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## **Dispatch and Delay: Post Conviction Relief Act Litigation in Non-Capital Cases**

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# Dispatch and Delay: Post Conviction Relief Act Litigation in Non-Capital Cases

*Donald J. Harris*

*Kim Nieves*

*Thomas M. Place\**

## I. INTRODUCTION

State court post conviction delays have been the object of much dismay, but little study. Indeed, one entire stage of these proceedings—trial court collateral review—has not been quantitatively examined at all. Few question the importance of a timely and final adjudication in criminal cases. For the innocent or illegally sentenced defendant, delays exacerbate the miscarriage of justice. In the absence of a legitimate claim, successive and lengthy reviews of a conviction or sentence forestall closure for both the victim and the community.

This article reports on decision times in trial court proceedings for collateral relief, and is the first study of its kind. It employs a range of empirical methods for systematically measuring litigation times, and presents a descriptive analysis of the factors accelerating or impeding disposition. The article is divided into four sections. The first section summarizes the legal and historical context of the Post Conviction Relief Act (PCRA), the statutory vehicle for pursuing collateral relief in Pennsylvania. The second section describes our research methodologies and is followed by the results of the statistical and qualitative analysis. The final section is a summary of findings and recommendations.

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## II. THE LAW OF PCRA

States began adopting post conviction procedures in the 1950's in response to the United States Supreme Court's decision in *Young v. Ragen*.<sup>1</sup> In *Young*, the Court held that the doctrine of exhaustion of state court remedies under federal *habeas corpus* "presupposes that some adequate state remedy exists"<sup>2</sup> by which state prisoners "may raise claims of denial of federal rights."<sup>3</sup> Initially, some states judicially construed their writ of *habeas corpus*<sup>4</sup> as a means of permitting defendants to raise federal constitutional challenges to their convictions, while others expanded the writ of *coram nobis*.<sup>5</sup> A small number of states enacted post conviction procedures that were either influenced by the ABA Standards Relating to Post Conviction Remedies<sup>6</sup> or were modeled after the Uniform Post Conviction Procedure Act.<sup>7</sup> Others adopted post conviction procedures by rule of court.<sup>8</sup> In 1965, the Supreme Court in *Case v. State of Nebraska*<sup>9</sup> stated that because of the great variations in the scope and availability of such remedies, state post conviction remedies were "entirely inadequate."<sup>10</sup> The Court urged the states to adopt comprehensive statutes enabling prisoners to test their federal constitutional claims in the state courts and thereby reduce the conflict between federal and state

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1. 337 U.S. 235 (1949).

2. *Id.* at 239.

3. *Id.*

4. See e.g. *Rice v. Davis*, 366 S.W.2d 153 (Ky. 1963); *Ex parte Bush*, 313 S.W.2d 287 (1958); *Huffman v. Alexander*, 251 P.2d 87 (1952); *Sewell v. Lainson*, 57 N.W.2d 556 (1953). *Habeas Corpus* is a writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment is not illegal. BLACK'S LAW DICTIONARY 715 (7th ed. 1999).

5. See e.g. *People v. Monahan*, 217 N.E.2d 664 (1966); *In re Chapman*, 273 P.2d 817 (1954); *State ex rel. McManamon v. Blackford Circuit Court*, 95 N.E.2d 556 (1950). See also *Richard B. Amandes, Coram Nobis - Panacea or Carcinoma*, 7 HASTINGS L.J. 48 (1955); *Edwin W. Briggs, Coram Nobis*, 17 MONT. L. REV. 160 (1956). *Coram nobis* is a writ of error directed to a court for review of its own judgment and predicated on alleged errors of fact. BLACK'S LAW DICTIONARY 338 (7th ed. 1999).

6. See STANDARDS RELATING TO POST-CONVICTION REMEDIES (ABA 1967).

7. See UNIFORM POST-CONVICTION PROCEDURES ACT (1955); see e.g. MD. ANN. CODE, art. 27 § 645A-645J; MINN. S.A. § 590.01-590.06 (1967); MONT. C.A. 46-21-101 to 46-21-203; ORE. REV. STAT. § 138.510-138.680 (1968). See also Meador, *Accommodating State Criminal Procedure and Federal Post Conviction Review*, 50 A.B.A.J. 928, 929-30 (1964).

8. ALASKA SUP. CT. RULE 35(b); DEL. SUPER. CT. CRIM. PROC. RULE 35, Del. C. Ann.; FLA. RULES CRIM. PROC. 1, F.S.A. ch. 924 Appendix; KY. RULES CRIM. PROC. 11.42; MO. SUP. CT. RULE 27.26, V.A.M.R.; N.J. CRIM. PROC. RULES OF SUPER. AND COUNTY CTS., Rule 3:10A-2.

9. 381 U.S. 336 (1965).

10. *Id.* at 338.

courts. More specifically, Justice Brennan in a concurring opinion called for the adoption of state post conviction procedures that were "swift. . . simple and easily invoked,"<sup>11</sup> sufficiently "comprehensive to embrace all federal constitutional claims"<sup>12</sup> and "eschew rigid and technical doctrines of forfeiture, waiver or default."<sup>13</sup> At the time *Case* was decided, collateral relief in Pennsylvania was limited to the writ of *habeas corpus*<sup>14</sup> and, to a lesser extent, the writ of *coram nobis*.<sup>15</sup> In response to significant increases in the number of post conviction challenges and the lack of a uniform process to hear and decide such claims, the Pennsylvania Supreme Court in 1965 called for legislation establishing a "process for hearing and determining alleged violations of federal constitutional guarantees."<sup>16</sup> In 1966, the Legislature enacted the Post Conviction Hearing Act (PCHA).<sup>17</sup> The PCHA provided a comprehensive procedure to hear and decide challenges to convictions obtained and sentences imposed "without due process of law."<sup>18</sup>

In 1988, the PCHA was modified in part, repealed in part and renamed the Post Conviction Relief Act.<sup>19</sup> The PCRA narrowed the grounds upon which post conviction relief could be obtained by limiting relief to "persons convicted of crimes they did not commit and serving illegal sentences."<sup>20</sup> The PCRA was amended in 1995<sup>21</sup>

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11. *Id.* at 346-347.

12. *Id.* at 347.

13. *Id.*

14. See PA. CONST. art. I, § 14. For a discussion of common law habeas corpus in Pennsylvania, see *Commonwealth ex rel. Stevens v. Myers*, 213 A.2d 613, 619-23 (Pa. 1965).

15. See *e.g.* *Commonwealth v. Orsino*, 178 A.2d 843, 846 (Pa. 1962) (stating purpose of writ of *coram nobis* is to correct errors of fact only); *Commonwealth v. Fay*, 439 A.2d 1227, 1228-29 (Pa. Super. Ct. 1982) (explaining expansion of scope of writ of *coram nobis* in Pennsylvania to include matters of law not previously before court); *Commonwealth v. Ditmore*, 363 A.2d 1253, 1256 (Pa. Super. Ct. 1976) (emphasizing traditional limited scope of writ of *coram nobis*).

16. *Myers*, 213 A.2d at 619-20.

17. See Pa. Laws 1580, 1580-84 (codified at 19 PA. CONS. STAT. §§ 1180-1 to 1180-12, and recodified as amended at 42 PA. CONS. STAT. §§ 9541-9551 (1982)). See Elizabeth L. Green, Student Author, *Habeas Corpus and the 1966 Post Conviction Hearing Act: Major Pennsylvania Remedies in Criminal Cases*, 39 TEMPLE L.Q. 188, 203-06 (1966) (summarizing changes in habeas corpus law under PCHA).

18. 42 PA. CONS. STAT. § 9542 (repealed 1988).

19. See 1988 Pa. Laws 336; 42 PA. CONS. STAT. §§ 9541-46 (West 1988).

20. 42 PA. CONS. STAT. § 9542.

21. See 1995 Pa. Laws 1118 (became effective January 16, 1996). The amendments also established the Capital Unitary Review Act, which replaced post appeal collateral review in capital cases. On August 11, 1997, the Pennsylvania Supreme Court permanently suspended Sections 9570 to 9579 of the Capital Unitary Review Act pursuant to its authority under Article V, Section 10 of the Pennsylvania Constitution. The Court also suspended Section 9545(c)(3), relating to limitations periods where a stay of execution is granted, Section 9545(d)(2), relating to discovery, and the 1995 and 1997 amendments to

to require, subject to several narrow exceptions, that a post conviction petition must be filed within one year of the date the defendant's judgment becomes final.<sup>22</sup> In 2002, the Legislature further amended the PCRA by authorizing post conviction DNA testing.<sup>23</sup>

The PCRA establishes a procedure for defendants to collaterally attack their conviction or sentence. It is not a substitute for the appeal process.<sup>24</sup> Rather, the PCRA permits a defendant to raise specific challenges to his or her conviction that were not considered by either the trial or appellate court. A PCRA petition may only be filed after a defendant has waived or exhausted his direct appeal rights.<sup>25</sup>

Unlike the PCHA, the PCRA provides that it "shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies. . . including *habeas corpus*."<sup>26</sup> The PCRA has been broadly interpreted as creating a unified statutory framework for reviewing claims that were traditionally cognizable in habeas corpus thereby avoiding a bifurcated system in which some claims are considered outside the framework of the PCRA.<sup>27</sup> Where a defendant's post conviction claims are "cognizable under the PCRA, the common law and statutory remedies now subsumed by the PCRA are not separately available to the defen-

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Section 9546(a) of the PCRA concerning review of orders in death penalty cases. *In Re: Suspension of the Capital Unitary Review Act and Related Sections of the Act of 1995-32 (SSI)*, 722 A.2d 676, 678-79 (Pa. 1999). In *Commonwealth v. Sanders*, 743 A.2d 970 (Pa. Super. Ct. 1999) the Superior Court rejected challenges to the validity of the 1995 Amendments based on allegations that the legislation exceeded the scope of the Governor's proclamation of designated subjects to be addressed during the 1995 Special Session. In doing so, the court reasoned that the legislature's consideration of the PCRA statute was proper in light of the Governor's proclamation seeking revisions of the criminal statutes of the Commonwealth.

22. 42 PA. CONS. STAT. § 9545(b). In 1997, the Legislature amended the custody section of the Act precluding relief unless the defendant is in custody at the time relief is granted. Act of June 25, 1997, P.L. 324, No. 33, 42 PA. CONS. STAT. § 9543(a)(1).

23. 42 PA. CONS. STAT. § 9543.1 (2002).

24. Comment, PA. R. CRIM. P. 901.

25. *Commonwealth v. Fralic*, 625 A.2d 1249, 1252, n.1 (Pa. Super. Ct. 1993).

26. 42 PA. CONS. STAT. § 9542. *Commonwealth v. Ahlborn*, 699 A.2d 718, 721 (1997); *Commonwealth v. Chester*, 733 A.2d 1242, 1250-51 (Pa. 1999).

27. See e.g. *Commonwealth v. Lantzy*, 736 A.2d 564 (Pa. 1995) (ineffectiveness of counsel in failing to protect defendant's right to direct appeal); *Commonwealth v. Chester*, 733 A.2d 1242 (Pa. 1999) (claims arising during penalty phase of capital trial cognizable under PCRA); *Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. Ct. 2001) (claim that counsel was ineffective for failing to assert rights under the Rules of Criminal Procedure presents a cognizable claim under the PCRA).

dant.”<sup>28</sup> The writ of *habeas corpus* continues to exist “only in cases where there is no remedy under the PCRA.”<sup>29</sup>

Relief under the PCRA is not available unless the defendant is in custody at the time the petition is filed and at the time relief is granted.<sup>30</sup> Unlike the PCHA, the PCRA does not “provide relief from collateral consequences of a criminal conviction.”<sup>31</sup>

To be eligible for relief under the PCRA, a defendant must establish by preponderance of the evidence that his/her conviction or sentence resulted from one or more of the PCRA's specifically enumerated errors or defects. Under the PCRA, a defendant may obtain relief if the conviction or sentence resulted from a violation of the Pennsylvania Constitution or the Constitution or laws of the United States where the error “undermined the truth determining process.”<sup>32</sup> Cognizable constitutional claims include the prosecution's failure to disclose exculpatory evidence,<sup>33</sup> violations of *Batson v. Kentucky*,<sup>34</sup> failure to prove the elements of the offense beyond a reasonable doubt<sup>35</sup> and improper remarks by prosecutors during closing argument.<sup>36</sup>

Ineffective assistance of counsel is a basis for relief under the PCRA where counsel's act or omission “so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.”<sup>37</sup> Ineffectiveness claims raised in a post conviction proceeding are governed by the same standard that applies when such a claim is presented on direct appeal.<sup>38</sup> To be eligible for relief, a defendant must establish both inadequate performance by counsel and prejudice. In addition to trial errors,

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28. *Commonwealth v. Yarris*, 731 A.2d 581, 586 (Pa. 1999).

29. *Commonwealth v. Peterkin*, 722 A.2d 638, 640 (Pa. 1998).

30. 42 PA. CONS. STAT. § 9543(a)(1); *Commonwealth v. Ahlborn*, 683 A.2d 632 (Pa. Super. 1991) (en banc), *aff'd*, 699 A.2d 718 (Pa. 1997). Relief under the PCRA is not available unless the defendant is in custody at the time the petition is filed and when relief is granted.

31. 42 PA. CONS. STAT. § 9542.

32. § 9543(a)(2)(1).

33. *See e.g.*, *Commonwealth v. Galloway*, 640 A.2d 454 (Pa. Super. Ct. 1994).

34. 476 U.S. 79 (1986) (racial discrimination in the exercise of peremptory challenges). *See e.g.*, *Commonwealth v. Basemore*, 744 A.2d 717, 733 (Pa. 2000).

35. *See e.g.* *Commonwealth v. Hanes*, 579 A.2d 920, 924 (Pa. Super. Ct. 1990); *Commonwealth v. Perlman*, 572 A.2d 2 (Pa. Super. Ct. 1990).

36. *See e.g.* *Commonwealth v. Lassen*, 659 A.2d 999 1011 (Pa. Super. Ct. 1995).

37. 42 PA. CONS. STAT. § 9543(a)(2)(ii).

38. *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999) (rejecting heightened standard for ineffectiveness in PCRA proceeding and concluding that the language in the PCRA is the equivalent to the prejudice requirement applied by the federal courts to both direct and collateral review under *Strickland v. Washington*, 466 U.S. 668 (1984)).

the Pennsylvania Supreme Court has construed the PCRA to provide relief where counsel is ineffective at the penalty phase of a capital case,<sup>39</sup> fails to protect the defendant's right to direct appeal<sup>40</sup> or provides ineffective assistance of counsel in a post conviction proceeding.<sup>41</sup> A defendant may seek relief under the Act where his/her plea of guilty was unlawfully induced,<sup>42</sup> where the Commonwealth obstructed the defendant's right of appeal,<sup>43</sup> and on the basis of newly discovered evidence that has "subsequently become available and would have changed the outcome if it had been introduced."<sup>44</sup> Pursuant to a 2002 amendment, the PCRA establishes a mechanism for defendants to seek DNA testing of available evidence and for the court to consider whether such evidence would have changed the outcome of the trial.<sup>45</sup> Relief may also be sought under the PCRA where the sentence imposed is greater than the lawful maximum<sup>46</sup> or where a court did not have jurisdiction to act.<sup>47</sup> The PCRA precludes relief for claims that could have been previously litigated on direct appeal or raised in a previously filed post conviction proceeding.<sup>48</sup> The PCRA cannot be used to re-litigate a previously litigated claim under the guise of ineffective assistance of counsel or by "presenting new theories of relief to support previously litigated claims."<sup>49</sup> Nor is relief available under the PCRA where the claim has been waived.<sup>50</sup> A claim is waived if the defendant could have raised the issue at trial, on appeal, or in a prior post conviction proceeding but failed to do so.<sup>51</sup> The waiver rule applies to claims of error alleging a constitutional violation,<sup>52</sup> ineffective assistance of counsel<sup>53</sup> and claims re-

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39. *Commonwealth v. Chester*, 733 A.2d 1242 (Pa. 1999).

40. *Commonwealth v. Lantzy*, 736 A.2d 564 (Pa. 1999).

41. *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998) (enforceable right to effective counsel appointed pursuant to PA. R. CRIM. P. 904).

42. 42 PA. CONS. STAT. § 9543(a)(2)(iii).

43. § 9543(a)(2)(iv).

44. § 9543(a)(2)(vi).

45. § 9543.1 (2002).

46. § 9543(a)(2)(vii).

47. 42 PA. CONS. STAT. 9543(a)(2)(viii).

48. §§ 9543(a)(3); 9544(a).

49. *Commonwealth v. Christy*, 656 A.2d 877, 881 (Pa. 1995); *Commonwealth v. Travaglia*, 661 A.2d 352, 358 (Pa. 1995); *Commonwealth v. McCall*, 786 A.2d 191 (Pa. 2001).

50. 42 PA. CONS. STAT. § 9543(a)(3); 42 PA. CONS. STAT. § 9544(b).

51. § 9544(b).

52. See e.g. *Commonwealth v. Menhart*, 796 A.2d 990 (Pa. Super. Ct. 2002).

53. In *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002) the Court changed its long-standing rule that an ineffectiveness claim was waived if it was not raised at the first opportunity in which the allegedly ineffective counsel no longer represents the defendant. See

garding unlawful inducement of a guilty plea. Not subject to the waiver rule are claims regarding the obstruction of the appellate process and discovery of exculpatory evidence since a post conviction petition is the only remedy to present the claim. Also not subject to the waiver rule is a claim that the sentence exceeds the lawful maximum or that the proceeding occurred before a court that did not have jurisdiction.<sup>54</sup> The PCRA permits a court to hear a waived claim if failure to pursue the claim in the prior proceeding was a result of ineffective assistance of counsel.<sup>55</sup> The Pennsylvania Supreme Court has recently ruled that new counsel on direct appeal is not required to raise claims of ineffectiveness of trial counsel and that such claims are not waived if raised for the first time in a PCRA proceeding.<sup>56</sup> The doctrine of "relaxed waiver" is limited to direct appeal in capital cases and does not extend to appeals from the denial of post conviction relief.<sup>57</sup>

As noted, the 1995 amendments to the PCRA established a one-year filing period with exceptions for newly-discovered evidence, where the failure to raise the claim previously was the result of interference by government officials or when the right asserted is a newly-recognized constitutional right that has been held to apply retroactively.<sup>58</sup> The PCRA requires that any petition invoking an exception to the one-year period shall be filed within sixty days of the date the claim could have been presented.<sup>59</sup> The Pennsylvania Supreme Court has held that the time limits under the Act are jurisdictional and, therefore, the period for filing is not subject to the doctrine of equitable tolling.<sup>60</sup> A claim of ineffectiveness of counsel does not save an otherwise untimely PCRA petition,<sup>61</sup> nor is untimeliness excused because the defendant did not have access to legal materials to file a *pro se* petition<sup>62</sup> or was mentally ill dur-

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*e.g.* Commonwealth v. Griffin, 644 A.2d 1162, 1170 (Pa. 1994). In *Grant*, the Court held that new counsel appointed for direct appeal is not required to raise claims of ineffectiveness of trial counsel. Such claims, the Court held, are not waived if presented for the first time in a PCRA petition.

54. Commonwealth v. Quinlan, 639 A.2d 1235, 1238 (Pa. Super. Ct. 1994); Commonwealth v. Butler, 566 A.2d 1209 (Pa. Super. Ct. 1989).

55. 42 PA. CONS. STAT. § 9543(a)(4).

56. *Grant*, 813 A.2d at 726 (Pa. 2002).

57. Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998); Commonwealth v. Tilley, 780 A.2d 649 (Pa. 2001).

58. 42 PA. CONS. STAT. § 9545(b).

59. § 9545(b)(1), (2).

60. Commonwealth v. Fahy, 737 A.2d 214 (1999).

61. Commonwealth v. Carr, 708 A.2d 1164 (Pa. Super. Ct. 2001).

62. Commonwealth v. Barrett, 761 A.2d 145 (Pa. Super. Ct. 2000).



ing the one year filing period.<sup>63</sup> Failure to timely file a petition precludes a court from considering a challenge to the legality of a sentence unless the petition is timely filed under one of the exceptions to the time period.<sup>64</sup>

The Pennsylvania Rules of Criminal Procedure 900 - 909 govern the filing and disposition of PCRA proceedings. With the exception of Pa.R.Crim. 909 governing capital cases, the Rules do not impose time limits on the parties or the court. Under the PCRA, a defendant must file a *pro se* petition before counsel will be appointed.<sup>65</sup> Once the petition is filed, under Rule 904, a defendant filing an initial petition is entitled to appointment of counsel without regard to the merits of the petition.<sup>66</sup> In capital cases, upon conclusion of direct review, the trial court is required to appoint new counsel for purposes of PCRA review unless the defendant waives counsel or decides to proceed with prior counsel.<sup>67</sup> In the usual case, appointed counsel will prepare and file an amended petition in conformity with Rule 902 governing the contents of a PCRA petition. Post conviction counsel may seek to withdraw if counsel determines that the issues raised in a post conviction proceeding are without merit. Counsel must submit a "no-merit" letter to the court listing each issue the defendant wishes to pursue and an explanation why the defendant's issues are without merit.<sup>68</sup>

The PCRA court can dismiss an initial petition without a hearing upon notice to the defendant if there are no genuine issues raised by the petition and the court concludes that the defendant is not entitled to relief.<sup>69</sup> An evidentiary hearing is required only where the Commonwealth moves to dismiss on grounds that the petition is untimely or where the petition raises material issues of fact.<sup>70</sup> Upon deciding the case, the court must advise the defendant of his/her right to appeal.<sup>71</sup>

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63. Commonwealth v. Hoffman, 781 A.2d 140 (Pa. Super. Ct. 2001).

64. Commonwealth v. Murray, 753 A.2d 201 (Pa. 2000).

65. 42 PA. CONS. STAT. § 9545(a). Once the petition is filed, under Rule 904, a defendant filing a first petition is entitled to appointment of counsel without regard to the merits of the petition.

66. Commonwealth v. Kutnyak, 781 A.2d 1259 (Pa. Super. Ct. 2001).

67. PA. R. CRIM. P. 904(F).

68. Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988).

69. PA. R. CRIM. P. 907.

70. PA. R. CRIM. P. 908.

71. PA. R. CRIM. P. 908(E).

## III. DATA COLLECTION

The central policy goal of the PCRA is to establish a procedure for the prompt, meaningful review of claims for collateral relief. Translating this goal into a set of research questions requires some conceptual groundwork. The variable *case processing time* is an objective measure of the amount of time (days or months) taken by a case as it proceeds through the court system. It encompasses both the necessary and inefficient use of time.<sup>72</sup> The categories *dispatch* and *delay*—which imply necessary and inefficient, respectively—are context-specific judgments based on the type of litigation, characteristics of the court, the governing court rules and the specific features of the case.

Because PCRA litigation takes place in stages, a breakdown of case processing times by stage of litigation helps to clarify the analysis of necessary and inefficient use of time. Trotter and Cooper's review of empirical studies of trial court case processing times found that research typically focuses on the overall time between the initial filing and final disposition of a case, without regard to the intermediate activities.<sup>73</sup> As a consequence, recommendations geared to shortening the time to disposition may overlook qualitative distinctions between different stages in the case. At distinct points along the trajectory of post conviction procedures, the defense attorney, the Commonwealth attorney, and the judge exchange primary responsibility for expediting or inhibiting events. The subdivision of cases into specific stages of litigation closely correlates activities with actors, and distinguishes specific areas of case progress that may be amenable to intervention.

A. *Surveys*

With this framework in mind, the authors developed an initial survey (Survey I) to answer three questions of interest:

- (1) how many PCRA petitions are pending statewide in the Pennsylvania courts of common pleas?
- (2) how long have those petitions been pending?

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72. M.L. Luskin and R.C. Luskin, *Why So Fast, Why So Slow?: Explaining Case Processing Time*. 77 J. CRIM. L. & CRIMINOLOGY. 190 (1986).

73. J. Trotter and C. Cooper, *State trial court delay: Efforts at reform*. 31 AM.U.L. REV. 213, 236 (1982).

(3) what factors affect the progress of a PCRA case at each stage of the litigation?

Common pleas court judges were asked to list each post conviction petition currently pending on his or her docket, the original filing date of the petition, the current stage of litigation, and any specific problems associated with the case. The survey questionnaire also was designed to categorize each pending petition by its current stage of litigation and to identify the most common case processing problems. The questionnaire was sent to half of the common pleas court judges in Pennsylvania, selected at random, on June 15, 2000.

Based on the responses to this initial survey, Survey II was developed to elicit more information about stage categorization and the problems related to delay. Survey II also asked the judges to distinguish between capital and noncapital cases, and to report the dates on which an amended petition or Finley letter<sup>74</sup> was filed. Survey II was mailed on September 1, 2000 to the remaining 50 percent of common pleas court judges statewide.

Of the total 472 questionnaires mailed in Surveys I and II, 95 percent of the judges responded. The surveys provided a quantitative "snapshot" of nearly all PCRA petitions pending statewide. The preliminary findings suggested three directions for the next phase of the research:

(1) conduct a series of in-depth interviews with judges, practitioners, and other experts to learn more about the problems that affect the pace and quality of PCRA litigation;

(2) collect a sample of disposed PCRA petitions to complement the pending case data in Surveys I and II. The additional sample would provide useful information regarding case outcomes and would help complete the picture of the PCRA case processing times; and

(3) analyze death penalty and non-death penalty PCRA cases separately as the two areas of litigation appear to be qualitatively different. This article is limited to non-capital cases.

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74. When counsel seeks to withdraw in a post conviction proceeding, the motion to withdraw must be accompanied by a "no merit" letter. *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. Ct. 1988).

### *B. Interviews*

Judges reported the types of problems associated with each case on the surveys, but many of the notations were not specific enough to discern the exact mechanisms of delay. For example, judges reported “inaction of defense counsel” as a typical problem. Though clear from the surveys that the problem was pervasive, less certain was how defense inactivity contributed to delay or even how to identify “defense inactivity.” We explored these issues, and the details of local PCRA practice, in semi-structured interviews with defense lawyers, Commonwealth attorneys, administrative and support personnel, and judges throughout the state.

### *C. Additional Data Collection*

In Surveys I and II the judges reported each PCRA case pending on their dockets at the time of the survey. By calculating the time between the original filing date of the petition and the survey due date, the age of each case was determined. Procedural stage was adduced from the status codes and other case information on the surveys.

The results revealed that, overall, a third of the cases had been pending more than a year, and a fifth had been pending more than two years. But is the processing time of a group of cases fully described by the age of pending cases? And how many cases are dismissed or denied, how many are granted relief, and what types of relief are granted? To pursue these questions, follow-up data were collected in Philadelphia, Delaware, and Allegheny Counties. The methods of collecting the additional data for each county are described below.

In Delaware County, PCRA cases tended to feature shorter overall times to disposition, prompting us to take a closer look. The Office of Judicial Support (OJS) provided us with a copy of their detailed log of all petitions filed from January 1, 1998 to February 15, 2001 (number of PCRA petitions = 227). The log included information on cases that were both pending and disposed.

For Allegheny County, a database was created that included all cases reported by judges on Surveys I and II (number of petitions = 230). Follow-up data for these cases were gathered directly from the county's electronic docket, the Integrated Criminal Information System (ICIS). Because the follow-up data were collected months after the survey data, many of the petitions reported as

pending on Surveys I and II had been disposed of. Disposition dates and outcomes were added to the database.

Philadelphia County was selected for further research because of its unique method of judicial assignment. It also has the largest PCRA caseload in the Commonwealth. At the time of the survey, in Philadelphia County all non-homicide PCRA cases were assigned to one PCRA judge, and all PCRA homicide cases were assigned to the sentencing judge.<sup>75</sup> Therefore, a majority of PCRA cases appeared on one judge's docket and were processed through a single, designated courtroom. Due to the volume of cases on the one docket, the Philadelphia PCRA judge was not asked to complete a manual survey. Rather, information about these cases was collected from the Philadelphia District Attorney's database of all cases (homicide and non-homicide) filed from January 1, 1996 to April 26, 2001 (number of PCRA petitions = 5,215). The database included cases that were both pending and disposed.

#### IV. STATISTICAL AND INTERVIEW FINDINGS

This section summarizes the quantitative data from Surveys I and II together with the interviews with judges, court-appointed defense attorneys, public defenders, district attorneys, administrators and support personnel. The findings are presented by stage of litigation.

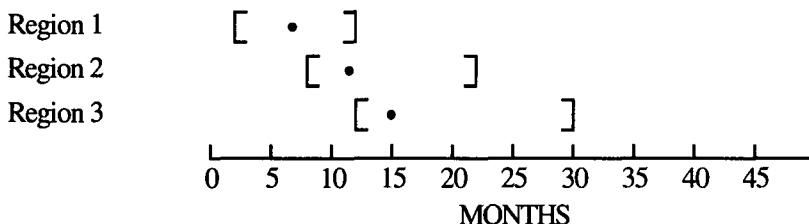
##### A. *An Introduction to the Graphics*

Instead of average case processing time, the figures presented in the following sections show case processing times in months at the 25<sup>th</sup>, 50<sup>th</sup> and 75<sup>th</sup> percentiles. Extremely old cases will make an average (mean) appear much higher than the typical case. PCRA data are especially vulnerable to this problem as some petitions await disposition for very long periods of time. Dividing the cases into quartiles according to age provides a more representative picture of the middle range of cases without the distorting effects of extremes or outliers.

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75. As of March 5, 2001, Philadelphia County changed its judicial assignment procedures. Two judges have been assigned to address the backlog of existing cases in the PCRA court. All incoming petitions are now assigned to the sentencing judge. This report looks at cases in the Philadelphia PCRA court prior to this change, as it will take some time to determine the efficacy of the new program.

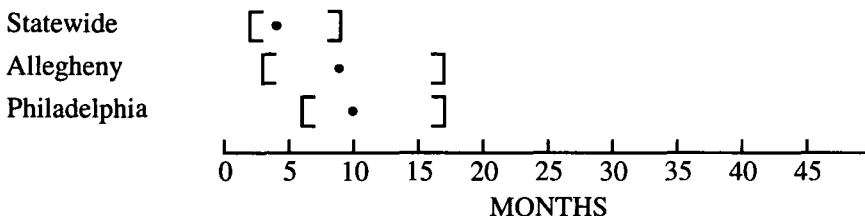
**Sample Figure**



The left bracket in the sample figure refers to the 25th percentile. The 50<sup>th</sup> percentile, or the median, is signified by the dot. The right bracket refers to the 75th percentile, and above it falls the oldest quartile of cases.

*B. Stage I: Appointment of Counsel, Finley Practice and Amended Complaint*

**Figure 1: Months pending for Stage I cases**



Based on the information provided on Surveys I and II, all active non-capital PCRA petitions were classified into one of three procedural stages. Stage I petitions were defined as awaiting first appointment of counsel or awaiting counsel's submission of an amended petition or Finley letter. The survey data indicated that statewide (excluding Allegheny and Philadelphia Counties), 213 of the 601 active non-capital PCRA petitions (36%) met the criteria for Stage I. Half of these cases were pending more than four months, and a quarter were pending more than nine months. In Allegheny County, 132 of the 230 active non-capital cases (57%) were Stage I. Of these, half were pending longer than nine months, more than twice as long as Stage I cases in the statewide sample, and one in four petitions had been active longer than 17

months. Philadelphia County had a similar distribution: of the 974 active non-capital cases available for stage analysis, 814 petitions (84%) were classified as Stage I. Half were pending more than 10 months, and a quarter were older than 17 months. See Figure 1.

Stage I covers several procedural steps. The sections below describe the litigation problems reported by practitioners at each step.

### *1. Assignment of Counsel and Initial Review of Petition*

An indigent defendant who files a first petition for post conviction relief is entitled to counsel,<sup>76</sup> regardless of the merits of the petition<sup>77</sup> or the timeliness of its filing.<sup>78</sup> When a second or subsequent petition is filed, counsel is appointed only if an evidentiary hearing is required.<sup>79</sup> Once appointed, counsel must determine whether the petition was timely filed and, if not, whether any of the exceptions to the filing period apply. Assuming a timely filed petition, counsel must determine whether the defendant is entitled to relief under the Act.

Defense attorneys emphasize that they cannot competently evaluate the merits of a case until all relevant records are acquired, including court files and transcripts of proceedings. In some cases these records are years old and are not readily available for review. Obtaining the court file and transcripts from the archives appears to be a chronic source of delay throughout the state. Some counties store old records at off-site facilities, making it time-consuming to retrieve pertinent materials. In the Philadelphia off-site storage facility, the slim court file and the bulky notes of testimony are stored separately to save space, and defense counselors report problems in recovering both halves. Allegheny County respondents report that acquiring the records necessary to prepare an amended petition or a petition to withdraw may take over six months. This may help to explain why one quarter of the cases awaiting an amended petition or a petition to withdraw had

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76. PA. R. CRIM. P. 901(A).

77. *Commonwealth v. Kaufmann*, 592 A.2d 691, 675 (Pa. Super. Ct. 1991).

78. *Commonwealth v. Guthrie*, 749 A.2d 502 (Pa. Super. Ct. 2000).

79. Our pending case data include both first and subsequent petitions. As case processing times were found to be similar for both types of petitions, separate analyses are not reported.

been pending over 17 months in Allegheny and Philadelphia Counties.

Untimely transcription of records also poses a problem as many PCRA petitions are filed following entry of a guilty plea, a proceeding not routinely transcribed. In Delaware County, the courtrooms are equipped for electronic recording, lessening dependency on harried court reporters. One Delaware County respondent estimates that the electronic recording unit provides transcription directly to counsel within a few weeks of the request. Another observes that transcription may take up to three months.

Getting records from other sources can be difficult as well. Respondents advise that trial and appellate counsel are at times reluctant to provide PCRA counsel with records and information about their representation of the defendant. Some report cooperation by the district attorney's office in sharing records; others state that the district attorney's office does not respond to requests for records. Pa.R.Crim.P. 902(e) precludes formal discovery in non-capital cases except upon leave of court after a showing of exceptional circumstances.

Difficulties in obtaining records occur frequently enough that a few counties have worked out alternative systems. In Philadelphia County, a local rule provides that "...if notes have not been received in three months after the PCRA unit has submitted an order for transcription, counsel is to assume the notes will never be available and should proceed without them."<sup>80</sup> In Allegheny County, a similar practice has evolved. The prosecutors contend that defense counsel will sometimes file an amended petition before obtaining the case files and transcripts. In such cases, the Commonwealth may seek to dismiss the amended petition pursuant to Pa.R.Crim.P. 902(A)(12), which requires that a petition contain the facts supporting each claim and where those facts appear in the record. To address the problem of timely access to records, some Allegheny County judges attach an order for transcription to the order appointing counsel in the hope of facilitating the record review process.

While counsel/petitioner face-to-face interviews are not required,<sup>81</sup> defense lawyers report that their investigation of claims is hindered by limited access to the incarcerated client. The client

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80. PHILADELPHIA PRACTICE AND PROCEDURE GUIDE 7, Revised July 27, 1998.

81. Commonwealth v. Torres, 630 A.2d 1250 (Pa. Super. Ct. 1993).



may be able to provide information about witnesses counsel chose not to call at trial, describe events not included in the record, and otherwise assist verification of his claims. In many cases, the client is housed in a remote state correctional institution while his appointed attorney is based in the county of the conviction. Each county uses a different system of prisoner transportation and few jurisdictions have the resources to transport defendants to meetings with their attorneys. As a result, written correspondence is usually the only means of communicating with the petitioner. Weeks taken to write and receive letters extend the time required to evaluate the *pro se* petition.

Magnifying the difficulties at the initial stage is the inexperience of many of the attorneys appointed to PCRA cases. Generally speaking, the appointments do not pay well, and the more seasoned attorneys tend to avoid them.<sup>82</sup> Administrators and judges report that inexperienced attorneys are less skillful in gaining cooperation from the clerical support offices, a necessity for recovering hard to locate files and transcripts. Lack of experience also impairs the ability of PCRA counsel to secure information and records from trial and appellate counsel and to engage in informal discovery with the prosecution.

## 2. *Finley Letters*

Counsel may seek to withdraw from a case if (a) counsel determines that the claim(s) raised by the petitioner have no merit and review of the case reveals no meritorious issues or (b) the petition is untimely and does not meet one of the exceptions to the filing period. Counsel seeking to withdraw from a PCRA case must submit a "no merit" or "Finley" letter stating the nature and extent of counsel's review, a list of claims that the petitioner seeks to have reviewed, and an explanation why the claims are without merit.<sup>83</sup>

Excluding Allegheny and Philadelphia Counties, an analysis of filing dates indicates that in most instances Finley letters were filed within four months of the *pro se* petition. In Allegheny

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82. The selection and compensation of PCRA counsel varies with judicial district. Most often, jurisdictions rely on individual judge-appointments where attorney qualifications are discretionary. Others appoint from a court-approved list with minimum eligibility requirements, and a few employ "contract counsel," an arrangement where PCRA cases are assigned to a small group of attorneys who have successfully bid on the work.

83. *Commonwealth v. Finley*, 550 A.2d 213 (Pa.Super. Ct. 1988).

County, half of the Finley letters were filed within eight months. However, for 25 percent of the cases, more than a year elapsed before the filing of the Finley letter. In Philadelphia, filing dates for Finley letters were only available for non-death penalty homicide cases. As with Allegheny, half the Finley letters filed in homicide cases in Philadelphia were submitted within eight months of the *pro se* petition. In 25 percent of the cases, Finley letters were not filed for nearly two years.

Following the submission of a Finley letter, the court must conduct its own independent review of the record. According to respondents, adherence to the *Finley* process varies. In Philadelphia County, respondents say that submission of a Finley letter is an increasingly unpopular action. If the court agrees with counsel that the claims are meritless, the court must serve the defendant with notice of its intention to dismiss the petition and state in the notice the reasons for the dismissal.<sup>84</sup> The petitioner then has 20 days to respond to the proposed dismissal. Following the petitioner's response, the judge may ask counsel to submit an amended Finley letter.<sup>85</sup> The amended Finley letter must provide additional explanation and detail as to why it would be fruitless to pursue the petitioner's claim(s). Counsel report that the work involved in preparing the original and amended Finley letters occasionally equals or exceeds the time involved in preparing an amended petition. Counsel is permitted to withdraw if the court is persuaded that the claims presented by the petitioner are meritless.<sup>86</sup>

Another possible "deterrent" to filing a Finley letter is the *perceived* risk that the defendant, if he disagrees with counsel's conclusion that the claims presented are meritless, will file a complaint with the Disciplinary Board. The Board is the agency of the Supreme Court charged with investigating the conduct of practicing attorneys in Pennsylvania.<sup>87</sup> Board statistics indicate that for the one-year period covering April 2002 to March 2003, 437 PCRA-related complaints were filed, an amount equal to nine percent of the total 4,979 complaints received by the Board.<sup>88</sup> Not all of the PCRA-related complaints involve disagreements over no-merit

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84. PA. R. CRIM. P. 907(1).

85. See *Commonwealth v. Mosteller*, 633 A.2d 615 (Pa. Super. Ct. 1993).

86. *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (Pa. 1988).

87. PA.R.D.E. 205.

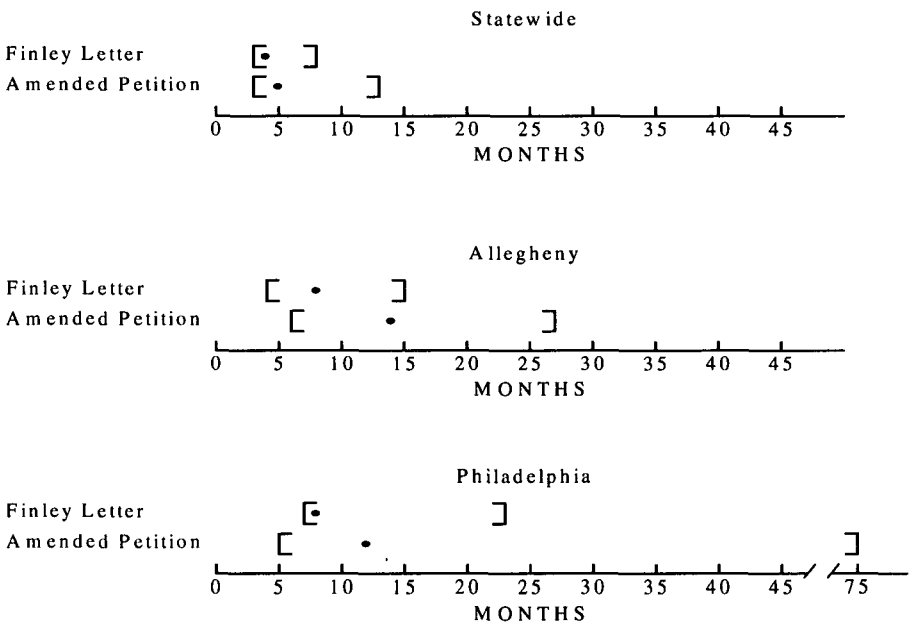
88. Personal communication from Disciplinary Board counsel, April 2003.

letters; however, the Board reports that where such a disagreement is the basis of the complaint, no action will be taken by the Board.

### 3. Amended Petitions

Pa.R.Crim.P. 905 authorizes amendment of a petition for post conviction relief by leave of court and provides that the amendment is to be freely allowed. Leave to amend is regularly sought where the petition is filed *pro se* and counsel is appointed pursuant to Pa.R.Crim.P. 904. The content of a petition for post conviction relief is governed by Pa.R.Crim.P. 902(A). The Rule requires detailed information about the defendant's conviction or guilty plea, sentence, prior proceedings initiated by the defendant and the nature and grounds for relief requested and the facts supporting each ground for relief. With the exception of cases where counsel is required to file an amended Finley letter, the time associated with preparing amended petitions is markedly longer than that associated with Finley letters. See Figure 2. In Allegheny County, amended petitions take six months longer to prepare than Finley letters when measured at the median.

**Figure 2: Months pending from the filing of the *pro se* petition to the submission of a Finley letter or amended petition**



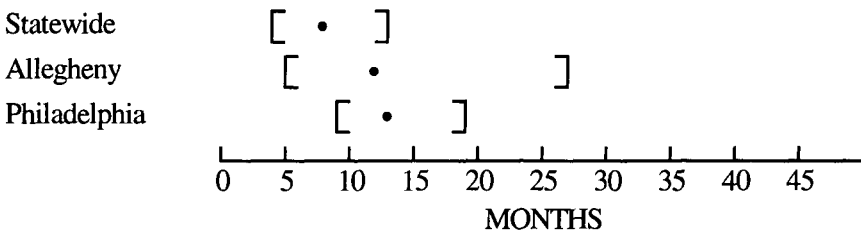
Respondents report that the time difference can be explained by the additional defense activities required to prepare an amended petition. For example, if a request for an evidentiary hearing is included in the petition, Pa.R.Crim.P. 902(A)(15) specifies that the request must be accompanied by a signed certification as to each intended witness, the substance of the witness' testimony and any documents material to that testimony. Defense counsel may be required to seek funds from the court to hire a private investigator to locate witnesses. The investigation, location and certification of multiple witnesses, or the investigation of newly discovered evidence is time consuming, particularly if the petition raises multiple claims for relief.

Once drafted, the amended petition must be verified by the incarcerated petitioner.<sup>89</sup> If the petitioner is not incarcerated locally, the process usually occurs by mail. The verification request may prompt an exchange of correspondence between the defendant and counsel about the amended petition.

*C. Stage II: Answer and Court Review*

Once an amended petition is filed, a case enters the second stage of litigation. Stage II marks the shift in litigation activity from the defense counsel to the district attorney and the court. During Stage II, the Commonwealth's answer or motion to dismiss is prepared. If defense counsel has submitted a no-merit letter, the primary event is the court's independent review.

**Figure 3: Months pending for Stage II cases**



Stage II has fewer procedural steps than Stage I, and, at the median, only adds about three to four months to the overall case processing time. See Figure 3. Statewide (excluding Allegheny

89. PA. R. CRIM. P. 902.

and Philadelphia), 243 cases were classified as Stage II. From the date of initial filing of the *pro se* petition, the median age of Stage II cases was eight months, and the 75th percentile was 13 months. Of the 41 Stage II cases in Allegheny County, half were pending for 12 months, while one in four was older than 27 months. Philadelphia County, with 106 homicide petitions in Stage II, had slightly shorter time frames at the upper range. The median was 13 months and the 75th percentile was 19 months.

### 1. *Commonwealth Response*

Across the state, prosecutors report that although the district attorney offices receive notification from the clerk of courts or receiving unit when a *pro se* petition is filed, they do not address post conviction petitions until an amended petition is filed. If defense counsel's Finley letter is accepted by the court, the Commonwealth usually does not get involved in the case resulting in shorter case processing times. There are occasions, however, when the court may order the Commonwealth to submit a response pursuant to Pa.R.Crim.P. 906. The response by the Commonwealth is usually a motion to dismiss.

Among the Allegheny County disposed cases ( $n = 114$ ), the Commonwealth filed 66 responses which represents 58 percent (66/114) of the total. The median time between the date the amended petition or Finley letter was filed and the date of the Commonwealth's response was one month. At the 75<sup>th</sup> percentile, the elapsed time was three months. The data from Allegheny County suggest that the preparation of the Commonwealth's response is not a source of delay.<sup>90</sup>

By contrast, Delaware County prosecutors filed an answer or motion to dismiss in only 11 percent (18/164) of the disposed cases. The rationale given for the low rate is that answers constrain the ability to respond to issues that may be presented in supplemental amended petitions.

Philadelphia County follows an altogether different system. If defense counsel files an amended petition, a court listing is scheduled 30 days after the filing date, at which time the Commonwealth must declare whether it agrees to an evidentiary hearing or whether it will file an answer,<sup>91</sup> and then has 60 days to do so

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90. In 15 cases, the filing date of the Commonwealth's response was missing.

91. PHILADELPHIA PCRA PRACTICE AND PROCEDURES, July 1993, revised July 1998.

after that appearance. If the Commonwealth does not submit an answer or motion to dismiss in the 60-day time frame, the matter is categorized as a “status” case until the response is filed.

## 2. *Dismissal Without a Hearing*

The court may dismiss a petition without a hearing where either a Finley letter has been filed and the court has conducted its own independent review of the record or if the court determines that there are no genuine issues of material fact presented in the petition, amended petition or answer and the defendant is not entitled to relief.<sup>92</sup> Pa.R.Crim.P. 907(1) requires the judge to notify the defendant of the intention to dismiss the petition. The defendant has 20 days to respond. If no response is received, or the substance of the response has no bearing on the merits of the case, the judge will dismiss the petition.<sup>93</sup> Some defense and district attorneys question the necessity of the procedure that grants the petitioner a right to respond to a proposed dismissal. According to one district attorney, there is rarely substance in the petitioner's uncounseled response that has not already been presented in the amended petition. A defense lawyer notes that if the petitioner files a response, the case might remain under advisement with the judge, at times for a protracted period, ultimately delaying the petitioner's appeal of the dismissal. In Allegheny County, of the 230 cases, 98 notices to dismiss were issued (43%). Twenty-six of those petitioners (27%) submitted a response and of those, 16 (16%) were denied or dismissed. The remaining ten response cases were still pending at the end of the study. At the median, the procedure adds only a fraction of a month. See Figure 4.

Of the 227 Delaware County cases, 55 notices to dismiss were issued (24%). Twenty-five percent (14/55) of petitioners submitted a response. Sixty-four percent (9/14) of the response cases were denied or dismissed, and the remaining 36 percent (5/14) were still pending at the end of the study. At the median, the procedure added five months in Delaware County.<sup>94</sup>

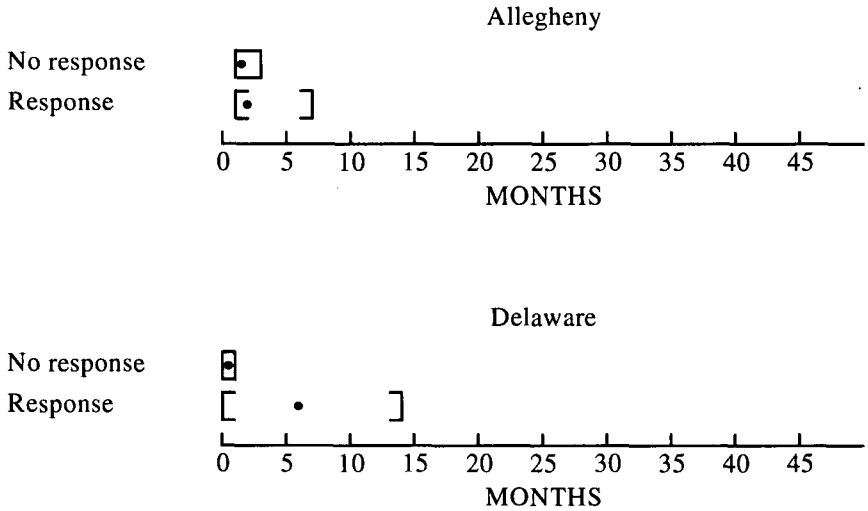
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92. PA. R. CRIM. P. 907(1).

93. When the petition is dismissed without a hearing, the court must advise the defendant of the right to appeal and the time within which the appeal must be taken. PA. R. CRIM. P. 907(4).

94. Notice of dismissal dates were not available for Philadelphia County.

**Figure 4: Months pending from notice to dismiss**

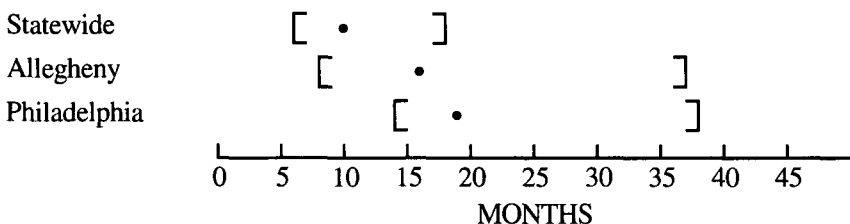


*D. Stage III: Hearing and Disposition*

Entry into Stage III signifies the transition from attorney preparation to case disposition by the court. The principal events of this stage are the evidentiary hearing and the court's decision-making.

Figure 5 depicts pending times for Stage III cases. The cumulative effects of delay are apparent. Statewide (excluding Allegheny and Philadelphia), half of the Stage III cases were pending for 10 months or longer from the filing of the *pro se* petition, while a quarter of the cases were older than 18 months. In Allegheny County, 50 percent of the Stage III cases had been pending longer than 16 months, and 25 percent were older than 37 months. In Philadelphia County, half of the Stage III cases were older than 19 months, and one in four were older than 38 months.

**Figure 5: Months pending for Stage III cases**



A comparison of Figure 3 with Figure 5 shows that, in most jurisdictions in Pennsylvania, the typical case spends about two months in Stage III. In Allegheny and Philadelphia Counties, it is five months and six months, respectively. At the 75th percentile, the time frames are at least doubled.

### 1. *Evidentiary Hearing*

If the petition, amended petition or the Commonwealth's answer raises issues of material fact, the judge will schedule an evidentiary hearing. An evidentiary hearing also may be scheduled if the Commonwealth has filed a motion to dismiss based on the untimely filing of the petition.<sup>95</sup> At the hearing, the defendant has the burden of establishing that his conviction or sentence resulted from one or more of the Act's specifically enumerated errors or defects, and that the claims have not been waived or previously litigated. The judges interviewed differ in their views on the need for a hearing on the merits. Some state that all timely first petitions are granted an evidentiary hearing.<sup>96</sup> By providing the defendant an evidentiary hearing, the judges believe they were decreasing the likelihood of second and subsequent petitions. Other judges report that evidentiary hearings are granted in about half the cases or less.

The defendant is entitled to be present at the evidentiary hearing and will often testify. Respondents report that securing the attendance of the incarcerated petitioner is a recurrent source of delay at the evidentiary hearing stage. The "bring-down problem," as it is called in Philadelphia County, refers to a shortage of county jail space available to house inmates transported from remote state correctional facilities. For example, in Philadelphia as jail population numbers fluctuate from day to day, officials will routinely disregard court orders to produce Philadelphia post conviction defendants if there is no bed space available. In both Philadelphia and Allegheny Counties, inmates attending trial are given priority for transportation and housing over inmates involved in PCRA litigation. Because of this practice, a PCRA case may be listed four or five times before a defendant is brought to

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95. PA. R. CRIM. P. 908(a)(1).

96. These particular judges, all from different jurisdictions, report that defense counsel do not submit Finley letters, and so either a petition is dismissed as untimely or an evidentiary hearing is granted.



the courthouse. Successive postponements of the evidentiary hearing due to transportation or housing problems can add three months or more to the duration of a case, a factor that may help to explain the longer Stage III times in Philadelphia.<sup>97</sup> Also, the PCRA judge may continue the evidentiary hearing to provide either party a reasonable opportunity for investigation and preparation of emergent issues, and may order briefs and argument to address such issues.<sup>98</sup>

At the conclusion of the evidentiary hearing, the judge can issue a ruling from the bench or take the case under advisement. Most judges say they issued a bench ruling "rarely" or "never." Of those judges that do not rule from the bench, about half stress the importance of writing an opinion following the evidentiary hearing. These judges feel that an opinion saves time in the long run by preparing the work that will be needed for the "inevitable" appeal. Judges also believe that if a petitioner receives a written opinion setting out the rationale for the denial/dismissal of his claims, the petitioner is less likely to file a second or subsequent petition. To assist in preparing the opinion, the judge may request that counsel prepare proposed findings of fact and conclusions of law.

## 2. *Disposition*

An analysis of disposed petitions in Allegheny, Delaware and Philadelphia Counties (n = 3,948) found that less than two percent resulted in a grant of a new trial or sentencing hearing. An additional nine percent had their appellate rights restored. Relief was denied in 87 percent.<sup>99</sup> The frequency of outcomes by county was generally consistent.

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97. Recently, Philadelphia has begun using video-conferencing to alleviate the "bring-down" problem.

98. PA. R. CRIM. P. 908(B).

99. Disposition information was unavailable for one case in Allegheny County, one case in Delaware County, and 103 cases in Philadelphia County.

TABLE 1: Frequency of PCRA disposition types by county

	Allegheny	Philadelphia	Delaware
Denied/dismissed	94 (81.9%)	3,174 (87.0%)	149 (90.3%)
Reinstatement of appellate rights	16 (13.8%)	341 (9.3%)	1 (0.6%)*
New trial granted	1 (0.9%)	1 (0.0%)	1 (0.6%)
Sentence vacated	1 (0.9%)	0 (0.0%)	1 (0.6%)
Granted (type unknown)	0 (0.0%)	6 (0.2%)	0 (0.0%)
Petition withdrawn	2 (1.7%)	48 (1.3%)	12 (7.3%)
Missing	1 (0.9%)	98 (2.7%)	1 (0.6%)
<b>Total Disposed</b>	<b>115 (100%)</b>	<b>3,668 (100%)</b>	<b>165 (100%)</b>

\* The comparatively low percentage of reinstatements of appellate rights in Delaware County raises the question of whether these dispositions are included in the "petition withdrawn" category.

### *E. Appeal to Superior Court*

If the petition for post conviction relief is denied, the petitioner may elect to appeal the PCRA court's decision. In calendar year 2000, 968 PCRA decisions were appealed in the Superior Court.<sup>100</sup> Based on the approximately 1,207 PCRA petitions filed in the trial courts in 1999, the PCRA appeal rate is estimated at nearly 80 percent. PCRA appeals comprise about 12 percent of the Superior Court's docket in 2000.

## V. CONCLUSION

A review of the scholarly literature reveals that this is the first empirical study of trial court collateral relief litigation in any United States jurisdiction. As the sole vehicle for obtaining collat-

100. PCRA appeals data provided by the Legal Systems Department, Superior Court of Pennsylvania.

eral relief, the PCRA is an essential protection for defendants and the last opportunity for the state court to ensure quality of justice. It is therefore surprising that PCRA practice has received so little attention.

Across Pennsylvania, it is not unusual to find PCRA cases that have been pending for two, three, or even four years. Numerous instances of dispatch can be found as well, but the norms and culture of post conviction delay are both deeply rooted and widespread in the Commonwealth. Only Philadelphia County has acknowledged the extent of the problem with systematic reform. Though it is too early to determine the long-term benefits of the new Philadelphia system, court officials report that major obstacles such as the "bring-down" problem and case backlog are being addressed.

The findings of this research disclose two major sites of litigation delay in PCRA cases. In Stage I, a thicket of administrative and procedural problems associated with the preparation of an amended petition impedes case progress and prolongs the overall time to disposition. While experienced defense counsel can overcome many of these obstacles, a concern expressed statewide, exclusive of Philadelphia, was the appointment of inexperienced attorneys to PCRA cases.

Stage III is the other major locus of delay. Once pleadings and briefs have been submitted and the case is ready for decision, whether by notice to dismiss or by hearing on the merits, the time to decision can be significant. The multiple steps of Stage I provide many opportunities for delay, but the decisional delay at Stage III is more difficult to explain. In part, the volume of cases assigned to each judge requires the setting of work priorities. In the course of this research, it was common for attorneys, judges and staff to assert that the disposing of post conviction petitions is less urgent than the termination of other matters on the docket.

The low status of PCRA petitions derives, in part, from the shared perception among the bench and bar that most post conviction claims are frivolous. Moreover, the mass of claims is thought to absorb a disproportionate share of the court's resources. The data reported in Table 1 lend a qualified measure of support to this perception. With the exception of a small group of cases that result in restoration of the petitioner's right to direct appeal, fewer than two percent of all petitioners are granted relief.

In view of the above, recommendations to improve the celerity and quality of PCRA litigation are more likely to succeed, particu-

larly in the long-term, if the incentives—to trial judges, attorneys, and court reporters—are redirected to elevate PCRA matters in the judicial scale of priorities. The bench and bar must provide active leadership in recognizing the fundamental justice concerns addressed by the PCRA and modify procedures accordingly. Toward that end we proffer the following recommendations:

(1) The PCRA court should enter an order directing the transcription of notes of testimony at the time counsel is appointed in the matter.

(2) Because PCRA counsel is required to review thoroughly the performance of trial counsel and, in many cases, the decisions made by direct appeal counsel, courts should only appoint experienced counsel in PCRA cases. Attorneys with only minimal experience in criminal trial and appellate work should be appointed only where the attorney has completed a CLE course on post conviction practice.

(3) In order for PCRA counsel to raise all claims that may entitle the defendant to relief, it is essential for PCRA counsel to meet with trial and direct appeal counsel to obtain the defendant's file and to discuss prior counsel's representation of the defendant. To this end, bar organizations can play an important role in helping defense lawyers understand that potential claims of ineffective assistance of counsel are not a basis for refusing to assist PCRA counsel.

(4) Effective communication between PCRA counsel and the defendant is essential in order for counsel to determine the validity of claims and to prepare an amended petition, if appropriate. The judiciary should take the lead in developing protocols with the state Department of Corrections to provide PCRA counsel with reasonable telephone access to petitioner.

(5) Courts must work with the county prisons and the sheriffs' departments to ensure that defendants are transported in a timely manner and that space is available in the county prisons to house defendants.

Nearly forty years ago, Justice Brennan called on states to adopt post conviction procedures that were "swift and simple..."<sup>101</sup> and "fair and just...."<sup>102</sup> The first goal can be achieved, the authors believe, if modest administrative changes are made by courts to facilitate prompt access by counsel to records, to develop proce-

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101. *Case v. Nebraska*, 381 U.S. 336, 345-347 (1965) (Brennan, J. concurring).

102. *Id.* at 344.

dures in conjunction with the Department of Correction that enable counsel to communicate more efficiently with their incarcerated clients, and to work with the county prisons and the sheriffs' departments to resolve transportation and housing problems for defendants pursuing PCRA relief. Clearly less modest is the substantive recommendation that experienced or specifically trained counsel be appointed in PCRA cases and the call for greater cooperation between PCRA counsel and prior counsel. However, the authors believe that these changes are necessary in order for Pennsylvania to achieve the goal of a "fair and just" post conviction procedure.