do not publish opinions in all merits decisions; thus, information on the frequency of issues will not even be available to those outside

the court. Even if such information were available, it is unrealistic to think that an individual trial judge could read and digest it all.

The source of the needed information is the appellate court. Appellate courts could derive considerable benefits from having a more systematic examination of the caseload that they address and the patterns of their outcomes. Information on caseload characteristics, outcomes, and issues is essential to permit appeals courts to monitor their own performance and to enhance their role in supervising the trial process. A significant by-product of an implemented methodology would be the ability to track issues in the appeals court.

Much of the benefit of the systematic inquiry, however, is the light it sheds on trial court operations. For that reason, the burden of recording and reporting the necessary information cannot be placed solely on the appellate court. Hence, it appears that a statewide approach, requiring the cooperation and participation of the state court administrator's office and the appellate courts, provides the best opportunity for making the information available in a useful form.

Initially, appellate courts need to incorporate outcome information into their recordkeeping, management information, and reporting systems, whether they be manual or automated. This will permit the information to be provided within the court and to the state court administrative office. The outcome classifications used must make clear at a glance what was done. The *State Court Model Statistical Dictionary* and *State Court Model Annual Report*, both available from the National Center for State Courts, contain a framework that all courts can use.

Some information on the nature of the case—e.g., the underlying trial court procedure, offense, and sentence—should accompany outcome information in what the appellate court reports internally and to the state court administrative office. This information already exists in many courts in retrievable form, in amplified notices of appeal, and in docketing statements.

In conclusion, the systematic information such as that proposed here would have multiple benefits, culminating in an increased understanding of the operations of both trial and appellate courts and a reduction in the frequency of trial court errors.

Notes

1. Defining trial court error by the decisions of first-level appeals is not conclusive, of course. Trial court decisions overturned on first-level review may be reinstated by a higher court. First-level appeals courts, however, are the workhorses of state appellate systems, and they are, in fact if not in law, the final arbiter for most appeals.

2. Four are intermediate appellate courts — the California Court of Appeal, Third District, in Sacramento; the Colorado Court of Appeals; the Appellate Court of Illinois, Fourth District, in Springfield; and the Maryland Court of Special Appeals. The fifth court, the Rhode Island Supreme Court, is a court of last resort in a jurisdiction without an intermediate appellate court. In each court, we looked at all defense appeals resolved on the merits within a set time frame—two years in Rhode Island (1983-1984) because of its small caseload and one year in each of the others (1983 in Sacramento and Springfield, 1985 in Colorado and Maryland). Original writs were excluded and discretionary appeals were included only to the extent that the court accepted an appeal for hearing on the merits. Government appeals, which require separate examination, were excluded too. In every court, the docket and the court's decision document were examined; briefs were examined in all courts except Maryland.

3. There is little difference in the percentage of reversible error between trial and nontrial proceedings. In addition, error does not vary by offense or the severity of the sentence.

4. Changes in the nature of trial court activity will also affect the composition of appeals. A prominent example is the increase in drug prosecutions, which began after the period covered by this research.

Paper III

Toward Understanding Criminal Reversals

Abstract

The primary function of intermediate appellate courts (IACs) is error correction—examining lower court proceedings to determine the correctness of the law applied and the procedures followed. Because few IAC decisions receive further review, these courts are, in fact if not in law, the final arbiter for most appeals.

Despite the central nature of this error-correction function and the vital role appeals play in assuring the integrity of the criminal justice process, little attention has been paid to IACs. Where do criminal appeals come from in terms of the trial court proceeding being challenged? What do these appeals look like in terms of the offenses involved and their seriousness? In terms of the issues raised? What are the outcomes of criminal appeals?

This paper presents findings concerning data collected from five state appellate courts hearing first-level criminal appeals. Four are intermediate appellate courts—the California Court of Appeal, Third District, in Sacramento; the Colorado Court of Appeals; the Appellate Court of Illinois, Fourth District, in Springfield; and the Maryland Court of Special Appeals. The fifth court, the Rhode Island Supreme Court, is a court of last resort in a jurisdiction without an intermediate appellate court.

The research results indicate that courts of first review have similar caseloads: Most appeals come from trials and involve crimes against the person and sentences of five years or less. The research results also demonstrate that the outcomes of appeals are similar from court to court: Most defense appeals are unsuccessful. Convictions are overturned in less than 10 percent of all appeals; defendants win something in an additional 10 percent of appeals. The most striking finding is that winning does not appear to be strongly associated with the type of trial court

proceeding, the severity of the offense or the length of the sentence, or the type of lawyer. The research results further indicate that the issues raised are the best predictors of whether a case is reversed on appeal.

Introduction

The major organizational development in the appellate system over the last three decades has been the establishment of intermediate appellate courts (Kagan et al., 1977; Stookey, 1982). In 1957 they existed in only 13 states, a number unchanged from 1911 (Wasby et al., 1979); by the end of 1987, they existed in 38 states.

The purpose of an intermediate appellate court (IAC) is to relieve the caseload burden of the jurisdiction's court of last resort. The IAC thus takes on a primarily mandatory jurisdiction, enabling the state supreme court, with an increased discretionary jurisdiction, to focus on the cases and issues of overarching importance. As a result of this allocation of jurisdiction, IACs have become the workhorses of state appellate systems, absorbing the stunning increase in appellate filings experienced over the last two decades.[1]

Differences in jurisdiction between supreme courts and IACs have resulted in a difference in the primary function attributed to each appellate level. Supreme courts are seen as lawmakers; IACs are primarily error correctors (Carrington et al., 1976).[2] Working within the confines of established law, IACs examine lower court proceedings to determine the correctness of the law applied and the procedures followed in reaching a decision. Because few of their decisions receive further review, intermediate appellate courts are, in fact if not in law, the final arbiter for most appeals.[3] In this regard, they are the primary supervisors of the trial process, ensuring the integrity of the trial process (Wold and Caldeira, 1980).

Despite the central nature of the error-correcting function of IACs, particularly in criminal appeals, relatively little attention has been paid to them. Where do criminal appeals come from in terms of the trial court proceeding being challenged, the offenses involved, and the issues raised? What are the outcomes of criminal appeals? Do successful appeals arise from particular types of proceedings and issues?

A growing body of literature has addressed these questions in single-court studies. Davies (1982, 1981) examines reversals as part of his analysis of the California Court of Appeal, First District, in San Francisco. Neubauer (1985 and n.d.) looks at the outcomes of criminal appeals at a time when such appeals fell within the mandatory jurisdiction of the Louisiana Supreme Court. More recently, Wasserman (1988) investigates criminal appeals in the first and second departments of the appellate division of the New York State Supreme Court, although his

primary focus is on assessing defense representation. In addition to these single-state studies, examinations of reversal patterns over time among all courts of last resort (Note, 1978; Meeker, 1984) draw from a larger scale investigation of the business of state supreme courts (see Kagan et al., 1977).

The objective of this paper is to present findings concerning data collected from five state appellate courts hearing first-level criminal appeals. Four of them are intermediate appellate courts. They are the California Court of Appeal, Third District, in Sacramento; the Colorado Court of Appeals; the Appellate Court of Illinois, Fourth District, in Springfield; and the Maryland Court of Special Appeals. The fifth court, the Rhode Island Supreme Court, is a court of last resort in a jurisdiction without an intermediate appellate court.[4]

In each court, the object of inquiry includes all criminal appeals resolved on the merits within a set time frame—two years in Rhode Island (1983-1984) because of its small caseload and one year in each of the others (1983 in Sacramento and Springfield, 1985 in Colorado and Maryland). Original writs and government appeals are excluded, and discretionary appeals are included only to the extent that the court accepted an appeal for hearing on the merits.[5]

The intended contribution of descriptive findings presented in this paper is to verify propositions extant in the literature. Because research in this field is in the developmental stage, past studies are exploratory rather than definitive tests of theoretically based hypotheses. For this reason, a conscious effort is made in this paper to compare and contrast the current findings with those of prior investigations.[6]

Caseload Composition—What Do Appeals Look Like?

Very little is known about the business of first-level appeals courts, other than the fact that there is a lot of it and much of it is considered by judges and attorneys to be routine (Wold and Caldeira, 1980; Wold, 1978; Chapper and Hanson, 1988a, 1988b; Hanson and Chapper, 1989). There is a need for systematic information on their present caseload compositions because first-level appeals courts are not uniform in their jurisdiction or their relationships with the other courts in their state (see National Center for State Courts, 1985). Thus, it is not self-evident that these courts are handling the same kinds of cases.

The caseload in each of the five courts is measured in terms of the trial court proceeding from which the appeal was taken, the nature of the underlying offense, the severity of the sentence, and the issues raised, all dimensions that the existing literature suggests might be associated with the distribution of outcomes. Because

of the possibility that there are intercourt similarities on some dimensions and intercourt differences on others, the data are organized on a court-by-court basis in order to uncover the nature of the cross-court patterns. The data are set forth in **Table 1.**

Trial Court Proceeding

The image of a defense appeal as a challenge to conviction after a trial has a solid grounding in fact, although a substantial number of appeals follow other

Table 1
Composition of Criminal Appeals in Individual Courts (Percentages)

TRIAL COURT PROCEEDING

	Courts					
	All Courts	Rhode Island	Sacramento	Springfield	Maryland	Colorado
Trials	74.6	78.3	57.3	77.2	85.9	75.0
Other proceedings	25.4	21.7	42.7	22.8	14.1	25.0
	100.0	100.0	100.0	100.0	100.0	100.0
	N=1747	n=120	n=471	n=246	n=630	n=280

OFFENSE AT CONVICTION

	Courts					
	All Courts	Rhode Island	Sacramento	Springfield	Maryland	Colorado
Homicide	11.2	14.2	10.0	10.2	11.3	13.1
Other crimes versus person	42.2	43.3	46.8	28.9	42.2	45.8
Property crimes	20.7	13.3	23.2	31.7	15.9	20.7
Other	25.8	29.2	19.9	29.3	30.6	20.4
	99.9	100.0	99.9	100.1	100.0	100.0
	N=1743	n=120	n=472	n=246	n=630	n=275

SENTENCE LENGTHS

	Courts					
	All Courts	Rhode Island	Sacramento	Springfield	Maryland	Colorado
No or incidental incarceration	12.1	13.7	10.4	14.8	11.5	12.8
1-5 years	30.8	31.4	35.8	39.3	24.0	24.7
6-10 years	24.5	16.7	29.5	21.3	21.4	27.2
11-20 years	15.1	16.7	12.4	11.1	19.1	16.6
More than 20 years	17.5	21.6	11.9	13.5	24.0	18.7
	100%	100.1%	100%	100%	100%	100%
	N=1476	n=102	n=461	n=244	n=434	n=235

proceedings. In the aggregate, almost three-quarters of the appeals are from trial convictions.[7] The remaining quarter are from pleas of guilty, revocations of probation and denials of postconviction relief, and a handful of miscellaneous proceedings, such as criminal contempt and bail hearings.

There are differences from court to court, however. In Maryland and in Springfield, there were large numbers of nonjury trials (15-20 percent of all trials). In all courts except Sacramento, appeals from probation revocations and denials of postconviction relief range from almost 12 to over 17 percent of the total criminal appeals caseload. In Sacramento, those appeals constitute less than 2 percent of the total. On the other hand, over 40 percent of the Sacramento appeals follow a plea of guilty.[8]

Most Serious Offense at Conviction

Homicides and other crimes against the person constitute just over half of all appeals;[9] 20 percent consist of property crimes; almost 10 percent involve drug or weapons charges; the remaining range from driving offenses, probation violations, fraud, perjury, and so forth.

There is relatively little variation from this distribution across the five courts. Homicides fall within a narrow range. With the exception of Springfield, other crimes against the person fall within an equally small range. In Springfield, the difference is made up in property crime convictions.

Sentence

The large plurality of cases involves sentences of five years or less—a pattern that holds across the five courts. The courts vary in the distribution of other sentences.[10] In Rhode Island and Maryland, sentences in excess of 20 years are the next most frequent; in the other courts, sentences between 6 and 10 years are more common.[11]

Issues

The distribution of issues raised will differ to a great extent by trial court proceeding. **Table 2** shows the percentage of jury trials in which each of the 13 categorized issues is raised at least once. Included in this total is a small number of appeals in Maryland and Colorado in which the type of trial could not be determined.[12]

It comes as no surprise that the most frequent issues are those relating to the conduct of the trial. Forty-three percent of the trial appeals challenge a ruling on the introduction of evidence or testimony. Over a third of the appeals challenge the sufficiency of the evidence. Just under 30 percent questioned jury instructions.[13]

On the other hand, one quarter of the appeals raise a sentencing issue, challenging either the sentencing hearing or the sentence itself. No other issues show frequencies as high as 20 percent across all courts.

The individual courts generally do not show great variations from this general pattern. The same few issues are the most commonly raised. But as the table illustrates, there are a few standouts. A challenge to the sufficiency of evidence is made in one of every two trial appeals in Maryland and one in five in Rhode Island. In Sacramento and Springfield, sentencing issues are the most commonly raised, skewing the five-court average.

Counsel

One of the most visible differences in the characteristics of the courts' caseloads revolve around the structure of defense representation. The most common pattern is that the public defender is the primary indigent defense provider. However, there are striking differences from court to court. In Rhode Island and Springfield, assigned counsel handle only a small number of conflict appeals. In Maryland and Colorado, the public defender contracts out "overflow" appeals (13 and 19 percent of the indigency appeals, respectively). Moreover, in

Table 2
Percentage* of Jury Trials Raising Particular Issues

	Courts					
Issues	All Courts	Rhode Island	Sacramento	Springfield	Maryland	Colorado
Evidentiary ruling	43.0	59.6	35.4	36.1	46.6	42.6
Sufficiency of evidence	35.1	19.1	25.6	36.1	49.7	22.6
Jury instruction	29.5	33.0	35.0	24.7	28.0	27.9
Sentence/sentencing hearing	24.4	4.3	40.0	41.1	17.9	15.2
Suppression evidence/statements	14.5	12.8	11.2	8.2	17.0	19.1
Prosecutorial misconduct	12.7	9.6	12.8	17.7	15.4	4.5
Judicial intrusion or management	9.7	10.6	6.4	6.3	12.4	10.6
Jury selection or deliberation	7.9	1.1	6.4	7.6	9.1	10.6
Improper lineup/identification	6.2	8.5	4.4	1.3	8.6	6.0
Lesser included offenses/merger	3.5	1.1	1.2	5.1	5.8	1.5
Speedy trial	3.3	5.3	1.6	1.9	4.2	3.5
Statutory interpretation	1.2	2.1	1.2	1.3	.9	1.5
Constitutionality of statute	1.0	3.2	.4	1.9	.2	1.5
Number of jury trials	1129	94	251	158	429	197

* Percentages in each column do not necessarily sum to 100 percent because some cases raised more than one issue.

Sacramento, the public defender is not even the primary provider. There, the public defender represents well under 20 percent of indigent appellants, with assigned private counsel the primary method of representation. There is also a wide range across courts in the frequency of representation by retained counsel, from a low of 3 percent of the defense appeals in Colorado to a high of 38 percent in Rhode Island.

What does this cross-court look at caseload composition tell us? Although it is clear from the predominance of appeals following trial convictions that the composition of the caseload in first-level appeals courts differs sharply from that of trial courts, there is a considerable similarity in what is seen across IACs. There are caseload similarities in terms of trial court proceedings, offenses, sentences, and issues. What accounts for the differences that do exist? Are there idiosyncracies in the courts' practices or different intercourt incentives to appeal? We believe that the differences can be largely explained by differences in each court's jurisdiction and underlying state law.

Jurisdiction plays a major role in determining the incidence of nontrial appeals. For example, there are big differences in the extent to which the five courts may hear challenges to guilty pleas. In California, Colorado, and Illinois, an individual can challenge the plea and underlying issues on direct appeal. In Rhode Island and with minor exceptions in Maryland, such challenges must be pursued in postconviction proceedings. In Rhode Island, appeals from these proceedings may be filed of right; in Maryland, they are discretionary.

There are also differences in the issues that can be brought on appeal. A major difference is the extent to which sentencing issues can be raised. California and Illinois have determinate-sentencing schemes, which permit direct challenges to the appropriateness of the sentence and its computation.[14] Opportunities for a successful challenge to the sentence are limited in the other courts. There are other restrictions on issues as well. For example, claims of ineffectiveness of trial counsel cannot normally be raised on direct appeal in Maryland as it can in the other courts.

Differences in the jurisdiction of the trial court and state sentencing laws may account for the predominance of property crimes and the distribution of sentences seen in the Springfield sample. The unified trial court in Illinois hears more of the less serious property crimes than the upper-tier general jurisdiction trial courts in the other four jurisdictions. In addition, mandatory incarceration provisions for residential burglary are thought to increase the trial rate in those prosecutions and ultimately the appeal rate.

Finally, Rhode Island's single-tier appellate structure may explain the slightly higher frequencies of challenges to statutory interpretation and to the constitutionality of a statute. Speedy trial and other constitutional issues are also raised somewhat more frequently in Rhode Island than in the other courts.

Winning and Losing on Appeal

The conventional wisdom is that with free appeals (appeal of right with no filing fee, a free lawyer, and transcript), there is little incentive not to appeal, and, as a result, a large number of criminal appeals are considered to be meritless if not frivolous (Carrington et. al., 1976; Wold, 1978). While one might not then expect to find many appeals in which the defendant prevails, this does not answer the question as to the distribution of outcomes in a variety of courts.

The answer to that question depends on what counts as a reversal. A traditional way of classifying outcomes is to divide court decisions into only two categories: affirmances and reversals. If this dichotomy is used, and every appeal in which the appeals court did not totally sustain the lower court is treated as a reversal, the overall affirmance rate for all five courts (as seen in Table 3) is 79.4 percent. Four of the courts (all but Rhode Island) are within plus-or-minus three percentage points of that figure (i.e., 78.6, 79.3, 79.3, and 81.7 percent).[15]

Following in the tradition of Davies (1982), appeals are separated here into three categories.[16] The first category consists of appeals in which the trial court judgment is completely affirmed. This includes appeals in which error occurred but is concluded to be harmless. In the second category are "big winners." Included here are cases in which a conviction or judgment is overturned, and either the case is remanded for a new trial (or hearing in the case of probation revocations) or the charges are dismissed. The third category consists of "little winners" (i.e., where the defendant obtains some modification, although a conviction is not necessarily disturbed). This includes remands for resentencing, vacating of convictions of lesser included offenses, and situations where one of several convictions was overturned.[17]

From the data displayed in **Table 3**, big winners are found to be infrequent. Within the category of big winners, it is quite rare for a defendant to win a dismissal of the charges. Acquittals constituted only 9.4 percent of all winners and only 1.9 percent of all appeals.[18] In no jurisdiction did acquittals occur in as many as 4 percent of all appeals.

A remand with the possibility of retrial is considerably more likely—31.9 percent of all winners and 6.6 percent of all appeals. Although information was not obtained on the outcomes of the cases in the five-court sample after remand, research in other contexts indicates that fewer than half ultimately result in a conviction.[19] In addition, there is no information on the extent to which the IAC dispositions reported here were later overturned by the state supreme court. However, the 4 percent figure is reliable and not subject to major change due to additional reversals by state supreme court actions. This is because of the fact that

few petitions from the intermediate appellate court to the state supreme court are accepted.[20]

Defendants more frequently win little (12.1 pecent) than they win big (8.5 percent). In most of these situations the "win" is a new sentencing hearing or a corrected sentence entered by the appeals court. These constitute 35.3 percent of all winners and 7.3 percent of all appeals. This might be expected in California and Illinois, where there are determinate-sentencing schemes. And, in fact, in Sacramento, 14.2 percent of the appeals result in a remand for resentencing. Springfield, however, is no different from the courts without sentencing review. In those cases, the resentencing was directed at issues relating to the conduct of the sentencing hearing (e.g., denial of allocution) and occasionally to the less frequent illegal sentence (e.g., improper delegation to probation officer to set amount of restitution).

The defendant obtains some relief in an additional 4.8 percent of the appeals. A quarter of these are appeals in cases with multiple convictions where at least one conviction was affirmed; some the less serious, some the most. The defendant's win might be significant, but it did not result in walking. Most are situations that do not affect the actual time served. Most of these are vacatings of included offenses.

There are differences by court, with the pattern of outcomes in Rhode Island (a court of last resort) sharply different from that of the four IACs. In the IACs, the lower court judgment or sentence was affected in about 20 percent of the appeals.

Table 3
Percentage Distribution of Alternative Outcomes by Court

	Courts					
Appeal Outcomes	All Courts	Rhode Island	Sacramento	Springfield	Maryland	Colorado
Win nothing	79.4	70.8	78.6	79.3	81.7	79.3
Win little	12.1	9.2	17.6	14.2	9.8	7.1
Affirmed/reversed	(1.4)	(.8)	(1.5)	(1.2)	(1.9)	(.4)
Resentencing	(7.3)	(3.3)	(14.2)	(4.9)	(4.8)	(5.0)
Other	(3.4)	(5.0)	(1.9)	(8.1)	(3.1)	(1.7)
Win big	8.5	20.0	3.8	6.5	8.4	13.6
Reversed/dismissed	(1.9)	(3.3)	(1.1)	(2.4)	(2.4)	(1.4)
Reversed/new trial	(6.6)	(16.7)	(2.7)	(4.1)	(6.0)	(12.1)
Totals	100%	100%	100%	100%	99%	100%
	N=1748	n=120	n=472	n=246	n=630	n=280

In the single-level Rhode Island Supreme Court, the total modification rate was just under 30 percent. In addition, only in Rhode Island do defendants win big with any frequency; one of every five appeals resulted in a reversal for a new trial or an acquittal. At the other end, it is quite rare for a defendant to win big in Sacramento, Springfield, and Maryland. Winning big is more common in Colorado but not nearly as frequent as in Rhode Island. On the other hand, small wins are less common in Rhode Island and Colorado.

How do these five-court patterns compare with those elsewhere? The most valid comparisons to these findings can be made with Davies (1982, 1981), who also examined a regional California appellate court. His classification of outcomes influenced the one used in the research reported here. Looking at California's first appellate district before adoption of the state's determinate sentencing law (DSL), Davies found some alteration of the lower-court action in 14 percent of criminal appeals. He called "winning something" an intervention. He divided interventions into "reversals" (winning big) and "modifications" (everything else). His "reversals" were 4.8 percent, almost identical with Sacramento's 3.8 percent. Sacramento's winning-little rate is higher, probably attributable to the greater number of sentencing modifications under DSL.

What Accounts for the Outcomes?

The literature suggests a number of competing factors that explain why some cases are affirmed and others are reversed. Should one expect differences in outcomes by trial court proceeding? Wasserman points out that trials have a wider range of issues and, thus, a greater opportunity for error (admission of evidence, instructions, procedural rulings). Neubauer (1985) hypothesizes that pleas would show high reversals since such appeals raise Fourth and Sixth Amendment questions noted for their lack of consistency.

The seriousness of the offense has also been suggested as affecting the frequency of reversal. Davies and others expect lower modification rates in appeals in cases involving crimes of violence due to a court's reluctance to overturn these convictions (see Note, 1978; Davies, 1981). Neubauer (1985) also tests this hypothesis. Yet, while it may be true that appellate judges are loath to overturn convictions in cases with serious offenses and long sentences, the outcome does not turn simply on the appellate court's inclinations. A lower modification rate in the more serious cases might be the result of a greater care paid by the trial judge in such cases.

Finally, defense representation is thought to be associated with frequency of reversal. The conventional wisdom is that retained counsel are more successful

than public defenders. One reason offered is that retained lawyers provide better representation. A second argument would attribute a greater success rate to the more neutral fact that private counsel can screen their cases, declining to pursue appeals which present unfavorable odds (see Wasserman, 1988).

Outcomes by Trial Court Basis—Trials Versus Nontrials

The overall five-court pattern, as indicated by the data displayed in Table 4, reveals essentially no difference in outcomes between appeals from trials and those

Table 4
Percentage Distribution of Alternative Outcomes

FIVE-COURT PATTERN

Appeal Outcomes	Trials	Nontrials	All Cases
Win nothing	79.1	80.5	79.4
Win little	11.8	12.7	12.1
Win big	9.1	6.8	8.5
Totals	100% N=1305	100% n=442	100% n=1747

BY TRIALS ONLY FOR EACH COURT

	Courts					
Appeal Outcomes	All Courts	Rhode Island	Sacramento	Springfield	Maryland	Colorado
Win nothing	79.1	72.3	75.2	76.8	83.2	78.6
Win little	11.8	4.3	20.7	14.7	10.1	5.2
Win big	9.1	23.4	4.1	8.4	6.7	16.2
Totals	100%	100%	100%	99.9%	100%	100%

BY NONTRIALS FOR EACH COURT

	Courts					
Appeal Outcomes	All Courts	Rhode Island	Sacramento	Springfield	Maryland	Colorado
Win nothing	80.5	65.4	83.6	87.5	73.0	81.4
Win little	12.7	26.9	12.9	12.5	7.9	12.9
Win big	6.8	7.6	3.5	-	19.0	5.7
Totals	100%	99.9%	100%	100%	99.9%	100%

from nontrial proceedings. The incidence of reversals is about the same, but appeals from trials are somewhat more likely than those from nontrials to result in the defendant winning big.[21]

By court, the picture is more complicated. In Rhode Island and Colorado, trials win big more frequently than they win little. The difference is quite large in Rhode Island (23.4 to 4.3 percent) and less so in Colorado. In the other three courts, winning little is more frequent, with a very large differential in Sacramento (20.7 to 4.1 percent). The pattern is different with nontrial appeals, with the picture in Rhode Island and Colorado looking like that of the other courts.

Comparing trials to nontrials, there are differences from court to court. In Colorado, Sacramento, and Springfield, trials win more frequently than nontrials. The differential ranges from about 4 percent in Colorado to about 9 percent in the other two. In Rhode Island and Maryland, nontrials win more frequently, and the differential is 7 to 10 percent. Even within this, the courts show different patterns in the extent of defendant's victory. In Rhode Island, the nontrials win little; in Maryland, they win big (primarily due to overturned probation revocations). Except for Springfield, the differences are relatively modest.

Outcome by Offense

The overall five-court pattern, as indicated by the data in **Table 5**, shows that the frequency of winning something does not appear to vary much by offense. Drugs and weapons cases are somewhat more likely to be affirmed; probation revocations less likely. Some differences emerge, however, when one examines the degree of winning. In appeals involving crimes against the person (but not in

Table 5
Percentage Distribution of Alternative Outcomes Within Offense Categories

	FIVE-COURT PATTERN				
	Appeal Outcomes				
Offenses	Win Nothing	Win Little	Win Big		
Homicide	77.6	13.3	9.2	= 100%	N=196
Other crimes versus person	79.2	13.3	7.5	= 100%	n=736
Property offenses	80.0	11.4	8.6	= 100%	n=361
Drugs and weapons	86.6	6.7	6.7	= 100%	n=164
Other	75.9	12.2	11.9	= 100%	n=286

homicides), defendants are more likely to win little than win big. Probation revocations appeals are more likely to win big than win little.

Although the incidence of alternative outcomes by the multiple-offense categories for each individual court is too cumbersome to display, we can report that there are some differences by court in the win nothing/win something dichotomy. In Maryland, the frequency of outcomes does not vary across the major offense categories; only probation revocations show a larger likelihood of modification. In Colorado, homicides, property offenses, and drug and weapon charges are modified less frequently than crimes against the person. Sacramento and Springfield show little variation. Rhode Island, on the other hand, shows considerable variation. Homicides are modified over half the time, and the vast majority of those win big (new trial or acquittal). The pattern does not extend to other crimes against the person, which have a modification rate markedly less than their frequency. Thus, while there is no obvious explanation for these intra- and intercourt patterns, the bottom line is that, contrary to Davies, Neubauer, and others, offense is not related to the likelihood of reversals.

Outcome by Sentence

The picture with respect to the relationship between sentence and outcome is more complicated. As shown in **Table 6**, there is variation in outcome by sentence, with appeals at each end of the incarceration spectrum showing the lowest affirmance rates. Winning big occurs most frequently in appeals with the least serious sentence (as reflected by incarceration); appeals involving the longest sentences show the highest percentage of winning little. However, these relation-

Table 6
Percentage Distribution of Alternative Outcomes Within Sentence Categories

	FIVE-COURT PATTERN			
	Appeal Outcome			
Sentence Categories	Win Nothing	Win Little	Win Big	
No or Incidental Incarceration	74.7%	12.4%	12.9%	N=178
1-5 years	80.9	9.7	9.4	n=455
6-10 years	79.6	13.2	7.2	n=362
11-20 years	82.1	13.4	4.5	n=223
Over 20 years	75.6	19.0	5.4	n=258

ships are very weak statistically and suggest that the effect of sentence length on outcome is a very minor one.[22]

Outcome by Counsel

Contrary to what Wasserman observed in New York (1988: Chapter 5:21), the overall five-court pattern, as indicated by the data in **Table 7**, indicates virtually no difference in outcome by counsel type: All are within one-half percentage point of the five-court average. Even across courts there is virtually no difference when one looks only at the comparison between win something and win nothing. When the degree of winning is examined, one observes a modest difference. Retained counsel and public defenders are slightly more likely than appointed counsel to win big, but these relationships are very weak statistically.[23] The lack of strong relationships holds, furthermore, when one examines representation in particular kinds of offenses.

Outcome by Issue

None of the case characteristics accounts for outcomes in a big way. Does anything? One possible answer is the nature of the issue raised on appeal. Are some issues more successful—i.e., when raised, the court finds error—than other issues? In **Table 8**, information is presented on the success rate of each issue—the number of times error is found in a given issue divided by the number of times that the issue is raised—across all five courts.

Two observations can be drawn from the data in Table 8. First, the success rate is variable. Prosecutorial misconduct has a very low success rate; in less than 2 percent of the time that this issue is raised do the courts find reversible error. On

Table 7
Percentage Distribution of Alternative Outcomes by Type of Representation

	Appeal Outcome				
Defense Representation	**Win Nothing**	**Win Little**	**Win Big**		
Public defender	79.3	11.2	9.5	100%	N=1037
Retained	79.9	7.5	12.6	100%	n=214
Assigned	79.7	15.8	4.5	100%	n=487
Overall	79.5	12.0	8.5	100%	n=1738

the other hand, when merger of offenses is raised, the courts find error over half the time. Second, the success rate tends to be inversely related to the relative frequency with which an issue is raised. The more frequently raised issues (e.g., challenges to evidentiary rulings, to the sufficiency of the evidence, to instructions) have a lower success rate than the less frequently raised ones (e.g., statutory interpretation, merger of offenses).

Summary

Understanding criminal appeals is one way to view the ability of courts to impose sanctions fairly. Without the error-correction function of intermediate appellate

Table 8
Reversible Error by Issue
Success Rate for Selected Issues*

	Five-Court Pattern	
Issue	Percentage of All Error Associated with Issue	Success Rate**
Admission/exclusion of evidence	20.6	7.7%
Instructions	13.5	9.7
Procedural or discretionary ruling	13.1	7.8
Sufficiency of the evidence	12.0	5.8
Merger of offenses	10.5	51.9
Suppression of evidence, statements, or identification	10.5	8.4
Ineffective assistance/waiver of counsel	6.0	12.9
Other constitutional claims (double jeopardy, speedy trial)	4.9	11.5
Jury selection or deliberation	3.4	8.8
Statutory interpretation or application	2.2	19.4
Plea voluntariness	2.2	15.0
Prosecutorial misconduct	1.1	1.9
	100% N=267	

* These are nonsentencing related errors. When looked at separately, sentencing errors have a success rate of 25 percent.

**Success rate is the number of times a given issue was found to have reversible error divided by the frequency with which the issue was raised.

courts, trial courts lack accountability. This paper draws a sketch of the criminal appeals landscape. What do the appeals look like? How frequently do defendants win? Are there factors associated with winning? Data from five courts help to reveal what is common and what is court-specific.

The data suggest that first-level appeals courts have similar caseloads and patterns of outcomes. Most appeals come from trials and involve crimes against the person and sentences of five years or less. Across courts, defense appeals are generally unsuccessful. Defendants win something only about 20 percent of the time; convictions are overturned in less than 10 percent of all appeals. Winning does not appear to be strongly associated with trial court proceedings, the offense or the severity of the sentence, or the type of lawyer. Rather, winning or losing lies in the nature of the issues raised on appeal.

Notes

1. Appellate caseloads have been increasing at a faster pace than trial court filings, doubling every 8 to 10 years since the 1960s. See Flango and Elsner, 1983; Marvell and Lindgren, 1985.

2. This distinction is, of course, obscured in the 13 states with a single-level appeals court. There, the court of last resort (COLR) performs both functions.

3. In 1987, for example, state courts of last resort granted review in only 14.1 percent of the discretionary petitions filed. The percentages for criminal appeals in California, Illinois, and Maryland were 4.1, 5.6, and 6.7 percent, respectively. No information was available from Colorado (information obtained from the Court Statistics Project, National Center for State Courts). See National Center for State Courts (1989:10-13) for a discussion of discretionary appellate caseloads.

4. Data from Sacramento, Springfield, and Rhode Island were collected in research examining alternative criminal appeals procedures with funding from the National Institute for Justice. Those data were merged with new data collected in Colorado and Maryland under a grant from the State Justice Institute. In every court, the docket and the court's decision document were examined; briefs were examined in all courts except Maryland.

5. Procedural dispositions of perfected appeals are uncommon. Our data set includes virtually all briefed appeals. The exclusion of prosecution appeals from a study of criminal appeals, on the other hand, raises a significant issue. Government appeals are limited in number, accounting for only 2 to 3 percent of the entire criminal caseload. Yet, the outcomes of governmental appeals are considerably more likely than defendant-based appeals to be reversed. Wasserman (1988) found the reversal rate to be 80 percent for government appeals. This study also shows a higher reversal rate for government appeals compared to defense appeals in four of the five courts (the Colorado Court of Appeals did not hear government appeals). Government appeals have reversal rates of 73, 50, 40, and 25 percent in Sacramento, Maryland, Springfield, and Rhode Island, respectively. A reversal in a government appeal, of course, is the same as an affirmance in a defendant-based appeal. Hence, if reversals are assumed to be in favor of the defendant, and government appeals are combined with defendant-based appeals, they contribute to a court's overall reversal rate in a misleading way.

6. This study, along with others in the field, is limited to first-level review of trial court decisions. Because there are instances in which a trial court judgment is reversed on first review only to be reinstated by a higher court, the discussion of trial court errors in this research is not conclusive.

7. This means that trial convictions account disproportionately for criminal appeals. In most jurisdictions, guilty pleas account for 90 to 95 percent of all convictions, and bench and jury trials account for the remaining 5 to 10 percent. However, as the data in Table 1 suggest, the 5 to 10 percent account for the overwhelming percentage of criminal appeals.

8. An incidence of guilty pleas similar to that in Sacramento is found elsewhere. In New York's first and second districts, 43 percent of appeals decided between 1980 and 1985 came from guilty pleas (see Wasserman, 1988; Chapter 5:13).

9. None of the five courts hear death penalty cases. There is no death penalty in Rhode Island; in the other states, cases with a death penalty go directly to the state supreme court.

10. Sentence data are subject to caution because the sentence could be determined in just over 85 percent of the sample. This ranges from a low of 69 percent in Maryland (where there was no access to the briefs) to a high of 99 percent in Springfield. The sentence was commonly found in the court's opinion; there were no opinions in appeals resolved in Rhode Island on the expedited show-cause calendar (almost 40 percent of all criminal appeals). A second source for sentence information was the appellant's brief. Again in Rhode Island, formal briefs were not filed in appeals handled on an expedited procedure. The notice of appeal, where available, was a third source of sentence information.

11. The caseload characteristics displayed in Table 1 are, by and large, independent of one another. The only relationship concerns the type of offense and sentence length. The correlation coefficient (using the phi measure of association) between these two factors is .53. This coefficient indicates that the type of offense had a moderate effect on sentence length. The phi correlation is a statistical measure of association that measures the strength of the relationship between two categorical factors. The values (or coefficients) of phi range from a minimum of 0.0 to a maximum of 1.0. The closer the relationship between the two factors, the higher the correlation coefficient. The reason for the close relationship between type of offense and sentence length is that homicide cases tended to have the longest sentences. Other crimes against the person had shorter sentences than homicide cases, but longer sentences than property and drug and weapons cases. Drug and weapons cases had the shortest sentences. Interestingly, there are very weak correlations between sentence length and the underlying proceeding (trial or nontrial) and between the type of offense and the lower court proceeding.

12. Issues are drawn from only jury trials for several reasons. First, jury trials capture the common core of appeals in the five courts. The frequency of the other proceedings varies considerably by jurisdiction, and there are not enough appeals from every court to speak of a common pattern. The Rhode Island appeals, for example, include none from nonjury trials or guilty pleas. In addition, Sacramento has over three times as many pleas and Maryland three times as many nonjury trials as the remaining courts. Looking at the issues raised in those proceedings would, thus, be effectively looking at individual court experiences. Second, despite the hazardous nature of such an undertaking, we did look at the issues raised in these other proceedings. With the exception of challenges to instructions, the distribution

of issues raised in nonjury trials is, in fact, similar to that of jury trials. Sufficiency of the evidence was the most frequently raised issue (42 percent of all bench trials). Evidentiary, procedural, and sentencing questions were each raised in 20-25 percent of the appeals. Sentencing issues are the most commonly raised in appeals following guilty pleas (almost half of such appeals). Hence, the use of issue data from nonjury trial proceedings adds little new to Table 2.

13. In the literature, there is very little information on the issues presented on appeal. Wasserman (1988) discusses the distribution of issues only for the reversals and modifications in his sample. Neubauer's data (1985) do not include information on issues. Davies (1982), on the other hand, examines and reports the frequency of issues raised. Although his categorization of issues differs from the one used in this research, his entire sample (nontrial as well as trial cases) shows a predominance of trial-related issues. For example, admission of prejudicial evidence was raised in 39.7 percent of the appeals; jury instruction challenges were raised in 25.9 percent.

14. Determinate sentencing also appears to be responsible for the high percentage of appeals following guilty pleas in Sacramento. Davies (1982), looking at the California appellate district in San Francisco before the introduction of the state's determinate-sentencing law, found relatively few appeals following convictions by guilty plea.

15. These figures are congruent with data reported for Louisiana, where the affirmative rate is 76 percent (Neubauer, 1985: 24), and New York, where the affirmance rate is 84 percent (Wasserman, 1988, Chapter 5:15).

16. This categorization is similar to that used by Davies (1982). Neubauer (n.d.) and Wasserman (1988) use somewhat different categories.

17. This categorization does not consider what the defendant sought to obtain from the appeal. For example, a number of appeals only asked for resentencing or vacating of a conviction for a lesser included offense; winning big was not a possible outcome. Yet, because one cannot determine what the defendant's true motivation or objective might have been and, therefore, cannot determine the degree to which the appeal might be considered successful in those terms, the categorization must be in terms of the extent to which a conviction is affected.

18. Interestingly, the acquittal rate in New York is quite similar to the five-court average. Wasserman (1988, Chapter 5:15) reports that 1.6 percent result in dismissals of the indictments. On the other hand, Neubauer (n.d.) reports that the acquittal rate is 3.5 percent in Louisiana.

19. Roper and Melone (1981), in a study of cases remanded from U.S. Courts of Appeals and subjected to reprosecution in 1975-1979, find that 48.8 percent of the cases were closed by convictions. Most of the remaining cases were dismissed (43.7 percent) or nolle prossed (0.5 percent), with 6.9 percent being acquitted on retrial.

20. See note 3, *supra*.

21. The lack of any substantial difference between trials and nontrials is consistent with Neubauer's evidence from Louisiana (1985:25), although Wasserman finds a difference in New York (1988: Chapter 5:16).

22. The correlation coefficient using the phi measure of association is .02.

23. The correlation coefficient using the phi measure of association is .01.

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