HABEAS CORPUS APPEALS – DIVISION OF CRIMINAL JUSTICE PERSPECTIVE

I. CURRENT HABEAS APPELLATE LOAD

During the 2017 calender year, the Appellate Bureau of the Chief State's Attorney's Office opened 74 new habeas appeals. This represented 31% of the total number of appeals opened by the Bureau that year.

During the 2018 calender year, the Bureau opened 116 new habeas appeals. This represented 43% of the total number of appeals opened by the Bureau.

From January 1 to July 11, 2019, the Bureau has opened 60 habeas appeals, representing 42% of the total number of appeals to date.

II. BRIEF HISTORY OF HABEAS APPEALS[1]

A. Adoption of Connecticut Constitution (1818) to 1882

At the time our state constitution was adopted in 1818, there was no constitutional or statutory right to appeal from a habeas court's judgment. Moreover, during this period, the subject matter of habeas corpus petitions was extremely limited. The habeas court was only permitted to decide whether the criminal court that rendered the judgment that led to the prisoner's incarceration had jurisdiction to do so. It did not encompass the plethora of claims that are the subject of habeas petitions today.

Habeas appeals were not authorized until 1882, at which time our legislature passed a statute providing generally for a right of appeal from trial court judgments, which implicitly included habeas court judgments.

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[1] Most of this history is discussed by our Supreme Court in the following cases: *Iovieno v. Comm'r of Correction*, 222 Conn. 254, 608 A.2d 1174 (1992); *Carpenter v. Meachum*, 229 Conn. 193, 640 A.2d 591 (1994); *Simms v. Warden*, 229 Conn. 178, 640 A.2d 601 (1994) (*Simms I*); and *Simms v. Warden*, 230 Conn. 608, 646 A.2d 126 (1994) (*Simms II*).

B. 1957 – Legislature Requires Petition for Certification to Appeal

Between 1882 and 1957, habeas appeals were not governed by any special rules that did not apply to other appeals. However, by 1957, the claims that could be litigated in habeas actions had expanded significantly beyond the issue of jurisdiction. Furthermore, habeas corpus was increasingly viewed as a way in which convicted persons, including capital litigants, could delay any sense of finality to to their convictions, regardless of the lack of merit to any of their habeas claims.

In response, then-Chief Justice Maltbie recommended, and our legislature adopted, the statutory restriction that still exists today (with minor amendments), as part of General Statutes § 52-470(g). This provision states that "[n]o appeal" may be taken unless the habeas judge who tried the case certifies "that a question is involved in the decision which ought to be reviewed by" an appellate court. On its face, this statutory language appeared to bar, absolutely, any appeal in a case in which the habeas judge denied the certification.

C. 1986 – *State v. Leecan*

In 1986, our state supreme court decided *State v. Leecan*, 198 Conn. 517, 504 A.2d 480 (1986), which held that claims of ineffective assistance of counsel cannot be brought on direct appeal but, rather, must be brought by way of either a habeas corpus petition or a petition for a new trial. However, because habeas corpus, at that time, did not have many of the same constraints as those governing petitions for a new trial (most importantly, habeas petitions were not controlled by the three-year statute of limitations that controlled petitions for a new trial), habeas corpus was the overwhelming choice of convicted persons in bringing postconviction challenges to the effectiveness of their counsel.

The *Leecan* decision is, without question, the single biggest factor in the flood of habeas actions that our state has been dealing with over the past thirty years, both at the habeas trial and appellate levels.

D. 1992 – *Lozada v. Warden*

In 1992, our state supreme court decided *Lozada v. Warden,* 223 Conn. 834, 613 A.2d 818 (1992). Therein the court held that, because our legislature granted indigent habeas petitioners a statutory right to representation by the public defender's office in habeas corpus actions (Gen. Stat. § 51-296), the legislature must have intended to permit all habeas petitioners to bring subsequent habeas actions challenging the effectiveness of habeas counsels' conduct in any previous habeas actions.

This decision not only added to the increase in the number of habeas petitions and appeals begun by *Leecan*, but effectively created a loophole that now permits habeas petitioners to bring an endless number of habeas corpus actions, and appeals therefrom, merely by challenging the effectiveness of prior habeas counsel (colloquially known as "a habeas on a habeas" and even "a habeas on a habeas on a habeas on a habeas, etc."). In 2017, our state supreme court reaffirmed the statutory right of habeas petitioners to endlessly bring such actions in light of its decision in *Lozada* but, significantly, emphasized that it was within the legislature's power to restrict this practice by clarifying the statute.[2]

Notably, this particular loophole was not closed by the statute of limitations enacted in 2012, nor could it have been remedied merely by a statute of limitations. Unless the legislature modifies the statutory language to clarify that it does not intend to authorize a "habeas on a habeas on a habeas, etc.," any effort by a habeas court to dismiss any

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[2] *Kaddah v. Comm'r of Correction*, 324 Conn. 548, 566-70, 153 A.3d 1233 (2017).

petition that is timely-filed after a previous petition is denied and challenges prior habeas counsel's effectiveness, even *ad infinitum*, risks reversal under *Kaddah*.

E. 1994 – *Carpenter v. Meachum*

After the enactment of the certification requirement in 1957, a number of habeas petitioners, in an effort to circumvent a habeas court's denial of certification, started to bring writs of error, in lieu of appeals. In short, a writ of error is a common law (i.e., judge-created) procedure by which a party who otherwise has no statutory right to appeal can nevertheless bring what is, for all intents and purposes, an appeal, even though it is called a writ of error. For a period, our Supreme Court allowed this to continue until, in 1994, the Court decided *Carpenter v. Meachum*, 229 Conn. 193, 640 A.2d 591 (1994). Therein, the Court held that petitioners could not use (and should not have been permitted to use) a writ of error to circumvent the certification requirement for habeas appeals.

F. 1994 – *Simms v. Warden*

Also in 1994, our Supreme Court decided *Simms v. Warden*, 229 Conn. 178, 640 A.2d 601 (1994) (*Simms I*) and *Simms v. Warden*, 230 Conn. 608, 646 A.2d 126 (1994) (*Simms II*). Though complicated in their reasoning, the end result of these decisions is as follows:

Notwithstanding the emphatic language, adopted in 1957, that "no appeal" could be entertained in cases in which the habeas judge has denied certification to appeal, the *Simms* Court held that the legislature meant that *every* appeal must be entertained, even in cases in which the habeas judge denied certification. The Court interpreted the language of the statute to mean that, in any case in which the habeas judge has denied certification to appeal, the appeal must go forward nevertheless, to full briefing and argument. The only

difference is that, in that appeal, the first issue that must be addressed is whether the habeas court abused its discretion in denying the petition for certification to appeal.

As aptly noted by Justices Borden[3] and Callahan[4], the majority's decision in *Simms* effectively nullified the statutory certification requirement adopted by the legislature in 1957 and eliminated any meaninful protection against frivolous habeas appeals.

III. CONSEQUENCES OF *SIMMS V. WARDEN*

Regardless of one's view of the analysis of the *Simms* Court, the result was both good and bad. On the good side, the habeas judge was no longer the sole and final arbiter of whether a party could appeal his or her decision.

On the bad side, however, the *Simms* Court created an unworkable and meaningless approach to dealing with frivolous habeas appeals. It must be remembered that, unlike other appeals, habeas appeals are especially ripe for abuse. A criminal defendant only has one opportunity for a direct appeal from his criminal conviction. However, particularly in light of *Lozada*, a habeas petitioner has endless opportunities to bring multiple habeas petitions and appeals.

Moreover, unlike other civil litigants, who may be bound by personal financial considerations to weigh heavily the cost of pursuing a meritless appeal, habeas petitioners have a right to state-funded counsel, both at the trial and appellate level, regardless of their inability to pay, regardless of the lack of merit to their cases and regardless of how many prior habeas actions they have brought.

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[3] *Simms I*, 229 Conn. 178, 189-92, 640 A.2d 601, 607 (1994) (*Borden, J.*, concurring).

[4] *Simms II*, 230 Conn. 608, 618, 646 A.2d 126, 131 (1994) (*Callahan, J.*, concurring).

Furthermore, even if appointed counsel seeks to withdraw from a frivolous case, significant time and expense is incurred in that process alone. Then, even if appointed trial counsel is allowed to withdraw, current procedure permits a petitioner to proceed *pro se* with a full hearing on his claims, despite the findings by the habeas court and his own counsel that they are frivolous. Once the petition is denied at the habeas trial court level, the petitioner's right to appeal his case is triggered, as is his statutory right to appellate counsel, unless and until such counsel likewise invests the time and effort to seek withdrawal on the grounds that the appeal is frivolous.

Given the very limited legal issues that can be entertained by way of habeas corpus (ineffective assistance, *Brady*, actual innocence) versus direct appeal (limitless issues), the fact that habeas corpus appeals nevertheless are approaching 50% of the Bureau's appellate caseload is significant. For example, in many of these cases, the petitioner's appeal ultimately hinges on his disagreement with a habeas judge's credibility determinations, a finding that our appellate courts consistently have held is beyond an appellate court's function to reconsider. Nevertheless, in light of *Simms* and in the absence of any meaningful screening process, such meritless claims, and others like them, must be allowed to continue to full briefing and argument. This not only results in a great waste of limited resources by the courts, the prosecutors and the public defender's office, but also deprives other, more worthy appellate litigants, including other habeas petitioners, of a speedier resolution of their appeals. It also deprives victims, their families and society as a whole of any sense of finality to the criminal conviction, no matter how abusive or otherwise frivolous the petitioner's conduct may be.

IV. CORRECTING THE *SIMMS* PROBLEM

Suggestions have been made for a certification process in which the appealing party who has been denied certification by the habeas court must file a ten-page petition or motion in an appellate court stating why the habeas court abused its discretion in concluding that the case was not worthy of further review by an appellate court. This would afford a losing party an opportunity to request that a different court, other than the habeas court, reconsider the denial of certification. If granted, the case would then proceed to full briefing and argument, but if the appellate court agreed that the appeal appeared frivolous, the losing party would not have a right to further appellate review in state court (although a petitioner would retain the right to then go to federal court). This process would resemble both a motion for review and the certification process used to bring appeals from Appellate Court judgments to our Supreme Court.

Notably, the *Simms I* Court expressly recognized that a "motion for review" or "petition for review" might be a viable alternative to the procedure the Court was adopting, but rejected these alternatives because there was not, as yet, any authority in the statutes or the practice book rules for such a procedure with respect to the denial of a petition for certification in habeas cases.[5]

In 2017, the editorial board of the Connecticut Law Tribune echoed the need for this type of reform to the habeas appeal process. See attached.

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[5] See *Simms I*, 229 Conn. at 186 n.13. It is unclear why the lack of statutory or practice book authority deterred the *Simms I* Court from utilizing the motion for review procedure but did not deter it from creating the unwieldy procedure the Court ultimately fashioned in *Simms I*, which also lacked any support in the statutes or practice book.

'Simms' Rule on Appellate Procedure Must Be Undone

THE EDITORIAL BOARD, The Connecticut Law Tribune

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There are various statutes in Connecticut that require permission of one sort or another to appeal from even a final Superior Court decision. Zoning decisions are one example. In that situation, the loser has to file a petition for certification in the Appellate Court. Unless the petition is granted, the case is over.

An appeal by the state in a criminal case is another example. In that situation, the trial court has to give permission to appeal, but the Connecticut Supreme Court many years ago granted the state's motion for review of the denial of permission, found an abuse of discretion, and allowed the appeal. *State v. Avcollie*, 174 Conn. 100 (1977). *Avcollie* involved a particularly aggravated abuse of discretion. The jury returned a guilty verdict of murder. In the presence of the jury, the trial judge set aside the verdict and acquitted the defendant. The state moved for permission to appeal, which the trial judge denied. By permitting the state to file a motion for review of that denial, the Supreme Court created an efficient way to right a clear injustice.

Another example of permission being needed is habeas corpus decisions. In this situation, the loser, whether the petitioner or the state, must get permission to appeal from the trial judge or an appellate judge. Fast forward from *Avcollie* in 1977 to *Simms v. Warden*, 229 Conn. 178, in 1994. *Simms* held that the proper remedy for a denial of permission to appeal is to appeal from the denial rather than to file a motion for review. *Simms* said nothing about how it could possibly be distinguished from *Avcollie*.

Quite apart from the fact that *Simms* and *Avcollie* are procedurally indistinguishable, the experience of the 23 years since *Simms* shows it to be a disaster. The reader may pick up a volume of the Connecticut Appellate Reports at random and see any number of decisions on appeal from the denial of permission to appeal a habeas decision. What is remarkable about them is that they are virtually indistinguishable in content—and length—from appeals where the trial court granted permission, except that, where unsuccessful, the appeal is dismissed in the former case and the judgment is affirmed in the latter.

Unlike a motion for review—which is efficiently ruled on, and presumably would be favorably considered if it had any arguable merit—an appeal from a denial of permission entails all the effort and delay of a regular appeal. If the petitioner is planning to go to the federal court after exhaustion of state remedies, forcing the petitioner to go through a full but likely futile appeal makes little sense. And the useless burden on the state, and the appellate judges and clerks, is evident.

Why *Simms* didn't follow the *Avcollie* path is difficult to see. *Simms* should be overruled.
