

COMMENT

THE APPOINTMENT OF COUNSEL IN COLLATERAL REVIEW

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ABSTRACT

The writ of habeas corpus is an incredibly important aspect of the criminal justice system, allowing petitioners in state or federal custody to challenge the validity of their detention. These petitions encompass extraordinarily difficult and complex areas of law, involve constitutional and statutory interpretation, and need to comply with difficult procedural rules. These petitions are also often completely pro se, involving state or federal prisoners representing themselves.

Some courts, on the state and federal level, have implemented rules for appointing counsel in habeas corpus petitions. But these rules are inconsistent and differ greatly, leading to petitioners having no knowledge of whether or not counsel will actually be appointed. And even an attorney is appointed in some instances, there is no guarantee that the attorney will have sufficient experience or knowledge to adequately counsel the complex nature of habeas cases.

However, there is an upside. Because these rules, at least those local rules of the federal district courts, can be changed relatively easily, the judges could adopt favorable appointment mechanisms without much difficulty. But how can one determine what these rules are, or where to locate them? Which rules provide the best shot for habeas applicants to be appointed qualified counsel? To begin answering these questions, this article looks at the Pennsylvania state rules and the local rules of several district courts, with the local rules of each court serving as individual “cases,” to determine just how effective the mechanisms of appointment are, and in doing so, makes recommendations as to what rules courts should adopt to ensure more effective appointment of counsel in habeas proceedings.

INTRODUCTION

Habeas corpus is a notoriously dense field of law that overlaps with civil and criminal procedure, and deals with intricate issues of constitutional and statutory interpretation. Thus, habeas is a complex field, which stumps some of the most well-educated legal scholars in the country. Yet, because there is no federal constitutional right to counsel in post-conviction review, and states

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are not required to provide counsel, most petitioners proceed pro se, or without counsel to represent them.¹

Before a petitioner files in federal court, all state court remedies must be exhausted.² Many of these state post-conviction proceedings are uncounseled. Pennsylvania is unique in that it provides for counsel in first habeas petitions.³ For capital habeas, the state provides a list of qualifications and experience for those that are appointed because of the demanding nature of capital habeas cases.⁴ But this is not necessarily the case with every state.

Every year, state prisoners seeking habeas relief file over 18,000 petitions in United States district courts.⁵ These petitions comprise about one of every fourteen civil cases in the district courts.⁶ The Criminal Justice Act of 1964 required all federal district courts to publish “CJA Plans” detailing how the individual court appoints counsel in federal criminal proceedings when a petitioner cannot afford counsel.⁷ These plans often have some sort of

¹ NANCY KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 23 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> [<https://perma.cc/BU9T-QWUB>]. In capital habeas cases, over 87% of petitioners filed without counsel, though in most of these cases counsel was later appointed. In non-capital cases, 92.3% involved no counsel at any point in the process.

A few things to note about this study. This study, prepared by Nancy J. King, Fred L. Cheesman II, and Brian J. Ostrom, was a two-year study, partially funded by the National Institute of Justice, and was the first to examine the 1996 amendments to habeas corpus law that apply when state prisoners challenge their convictions and sentences in federal court. The research looked at 2,400 non-capital cases filed during 2003 and 2004, and 360 death penalty cases filed in 2000 and 2002. The study was published in 2007, and statistics gleaned from it have likely changed over the last decade. However, the only habeas statistics that have been published since then have been broad statistics about the amount of filing, and none dealing with the appointment of counsel or processing time. Lastly, the study only looked at the filing for federal review of state habeas petitions, while this article additionally looks at the appointment of counsel in state post-conviction review. However, the statistics used in this study are highly relevant and important to this article.

² 28 U.S.C. § 2254(b)(1)(A) (2018).

³ *See infra* Part III.

⁴ *See infra* Part III.

⁵ KING ET AL., *supra* note 1, at 1.

⁶ *Id.*

⁷ *See generally* 18 U.S.C. § 3006A (2018) (requiring plans for “furnishing representation for any person financially unable to obtain adequate representation in accordance with this section”); *see also id.* § 3006A(a)(2)(B) (providing for appointment of counsel for state and federal habeas petitions should a magistrate judge or district court judge determine that “the interests of justice so require.”).

provision for habeas corpus proceedings, but they differ depending on the district court, even those within the same circuit jurisdiction.⁸

Some of these systems are discretionary and ad hoc, differing between chambers, and others are court-wide systems administered by the Clerk of the Court. Some counsel appointments occur through a public defender's office, and others are done through an assigned counsel system. Some courts include very few details on the qualifications of appointed counsel for habeas proceedings, while others have detailed multifactor lists requiring prior experience and a sufficiently manageable caseload to be able to take on a habeas petition. Finally, some courts appoint counsel in both capital and non-capital proceedings, while others only appoint counsel for capital petitioners.

This decentralized system creates a disorganized framework that leads to inconsistent appointment for similarly situated petitioners, not only in whether or not a petitioner will receive counsel, but in the experience and quality of counsel as well. And the quality of counsel matters. Experienced counsel, with resources and time, is likely to achieve a better outcome for clients than inexperienced or overwhelmed attorneys.⁹ This problem is, in a way, its own solution. Because a court's local rules are readily available, the different appointment mechanisms are easily studied to determine which rules are most efficacious. And since a court's local rules may be easily changed should a court decide to adopt a new proposal, it is not a burdensome requirement on the courts. This paper seeks to centralize appointment of counsel under a uniform policy, providing a way to get habeas petitioners the relief they need.

Some of these appointment methods are likely to be more successful than others in providing effective counsel for habeas petitioners. For example, some might lead to more effective counsel, faster appointment, and/or lower burdens on the courts.¹⁰ The difference in these mechanisms raises one question: what appointment mechanism, taking into account all possible

⁸ See *infra* Part III; see also § 3006A(a)(2)(B). The “interests of justice” requirement is a relatively subjective one, as it is up to the discretion of the presiding judge. Thus, court guidelines for deciding whether a petitioner requires counsel may vary from judge to judge.

⁹ This refers to either re-sentencing from the death penalty to life imprisonment or a lesser sentence (most common in the capital habeas context) or succeeding in a petition for a new trial.

¹⁰ By “timely fashion,” the author means without delay and as soon as possible for the petitioner to benefit. Ideally, this would be before the habeas petition is even filed so that petitioner may have the assistance of counsel in determining the issues in their case.

metrics of success, is best? This is a question worth asking, because answers could give courts guidance on how to greatly expand access to effective counsel while minimizing the drain on their resources. This article seeks to determine this answer, and in doing so, has researched appointment mechanisms in Pennsylvania state courts and the federal courts within the United States Court of Appeals for the Third Circuit. This research involved reviewing the rules and appointment plans of each court and interviewing actors within the court system to determine if and how counsel is appointed, and how effective counsel that counsel is.

Pennsylvania and the courts within the Third Circuit provide a good case study for multiple reasons. First, the United States District Court for the Eastern District of Pennsylvania has one of the heaviest capital habeas caseloads in the country.¹¹ Second, the Third Circuit jurisdiction encompasses three different states and five different district courts, and so is likely to lead to differing appointment methods between district courts.¹² Third, the unique nature of Pennsylvania and the Third Circuit's geography has led to those jurisdictions having multiple courts in diverse geographies—including rural, suburban, and urban areas. This unique aspect of the courts within the Third Circuit is likely to result in differing local rules, providing more data for review.

In all federal district courts, including those outside of Pennsylvania, if a petitioner is awarded in forma pauperis status they are assigned counsel regardless of whether the case is capital or non-capital. In forma pauperis status would provide a habeas petitioner with counsel regardless of the status of their case. But in forma pauperis status is rarely awarded, and that methodology of determination also differs greatly based on the discretionary rules of the district court.¹³ Having a provision to appoint a pro bono attorney when the public defender's office is unable to do so is a reasonable way to appoint counsel in a low-cost manner. Additionally, promulgating a list of factors to ensure that pro bono counsel has experience in capital proceedings, habeas proceedings, or both, and a sufficiently manageable

¹¹ See KING ET AL., *supra* note 1, at 16–17 (describing how thirteen federal district courts, including the Eastern District of Pennsylvania, comprise over sixty percent of all capital habeas cases filed between 2001 and 2004).

¹² This article does not address the United States District Court of the Virgin Islands, which is a territorial court.

¹³ See Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1481 (2019) (noting that the way people plead in forma pauperis varies dramatically across the federal courts).

caseload to be able to spend the necessary time working on the habeas proceeding will create guidelines for judges to appoint appropriate counsel in all cases. Further, providing counsel earlier on in the case, such as before a petitioner files, instead of requiring petitioners essentially prove their claims before being assigned an attorney, would benefit all parties to the habeas process.

In order to determine which appointment mechanisms currently used within Pennsylvania and the Third Circuit could most effectively serve as a blueprint for future reform, this article proceeds as follows. Part I of this article looks at the constitutional right to counsel today, its importance, and why the right is not extended to habeas proceedings. Part II discusses the wide range of different types of counsel that may be appointed. Part III looks at the different plans the state and federal courts use to appoint counsel in post-conviction proceedings. Part IV analyzes these mechanisms and plans, determining the effectiveness of the current systems and their relative success, and articulates which of these mechanisms can and should be broadly employed in a uniformly enforced policy to provide habeas petitioners with more effective counsel.

I. THE LACK OF A RIGHT TO HABEAS COUNSEL

The right to counsel in criminal proceedings, and the lack thereof in habeas proceedings has led to the decentralized nature of habeas counsel appointments today. Before the affirmative right to counsel in criminal prosecutions was made explicit by the Supreme Court, it was fulfilled by legal aid societies that provided assistance in criminal cases as well as municipally funded public defender offices.¹⁴ Before *Powell v. Alabama*,¹⁵ there were two major forms of legal aid. The first was the public defender model, focusing on government funding providing legal aid.¹⁶ This proposal intended to create fairer legal outcomes and fix the bar's previously haphazard assigned counsel system in the few instances where it existed.¹⁷ The public defender model gained traction and was even adopted by Los Angeles in 1914, but in

¹⁴ Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1169 (2019).

¹⁵ 287 U.S. 45 (1932).

¹⁶ Ossei-Owusu, *supra* note 14, at 1171.

¹⁷ *Id.* at 1173.

the beginning of the right to counsel movement the public defender model was much rarer.¹⁸

The second, more widespread approach was the legal aid society model.¹⁹ These societies were the creation of privately funded volunteer organizations, with a range of assistance coming from local bar associations and philanthropists.²⁰ Some worked on both civil and criminal work, and others focused exclusively on civil cases.²¹ Some smaller self-help organizations also cropped up, focusing on social services generally as well as legal services for marginalized groups.²²

The Supreme Court was silent on the right to counsel before deciding *Powell* in 1931. *Moore v. Dempsey* was one of the first cases to involve a constructive ineffective assistance of counsel claim, but the Court focused solely on the mob-oriented nature of the proceedings.²³ In *Powell v. Alabama*, the Supreme Court required for the first time that states appoint counsel for indigent capital defendants.²⁴ But this was a limited holding, only applicable to federal and capital cases. In *Betts v. Brady*, Smith Betts was not provided a lawyer for a robbery charge in Maryland and lost on appeal.²⁵ Instead, the Court created the “special circumstances” test, requiring courts to examine the appointment of counsel on a case-by-case basis.²⁶

The right to counsel as we now know it was recognized in the watershed criminal law case *Gideon v. Wainwright*.²⁷ Clarence Earl Gideon was accused of robbery, was not appointed an attorney despite his indigence, and was convicted.²⁸ His handwritten petition to the Supreme Court turned into “the

¹⁸ *Id.*

¹⁹ *Id.* at 1171.

²⁰ *Id.* at 1178.

²¹ *Id.* at 1179–80.

²² Ossei-Owusu, *supra* note 14, at 1185.

²³ 261 U.S. 86, 89–91 (1923).

²⁴ 287 U.S. 45, 73 (1932).

²⁵ 316 U.S. 455, 456–57 (1942) (highlighting the debate between the Justices surrounding federalism and the total incorporation of the Sixth Amendment right to counsel against the states). *See* William J. Brennan Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 768–69 (1961) (detailing Justice Black’s support for full incorporation of the Bill of Rights); *see also* Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 748 (1965) (arguing that Supreme Court history does not warrant total incorporation).

²⁶ Tracey L. Meares, *What’s Wrong with Gideon*, 70 U. CHI. L. REV. 215, 221 (2003).

²⁷ 372 U.S. 335 (1963).

²⁸ *Id.* at 336–37.

vehicle for a national and incorporated right to counsel.”²⁹ Following *Gideon*, the Court continued to develop the right to counsel doctrine, providing when counsel should be present in order for the defendant to have a full and fair trial.³⁰ Yet in practice, *Gideon* does not always live up to its expectations, and only applies to the trial stage of criminal litigation.³¹

On direct appeal, there is no true federal constitutional right to counsel—because there is no right to appeal a criminal conviction in the first place.³² The right of an appeal in a criminal case is rather a creation of statute.³³ *Douglas v. California* established that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in state court because of the “equality demanded by the Fourteenth Amendment.”³⁴ But this right only supports “one appeal as of right,” and following that appeal there is no constitutional right to counsel beyond a first appeal pursuing state discretionary or collateral review.³⁵

A petition for habeas corpus, while challenging the validity of a criminal conviction, is technically styled as a civil action. Because it is civil, much of the right to counsel case law discussed above is inapplicable to petitioners. Therefore, no constitutional right to habeas counsel exists. There is also no constitutional right to effective assistance of counsel on post-conviction review, should a petitioner even be assigned an attorney. Because of this, there is no uniform system for appointing counsel. Since there are no

²⁹ *Id.*; Ossei-Owusu, *supra* note 14, at 1204.

³⁰ *See Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (holding that the Sixth Amendment right to counsel extends to police interrogations).

³¹ *See* Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1769 (2016) (arguing that many lawyers appointed to represent indigent defendants do not perform adequately because they have been conditioned not to fight for their clients).

³² *Abney v. United States*, 431 U.S. 651, 656 (1977) (“[I]t is well settled that there is no constitutional right to a [criminal conviction] appeal.”).

³³ *Id.*

³⁴ 372 U.S. 353, 358 (1963); *see also* *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (clarifying that a defendant’s right to appointed counsel includes the right to effective assistance of counsel for all criminal defendants in their first appeal as of right).

³⁵ *See* *Coleman v. Thompson*, 501 U.S. 722, 756–57 (1991) (finding that a first state collateral proceeding could be considered a “one and only appeal,” and that a habeas petitioner was not entitled to counsel to appeal the state trial court’s determination); *see also* *Pennsylvania v. Finley*, 418 U.S. 551, 556–57 (1987) (holding that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review); *Coleman*, 501 U.S. at 756 (“[N]either the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment’s equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right.” (citing *Ross v. Moffitt*, 417 U.S. 600, 616 (1974))).

standards by which counsel must be provided, the counsel appointment system is incredibly disorganized, with courts using different mechanisms. Because this decentralized system has no standardized methods by which to measure appointment, the quality of habeas counsel essentially depends on where a petitioner is filing.

II. TYPES OF APPOINTED COUNSEL

Because there is no right to counsel on postconviction review, it is hard to determine exactly if the type of counsel makes a difference for a habeas petitioner. There is very little data that compares success rates in habeas petitions and the type of counsel that litigated them, if any were provided. Because no data specifically related to habeas counsel was available, this Article utilized a well-studied analog: the efficacy of different types of appointed counsel in indigent defense proceedings. “While the Supreme Court recognized the right to defense counsel in most criminal proceedings except for habeas, the Court has not mandated how criminal defense should be provided by the states.”³⁶ Because of this, the state and federal systems have adopted a variety of approaches including public defender systems, assigned counsel programs, or contract attorneys.³⁷ These systems may be applied singularly or combined. Some states employ statewide public defenders but still appoint contract or assigned counsel in conflict cases or to assist with a heavy caseload.³⁸

Assigned counsel systems, in which a private attorney is appointed from a list of available attorneys either on an ad hoc basis or coordinated by an administrator, is arguably the oldest system of indigent representation.³⁹ Comparatively, contract attorneys are a more recent private approach to indigent representation.⁴⁰ These systems “involve governmental units reaching agreements with private attorneys, bar associations, or law firms to

³⁶ Thomas H. 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, 30 (2014).

³⁷ *Id.* (pointing out that while defendants can always hire criminal defense attorneys, the focus on the article will be on those that cannot afford counsel).

³⁸ *Id.*

³⁹ *Id.* at 31.

⁴⁰ *Id.*

provide indigent defense services for a specific dollar amount and time period.”⁴¹

The most popular and widely used form of indigent defense is public defender programs.⁴² In these programs, full-time public defenders represent indigent criminal defendants through nonprofit or government services.⁴³ The administration and funding of these programs occur at either the state, county, or federal level depending on the program.⁴⁴

Regardless of the type of counsel appointed, it is important that the attorney is familiar with habeas petitions, either through practice or through education.

The process of appointment of counsel for capital petitioners is relatively consistent. As of 1988, all federal capital petitioners are statutorily entitled of the appointment to federal counsel as well as investigative or expert services.⁴⁵ The mechanism for the appointment of counsel in capital habeas cases under both 28 U.S.C. §§ 2254 and 2255 in district courts is Form CJA 30. CJA 30 authorizes payment of counsel for representative and investigative services in capital habeas proceedings.⁴⁶ And according to *McFarland v. Scott*, the right to appointed counsel may attach prior to the filing of a formal habeas petition, allowing petitioners to receive the benefits of investigative services that may be critical in the preapplication phase of a habeas petition.⁴⁷ It is unlikely that *McFarland* actually attaches prior to filing in practice, however, as research has shown that over eighty-seven percent of capital habeas petitioners file without counsel.⁴⁸

⁴¹ *Id.* at 33.

⁴² *Id.* at 31.

⁴³ *Id.*

⁴⁴ Cohen, *supra* note 36, at 5. About twenty-two states administer and provide funding at the state level, while in the remaining 27 states and the District of Columbia, public defender programs are funded and administered at the local level.

⁴⁵ See 18 U.S.C. § 3599(a)(2) (2018) (“In any post-conviction proceeding under section 2254 or 2255 of title 28 . . . seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).”).

⁴⁶ *Death Penalty Proceedings: Appointment of and Authority to Pay Court-Appointed Counsel, CJA Form 30*, U.S. CTS., <https://www.uscourts.gov/forms/vouchers/death-penalty-proceedings-appointment-and-authority-pay-court-appointed-counsel> [<https://perma.cc/X7X3-KNMY>].

⁴⁷ *McFarland v. Scott*, 512 U.S. 849, 854–55 (1994).

⁴⁸ KING ET AL., *supra* note 1, at 23.

But there is absolutely no consistent mechanism available for noncapital petitioners to receive counsel. In non-capital cases, a judge may appoint counsel if the “interests of justice” require doing so.⁴⁹ If the case is potentially meritorious and complex, involves a disabled or mentally ill petitioner, requires an evidentiary hearing, or requires some other form of discovery, judges may be more inclined to appoint an attorney.⁵⁰ But over ninety percent of non-capital cases are still unrepresented by counsel.⁵¹ Even in capital cases, the *McFarland* rule has not been consistently followed, with only 12.5% of capital petitioners having counsel when they first filed.⁵²

And even if a petitioner has the statutory right to counsel, there is no guarantee of *effective* assistance of counsel, as that is only available when the right to counsel is derived from the Sixth Amendment.⁵³ Habeas petitioners may not make a claim for ineffective assistance of habeas counsel as a ground for relief.⁵⁴ Therefore, any habeas petitioner, whether petitioning for review of a capital or non-capital sentence, has no remedy for an Ineffective Assistance of Counsel (IAC) claim for their habeas counsel.⁵⁵ Because of this, it is imperative that counsel is appointed correctly the first time. This means that appointed counsel for habeas review should have at minimum some experience in criminal law, familiarity with habeas, and sufficient time to dedicate to the case.

Habeas corpus is a complicated field of case law that most petitioners must navigate on their own.⁵⁶ Having counsel appointed in habeas petitions may very well make a major difference. Petitions with counsel are associated with longer processing times, which means that they are less likely to be terminated early in the case or on the ground of procedural default.⁵⁷ Under Form CJA 30, appointed counsel “may obtain investigative, expert, and

⁴⁹ 18 U.S.C. § 3006A(a)(2)(B) (2018).

⁵⁰ See Rules Governing Section 2254 Cases in the United States District Courts, Section 2254 Rule 6(a).

⁵¹ See KING ET AL., *supra* note 1, at 23 (noting that 92.3% of non-capital cases did not involve petitioner’s counsel).

⁵² See *id.*

⁵³ See 28 U.S.C. § 2254(i) (2018) (stating that “[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”).

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *supra* notes 49–51 and accompanying text.

⁵⁷ See KING ET AL., *supra* note 1, at 23.

other services necessary for adequate representation in accordance with the procedures set forth in 18 U.S.C. § 3006A(e) of the Criminal Justice Act.”⁵⁸ This means that counsel may obtain resources for actually investigating a petitioner’s claims and support them with evidence, as opposed to a petitioner making a claim in a petition without the resources available to support the petitioner’s claims. By appointing qualified counsel earlier on in the petition process and giving them resources needed to investigate their client’s claims, more petitions could be reviewed on the merits of the case instead of procedurally defaulting or hitting another avoidable roadblock. Thus, two problems in the current system need addressing: (1) counsel should be appointed consistently; and (2) counsel should be sufficiently qualified and prepared to work a habeas petition.

III. STATE AND FEDERAL POST-CONVICTION APPOINTMENT

While different types of counsel are available for appointment, both state and federal courts have different plans for appointing counsel. These plans vary in their differences, not only between state and federal courts but district courts as well. This section first looks at how Pennsylvania state appoints counsel in habeas review, and then addresses the courts in the Third Circuit.

A. *Pennsylvania State Post-Conviction Proceedings*

Pennsylvania’s Post Conviction Relief Act (“PCRA”) provides for postconviction review when a person is convicted of crimes they did not commit or are serving illegal sentences.⁵⁹ It is the only means by which a person in custody may obtain collateral relief in Pennsylvania.⁶⁰ To be eligible for relief under the PCRA a petitioner must plead and prove by a preponderance of the evidence multiple complicated factors.⁶¹ Usually the

⁵⁸ See *Death Penalty Proceedings*, *supra* note 46.

⁵⁹ See 42 PA. CONS. STAT. § 9542 (1982).

⁶⁰ See *id.*

⁶¹ See 42 PA. CONS. STAT. § 9543(a) (2018). A petitioner must plead and prove by a preponderance of the evidence that: (1) the petitioner is currently serving a sentence; the conviction occurred from either a violation of the Pennsylvania or Federal Constitution, ineffective assistance of counsel, unlawful inducement of a guilty plea, improper obstruction by government officials, previously unavailable exculpatory evidence has become available, an unlawful imposition of a sentence, or that the tribunal did not have jurisdiction; (2) the error has not been litigated or waived; and (3) the failure to litigate previously at trial or on direct appeal could not have been the result of strategic or tactical decisions by counsel.

issue must involve the truth-determining process.⁶² If these conditions are met the petition “shall be dismissed” if delay caused prejudice to the Commonwealth.⁶³ There is a one-year grace period to file a PCRA petition.⁶⁴

Pennsylvania’s Rule of Criminal Procedure Rule 904 guides the appointment of counsel for those that proceed in forma pauperis, and those that succeed in having counsel appointed keep counsel until habeas proceedings conclude.⁶⁵ Should a judge determine that the party is unable to pay the costs of the proceedings, the judge shall order that the defendant be permitted to proceed in forma pauperis and that counsel be appointed.⁶⁶ The determination of “unable to pay the costs” is supposed to be construed broadly, with the intent of 904 being that counsel is appointed in every first habeas petition if the petitioner cannot afford it.⁶⁷ Trial courts in Pennsylvania have considerable discretion in determining whether a person is entitled to in forma pauperis status,⁶⁸ but a court must consider gross income, debt, obligations, and dependents when reviewing an application for in forma pauperis status.⁶⁹ And even if a prisoner is granted in forma pauperis status, the court may still collect the filing fee from the prisoner’s account should funds exist.⁷⁰ Should a habeas petitioner qualify for in forma pauperis status, counsel is appointed regardless of the other rules for habeas counsel.

Even if a petitioner does not qualify for in forma pauperis, a petitioner is still entitled to counsel on the first petition for postconviction collateral relief.⁷¹ This appointment is effective throughout the post-conviction

⁶² See *Commonwealth v. Figueroa*, 29 A.3d 1177, 1179 (Pa. Super. Ct. 2011) (noting that the PCRA court denied relief because it found that “the issue did not involve the truth-determining process and was not cognizable under the PCRA.”).

⁶³ 42 PA. CONS. STAT. § 9543(b) (2018) (“This subsection does not apply if the petitioner shows that the petition is based on grounds of which the petitioner could not have discovered by the exercise of reasonable diligence . . .”).

⁶⁴ See 42 PA. CONS. STAT. § 9545(b).

⁶⁵ See PA. R. CRIM. P. 904(F)(2).

⁶⁶ See PA. R. CRIM. P. 904(C).

⁶⁷ See PA. R. CRIM. P. 904 cmt. (amended 2011).

⁶⁸ See *Amrhein v. Amrhein*, 903 A.2d 17, 20 (Pa. Super. Ct. 2006).

⁶⁹ See *id.* at 22.

⁷⁰ See 42 PA. CONS. STAT. § 6602(b).

⁷¹ See PA. R. CRIM. P. 904(C) (“[W]hen an unrepresented defendant satisfies the judge that the defendant is unable to afford or otherwise procure counsel, the judge shall appoint counsel to represent the defendant on the defendant’s first petition for post-conviction collateral relief.”).

collateral proceedings, including any appeal from the PCRA judge's determination.⁷² When a habeas petitioner is granted an evidentiary hearing, no matter if the petition is second or successive, Pennsylvania entitles the petitioner to the appointment of counsel.⁷³ Other than when an evidentiary hearing occurs, counsel is rarely appointed on a second or successive petition unless the initial PCRA is found ineffective.⁷⁴

Rule 904(H) contains special provisions for capital cases. At the conclusion of direct review in a death penalty case, which concludes after discretionary review in the Supreme Court of the United States or when the window for seeking such review is over, the trial judge appoints new counsel for post-conviction collateral review.⁷⁵ This appointment of counsel can be waived if the petitioner has elected to proceed pro se or waive collateral proceedings;⁷⁶ the defendant requests continued representation and voluntarily waives an IAC claim;⁷⁷ or the defendant has engaged counsel that will participate in collateral review proceedings.⁷⁸ Should a petitioner seek to proceed pro se, the court may appoint standby counsel.⁷⁹ Standby counsel "shall attend the proceedings and shall be available to the defendant for consultation and advice."⁸⁰ Appointing standby counsel minimizes delay should the petitioner seek to withdraw the waiver and be represented by counsel.⁸¹

⁷² See PA. R. CRIM. P. 904(F)(2) ("[T]he appointment of counsel shall be effective throughout the post-conviction collateral proceedings, including any appeal from disposition of the petition for post-conviction collateral relief.").

⁷³ See, e.g., PA. R. CRIM. P. 904(D) (providing for appointment of counsel for indigent defendant with respect to a second or subsequent PCRA petition where an evidentiary hearing is required); PA. R. CRIM. P. 908(C) (providing that upon scheduling an evidentiary hearing the court shall provide defendant an opportunity for counsel); see also *Commonwealth v. Torres*, 101 A.3d 781, 781 (Pa. 2014) (holding that once an evidentiary hearing is ordered on claims raised in a timely PCRA petition, petitioner is entitled to counsel).

⁷⁴ *Commonwealth v. Bennett*, 930 A.2d 1264, 1274 (2007) (holding that because PCRA counsel's failure to file an appellate brief, which resulted in the dismissal of petitioner's appeal, constituted abandonment for purposes of that appeal, and was *per se* prejudicial, a second PCRA petition was timely).

⁷⁵ PA. R. CRIM. P. 904(H)(1).

⁷⁶ PA. R. CRIM. P. 904(H)(1)(a).

⁷⁷ PA. R. CRIM. P. 904(H)(1)(b).

⁷⁸ PA. R. CRIM. P. 904(H)(1)(c).

⁷⁹ PA. R. CRIM. P. 121(D).

⁸⁰ *Id.*

⁸¹ See *Commonwealth v. Africa*, 353 A.2d 855, 864 (Pa. 1976).

Appointment of counsel is effective throughout the post-conviction collateral proceedings including collateral appeal.⁸² The intent of the rule is to provide counsel in every case in which a defendant has filed a petition for post-conviction collateral relief for the first time and is unable to afford counsel.⁸³ The rule does limit appointment of counsel on a second or successive petition to instances *only* when an evidentiary hearing is required.⁸⁴ There is, however, an “interests of justice” exception, where a judge may have discretion to appoint counsel regardless of the need for an evidentiary hearing.⁸⁵

According to Rule 801, attorneys for a capital petitioner on post-conviction review must meet certain educational and experiential requirements.⁸⁶ The determination of this experience is accomplished by the appointing court.⁸⁷ These requirements include that counsel must be an active trial practitioner with a minimum of five years of criminal litigation experience and must have served as lead or co-counsel in a minimum of eight “significant cases” that included jury deliberations, or, if representation is to be only on appeal, prior appellate or post-conviction representation is satisfactory.⁸⁸ Capital counsel also have a Continuing Legal Education requirement, and must have completed specific capital case-based training within the three years prior to the appointment.⁸⁹ The Pennsylvania Continuing Legal Education Board maintains a list of attorneys who satisfy these requirements from which appointments can be taken.⁹⁰ The purpose of Rule 801 is to provide uniform standards for those appointed in capital cases “to thus ensure such counsel possess the ability, knowledge, and experience to provide representation in the most competent and professional manner possible.”⁹¹ The qualifications for counsel in capital cases apply at

⁸² PA. R. CRIM. P. 904(H)(2)(b).

⁸³ PA. R. CRIM. P. 904 cmt. (amended 2011).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ PA. R. CRIM. P. 801 cmt. (amended 2016).

⁸⁸ PA. R. CRIM. P. 801(1) (2018). A “significant case” is one that charges murder, manslaughter, vehicular homicide, or any felony for which the maximum penalty is ten years or more. *Id.*

⁸⁹ PA. R. CRIM. P. 801(2). This training includes, but is not limited to, relevant state, federal, and international law, pleading and motion practice, trial investigation and preparation, jury selection, presentation and rebuttal of relevant evidentiary theories, and more. PA. R. CRIM. P. 801(2)(b).

⁹⁰ PA. R. CRIM. P. 801(2)(c).

⁹¹ PA. R. CRIM. P. 801 cmt. (amended 2016).

all stages, including post-conviction and appellate and may not be waived.⁹² The appointment of counsel for habeas petitioners in Pennsylvania concludes when the Supreme Court of Pennsylvania collateral review is finalized.⁹³ Counsel does not carry over should the petitioner choose to file a petition for federal review of state habeas corpus.⁹⁴

B. Federal Courts within the Third Circuit's Jurisdiction

Since Congress passed the Criminal Justice Act of 1964 (“CJA”), each United States District Court has been required to keep in place a plan to provide adequate counsel for those who may be financially unable to do so.⁹⁵ Because state counsel does not carry over, defendants will likely need to start anew in federal court with fresh counsel unfamiliar to the case.

These plans include varying provisions for appointing attorneys, and the circuit court overseeing the district supplements the plan with provisions for appellate representation.⁹⁶ These plans are supervised by the Administrative Office of the United States Courts and the Judicial Conference of the United States.⁹⁷

In the Middle District of Pennsylvania there is a Pro Bono Attorney Program that is a cooperative program between the Middle District of Pennsylvania and the Middle District Chapter of the Federal Bar Association.⁹⁸ Any pro se indigent litigant may apply to have a volunteer attorney appointed.⁹⁹ It is not completely clear, but appears to be that a volunteer pro bono attorney will be appointed should a judge grant any pro se litigant in forma pauperis status. For state court review under § 2254 a petitioner must pay a fee of five dollars, and if the prisoner’s institutional account exceeds fifty dollars they may not proceed under in forma pauperis

⁹² *Id.*

⁹³ PA. R. CRIM. P. 904 cmt. (amended 2011).

⁹⁴ *See id.*

⁹⁵ 18 U.S.C. § 3006A(a) (2018).

⁹⁶ 18 U.S.C. § 3006A(a)(3) (2018).

⁹⁷ 18 U.S.C. § 3006A(h) (2018).

⁹⁸ *Pro Bono Attorney Program*, U.S. DIST. CT. FOR MIDDLE DIST. PA., <https://www.pamd.uscourts.gov/content/pro-bono-attorney> [<https://perma.cc/E5KG-MR4Q>] (last visited May 22, 2022).

⁹⁹ *Id.*

status.¹⁰⁰ For all motions under habeas, should a petitioner wish to proceed in forma pauperis, the prisoner must fill out the AO 240 form, stating why they cannot pay the filing fee.¹⁰¹ Additionally, along with the AO 240, a prisoner must submit a certificate signed by an institutional officer showing the amount of money in their account as well as any receipts and expenditures for the account for the past six months.¹⁰² Thus, in the Middle District of Pennsylvania, a non-capital habeas petitioner may apply for counsel, but must seek in forma pauperis status.

In the Western District of Pennsylvania there is no mechanism for appointment of counsel in a habeas corpus proceeding unless it is a financially eligible prisoner seeking to vacate or set aside a death sentence in either §§ 2254 or 2255.¹⁰³ Counsel for § 2254 petitions are appointed from the Capital Habeas Unit of the Federal Public Defenders for the Western District of Pennsylvania.¹⁰⁴ Should there be no counsel available to undertake representation, the court will seek assistance from another Capital Habeas Unit in the Third Federal Judicial Circuit.¹⁰⁵ Should no other Capital Habeas Unit be able to accept an appointment, the court shall appoint private attorneys from the District's Criminal Justice Act Panel who qualify for the appointment.¹⁰⁶ In appointing counsel in a § 2255 petition, the court will "seek and consider" the recommendation of the federal public defender's office.¹⁰⁷ Under the Western District's appointment plan, once counsel is appointed, representation will continue until the matter has been closed.¹⁰⁸

¹⁰⁰ U.S. DIST. CT. FOR MIDDLE DIST. PA., PETITION FOR RELIEF FROM A CONVICTION OR SENTENCE BY A PERSON IN STATE CUSTODY, <https://www.pamd.uscourts.gov/sites/pamd/files/2254.pdf> [<https://perma.cc/3SSN-HXES>] (last visited May 22, 2022).

¹⁰¹ U.S. DIST. CT. FOR MIDDLE DIST. PA., APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS (June 2009), https://www.pamd.uscourts.gov/sites/pamd/files/AO_240.pdf [<https://perma.cc/VVS6-47R7>].

¹⁰² *Id.*

¹⁰³ U.S. DIST. CT. FOR W. DIST. PA., CRIMINAL JUSTICE ACT PLAN OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA 7–8 (Dec. 15, 2015), <https://www.pawd.uscourts.gov/sites/pawd/files/Signed2015CJAPlan.pdf> [<https://perma.cc/22H3-QE4S>].

¹⁰⁴ *Id.* at 7.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 7–8.

¹⁰⁷ *Id.* at 8.

¹⁰⁸ *Id.*

The Eastern District of Pennsylvania CJA plan deals with appointment in capital habeas petitions and in forma pauperis applications in §§ 2254 and 2255 very similarly to the Western District, in that counsel will be appointed from the Capital Habeas Unit of the Federal Community Defenders of the Eastern District of Pennsylvania, and if no such counsel is available, the court shall appoint private attorneys who qualify for the appointment. The Eastern District, however, has specific qualification requirements for counsel in capital cases.¹⁰⁹ Should counsel not be able to be appointed from the Federal Public Defender Capital Habeas Unit the Eastern District plan states that counsel should have “distinguished” prior experience in federal and capital post-conviction proceedings, and when possible, should have prior experience in capital § 2254 representations.¹¹⁰ Additionally, the Eastern District considers factors such as qualification standards endorsed by bar associations, commitment to the defense of capital cases, current caseload including other capital cases, and counsel’s “willingness to represent effectively the interests of the client.”¹¹¹

In the District of Delaware, the Court maintains a court-wide habeas law clerk and a pro se law clerk that are staffed by the AO.¹¹² The habeas law clerk will typically help draft an opinion, and works on almost all cases on the merits.¹¹³ These clerks give advice as to whether or not counsel should

¹⁰⁹ See U.S. DIST. CT. FOR EAST. DIST. PA., UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA CRIMINAL JUSTICE ACT PLAN 33–34 (Nov. 27, 2017), <https://www.paed.uscourts.gov/documents/cja/CJA%20Plan.pdf> [<https://perma.cc/6J46-V5ZH>] (discussing the qualifications that capital habeas counsel need for appointment).

¹¹⁰ *Id.* at 34.

¹¹¹ *Id.*

¹¹² Interview with Leonard Stark, Chief Judge, U.S. Dist. Ct. for the Dist. of Del. (Mar. 4, 2020). This interview was conducted while Judge Stark was Chief Judge of the United States District Court for the District of Delaware. Since then, Judge Stark has been appointed to the United States Court of Appeals for the Federal Circuit.

It is important to note that the Author obtained this information through an interview with Chief Judge Stark because the court’s website does not necessarily make clear how to apply to have counsel appointed. The court does not have the AO 240 petition for prisoners to apply in forma pauperis on the website, nor does the court have the petition for § 2254 review live on the website. There are many possible explanations for this, including Delaware’s small population and small amount of habeas corpus petitions, KING ET AL., *supra* note 1, at 16, the court’s focus on civil patent litigation, the availability of the court’s Clerk’s Office, and the availability of the habeas and pro se law clerks to pre-screen applications and determine which cases are appropriate to have counsel appointed.

¹¹³ Interview with Chief Judge Stark, *supra* note 112.

be appointed in a particular petition.¹¹⁴ This advice is based on a determination of petitioner need and the “non-frivolous” nature of the petition.¹¹⁵ The clerks typically screen for counsel based on the preliminary habeas motions, and so counsel is rarely appointed before those motions are filed.¹¹⁶ Counsel is, however, typically appointed in most cases.¹¹⁷ For capital § 2255 review the court often appoints members of the Federal Public Defender Capital Habeas Unit.¹¹⁸ For other cases, counsel is appointed from a Federal Civil Panel.¹¹⁹ This panel consists mostly of lawyers from firms, and the Clerk’s Office will contact them to request their appointment to a case after a determination of whether or not a petitioner should be appointed counsel is made.¹²⁰ To apply to the panel, a lawyer or their firm fills out a form specifying the type of work they are willing to accept.¹²¹ Because the panel is a joint effort between the court and the bar association, it appears as if the quality of representation is monitored.¹²² Additionally, educational and training sessions are conducted.¹²³

The District of New Jersey does not have a motion for habeas pro bono counsel.¹²⁴ The court does provide an in forma pauperis form for habeas corpus cases that forces a prisoner to categorize any and all assets and money

¹¹⁴ *Id.*

¹¹⁵ U.S. DIST. CT. FOR DIST. DEL., IN RE AMENDMENTS TO THE FEDERAL CIVIL PANEL THAT PROVIDES LEGAL ASSISTANCE TO INDIGENT PARTIES IN CERTAIN CIVIL LITIGATION, 2, n.1 (June 27, 2016), <https://www.ded.uscourts.gov/sites/ded/files/news/Revised%20Federal%20Civil%20Panel%20Order%20dated%206-27-16.pdf> [<https://perma.cc/YJY5-X7Y4>].

¹¹⁶ Interview with Chief Judge Stark, *supra* note 112. During the interview there was a general guess as to seventy-five percent of appointments, but the Author has been unable to confirm this.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ U.S. DIST. CT. FOR DIST. DEL., APPLICATION TO THE FEDERAL CIVIL PANEL, <https://www.ded.uscourts.gov/sites/ded/files/forms/FCP-SIGNUP-FORM.pdf> [<https://perma.cc/3MX8-XXJM>] (last visited May 22, 2022) (giving lawyers three categories of cases to accept, including “[p]risoner civil rights cases, [e]mployment discrimination cases, and [o]ther civil cases”).

¹²² IN RE AMENDMENTS, *supra* note 115, at 3. (“The Court and the Bar will meet regularly to discuss Panel matters of mutual concern.”).

¹²³ *Id.*

¹²⁴ The District of New Jersey, however, provides a motion for pro bono counsel for a prisoner civil rights case, such as under 42 U.S.C. § 1983.

available to them.¹²⁵ Distinct from the Pennsylvania District Courts' account maximum for fifty dollars to be able to proceed in forma pauperis, the District of New Jersey's account maximum is two hundred dollars.¹²⁶ The District of New Jersey's CJA Plan provides that all attorneys appointed in federal capital cases must be well qualified "by virtue of their training, commitment, and distinguished prior capital defense experience at the relevant stage of the proceeding," and that any appointed attorney must have sufficient time and resources to devote to the representation.¹²⁷ The "[d]istinguished prior experience" is explicitly made clear to refer to quality of representation, not just prior experience.¹²⁸ Counsel may be appointed from outside the district if it means meeting this standard.¹²⁹ The CJA plan does not explicitly provide standards for § 2254 petitions but has a provision for § 2255 petitions, and recommends the appointment of at least two attorneys who should have "distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings."¹³⁰ It is unclear whether the New Jersey CJA plan provides at all for representation in a § 2254 capital case.

While the District Courts all have slight differences between procedures when going forward with deciding whether to appoint counsel in a §§ 2254 or 2255 petition, the court of appeals has a consolidated procedure. In the Third Circuit, to go forward with postconviction review a petitioner must seek a Certificate of Appealability from either the District Court that denied their petition or the Third Circuit.¹³¹ Typically this must be sought from the

¹²⁵ U.S. DIST. CT. FOR DIST. N.J., AFFIDAVIT OF POVERTY AND CERTIFICATION (HABEAS CORPUS), (Sept. 2009), <https://www.ded.uscourts.gov/sites/ded/files/forms/FCP-SIGNUP-FORM.pdf> [<https://perma.cc/J83S-BXM6>]. This is distinct from the AO 240, which is for both civil plaintiffs and habeas petitioners.

¹²⁶ U.S. DIST. CT. FOR DIST. N.J., PETITION FOR RELIEF FROM A CONVICTION OR SENTENCE BY A PERSON IN STATE CUSTODY (Jan. 2014), <https://www.njd.uscourts.gov/sites/njd/files/forms/relief%20from%20conviction%20in%20custody.pdf> [<https://perma.cc/BYE5-RE3G>].

¹²⁷ U.S. DIST. CT. FOR DIST. N.J., UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY CRIMINAL JUSTICE ACT PLAN 28 (Apr. 26, 2018), https://www.njd.uscourts.gov/sites/njd/files/DNJJCJAPlan2018_0.pdf [<https://perma.cc/FG96-3UBP>].

¹²⁸ *Id.* ("Distinguished prior experience" contemplates excellence, not simply prior experience.')

¹²⁹ *Id.* ("Counsel with distinguished prior experience should be appointed even if meeting this standard requires appointing counsel from outside the district where the matter arises.')

¹³⁰ *Id.* at 29–30.

¹³¹ Video Conference Interview with Stephanos Bibas, Judge, U.S. Court of Appeals for the Third Circuit (Mar. 26, 2020).

Third Circuit because the District Court is highly likely to have denied it.¹³² The Clerk's Office goes through the petitions and determines those for which it is proper to appoint counsel.¹³³ This certificate is granted when a petitioner can show a "substantial showing of a denial of a constitutional right."¹³⁴ Upon meeting this threshold, the Third Circuit will appoint a lawyer to brief and argue the case on appeal.¹³⁵ Usually counsel is a lawyer from a law firm acting pro bono.¹³⁶ The Third Circuit does some measure of quality and is likely to re-appoint counsel should their work be satisfactory.¹³⁷ This method is for both non-capital and capital petitioners.¹³⁸

IV. EFFECTIVENESS OF MECHANISMS OF APPOINTMENT

As noted previously, the methods of appointment differ greatly between the various courts looked at in this article.¹³⁹ Each of these mechanisms has various benefits and issues, with some being more effective in appointment than others. This section first addresses the effectiveness of the different types of counsel available to be appointed, and then analyzes the costs and benefits of each court plan, determining certain requirements that courts should consider adopting to allow more petitioners counsel earlier on in the habeas process, as well as eligibility requirements to ensure that counsel is prepared to litigate a habeas claim.

A. *Effectiveness of Different Methods of Appointing Counsel*

Assigned counsel systems allow a number of attorneys who would not typically be available to represent petitioners. These attorneys often do not work in criminal justice, instead opting to take on these cases on a pro bono

¹³² *Id.* This evaluation is an opinion and the Author was not able to find information on how often district courts deny Certificates of Appealability. The logic is sound, however—it would be odd if a district court denied a petition but permitted it to be appealed to the relevant circuit court.

¹³³ Third Cir. I.O.P. 10.3.2 (2018) (stating in the internal operating procedures for the Third Circuit that "[w]hen a certificate of appealability is granted on behalf of an indigent appellant pursuant to 28 U.S.C. § 2254 or § 2255, the clerk appoints counsel for the appellant unless the court instructs otherwise.").

¹³⁴ Interview with Judge Bibas, *supra* note 131.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See supra* Part III.

basis, providing a court with a long list of possible counsel. But these systems have been criticized for appointing attorneys with inadequate skills, experience, and qualifications to represent indigent defendants, especially in counties with ad-hoc assignment systems where recent law school graduates or attorneys of marginal capabilities will sometimes take clients as a means to gain experience or supplement income.¹⁴⁰ Further, because these attorneys may not have expertise or knowledge of substantive and procedural criminal law they may not be a good fit for habeas cases, which often include a number of complex and detailed procedural questions. Administrative oversight systems that ensure appointed counsel have the requisite skills and qualifications may mitigate these weaknesses.¹⁴¹ Additionally, court-wide rules that specify certain requirements in complex cases, such as prior experience and a caseload manageable enough to sufficiently devote time to the client, may help these weaknesses as well.¹⁴²

Contract attorney systems are a means of providing a large number of petitioners with representation for a set time. Contract attorney systems are often used to assist in conflict cases or when courts have overwhelming caseloads.¹⁴³ These systems can limit the costs governments pay for indigent defense, as a set dollar amount is bid per representation, but may reduce the quality of representation as law firms underbid each other to secure competitive contracts.¹⁴⁴ And in some markets contract systems have resulted in higher defense costs as a result of not enough attorneys being available to generate competitive markets.¹⁴⁵ Further, unless the bidding system requires it, contract attorneys may not have specific expertise in criminal law, meaning that they may not be a good fit for habeas petitions in the same manner as an assigned attorney system.

The effectiveness of public defender systems is clear. The benefits of public defender programs have been discussed extensively, with the principal benefits being that they offer indigent defendants with access to professional legal staff with the training, experience, and skills to provide adequate legal defense. Further, public defender programs also have investigative resources

¹⁴⁰ Cohen, *supra* note 36, at 31.

¹⁴¹ *Id.* at 55.

¹⁴² *See supra* Part III.

¹⁴³ Cohen, *supra* note 36, at 31.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 31 (discussing the contract attorney system).

tailored to criminal law that assigned attorneys or contracts attorneys may not have.¹⁴⁶ But in many jurisdictions, public defender programs are not allocated enough resources to keep up with expanding caseloads, preventing them from adequately representing their clients.¹⁴⁷ Further, while a public defender may have far more experience in criminal law than a typical attorney, that does not necessarily translate to a support network and expertise required to properly litigate a habeas petition.

Some federal public defender's offices have Capital Habeas Units ("CHU") that exclusively provide representation in postconviction cases where the petitioner has been sentenced to death. CHU attorneys are experts in their field who deal exclusively with capital habeas cases, and may represent petitioners either in the district where their office is located or in other jurisdictions if appointed by a court. CHU does not, however, take on non-capital cases.

Which type of counsel is most effective at securing a favorable outcome for their client on postconviction review? That favorable outcome can occur at any part of the proceeding, including securing acquittals or dismissal, keeping clients from being incarcerated, or mitigating sentences. Although most studies find public defenders and private attorneys securing similar outcomes, some research shows private attorneys are able to secure shorter prison sentences or influence pretrial release decisions, charge reductions, and sentencing outcomes.¹⁴⁸ Research reviewing the representation of assigned attorneys, contract counsel, and public defenders have found assigned counsel producing less favorable outcomes for their clients.¹⁴⁹ More recent studies of conviction and sentencing rates have found that among convicted defendants sentenced to serve time either in prison or jail, those using public defenders received shorter average sentences than those with

¹⁴⁶ *See id.*

¹⁴⁷ *See State v. Peart*, 621 So. 2d 780, 790–91 (La. 1993) (finding that because of incredibly high caseloads public defenders in Section E of Orleans Parish Criminal District Court were per se ineffectively representing clients and instituting a presumption of ineffective assistance of counsel until otherwise proven).

¹⁴⁸ *See Cohen*, *supra* note 36, at 33.

¹⁴⁹ *See id.* at 38–40. One study comparing defendants represented by public defenders to those with court appointed counsel in federal district courts found that defendants with assigned counsel were more likely to be convicted and receive longer sentences than defendants with public defenders. *See id.* at 39, tbl. 5. Another study determined assigned counsel obtained noticeably less favorable outcomes compared to public defenders. *See id.*

private attorneys or assigned counsel.¹⁵⁰ CHU specifically has extreme success rates. The CHU of the Eastern District of Pennsylvania is especially successful at achieving either new trials or re-sentencing from the death penalty to life imprisonment for their clients.

B. Effectiveness of State and Federal Court Plans

Pennsylvania PCRA courts have specific rules they need to follow when appointing counsel for habeas cases.¹⁵¹ These rules, including requirements for counsel and requirements for appointment of counsel, seem as if they may result in wide appointments of qualified counsel. Rule 801's educational and experiential requirements as well as Rule 904's automatic appointment for first habeas petitions theoretically allow for petitioners to be counseled in a majority of first-time petitions by relatively experienced counsel.

These methods, however, incur substantial trade-offs between them. While most first habeas petitions are likely to receive counsel, a petitioner is highly unlikely to be appointed counsel in a second or successive petition unless there is a need for an evidentiary hearing.¹⁵² But pleading for an evidentiary hearing is a complex process, including determining the legal claim that they must bring and gathering witnesses to prove their claim, and a petitioner could benefit from the assistance of counsel in filing a petition for said hearing.¹⁵³

The Middle District of Pennsylvania utilizes a Pro Bono Attorney Program, similar to an assigned counsel system. This program seems like a great way to have counsel appointed in a variety of ways. It is applicable to *any* indigent petitioner, meaning a petitioner need not prove their case prior to actually filing their petition as they do not need to plead a certain level of constitutional error. But the indigent cap for prisoners is only fifty dollars, leaving a good number of prisoners who are too rich to proceed in forma pauperis but too poor to hire private counsel. Furthermore, assigned counsel

¹⁵⁰ See *id.* at 49. Defendants with public defenders were sentenced to an average of twenty-three months of confinement while those who hired attorneys or were assigned counsel were sentenced to incarceration terms averaging thirty-one and thirty-five months, respectively. See also *id.* at 39, tbl. 5.

¹⁵¹ See generally *supra* Part III.A (describing Pennsylvania Criminal Procedure rules for counsel in PCRA cases).

¹⁵² PA. R. CRIM. P. 904(D) (requiring appointment of counsel if an evidentiary hearing is required).

¹⁵³ See 42 PA. CONS. STAT. § 9545(d) (2018) (stating the procedures for evidentiary hearings).

systems benefit from some form of safeguards or requirements of attorneys to ensure that they are capable of litigating a habeas petition. The Middle District does not appear to have any such requirements or safeguards of quality and experience listed in their CJA Plan.

The Western District of Pennsylvania, meanwhile, has in a way an opposite problem: appointments are made from the district court's CHU or a CHU from a different jurisdiction if no local attorneys are available, with qualified attorneys recommended by the district's CJA panel, but only indigent capital petitioners receive counsel.¹⁵⁴ Furthermore, it is unclear if attorneys recommended by the CJA panel are expected to meet a certain educational and experiential threshold in order to be recommended. If not, attorneys may not be suitable for habeas appointment.

In the Eastern District of Pennsylvania, capital habeas attorneys, if not appointed from the local CHU, are expected to meet a significant number of provisions.¹⁵⁵ These provisions are extremely intriguing as they are not present in other District Courts' CJA plans, at least in this explicit of a manner. The plan requires that the counsel has "distinguished" prior experience in federal and capital post-conviction proceedings, especially experience in § 2254.¹⁵⁶ Further, counsel must have sufficient room in their caseload to effectively litigate a habeas petition. This may have a significant impact on the quality of counsel assigned to capital cases, because not only will a judge be seeking the recommendation of the public defender, but also actively ensuring that the counsel who takes on the case is able to do so in light of their workload and will represent the petitioner effectively.

In the District Court of Delaware and the Third Circuit, counsel is appointed in both capital and non-capital cases, which is unique.¹⁵⁷ But the appointment of counsel is based on some sort of threshold showing of

¹⁵⁴ See U.S. DIST. CT. FOR W. DIST. PA., CRIMINAL JUSTICE ACT PLAN OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA 7–8 (Dec. 15, 2015), <https://www.pawd.uscourts.gov/sites/pawd/files/Signed2015CJAPlan.pdf> [<https://perma.cc/347D-Y8PP>] (describing the process for appointing counsel in death penalty habeas proceedings under 28 U.S.C. § 2254).

¹⁵⁵ See U.S. DIST. CT. FOR EAST. DIST. PA., UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA CRIMINAL JUSTICE ACT PLAN 32–34 (Nov. 27, 2017), <https://www.paed.uscourts.gov/documents/cja/CJA%20Plan.pdf> [<https://perma.cc/845N-KWGE>] (discussing the qualifications that capital habeas attorneys need).

¹⁵⁶ See *id.* at 34 (stating that counsel for § 2254 cases "should have distinguished prior experience in capital § 2254 representations").

¹⁵⁷ See *supra* Part III (discussing state and federal post-conviction appointment of counsel).

constitutionality, which a petitioner may not have had the opportunity to develop without resources or assistance of counsel previously. The district courts differ in the type of counsel that is appointed when a public defender is unavailable. Some appoint from a volunteer list that has no determination of qualifications while others have extensive lists that require experience and commitment as important aspects of appointment, and typically seek the recommendation of the public defender's office when possible.¹⁵⁸ This could be problematic because a petitioner would be appointed counsel, but it could be counsel that has no idea how habeas corpus petitions work or counsel that has too heavy of a caseload to sufficiently manage a petition. Having some bare minimum threshold requiring prior criminal pro bono experience, habeas experience preferred, and a light enough caseload at the time of appointment so that counsel could commit sufficient time to the case would be best practices in all habeas appointments.

Yet, for all of the above discussion, there is no consistent mechanism of appointment for a non-capital petitioner in most district courts.¹⁵⁹ This leaves tens of thousands of petitioners uncounseled.¹⁶⁰ Capital petitioners, according to the CJA, are almost always afforded counsel if they are considered indigent, but that process in itself is unclear. Further still, in some courts—such as the Middle District of Pennsylvania—the threshold to be considered no longer indigent is so low that there must be many petitioners both unable to afford counsel *and* unable to have counsel appointed for them because they are not considered indigent under the court's rules.¹⁶¹

Further, it is concerning that some federal courts require that the petitioner themselves must prove “some significant denial of a constitutional right”¹⁶² or some “non-frivolous”¹⁶³ claim in order to have counsel be appointed for them. Having proper counsel to help them investigate and

¹⁵⁸ See *supra* Part III.

¹⁵⁹ See *supra* Part III.

¹⁶⁰ See KING ET AL., *supra* note 1, at 15 (noting that between 2003–2004, state habeas petitions for review in federal courts numbered 36,745).

¹⁶¹ See *supra* Part II.

¹⁶² Interview with Judge Bibas, *supra* note 131.

¹⁶³ See U.S. DIST. CT. FOR DIST. DEL., IN RE AMENDMENTS TO THE FEDERAL CIVIL PANEL THAT PROVIDES LEGAL ASSISTANCE TO INDIGENT PARTIES IN CERTAIN CIVIL LITIGATION 2 (June 27, 2016), <https://www.ded.uscourts.gov/sites/ded/files/news/Revised%20Federal%20Civil%20Panel%20Order%20dated%206-27-16.pdf> [<https://perma.cc/V88T-JZQJ>] (amending the policies and procedures regarding the District Court's appointment of attorneys to a volunteer panel that represents indigent parties).

prepare their petition may be the very difference in a pro se petitioner being able to show a denial of a constitutional right or a non-frivolous claim clearly to the court, as attorneys are the ones trained to spot those issues and argue them, not petitioners. Instead, courts may need to read between the lines of a pro se petition to be able to determine whether counsel should be appointed, theoretically leading to meritorious petitions being denied merely because they are pro se. Having counsel be appointed to assist petitioners in preparing their application for habeas corpus, the way PCRA courts do, would better serve both courts and litigants.

CONCLUSION

For all of the district courts, if a petitioner is given in forma pauperis status they may be assigned counsel regardless of whether their case is a capital or a non-capital one.¹⁶⁴ However, it is important to note that this is a discretionary appointment and even if a petitioner qualifies as in forma pauperis it is possible that counsel will still not be appointed because there is no constitutional, statutory, or local rule that mandates such an appointment.¹⁶⁵ And even if a court provides some appointment of counsel for an in forma pauperis petitioner it is absurdly easy for a petitioner to not qualify, and the status can be revoked even if the petitioner initially qualifies.¹⁶⁶ And in the rare instance when counsel is appointed in a case, depending on the District Court, even within the Third Circuit, there are varying guidelines for the qualifications of counsel, with some courts laying out detailed guidelines for the experience of counsel and other courts having more flexible, less detailed rules.

Overall, appointing counsel from the Federal Public Defenders Capital Habeas Unit is likely the best way for a petitioner to receive qualified counsel, as these are lawyers who specialize in these types of proceedings. But that is not always practicable in a criminal justice system that overworks and underpays public defenders.¹⁶⁷ This is especially true in certain district courts

¹⁶⁴ See *id.* at 1 (stating that the Court has the discretion to request an attorney's service in any type of case).

¹⁶⁵ See Hammond, *supra* note 13, at 1494–95.

¹⁶⁶ See *supra* Part III.

¹⁶⁷ See Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017, 5:55 AM), <https://www.nbcnews.com/news/us-news/public-defenders->

where there may be more habeas petitions than other courts like the Eastern District of Pennsylvania.¹⁶⁸ Providing for the appointment of a public defender from the Capital Habeas Unit in the first instance is likely the best way to do so. When a public defender is unavailable, appointing an attorney from a pro bono list is highly recommended, and having some sort of screening or qualification procedure would ensure that counsel that is being appointed is competent. The Eastern District of Pennsylvania's screening requirements are scrutable, and other district courts should consider adopting similar language, as it allows not only for the consideration of quality of counsel, but ensures that counsel has sufficient time to litigate a habeas petition properly.

Federal courts should also consider adopting some form of rule similar to the PCRA courts, where counsel is essentially automatically appointed to any first-time habeas petitioner. That way, not only would more indigent and non-capital petitioners be availed of counsel, they would be able to properly prepare their petition instead of a pro se petitioner needing to prove some constitutional issue on their own before even being considered for appointment of counsel. Waiting until after a layperson has had to prove a difficult legal threshold before appointing them counsel has likely led to the denial of meritorious petitions on habeas review.

At the very minimum, should the prior recommendations not be attractive to a district court, the court should consider promulgating a list of requirements for appointment of counsel that necessitates a minimum level of experience in habeas petitions or capital cases, or both. This would ensure that at the very least appointed counsel is familiar with the complex issues that come up in these types of cases. Optimally, for capital habeas cases, should a Federal Public Defender with habeas experience be unavailable, a district court should have an extensive, detailed list of factors that takes into account counsel's prior work experience, success rate, and current caseload to ensure they have sufficient experience and time to devote meaningful

nationwide-say-they-re-overworked-underfunded-n828111 [https://perma.cc/B86L-N9P9] (describing the caseloads of public defenders who may handle 80-100 cases per week); *See also* Tina Peng, *I'm a Public Defender. It's Impossible For Me to Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken--its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html [https://perma.cc/MW7D-6DCZ] (noting that the caseload of public defenders is so overwhelming it is impossible to understand every case).

¹⁶⁸ *See* KING ET AL., *supra* note 1, at 37.

representation to the petitioner. By availing more petitioners, both capital and non-capital, of more effective counsel, courts are only serving to strengthen the fairness of the judicial process and allowing petitioners a real chance at proving their case.