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Appeals by the Prosecution

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Scholarly and public debates about criminal appeals have largely taken place in an empirical vacuum. This study builds on our prior empirical work exploring defense-initiated criminal appeals and focuses on criminal appeals by state and federal prosecutors. Exploiting data drawn from a recently released national sample of appeals by state prosecutors decided in 2010, as well as data from all appeals by federal prosecutors to the U.S. Courts of Appeals terminated in the years 2011 through 2016, we provide a detailed snapshot of noncapital, direct appeals by prosecutors, including extensive information on crime type, claims raised, type of defense representation, oral argument, and opinion type, as well judicial selection, merits review, and relief. Findings include a rate of success for state prosecutor appeals about four times greater than that for defense appeals (roughly 40 percent of appeals filed compared to 10 percent). The likelihood of success for state prosecutor-appellants appeared unrelated to the type of crime, claim, or defense counsel, whether review was mandatory or discretionary, or whether the appellate bench was selected by election rather than appointment. State high courts, unlike intermediate courts, did not decide these appeals under conditions of drastic asymmetry. Of discretionary criminal appeals reviewed on the merits by state high courts, 41 percent were prosecutor appeals. In federal courts, prosecutors voluntarily dismissed more than half the appeals they filed, but were significantly less likely to withdraw appeals from judgments of acquittal and new trial orders after the verdict than to withdraw appeals challenging other orders. Among appeals decided on the merits, federal prosecutors were significantly more likely to lose when facing a federal defender as an adversary compared to a CJA panel attorney.

I. Introduction

This article presents results from the first nationwide empirical study of direct appeals by the government in both state and federal criminal cases. Examining recently released data drawn from the 2010 decisions of every state court with jurisdiction to hear criminal appeals,[1] we provide a detailed snapshot of noncapital, direct appeals by state prosecutors, including

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[1]Survey of State Court Criminal Appeals, Inter-University Consortium for Pol. & Soc. Res. (2010), https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/36465?q=36465 (https://perma.cc/BSC5-LDK2) [hereinafter Survey of State Court Criminal Appeals].

information on crime type, claims raised, type of defense representation, oral argument, and opinion type, as well judicial selection, merits review, and relief. Data on appeals by the prosecution in federal cases presented here include similar information, drawn from datasets recently made public by the Federal Judicial Center that include every criminal appeal to the U.S. Courts of Appeals from 2011 through 2016,[2] supplemented with information gathered from case filings available on PACER. In addition to this rich descriptive information, we report, for both state and federal appeals, results from analyses investigating which case- and court-specific factors correlate with a higher likelihood of success for the government appellant. We also examine how state prosecutor appeals compare with both state defendant appeals and federal prosecutor appeals. The empirical information presented here provides an unprecedented portrayal of the real world of prosecutor appeals, with a number of surprising findings.

Section II briefly summarizes the law authorizing government appeals in criminal cases and reviews existing scholarship on these appeals. Section III sets out our research questions. Section IV presents our study of state prosecutor appeals, including our empirical strategy, descriptive findings, and statistical analyses examining success by prosecutor-appellants. Section V contrasts these findings with earlier findings concerning *defense* appeals in state courts.[3] Section VI turns to appeals by the government in federal criminal cases, presenting the methodology and findings for our study of those appeals. Section VII addresses the similarities and differences between state and federal prosecutor appeals. Section VIII concludes with potential policy implications and suggestions for further research.

II. Appeals by the Prosecution: Legal Context and Existing Research

The Double Jeopardy Clause bars a prosecutor from appealing a judgment of acquittal to gain a second opportunity for a conviction.[4] Beyond this constitutional restriction, various statute and state constitutional provisions control when a prosecutor may appeal.[5]

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[2]See notes 104–111; https://www.fjc.gov/research/idb/appellate-cases-filed-terminated-and-pending-fy-2008-present (https://perma.cc/7UNN-7SKW).

[3]See Michael Heise, Nancy J. King & Nicole A. Heise, State Criminal Appeals Revealed, 70 Vand. L. Rev. 1939 (2017).

[4]The Double Jeopardy Clause does not bar appeals of a judgment of acquittal entered after a jury verdict of guilt because success would require only validating a conviction already obtained, and would not provide a second chance to obtain one. United States v. Wilson, 420 U.S. 332, 352–53 (1975).

[5]For example, a number of states restrict the prosecution's authority to appeal more closely in misdemeanor cases than in felony cases. See, e.g., Minn. R. Crim. P. 28.04 (authorizing appeals of sentences in felony cases only); State v. Mansfield, 104 N.E. 1001, 1001–02 (Ohio 1913) (Ohio Constitution gives the Ohio Supreme Court no appellate jurisdiction in misdemeanor cases, and the general assembly has no authority to confer appellate jurisdiction on the court in misdemeanor cases); State v. Smith, 2011 VT 83, 190 Vt. 222, 224, 27 A.3d 362, 364 (2011) (state cannot appeal a final judgment in a misdemeanor case).

There are four categories of orders that Congress and a significant number of state legislatures have authorized prosecutors to appeal: orders granting a defendant's motion to dismiss a charge,[6] sentences the government alleges are too lenient, illegal, or the result of procedural error,[7] new trial orders, and judgments of acquittal entered after a guilty verdict.[8]

It is these appeals challenging trial court decisions that dismiss a charge, impose a sentence, or grant either a judgment of acquittal or a new trial after a guilty verdict—together with appeals to a court of last resort contesting a decision of an intermediate appellate court[9]—that we examine in this article. To accommodate data limitations and facilitate comparisons with existing information on direct appeals by defendants, our analyses exclude interlocutory appeals,[10] petitions to appellate courts seeking relief by writ,[11] and appeals seeking relief from orders entered *after* the final sentence, such as post-

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[6]See Anne Bowen Poulin, Government Appeals in Criminal Cases: The Myth of Asymmetry, 77 U. Cin. L. Rev. 1, 15 (2008); Wayne LaFave, Jerold Israel, Nancy King & Orin Kerr, 6 Criminal Procedure § 27.3(c) (4th ed. 2015) (noting that some states permit appeal from all final judgments, while others restrict appeals to dismissals for deficiency in the charge or the unconstitutionality of the underlying statute). In the federal courts, and in a smaller number of states, the prosecution may appeal from midtrial orders dismissing a charge for procedural error. See 18 U.S.C. § 3731 (authorizing appeal of orders dismissing the indictment or information before jeopardy attaches or on grounds unrelated to factual innocence, orders granting a motion for new trial or for judgment of acquittal or arresting judgment after a guilty verdict; orders granting a motion to suppress or exclude evidence, before jeopardy has attached and before a verdict or finding, if the government "certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding").

[7]For example, 18 U.S.C. § 3742 (appeal of sentence); Tex. Code Crim. P. Art. 44.01(b) (appeal of illegal sentence); Wash. R. App. P. 2.2(b)(6) (2009) (authorizing appeal of a sentence outside the standard range for the offense). The Double Jeopardy Clause does not bar the government from seeking a higher sentence on appeal. See generally United States v. DiFranscesco, 449 U.S. 117 (1980).

[8]See LaFave et al., supra note 6, at §§ 25.3(a), 26.7(a), (b), and 27.3 (describing the authority on prosecutorial appeals for new trial orders and judgments of acquittal after the verdict). Several states also have statutes authorizing the appeal of orders arresting judgment. For example, Or. Rev. Stat. § 138.060(1)(c) (2011); Tex. Code Crim. Proc. Art. 44.01(a)(2) (2009).

[9]In jurisdictions with two levels of appellate courts, prosecutors may seek high court review of intermediate appellate court decisions favoring the defense. See, e.g., Cal. Rules of Court, Rule 8.500 (2017) ("a party may file a petition in the Supreme Court for review of any decision of the Court of Appeal"); Or. Rev. Stat. § 2.520 (2017) (allowing any party to petition the Supreme Court for review of the Court of Appeals decision).

[10]Neither the federal or state data sources we examine here code an appeal from a new trial order after the verdict as an interlocutory appeal. See Federal Judicial Center Integrated Data Base Appeals Documentation FY 2008 – Present, https://www.fjc.gov/sites/default/files/idb/codebooks/Appeals%20Codebook%202008%20Forward_0.pdf (https://perma.cc/XWH2-MJJN) (hereinafter FJC Codebook); Survey of State Court Criminal Appeals, supra note 1, Codebook. Although none of the state prosecutor appeals we examine raised a claim challenging the grant of a new trial, many of the federal prosecutor appeals coded as direct (not interlocutory) appeals challenged new trial orders. See also LaFave et al., supra note 6, at § 27.3(c) (discussing interlocutory appeals by prosecutors generally).

[11]Many jurisdictions provide judicial review of some trial court rulings through writs of mandamus or prohibition in addition to appeal, and in some states review by writ is more frequent than review on direct appeal. See LaFave et al., supra note 6, at § 27.4(d) nn. 37–50 (detailing state practice); see generally Poulin, supra note 6.

commitment orders sentencing a defendant after revoking release, or granting a defendant's motion to reduce a sentence.

Scholars continue to debate the appropriate scope of appeals by the prosecution as well as the consequences of those appeals.[12] Some blame asymmetric appeal rights for various biases or errors in appellate review in criminal cases.[13] Some praise centralized coordination of government appeals by state attorneys general,[14] while others warn that because of its superior ability to coordinate the development of the law, the government enjoys unfair advantages over defendants.[15] Still others argue that prosecutors are able to obtain judicial review when they need to,[16] or that the effects of asymmetry are insignificant.[17]

These debates, however, have largely taken place in an empirical vacuum. State policymakers evaluating potential changes to the authorized scope of prosecution appeals have surprisingly thin empirical information to turn to for guidance and insight. In *federal* cases, statistics regularly posted on the U.S. Courts website do not track government and defense appeals separately, nor do the Bureau of Justice Statistics (BJS) Bulletins

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[12]See generally Joshua Steinglass, The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals, 31 Ind. L. Rev. 353 (1998) (describing various scenarios where review is not, but should be, available to prosecutors, noting the perverse incentives resulting from attempts by judges to preempt reversal). On proposals to require trial judges to wait to enter any judgment of acquittal until after the jury delivers its verdict, in order to preserve the government's opportunity to appeal, see Jeanne M. Kempthorne, Naked and Arbitrary Power: Judicial Judgments of Acquittal, 48 Boston Bar J. 30, 32 (2004); Richard Sauber & Michael Waldman, Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433, 462 (1994); Minutes of the April, 2007 Meeting of the Advisory Committee on the Federal Rules of Criminal Procedure, 11–14, http://www.uscourts.gov/sites/default/files/fr_import/CR04-2007-min.pdf (https://perma.cc/RP7D-HG53) (describing the consideration and rejection of a proposal to amend Fed. R. Crim. P. 29 to bar a judge from granting a motion for judgment of acquittal before the case goes to the jury, unless the defendant waived his double jeopardy rights barring the government from appealing that order); Minutes of the June, 2007 Meeting of the Committee on Rules of Practice and Procedure, 42 http://www.uscourts.gov/sites/default/files/fr_import/ST06-2007-min.pdf (https://perma.cc/XT2U-VAVR) (same).

[13]See Kate Stith, The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal, 57 U. Chi. L. Rev. 1, 52 (1990) (suggesting that asymmetric appeal rights encourage a pro-defendant bias in the development of the law and pro-defendant trial court decisions). See generally Jonathan S. Masur & Lisa Larrimore Ouellette, Deference Mistakes, 82 U. Chi. L. Rev. 643 (2015) (describing various "asymmetric deference regimes" that lead to appeals that always favor one type of party).

[14]See Rachel E. Barkow, Federalism and Criminal Law: What the Feds Can Learn from the States, 109 Mich. L. Rev. 519, 572 (2011); James R. Layton, The Evolving Role of the State Solicitor: Toward the Federal Model? 3 J. App. Prac. & Process 522, 553 (2001) (predicting states will benefit from the growing prestige and influence of state solicitors).

[15]See Andrew Hessick, The Impact of Government Appellate Strategies on the Development of Criminal Law, 93 Marq. L. Rev. 477, 490–93 (2009) (suggesting ways appellate courts could counteract government manipulation).

[16]See generally Poulin, supra note 6.

[17]See Vikramaditya S. Khanna, Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve? 82 B.-U. L. Rev. 341, 367–74 (2002).

discussing information on federal criminal appeals. The most recent information in BJS publications addressing federal criminal appeals is from 1999, reporting a success rate for government appeals of 37 percent.[18]

The U.S. Sentencing Commission also reports information about some of the prosecution appeals decided in the past several years by the federal courts of appeals,[19] but the data are, in the Commission's own words, "biased due to the document submission practices of the various circuits."[20] As a result, "it is unknown to what extent these data are representative of all appeals in the federal system." Not only is the Commission's sample neither a comprehensive nor random collection of all government appeals filed or terminated in the U.S. Courts of Appeals, the information collected from those appeals is incomplete. Disposition information, for example, is not available for prosecution appeals raising claims other than sentence claims, so there are no data on the outcome of appeals challenging dismissals, judgments of acquittal after guilty verdicts, or grants of new trials after guilty verdicts.[21] Disposition information and very limited information about the type of sentencing issue raised is available, but only for appeals in the sample that either (1) raised solely sentence claims or (2) included an appeal by the defendant as well, and only after 2013.[22]

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[18]Compare Mark Motivans, Federal Justice Statistics, 2013—Statistical Tables, NCJ 249150 (2017), https://www.bjs.gov/content/pub/pdf/fjs13st.pdf?utm_source=juststats&utm_medium=email&utm_content=fjs13_report_pdf&utm_campaign=FJS13&ed2f26df2d9c416fbdddd2330a778c6=nrphbbxxuu-nrupounhx (https://perma.cc/QY7W-USV4) (not reporting government appeals separately), with John Scalia, U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 185055, Federal Criminal Appeals, 1999 with Trends 1985–99 (2001), https://www.bjs.gov/content/pub/pdf/fca99.pdf [https://perma.cc/FCX5-F89Y], 2, 5, Tables 1 and 3 (noting that 37.3 percent of the 506 government appeals decided by the federal courts of appeals in 1999, which could have included interlocutory and postconviction appeals, were reversed, remanded, or only partially affirmed, while the remainder were procedural terminations, affirmances, or dismissals; 60 percent of government appeals terminated on the merits produced a reversal or remand; and that of the more than 10,000 criminal appeals filed in 1999, 95 percent were filed by the defendant and 5 percent by the government, and that 19 percent of interlocutory appeals were filed by the government compared to 6 percent or less of appeals challenging the sentence). See also Michael Heise, United States Department of Justice Bureau of Justice Statistics, Federal Justice Statistics Program: Criminal Appeals Cases in Courts of Appeals, ICPSR26201-v1 (2008), http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/26201?q=criminal+appeals (https://perma.cc/6AL9-LVTN) (examining defense appeals, excluding prosecutor appeals; the webpage for the data lists no publications other than Heise using the data).

[19]See Monitoring of Federal Criminal Convictions and Sentences: Appeals Data Series, https://www.icpsr.umich.edu/icpsrweb/ICPSR/series/75. Some descriptive information drawn from these data files is available in the Commission's statistical sourcebooks on its website. See, e.g., U.S. Sentencing Commission Sourcebook, for the years 2015, at Table 58 (https://perma.cc/S6NW-VWAW), and Table 56A, (https://perma.cc/GXG7-5MUK).

[20]See Monitoring of Federal Criminal Convictions and Sentences: Appeals Data, 2015, United States Sentencing Commission, Codebook, 3 (hereinafter Codebook, Commission Appeals Data 2015).

[21]Id. at 6 (noting as to disposition information: "Beginning in fiscal year 2005, this variable is only coded for sentencing appeals.").

[22]Id. at 52 (noting as to GOVTXDISP, issue disposition for sentencing issues in cross-appeals for issues brought forth by the government, that this variable was created in fiscal year 2014); id. at 63 (describing variable REASONABLENESS 1-1, created in 2013).

These information gaps greatly limit the utility of the Commission's information on prosecution appeals.[23]

Another source that could shed some light on appeals by federal prosecutors is an article by Professor Anne Poulin in which she reports her examination of 310 federal prosecutor appeals "from 1980 to mid-2007." She found a success rate of 74 percent (77 percent in post-verdict appeals and 66 percent in pretrial appeals). She also reported that "[a]pproximately 35% of appeals taken by the government from 1980 to mid-2007 challenged pretrial dismissals, 15% judgments of acquittal, 13% new trial orders, 12% exclusion of testimony or evidence, and 5% were pretrial orders."[24] The footnotes contain an extensive catalogue of issues federal prosecutors raised on appeal. Unfortunately, the article contains no explanation of how these cases were selected or identified, so it is difficult to know whether the sample was representative.[25]

As for *state* prosecutor appeals, aside from a handful of older studies of individual courts,[26] nationwide statistics were not available until the Bureau of Justice Statistics released the National Center for State Courts study we examine in this article. State court statistics reports, driven in part by the State Court Statistics Project and initiatives designed to help courts dispose of their caseloads more efficiently, do not track appeals

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[23]For what it is worth, we merged the Commission's 2014 and 2015 appeals datasets to investigate. The combined file contained 151 government appeals; 78 conviction-only sole government appeals, 36 sentence-only sole government appeals, and 37 government appeals in which the defendant also appealed—eight of which were conviction-only appeals, and four sentencing-only appeals. Of the 40 sentence-only government appeals, two were dismissed, six were affirmed, and the remainder reversed and/or remanded, for a success rate of 80 percent. See also note 115, comparing information on dismissals.

[24]Poulin, supra note 6, at 24 n.69.

[25]Id. If these cases were, for example, only those that appeared on WESTLAW and LEXIS, then the study would have missed cases filed but resolved by order, as well as cases ending in opinions not included in these sources during those years.

[26]See Joy A. Chapper & Roger A. Hanson, Nat'l Ctr. for State Courts, Understanding Reversible Error in Criminal Appeals: Final Report (1989), https://cdm16501.contentdm.oclc.org/digital/collection/criminal/id/1 (https://perma.cc/39YS-YJFK), at 43 n.5 (explaining that the study of five appellate courts excluded prosecutor appeals because they accounted for only 2 to 3 percent of the criminal appellate caseload and had a much higher reversal rate than defense appeals); David T. Wasserman, A Sword for the Convicted: Representing Indigent Defendants on Appeal 105–06 (1990) (investigating criminal appeals in the appellate division of the New York State Supreme Court and the effects of defense representation, finding a reversal rate for government appeals of 80 percent); Thomas Y. Davies, Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal, 82 Am. B. Found. Res. J. 543, 551 (1982) (finding a high reversal rate for prosecution appeals in one California court of appeal since World War II); Daniel J. Foley, The Tennessee Court of Criminal Appeals: A Study and Analysis, 66 Tenn. L. Rev. 427, 433 (1999) (finding 2 percent of appeals were by the prosecution, which succeeded in two-thirds of those appeals); Brian L. Zavin, The Right to Appointed Counsel on Prosecution Appeals: Hard Realities and Theoretical Perspectives, 25 N.Y.U. Rev. L. & Soc. Change 271, 300, app. tbl. 1 (1999) (noting that of 188 prosecution appeals to the New York Appellate Division, First Department, between 1995 and 1998, the prosecution won 115 (61 percent)). See also George Castelle, Reversals, Per Curiams, and the Common Law: A Survey of the Opinions of the West Virginia Supreme Court of Appeals, 11–Jul. W. Va. Law. 16 (1998) (noting prosecutors received relief in every case the high court agreed to hear, but noting "no available data regarding the number of appeals that the prosecution may have filed that the Court declined to hear").

by the appellant's identity. Even individual states that today collect and report detailed appellate data do not break out information this way.[27]

Only two other publications report information from the new state criminal appeals data we examine here: our published study of *defense* appeals,[28] which we reference throughout this article, and a BJS "Bulletin" summarizing various descriptive information from both defense and prosecution appeals.[29] The information on prosecution appeals in the Bulletin consists of three sets of aggregated descriptive statistics: frequency, rate of merits review, and success rate, each by level of appellate court, without distinguishing between appeals of right and discretionary appeals. The Bulletin notes that 4 percent of criminal appeals to state high courts and 2.5 percent of criminal appeals to state intermediate courts were filed by the government. Of the estimated 69,000 direct criminal appeals decided by state courts in 2010, that suggests that approximately 2,000 were filed by the government.[30] According to the Bulletin, the rate of merits review for government appeals was 49 percent in high courts and 75 percent in intermediate appellate courts; the rate of success was 40 percent in high courts and 38 percent in intermediate courts.[31]

The existing scholarship leaves a considerable gap in our understanding of contemporary appeals by the prosecution. To help fill this gap, we examine a nationwide sample of appeals by state prosecutors, reporting both descriptive findings and results from regression analyses. Unlike existing information about selected appeals by federal prosecutors, we draw detailed information from every direct appeal by the government in a criminal case available in the Federal Judicial Center's datasets from 2011 through 2016.

III. Research Questions

Given the paucity of empirical information about prosecutor appeals, unanswered questions about this litigation abound. We focused our attention on the likelihood that an

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[27]See, e.g., Judicial Council of California, 2016 Court Statistics Report: Statewide Caseload Trends 2005–2006 Through 2014–2015 (2016), http://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf [https://perma.cc/DA2Q-US53]; Florida Courts, 2016–2017 Annual Report Court Administration and Court Data, at Court Filings FY 2015-16 (2017) http://www.flcourts.org/core/fileparse.php/676/urlt/ar-16-17-dca-circuit-county-filings-2015-16.pdf [https://perma.cc/U8TR-8L4R]; Texas Judiciary, Fiscal Year 2016 Annual Statistical Report, at Detail 1–7 (2016) http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf [https://perma.cc/J7DL-3BE4].

[28]See Heise et al., supra note 3.

[29]Nicole L. Waters, Anne Gallegos, James Green & Martha Rozsi, Bureau of Justice Statistics, NCJ 248874, Criminal Appeals in State Courts (2015). https://www.bjs.gov/content/pub/pdf/casc.pdf (https://perma.cc/KVR2-RCX8).

[30]Of the nearly 19,000 appeals challenging final judgments in criminal cases and decided by courts of last resort in 2010, only an estimated 760 (4 percent) were appeals brought by the state rather than the defendant. Id. at 4. Of the more than 50,000 similar appeals decided by intermediate appellate courts, only an estimated 1269 (2.5 percent) were prosecutor appeals. Id. at 5. Interlocutory appeals, and appeals in juvenile, post-conviction, or revocation proceedings, were excluded from these figures. Id. at 10.

[31]Id. at 4–5.

appeal by the prosecution will secure merits review or a favorable decision, as well as factors related to the likelihood of merits review and ultimate success. In addition to examining these issues for state and federal appeals separately, we also compared state prosecutor appeals to state defendant appeals, and compared state prosecutor appeals to federal prosecutor appeals.

Before turning to our specific research questions, we mention some of the questions we did not investigate, and why. Because our data include only appeals that prosecutors actually filed, and include no information about orders that could have been appealed but were not, we were unable to learn whether opportunities for appeal were more limited for prosecutors than for defendants, or more limited for state prosecutors than for federal prosecutors.[32] Nor could we use our data to investigate how selective prosecutors actually were in deciding which appeals to file, what types of appeals were more or less likely to be filed, or whether federal prosecutors were more selective than state prosecutors. We have hypotheses about these issues that we could test if we had appropriate data,[33] but the information we have addresses only those appeals that prosecutors selected for appeal, and can provide no information about potential appeals never filed.[34] We were also unable to examine other interesting questions we would have liked to explore because our data did not include enough appeals with the factor of interest. For example, assessing whether the pro se status of an appellee correlates with greater success by a prosecutor appellant was not possible given that our state data includes only two such appeals.[35]

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[32]To the extent trial court orders and outcomes tend to favor the prosecution (e.g., most felony prosecutions end in some conviction), there may be fewer adverse orders for the prosecution to challenge. See Brian A. Reaves, State Court Processing Statistics, NCJ 243777, Felony Defendants in Large Urban Counties, 2009—Statistical Tables, Table 21, https://www.bjs.gov/content/pub/pdf/fdluc09.pdf (https://perma.cc/BJ86-54YP) (reporting that of 48,939 felony charges, 66 percent resulted in a felony or misdemeanor conviction with 26 percent dismissed, acquitted, or diverted).

[33]As for comparative opportunities to appeal for state and federal prosecutors there are at least two competing hypotheses: there could be comparatively more opportunities for federal prosecutors to appeal than for state prosecutors because appeal authority is not as restricted as it is in many states; or, there could be comparatively fewer opportunities because an even smaller proportion of cases end in orders favorable to the defendant. For more on selection rates, see text accompanying notes 55–63.

[34]Moreover, even among the appeals that were selected for appeal and appear in our dataset, it is possible—indeed, likely—that any such prosecutorial filtering varied across prosecutors, states, and appeal types. Consequently, while our default empirical strategy was to model merits review and outcome with two separate logit specifications, in unreported supplemental analyses, we also explored alternatives (probit and bivariate probit) to model an appeal's success conditioned on that appeal's persistence to merits review. With regard to state appeals, our main substantive results were largely impervious to various alternative empirical specifications. See Tables 4, 8 and 9.

[35]At least one prior examination of prosecution appeals reported more frequent self-representation. See Brian L. Zavin, The Right to Appointed Counsel on Prosecution Appeals: Hard Realities and Theoretical Perspectives, 25 N.Y.U. Rev. L. & Soc. Change 271, 272 (1999) (lamenting that indigent defendants are frequently unrepresented by counsel in prosecution appeals).

A. Questions Relating to Merits Review and Success for Both Federal and State Appeals

Drawing in part on our earlier study of state defense appeals, we expected that several factors available to us for analysis might correspond with a higher rate of merits review and ultimate success for prosecutors in either state or federal court. These factors fall into three general categories: advocacy; type of crime; and type of claim.

1. Advocacy

First, more opportunities for the appellant to advocate its position might affect outcome. Research on defense appeals implies that the presence of an oral argument (increasingly less common in state and federal criminal appeals) corresponds with a greater likelihood of success for the appellant.[36] The presence of an oral argument not only provides an appellant with an additional opportunity to persuade, but seeking oral argument also may indicate generally more zealous advocacy.[37]

Appeals in which the defendant appellee has retained counsel could be associated with less success for the prosecutor than appeals defended by publicly funded counsel, if retained counsel benefited from more resources or expertise to defend against the government's claim of error. We did not find support in our study of defense appeals for the hypothesis that defendants who retained counsel for appeal were more likely to succeed than those who did not, even though defendants who must pay attorney fees have an incentive to forego losing cases not shared by other defendant appellants.[38] In this study, we considered whether retained counsel performed better when *defending against* a government appeal.

2. Crime Type and Severity

The seriousness of a crime may also affect the likelihood that a reviewing court will decide to review on its merits an appeal contesting a conviction or sentence for that crime. This relationship would exist if a court with the discretion to do so chooses not to spend its limited resources on cases with minor penalties and lower stakes, or if prosecutors are more likely to abandon the effort and withdraw their appeals in such cases, or

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[36]See Heise et al., supra note 3, at 1958 (reporting results showing oral argument is linked to greater success rates for defendant appellants in first appeals of right in state courts). On oral argument's influence generally, see Warren D. Wolfson, Oral Argument: Does it Matter? 35 Ind. L. Rev. 451, 454 (2002) (estimating argument affects outcome in only a small percentage of appeals); Jay Tidmarsh, The Future of Oral Argument, 48 Loy. U. Chi. L.J. 475, 479 nn.18–19 (2016) (collecting sources on the impact of oral argument).

[37]In addition, granting oral argument could also signal the court's perception of the appeal's importance or merit. A similar signal is provided by the court's decision to produce a full judicial opinion. Also, a full opinion may be more common when the decision being appealed is reversed, as it provides an opportunity for explanation a court may decide is not necessary when affirming an order or dismissing an appeal.

[38]See Heise et al., supra note 3, at 1960–61 (presence of a private attorney had the same favorable association with outcome that the presence of a public attorney had when each was compared to appeals with all other forms of representation).

both. Crime seriousness could also influence the outcome of appeals reviewed on the merits. Appellate courts may be less concerned about leaving error uncorrected in minor cases, for example, or more willing to find errors harmless.[39]

The type of offense may also correspond with likelihood of relief, as we found in our study of defense appeals.[40] For reasons similar to those posited for a greater likelihood of success for more serious crimes, courts may be more likely to grant review and relief to prosecutors in appeals involving violent crimes, as compared to other crimes. A prosecutor may have additional incentive to appeal an unfavorable ruling in a violent crime case if the presence of a victim increases the incentive to appeal, or if appeals in violent crime cases are more likely to be covered by the media or salient to the community.

3. Claim Type and Part of Judgment Appealed

Success for prosecutors who appeal may also vary with the type of error they contest on appeal, just as the likelihood of success varied with the type of claim raised by state defendants who appealed. We found a higher rate of relief for defendant-appellants who raised claims involving certain trial issues (competency, interpreters, mistrial, and joinder), as compared to those who raised issues described by other categories.[41] For our study of prosecutor appeals, we were particularly interested in three specific types of claims. First, we expected that prosecutors may be more likely to win an appeal challenging a judicial decision that overturned for insufficient evidence a jury's guilty verdict, compared to an appeal raising other claims by prosecutors. Appellate judges might be more inclined to reverse a trial judge's ruling when that reversal restores a jury's verdict, given that judges give great deference to jury decisions, and apply a standard for review of sufficiency that is quite favorable to the government. Information on the extent to which appellate review regulates judicial assessments of sufficiency is also a topic of particular interest to researchers interested in wrongful convictions.[42] Second, we explored whether courts were more likely to grant relief to prosecutor-appellants when reviewing suppression claims

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[39]The data do include variables identifying harmless error findings, but only for those appeals that produced a reasoned decision of the court. See text accompanying Figure 8.

[40]We found, for example, that among discretionary appeals to courts of last resort, drug trafficking cases appealed by defendants were significantly associated with a higher likelihood of being granted review, and of defense appeals granted review, sex offenses were significantly associated with greater likelihood of relief. See Heise et al., supra note 3, at 1962–63.

[41]Id. at 1960–61 (reporting results for first appeals of right); id. at 1962–64 (reporting results for discretionary appeals to courts of last resort).

[42]See, e.g., Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 204 (2011) (discussing sufficiency claims that failed when raised by defendants later exonerated). Other claims, such as faulty eyewitness identification, *Brady* violations, ineffective assistance of counsel, and joinder, also are of interest to wrongful conviction researchers, but the sample size prohibited us from evaluating each of these separately.

compared to other claims.[43] Finally, we wondered if prosecution appeals that question a sentence could be associated with a greater probability of success than appeals challenging only conviction, as we found in our study of defense appeals,[44] since correcting sentencing error may be easier for an appellate court and less costly for the district court.[45]

B. Questions Relating to Merits Review and Success, State Appeals Only

Because several factors did not vary among federal appeals, we were able to examine their relationship with merits review and success only in our state appeals data. These factors included: (1) whether review was mandatory or discretionary; (2) whether the appeal challenged a decision by a trial court or an appellate court; (3) whether the appeal was managed by the local prosecutor or a statewide appellate office; and (4) whether the judges on the appellate court were appointed or selected by election.

1. Discretionary Versus Mandatory Review

In our prior study of state defense appeals, we found that defendant appellants experienced much lower rates of merits review and success in discretionary appeals than they did in of-right ("mandatory") appeals.[46] We expected this result, as some discretionary appeals will be denied review, whereas all mandatory appeals will be considered on their merits absent voluntary dismissal or procedural error requiring dismissal. We investigated whether this was also true for state prosecutor appellants. Because not all of the state prosecutor appeals were mandatory,[47] our analyses accounted for whether the appeal was

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[43]See note 80 infra, noting how suppression issues could appear in prosecutor appeals to state high courts from intermediate appellate court decisions.

[44]See Heise et al., supra note 3, at 1960 (reporting results for first appeals of right); id. at 1965–66 (discussing findings).

[45]Although defendants' first appeals of right from the sentence were associated with a higher likelihood of success, at the court of last resort level it was conviction-only appeals—not sentence appeals—that proved significantly related to the success of appeals by defendants. Id. at 1962–63, 1966.

[46]Id. at 1952–53 (finding that of defendants who filed discretionary appeals in courts of last resort, only 2.8 percent were successful, compared to the 14.9 percent success rate for first appeals of right).

[47]At either level, state appellate review can be mandatory or discretionary. In 2010, approximately one dozen states had no intermediate appellate court, and in all but two of these states, review of trial court orders in the only court of appeals was mandatory. See Waters et al., supra note 29, at 2. Additional states with intermediate courts authorized the prosecution to appeal certain categories of trial court rulings, such as rulings in capital cases, directly to the court of last resort, skipping the intermediate court. See, e.g., Haw. Rev. Stat. § 602-58 (2017) (providing right to appeal to the high court any ruling invalidating a statute or constitutional provision, and judgments in cases carrying life sentences). Discretionary review at the intermediate appellate court level is also possible. Even today, the state of Virginia maintains only discretionary review for criminal appellants in its courts of appeal. See Va. Code Ann. § 17.1-407. Another variation can be found in states where all appeals from trial court orders in criminal cases are filed in the high court, which retains some and refers others back to the intermediate court. These states are termed "deflective" states, and include Iowa, Idaho, and Mississippi. See Waters et al., supra note 29, at 2–3.

one that the court was required to review, or one the court could have declined to review.

2. Challenges to Trial Court Versus Appellate Court Decisions

Because reviewing courts may provide greater deference to trial court fact finding and exercises of discretion than they provide to decisions of another appellate court, we expected that state prosecutor appeals challenging intermediate appellate court decisions might be more likely to succeed than appeals that challenge trial court decisions. The federal data contain only appeals challenging trial court decisions and no appeals challenging intermediate appellate court decisions. As the state dataset contains both, we exploited this variation in our analyses.

3. Central Coordination

Expert screening of and staffing for government appeals provide the opportunity for strategic and consistent case selection and better advocacy, as compared to appeals that lack such central coordination.[48] This coordinating function is the rule in federal court, where the Solicitor General must approve all appeals by the government.[49] It is much less pervasive, however, in the states.

In some states, assistance in the form of expertise and dedicated resources is provided regularly for prosecution appeals by a statewide agency or organization, usually part of the Office of Attorney General. This coordinating body may be able to screen out losing claims or shape claims to be more successful, while pursing longer-term litigation strategies, with staff specializing in appellate advocacy. Most states authorize the Attorney General's Office to screen and staff criminal appeals by prosecutors to the state's high court.[50] State-level coordination of prosecutor appeals to the *intermediate* appellate court is less common. Instead, either the county prosecutors' offices themselves handle these intermediate appeals with only minimal input, if any, from the Attorney General's Office, or there is a combination of approaches—with the largest urban counties handling their own appeals and a statewide office handling appeals for the smaller counties. We expected that appeals screened or staffed by a statewide organization or office would be

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[48]See, e.g., Davies, supra note 26, at 635–36 (attributing high success rate for prosecutors on appeal to careful case selection).

[49]See 18 U.S.C. § 3742(b); 28 C.F.R. § 0.20. See also United States v. Hare, 269 F.3d 859, 861 (7th Cir. 2001) ("United States Attorneys lack any right to control appeals by the United States, through plea agreements or otherwise; that right belongs to the Solicitor General"); infra text accompanying note 65 (describing screening process for criminal appeals by the United States).

[50]See Barkow, supra note 14, at 560–61, 560 nn. 226–37 (2011) (collecting state law regulating appellate authority between local prosecutors and the state's attorney general for appeals to state courts of last resort).

more likely to succeed than appeals that local prosecutors controlled because of more effective filtering and more experienced advocacy.[51]

4. Judicial Selection

We suspected that a decision favorable to the prosecution would be more likely when the bench was selected or retained by election rather than appointment because of the incentive to appear tough on crime. Some prior research suggests that elected judges are less likely than appointed judges to side with criminal defendants.[52] Although we did not find that association in our study of defense appeals when we controlled for whether a state's initial judicial selection method for the relevant court involved any form of election rather than appointment,[53] we considered whether this factor has more salience when the prosecutor appeals.

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[51]We explored but eventually abandoned an additional hypothesis concerning "advisory" or "moot" appeals by state prosecutors. Statutes in about a dozen states permit the prosecution to file an appeal after an acquittal in order to obtain the appellate court's resolution of a legal question that would otherwise be unreviewable because of the acquittal. See State v. Ashley, 66 S.W.3d 563, 565 (Ark. 2002) (citing Ark. R. App. P.—Crim. 3(c), appeals to Supreme Court only); People v. Jackson, 972 P.2d 698, 700–01 (Colo. App. 1998) (citing Colo. Rev. Stat. § 16-12-102(1) (2017), appeals to both intermediate and high courts); State v. Anonymous, 739 A.2d 298, 300 (Conn. App. Ct. 1999) (citing Conn. Gen. Stat. § 54-96 (2017), appeals to both intermediate and high courts); State v. Barnes, 116 A.3d 883, 887 n.17 (Del. 2015) (citing Del. Code Ann. tit. 10, § 9903 (2017)); State v. Walton, 715 N.E.2d 824, 825 (Ind. 1999) (citing Ind. Code § 35-38-4-2(4) (2017), appeals to both intermediate and high courts); State v. Grice, 515 N.W.2d 20, 22 (Iowa 1994) (citing Iowa Code § 814.5(2)(d) (2017)); State v. LaPointe, 390 P.3d 7, 12–13 (Kan. 2017) (citing Kan. Stat. Ann. § 22-3602(b)(3) (2017), appeals to both intermediate and high courts); Commonwealth v. Derringer, 386 S.W.3d 123, 125 (Ky. 2012) (citing Ky. Const. § 115, appeals to supreme court only); State v. Shaw, 880 So. 2d 296, 298 (Miss. 2004) (citing Miss. Code Ann. § 99-35-103 (b) (2017), appeals to both intermediate and high courts); State v. Hall, 691 N.W.2d 518, 522 (Neb. 2005) (citing Neb. Rev. Stat. § 29-2315.01 (2017), appeals to both intermediate and high courts); State v. Campbell, 965 P.2d 991, 992 (Okla. Crim. App. 1998) (citing Okla. Stat. tit. 22, § 1053(3) (2017), appeals to Court of Criminal Appeals); State v. Keffer, 860 P.2d 1118, 1124 (Wyo. 1993) (citing Wyo. Stat. Ann. § 7-12-102 (2017)). Review in these cases does not provide a second chance at conviction. It creates binding precedent for subsequent cases only, with no effect on the acquittal in the case appealed. (These states do not follow the same "case or controversy" doctrine as the federal courts, which precludes such an appeal.) See generally James A. Strazella, The Relationship of Double Jeopardy to Prosecution Appeals, 73 Notre Dame L. Rev. 1 (1997); see also Nancy J. King, State Criminal Appeals, in Academy for Justice: A Report on Scholarship and Criminal Justice Reform 271–72 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/12_Reforming-Criminal-Justice_Vol_3_Appeals.pdf (https://perma.cc/NWX2-6AWU) (recommending the use of advisory appeals to allow appellate courts to address important issues shielded from scrutiny when they recur in cases ending in acquittal). Prosecutors may enjoy more success in these "advisory appeals," often selected for their importance, but because we could identify only the court in which an advisory appeal might have been filed, not which individual appeals actually were advisory, we did not include this in our analysis. In our regression models, we were already clustering on state, and there was no meaningful difference between the success rate of the 14 appeals in courts that allowed advisory appeals and the success rates of appeals in all other courts.

[52]See generally Michael S. Kang & Joanna M. Shepherd, Judging Judicial Elections, 114 Mich. L. Rev. 929 (2016) (presenting study findings showing that judicial decisions become more hostile to criminal defendants as attack advertising in judicial elections increases).

[53]See Heise et al., supra note 3, at 1968.

C. Questions Comparing Appeals by State Prosecutors and Defendants

Our data permit comparisons of defense and prosecution appeals. We posited four potential reasons to expect state appellate courts to accept a greater percentage of prosecutor appeals for review and grant relief in a greater proportion of prosecutor appeals, as compared to defense appeals: (1) differences in rulings appealed; (2) case selection by prosecutors; (3) better advocacy; and (4) pro-prosecution bias of judges. As noted below, our ability to investigate each of these hypotheses was limited.

1. Claims Available to Appeal Inherently More Likely to Succeed

Compared to pro-prosecution rulings subject to appeal by the defense, pro-defendant rulings subject to appeal by the prosecution may be, as a class, systematically different in ways that would suggest a greater likelihood of success when challenged on appeal. First, the trial court dismissals, post-verdict judgments of acquittal, new trial orders, and sentencing errors that prosecutors appeal might be easier for reviewing courts to identify as erroneous than the various errors appealed by defendants if they involve more objective standards of review, for example. Our state data permitted us to examine this only indirectly by controlling for type of claim included in the appeal.

Second, the errors that prosecutors allege on appeal might be more likely to be preserved for appeal than errors that defense counsel raise on appeal. If prosecution and defense appeals show differing rates of merits review for various claims, that may inform this supposition.

Third, a greater percentage of errors alleged by prosecutors may not be subject to harmless error analysis compared to errors appealed by defendants.[54] Our data include information on the application of harmless error review for the select portion of appeals ending in reasoned opinions. However, because this information was not available for the bulk of appeals, which were denied review or terminated without a reasoned decision, we could not evaluate what association, if any, there might be between harmlessness and likelihood of success overall.

2. Appeal Selection and Screening

Even if there is nothing inherent in the rulings appealed that would suggest a higher rate of success for prosecutors, research suggests that prosecutors, unlike defendants, probably selected for filing those appeals that were more likely to succeed.[55] This was

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[54]See Davies, supra note 26, at 635 n.287 (suggesting that the differences in the types of issues raised probably contributes to differences in outcomes for defendant and prosecutor appeals, noting erroneous orders dismissing charges are not subject to harmless error review).

[55]See, e.g., Wasserman, supra note 26, at 106 (attributing high success rate of prosecutors in New York appellate courts to selection of appeals likely to succeed).

something we could not test with data available, for reasons noted earlier,[56] but because it is such an important explanation for differences if they exist, we spell out that explanation here.

Prosecutors are likely more selective about the appeals they file, first because they do not face the same incentives to appeal unfavorable decisions that defense counsel face. Prosecutors have the authority to select which appeals to file—unlike defense counsel who have an ethical duty to file an appeal whenever the client wants to file one. Also, in some cases, prosecutors have an alternative avenue, other than appeal, to secure a conviction or higher sentence. Especially when an unfavorable final order is entered prior to the attachment of jeopardy, such as an order dismissing a charge before trial, trial prosecutors understand that starting over by filing a new charge may be a cheaper and faster way to obtain a conviction and sentence than appeal. Defendants lack this alternative option and must appeal in order to seek relief from an unfavorable decision.[57]

Not only are there fewer incentives for prosecutors to file appeals, prosecutors have reasons to carefully select which appeals they file, reasons that defendants and defense counsel do not share. Prosecutors may avoid filing appeals because they are concerned about: (1) avoiding appeals that risk a negative impact on *other* cases, preferring those that are likely to generate favorable precedent for future prosecutions;[58] (2) the impact of the appeal on the prosecutor's future election, selecting cases with more salience to constituents and foregoing appeals with less; (3) the opportunity cost of spending office resources on appeals involving losing claims, minor crimes, or defendants already incarcerated for other crimes;[59] (4) a victim's request to forego an appeal to secure finality; (5) cultivating a winning reputation with the reviewing court by bringing only the strongest appeals;[60] (6) avoiding harm to a good "working relationship" with the trial judge by

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[56]See text accompanying notes 33–35.

[57]And when an appealable order weakens but does not kill a case, such as the dismissal of some but not all counts or the grant of a motion for new trial, offering a sweeter plea bargain might provide an option more attractive to a prosecutor than appeal. Both parties can seek a more favorable outcome through negotiation instead of appeal, but prosecutors probably have on balance more negotiating leverage once a defendant is convicted.

[58]See, e.g., United States Sentencing Commission, 2012 Report to the Congress: Continuing Impact of United States v. Booker on Federal Sentencing 106 n.441 (2012) (federal prosecutors reportedly appeal sentences infrequently "because of the deferential standard of review"). Prosecutors may also cherry pick for appeal cases that could settle destabilizing inconsistency in lower courts.

[59]County prosecutors who must finance their own appeals know that resources spent on appeals are resources that will not be available for trial work. When state-level attorneys screen or handle appeal requests from county prosecutors, it is the state and not the local budget that limits the number and type of appeals prosecutors can pursue. Tight budgets would mean that complicated, costly appeals with a low likelihood of success are much less likely to be filed than appeals less costly to pursue or more likely to succeed.

[60]Cf. Khanna, supra note 17, at 372 (referencing "ire from the court for bringing baseless appeals" and noting "we would expect prosecutors to screen cases they appeal, and hence that the appeals process should have some separation effect").

appealing only rarely;[61] or (7) securing, in a plea negotiation, a defendant's waiver of right to appeal sentencing error, which could entail waiving the state's right to appeal erroneous sentencing rulings favoring the defense, for example.[62] Defendants and defense counsel, by contrast, typically are not concerned about *other* defendants or future cases, elections, the cost of litigation (except if counsel is retained),[63] victim's wishes, their reputation with trial or appellate judges, or securing a waiver of the prosecution's right to appeal.

3. Better Advocacy

Even if nothing inherent in the rulings appealed predicts a higher rate of success, and even if defense and prosecution were equally selective about which appeals to file, the advocacy by state prosecutor appellants may be more effective than advocacy by counsel representing state defendant appellants. This may be the case if prosecutor appellants are better resourced, more experienced, or have superior training compared to defendant appellants. The only potential indicators available in both defense and prosecutor data on these issues were the presence of oral argument and the type of counsel for the defense.

4. Judicial Bias

Finally, even if nothing inherent in the rulings appealed implies a higher rate of success, defense and prosecution are both selective (though perhaps in varying degrees) about which appeals to file, and defense counsel and prosecutors equally effective advocates, prosecutors who appeal may benefit from any pro-prosecution bias of appellate judges. For example, if judges systematically lean in favor of finding for the government rather than a criminal defendant, all else equal, then this could help explain higher rates of

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[61]See Hon. Stephen R. Shaw, Prosecution Appeals Taken Midtrial and Following Acquittal: Changing the Trial and Review of Criminal Cases in Ohio, 22 Ohio N.U. L. Rev. 729, 730 (1996) (remarking on the rarity of prosecution appeals midtrial or after acquittals, stating: "apprehension by prosecutors that frequent challenges to the rulings of a particular trial judge, especially following an acquittal, might jeopardize a working relationship with that judge may be a significant reality deterring such appeals").

[62]Terms in agreements expressly barring appeal are widespread in federal cases, perhaps less so in state cases. See Nancy J. King & Michael E. O'Neill, Appeal Waivers and the Future of Sentencing Policy, 55 Duke L.J. 209, 255–56 (2005); Susan R. Klein, Aleza S. Remis & Donna Lee Elm, Waiving the Criminal Justice System: An Empirical and Constitutional Analysis, 52 Am. Crim. L. Rev. 73, 80–81 (2015). There is some authority in the Fourth Circuit requiring that ambiguous appeal waivers should be interpreted as mutual; see United States v. Zuk, 874 F.3d 398, 407 (4th Cir. 2017) (quoting United States v. Bowe, 257 F.3d 336, 342 (4th Cir. 2001)) ("'a plea agreement provision that bars the defendant from appealing, but is silent as to the Government's right to appeal, must be construed as imposing a reciprocal limitation on the Government's right to challenge a judgment or sentence imposed by the district court'").

[63]About 80 percent of felony defendants are indigent with publicly funded counsel, and have no fiscal incentive to forego losing appeals. See Bureau of Justice Statistics, U.S. Dep't of Justice, Defense Counsel in Criminal Cases, NCJ 179023 (2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf (https://perma.cc/6SMT-G5BM).

leave granted, and higher rates of success among those appeals reviewed on the merits. The only measure of potential pro-prosecution bias available to us—judicial selection by election—may be more salient for prosecutor than defendant appeals.

D. Questions Comparing Appeals by State and Federal Prosecutors

We expected that some of the factors potentially associated with the variation in merits review or success rates could impact state and federal prosecutor appeals differently. First, some research suggests that at the trial level, appointed "panel attorneys," also known as "CJA attorneys," are less effective representatives than federal defenders.[64] We posited that in appeals too, the presence of a federal defender would correspond with a lower likelihood that the government would win its appeal, as compared to appeals in which defense counsel was appointed from outside a federal defender's office. Our state data do not identify whether a publicly funded attorney was from a defender office, so we were able to examine this question only in our federal analyses.

We also expected that some of the reasons state prosecutor appeals may succeed more often than state defendant appeals could also explain why federal prosecutor appeals may succeed more often than state prosecutor appeals. The errors appealed by federal and state prosecutors may differ systematically, being, on average, easier to prove, better preserved, or less likely to be considered harmless than errors raised by state prosecutors. Screening and selection of appeals by the local U.S. Attorneys and the various attorneys in the Appellate Section of the Criminal Division and the Office of Solicitor General could be more rigorous and strategic than the screening that prosecutors' appeals receive in the states. Consider one description of the screening process, lifted from a motion for extension of time filed by the United States in one of the appeals in our dataset:

> The United States Attorney must report each adverse, appealable decision to the responsible component of the United States Department of Justice in Washington, D.C., and must provide that component with the United States Attorney's recommendation as to whether the Solicitor General should authorize an appeal of that decision. *United States Attorneys' Manual* §§ 2-2.110-2-2.112, 9-2.170B and D. Once the responsible component of the Department of Justice receives the recommendation of the United States Attorney, that component must prepare its own recommendation as to whether the Solicitor General should authorize an appeal. *United States Attorneys' Manual* § 9-2.170F; *see United States Attorneys' Manual* § 2-3.110. Responsible attorneys in the Office of the Solicitor General also prepare recommendations for the Solicitor General. *See id.* Based on all of these recommendations, the Solicitor General determines whether to authorize an appeal. 28 C.F.R. § 0.20(b); *United States Attorneys' Manual* §§ 2-2.121, 2-2.311,

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[64]See generally James M. Anderson & Paul Heaton, How Much Difference Does the Lawyer Make?: The Effect of Defense Counsel on Murder Case Outcomes, 122 Yale L.J. 154 (2012) (finding shorter sentences and rates of conviction when defendants were represented by public defenders rather than panel attorneys, and offering explanations for those results); Erwin Chemerinsky, Lessons from Gideon, 122 Yale L.J. 2676, 2682 (2013) (collecting research finding public defenders provide more effective representation than court-appointed attorneys); Thomas Cohen, Who Is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes, 25 Crim. Just. Pol'y Rev. 29 (2014) (concluding that defendants with assigned counsel receive less favorable outcomes compared to their counterparts with public defenders).

2-2.600, 9-2.170A. This process is intended to assure that the United States pursues only appeals of relative importance and merit.[65]

Not only may screening be more rigorous, appellate advocacy by experienced appellate attorneys from the Department of Justice may be more effective, on balance, than advocacy by state prosecutors. As pointed out earlier, our data permit only very limited examination of the first and third of these hypotheses, and do not permit examination of the relative effectiveness of screening.[66]

IV. Prosecutor Appeals in State Courts

A. Data, Methodology, and Research Design

For our study of state prosecutor appeals, we examined the decisions identified as part of two nationally representative probability samples of the 2010 decisions of all state appellate courts with criminal jurisdiction. Both samples include only direct appeals in criminal cases.[67] After combining the two samples,[68] we dropped all appeals that defendants had filed,[69] as well as appeals in capital cases.[70] A total of 154 noncapital, state-initiated appeals remained. Of those noncapital appeals, 130 involved felonies, 17 were misdemeanors, and seven were of unknown severity.[71]

Because ours is the first detailed examination of any nationwide sample of prosecutor appeals in state courts, we provide extensive descriptive information about a variety of features (or "variables") in Section IV.B. Results from our regression models, reported in Section IV.C, report each variable's independent influence on: (1) whether an appeal was reviewed on the merits and (2) whether the government appellant succeeded on appeal.

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[65]United States Unopposed Motion for Extension of Time, United States v. Reid, No. 13-12860-BB (11th Cir. Aug. 12, 2013).

[66]See text accompanying notes 32–34.

[67]"Writ" litigation, as well as appeals in juvenile, revocation, and post-conviction proceedings, were excluded from the data, as were interlocutory appeals such as a prosecutor's pretrial appeal of an order granting a defendant's motion to suppress evidence. To the extent that writ litigation in the courts of appeals supplants or supplements direct appellate review, see sources cited supra note 11, our findings could understate the extent to which judicial review benefits prosecutors seeking relief from trial court orders in criminal cases. See generally Poulin, supra note 6.

[68]The raw merged dataset includes 5,045 criminal appeals (4,673 from the main dataset and 432 from the supplemental dataset).

[69]We included an appeal only if the state was identified as the appellant or petitioner for that particular appeal.

[70]Removing the capital cases decreased the set of appeals by five.

[71]See Table 3.

One final note about our dataset construction warrants brief mention. Combining the two random samples of state criminal appeals was important to help provide a sample size that would facilitate our statistical analyses. However, it did introduce the potential for bias. Specifically, although one of the random samples was created by pulling decisions from every intermediate appellate court and court of last resort with criminal jurisdiction, and produced 133 of the 154 appeals examined here, the other random sample, contributing 21 of the 154 appeals, drew only from decisions by state high courts reviewing decisions of intermediate courts. Our combined set of 154 appeals thus *over*represents state high court decisions reviewing appellate decisions in 2010. This means that the mix of mandatory and discretionary review cases and high court and intermediate court cases examined here is not necessarily random.[72] To account for the potential biasing effects of adding these 21 cases, we added to our regression analyses a control variable that signaled whether an appeal was one of the 21 cases from the second "supplemental" sample. For the descriptive findings, we report below information about the combined set, as a foundation for the regression analysis, but we also carefully evaluated whether including those 21 cases made any substantive difference, and note when it did. Appendix Table A2 also reports descriptive information without the supplement sample.

Dependent Variables

a. Merits review: Our data include for each appeal whether it was terminated for a reason unrelated to the merits or was instead reviewed on its merits. Appeals terminated for reasons other than the merits include appeals denied review by the appellate court, appeals dismissed by the appellate court for a procedural problem unrelated to the merits, and appeals withdrawn by the government appellant.

b. Decision favored the prosecution: We defined a decision as favoring the government when it involved anything other than an affirmance, a dismissal, a denial of review, or a withdrawal. In addition to full and partial reversals, remands as well as modifications of one of several sentences were considered favorable outcomes for the appellant, as the data offer no reliable method to distinguish significant modifications or remands from less meaningful ones.[73]

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[72]Combining these two sets of cases in our earlier article evaluating the defense appeals in these same datasets had no similar effect because there the number of cases allowed us to use separate models for COLR discretionary cases. As well, as results in Table 4 illustrate, the 21 additional state high court appeals drawn from National Center for State Court's Survey of State Court Criminal Appeals, 2010, Supplement dataset, did not systematically vary from the appeals drawn from the Center's Main dataset. See generally Survey of State Court Criminal Appeals, supra note 1.

[73]This approach comports with prior empirical work examining appeals. See, e.g., Chapper & Hanson, supra note 26, at 5; Theodore Eisenberg & Michael Heise, Plaintiphobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal, 12 J. Empirical Legal Stud. 100, 115 n.72 (2015).

Independent Variables[74]

a. State: The combined sample of 2010 appellate decisions in every state produced government appeals from 28 different states. Ohio appeals make up a disproportionate 16 percent of those decisions.[75] Although other variables already account for differences among states, we also examined in our descriptive and regression analyses whether the appeals that prosecutors filed in Ohio systematically differed from prosecutor appeals filed in other states.[76]

b. Mandatory/discretionary review; court of last resort/intermediate appellate court: Our data indicate for each appeal whether the appeal was "of right" (mandatory) or "by permission" (discretionary), and we constructed a dummy variable to investigate whether this distinction correlates with an appeal's likelihood of success. Unlike the thousands of appeals examined in our study of defense appeals, the smaller number of prosecutor appeals would not comfortably permit separate analysis of decisions by courts of last resort and those of intermediate appellate courts. We therefore controlled for whether the appeal was decided by an intermediate court (which would be reviewing trial court orders only) or a court of last resort (which may review either a trial court order or an intermediate appellate court) to investigate whether success was less likely when the appellant challenged a trial court order.

c. Appeal from sentence or conviction: To investigate whether sentence appeals are associated with a greater likelihood of success than appeals from conviction, we used two dummy variables identical to those used in our study of defense appeals. One indicates whether the appeal included a challenge to the sentence, the other whether the appeal challenged only the conviction.[77]

d. Felony/misdemeanor: To investigate the potential significance of crime seriousness to the likelihood of success, we created a dummy variable signaling whether each appeal involved a felony or misdemeanor.[78]

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[74]For many of the variables described below, one reason to construct them as we did, in addition to the reasons explained in the research question section, was to facilitate comparisons with our prior defense appeal study.

[75]See Table 1.

[76]We also ran models, unreported here, that included controls for Louisiana cases, making up more than 10 percent of the combined sample.

[77]The reference for each of these two dummy variables was cases in which the part of the judgment appealed from was neither (e.g., an appeal from dismissal) or unknown.

[78]This information was not included in our study of defense appeals, as we excluded misdemeanor appeals from the cases examined. In upcoming research, we plan to study these misdemeanor appeals by defendants and how they differ from felony appeals by defendants and misdemeanor appeals by the prosecution.

e. Crime type: To investigate whether the type of crime made a difference in appellate success for prosecutors, we first collapsed the 23 crime types available in the data into eight categories,[79] then collapsed these further into three broad categories: (1) violent offenses (homicide, robbery, assault, sex offenses); (2) drug trafficking, weapons, and DUI offenses (all cases likely to involve search and seizure issues and each showing relatively high rates of relief in descriptive analyses); and (3) nonviolent offenses and unknown, capturing every appeal other than those in the first two categories. We also created two dummy variables allowing us to examine whether an appeal of a violent offense systematically varied with success, as compared to the appeal of a drug trafficking, weapons, or DUI offense, and whether the appeal of a violent offense was significant as compared to an appeal of a nonviolent offense.

f. Claim included in brief: We condensed the various claim categories available in the data into four categories: (1) claims contesting a post-verdict judicial decision assessing the sufficiency of evidence; (2) claims addressing the suppression of evidence;[80] (3) claims contesting the sentence or sentencing; and (4) all other claims, including claims contesting dismissal of the charge or granting a new trial for various reasons, and claims coded as unknown in the data. We created dummy variables for each, indicating whether the appeal included the type of claim, with all other appeals as a reference.[81] Because we were able to track these same four categories in the state defense appeal data and the federal prosecutor appeal data, and defined our variables identically in each, this facilitated state-federal comparisons.

g. Whether prosecutor appeals are coordinated statewide: To examine whether central coordination advantaged prosecutor appeals, we created a dummy variable for each court in each state that indicates whether prosecutor appeals to that court were coordinated.[82]

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[79]These were the eight categories examined in our study of appeals by defendants using the same dataset. Descriptive findings for these categories are not reported here.

[80]Assuming interlocutory appeals (where orders granting suppression motions are also litigated) were all excluded from the data sources we used here, these appeals included prosecutor appeals of intermediate court decisions finding that a trial court should have granted a motion to suppress but did not.

[81]As explained in note 89, for our regression analysis, we opted to measure whether the appeal raised a sentencing claim with an alternative dummy variable—whether the appeal included a challenge to the sentence.

[82]See Table A4 in the Appendix. For each state with at least one case from an intermediate court in our sample, information about coordination for intermediate appellate courts was collected by phone and email communications with the offices of the attorney general, the prosecutors' association, and/or state appellate defender office. For courts of last resort, we used research by Professor Rachel Barkow, supra note 14, corrected in a few instances based on information received directly from the conversations noted above. When a state provided coordination for all but the very largest counties, we counted that state as coordinated. For example, the state handles appeals in Michigan for prosecutors in counties with a population of less than 75,000. Similarly, a statewide association manages criminal appeals for prosecutors in Illinois for all but two counties.

h. Type of defense representation: To test whether the type of defense representation relates to success, we created two separate dummy variables that signal the presence of publicly funded or a private attorney representation, respectively.[83]

i. Oral argument, full opinion: We tested for the importance of oral argument and type of opinion using dummy variables identical to those used in our analysis of state defense appeals. One indicates whether oral argument took place or not, and the other whether the court's decision appeared in a full opinion, or some other form of decision.[84]

j. Judicial selection method: We used the same dummy variable that we used in the defense appeals study to test the significance of this distinction in judicial selection for the outcome of state prosecutors' appeals, coding a specific appellate court as "elected" if the initial judicial selection method for the relevant court involved any form of election rather than appointment.[85]

B. Descriptive Findings: State Prosecutor Appeals

The most striking aspect of prosecutor appeals is their scarcity. Although the main national sample of appellate decisions identified more than 4,500 direct appeals by defendants, with every state represented,[86] it identified only 133 direct appeals in noncapital cases filed by prosecutors, from 28 of the 50 states. Table 1 shows the state breakdown for the full set of 154 prosecutor appeals.

As Table 1 shows, Ohio had the most appeals by the prosecution, 17 percent of the sample. Nationwide, discretionary appeals outnumbered mandatory appeals, and more appeals were filed in courts of last resort than in intermediate appellate courts.[87]

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[83]The reference for each variable is all other types of representation, which includes cases in which the appellee was pro se and cases that were missing information on the type of representation.

[84]We did not include in our analysis of prosecutor appeals a variable for court workload. First, we found workload was not related to any variation in merits review or success in our analyses of appeals by criminal defendants. Second, we expected its importance to be even more attenuated for prosecution appeals because those appeals made up such a small portion of total caseload for these courts, as compared to defense appeals. Given the importance of limiting the number of factors included in our models to only those most theoretically salient, this workload control did not make the cut.

[85]See Heise et al., supra note 3, at 1950. We also used an alternative measure of election—retention instead of initial selection. The results, not reported here, did not materially differ.

[86]See Waters et al., supra note 29, at 10. Based on BJS estimates, this is a random sample of more than 6 percent of all appeals decided in 2010. Id. at 1, 4–5, tbls. 1 & 2 (estimating prosecutors filed a total of 2,029 of the 69,349 direct criminal appeals decided by state courts in 2010).

[87]While in our total dataset state high court appeals account for 63.6 percent of our sample and discretionary appeals account for 66.2 percent, after backing-out the 21 appeals drawn from the supplemental sample, see text accompanying note 72, the percentage of high court appeals drops to 57.9 percent. The percentage of mandatory appeals rises from 33.8 percent to 39.1 percent. See Appendix Table A2.

Table 1: Summary of Prosecutor Appeals and Success, by State

	N	%	*Mand* (N)	*Disc* (N)	*Mand P Succ (%)*	*Disc P Succ (%)*	*IAC* (N)	*COLR* (N)	*IAC P Succ (%)*	*COLR P Succ (%)*
AL	1	0.7	1	0	0.0	—	1	0	0.0	—
AZ	9	5.8	3	6	66.7	16.7	3	6	66.7	16.7
CA	12	7.8	1	11	0.0	54.6	1	11	0.0	54.6
FL	12	7.8	10	2	30.0	0.0	10	2	30.0	0.0
HI	2	1.3	1	1	0.0	0.0	1	1	0.0	0.0
IA	6	3.9	0	6	—	50.0	2	4	100.0	25.0
IL	5	3.3	2	3	50.0	0.0	2	3	50.0	0.0
IN	1	0.7	0	1	—	0.0	0	1	—	0.0
KS	1	0.7	0	1	—	0.0	1	0	0.0	—
KY	5	3.3	1	4	0.0	100.0	0	5	—	80.0
LA	15	9.7	0	15	—	46.7	0	15	—	46.7
MA	2	1.3	2	0	0.0	—	2	0	0.0	—
MI	6	3.9	0	6	—	83.3	3	3	66.7	100.0
MN	4	2.6	0	4	—	0.0	0	4	—	0.0
MO	1	0.7	0	1	—	100.0	0	1	—	100.0
NC	1	0.7	1	0	0.0	—	1	0	0.0	—
ND	1	0.7	1	0	100.0	—	0	1	—	100.0
NE	1	0.7	1	0	0.0	—	1	0	0.0	—
NJ	4	2.6	4	0	25.0	—	4	0	25.0	—
NM	3	2.0	0	3	—	33.3	0	3	—	33.3
NY	10	6.5	7	3	85.7	0.0	7	3	85.7	0.0
OH	26	16.9	9	17	33.3	5.9	10	16	30.0	6.3
OR	6	3.9	2	4	50.0	50.0	2	4	50.0	50.0
PA	5	3.3	0	5	—	20.0	0	5	—	20.0
TX	6	3.9	1	5	0.0	100	1	5	0.0	100.0
VT	1	0.7	1	0	0.0	—	0	1	—	0.0
WA	7	4.6	4	3	75.0	0	4	3	75.0	0.0
WI	1	0.7	0	1	—	100.0	0	1	—	100.0
%		*100*	*33.8*	*66.2*	*40.4*	*37.3*	*36.4*	*63.6*	*42.9*	*35.7*
N	*154*		*52*	*102*	*21*	*38*	*56*	*98*	*24*	*35*

SOURCE: Survey of State Court Criminal Appeals, 2010.

Turning to the rates of success, Table 2 reports that prosecutors secured a favorable decision in approximately 38 percent of all appeals combined. Of discretionary appeals reviewed on the merits, prosecutors were overwhelmingly successfully and prevailed more than 79 percent of the time.

Several of the factors we tracked appear to correlate with success, as suggested by the comparisons in Table 3. These included appeals that addressed the conviction alone and did not contest a sentence, felony appeals (as opposed to misdemeanors), appeals from drug trafficking, weapons, and DUI prosecutions, appeals that raised suppression, sufficiency, or sentence issues, appeals with oral argument or full opinions, appeals coordinated statewide, and appeals from California and Louisiana. Factors that appeared to decrease the likelihood of appellant success included appeals with various categories of

Table 2: Merits Review and Decision Favoring State Prosecutor, by Type of Appeal (With and Without Supplemental Cases)

	(1) % of All Appeals	*(2) % of Mandatory Appeals*	*(3) % of Discretionary Appeals*	*(4) % of Discretionary Appeals Reviewed on Merits*
N	*154*	*52*	*102*	*48*
Dependent Variables				
Reviewed on merits	57.1	76.9	47.1	—
Decision favored prosec.	38.3	40.4	37.3	79.2
N (w/o supp. cases)	*133*	*52*	*81*	*41*
Dependent Variables				
Reviewed on merits	60.9	76.9	50.6	—
Decision favored prosec.	40.6	40.4	40.7	80.5

SOURCE: Survey of State Court Criminal Appeals, 2010.

unknown information,[88] appeals in violent crime cases, appeals involving pro se defendants, and appeals from Ohio.

C. Modeling State Prosecutor Appeals

Given the nature of our dependent variables, we turned to logistic regression analyses to assess whether the correlations suggested in the descriptive comparisons reported in Tables 2 and 3 would withstand more rigorous empirical testing.[89] Once other factors were controlled, only one variable correlates with an increased likelihood of success at a statistically significant level in one or more of the two models: the presence of oral argument.[90]

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[88]This is not surprising, given that records available for appeals terminated before briefing were less likely to include detailed information needed to code many of the variables.

[89]Because of sample size concerns, we could not include in our models all of factors in Table 3. The variables we chose to include in our models were those we thought would best inform our research questions. So, for example, we opted for "appeal from sentence (included)" as a better measure of whether the appeal challenges a sentence than "sentence claim included in brief," which, because of missing claim information, did not capture all sentence appeals. Of the two remaining claim-included variables, we omitted the variable for suppression claims and kept the variable for sufficiency claims for two reasons. The suppression variable was captured in a limited way by the crime category "drug trafficking, weapons, and DUI," which was included both because of a higher than average rate of relief for each of the three included crime types and because all three had in common frequent search and seizure issues. Second, the suppression variable was insignificant in every one of our alternative unreported models. Of the counsel variables, we opted to examine our hypothesis about the impact of private retained counsel, and included that dummy variable. And of the states, we controlled only for Ohio, with the largest proportion of cases.

[90]The presence of a full opinion in models not reported was also significantly associated with a greater likelihood of appellant success, as predicted, but we decided not to include it in the models for two reasons. First, both logic and unreported supplemental analyses made clear that the two separate variables "full opinion" and "oral argument," while not perfect substitutes, were essentially capturing the same variance, signaling perhaps how potentially important the appellate court considered an appeal. We remained careful throughout our study to not "overload" our models on the "right side" of the regression equation. As between the two variables, we selected oral argument partly because, unlike the decision to produce a full judicial opinion, a reviewing court typically decides whether to grant oral argument before settling on the appropriate resolution of the appeal. To the extent that we sought to model judicial outcomes, we felt variables reflecting actions that preceded those outcomes were more appropriate and probative.

Table 3: Independent Variables, by Decision Favoring State Prosecutor

Independent Variables	*(1) % Cases with Variable Receiving Decision Favoring P*	*(2) % Cases w/o Variable Receiving Decision Favoring P*
Court of last resort (n = 98)	35.7	42.9
Mandatory review appeal (n = 52)[1]	40.4	37.3
Appeal from		
Conviction (alone) (n = 83)	43.4	32.4
Sentence (included) (n = 38)	36.8	38.8
Unknown/missing (n = 33)	27.3	41.3
Offense Severity		
Felony (n = 130)	40.0	29.2
Misdemeanor (n = 17)	35.3	38.7
Severity unknown/missing (n = 7)	14.3	39.5
Crime Type		
Drug trafficking, weapons, DUI (n = 52)	55.8	29.4
Violent (sex, homic., rob, assa) (n = 59)	28.8	44.2
Nonviolent and unknown crime (n = 43)	30.2	41.4
Claim Included in Brief		
Evidence suppression (n = 24)	54.2	35.4
Insufficient evidence (n = 15)	66.7	35.3
Sentence (n = 11)	63.6	36.4
Claims other than above (n = 48)	41.7	36.8
Claim unknown (n = 61)	18.0	51.6
Court Factors		
Elected judges (n = 92)	39.1	37.1
CA state (n = 12)	50.0	37.3
FL state (n = 12)	25.0	39.4
LA state (n = 15)	46.7	37.4
OH state (n = 26)	15.4	43.0
Process & Advocacy Factors		
State coordinates appeal (n = 84)	41.7	34.3
Oral argument held (n = 46)	65.2	26.9
Full judicial opinion (n = 63)	66.7	18.7
Private defense attorney (n = 24)	41.7	37.7
Public defense attorney (n = 85)	41.2	34.8
Pro se defendant (n = 3)	0.0	39.1
Unknown representation (n = 42)	33.3	40.2
N	*154*	

[1] Comparison switched direction once supplemental cases were removed. For a discussion of the supplemental cases, see text accompanying note 72.

SOURCE: Survey of State Court Criminal Appeals, 2010.

Two variables also correspond to a lowered likelihood of success. In Ohio, the state with the largest number of appeals in the sample, prosecutors were less likely than prosecutors in other states to receive a favorable decision when they appealed, even after controlling for other factors, in each of the models. That the appeal was to a court of last resort was associated with a lower likelihood of success in one model.

The salience of an oral argument comports with our initial hypothesis; we expected prosecutors were more likely to succeed when given a chance to argue the case before the bench. But several surprises also emerged (see Table 4).

Table 4: Logistic Models, Decision Favoring State Prosecutor

	(1)	*(s.e.)*	*(2)*	*(s.e.)*
Case-Specific Variables				
Court of last resort	−1.49*	(0.72)	−1.35	(0.75)
Mandatory appeal	−1.02	(0.79)	−1.05	(0.78)
Appeal of conviction (alone)	0.50	(0.56)	0.52	(0.55)
Appeal of sentence (included)	0.54	(0.63)	0.50	(0.65)
Offense severity = felony	0.54	(0.58)	0.55	(0.54)
Crime Types				
Violent crime type (ref.)				
Nonvio. and unknown crime type	0.80	(0.69)	0.81	(0.72)
Drug traffic, weapon, or DUI	0.91	(0.61)	1.01	(0.66)
Claim in Brief				
Insufficient evid. claim included	0.70	(0.87)	0.70	(0.91)
Court-Specific Factors				
Elected judges	0.25	(0.39)	0.27	(0.39)
Ohio state	−1.85**	(0.51)	−1.91**	(0.50)
Process & Advocacy				
Oral argument	1.83**	(0.48)	1.79**	(0.50)
Private attorney	−0.48	(0.62)	−0.55	(0.62)
State coordinates appeal	0.06	(0.48)	0.05	(0.47)
Supp. data	—		−1.03	(0.65)
Constant	−1.12	(1.32)	−1.09	(1.33)
N	154		154	
Log likelihood	−81.35		−80.16	
Psuedo R^2	0.21		0.22	

NOTES: We report results from logistic regression models of prosecutor success with appeals initiated by the state. The dependent variable is whether the appellate court outcome favored the prosecutor (success is construed as something less than a full affirmance or dismissal and involved upsetting, to some degree, the lower court decision). Robust standard errors (clustered on the state level) are in parentheses. $*p < 0.05$; $**p < 0.01$. We estimated the models using the "logit" command in Stata (v.15.1). Results from alternative unreported analyses simultaneously modeling the appeal outcome conditioned on a merits review did not materially differ from those presented above.
SOURCE: Survey of State Court Criminal Appeals, 2010.

Contrary to our expectations, many factors made no systematic difference.[91] The first surprise was that whether the reviewing court had the option of declining review made no statistical difference to the likelihood that a state prosecutor appeal, once filed, would succeed. In other words, after controlling for other factors—including whether the appeal was to an intermediate or a court of last resort—a prosecutor was just as likely to win a discretionary appeal as an appeal the court must review. This does not mean that state courts with the discretion to decline a prosecutor's appeal never did so. It suggests

[91]We are mindful of the limited analytic weight we can properly place on our null findings due to our limited sample size ($N = 154$) and the number of variables included on the right side of our estimation (13–14). Various power calculations estimate that a slightly larger sample size (or slightly fewer independent variables) would enhance our statistical power and confidence in the null findings. In unreported alternative (and more parsimonious) model specifications, the main results we report here remain largely unchanged.

only that the exercise of that discretion has such little impact on probable success that as far as prosecutor appellants are concerned, those discretionary appeals did not systematically differ from mandatory appeals.

We also expected state prosecutors to be more likely to win appeals in felony cases than to win the 17 misdemeanor appeals in our data, but once other factors were controlled, this difference did not achieve statistical significance. Perhaps prosecutors were particularly selective when appealing in misdemeanor cases, choosing to devote appellate resources to these relatively minor cases only when a court's ruling was especially egregious. Also contributing to this null finding may be the comparatively small number of misdemeanor appeals launched by prosecutors.

Unexpected also was that whether the appeal was from a conviction only or was one that included a challenge to the sentence made no systematic difference in terms of the likelihood of success. Finally, whether an appeal was decided by a state high court was significantly associated with a lower, not higher, likelihood of success for the prosecutor appellant in Model 1.[92] This conflicts with our prediction that courts will be more likely to find in favor of an appellant when reviewing another appellate decision than they are when reviewing a trial court decision, especially given that another variable controls for whether the appeal is mandatory or discretionary.

V. Comparing State Prosecutor and Defense Appeals

Comparing the results from the study of prosecutor appeals above with the results of our earlier study of state criminal appeals filed by defendants reveals several striking differences. All of the comparisons that follow must be interpreted with caution, however, because the two study samples, although drawn from the same databases, include some structural differences. Specifically, the prosecutor appeal sample includes the following categories of appeals that the defense appeals sample does not: appeals from "deflective" states,[93] discretionary appeals to *intermediate* (as opposed to last resort) courts,[94] and appeals in misdemeanor cases. The numbers of these appeals in the prosecutor dataset are small, and if their inclusion had any influence on the

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[92]In Model 2, however, where we control for whether an appeal is one of the 21 court of last resort cases reviewing an intermediate court decision from the supplemental data, see text accompanying note 72, the same distinction just barely falls out of significance. That these two variables interact, however, makes sense. Only 23.8 percent of these supplemental court of last resort cases succeeded (compared with 40.6 percent of the 133 "main" appeals), and only 35.7 percent of all high court appeals succeeded (compared with 42.9 percent of intermediate court appeals). Thus, in Model 2, the inclusion of the supp data dummy variable diluted the independent influence of our COLR dummy variable enough to pull the COLR variable out of the conventional range for statistical significance.

[93]See supra note 47 (describing "deflective" appeal structure).

[94]The discretionary intermediate court appeals were mostly from Virginia where all direct appeals are discretionary, and Michigan, where appeals from guilty pleas are discretionary. See supra note 47; Heise, et al., supra note 3, at 1945.

results, it likely would have slightly depressed the rate of success by prosecutor appellants.[95]

A. Comparing Descriptive Findings

Comparisons of descriptive findings for state prosecution and defense appeals generated several interesting findings.[96]

1. Differences in the Subpools of Prosecution and Defense Appeals

Among mandatory appeals, fewer prosecutor than defense appeals included a challenge to the sentence (31 percent compared to 43 percent), although about half of both prosecutor and defense appeals challenged the conviction alone. Just under a third of appeals by both the prosecution and defense involved nonviolent (and unknown) crimes. Violent crimes constituted the largest category of mandatory appeals for both prosecution and defense, but made up a larger portion of defense appeals than prosecutor appeals. Drug trafficking, weapons, and DUI cases made up a larger portion of prosecutor appeals than defense appeals. Defendants raised claims involving the sufficiency of evidence more often than prosecutors did (29 percent compared to 17 percent), but prosecutors raised suppression issues more often (19 percent compared to 13 percent).

Among discretionary appeals in courts of last resort, the case mix that state high courts ultimately considered on the merits was similar in some respects to the mix in mandatory appeals. More defense appeals than prosecutor appeals involved violent crime, sentencing challenges, and claims pertaining to the sufficiency of evidence, for example. Unlike mandatory appeals, however, slightly more of the discretionary appeals filed by defendants and reviewed on the merits included a suppression claim (29 percent compared to 26 percent of discretionary appeals by prosecutors), and violent crime was not the largest category for prosecutor appeals. Instead, drug trafficking, weapons, and DUI cases made up 42 percent of the appeals by prosecutors heard on the merits at this level.

2. Comparing Rates of Merits Review

Appellate courts reviewed most appeals of right on their merits, no matter who appealed. Appeals of right by the defense were *more* likely to be reviewed on the merits compared to those filed by the government (90 percent of the 2,080 defense of right appeals compared to 77 percent of the 52 prosecution of right appeals). Among mandatory appeals, 15 percent of the prosecutor appeals were withdrawn, compared to only 4.5 percent of the defense appeals. However, discretionary appeals filed by the defense in state courts of last resort were far less likely to be reviewed on their merits than those filed by

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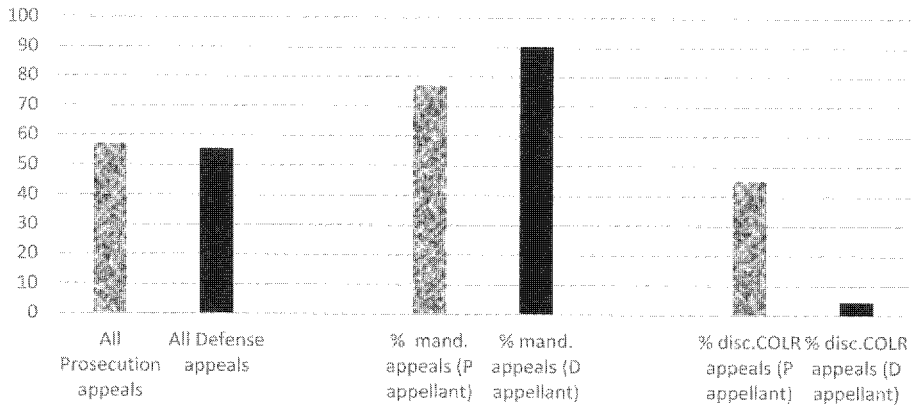
[95]The 17 misdemeanor appeals had a lower rate of success (35.3 percent), while the seven discretionary appeals in intermediate courts had higher rates of success (57.1 percent), as did the six deflective state appeals (50 percent).

[96]Figures in this section are drawn from tables found in the Appendix.

Figure 1: Comparing rates of merits review, by appeal type.



prosecutors. This relationship is illustrated in Figure 1, showing the difference between the prosecutor's almost 50-50 odds of securing merits review for a discretionary appeal filed in a state's high court (45.3 percent reviewed on the merits), compared to the 20 to 1 odds facing the defendant appellant (4.6 percent reviewed on the merits).

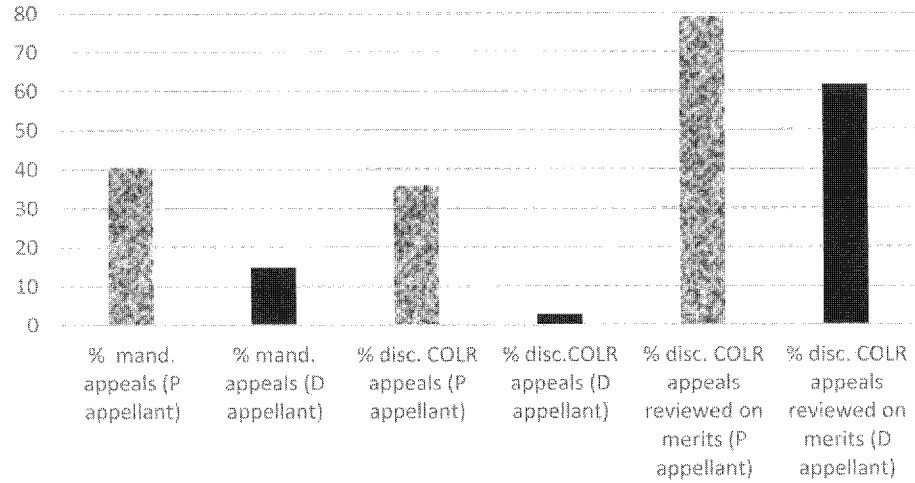
Although the number of appeals *filed* by defendants eclipsed the number filed by prosecutors, at the state-high-court level that asymmetric mix changed among cases considered on the merits. As Appendix Table A2 reports, in the random nationwide sample, state high courts heard 52 discretionary defense appeals and 36 discretionary prosecution appeals, not nearly as skewed a difference as the disparity in the number of appeals filed.

3. Comparing Success of Prosecutor and Defense Appeals

Turning to comparative rates of ultimate success in these appeals, prosecutor appellants enjoyed a total rate of success roughly four times that experienced by defendants (38 percent compared to 10 percent).[97] Figure 2 illustrates the greater likelihood of success for prosecutors compared to defendants. This difference persists even among those discretionary appeals granted review in high courts, where the appellant—prosecutor or defendant—was generally more likely to win than the appellee. Appendix Tables A1 and A2 reveal defendant appellants had a higher success rate than prosecutor appellants in only two of the dozens of comparisons reported. Among discretionary appeals reviewed on the merits in state high courts, defendant appellants were more likely to win than prosecutor appellants when the appeal was coded as not from conviction alone (73 percent vs. 63 percent) and also when the appeal raised a claim other than insufficient

[97]Without the supplemental data, the prosecutor success rate was 41 percent. See Table 2; Heise et al., supra note 3, at 1948 (reporting that 349 of 3,505 defense appeals in sample were successful).

Figure 2: Comparing rates of a favorable appeal, by appeal type.



evidence, suppression, or sentence (65 percent vs. 60 percent). Other than that, prosecutors were more successful in every category.[98]

The pattern of greater success for prosecutors in discretionary appeals heard on the merits is also evident when comparing appeals of different crime types (Figure 3), different claims (Figure 4), and even when the appellant was provided oral argument or the court decided to issue a full opinion (Figure 5).

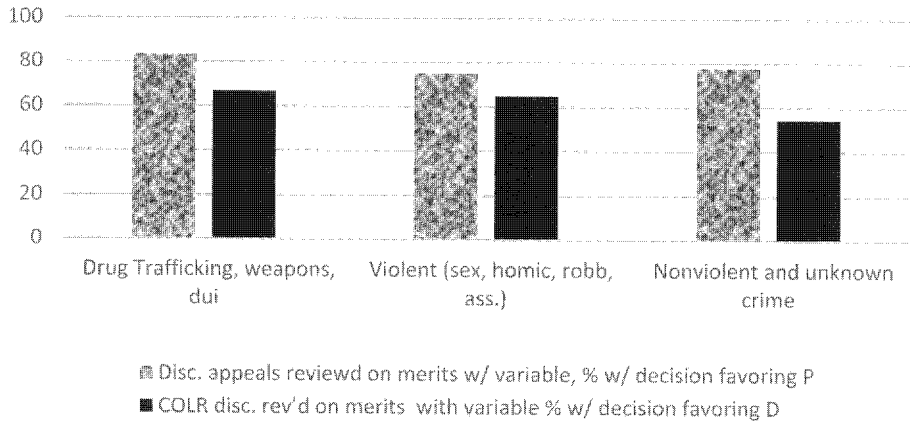
As illustrated by Figure 6, compared to defendants with retained counsel, defendant appellants represented by publicly funded attorneys enjoyed a much better chance of winning once a court of last resort granted review. Among prosecutor appeals, success rates did not vary as much by type of representation.

As for mandatory appeals, the higher success rates for the prosecution are much more pronounced. For example, consider Figure 7, showing success rates for mandatory appeals with oral argument and full opinions. Almost all these mandatory appeals were considered on their merits and courts opted to provide them the highest level of attention—oral argument and a full opinion. Yet prosecutors were more than twice as likely to win.

Although we were unable to examine the application of harmless error analysis in our regression analyses, we report here the descriptive information our state appeals data provide on this topic. For only those cases with reasoned opinions, a subset of the case sample ($N = 97$ prosecutor appeals; $N = 1{,}616$ defense appeals), data include whether the court found no error, reversible error, or harmless error for each claim resolved by the

[98]Appendix Table A2 does show defendant appellants were more likely to succeed than prosecutor appellants in mandatory appeals filed in California, but there was only one such appeal for the prosecution (most in that state were discretionary).

Figure 3: Comparing success rates, discretionary merits appeals, by crime type.



opinion. Evaluating the first four claims resolved, Figure 8 shows what proportion of those resolutions indicated no error, harmless error, or reversible error, comparing defense and prosecution appeals.

Figure 4: Comparing success rates, discretionary appeals reviewed on merits, by claim included.

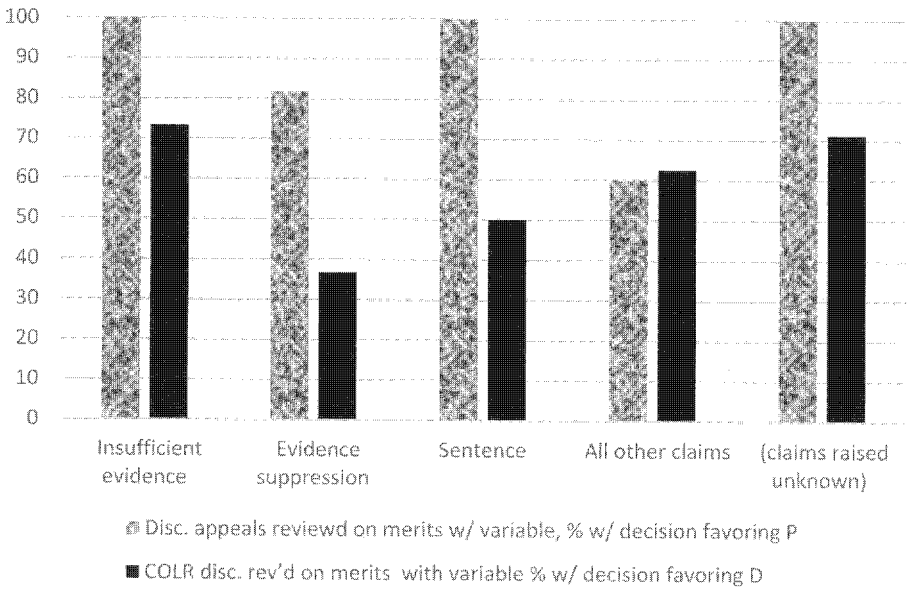
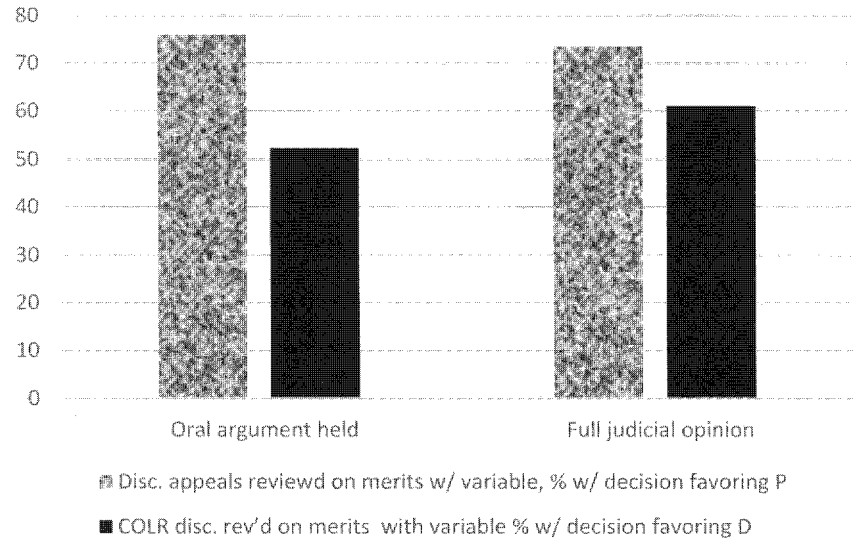


Figure 5: Comparing success rates, discretionary appeals reviewed on merits, by arguments and opinion type.



In this specific subset of cases, issues resolved in appeals by prosecutors compared to issues resolved in appeals by defendants were more than five times as likely to produce relief for the appellant. Reviewing courts found *error* more often for prosecutors than

Figure 6: Comparing success rates, discretionary appeals reviewed on merits, by type of defense counsel.

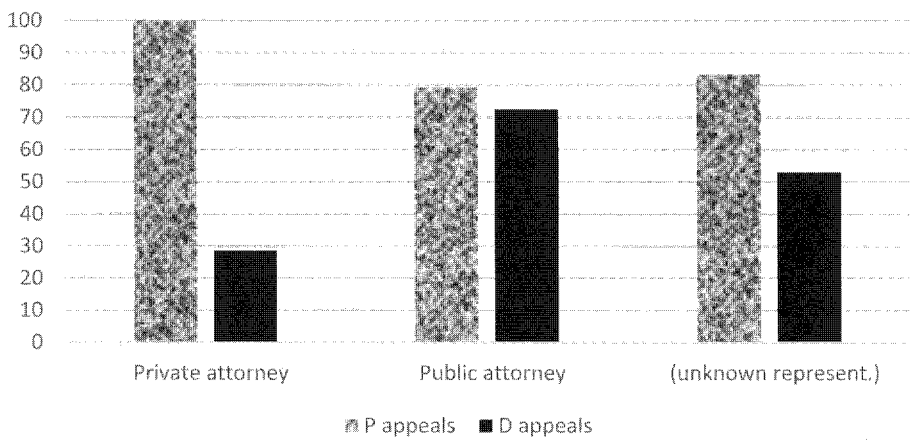
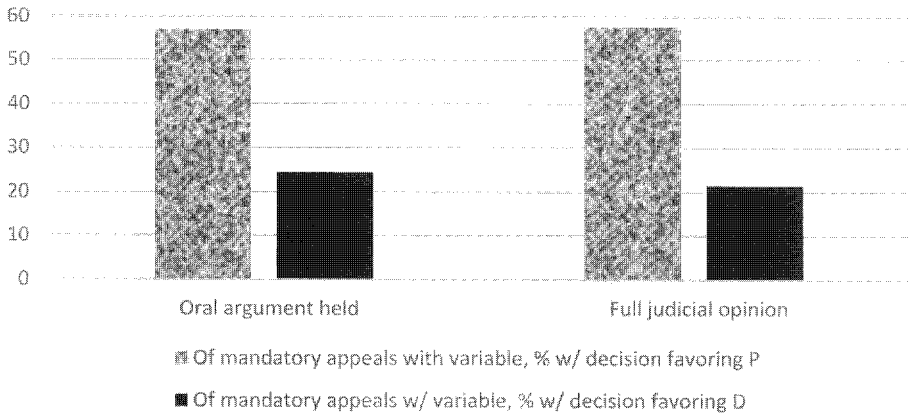
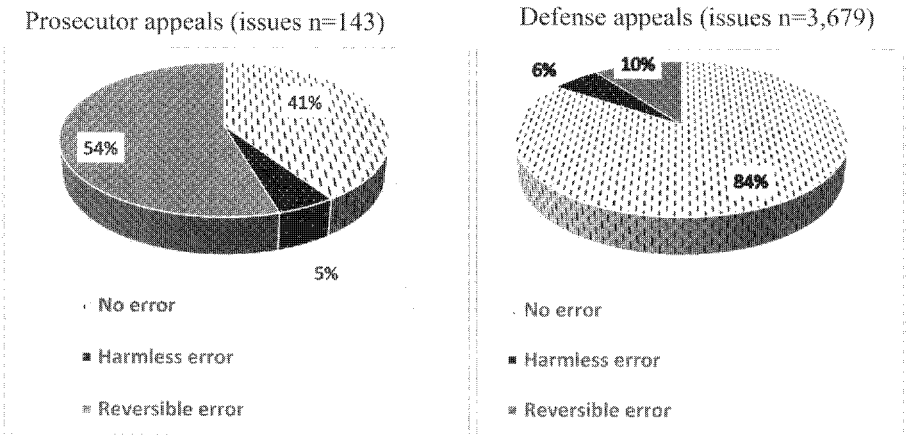


Figure 7: Comparing success rates, mandatory appeals by argument and opinion type.



defendants, in 59 percent compared to 16 percent of the issues. And courts considered a larger portion of those errors harmless in defense appeals—38 percent compared to 8 percent in prosecutor appeals. This is consistent with our suspicion that the types of claims raised by prosecutors are less likely to be considered harmless and more likely to be preserved for appeal, but it is weak support at best, not only because other factors such as the government's selection of which appeals to file could have distorted the mix of claims that appellate courts reviewed, but also because the subset of cases with reasoned opinions was itself the product of selection decisions by the reviewing courts.

Figure 8: Comparing application of harmless error analysis, first four claims combined, appeals with reasoned opinions only.



B. Comparing Findings of Regression Analyses for Defense and Prosecution Appeals

Our descriptive comparisons of raw, averaged rates of appellate success, while important and helpful, risk misleading insofar as descriptive analyses do not permit the more granular inquiry into how various important factors may interact in their potential influence on criminal appellate outcomes. Comparing results from descriptive and regression analyses provides additional insights into how criminal defendants' appeals may systematically differ from prosecution appeals. The analyses of prosecutor data were necessarily less refined and less statistically powerful than our defendant analyses because of the smaller number of prosecution appeals available.

Comparisons of regression results for state prosecution and defense appeals support our basic expectation that prosecutors win more often, overall, and by a wide margin, but the analyses tell us little about why that might be so. Consider our prediction that there might be something about the particular types of rulings that prosecutors appeal, as opposed to those that defendants appeal, that makes those errors easier to preserve for appeal or easier for a reviewing court to recognize as error. The findings do not suggest that any particular claim category fares better or worse than another for prosecutors, bringing us no closer to determining whether the claims that prosecutors raise are different in some significant way. Also, the higher rate of merits review for appeals of right filed by defendants does not suggest that state prosecutors are substantially better than state defendants at preserving errors for appeal in the trial courts.

Owing to data limitations, the findings also tell us little about the relative effectiveness of advocacy, a difference that could inform different success rates. Oral argument is significant to both prosecution and defense appeals, in the same direction—increasing the chances of a favorable outcome for the appellant. The fact that more of the prosecutors who appealed secured oral argument compared to defendant appellants might suggest more effective advocacy, but it could reflect instead policies or preferences of the court unrelated to an attorney's efforts,[99] and the absence of a relationship between the presence of some statewide coordination of appeals and success suggests that this potential advantage in advocacy either does not exist or is outweighed by other factors.[100]

Finally, we found no evidence suggesting that decisions in criminal appeals in state courts correspond with any pro-prosecutor bias that might be tied to the method by which a judge is selected, bias that might supply an alternative reason for disparate success rates. Neither defense nor prosecutor success on appeal was significantly correlated with whether the appellate bench was selected by election rather than appointment. If

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[99]See David R. Cleveland & Steven Wisotsky, The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal, 13 J. App. Prac. & Process 119, 144 (2012) (rejecting inference that the decline in oral argument for federal criminal appeals reflects a change in the rate at which appellate counsel requested oral argument, stating "[c]ommon sense strongly suggests that the operative variable is the courts' screening out an increasing proportion of cases for oral argument because they think it is not particularly valuable").

[100]Neither our defense study nor this study controlled which states provided statewide expertise for defense appeals in the form of public defender offices handling state appeals for defendants.

state appeals judges were, in fact, biased in favor of the prosecution, our analysis, using the only measure we had available, did not detect that.

Other interesting comparisons between the regression results for state prosecution and defense appeals also warrant note. Looking at the review of sentences, we found both sides sought appellate review of sentences regularly—one-quarter of prosecutor appeals and nearly a third of defense appeals overall. These appeals were significantly associated with a greater likelihood of success for defendants in their first appeals of right, but *not* significantly associated with success for the prosecutor appellant. Combined with the higher rates of relief for defendants for sentence challenges heard on the merits by high courts, the findings suggest that appellate review provides an important oversight function for sentencing in the states.

Turning to the type of representation for the defendant on appeal, the results did not support our hypothesis that private counsel might correlate with a higher likelihood of success for either the defendant appellee or the defendant appellant. Private counsel did represent a higher proportion of defendant appellees as compared to defendant appellants. Simple comparisons suggested private counsel gave their clients an edge over defendants with publicly funded counsel, but once other factors were controlled, regression analyses showed that representation by a retained attorney had no significant association with variation in the likelihood of relief in either prosecution or defense appeals.

The type of claim included by the appellant, as noted earlier, also appears unrelated to success for both prosecutor and defendant appellants. Even though it looked as if high courts may have been more receptive to defendants' claims of insufficiency than prosecutors' claims of sufficiency,[101] regression analyses suggested that these claims were treated no differently once other factors were controlled. For defendants who appealed, but not for prosecutors, crime type made some difference as well. Drug trafficking, weapons, and DUI appeals were significantly associated with a higher likelihood of success when compared to violent crime appeals for defendants, but our analyses showed no significant relationship between crime type and likelihood of success for prosecutor appeals.

Turning to our findings concerning judicial selection, it is important to point out that compared to defense appeals, a smaller proportion of prosecutor appeals were filed in courts whose judges were appointed. It is unclear from our data whether prosecutors were deliberately selecting cases for appeal based on expectations about how judges

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[101]When a prosecutor makes this claim to a high court with discretion to hear the appeal, the prosecutor asks the high court to reject the decision of the trial judge or intermediate court and to reinstate the conviction, while a defendant who raises this claim in the high court asks the court to set aside the conviction and possibly another appellate court's decision affirming that conviction. If courts give closer scrutiny to orders setting aside a jury's verdict, it would make sense if prosecutors won this type of claim more often than defendants. An alternative hypothesis is that high courts are more concerned about wrongful convictions on weak evidence, disinclined to second-guess a trial court's finding of insufficient evidence, and more willing to review cases in which defendants raise insufficiency claims. Simple comparisons lend some support to both hypotheses. Appeals including claims regarding sufficiency succeeded more often than the average rate in both mandatory appeals and discretionary high court appeals, when raised by either side. However, the regression analyses did not bear out any significant relationship between the presence of such a claim and outcome.

would rule or, rather, that the number of prosecutor appeals was larger in states with appointed benches for other reasons. We found that the likelihood of appellant success was not significantly related to the method used to select the judges of the court deciding the appeal, for either defendants or prosecutors, regardless of whether we controlled for the presence of initial selection by election or the presence of retention elections. At least with the measures of selection applied here, the hypothesis that an elected bench might be associated with a higher win rate for prosecutors found little empirical support.

Perhaps the most interesting finding is what this study revealed about the mix of prosecutor and defense appeals ultimately considered on the merits by state courts. In state intermediate courts hearing appeals of right on their merits, judges apply and develop the law that governs the investigation and adjudication of crime with a criminal docket made up of 98 percent defense appeals and only 2 percent prosecutor appeals. Under these conditions, allegations of error harmful to defendants may overwhelm allegations of error harmful to the state. State high courts, by contrast, confront an entirely different context. Courts with discretion to review criminal appeals exercise that discretion to hear nearly half (45 percent) of prosecutor appeals filed, but less than 5 percent of defense appeals. What results is a merits docket in state high courts with discretionary appellate jurisdiction that looks very different than the dramatically skewed filings would suggest. Of discretionary direct criminal appeals reviewed on the merits by state high courts, 41 percent are prosecution appeals.[102] Indeed, of appeals heard on the merits by state high courts, the percentage filed by prosecutors may be even larger if interlocutory appeals were included in the tally because in many states the prosecutor may seek interlocutory review of suppression and other rulings whereas defendants cannot.[103] Our findings show that state high courts, unlike intermediate courts, do *not* decide direct appeals in criminal cases under conditions of drastic asymmetry. Instead, in state courts of last resort, judges regularly consider appeals from both sides on a number of recurring issues.

VI. Appeals by Federal Prosecutors

A. Data, Methodology, and Research Design

1. Sample

The appeals that form the basis of the federal component of our study appear in the nations' leading data source on federal appeals: the Federal Judicial Center's (FJC)

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[102]See Appendix Table A2. Comparing all high court cases, both discretionary and mandatory, without supplemental sample cases added, our data show that state courts of last resort heard on the merits approximately one prosecutor appeal for every two defense appeals.

[103]In the federal system, if interlocutory and direct appeals by the government were combined, interlocutory appeals would constitute approximately 30 percent of that combined group. Although our state data did not include interlocutory appeals, we have no reason to believe that the proportion of interlocutory appeals to appeals from final judgment differs in state and federal court.

Integrated Data Base.[104] The FJC datasets in its public archive include federal appeals holdings, which, in turn, include a specific dataset that includes the known universe of "modern" (from fiscal years 2008 through 2016) federal appeals.[105] Sampling issues do not arise as the individual data files include the entire universe of known federal appellate activity for those years.

To construct our final usable dataset that focused on direct federal criminal appeals by the government, we began with each individual fiscal year data file that included detailed information about each appeal decided that fiscal year. For example, for fiscal year 2008, we began with a total of 59,096 appeals. To identify the appropriate subpool of federal appeals for our analyses, we then, for each FY data file, eliminated all appeals where the United States was not the appellant as well as all noncriminal appeals.[106] We then merged all nine separate FY datasets into a single dataset for those appeals that remained, for a total of 1,718 criminal appeals in which the United States was the appellant.

Due to important coding changes implemented by the FJC that took effect on October 1, 2011, we then eliminated all appeals *filed* prior to that date.[107] Among the 343 appeals remaining, we excluded interlocutory and post-conviction appeals (including appeals of rulings on motions to reduce sentence), as well as appeals relating to capital, reopened, and "miscellaneous" cases.[108] For the 247 appeals that remained, one of us examined each appeal more closely by reviewing case documents available on PACER to confirm the nature of the appeal. This review uncovered an additional 42 appeals that we concluded were miscoded in the FJC dataset—some that were not, in fact, initiated by the prosecutor, and others that involved either interlocutory or post-conviction appeals. Excluding these appeals not germane to our study left us with a dataset of 205 federal criminal appeals initiated by the United States between October 1, 2011, and September 30, 2016, and terminated by September 30, 2016 (see Table 5).

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[104]See https://www.fjc.gov/research/idb (https://perma.cc/5EX7-GW4W). The FJC, under an arrangement with the U.S. Administrative Office of the U.S. Courts, provides public access to its Integrated Data Base.

[105]See https://www.fjc.gov/research/idb/appellate-cases-filed-terminated-and-pending-fy-2008-present (https://perma.cc/7UNN-7SKW) (hereinafter FJC Integrated Data Base, Appellate Cases).

[106]In each separate dataset the "USAPT" variable identifies those appeals initiated by the federal government (USAPT = 1) and the "APPTYPE" variable identifies the criminal appeals (APPTYPE > 12). See FJC Codebook, supra note 10.

[107]As of October 1, 2011, new APPTYPE values were added indicating whether the appeal was direct, interlocutory, or involved the appeals termed "post-conviction," that is, any order post-sentencing. Email from George Cort, Federal Judicial Center, to Nancy King, Jan. 3, 2018. In other words, the coding did not distinguish between interlocutory, direct, and post-conviction appeals prior to October 1, 2011.

[108]We excluded from our analyses the 96 appeals that the FJC Codebook identified as APPTYPE (values = 15, 20, and 22). See FJC Codebook, supra note 10.

Table 5: Summary of Federal Prosecutor Appeals and Success, by Circuit

	N	*% of All Appeals (205) from Circuit*	*% of All Appeals Reviewed on Merits (87) from Circuit*	*% Appeals from Circuit that Were Reviewed on Merits*	*% Appeals from Circuit with Decision Favoring Gov't*	*% Appeals Reviewed on Merits from Circuit w/ Decision Favoring Gov't*
DC	2	1.0	1.1	50.0	50.0	100.0
1	11	5.4	1.1	7.7	9.1	100.0
2	19	8.3	11.5	58.8	52.9	90.0
3	4	2.0	2.3	50.0	0.0	0.0
4	13	6.3	6.9	46.2	38.5	83.3
5	17	8.3	10.3	52.9	35.3	66.7
6	12	6.9	4.6	33.3	25.0	75.0
7	20	9.8	11.5	50.0	20.0	40.0
8	29	14.1	17.2	51.7	17.2	33.3
9	12	5.9	4.6	33.3	33.3	100.0
10	6	2.9	3.4	50.0	50.0	100.0
11	62	30.2	25.3	35.5	27.4	77.3
Mean				*42.4*	*28.3*	*66.7*
N	*205*	*205*	*87*			

SOURCE: Federal Judicial Center, Integrated Database, Federal Appellate Cases: 2011–2016.

2. Variables

The dependent variables of interest we used for our federal analyses mirror those for the state prosecutor appeals: whether the appeal received review on its merits,[109] and whether the appeal produced a decision favorable to the prosecution.[110] We coded as a favorable decision any outcome other than a dismissal or affirmance. Using the docket number to find each appeal, we supplemented the factors collected in the FJC dataset with additional information from documents available on PACER to provide a basis for comparison with the state prosecutor appeals. Most of the variables we report are identical to those in the state appeal study,[111] and are included for similar reasons. Instead of controlling for the state with the most appeals, we controlled for the circuit with the most appeals, the Eleventh Circuit. The federal data do not indicate whether the decision produced a "full opinion," so we created a dummy variable for "published opinion" as a substitute.

Several of the factors in our state analyses had no variation in federal appeals, and as a result were dropped from our analyses. All federal appeals were mandatory, not discretionary; all sought relief from intermediate appellate courts, not courts of last resort;

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[109]Indicated by the FJC variable DISP.

[110]Indicated by the FJC variable OUTCOME.

[111]Using information from PACER and the OFFENSE variable in the FJC dataset, we sorted each appeal into one of the three crime-type variables used in the state study. We coded from PACER documents the claims raised by the government, sorting them into the same claim categories and variables used in the state study. We also coded the same counsel categories, but in addition subdivided "public attorney" into two subgroups, federal defender and CJA appointed.

Table 6: Decision Favoring Federal Prosecutor, by Type of Appeal

	(1) % of All Appeals	*(2) % of Appeals Reviewed on Merits*
N	*205*	*87*
Dependent Variables		
Reviewed on merits	42.4	—
Decision favored prosecution	28.3	66.7

SOURCE: Federal Judicial Center, Integrated Database, Federal Appellate Cases: 2011–2016.

all involved judges who were appointed, not elected; all questioned trial court orders, not decisions of intermediate appellate courts; and all were centrally coordinated by the Department of Justice and the Office of the Solicitor General.

B. Descriptive Findings

Excluding interlocutory and post-conviction appeals, as well as appeals from revocations and orders regarding the reduction of sentence, the number of direct criminal appeals by the federal government is very small. Only 205 direct criminal appeals were decided by the courts of appeals in five years (see Table 6). As Table 5 notes, the circuit with the most appeals in the dataset is the Eleventh, with 30.2 percent.

More than half of these 205 appeals were terminated without review on the merits ($N = 118$), even though all were appeals of right, and the courts had no discretion to deny leave to appeal. These nonmerits dispositions were overwhelmingly ($N = 97$) voluntary dismissals by the government,[112] where the clerk of court rather than a judge "take [s] or direct[s] the final termination action."[113] Another 19 appeals ended similarly, but with judicial involvement granting the government's motion to dismiss,[114] so that combined, voluntary dismissals accounted for 116 of the 118 nonmerits dispositions. Overall, the government voluntarily dismissed 57.5 percent of the appeals it had filed.[115] Given

[112]Fed. R. App. Proc.42(b).

[113]See FJC Codebook, supra note 10, at 11 METHOD (value = 1).

[114]Id. at 10–11, PROCTERM (value = 2).

[115]In the merged 2014–2015 set of appeals data from the Sentencing Commission, see supra note 23, only three of the government appeals (2 percent) were coded as dismissed for the years 2014 and 2015, suggesting that the Commission's collection of appeals did not include most or all of the appeals filed but later dismissed. The documents available on PACER for appeals filed and later dismissed typically included a reference to the trial court order appealed, usually with a docket number or filing date to identify that order. In some circuits, the notice of appeal entry included a copy of the trial court order appealed. This allowed us to determine when the government was objecting to a judgment of acquittal, an order granting new trial, or an order of dismissal. Appeals from the sentence were in some circuits specified as such, some even noting what aspect of the sentence was being challenged. There were also appeals after convictions that identified the order being appealed only by referencing a specific judgment or judgment and commitment order. In these cases, we used a process of elimination to determine that the appeal was not from an order dismissing a charge, granting a motion for new trial or judgment of acquittal. Once these options were eliminated, and there were no orders docketed in the trial court record that could have been appealed by the government from the judgment other than the sentence, we coded the government's appeal from judgment and commitment as an appeal from sentence.

Table 7: Independent Variables, by Decision Favoring Federal Prosecutor

	(1) % Cases with Variable Receiving Decision Favoring P	*(2) % Cases w/o Variable Receiving Decision Favoring P*
Independent Variables		
Merits review (n = 87)	66.7	—
Filed in dkt year 2011 (n = 28)	57.1	23.7
Appeal from		
Conviction (alone) (n = 21)	57.1	25.0
Sentence (included) (n = 138)	28.3	28.4
Dismissal/unknown (n = 46)	15.2	32.1
Offense Severity		
Felony (n = 197)	29.4	0.0
Misdemeanor (n = 4)	0.0	28.9
Severity unknown/missing (n = 4)	0.0	28.9
Crime Type		
Drug trafficking, weapons, DUI (n = 73)	20.6	32.6
Violent (sex, homic., robbery, assault) (n = 18)	27.8	28.3
Nonviolent and unknown crime (n = 114)	33.3	22.0
Claim (Included in Brief)		
Evidence suppression (n = 2)	0.0	28.6
Insufficient evidence (n = 16)	62.5	25.4
Sentence (n = 139)	28.8	27.3
Claims other than above (n = 42)	19.1	30.7
Claim unknown (n = 9)	11.1	29.1
Court Factors		
CA11 (n = 62)	27.4	28.7
Process & Advocacy Factors		
Oral argument held (n = 62)	66.1	11.9
Published opinion (n = 52)	65.4	15.7
Private defense attorney (n = 73)	31.5	26.5
Public defender (n = 63)	19.1	32.4
Public appointed (CJA) attorney (n = 57)	29.8	27.7
Pro se defendant (n = 6)	50.0	27.6
Unknown representation (n = 6)	50.0	27.6
N	*205*	

SOURCE: Federal Judicial Center, Integrated Database, Federal Appellate Cases: 2011–2016.

this high incidence of voluntary dismissal, the success rate for all appeals filed was less than 30 percent.[116] Among appeals considered on the merits the average success rate was more than double that (66.7 percent), and varied across circuits.

Simple comparisons presented in Table 7 also reveal that appeals from conviction (judgments of acquittal and new trial orders following a guilty verdict) were more likely to win than appeals from orders dismissing charges or orders that could not be determined (i.e., the docket was sealed and unavailable on PACER). Felony appeals were more

[116]This is a lower rate than the 37.3 percent success rate reported in 1999. See supra note 18.

successful than misdemeanor appeals. Prosecutors had more success in appeals involving nonviolent and unknown crimes than when appealing in violent crime cases. Including a sufficiency of evidence claim increased the rate of success among all appeals filed, as did the presence of oral argument or a published opinion. When facing retained counsel, the government was more likely to lose; when facing a federal defender, more likely to win—when considering all appeals filed including those terminated for nonmerits reasons.

Comparing the rates of merits review separate from the rate of ultimate success provided additional descriptive insights. Given that almost all nonmerits dispositions were voluntary dismissals requested by the government, the rate of merits review may serve as a proxy for the rate at which the government decided not to dismiss the appeal. Government appeals in drug trafficking, weapons, and DUI cases were less likely to proceed on the merits compared to appeals in other cases. More of the conviction-only appeals (appeals of judgments of acquittal and new trial orders after a jury verdict of guilt) were reviewed on the merits compared to appeals challenging a sentence, an order dismissing charges, or an unknown order. Only felony appeals proceeded; none of the four misdemeanor appeals made it to merits review. Appeals raising sufficiency of evidence claims were less likely to be dismissed than appeals including other claims.[117] To the extent these voluntary dismissals reflect choices by the Department of Justice and the Office of the Solicitor General to forego appeals that had been filed,[118] the descriptive information sheds some light on that selection process.

Descriptive results also suggest several factors that might correlate with government success rates *among* these merits cases. The overall success rate among merits cases was about 67 percent. As we expected, merits appeals challenging a judgment of acquittal or new trial order entered after a guilty verdict enjoyed a higher than average rate of success (70.6 percent), as did appeals raising sentencing claims (70.9 percent). As expected, appeals including a claim contesting an insufficient evidence finding (76.9 percent success) or a sentencing claim (71.4 percent) were more successful than appeals not raising those claims (50.0 percent). Interestingly, and also supporting our initial hypothesis, prosecutors were less likely to receive a favorable decision when they were up against a federal defender, winning only 42.9 percent of the time, compared to defendants with other representation. Against retained counsel, prosecutors won 82.1 percent of their appeals; against CJA counsel, 70.8 percent.[119]

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[117]These statistics are reported in Table 10, comparing state and federal government appeals, in Columns 5 and 6.

[118]Although we did not attempt to code the exact basis for the voluntary dismissal in the small portion of these federal appeals where that information was available, judging from information that was available documents on PACER, these dismissals appeared to be based primarily not on compromise or settlement with the defense, but on the decision of the Solicitor General's Office not to proceed. There were only a few cases, each involving a government's cross-appeal, in which it appeared that both parties had agreed to drop their appeals. The other voluntary dismissals appeared to be unilateral decisions with no indication that the defendant gave up anything in return.

[119]Only four of the merits cases involved pro se defendants, and the government won three of the four.

Contrary to our expectations, results in Table 10 make clear that the government fared somewhat worse in violent crime appeals heard on the merits (62.5 percent) compared to nonviolent and unknown crime appeals heard on the merits (69.1 percent). Cases with oral argument or a published opinion also had a slightly lower than average win rate. We also noticed that as compared to cases filed in later years, the 28 direct appeals by the government filed during FY 2011 had higher rates of merits review and success among merits cases.[120] And although more of the cases filed in the Eleventh Circuit were dismissed, the appeals that remained in that circuit were more likely to win than the merits appeals in other circuits.

C. Factors Associated with Merits Review and Success: Regression Analysis

To determine whether these relationships survive more rigorous analysis we investigated them using regression models containing the same variables as in the state appeal models, along with the variable *Filed in docket year 2011*, and a separate variable for federal defenders, in light of the descriptive finding regarding type of defense representation noted above. Table 8 reports the results of models examining the relationship of these factors to the likelihood of merits review; Table 9 reports the results of models examining the likelihood of success among those appeals reviewed on the merits.

Of the factors that simple comparisons suggested might correspond with merits review (i.e., the likelihood of not being voluntarily dismissed), only three factors achieved statistical significance after controlling for other factors.[121] Conviction-only appeals (appeals from judgments of acquittal and new trial orders) significantly correlate with an increased likelihood of merits review (a lower likelihood of voluntary dismissal), as compared to appeals challenging an order dismissing charges or an unknown order. Appeals filed in FY 2011 correspond with a greater likelihood of reaching merits review than appeals filed in later years. Also, appeals in the Eleventh Circuit correlate with a significantly lower likelihood of merits review (a higher likelihood of voluntary dismissal) as compared to appeals in other circuits. Crime type and claim type appear unrelated to the likelihood of merits review.[122] For example, as far as predicting the likelihood of merits review, it made no difference whether the government's appeal challenged the sentence, as measured by either the "appeal from sentence" variable, or the "sentence claim included" variable.

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[120]The overall success rate of appeals filed in FY 2015 is understandably lower than the appeals filed in earlier years, as the 2016 termination set would have included only those appeals filed in FY 2015 that would have terminated by September 30, 2016, and appeals decided on the merits tend to take longer than appeals that are dismissed before reaching the merits. But this does not explain the lower success rate for cases filed in FY 2012, unless a meaningful number took more than four years for the courts to complete and were still pending as of September 30, 2016.

[121]Our models examining merits review omitted the felony/misdemeanor variable, as there were no misdemeanor appeals that reached the merits stage; all four misdemeanor appeals filed were voluntarily dismissed by the government.

[122]While the pseudo R^2 value of 0.11 for both of our models in Table 8 implies that important variation is not explained by our model specifications, we are heartened by our results' robustness across models.

Table 8: Logistic Models, Merits Review, Federal Appeals

	(1)	*(s.e.)*	*(2)*	*(s.e.)*
Appeal received merits review				
Case-Specific Variables				
Appeal of conviction (alone)	2.44*	1.16	2.36*	1.14
Appeal of sentence (included)	0.41	0.40	—	
Crime Types				
Violent crime type (ref.)				
Nonvio. and unknown crime type	0.13	0.63	0.12	0.63
Drug traffic, weapon, or DUI	−0.44	0.64	−0.45	0.64
Claim in Brief				
Insufficient evid. claim included	−0.22	1.25	−0.12	1.28
Sentence claim included	—		0.45	0.42
Court-Specific Factors				
CA11	−0.30*	0.13	−0.31*	0.13
Appeal filed in 2011	1.19**	0.46	1.19*	0.46
Process & Advocacy				
Private attorney	−0.14	0.36	−0.14	0.36
Federal defender	0.31	0.51	0.31	0.51
Pro se	1.05	0.72	1.04	0.71
Constant	−0.88	0.70	−0.89	0.71
N	205		205	
Log likelihood	−124.49		−124.40	
Psuedo R^2	0.11		0.11	

NOTES: We report results from logistic regression models of prosecutor success with appeals initiated by the state. The dependent variable is whether the appeal resulted in a merits review. Robust standard errors (clustered on the circuit level) are in parentheses. *$p < 0.05$; **$p < 0.01$. We estimated the models using the "logit" command in Stata (v.15.1).
SOURCE: Federal Judicial Center, Integrated Database, Federal Appellate Cases: 2011–2016.

If selection for merits review essentially reflects which cases the government files but later chooses not to dismiss, as we suspect, our results suggest that Department of Justice attorneys and the Solicitor General's Office were more likely to dismiss appeals filed in the Eleventh Circuit than appeals filed in other circuits. Explanations for this might include: (1) local U.S. Attorneys in that circuit were more likely than those in other circuits to file appeals that central screening attorneys from DOJ and the SG's office preferred not to pursue; (2) central screening attorneys had more difficulty evaluating all the potential appeals from districts in the Eleventh Circuit in a timely fashion, so that local U.S. Attorneys in the Eleventh Circuit filed a greater proportion of "protective appeals" before the notice of appeal deadline[123] than in other circuits simply to preserve the opportunity to appeal; or (3) central screening attorneys screened appeals to the Eleventh Circuit more rigorously than appeals in other circuits, retaining only those most likely to succeed.

Table 8 also suggests that the government was less likely to drop appeals that challenged a trial court's judgment of acquittal or new trial order following a jury's verdict of

[123]See Fed. R. App. Proc. 4(b)(1)(B) (providing government must file notice within 30 days after the later of (1) the entry of judgment or order being appealed or (2) the filing of a notice of appeal by any defendant).

Table 9: Logistic Models, Appeal Outcome Favored Federal Prosecutor, Merits Appeals

	(1)	*(s.e.)*	*(2)*	*(s.e.)*
Outcome favored prosecutor				
Case-Specific Variables				
Appeal of conviction (alone)	0.73	1.04	—	
Appeal of sentence (included)	—		0.79	0.72
Crime Types				
Violent crime type (ref.)				
Nonvio. and unknown crime type	−0.31	1.11	−0.23	1.13
Drug traffic, weapon, or DUI	−0.40	1.05	−0.23	0.97
Claim in Brief				
Insufficient evid. claim included	—		0.86	1.18
Sentence claim included	0.95	0.63	—	
Court-Specific Factors				
CA11	0.45	0.40	0.44	0.45
Appeal filed in 2011	0.81	0.72	0.79	0.72
Process & Advocacy				
Private attorney	0.42	0.91	0.31	0.87
Federal defender	−1.24**	0.37	−1.30**	0.43
Constant	0.34	0.85	0.43	0.74
N	87		87	
Log likelihood	−47.48		−47.54	
Psuedo R^2	0.14		0.14	

NOTES: We report results from logistic regression models of prosecutor success with appeals initiated by the state. The dependent variable is whether the appellate court outcome favored the prosecutor (success is construed as something less than a full affirmance or dismissal and involved upsetting, to some degree, the lower court decision). Robust standard errors (clustered on the circuit level) are in parentheses. $*p < 0.05$; $**p < 0.01$. We estimated the models using the "logit" command in Stata (v.15.1).
SOURCE: Federal Judicial Center, Integrated Database, Federal Appellate Cases: 2011–2016.

guilt than to drop appeals in which the order appealed dismissed a charge. Assuming that attorneys who screen these appeals did so hoping to maximize the success of the appeal, predicting greater success in these appeals as compared to appeals of judicial rulings that did not upset a jury's verdict of guilt provides support for our initial hypothesis.[124]

Turning to our models of appeals' success, for cases reviewed on the merits, results reported in Table 9 identify only one factor significantly associated with either a lower or higher likelihood of success: whether the defendant appellee was represented by a federal defender as opposed to a CJA panel attorney. Controlling for all other factors, the

[124]In our alternative simultaneous two-stage models, the relationship between the likelihood of merits review and appeals in the Eleventh Circuit did not achieve statistical significance. Also replacing the appeal of conviction alone variable with the insufficient evidence claim variable in the model generated statistical significance for insufficient evidence claims, which is to be expected since such claims are included in most of the appeals coded as appeal from conviction alone. Conservatively interpreting results from both the logistic and bivariate probit analyses suggests greater confidence in the finding of a significant association between the likelihood of merits review and both appeals filed in 2011 and conviction-only challenges, than in the finding of a significant relationship between the likelihood of merits review and appeals filed in the Eleventh Circuit.

Table 10: Success Rates, Federal and State Prosecution Appeals of Right Compared (State Data Include Main Sample Only Without Supp. Data)

	% of Mandatory Appeals with Variable State Fed*		*Of State Mand Appeals w/ Variable, % Favoring P*	*Of Fed Mand Appeals w/ Variable, % Favoring P*	*Of State Mand Appeals w/ Variable, % Reviewed on Merits*	*Of Fed Mand Appeals w/ Variable, % Reviewed on Merits*	*Of State Mand Appeals w/ Variable Reviewed on Merits, % Favoring P*	*Of Fed Mand Appeals w/ Variable Reviewed on Merits, % Favoring P*
N	*52*	*205*	*52*	*205*	*52*	*205*	*40*	*87*
COLR & IAC combined (state only)	100.0	—	40.4	—	76.9	—	52.5	—
Intermediate appellate court (n = 49 for state) (n = 205 for fed)	94.2	100.0	40.8	28.3	77.6	42.4	52.6	66.7
Filed in dkt year 2011	—	13.7	—	57.1	—	67.9	—	84.2
Appeal from								
Conviction (alone)	50.0	10.2	42.3	57.1	84.6	81.0	50.0	70.6
Sentence (included)	30.8	67.3	43.8	28.3	93.8	39.9	46.7	70.9
Dismissal/missing	19.2	22.4	30.0	15.2	30.0	32.6	100.0	46.7
Offense Severity								
Felony	86.5	96.1	42.2	29.4	80.0	43.7	52.8	67.4
Misdemeanor	9.6	2.0	40.0	0.0	80.0	0.0	50.0	—
Severity unknown/missing	3.9	2.0	0.0	0.0	0.0	25.0	—	0.0
Crime Type								
Drug trafficking, weapons, DUI	28.9	35.6	66.7	20.6	100.0	32.9	66.7	62.5
Violent (sex, homic, robb, ass.)	40.4	8.8	23.8	27.8	71.4	44.4	33.3	62.5
Nonviolent and unknown crime	30.8	55.6	37.5	33.3	62.5	48.3	60.0	69.1
Claim Included in Brief								
Insufficient evidence	17.3	7.8	66.7	62.5	100.0	81.3	66.7	76.9
Evidence suppression	19.2	1.0	30.0	0.0	100.0	50.0	30.0	0.0
Sentence	15.4	67.8	62.5	28.8	100.0	40.3	62.5	71.4
All other claims	30.8	20.5	43.8	19.1	87.5	38.1	50.0	50.0
Claims raised unknown	23.1	4.4	8.3	11.1	16.7	22.2	50.0	50.0
Court Factors								
Eleventh Circuit	—	30.2	—	27.4	—	35.5	—	77.3
Advocacy Factors								

Central coordination of appeal	55.8	100.0	37.9	28.3	72.4	42.4	52.4	66.7
Oral argument held	26.9	30.2	57.1	66.1	92.9	100.0	61.5	66.1
Full/pub. judicial opinion	50.0	25.4	57.7	65.4	100.0	100.0	57.7	65.4
Private attorney	19.2	35.6	40.0	31.5	80.0	38.4	50.0	82.1
Public attorney	61.5	—	43.8	—	84.4	—	51.9	—
Defender	—	30.7	—	19.1	—	44.4	—	42.9
Appointed	—	27.8	—	29.8	—	42.1	—	70.8
Pro se	—	2.9	—	50.0	—	66.7	—	75.0
Unknown represent.	19.2	2.9	30.0	50.0	50.0	50.0	60.0	100.0

*For an explanation of the sample for the defense and prosecution appeal studies, see text accompanying notes 93–95.
SOURCES: Survey of State Court Criminal Appeals, 2010; Federal Judicial Center, Integrated Database, Federal Appellate Cases: 2011–2016.

government was systematically more likely to lose its appeal if it faced a federal defender as an adversary than if it faced a CJA panel attorney. This, too, is consistent with our hypothesis and growing research indicating the favorable performance of defense attorneys from federal defender offices as compared to CJA panel attorneys.[125]

Overall, while the picture that emerges from our initial preliminary analyses of federal prosecutor appeals remains hazy, certain basic features become discernable. First, the number of these appeals considered by the federal courts of appeals is very small. The courts resolved nationwide an average of 40 direct appeals per year during our study period. Because more than 57 percent of the appeals filed never reached merits review, 10 out of the 12 circuits actually decided the merits of fewer than a dozen of these appeals over the entire five-year study period. When considered alongside the annual volume of defense appeals, our federal appellate judges encounter a highly skewed set of claims. For example, even though more than 64 percent of the government appeals heard on the merits challenged the sentence, the total number is only a tiny fraction of the number of sentencing appeals by defendants heard on the merits.

Second, the process of choosing which appeals to advance persists long after filing in many of these appeals—more than half those appeals filed never reached merits review because they were voluntarily dismissed by the government. The data also suggest that a greater proportion of appeals challenging judgments of acquittal and new trial orders survived this screening compared to appeals from sentence, dismissal, or unknown orders. Also, a smaller proportion of appeals filed in the Eleventh Circuit survived this screening process.

Third, among those appeals that were not voluntarily dismissed, the government won two of every three—good odds, perhaps attributable, at least in part, to the careful screening of which appeals to advance. Notably, the only factor found to make a statistically significant difference in the government's chances of winning an appeal reviewed on its merits was whether the attorney representing the defendant appellee was a federal defender.

VII. Comparing Appeals by State and Federal Prosecutors

For perhaps the first time, we have empirical information about state and federal prosecutor appeals that reveals that they differ in several important ways, some predictable, others less so. We begin this section with some observations about our descriptive findings, then turn to the regression results.

Table 10 presents key descriptive information comparing the 52 mandatory appeals by state prosecutors in our random sample of state appeals (excluding the supplemental

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[125]In our alternative simultaneous two-stage models, type of counsel did not achieve statistical significance with respect to likelihood of success, but the "year filed 2011" and "appeal from conviction alone" variables did achieve significance, as they did in our model for decisions on the merits. Interpreting these findings conservatively, this suggests that the statistical support for a possible relation between an appellee's counsel and success may not be as strong as the relationships that were confirmed by both logistic and bivariate probit analyses.

cases)[126] with the 205 federal mandatory appeals. The overall win rate of federal prosecutors is lower than state prosecutors when comparing appeals filed (28.3 percent vs. 40.8 percent), but when comparing appeals reviewed on the merits, federal prosecutors won 66.7 percent of their appeals compared to state prosecutors, who won only 52.6 percent of their appeals. These differences may be related in part to the routine practice in federal court of filing then voluntarily dismissing appeals, a practice that did not emerge in state courts. Compared to federal prosecutors, who withdrew more than half the appeals they filed, state prosecutors withdrew less than 5 percent of all appeals filed, and about 15 percent of mandatory appeals filed.

Other interesting contrasts in the descriptive findings include different rates of success among merits appeals defended by retained counsel. In federal appeals, retained counsel lost more than 82 percent of the time, while in state mandatory appeals retained counsel had a 50-50 chance of winning. Among these mandatory appeals resolved on the merits, oral argument boosted the rate of success for state prosecutors, but slightly depressed that rate for federal prosecutors. One possible explanation for the unexpected association of no oral argument with greater success by federal prosecutor appellants may be that some of these appeals challenged rulings that were clearly wrong under existing precedent, and at least some circuits tend not to grant oral argument in these circumstances.[127] The rates of success among merits appeals for different types of orders appealed also varied—state prosecutors had their best chance with appeals of dismissal and unknown orders, with below average rates of success for both conviction-only and sentence-included appeals. By contrast, federal prosecutors did better with conviction-only and sentence appeals than they did when appealing from dismissal and unknown orders. There are differences, too, in the success rates for crime types. The higher success rate among merits cases for state appeals in nonviolent cases and drug trafficking, weapons, and DUI cases, as compared to violent crime cases, did not emerge in the federal appeals.

But there is also much in common in these two systems, looking at both the descriptive and regression results. Prosecutors in both systems challenged similar rulings and were successful more often than not if an appeal was reviewed on its merits. In both state and federal courts, mandatory appeals contesting insufficiency findings generated higher than average rates of success. In both systems, factors that seemed important to success in descriptive comparisons turned out not to be significantly associated with the likelihood of success of merits appeals once other variables were taken into account.

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[126]See text accompanying note 72.

[127]The language of Federal Rule of Appellate Procedure 34 accommodates this practice. See Fed R. App. P. 34(a)(2)(C) (providing that one of the reasons a panel may deem oral argument unnecessary is that "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument). See also Cleveland & Wisotsky, supra note 99, at 132 (quoting one circuit's rule stating that it is usual to find argument unnecessary when the "outcome of the appeal is clearly controlled by a decision of the Supreme Court or this court").

VIII. Conclusion

For decades, state and federal prosecutors have appealed sentences, new trial and dismissal orders, judgments of acquittal after jury verdicts of guilt, and intermediate appellate court decisions favoring defendants. Yet few researchers have attempted to test empirically what actually happens during this litigation or consider why. Using newly released nationwide data, the statistical analyses we present in this article provide a unique glimpse into the real world of prosecutor appeals and a baseline for future research. Informed by criminal appellate law, policy, and practice, it is the first research to examine both state and federal prosecutor appeals nationwide, and the first to investigate factors associated with merits review and criminal appeal success.

Comparing appeals by state prosecutors and defendants, we found that prosecutors enjoyed a rate of success for all appeals that was about four times that experienced by defendants (roughly 40 percent compared to 10 percent). Oral argument correlated with greater success for state prosecutor appellants, but outcome did not systematically vary with several factors, including whether review was mandatory or discretionary, whether the appellate bench was selected by election rather than appointment, and the type of crime, claim, or defense counsel. State intermediate appellate courts considered a drastically skewed docket; prosecutors filed only 2 percent of direct criminal appeals heard on the merits. By contrast, prosecutors filed 41 percent of all discretionary criminal appeals considered on the merits by state high courts (30 percent of discretionary and mandatory appeals combined). In federal courts, prosecutors voluntarily dismissed more than half the appeals they filed, but were significantly less likely to withdraw appeals from judgments of acquittal and new trial orders after the verdict than appeals challenging other orders. Among appeals decided on the merits, controlling for other factors, federal prosecutors were significantly more likely to lose when facing a federal defender as an adversary compared to a CJA panel attorney.

Our findings shed light on several policy questions. For example, policymakers in states that bar prosecutors from appealing orders that other states' prosecutors successfully appeal might use these findings as support for expanding the government's opportunities to appeal. The high rates of success for prosecutors' challenges to judgments of acquittal after a guilty verdict might encourage trial judges who are interested in avoiding review to resolve more insufficiency claims before the verdict, while at the same time encouraging judges and policymakers interested in ensuring review of trial court rulings to favor efforts to postpone judgments of acquittal until after verdict. That we found no statistically significant advantage for prosecutor appellants in state courts where appeals were centrally coordinated suggests that state policymakers considering new processes for centrally screening prosecutor appeals would be prudent to investigate more deeply which types of coordination and screening are most effective. On the federal side, the findings provide additional support to arguments by indigent defense reformers who favor expanding federal defender offices rather than the use of CJA attorneys for appeals. Also, the Department of Justice might consider why the percentage of appeals filed only to be later withdrawn is so much larger in certain circuits, and whether this particular

expenditure of prosecutorial and judicial resources could be reduced with targeted attention.

Several findings raise intriguing questions for further research, particularly as additional data become available. We posit a handful of those questions here, in the hope that empirical investigation will continue to inform policy choices about the legal regulation of appeals by the prosecution. At the most basic level, state prosecutors have greater success in their appeals than state defendants do, and, considering only those appeals reviewed on the merits, federal prosecutors win more of their appeals than state prosecutors do. Our data imply several explanations for these differences that could be examined by future research, including the influence of different choices concerning which rulings to appeal. Our state data do not include interlocutory or post-conviction appeals by prosecutors—Do the factors associated with merits and success, and the rates of success in such cases, resemble what we found for direct appeals? And what proportion of these prosecution appeals are primarily focused on correcting trial court errors in particular cases, as opposed to making new law (e.g., interpreting new statutes or addressing issue of first impression), or resolving lower court conflicts?

Variations in the mix of defense and prosecution appeals considered by different courts raise additional questions. While markedly asymmetric access to appellate review is evident in federal and state intermediate courts of appeal hearing first appeals of right in criminal cases, the picture is quite different in state high courts. Additional research could investigate whether the behavior of litigants, trial judges, or reviewing courts differs systematically between jurisdictions with more symmetric review and jurisdictions with less.

A number of advocacy-related questions emerged as well. What role do and should victims play in determining whether the government pursues an appeal? Why did oral argument appear to benefit the appellant in state court, both prosecution and defense, but not federal prosecutors appealing to the U.S. Courts of Appeals? The presence of retained counsel for the defendant appellee had surprisingly little correlation to appellate success for prosecutors in state and federal courts, but the presence of a federal defender was significantly related to a higher likelihood the United States would lose a criminal appeal. If new data allowed for a comparison of state appellate defenders and other appointed counsel, would it show a similar relationship? And what explains why centralized coordination or staffing of state prosecutor appeals made no significant difference in either merits review or success: Which are the most effective state coordination processes? Additional data, including a larger number of appeals, may allow both more refined and more statistically powerful analyses that may help detect correlations undetectable with existing datasets, and insights into how these appeals may evolve over time.

Even without further additional research, however, direct appellate review of claims raised by the prosecution, a critical piece of our nation's criminal justice system, is no longer a matter of abject guesswork. The findings reported here help provide courts, litigants, lawmakers, and scholars with a more complete understanding of the role of judicial review in the administration of criminal sanctions.

APPENDIX

Table A1: Success Rates, State Defense and Prosecution Appeals Compared, by Key Variables and Type of Appeal

			Mandatory Appeals		*Discretionary Appeals*					
	% of Total Sample with Variable P*	*D*	*Mandatory Appeals with Variable % w/ Decision Favoring P*	*Mandatory Appeals w/ Variable, % w/ Decision Favoring D*	*Disc Appeals w/ Variable, % w/ Decision Favoring P*	*COLR Disc. Appeals with Variable % w/ Decision Favoring P*	*COLR Disc. Appeals w/ Variable, % w/ Decision Favoring D*	*Disc. Appeals Reviewed on Merits w/ Variable, % w/ Decision Favoring P*	*COLR Disc. Reviewed on Merits with Variable % w/ Decision Favoring P*	*COLR Disc. Reviewed on Merits with Variable % w/ Decision Favoring D*
N	*154*	*3,505*	*52*	*2,080*	*102*	*95*	*1,425*	*48*	*43*	*65*
Court of last resort	63.6	45.1	33.3		35.8			79.1		
Intermediate appellate court	36.4	55.0	40.8		57.1			80.0		
Appeal from										
Conviction (alone)	53.9	34.8	42.3	12.3	43.9	42.6	11.3	83.3	82.1	58.5
Sentence (included)	24.7	31.0	43.8	20.5	31.8	26.3	7.0	58.3	55.6	77.8
Unknown/missing	21.4	34.2	30.0	1.6	26.1	27.3	0.2	100.0	100.0	33.3
Offense Severity										
Felony	84.4	100	42.2	14.9	38.8	38.3	2.8	80.5	81.6	61.5
Misdemeanor	11.0	—	40.0	—	33.3	27.3	—	66.7	60.0	—
Severity unknown/missing	4.6	—	0.0	—	20.0	0.0	—	100.0	—	—
Crime Type										
Drug trafficking, weapons, DUI	33.8	16.4	66.7	16.6	51.4	45.6	6.1	86.4	83.3	66.7
Violent (sex, homic, robb, assau.)	38.3	50.4	23.8	14.1	31.6	32.4	3.9	70.6	75.0	64.9
Nonviolent and unknown crime	27.9	31.4	37.5	16.0	25.9	28.0	0.9	77.8	77.8	54.6
Claim Included in Brief										
Insufficient evidence	9.7	18.2	66.7	16.9	66.7	66.7	32.4	100.0	100.0	73.3
Evidence suppression	15.6	8.6	30.0	15.8	71.4	69.2	31.8	83.3	81.8	36.8
Sentence	7.1	18.3	62.5	21.7	66.7	100.0	10.0	66.7	100.0	50.0
All other claims	31.2	16.3	43.8	14.4	40.6	38.7	39.5	61.9	60.0	65.2
Claims raised unknown	39.6	47.2	8.3	4.0	20.4	17.8	0.4	100.0	100.0	71.4
Court Factors										
Elected judges	59.7	41.7	40.9	15.3	38.6	37.9	3.6	75.0	73.5	72.0

CA state	7.8	25.2	0.0	19.3	54.6	54.6	0.4	100.0	100.0	33.3
LA state	9.7	2.3	0.0	32.5	46.7	46.7	0.0	100.0	100.0	—
OH state	16.9	7.2	33.3	25.6	5.9	6.3	1.4	25.0	25.0	100.0
Advocacy Factors										
State coordinates appeal	54.6	—	37.9	—	43.6	40.0	—	85.7	83.3	—
Oral argument held	29.9	12.6	57.1	24.4	68.8	68.8	52.4	75.9	75.9	52.4
Full judicial opinion	40.9	34.6	57.7	21.5	73.0	73.5	61.1	73.0	73.5	61.1
Private attorney	15.6	5.6	40.0	18.8	42.9	36.7	3.9	100.0	100.0	28.6
Public attorney	55.2	52.0	43.8	16.9	39.6	37.3	9.8	77.8	76.0	72.5
Pro se	2.0	7.8	—	2.9	0.0	0.0	0.0	0.0	0.0	0.0
Unknown represent.	27.3	34.7	30.0	7.1	34.4	36.7	1.0	84.6	91.7	52.9

*For an explanation of the sample for the defense and prosecution appeal studies, see Sections IV.A.1, IV.A.2, and VI.A.1.

Table A2: Success Rates, State Defense and Prosecution Appeals Compared, by Key Variables and Type of Appeal (w/out Supplemental Data)

			Mandatory Appeals		*Discretionary Appeals*					
	% of Total Sample with Variable P D*		*Mandatory Appeals with Variable % w/ Decision Favoring P*	*Mandatory Appeals w/ Variable, % w/ Decision Favoring D*	*Disc Appeals w/ Variable, % w/ Decision Favoring P*	*COLR Disc. Appeals with Variable, % w/ Decision Favoring P*	*COLR Disc. Appeals w/ Variable, % w/ Decision Favoring D*	*Disc. Appeals Reviewed on Merits w/ Variable, % w/ Decision Favoring P*	*COLR Disc. Reviewed on Merits with Variable, % w/ Decision Favoring P*	*COLR Disc. Reviewed on Merits with Variable, % w/ Decision Favoring D*
N	*133*	*3,505*	*52*	*2,080*	*81*	*74*	*1,153*	*41*	*36*	*52*
Court of last resort	57.9	45.1	33.3		39.2			80.6		
Intermediate appellate court	42.1	55.0	40.8		57.1			80.0		
Appeal from										
Conviction (alone)	51.8	34.8	42.3	12.3	46.5	45.0	10.7	83.3	81.8	55.9
Sentence (included)	27.1	31.0	43.8	20.5	35.0	29.4	6.8	63.6	62.5	73.3
Unknown/missing	21.1	34.2	30.0	1.6	33.3	35.3	0.3	100.0	100.0	66.7
Offense Severity										
Felony	84.2	100	42.2	14.9	43.3	42.9	2.8	80.6	81.8	61.5
Misdemeanor	10.5	—	40.0	—	33.3	25.0	—	75.0	66.7	—
Severity unknown/missing	5.3	—	0.0	—	20.0	0.0	—	100.0	—	—
Crime Type										
Drug trafficking, weapons, DUI	31.6	16.4	66.7	16.6	55.6	35.3	6.2	88.2	84.6	72.7
Violent (sex, homic, robb, assau.)	39.9	50.4	23.8	14.1	34.4	35.5	4.2	68.8	73.3	60.0
Nonviolent and unknown crime	28.6	31.4	37.5	16.0	31.8	35.0	1.0	87.5	87.5	60.0
Claim Included in Brief										
Insufficient evidence	10.5	18.2	66.7	16.9	60.0	60.0	25.9	100.0	100.0	63.6
Evidence suppression	15.8	8.6	30.0	15.8	72.7	70.0	27.8	88.9	87.5	33.3
Sentence	8.3	18.3	62.5	21.7	66.7	100.0	11.8	66.7	100.0	50.0
All other claims	30.1	16.3	43.8	14.4	41.7	39.1	39.4	62.5	60.0	65.0
Claims raised unknown	37.6	47.2	8.3	4.0	26.3	23.5	0.5	100.0	100.0	100.0
Court Factors										
Elected judges	57.9	41.7	40.9	15.3	40.0	39.2	3.6	75.9	74.1	75.0
CA state	7.5	25.2	0.0	19.3	66.7	66.7	0.4	100.0	100.0	40.0

LA state	8.3	2.3	—	32.5	45.5	45.5	0.0	100.0	100.0	—
OH state	17.3	7.2	33.3	25.6	7.1	7.7	1.8	25.0	25.0	100.0
Advocacy Factors										
State coordinates appeal	54.9	—	37.9	—	50.0	46.2	—	88.0	85.7	—
Oral argument held	30.8	12.6	57.1	24.4	66.7	66.7	51.4	75.0	75.0	51.4
Full judicial opinion	42.9	34.6	57.7	21.5	74.2	75.0	59.1	74.2	75.0	59.1
Private attorney	16.5	5.6	40.0	18.8	41.7	33.3	2.6	100.0	100.0	20.0
Public attorney	54.9	52.0	43.8	16.9	43.9	41.0	10.0	78.3	76.2	68.6
Pro se	1.5	7.8	—	2.9	0.0	0.0	0.0	0.0	0.0	—

*For an explanation of the sample for the defense and prosecution appeal studies, see Sections IV.A.1,, IV.A.2, and VI.A.1.

Table A3: State Defense and Prosecution Appeals Compared, by Key Variables

			Mandatory Appeals		*Discretionary Appeals*					
	*% of Sample with Variable**		*% Mand. Appeals w/ Variable*	*% Mand. Appeals w/ Variable*	*% Disc. Appeals w/ Variable*	*% Disc COLR Appeals w/ Variable*	*% Disc. COLR Appeals w/ Variable*	*% Disc. Appeals Reviewed on Merits w/ Variable*	*% Disc COLR Appeals Reviewed on Merits w/ Variable*	*% Disc. COLR Appeals Reviewed on Merits with Variable*
	P	*D*	*(P Appellant)*	*(D Appellant)*	*(P Appellant)*	*(P Appellant)*	*(D Appellant)*	*(P Appellant)*	*(P Appellant)*	*(D Appellant)*
N	*154*	*3,505*	*52*	*2,080*	*102*	*95*	*1,425*	*48*	*43*	*65*
Reviewed on merits	57.1	55.5	76.9	90.3	47.1	45.3	4.6	—	—	—
Decision favored appellant	38.3	10.0	40.4	14.9	37.3	35.8	2.8	79.2	79.1	61.5
Court of last resort	63.6		5.8		93.1	—		89.6	—	
Intermediate appellate court	36.4		94.2		6.9	—		10.4	—	
Appeal from										
Conviction (alone)	53.9	34.8	50.0	48.4	55.9	56.8	15.0	62.5	65.1	63.1
Sentence (included)	24.7	31.0	30.8	42.6	21.6	20.0	14.0	25.0	20.9	27.7
Unknown/missing	21.4	34.2	19.2	9.0	22.6	23.2	71.1	12.5	14.0	9.2
Offense Severity										
Felony	84.4	100.0	86.5	100.0	83.3	85.3	100.0	85.4	88.4	100.0
Misdemeanor	11.0	—	9.6	—	11.8	11.6	—	12.5	11.6	—
Severity unknown/missing	4.6	—	3.9	—	4.9	3.2	—	2.1	—	—
Crime Type										
Drug traffick., weapons, DUI	33.8	11.2	28.9	13.6	36.3	34.7	7.6	45.8	41.9	23.1
Violent (sex, homi, rob, assa.)	38.3	50.4	40.4	55.6	37.3	39.0	43.1	35.4	37.2	56.9
Nonvio. and unknown crime	27.9	33.6	30.8	30.8	26.5	26.3	49.3	18.8	20.9	16.9
Claim Included in Brief										
Insufficient evidence	9.7	18.1	17.3	28.9	5.9	6.3	2.4	8.3	9.3	23.1
Evidence suppression	15.6	8.6	19.2	13.4	13.7	13.7	1.5	25.0	25.6	29.2
Sentence	7.1	18.3	15.4	29.9	2.9	2.1	1.4	6.3	4.7	6.2
All other claims	31.2		30.8	25.7	31.4	32.6	2.7	43.8	46.5	35.4
Claims raised unknown	39.6	47.1	23.1	15.6	48.0	47.4	93.2	20.8	18.6	10.8
Court Factors										
Elected judges	59.7	41.7	42.3	46.4	68.6	69.5	34.7	75.0	79.1	38.5
CA state	7.8	25.2	1.9	15.0	10.8	11.6	40.1	12.5	14.0	9.3

LA state	9.7	2.3	—	1.9	14.7	15.8	2.7	14.6	16.3	0.0
OH state	16.9	7.2	17.3	8.7	16.7	16.8	5.0	8.3	9.3	1.5
Advocacy Factors										
State coordinates appeal	54.6	—	55.8	—	53.9	52.6	—	58.3	55.8	—
Oral argument held	29.9	12.6	26.9	19.1	31.4	33.7	2.9	60.4	67.4	64.6
Full judicial opinion	40.9	34.6	50.0	55.7	36.3	35.8	3.8	77.1	79.1	83.1
Private attorney	15.6	5.6	19.2	6.9	13.7	11.6	3.6	12.5	9.3	10.8
Public attorney	55.2	52.0	61.5	73.3	52.0	53.7	63.6	56.3	58.1	61.5
Pro se	2.0	7.8	—	4.9	2.9	3.2	11.9	4.2	4.7	1.5
Unknown represent.	27.3	34.7	19.2	14.9	31.4	31.6	63.6	27.1	27.9	26.2

*For an explanation of the sample for the defense and prosecution appeal studies, see Sections IV.A.1, IV.A.2, and VI.A.1.

Table A4: Central Coordination of Prosecutor Appeals, by State

State	*Court Level*	*Coordination*
AL	IAC	Y
AZ	COLR	Y
	IAC	Y
CA	COLR	Y
	IAC	
FL	COLR	Y
	IAC	Y
HI	COLR	
	IAC	
IA	COLR	Y
	IAC	Y
IL	COLR	Y
	IAC	
IN	COLR	Y
KS	IAC	
KY	COLR	Y
LA	COLR	
MA	IAC	
MI	COLR	Y
	IAC	Y
MN	COLR	Y
MO	COLR	Y
NC	IAC	Y
ND	COLR	Y
NE	IAC	Y
NJ	IAC	Y
NM	COLR	Y
NY	COLR	
NY	IAC	
OH	COLR	
	IAC	
OR	COLR	Y
	IAC	Y
PA	COLR	
TX	COLR	
	IAC	
VT	COLR	Y
WA	COLR	Y
	IAC	Y
WI	COLR	Y

SOURCES: Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States,* 109 MICH. L. REV. 519, 560–61, 560 nn. 226–37 (2011)); state prosecutor association websites; email correspondence; telephone calls.