Connecticut General Assembly

Habeas Corpus Matters Task Force

Merit Lajoie & Kenneth Rosenthal, Esq.
Cochairpersons

c/o Judiciary Committee, Room 2500
Legislative Office Building
300 Capitol Avenue
Hartford, Ct 06106

Judiciary Committee Habeas Corpus Matters Task Force
Meeting Minutes from Thursday, September 18, 2019
2:00 PM in Room 2B of the LOB

The meeting was called to order at 2:00PM by Co-Chair Kenneth Rosenthal, Esq.

The following committee members were present:

Representative Maria Horn, 064; Kenneth Rosenthal, Nicole Anker; Judge William Bright; Tim Everett; Kevin Lawlor (for Kevin Kane); Charles Ray; Christine Rapillo; Judge Samuel Sferrazza; Judge Carl Schuman, Judge Thomas Bishop

Absent were: Merit Lajoie, Representative Rosa Rebimbas, 070; Senator John Kissel, S07

The minutes of the last meeting were approved.

The Chair suggested that the Pet. Cert. process be discussed at the next meeting. And it was agreed to put that topic on the agenda for the October meeting.

Presentation #1: Judicial Dept. Data
Joe Greelish, Director, Performance Management, CT Judicial Branch, presented data on trends in the number of underlying conviction cases added for the period 1/1/2019 – 9/11/2019, comparable to that previously provided for the 2008-2019 time period, to identify current trends. Underlying conviction cases comprise about 88% of the total. The decline downward from the spike in 2014 is continuing. Underlying conviction claims include: actual innocence, ineffective assistance of counsel, juvenile sentencing, prosecutorial misconduct, risk reduction, earned credit, sentence credit, illegal sentencing, and a mixture of two or more of these categories.

The highest are ineffective assistance of counsel and a mix. The number of cases added includes cases later dismissed under PB § 23-24. They are given a docket number and then dismissed. (Judge Bright clarified that petitions may be returned because they do not have what is required for a writ under PB § 23-21. If the information on the writ does not comply with the practice book, it is just returned and not docketed. Once they are accepted, they are docketed and then declined, dismissed or heard on the merits.)

Mr. Greelish then presented a data analysis of withdrawn cases. Time from filing to withdrawal showed that three quarters of the cases are withdrawn after one year. Most of the cases that go to trial are resolving after the 2 plus year mark. After juxtaposing the data, he said it looked like over 1200 cases - 45% of cases - are being withdrawn close to the eve of trial.

Judge Bishop and ASA Killen expressed concern that resources and facilities were invested in preparation for a trial only to have the petitioner withdraw the claim with no consequences. In addition, the petitioner could then file another claim immediately. Chief PD Rapillo explained that there are complications with bringing a case to trial. Often attorneys don't have all the evidence, the discovery comes in at different points; attorneys find things out at the eve of the trial that change the decision, and the availability of witnesses to appear at trial is uncertain. Judge Bright added that a typical scenario is when the attorney would come in and say he/she was ready to go but the client wants to withdraw the case, because there has been disagreement on how the case would be presented. He expressed a concern about what percent of habeas withdrawals resulted in re-filings. Attorney McGraw clarified that there is a statute of limitations and a rebuttable presumption of not having delay in good faith in the 2012 amendment that went into effect in 2014 - one of the reasons for the spike of petitions. A petitioner can't keep filing and filing and filing. She also said that the appellate court has ruled that the habeas court has discretion to rule that a case be considered withdrawn with prejudice.

Attorney Kirschbaum noted that the Public Defender office has a policy to address the issue of clients withdrawing in order to get another attorney because they disagree with the one they have. The office sends the petitioner back to the same attorney that they had before. He presented another problem: the petitioner does not have the right to amend the petition without permission of the court, when new evidence comes forward on the eve of trial. When an amendment is refused, it causes a withdrawal and refiling. Professor Everett, addressing the length of time to trial, suggested that pleadings take much of that time and that improving the pleading process would help unclog the system. Mr. Greelish said he could check the data to see if there was a marker where the pleadings end. He added that he would be happy to look at any other points in the process to find out where the real delays were.

Mr. Greelish then presented data on the conditions of confinement petitions. The length of time for petitions going to trial increased from one to three years. The pattern of withdrawals is similar to underlying conviction petitions – most withdrawals are on the eve of trial. Conditions of confinement categories are discipline, good time, harassment, stigma plus, medical, and miscellaneous.
Judge Bishop expressed concern on the length of time to resolve conditions of confinement issues, particularly for medical conditions – how could a medical condition last for three years and not be dealt with. Judge Bright stated that since there were so few conditions of confinement petitions that go to trial – fifteen in 2018 – one particularly long trial, especially on a medical issue, could skew the data.
Presentation #2: Continuation of last month's defense counsel presentation
Attorney O'Shea presented two cases that in his view exemplified the need to keep open an avenue for successive petitions. The first, Kaddah v. Commissioner, was an instance in which the earlier petitions had completely missed the central, and arguably most meritorious, claim (involving mental capacity) that was finally the subject of the third, pending petition that the Supreme Court deemed procedurally permissible. The second, Birch/Henning, in which the Supreme Court recently granted relief, likewise involved successive petitions, in which the earlier proceedings had failed to identify individuals now found to have been improperly convicted and entitled to relief. Attorney O'Shea said that the system needs to do better at identifying wrongful convictions either with an independent board or some other mechanism. He suggested that there are a number of cases that are not granted relief that deserve relief.

Judge Bright noted that we can look at the two cases presented in two ways. We can say that mistakes are going to be made and therefore we need repeated opportunities to come into court. Or we can look at

processes that get it right the first time so there is no need for a second third or fourth time. Focusing on assuming we are not going to get it right and providing a lot of backstopping when people get it wrong is not only an inefficient use of resources but is unfair to the petitioners. ASA Killen added that allowing multiple habeas is a disservice to the other petitioners who have to wait longer for their claims to be heard. Attorney Kirschbaum agreed that that we should put resources into getting it right the first time, but we cannot be certain that that will be sufficient, as illustrated by wrongful conviction cases in CT and elsewhere. CTIP Director McGraw agreed that if we devote resources to one case the others have to wait and may have meritorious claims. On the other hand, she noted Vernon Horn spent 18 years in prison and Birch and Henning spent almost 30 years. She said we need to look at wrongful convictions and how to solve that problem. In the Horn, Birch and Henning cases, the evidence was there the whole time. She suggested that the real front end of the habeas process is the evidence at trial. The Chair added that the real front end is the police investigation. There are examples of the police not turning over exculpatory evidence even to the prosecutors, so it is not the fault of the attorneys or the courts.

The Chair suggested that the foregoing discussion – on the issue of successive petitions and how to address it – needed to be further explored and suggested the November meeting be used to do so.

Presentation #3: DOC re conditions of confinement cases
Nicole Anker, Legal Branch of the Department of Corrections, presented information on the habeas process for conditions of confinement petitions. She explained that were two processes for handling complaints on conditions of confinement – habeas petitions and administrative requests. Administrative requests are responded to in three days. If not responded to or if the inmate is not happy, a grievance is filed with the facility's grievance coordinator. The grievance can then be appealed to the district administrator. If the remedy is straightforward, she stated, it is much faster to go through the administrative process and does not waste court time. For those where the DOC disagrees, the inmate has the option of going to court.

There are currently 960 habeas in process. Conditions of confinement petitions are all pro se unless there is an overlap with an underlying conviction habeas.
The following are problems the Department of Correction has with the habeas process and their suggested solutions: administrative remedies do not have to be exhausted before taking to court (suggesting an administrative exhaustion prerequisite to filing conditions of confinement habeas petitions); the problem of successive petitions often involving the same claim or category of claim, including claims that were the subject of a previous petitions withdrawn on the eve of trial (suggesting that some sanctions be imposed for unfounded successive petitions); the possibility of some unwaivable fee being required; improvements to pleadings process in conditions cases, including the use of a separate form for pleading a pro se conditions petition, in place of the current practice of using the same form for conditions cases as for petitions based on underlying convictions.

The Chair suggested that the task force is not equipped to make recommendations about conditions of confinement because not all the stakeholders involved in those cases are represented on the task force as it now stands. Judge Bishop noted that there was no representative of the conditions of confinement constituents – the inmates.

Chief PD Rapillo agreed, noting that most of that constituency are pro se. It would be a one sided conversation. She said that if the task force was going to make conditions of confinement part of their mission, an in depth discussion and more information was needed. For example, exhaustion of administrative remedies concerning medical claims requires a lengthy discussion because the Public Defender Office has a documented history of there being problems with the delivery of medical care in the DOC. Attorney McGraw added that Judge Underhill ruled last month that the Connecticut DOC was in

violation of the 8th amendment. Professor Everett noted that the DOC functions using administrative directives rather than regulations that are subject to administrative procedure laws, and suggested that the department be subject to those laws rather than having the judicial system rule on conditions of confinement. He concurred that the habeas task force propose that another task force be created to deal with conditions of confinement issues.
Attorney Anker responded that conditions of confinement cases come within the existing mandate of the task force and should be addressed. The Chair suggested that there be a discussion and decision on the scope of the task force at the next meeting.

A motion was duly made and seconded to adjourn the meeting.

The meeting was adjourned at 4:00PM.

Deb Blanchard	Zoë Gluck
Administrator	Committee Clerk