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Trial and Error: A Comprehensive Study of Prosecutorial Conduct in New Jersey

A Report by the American Civil Liberties Union of New Jersey

By Principal Investigators

Alexander Shalom, *Policy Counsel, ACLU-NJ*
George C. Thomas III, *Board of Governors Professor of Law*
Judge Alexander P. Waugh, Sr. Distinguished Scholar,
Rutgers School of Law-Newark

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AMERICAN CIVIL LIBERTIES UNION of NEW JERSEY

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Executive Summary

As a whole, prosecutors understand the unique role they play in the administration of justice and take their responsibilities seriously. They seek diligently to avoid errors that could undermine both the integrity of the criminal justice system and the validity of their hard-fought convictions. They proceed confident in the knowledge that they seek not only convictions, but justice, and often without competitive remuneration.[1] When prosecutors err, and transgress rules established for their conduct, they generally learn from their mistakes and avoid repeated missteps.

However, a small group of prosecutors commits multiple errors without seeming to learn from those missteps. This American Civil Liberties Union of New Jersey study aims to survey comprehensively prosecutorial error in New Jersey by examining the prevalence of error and determining which errors occur most frequently. After compiling the foundational data, the study's authors quantitatively analyzed the data's meaning. Specifically, researchers examined the extent of inter-county disparities among rates of error, correlations between error and experience and prevalence of individual prosecutors with repeated instances of error. The report examines the contexts in which prosecutors were cited for error on multiple occasions and explores the costs of prosecutorial error for criminal defendants, for society and for individual prosecutors.

Having taken stock of the landscape, the authors sought to determine current and potential steps taken to address prosecutorial error, looking at the roles played by prosecutors' offices, courts and ethics boards. Finally, the report proposes ways for prosecutors' offices, courts, ethics boards and defense attorneys to combat prosecutorial error going forward.

Ultimately, the study found that prosecutors who commit multiple errors are the exception rather than the rule. However, the study also found that those outliers can be held accountable only with better systems of training, supervision and discipline. Improving those systems would benefit the public, the criminal justice system and the integrity of the profession that most prosecutors strive to maintain.

[1] *See, e.g.*, Chris Megerian, "N.J. Attorney General pushes for better pay for state prosecutors" *Newark Star Ledger*, December 10, 2009 (available at: http://www.nj.com/news/index.ssf/2009/12/nj_attorney_general_pushes_for.html).

Introduction

By nature "[c]riminal trials are emotionally charged proceedings,"[2] and expecting a prosecutor "to conduct himself in a manner appropriate to a lecture hall"[3] would not be reasonable. Nonetheless, "the primary duty of a prosecutor is not to obtain convictions, but to see that justice is done."[4] To that end, "a prosecutor's duty is twofold: a prosecutor must refrain from improper methods that result in a wrongful conviction, and is obligated to use legitimate means to bring about a just conviction."[5] As the United States Supreme Court put it in 1935, while the prosecutor "may strike hard blows, he is not at liberty to strike foul ones."[6] Most prosecutors discharge their exceptional responsibilities with appropriate respect and remarkable skill. However, in the instances where prosecutors fail to live up to their tremendous obligations, the consequences are grave. In some cases, the innocent are wrongly convicted. In other cases, the guilty get less than their just deserts after appellate reversals. In all cases, public confidence in the integrity of the judicial system erodes.

Courts reverse convictions when the "conduct was so egregious that it deprived defendant of a fair trial."[7] Such reversals address potential harm to defendants but do little to restore public trust. More importantly, when confronted with an appellate opinion classifying his conduct as error — whether or not it is sufficiently egregious to warrant reversal — does a prosecutor learn from his mistake and avoid similar conduct in the future? This study seeks to shed light on that question, as well as whether prosecutors' offices take appropriate action to prevent error and which bodies could play a greater role in reducing the likelihood of prosecutorial error, particularly repeated error.

[2] *State v. DiPaglia*, 64 *N.J.* 288, 305 (1974) (Clifford, J., dissenting) (citations omitted).

[3] *Id.*

[4] *State v. Ramseur*, 106 *N.J.* 123, 320 (1987).

[5] *State v. Smith*, 167 *N.J.* 158, 177 (2001).

[6] *Berger v. United States*, 295 *U.S.* 78, 88 (1935).

[7] *Ramseur, supra*, 106 *N.J.* at 322.

Methodology

The inspiration for this project came from a report by Kathleen M. Ridolfi and Maurice Possley *Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009* (2010) (hereafter "the California study" or "Ridolfi and Possley"). That project in New Jersey, at least initially, aimed to utilize a methodology similar to the one employed by Ridolfi and Possley, which would also invite interstate comparisons. However, certain differences between the states necessitated using a somewhat different approach.

Timeframe

While the California study tracked cases over a 13-year period, the New Jersey study examined a shorter period: from January 1, 2005 until May 31, 2011. January 1, 2005, the date all Appellate Division decisions in New Jersey became electronically available, seemed a natural starting place. Had the data included earlier cases, electronic search engines like Westlaw would not have been available for use.

To ensure meaningful analysis of individual prosecutors, the study omits cases where trials took place before 2001. Of course, some cases — particularly cases on collateral review — take years from the trial until the appellate decision finding whether error occurred. The long time lag between trial and appellate decision makes it difficult to identify which prosecutors have faced scrutiny and to make subsequent, meaningful comparisons of cases.

Initial Searches

As in the Ridolfi and Possley study, this one began with a series of searches in Westlaw using terms likely to identify cases in which issues of prosecutorial error had been raised. A search of New Jersey state court[8] databases for: "prosecutorial misconduct," "prosecutor's misconduct," "improper argument," "*Brady v. Maryland*,"[9] "*Doyle v. Ohio*,"[10] "*Griffin v. California*,"[11] "*State v. Muhammad*, 182 *N.J.* 551,"[12] "*Batson*,"[13] "*Gilmore*,"[14] and "*State v. Frost*"[15] produced more than 875 results.

[8] Initially we included federal cases, but later excluded them to ensure uniformity in how we identified prosecutors. Here we differed from the California study.

[9] 373 *U.S.* 83 (1963) (establishing duty of prosecutor to disclose exculpatory evidence).

[10] 426 *U.S.* 610 (1976) (holding that silence in response to a *Miranda* warning cannot be used against criminal defendant).

[11] 380 *U.S.* 609 (1965) (preventing state prosecutors from commenting on defendant's decision not to testify).

[12] (2005) (determining that, narrow exceptions aside, evidence of defendant's silence before arrest is inadmissible).

[13] *Batson v. Kentucky*, 476 *U.S.* 79 (1986) (prohibiting the use of race in the exercise of peremptory challenges).

[14] *State v. Gilmore*, 103 *N.J.* 508 (1986) (state-law analog to *Batson*).

[15] 158 *N.J.* 76, 83 (1999) (reversing conviction based on "egregious prosecutorial misconduct" in summation).

Several types of cases were then excluded: civil cases; cases dealing with alleged misconduct related to grand jury proceedings; cases dealing with alleged misconduct related to plea bargaining; cases dealing with alleged misconduct related to sentencing; cases involving juvenile defendants prosecuted in the Family Practice Division of the New Jersey Courts; appeals from denials of Post-Conviction Relief (PCR) where prosecutorial error or prosecutorial misconduct are mentioned only in the procedural history; PCR appeals where the issue of prosecutorial error is deemed procedurally defaulted and not addressed on its merits; and duplicate cases, including cases decided by two different courts within the study period. Also, as indicated, all cases where the trial occurred before 2001 were excluded. Thus, the study drew upon a pool of appeals from state criminal trials after January 1, 2001 decided by state appellate courts between January 1, 2005 and May 31, 2011. Our data set contained a total number of 570 cases.[16]

The authors note that no statistical inference about the incidence of prosecutorial error can be drawn from our study. Because the data pool includes appellate opinions exclusively, this study effectively ignores the 98 percent of New Jersey cases that are plea-bargained to a conviction. Almost all prosecutorial errors that might attend a plea-bargained conviction, such as the failure to disclose favorable evidence to the defense, are effaced by the guilty plea.[17]

Coding

Following the dramatic reduction in the pool of cases, every case received a code identifying the type of error alleged, the holding of the court and, where possible, the standard of review. Incidents of prosecutorial error occurred during six phases of trial:

1. **Discovery**
2. **Jury selection**
3. **Opening statements**
4. **Examination of witnesses**
5. **Summation**
6. **Other or unknown.**

[16] This number, of course, fails to capture prosecutorial error that is never addressed on appeal. It is certainly possible that error occurred in some of the hundreds of cases each year where defendants are acquitted. For example, in the highly publicized trial of Lee Evans, the judge upbraided the prosecutor on numerous occasions for error during the examination of witnesses. The judge went as far as to require that, if the prosecutor rather than his co-counsel wished to deliver the summation, the prosecutor receive permission from his supervisor to do so (available at: http://videos.nj.com/star-ledger/2011/11/video_judge_in_lee_evans_trial.html).

[17] Prosecutorial errors that lead to the guilty plea, such as coercion or trickery, can of course be raised on appeal. But so few plea bargained convictions are appealed that no useful database could be assembled to measure these errors.

Holdings fell into six other categories:

- Harmful error, where the court reverses a conviction at least in part because of prosecutorial error
- Did not reach prejudice, where the court concludes there is error, but is not required to determine if such an error would warrant reversal because it reverses on other grounds
- Harmless error, where the court finds error, but does not find the error sufficient to reverse the conviction
- Did not reach error, where the court does not determine whether conduct constituted error because it first decides that the conduct did not result in prejudice
- Did not reach anything, where the court does not address the merits of the issue because it reverses on other grounds
- No, where the court finds that the conduct of the prosecutor does not constitute error.

Identifying Prosecutors

The study sought to identify the prosecutors who had been accused of error by utilizing a publicly available database called Promis/Gavel[18] to determine who represented the state in each trial. In cases where multiple prosecutors appeared for the state, the researchers endeavored to figure out who appeared at the contested portion of the trial. In cases where the appellate court decision did not identify the defendant by name, most frequently in cases of sexual assaults against family members, the prosecutors could be found through the indictment number or by determining the identity of the defendant using publicly available searches on the Department of Corrections website.[19] Where Promis/Gavel did not provide sufficient information, transcripts from either the New Jersey Law Library or appellate defense attorneys helped to identify the prosecutors involved.

[18] Promis/Gavel is now available online at: https://njcourts.judiciary.state.nj.us/web10/ExternalPGPA/CaptchaServlet.

[19] https://www6.state.nj.us/DOC_Inmate/inmatefinder?i=I.

Other Data

To compare counties that vary dramatically not only in population and case volume, but also in frequency of trials and convictions, the study used data gleaned from the Administrative Office of the Courts. Specifically, we obtained "fallout rates," or data about the number of defendants acquitted and convicted post-trial for each county, from July 2009 until June 2010 to extrapolate volume throughout the timeframe.[20] Although the possibility exists that the year selected may have been an outlier, these data nonetheless provide a reasonable estimation of the number of trials and convictions in each county.

Prosecutorial Experience

The *New Jersey Lawyers Diary and Manual* provided information concerning the prosecutors included in the study, including the year of their admission to the Bar, which was used to determine the correlations between experience and prevalence of prosecutorial error. While the year of admission does not necessarily reflect the attorney's trial experience — some lawyers start trying cases right out of law school and others may work for years as transactional attorneys — it provides a suitable proxy. Prosecutors were sorted into four broad categories:

1. Those admitted in 2000 or later, classified as having little experience
2. Those admitted between 1990 and 1999, classified as having medium experience
3. Those admitted before 1989, classified as having significant experience
4. Unknown, where we could not determine the prosecutor's year of admission.

[20] These data are available as Appendix A.

Open Public Records Act

On October 28, 2011, the ACLU-NJ sent requests to all 21 county prosecutors in New Jersey under the Open Public Records Act (N.J.S.A. 47:1A-1, et seq.) seeking: "All policies related to training, supervision, and discipline surrounding issues of prosecutorial misconduct or prosecutorial error." The requests explained that:

> For the purposes of this request, the terms "policy" and "policies" shall mean documents used to guide the actions of the county's prosecutors including but not limited to handbooks, rules, regulations, directives, memoranda, reports, training documents, correspondence and/or notes.
>
> For the purpose of this request, the terms "prosecutorial misconduct" and "prosecutorial error" include, but are not limited to: summation or opening statement errors, comments on silence, improper cross examination, discovery violations and discriminatory use of peremptory challenges.

All 21 prosecutors responded in some way. Most prosecutors' offices said they had neither documents responsive to the request specifically nor formal written policies, but rather followed the *Rules of Professional Conduct* and training requirements found in *R.* 1:42-1.[21]

A few offices provided more information. One office[22] provided memoranda circulated from office leadership to assistant prosecutors explaining developments in the law related to prosecutorial error. Other offices[23] explained that as accredited continuing legal education providers they regularly provided trainings on issues relevant to prosecutorial error. One prosecutor's office provided a syllabus for a training given by an outside vendor titled "Lax Attorney Ethics: Lessons Learned from the Duke Lacrosse Rape Case."[24] One office provided selected chapters from its employee manual, which addressed ethical considerations for prosecutors but not trial conduct.[25] Finally, one office directed us to the Office of the Attorney General's (OAG) publication entitled "Prosecutor Conduct: How to Avoid Reversible Error," authored by New Jersey Assistant Attorney General Carol M. Henderson.[26]

[21] Atlantic County; Bergen County; Burlington County; Camden County; Cape May County; Cumberland County; Essex County; Hudson County; Hunterdon County; Mercer County; Morris County; Ocean County; Salem County; Sussex County; Union County; and Warren County.

[22] Gloucester County.

[23] Monmouth County and Middlesex County.

[24] Somerset County.

[25] Passaic County.

[26] Middlesex County. The publication is available as Appendix B.

Public Searches Regarding Costs

A search of publicly available sources such as newspapers provided information about defendants' cases after reversals of their convictions: were they acquitted in a retrial? Did they accept a plea bargain for a lesser sentence? Were they again convicted and sentenced? While this research was less systematic than the more central parts of the project, understanding whether defendants were acquitted in a retrial, entered into a plea bargain for a lesser sentence or were again convicted and sentenced provided insight into the costs of prosecutorial error not only for defendants but for society.

DRB Searches

A search of the Office of Attorney Ethics' disciplinary reports from January 1, 2001 until September 30, 2011 comparing the 343 prosecutors identified in the study with the names of disciplined attorneys in the same period helped determine the extent to which state ethics boards handle complaints related to prosecutorial error.[27]

[27] The reports are available here: http://www.judiciary.state.nj.us/oae/discipline.htm.

Overview of Findings

Holdings

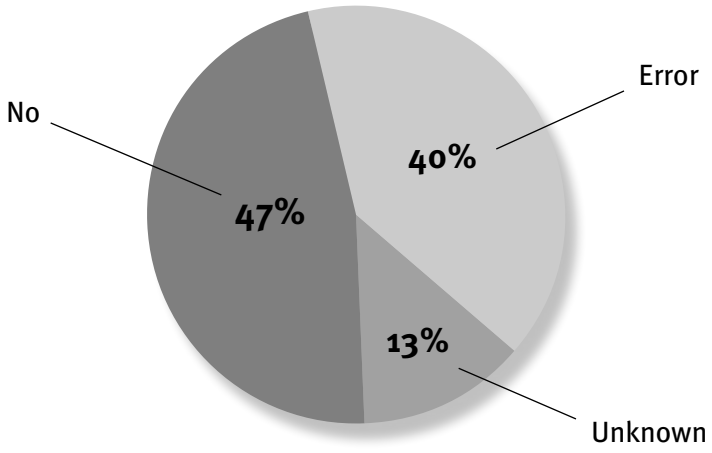
The New Jersey criminal cases tried in Superior Court from 2001 onward, comprising the case body used for this study, fell into three broad categories: those where courts found error, those where courts found no error and those where courts did not reach the question of whether the conduct constituted error.

Where courts found error, the cases fell into one of three classifications: harmful error necessitating reversal; harmless error[28] not requiring reversal; or conviction reversed on other grounds independent of the error. Where courts found no error the cases were coded as "no."

In two types of cases courts did not determine whether there was error: those where the court had already determined that any error that might have occurred was harmless, precluding further inquiry into the conduct in question; and those where the reviewing court decided that reversal on other grounds precluded further inquiry into whether the prosecutorial actions constituted error.

In almost half of the cases, claims of alleged error were rejected by courts. We draw no inferences about prosecutorial behavior from cases where claims of error are raised and rejected. The distribution of cases among the three broad categories was: total error (229), total unknown (74) and total no (267). That distribution is illustrated below in Chart 1.

Chart 1: Distribution of broad categories of findings



[28] *Chapman v. California*, 386 *U.S.* 18 (1967); *State v. Macon*, 57 *N.J.* 325, 337-38 (1971).

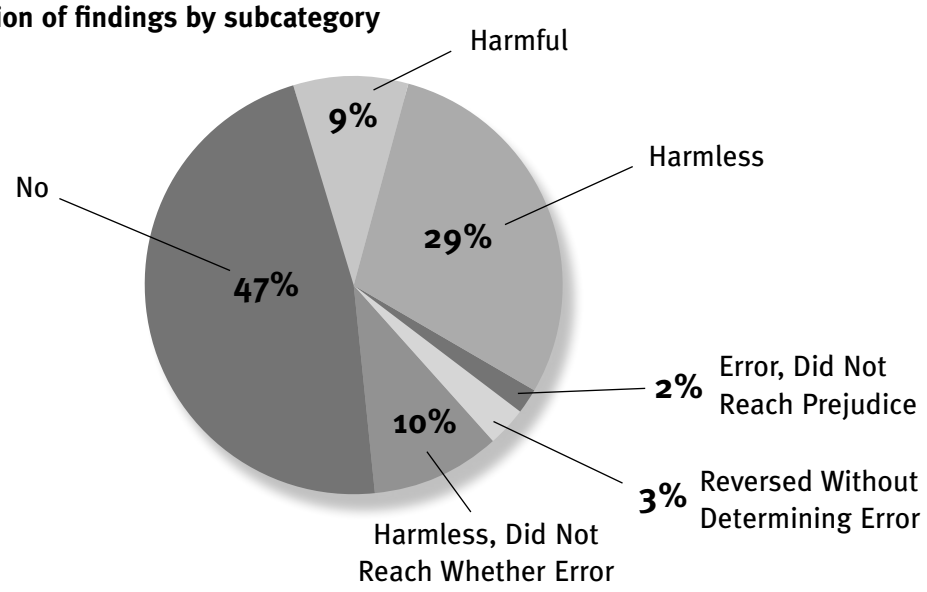
When all the cases are broken down into smaller categories, the distribution (illustrated in Table 1 and Chart 2) is as follows:

- 53 cases were deemed harmful
- 167 were deemed harmless
- In 9 cases the court did not determine whether the error was harmful, but did determine that there was error
- 17 cases were reversed without reaching the question of prosecutorial error
- In 57 cases courts determined that if any error existed, it was harmless beyond a reasonable doubt and therefore did not determine whether there was error
- In 267 cases court determined that there was no error.

Table 1: Distribution of findings by subcategory

Harmful	53
Harmless	167
Error Found, But Did Not Reach Question of Prejudice	9
Reversed Without Determining Error	17
Finding of Harmlessness Without Inquiry Into Error	57
No Error	267

Chart 2: Distribution of findings by subcategory



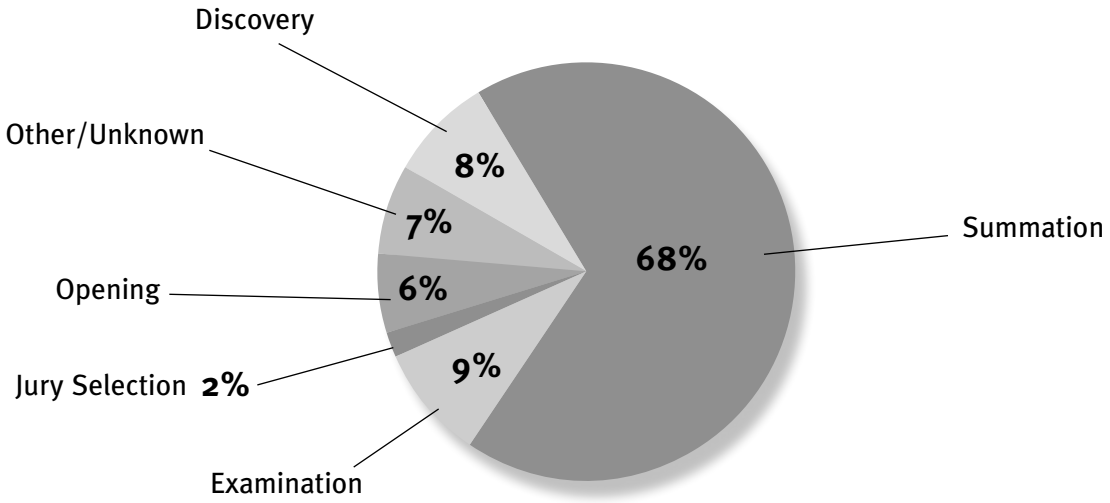
Types of Error

The largest portion of claims related to prosecutors giving improper closing statements, followed by claims citing improper examination of witnesses and discovery violations. Least common were complaints about the discriminatory use of peremptory challenges. The distribution of claims of error is illustrated in Table 2 and Chart 3, below.

Table 2: Distribution of claims raised

Discovery	47
Jury Selection	8
Opening	33
Examination	53
Summation	389
Other	40

Chart 3: Distribution of claims raised

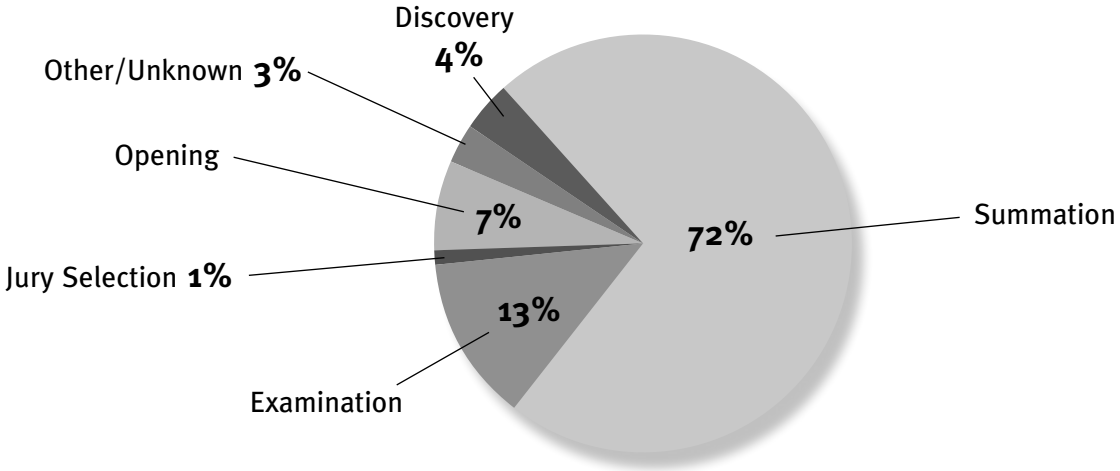


The distribution is not dramatically different in cases where courts found error, except as it relates to discovery violations. Again, summation errors dominate, followed by improper examinations. Courts found error in discovery in only about 4 percent of cases, half of the 8 percent of cases in which it was alleged. The distribution of findings of error is illustrated as follows in Table 3 and Chart 4.

Table 3: Distribution of findings of error

Discovery	9
Jury Selection	3
Opening	16
Examination	29
Summation	165
Other	7

Chart 4: Distribution of findings of error



The rates of various findings of error ranged depending on the nature of the errors alleged. As illustrated as follows in Charts 5-10, findings of error ranged from 17 percent for other/unknown errors and 20 percent for discovery violations to 48 percent for opening statements and 55 percent for examination of witnesses. In other words, some types of error were found in less than one in five cases in which the issue was raised and others were found in more than half of the cases in which the issue was raised. Reversals based on prosecutorial error (i.e., findings of harmful error) ranged from 3 percent for opening statements to 15 percent for examination of witnesses. These data do not necessarily suggest anything about prosecutorial behavior. It might mean that defense attorneys raise certain issues with greater frequency, prosecutors transgress rules more often on certain topics, courts are more receptive to certain arguments or any combination of the above.[29]

[29] The sample size for jury selection errors is too small to make meaningful statistical comparisons.

Chart 5: Distribution of findings in cases where discovery error alleged

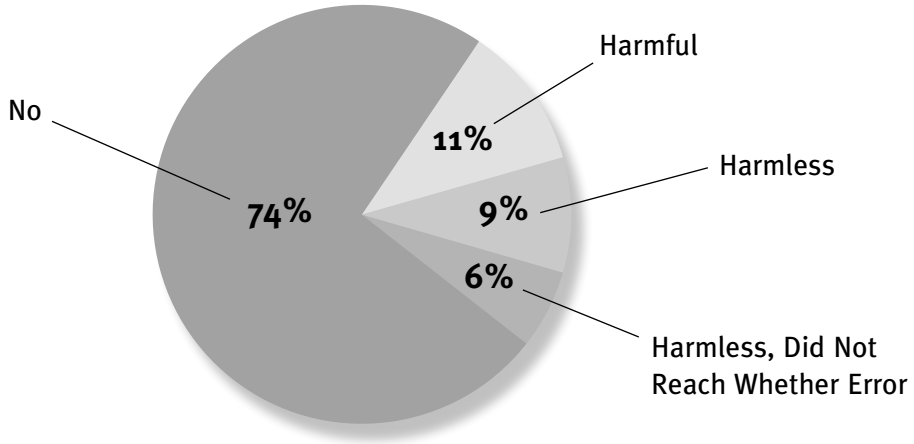


Chart 6: Distribution of findings in cases where jury selection error alleged

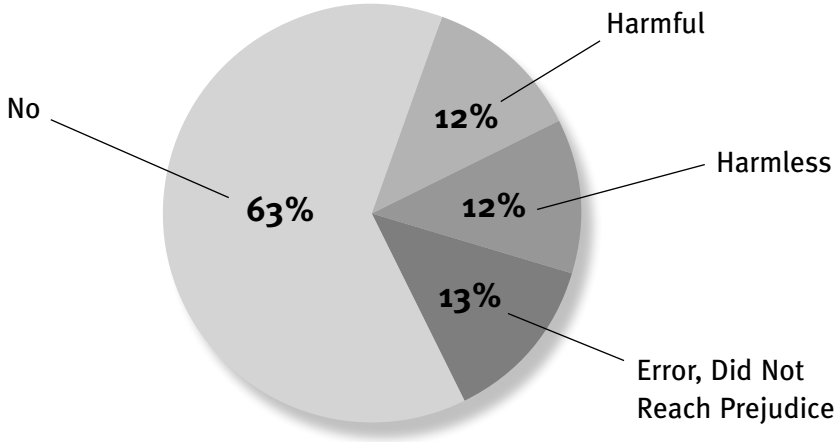


Chart 7: Distribution of findings in cases where opening statement error alleged

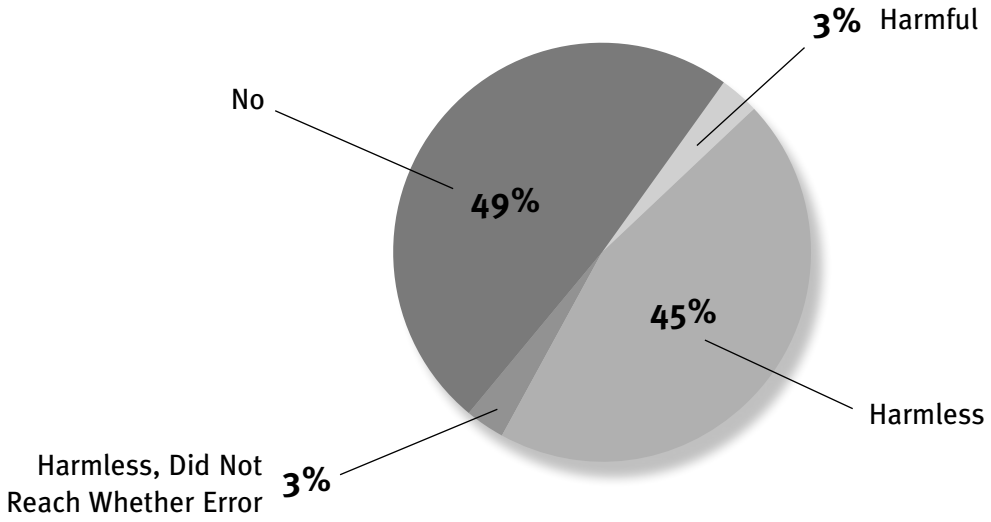


Chart 8: Distribution of findings in cases where examination error alleged

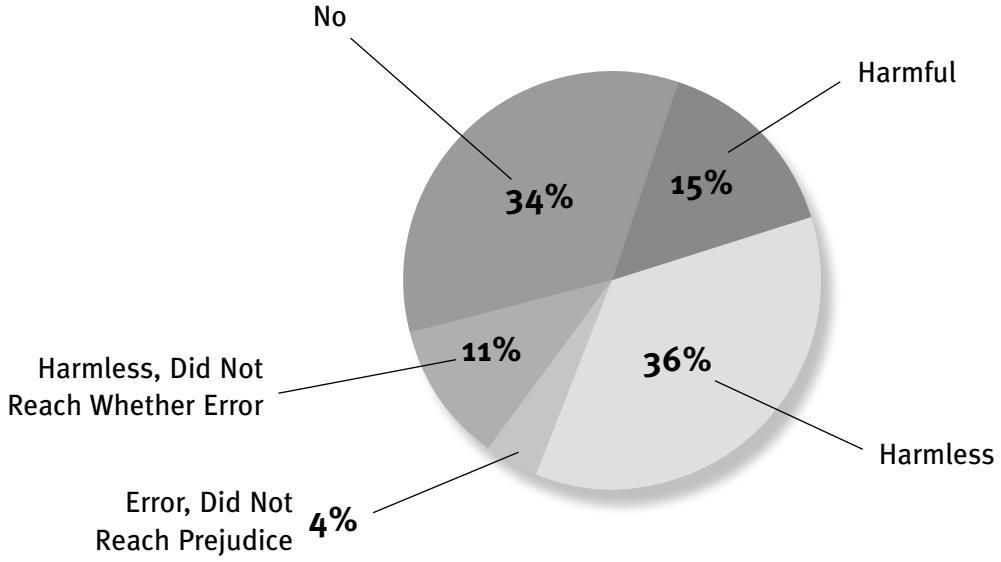


Chart 9: Distribution of findings in cases where summation error alleged

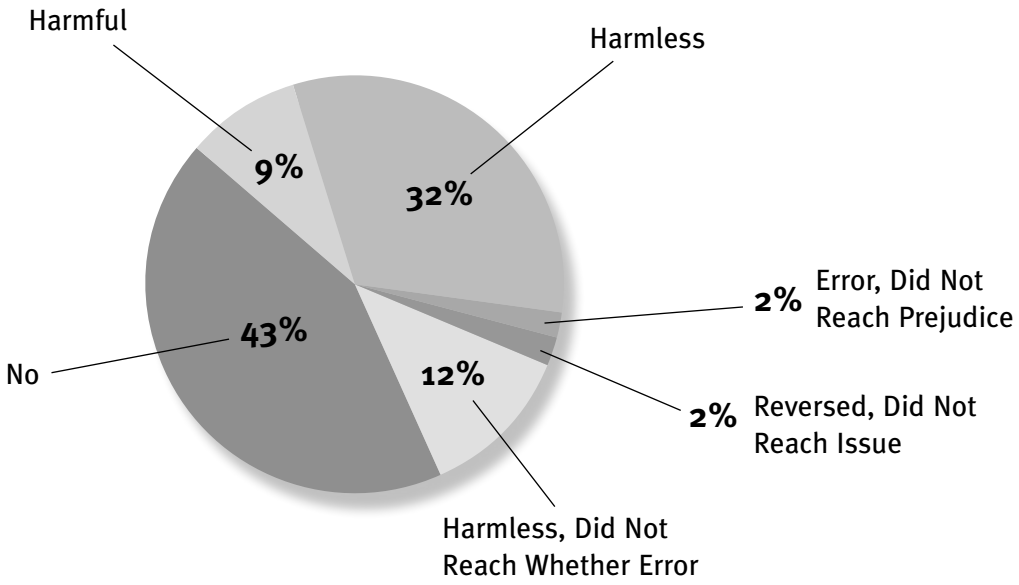
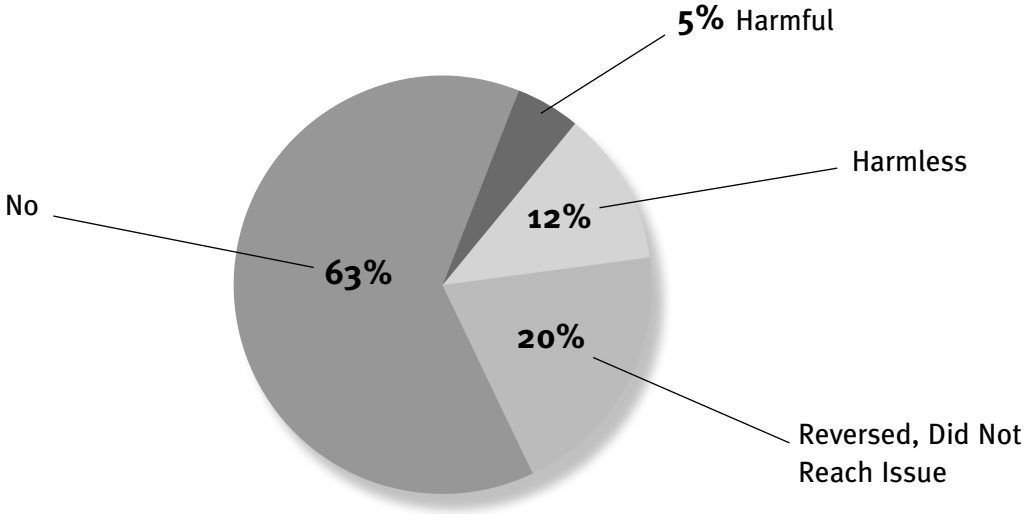


Chart 10: Distribution of findings in cases where other or unknown error alleged



County Distribution

The data showed surprising disparities among counties. In some lower-volume counties, the proportion of errors found greatly exceeded the same county's share of convictions. Warren County, for example, accounted for 1.4 percent of the statewide convictions but contributed 5.7 percent of the findings of harmful error. In other, higher-volume counties, the rate of errors and reversals accounted for less than their expected share in comparison to the county's convictions. For example, Camden County had 6.2 percent of New Jersey's convictions, but contributed no reversals and only 3.1 percent of the findings of error.[30] The distribution of convictions, errors, and reversals based on prosecutorial error is illustrated in Table 4, below. Charts 11 and 12 illustrate the ratio of errors to convictions and the ratio of reversals to convictions in each county.

Table 4: Distribution of convictions, errors and harmful errors by county

County	Percentage of convictions	Percentage of total errors	Percentage of harmful errors
Atlantic	5.5%	6.6%	5.7%
Bergen	8.0%	7.4%	7.5%
Burlington	3.9%	2.6%	3.8%
Camden	6.2%	3.1%	0.0%
Cape May	1.8%	2.2%	3.8%
Cumberland	3.0%	3.9%	1.9%
Essex	16.8%	16.2%	24.5%
Gloucester	2.3%	0.4%	0.0%
Hudson	7.3%	4.4%	5.7%
Hunterdon	1.8%	1.3%	1.9%
Mercer	3.2%	6.6%	5.7%
Middlesex	11.4%	10.0%	7.5%
Monmouth	3.9%	7.0%	7.5%
Morris	1.1%	0.9%	1.9%
Ocean	3.4%	1.7%	1.9%
Passaic	4.5%	6.6%	7.5%
Salem	1.2%	0.4%	0.0%
Somerset	3.0%	2.6%	0.0%
Sussex	0.7%	0.4%	0.0%
Union	9.4%	12.7%	7.5%
Warren	1.4%	3.1%	5.7%

[30] The small number of trials and errors in many counties provides an insufficient sample upon which to make statistically significant extrapolations.

Chart 11: Ratio of errors/convictions

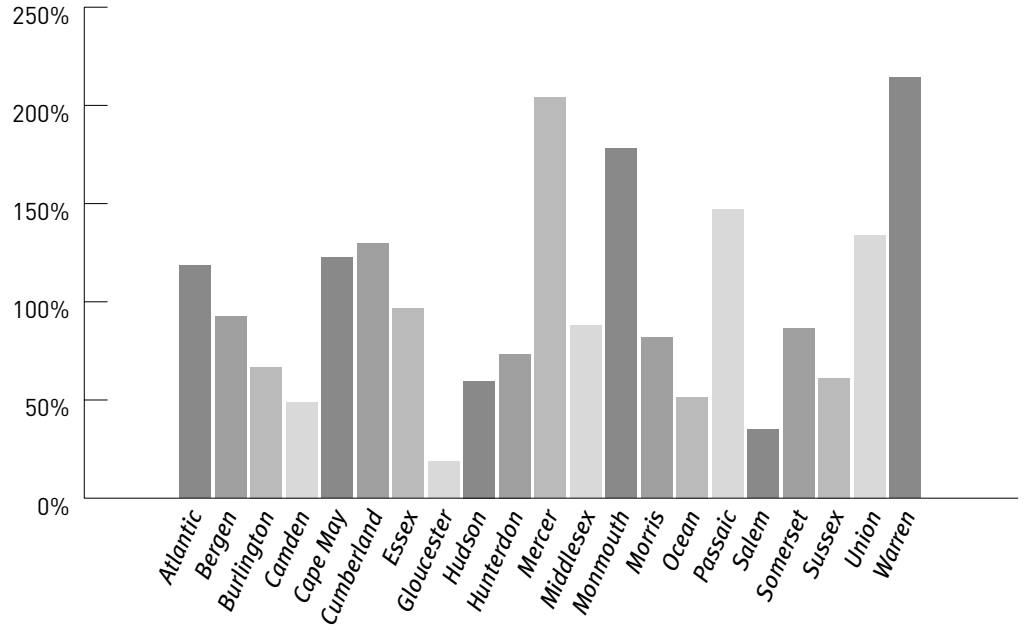
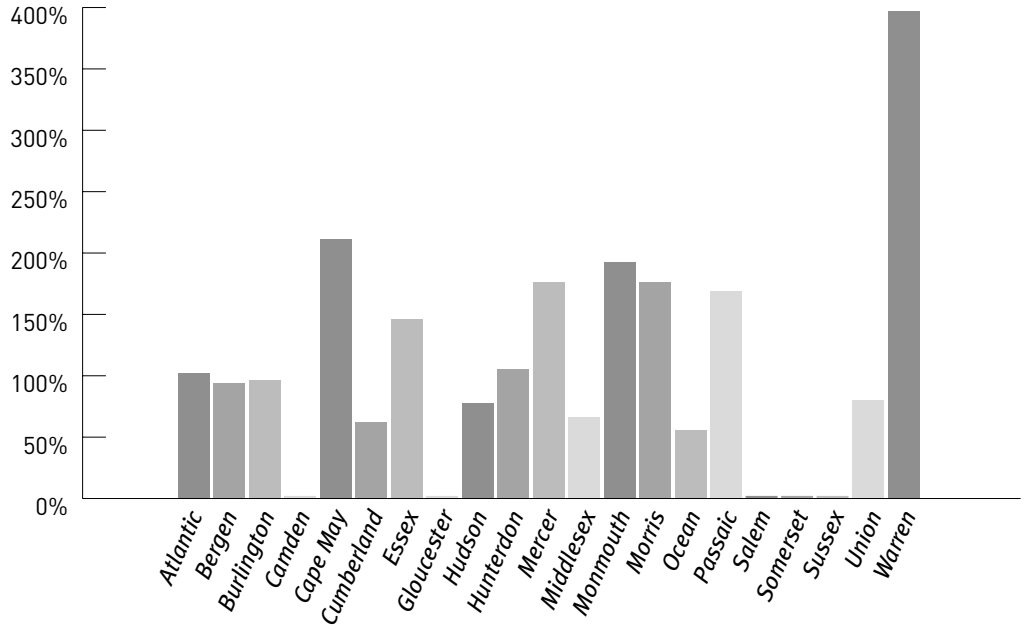


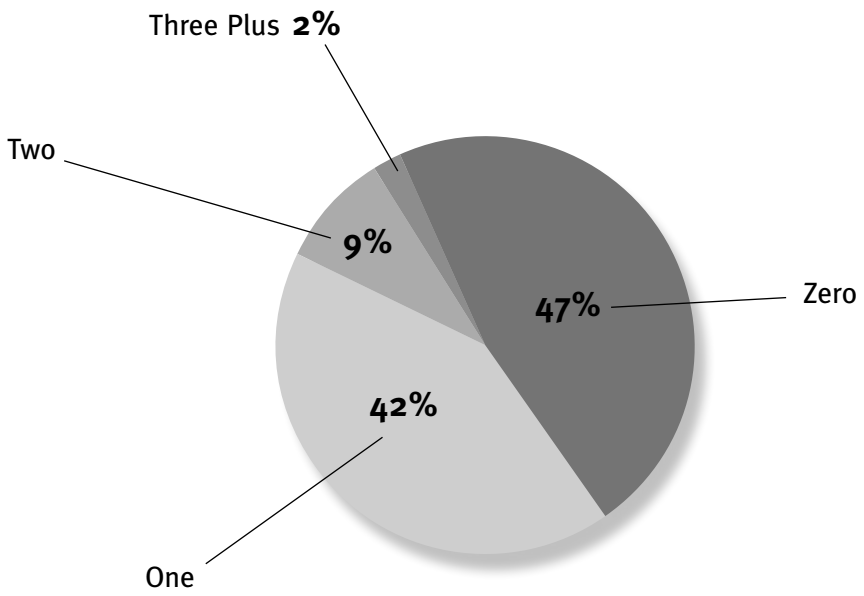
Chart 12: Ratio of reversals for harmful error/convictions



Distribution of Prosecutors

The primary purpose of this study was to determine whether prosecutors who commit error repeat their conduct or learn from their first experience. In most of the New Jersey cases in which prosecutorial error was alleged, the prosecutor had never committed error before. Of the 343 prosecutors identified in our study, 162 had zero findings of error, meaning that in 47 percent of the cases flagged in the study for an allegation of error, the court found no error had occurred. Another 143 New Jersey prosecutors, 42 percent of those studied, committed error in only one case. Only 30 prosecutors (9 percent) committed error in two cases and eight prosecutors were found to have committed error in three or more cases. Of those, five committed error three times, two committed error four times, and one committed error six times. The distribution is illustrated in Chart 13, below.

Chart 13: Number of errors per prosecutor



Ten prosecutors in New Jersey were cited during the study period for errors in multiple cases, with at least one of those errors held to be harmful. In total, this group of 10 prosecutors had errors found in 27 cases.

Case in point: The prosecutor in our study with the most errors, as determined by the courts, was Steven Siegel, of Warren County. During the five years of the study, six appellate cases found errors attributable to Siegel, two of which were harmful. Three 2008 appellate cases found errors in his summations. Two summations improperly argued that the defense lawyer would do whatever it took to get an acquittal for his client. *State v. Russell*, 2008 WL 4648842 (App. Div. 2008) (unpublished opinion); *State v. Williams*, 2008 WL 215706 (App. Div. 2008) (unpublished opinion). The third summation included the prosecutor's opinion that the State's witnesses were telling the truth. *State v. Miller*, 2008 WL 304532 (App. Div. 2008) (unpublished opinion). In all three cases, Siegel was in effect seeking to have the jury consider his views of the evidence, which the New Jersey Prosecutor's Manual forbids in Chapter I, 5. g. After two of these appellate decisions had been issued, Siegel committed an error examining a witness when he asked about the beatings the defendant had given her over a period of seven years. *State v. Sullivan*, 2010 WL 5376351 (App. Div. 2010) (unpublished opinion). The trial court held that this was an improper reference to past wrongs and granted the defendant's motion for a mistrial.

An appellate court also found Siegel committed reversible error in *State v. Singleton*, 2011 WL 9104 (App. Div. 2011) (unpublished opinion).

Case in point: Assistant Prosecutor David Calviello, of Bergen County, was charged with six different errors in his summation for a 2001 aggravated assault case. These included suggesting that the indictment was evidence against the defendant and describing the victim's family background to elicit sympathy. The only charge that the appellate court held to be error was the prosecutor's comment that the defendant manipulated facts to create a defense. The prosecutor garnered a seventh allegation of prosecutorial error for exclaiming to the judge, "Don't yell at me," to which the judge responded by admonishing the prosecutor's "arrogance" and by stating that he was "tired" of the prosecutor's "rude" behavior toward defense counsel. *State v. Zilleruleo*, 2006 WL 1714542 (App. Div. 2006) (unpublished opinion).

Calviello also committed harmful error in a 2008 trial. *State v. Mosby*, 2010 WL 1526438 (App. Div. 2010) (unpublished opinion). To explain why a key witness could not corroborate part of the defendant's story, defense argued that the witness had failed to comply with a subpoena to appear that day in court. During his closing argument, Calviello had the previously absent witness brought into the courtroom, seated in the front row and identified as the witness for the jury. The appellate division held this conduct to be "clearly and unmistakably improper" because it suggested that the witness was available if the defense had really wanted him to testify, which further suggested that he might not have corroborated the defendant's story.

Appellate courts also found Calviello committed error in: *State v. Ozonia-Ambierix*, 2008 WL 1832908 (App. Div. 2008) (unpublished opinion) and *State v. R.F.*, 2009 WL 1347396 (App. Div. 2009) (unpublished opinion).

Case in point: Frederick Elflein, of Essex County, had two cases where courts found harmful error. In one, the court found that he disparaged defense counsel, suggested that the defense had wasted the jury's time, and repeatedly "uttered sarcastic, caustic and demeaning remarks" aimed to show that defense counsel was "inept." *State v. Bridges*, 2010 WL 3528988 (App. Div. 2010) (unpublished opinion). In a second case, the court found "a pattern of misconduct on the prosecutor's part." *State v. Jennings*, 2008 WL 795001 (App. Div. 2008) (unpublished opinion).

In a third case, the appellate court did not reach the merits of the prosecutorial error argument because it reversed on other grounds. But the court concluded its opinion as follows: "The prosecutor who tried the case should not mistake our decision to forego discussion of the allegations of excess and overreaching on his part as approval of the manner in which he represented the State." *State v. Myers*, 2011 WL 13846 (App. Div. 2011).

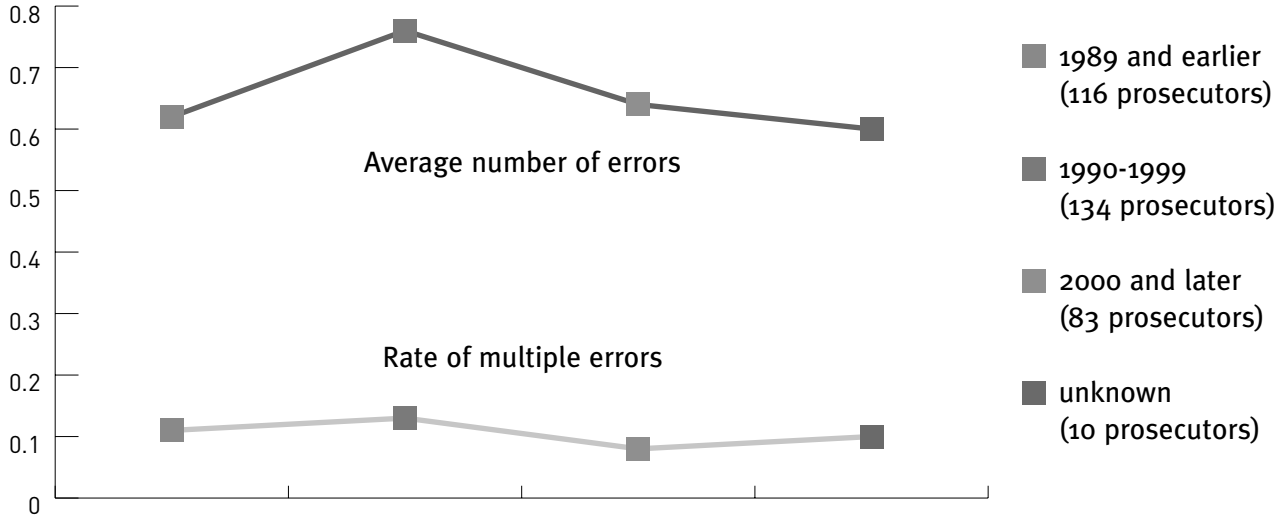
Experience of Prosecutors

The study also aimed to learn whether a prosecutor's level of experience had any bearing on rates of error. The data revealed that, among prosecutors accused of committing errors, those who joined the Bar between 1990 and 1999, classified for purposes of the study as medium-experience prosecutors, committed error at the highest rate. As illustrated in Table 5 and Chart 14, the 134 prosecutors who became members of the Bar in the 1990s had the highest rate of error, with an average of .76 errors per prosecutor, as well as the highest rate of repeating error, at 13.43 percent. Incidentally, that group also comprised a plurality of the prosecutors listed in our database.[31]

Table 5: Distribution of errors and multiple errors by level of experience among prosecutors accused of error

Category of prosecutors	Number of prosecutors	Average number of errors per prosecutor	Percentage of prosecutors with multiple errors
1989 and earlier	116	0.62	11.21%
1990-1999	134	0.76	13.43%
2000 and later	83	0.64	8.43%
Unknown	10	0.60	10.00%

Chart 14: Distribution of errors and multiple errors by level of experience



[31] There is little that can be divined from this finding. It may well be that prosecutors with a medium amount of experience try the most cases because they have enough seniority to be on trial teams but not enough to be in management.

Costs and Consequences of Prosecutorial Error

Consequences for the Wrongly Convicted

Government misconduct[32] — prosecutorial error and police misconduct — has contributed to the wrongful conviction of at least 46 people in the United States who were later exonerated.[33] Studies suggest that a significant number of people exonerated as a result of DNA testing were convicted initially in cases where government misconduct occurred.[34] While none of the convictions attributable to government misconduct that were later overturned based on DNA evidence were from New Jersey, the possibility remains that some New Jerseyans convicted as a result of prosecutorial error could, in fact, be innocent. Whenever a court reverses a conviction based on prosecutorial error, it necessarily acknowledges the risk that the error led to a wrongful conviction.[35] As the New Jersey Supreme Court has explained, reversals are necessary whenever a "prosecutor's misconduct had the clear capacity to have led to an unjust verdict."[36]

Consequences for Society

Even when prosecutorial error does not result in the conviction of an innocent person, society in general and crime victims in particular still pay deeply troubling costs. Financially, the reversal of a conviction triggers the potential for exceptionally costly retrials, but costs also include emotional harm and a "cost" in terms of justice.

[32] Throughout this study we have used the phrase "prosecutorial error." Courts traditionally use the phrase "prosecutorial misconduct." While the authors of this study believe the phrase "prosecutorial error" is more appropriate, this section adopts the term used in the reports by the Innocence Project referenced here.

[33] http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=Government+Miscond uct&perpetrator=&compensation=&conviction=&x=32&y=1.

[34] Emily M. West, "Court Findings Of Prosecutorial Misconduct Claims In Post-Conviction Appeals And Civil Suits Among The First 255 DNA Exoneration Cases, Innocence Project" (2010), available at: http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf.

[35] Courts' ability to determine when an error is, in fact, harmless is, at best, suspect. Findings of harmless error in the cases of several people later determined to be innocent undermine faith in courts' determinations that evidence of guilt in a particular case was overwhelming. *See, e.g.*, Brandon L. Garrett, "Innocence, Harmless Error, and Federal Wrongful Conviction Law" 2005 *Wis. L. Rev.* 35, 56 (2005) (arguing that the doctrine of harmless error has prevented appellate courts from "remedy[ing] constitutional errors long before innocent people languished in prison").

[36] *Frost, supra*, 158 *N.J.* at 88-89.

The financial costs are the easiest to calculate. Trials are expensive: taxpayers fund the prosecution, the judge, the jury, the court staff, the security, and, often, the defense attorneys. Law enforcement officers who serve as necessary witnesses in a trial often receive overtime for their preparation and testimony.[37] These financial costs help explain the rarity of criminal trials in the United States in general, and New Jersey in particular. In New Jersey, according to data provided by the Administrative Office of the Courts, between July 2009 and June 2010, 54,339 indictments were returned statewide; 37,522 were resolved by way of guilty plea, only 379 by acquittal and 561 by conviction after trial. In other words, only 1.7 percent of indictments resulted in trials and indicted defendants were 39.9 times as likely to plead guilty than go to trial.[38]

Emotional costs are less easily quantified. The unpredictable nature and high stakes of jury verdicts often drains victims and their families emotionally. Despite their testimony, they have no assurance that the alleged perpetrator will be convicted. The sense of relief a victim may feel after a jury has returned a guilty verdict quickly unravels if that conviction is reversed.[39] The prospect of a retrial is daunting: the victim not only faces the anxiety of repeating his testimony, but also the prospect of an adverse jury verdict.

Case in point: Consider the case of Tania Silva. In 2007, a jury convicted Paul Cibelli Jr. for the murder of Ms. Silva. The prosecutor unfairly relied on inadmissible, prejudicial evidence during summation, resulting in the reversal of Cibelli's conviction. When the State retried Cibelli in 2010, Ms. Silva's parents, Elvira and Moises Silva, travelled from Texas to New Jersey to attend every day of the month-long trial. Cibelli was again convicted and again sentenced to 55 years in prison. Apart from all of the other material costs, the need for a retrial forced Elvira and Moises Silva to endure further rounds of emotional turmoil between 2007 and 2010 reliving the trauma of their daughter's death.

Sue Epstein, "South Plainfield man found guilty of girlfriend's murder again, after first conviction was tossed," *Newark Star Ledger*, October 21, 2010. Available at: http://www.nj.com/news/index.ssf/2010/10/court_again_finds_south_plainf.html

[37] T. Ward Frampton, "The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State," 100 *Cal. L. Rev.* 183, 207-14 (2012); *New Jersey Transit Policemen's Benevolent Association Local 304 v. New Jersey Transit Corporation*, 806 *F.*2d 451 (3rd Cir., 1987) (exempting New Jersey Transit from ordinary requirement that officers receive pay-and-a-half for *inter alia* "testifying at mandatory court hearings").

[38] Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," 1 *J. Emp. L. Stud.* 459 (2004).

[39] See Marilyn Peterson Armour & Mark S. Umbriet, "The Ultimate Penal Sanction and 'Closure' for Survivors of Homicide Victims," 91 *Marq. L. Rev.* 381, 408 (2007) (describing capital appellate process as "emotional roller coaster" for victims' families).

Justice also potentially suffers if the defendant ultimately receives a disposition that does not reflect his culpability. This can occur because the results of prosecutions conducted without the prosecutorial error that infected the first trial are not always the same as initial trials. The passage of time between the first trial and the retrial rarely benefits the State. Witnesses' memories often fade, witnesses may relocate or die and evidence can be degraded or lost. Therefore, prosecutors' offices faced with the prospect of a retrial frequently offer plea bargains to defendants that offer dramatically shorter prison stays than the original sentence in exchange for a guilty plea.[40]

Case in point: On February 16, 2007, Frederick Parrish received a 30-year sentence in state prison with 85 percent parole ineligibility for his role in a gang-related drive-by shooting. According to the trial proofs, the defendant pulled alongside a car containing five people and fired six shots into the car, striking the driver once in the lungs. The 18-year-old victim was pronounced dead at the scene. The initial trial lasted two and a half weeks and the jury deliberated two full days.

On appeal, the court called the prosecutor's summation an "inflammatory and highly emotional appeal to the jury to imagine what the shooting must have been like for [the victim]." Because the court concluded that "the prosecutor's 'imagine' remarks substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense," it reversed Parrish's conviction.

Faced with the prospect of a retrial, Parrish pleaded guilty and received the minimum sentence for aggravated manslaughter, 10 years with 85 percent parole ineligibility. By the time he was re-sentenced, he only had two years and two days left of his sentence to serve.

Office of the Essex County Prosecutor, Press Release: "Newark Gang Member Sentenced to 30 Years in Prison" (February 16, 2007) (available at: http://www.njecpo.org/Press/pr_714.html)
State v. Parrish, 2009 WL 1917810 (App. Div. 2009) (unpublished opinion) (citations omitted).
https://www6.state.nj.us/DOC_Inmate/details?x=1186187&n=15

[40] *See, e.g.*, the case of Sky Atwater, who was originally sentenced to 25 years in prison for his role in a double-fatal drunk driving accident (Tom Hester, "Retrial ordered in double-fatal DWI case," *Newark Star Ledger*, May 22, 2008, available at: http://www.nj.com/newark/index.ssf/2008/05/a_retrial_is_ordered_in_double.html). After a reversal based on prosecutorial error, he pleaded guilty to a seven-year sentence (https://www6.state.nj.us/DOC_Inmate/details?x=1002784&n=0). Edwin Lebron was originally sentenced to 30 years in prison as a result of a felony murder conviction; after a reversal because of prosecutorial error he was offered a plea bargain of a sentence half as long (Kristin Jesson Bucci, "Trenton man turns down deal in slaying," *Times of Trenton*, October 9, 2007, available at: http://blog.nj.com/timesupdates/2007/10/trenton_man_turns_down_deal_in.html). He ultimately accepted a plea bargain and received an even shorter sentence (https://www6.state.nj.us/DOC_Inmate/details?x=1323525&n=1).

Consequences for Prosecutors

Although some courts may have referred prosecutors to the Attorney General or district ethics boards, a search of every disciplinary report from January 1, 2001, through September 30, 2011, revealed no instances of any prosecutor being disciplined for in-court behavior.[41] Not one of the 343 prosecutors identified in our study had been subjected to discipline, in stark contrast to discipline meted out against other categories of attorneys for in-court behavior.[42] Thus, while prosecutors may have faced either informal consequences or ones affecting their employment, such as transfer, suspension or firing, no ethical sanctions have been handed down as a result of prosecutorial error, even in cases of repeated or egregious errors.[43]

[41] During the more than ten-year period we surveyed, three prosecutors were disciplined: in 2008 a Union County Assistant Prosecutor was suspended for possession of cocaine; in 2007, an assistant prosecutor was reprimanded for practicing law when she was not up-to-date on her annual attorney registration fee; and in 2002, a Mercer County Assistant Prosecutor was admonished for signing the name of his supervisor to an affidavit in support of a wiretap application.

[42] *See, e.g.*, the case of Gerard L. Del Tufo who was admonished in 2010 for "accusing a municipal court judge of being in collusion and 'in bed' with the prosecutor after the judge granted the prosecutor an adjournment but denied the respondent's similar adjournment request." (available at: http://www.judiciary.state.nj.us/oae/DisciplinarySummaries1984-2008.pdf, page 4). Dennis D. McAlevy was thrice disciplined: he was reprimanded by the New Jersey Supreme Court based on a finding of ineffective assistance of counsel in federal court. 167 *N.J.* 607 (2001). He was suspended for three months for, among other things, "discourteous conduct degrading to a tribunal." 94 *N.J.* 201, 208 (1983). In 1976, he also received a reprimand for lack of civility, good manners, and common courtesy before the court. 69 *N.J.* 349. For numerous instances of calling the judge unfair and prejudiced in front of the jury, Richard C. Swarbrick received a reprimand. 178 *N.J.* 20 (2003). Sharon Hall was suspended for three years for a pattern of, *inter alia*, accusing judges, without any factual basis, of fraud, dishonesty and conspiracy. 170 *N.J.* 400 (2002).

[43] It is worth noting that while prosecutors appear practically exempt from ethical consequences of error, they are, in fact, absolutely immune from civil liability. This, too, may diminish accountability. But a full discussion of the impact of civil immunities on prosecutorial error is beyond the scope of this report and has been much discussed. *See, e.g.*, David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, "The Myth of Prosecutorial Accountability After *Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct" 121 *Yale L.J. Online* 203 (2011).

Role of Prosecutors' Offices in Addressing Prosecutorial Error

The New Jersey Open Public Records Act helped elucidate which policies prosecutors' offices have in place to prevent or correct prosecutorial error. The results of the search showed that few prosecutors' offices in the state have *policies* in place to deal specifically with prosecutorial error, but almost all offices have *practices* in place to deter and remedy prosecutorial error.

With a few notable exceptions, New Jersey prosecutors' offices only rarely have policies mandating training, supervision or discipline to prevent prosecutorial error. However, individual offices take proactive steps to minimize if not altogether prevent errors. Whether an office spends extra time training assistant prosecutors to avoid common pitfalls in summation, consistently provides attorneys to staff the "second chair" in every trial or creates an informal system to penalize and reward prosecutors, one thing is clear: some counties succeed more than others in minimizing the incidence of prosecutorial error.

It has been long recognized that court dockets contain a problematic number of valid claims of summation errors by prosecutors.[44] A massive memorandum written by the Office of the Attorney General and provided to all county prosecutors' offices on prosecutorial error, "Prosecutor Conduct: How to Avoid Reversible Error,"[45] spends many pages detailing conduct to avoid during summation.[46] Despite a title pertaining to *reversible* error exclusively, the memorandum provides thorough and useful guidance on pitfalls that jeopardize either the integrity of the trial or the validity of the conviction. Prosecutors' offices undoubtedly train their attorneys in efforts to decrease the number of summation errors, which occur with what courts have deemed "numbing frequency."[47] The results of the present study suggest that even more must be done.

[44] For almost a quarter century review courts discussing prosecutorial excess in summation have noted that "instances of prosecutorial excesses in the course of summation seem to come to [our appellate courts] with numbing frequency." The phrase was first used in *State v. Watson*, 224 *N.J. Super*. 354, 362 (App. Div. 1988); it was most recently used in an unpublished opinion in November of 2011, *State v. Marrero*, 2011 WL 5245205 (App. Div. 2011) (unpublished opinion). A full half-century ago Justice Francis lamented that "[a]ppellate courts continue to be too much occupied in review of prosecutors' summations." *State v. Thornton*, 38 *N.J.* 380, 400 (1962).

[45] The Office of the Attorney General uses the phrases "prosecutorial misconduct" and "prosecutorial error" interchangeably.

[46] The 114-page memorandum lays out the role of the prosecutor in the first two pages, discusses obligations of the prosecutor in front of the grand jury in the next nine pages, and then spends the next more-than hundred pages describing problematic topics for opening statements, examination and summation.

[47] *Frost, supra*, 158 *N.J.* at 88.

Areas of focus for decreasing prosecutorial error

- **Training on summation error must continue as a focus**, but with increasing frequency.

- **Prosecutors' offices need to increase supervision of summations.** Of course, summations are spontaneous in nature: attorneys cannot prepare summations before trial because closing statements must respond to the evidence that was presented at trial. Still, to the extent possible, attorneys should vet their proposed summations with colleagues and supervisors.

- **When feasible, prosecutors' offices should ensure that another member of the office is present to observe either rehearsed deliveries or the actual summation.** An attorney who has not delivered the closing statement is far more likely to be able to provide an objective assessment of any given remark, removed from the passion that attaches to a trial.

- **Where prosecutors transgress the established rules for delivering summations, their supervisors must determine first whether the prosecutor knew whether the conduct was erroneous.** If the prosecutor committed the error unknowingly, the failure in training must be remedied; if the prosecutor did know the conduct constituted error, the office must determine whether the error stemmed more from the emotional nature of a trial (more likely if it is the prosecutor's first finding of error) or deliberate transgression (more likely if the prosecutor has been previously cited for a similar error). In the former case, supervision should prevent repeated error. In the latter case, discipline is likely appropriate.

Current Role of Courts and Legal Bodies in Addressing Prosecutorial Error

There are currently four remedies in New Jersey:

1. **Referral to Ethics Committees**
2. **Referral to Attorney General from Appellate Courts**
3. **Reporting from Lawyers**
4. **Reporting from Judges**

Courts and ethics bodies, which have an important function alongside prosecutors' offices, must consider which potential policies could augment the current ones — which in themselves appear inadequate — to curb the frequency of prosecutorial error. Judge David Baime of the New Jersey Appellate Division, coining the phrase "numbing frequency," explained one such solution:

> We would be remiss, however, were we to fail to note that instances of prosecutorial excesses in the course of summation seem to come to this court with numbing frequency. Often, as here, such derelictions go unpunished because it is clear that no prejudice to the defendant resulted. Although an automatic reversal rule might well have prophylactic value in deterring future misconduct, public security should not suffer because of the prosecutor's blunder. We again remind prosecutors that a criminal trial is not a sporting event. Winning and doing justice are not always equivalent. We allude to the warning expressed by our Supreme Court … that *possible violations of the special ethical rules governing prosecutors may be referred to the appropriate district ethics committee for disciplinary action.*[48]

Judge Baime acknowledges that an automatic reversal rule seems clearly too harsh a remedy, but proposes an alternate prophylaxis: referral of possible violations of the special ethical rules governing prosecutors to district ethics committees.

[48] *Watson, supra*, 224 *N.J. Super*. at 362-63 (emphasis added).

In *State v. Frost*, the New Jersey Supreme Court offered a slightly different solution:

> In view of the egregious prosecutorial misconduct that occurred in this case, we are compelled to consider what if any action should be taken against the trial prosecutor personally to discourage such blatant misconduct in the future. The Appellate Division referred this matter to the Attorney General who, as the chief law enforcement officer of the State, has supervisory powers over prosecutors. *The Attorney General wrote the assistant prosecutor a letter of reprimand. Because this was the young assistant prosecutor's first jury trial, and because he had left the Essex County Prosecutor's Office, that letter was a sufficient personal sanction in this case.* Again, we remind prosecutors that they have "a unique role and responsibility in the administration of criminal justice and, therefore, have an extraordinary power to undermine or destroy the efficacy of the criminal justice system." "The sound administration of criminal justice in our democracy requires that both the end and the means be just."[49]

The *Rules of Professional Conduct* also offer guidance, requiring that:

> "[a] lawyer who knows that another lawyer has committed a violation of the *Rules of Professional Conduct* that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects... inform the appropriate professional authority."[50] Judges are similarly bound: "A judge having knowledge that a lawyer has committed a violation of the *Rules of Professional Conduct* that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority."[51]

[49] *Frost, supra*, 158 *N.J.* at 89 (citations omitted; emphasis added).

[50] R.P.C. 8.3(a).

[51] *Code of Judicial Conduct*, Canon 3B(3)(b).

These four remedies — possible referral to disciplinary bodies by appellate courts, possible referral to the Office of the Attorney General by appellate courts, mandatory reporting of *unethical* behavior by attorneys, and mandatory reporting of *unethical* behavior by judges — cannot alone remedy the problem of repeated prosecutorial errors. The gaps in the final two of these safeguards are almost self-evident: not all prosecutorial error, even serious error, amounts to unethical behavior, even in egregious cases that warrant reversal. The emotionally charged nature of criminal trials, particularly during summation, explains but does not justify some prosecutorial overreaches. As a result, optional referrals by reviewing courts appear to be exceedingly rare.[52] The fundamental problem with optional referrals stems from courts' limited ability to determine whether an error constitutes a prosecutor's first or fifth. The judges' gaps in information leave them unlikely to refer any conduct but the most outrageous.

[52] Our research revealed four cases optionally referred to ethics committees by courts: *Frost, supra*, 158 *N.J.* at 89 (referencing referral of matter to the Office of Attorney General); *State v. Torres*, 328 *N.J. Super*. 77, 95 (App. Div. 2000) (referring matter to the Office of the Attorney General where "the assistant prosecutor acted in a manner entirely heedless of the risk of causing ineradicable prejudice to the accused"); *State v. Kevin Baker*, A-1143-96T3, Slip. Op. at 7-8 (App. Div. Feb 23, 1998) (unpublished opinion) (finding that "prosecutor's errors were not so grave as to justify referring this matter to an ethics committee" but referring the matter to the county prosecutor for corrective action) (Appendix C); *State v. Clarence McKinley Moore*, A-1910-87T4, Slip. Op. at 7, n. 1 (App. Div. April 1, 1991) (unpublished opinion) (urging "the Attorney General to bring the matter to the attention of the appropriate ethics body") (Appendix D). The *Baker* and *Moore* cases were appended to the defendant's brief before the New Jersey Supreme Court in *Frost*. A survey of several attorneys who handle criminal appeals revealed no additional cases.

Advantages of Mandatory Reporting of Error

Other states have benefited from broader mandatory reporting requirements, although with limited utility in some cases. New Jersey could benefit as well. California requires judges to notify the State Bar "[w]henever modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney."[53] Because convictions are reversed in just over a quarter of cases in which courts have found error,[54] many findings of error will never be reported to ethics boards. Arguably some isolated cases of harmful error may demand less rigorous ethical review than repeated instances of harmless error from the same prosecutor, for example.

A system of mandatory reporting of all findings of prosecutorial error to the Office of the Attorney General would create a database to track prosecutors with repeated violations. Under this model, the OAG would be required to forward a complaint to the appropriate district ethics board whenever error contributed to a reversal of a conviction and whenever a prosecutor had been cited for a subsequent finding of error. Armed with information about serious or repeated error, ethics boards can determine what sanctions, if any, are appropriate.[55] Trial courts, too, should be obligated to report prosecutorial error that results in a mistrial or a significant deprivation of a defendant's rights, regardless of the outcome of the trial.

Courts should reach the issue of prosecutorial error in every case, even where error is deemed harmless or where the case is reversed for other reasons, to offer prosecutors maximum guidance concerning acceptable and forbidden conduct. In total, more than 13 percent of the total cases surveyed (57 were never reviewed because the error was deemed harmless and 17 were not reviewed because the case had been reversed for other reasons) denied prosecutors court guidance that could have served to delineate examples of proper and improper conduct.

[53] Cal. Bus. & Prof. Code §6086.7(a)(2)(ii) (2009).

[54] In New Jersey, harmful error was found in 53 cases; error was found in another nine reversed cases. There were 229 total cases of error. The reversal rate among error cases was 27.1 percent.

[55] A similar argument could be made in respect of claims of ineffective assistance of counsel by defense attorneys. There are certainly some major differences: as a representative of the state, prosecutors have unique responsibilities. American Bar Association, *Model Rules of Professional Conduct*, Rule 3.8, Special Responsibilities of a Prosecutor (available at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/r ule_3_8_special_responsibilities_of_a_prosecutor.html). But, of course, the right to counsel is a constitutional imperative. Violations of that right — particularly repeated violations — are appropriately considered by ethics boards.

Anonymity and Accountability

Appellate opinions in New Jersey rarely identify a prosecutor by name, even in cases of the most outrageous prosecutorial conduct.[56] The public interest in having an accountable criminal justice system far outweighs prosecutors' individual interests in protecting their identities, which, as this study illustrates, are already publicly, if not easily, accessible.

The Ninth Circuit Court of Appeals recently confronted this very issue head-on. In *United States v. Lopez-Avila*,[57] the prosecutor, Jerry Albert, misleadingly quoted from a plea transcript.[58] When the misrepresentation was revealed to the district judge, he granted the defendant's motion for a mistrial.[59] The case proceeded to the Ninth Circuit on a double jeopardy question.[60] "[U]pon initial release of th[e] opinion, the government filed a motion requesting that [the court] remove Albert's name and replace it with references to 'the prosecutor.'"[61] The government "contended that naming Albert publicly is inappropriate given that...the outcome of any potential investigations or disciplinary proceedings"[62] was unknown. The Ninth Circuit denied the motion and explained its rationale:

> We have noticed that the U.S. Attorney's Office in Arizona regularly makes public the names of prosecutors who do good work and win important victories. If federal prosecutors receive public credit for their good works — as they should — they should not be able to hide behind the shield of anonymity when they make serious mistakes.[63]

The issue is not simply one of praise and blame, but of accountability. Prosecutors' offices can track error findings by reading all cases and flagging identified prosecutors. But other bodies — such as the Office of the Attorney General or district ethics boards — seeking to determine whether a prosecutor had committed the same error previously would need to undertake research similar to the efforts behind this study.

[56] *See, e.g.*, *Frost, supra*, 158 *N.J.* at 89 (case referred to Office of Attorney General, but prosecutor not named); Torres, supra, 328 *N.J. Super*. at 95 (same); *State v. Baker, supra*, A-1143-96T3, Slip. Op. at 7-8 (unpublished opinion) (referring the matter to the county prosecutor for corrective action but not naming prosecutor); *Moore, supra*, A-1910-87T4, Slip. Op. at 7, n. 1 (unpublished opinion) (urging "the Attorney General to bring the matter to the attention of the appropriate ethics body" but not naming prosecutor).

[57] *F.*3d , 2012 WL 450314 (9th Cir. 2012 (Ariz.)).

[58] *Id.* at 3-5.

[59] *Id.* at 5.

[60] *Id.* at 5-8.

[61] *Id.* at 10.

[62] *Id.*

[63] *Id.* at 10 (citations omitted).

Opinions addressing prosecutorial error should identify offending prosecutors by name. The prosecutors might do well to take a page from the policing realm, also overseen by the Office of the Attorney General in New Jersey, in which many agencies institute "early warning systems." In broad terms, "the purpose of an early warning system is to detect patterns and trends before the conduct escalates into more serious infractions."[64] The public, the OAG and ethics boards should have access to the raw data necessary to track repeated prosecutorial error, regardless of whether the prosecutors create formal early warning systems.[65]

Ethics boards must be notified more often of occurrences of prosecutorial error, and policies should be put in place to ensure it. Only by knowing how often instances of prosecutorial error are referred to ethics boards can meaningful critiques of disciplinary proceedings occur. And when ethics boards are notified, they must thoroughly investigate the allegations and impose discipline as appropriate, taking into consideration the important role that prosecutors play in our criminal justice system and the unique position they hold in the public trust.

Defense attorneys play a key role in halting prosecutorial error as it occurs, by making appropriate objections. Failure to object is a tacit invitation to more error. Trial-level defense attorneys must become better versed in the law so they are able to make timely objections to conduct that courts have condemned.[66] Often times, courts conclude that certain conduct is not error, or if it is error, it is harmless, because defense attorneys fail to object. As the New Jersey Supreme Court explained:

> Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial. Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made. Failure to object also deprives the court of the opportunity to take curative action.[67]

[64] New Jersey Office of the Attorney General, *Internal Affairs Policy and Procedure*, (Sept. 2011), p. 53 (available at: http://www.nj.gov/lps/dcj/agguide/internalaffairs2000v1_2.pdf).

[65] As with mandatory referrals to ethics boards, a similar argument could be made with respect to claims of ineffective assistance of counsel by defense attorneys. Because the right to counsel is a constitutional imperative, violations of that right — particularly repeated violations — are of great concern to the public. Courts should also publish the names of defense attorneys who provide ineffective assistance of counsel.

[66] The Office of the Public Defender has made two outlines available to its staff and pool attorneys: Lois De Julio, *Table of Prosecutors' Summation Errors* (July, 2000) and Jay L. Wilensky *Recognizing and Combatting Prosecutorial Misconduct, or the "Numbing Frequency" Continues....* (September, 2005). That such outlines are available underscores the responsibility of trial attorneys to familiarize themselves with the material and, when appropriate, make timely objections.

[67] *State v. Timmendequas*, 161 *N.J.* 515, 576 (2001).

Recommendations

Prosecutors' Offices

✔ Develop written policies that mandate training, supervision and discipline to prevent prosecutorial error

✔ Increase mandatory training on summation error

✔ Increase supervision of summations

- To the extent possible, attorneys should vet their proposed summations with colleagues and supervisors.
- When feasible, prosecutors' offices should ensure that another member of the office is present when the summation is being delivered.

✔ Respond with increased training, supervision or discipline when prosecutors break rules

- Training is appropriate where the prosecutor was unaware the conduct was improper.
- Supervision is appropriate where the prosecutor made a one-time error that was a product of the emotional nature of a trial.
- Discipline is appropriate where the prosecutor committed multiple, purposeful or egregious transgressions.

Courts

✔ Mandate reporting of all instances of prosecutorial error to the Office of the Attorney General

- The OAG should be required to report to district ethics boards whenever a prosecutor's error contributed to a reversal, resulted in a mistrial or significantly prejudiced a defendant.
- The OAG should be required to report to district ethics boards whenever a prosecutor has committed more than one error — regardless of whether the errors were deemed harmless.

✔ Reach the issue of prosecutorial error in every case

- Courts should still determine whether there was error even if they have already determined there was no prejudice.
- Courts should still reach the prosecutorial error issue even if they reverse on other grounds.

✔ Identify offending prosecutors by name in all opinions addressing prosecutorial error

Ethics Boards

✔ Thoroughly investigate the allegations against prosecutors and impose discipline as appropriate, taking into consideration the important role that prosecutors play in our criminal justice system

Defense Attorneys

✔ Become better versed in the law to object in a timely manner to conduct that courts have previously condemned

Conclusion

As a general rule, prosecutors in New Jersey deserve praise for avoiding repeated error in the overwhelming majority of cases. However, three major issues must be confronted to improve the fairness of the criminal justice system: First, repeated prosecutorial error — no matter how rare — must be addressed through policies that provide for training, supervision and discipline. Second, training must be improved on summation errors, which continue to occur with "numbing frequency." Third, courts must develop policies — including publicly naming offending prosecutors and reporting them to appropriate bodies — that will ensure that prosecutorial error happens less often. Defendants, prosecutors, and society at large will benefit from such improvements.

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Appendices

Appendix	Description
A.	Fall Out Rates provided by Administrative Office of the Courts (July 2009-June 2010)
B.	Carol Henderson, "Prosecutor Conduct: How to Avoid Reversible Error" (May 2011)
C.	*State v. Kevin Baker*, A-1143-96T3, (App. Div. Feb 23, 1998) (unpublished opinion)
D.	*State v. Clarence McKinley Moore*, A-1910-87T4, (App. Div. April 1, 1991) (unpublished opinion)
E.	*Harmful Cases by Jurisdiction*
F.	*Harmless Cases by Jurisdiction*

A Report by the American Civil Liberties Union of New Jersey

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