

- 1) Are you limiting your collection to DIRECT appeals only, or also appeals of post-conviction rulings by trial courts? (And in some states like California, the appellate courts entertain original applications for relief)

The Survey of State Court Criminal Appeals (SSCCA) data collection is being limited to direct appeals and will not include post-conviction activity. The Bureau of Justice Statistics (BJS), in collaboration with the National Center for State Courts (NCSC), conducted an extensive design and development project to ascertain the feasibility of collecting criminal appellate data before going forward with the actual data collection. During the design and development phase of the SSCCA, we explored and ultimately decided not to collect data on post-conviction and habeas corpus cases. According to the design and development project, these appeals were not uniformly classified - some states labeled them as civil and others criminal. In addition, pilot tests showed post-conviction appeals being difficult to code. The coding forms developed for the pilot test proved insufficient to capture the complexity of these cases. Due to these difficulties, the coding forms were changed so that only direct criminal appeals would be coded.

- 2) Are you collecting conviction type (trial/plea); as well as crime of conviction (murder; drugs)- I hope so

We plan to collect conviction information for both general and specific crime categories. The general conviction categories will include whether the defendant was convicted of a person, property, drug, or public order crime. Each of these categories will also include specific offenses. For example, the person category will provide codes for defendants convicted of murder, robbery, assault, and sex crimes, while the property category will include codes for defendants convicted of burglary, larceny, motor vehicle theft, and forgery/fraud offenses. We also plan to collect information on conviction type by examining the legal issues raised on appeal and plan to code instances where the appeal raised issues related to the plea, trial conviction, or sentence.

- 3) Will your "legal issues" be structured in such a way that you can report how many appeals challenge sentence alone, conviction alone, or both? I hope so

Yes, the survey instrument will be structured in a way that reports on how many appeals resulted from challenges to the sentence, conviction, or both. The issue of whether the appeal results from a conviction or sentence constitutes one of the primary and first questions on the survey instrument.

- 4) Will you be collecting NUMBER of issues as well? That is not easy, but if you are going to code "issues" you have to divide them up somehow. Prior studies indicate that the number of claims raised is related to processing time.

Yes, we plan to code the number of legal issues raised on appeal. The survey instrument requests information on both the number and types of legal issues raised on appeal. Specifically, the survey counts the total number of issues raised on appeal and then provides information about the types of legal or factual assertions raised for the first six of these issues.

- 5) Scholarly interest in criminal appeals in recent years has focused on the following - any light the study could shed on these would be welcome:

- a. sentencing appeals – on what grounds do appellate courts grant relief, under what standard, and what is the relief (resentencing? reduced sentence?);

The SSCCA will identify cases in which the appeal primarily resulted from a conviction or sentence. For those sentencing appeals, the SSCCA will be able to identify a variety of issues raised and addressed in the appeal including sentencing hearings, exclusion or admission of aggravating factors at the sentencing hearing, imposition of excessive sentences, and issues related to revocation of the sentence as a result of probation violations. In addition, the SSCCA will ascertain whether these issues resulted in reversible error. For those cases remanded to the trial court, information will be collected on the appellate court's instructions to modify the sentence.

- b. appeal waivers in plea agreements (more on that below)

Although the SSCCA will identify appeals involving guilty pleas issues, it will not be able to ascertain instances involving waivers of the right to appeal at the guilty plea stage.

- c. attempts by defendants to raise ineffective assistance of trial counsel on direct appeal – it would be helpful to learn how often this really does or does not happen

Ineffective assistance of counsel is one of the legal issues identified in the SSCCA project. The SSCCA will be able to determine how many direct appeals resulted from an ineffective assistance of counsel claim and the percentage of these claims that resulted in reversible error.

- d. claims of innocence – or claims related to innocence. Brandon Garrett would be a good person to talk with regarding this.

The SSCCA identifies appeals in which the appellants raised various evidentiary issues asserting claims of innocence. For example, the SSCCA will collect information on the number of appeals in which appellants asserted that the exclusion of exculpatory/mitigating evidence or the failure to prove facts sufficient to satisfy each element of the crime beyond a reasonable doubt should have resulted in the defendant being adjudicated innocent at the trial court level.

- e. Rate of relief – I assume you will be reporting this, both among the cases decided on the merits and all cases.

The SSCCA will collect information on the rate in which appeals decided on the merits are affirmed, reversed in whole, reversed in part, or remanded with instructions for additional changes.

- f. Prosecution appeals – prosecutors have been granted greater and greater authority to appeal various trial court orders short of a verdict of acquittal – including trial orders granting motions to suppress, dismissing indictments, determining competency, etc. – will you be evaluating all of these as well? Or only defense appeals from criminal judgments?

It's my understanding that prosecutors typically file interlocutory appeals in instances where they seek to challenge pre-trial decisions involving trial court orders, motions to suppress evidence, competency determinations, or other pre-trial decisions. During the design and development phase of the SSCCA, it was determined that interlocutory appeals would not be coded because they were found to be a relatively uncommon form of appeal and took twice as long to code as direct appeals. The SSCCA survey instrument, however, does identify the party - state or defendant - filing the appeal. Hence, the SSCCA will be able to identify instances where the prosecutor filed an appeal after the case was disposed at the trial court level.

- g. Victims access to appellate review of trial court rulings in criminal cases under state victims rights constitutional and statutory provisions are also a hot topic - in many states these are mandamus actions not direct appeals.

The SSCCA will not delve into the topic of victims filing mandamus actions in the nation's appellate courts.

- 6) I'm not sure what "impact of appellate process on trial court outcomes" means? Is that what happens to the cases on remand?

The "impact of the appellate process on trial court outcomes" refers to whether the appellate court decision resulted in the trial court outcome being affirmed or reserved on appeal. Cases can be reversed in whole or in part and the appellate court can remand cases back to the trial court for further proceedings. In cases where the appellate court reverses the trial court decision or remands the case back for further proceedings, the effect of that reversal/remand will be coded on the survey instrument.

- 7) The merits/non merits distinction will be important - I expect one of the most common non-merits reason for disposition will be waiver or forfeiture - the failure to raise the issue on time or correctly - and that many of these decisions will be framed in the alternative, even if it had been properly raised we wouldn't grant relief. How will you deal with alternative holdings - merits and non-merits?

The SSCCA will have a variety of disposition codes for cases not decided on the merits including cases dismissed due to the following reasons: (1) improvidently granted appeals, (2) no valid issues raised on appeal, (3) denied due to discretionary review, (4) lack of jurisdiction, and (5) procedural errors. In addition, the SSCCA will code appeals not decided on the merits because the appellant withdrew the case or the case was transferred from an intermediate appellate court to a court of last resort.

- 8) Is there was a way to determine what percentage of state criminal appeals were being rejected because of the non-merits reason that the defendant agreed expressly in his plea agreement not to appeal? This an important development in federal cases since the 1990s and unexplored in state cases.

The SSCCA will not be able to identify those appeals in which review was not granted because the defendant agreed in the plea agreement not to appeal. Since the SSCCA focuses on appellate,

and not trial courts, it will not be able to ascertain the specifics of guilty plea agreements at the trial court level.

- 9) Many are interested in the operation of harmless error rules, but decisions applying harmless error rules are difficult to code/categorize. You probably won't be able to collect this, but it would be very interesting to learn what percentage of the denials and dismissals included a finding that there was error, but that relief was not warranted because of an inadequate showing of prejudice. How will you categorize that type of ruling – merits or non merits?

As stated in the response for question number seven, the SSCCA will be able to identify appeals dismissed as a result of no valid issues raised on appeal. In addition, the SSCAA will code up to six issues resolved by the appellate courts for each case. For each of these issues, the SSCCA will collect information on whether the issue resulted in reversible error, no error, or harmless error. In that way, the SSCCA will be able to determine the number of cases dismissed as a result of harmless error at the appellate court level.

- 10) I'd be interested to find out how many, if any, cases are dismissed or denied because the prisoner finished serving his sentence – they wouldn't always be dismissed as moot, might be voluntary dismissals, or summary dismissals, or failures to prosecute. Not sure if you can find that out, but that is one criticism of appellate delay – that the process takes so long it is only useful to those serving the lengthiest sentences. If you collected information on the SENTENCE of those who appeal as well as the CONVICTION TYPE and CRIME, that might help. It also might help if you could collect DATE OF CONVICTION or JUDGMENT – but that won't be as easily lifted from docket sheets. Part of appellate delay, after all, is delay in commencing the appeal.

Unfortunately, the SSCCA does not have a component collecting information on case activity at the trial court level. During the design and development phase of the SSCCA, consideration had been given to a bottom up approach in which cases disposed at the trial court level would be followed through the appellate courts. Given the time, expense, and difficulty collecting trial court information on criminal appeals, it was decided that an appellate only data collection would be more cost effective, realistic, and expeditious. For these reasons, the SSCCA will not be able to collect information on the type of sentence imposed or the date of case adjudication at the trial court level. Hence, it will not be possible for the SSCCA to determine appeals dismissed because the prisoner had finished serving his/her sentence.

- 11) On processing time – I'm sure you are aware of the earlier NIJ funded study of delay in capital appeals, as well as all of the NCSC's work on appellate delay (Roger Hanson, I believe) – if states have the data on the timing of the different steps in the appellate process (should be on the docket sheets), finding out which steps vary most might assist in using the study to troubleshoot. This is particularly important for capital cases – delay in one state may be months and months waiting for counsel to be appointed. In another state it might be waiting for the trial transcripts. In another state it might be that the state courts stay the appeal while waiting for a Supreme Court decision. In yet another state there may be months of delay if remand is allowed to develop an evidentiary record. Some states may allow years for briefing but decide the case quickly once briefed; other states may enforce strict deadlines on briefing but allow longer to issue the decision; some allow reconsideration some don't. Even if you can't break out the time periods for all of the cases, it would be useful for the death cases.

The SSCCA will collect information on a variety of case milestones dates. The appeal milestones collected in the survey instrument include the following key dates –initial documentation, record filing, transcript filing, appellant brief filing, appellee brief filing, reply briefs, completion of all briefs, oral argument, and appellate disposition. As stated in your question, we anticipate that these key dates will be crucial in gaining a better understanding of the factors driving case processing time in appellate courts.

12) Will you be comparing the “as of right” courts with the “discretionary review” courts?

The population of inference for the 2010 SSCCA will be all direct criminal appeals disposed in intermediate appellate courts or courts of last resort. Specifically, the sample will be designed to examine a national sample of appeals adjudicated in intermediate appellate courts and courts of last resort separately. Since intermediate appellate court and courts of last resort serve different functions, the sample will aim to produce national level estimates on criminal cases disposed at both levels of appellate review.

That’s all I can think of for now. The study is sorely needed – THANK YOU