Habeas Matters Task Force

MEETING MINUTES

Wednesday, October 16, 2019

2:00 PM in Room 2B of the LOB

The meeting was called to order at 2:00 PM by Chairwoman Merit Lajoie

The following committee members were present:

Merit Lajoie, Kenneth Rosenthal, Nicole Anker, Judge Thomas Bishop, Judge William Bright, Senator Gennaro Bizzarro, Tim Everett, Sue Hatfield, Representative Maria Horn, Kevin Kane, Charles Ray, Judge Samuel Sferrazza, Judge Carl Schuman

Absent were: Christine Rapillo

The minutes of the September 18 meeting were approved.

Chief State's Attorney Kevin Kane gave a farewell statement on the occasion of his forthcoming retirement, noting his strong interest in the work of the task-force. Reform of Connecticut's habeas corpus process has long been a priority for him, and he regrets that he will not personally be able to see the work of the task force through to conclusion in view of his imminent retirement, leaving that work to his successor or successor's designee.

Two new members were introduced: Attorney Sue Hatfield and Senator Gennaro Bizzarro from Connecticut 6th District.

The first item on the agenda was a discussion of potential changes to the current procedure for requiring petitions for certification for permission to appeal to be submitted to, and decided by, the judge before whom the case was tried. Representatives of the judiciary, state's attorney's office and public defender presented proposals.
Judge Schuman proposed that the habeas trial judge make an initial decision whether to grant an appeal, under which (1) in cases where the trial judge granted permission, a full appeal would follow, and (2) in cases where the trial judge denied permission, the appellate court would then consider the issue anew, via a motion or petition for review. He suggested that the appellate judges define how the review would work – anywhere

from one to three judges from the appellate court. If the appellate panel grants review then a full appeal would follow. If the panel rejected the petition for certification to appeal, there would be no further review (state remedies would be considered exhausted).

Judge Bright proposed a different model, similar to what is done in zoning appeals, where the party wishing to pursue further appeal, following an adverse ruling on the zoning appeal at the trial level, is required to file a petition for certification with the appellate court. If three of the nine judges of the appellate court decide to grant certification, a full appeal is then permitted. In contrast to the current process in habeas appeals, where, as a practical matter under *Simms v. Commissioner*, regardless of the decision by the trial judge on the pet. cert. application, the appellate court must consider the appeal on the merits, the new process proposed by Judge Bright would require initial consideration of the pet. cert. by a panel of appellate court judges. If the appellate panel unanimously determined there were no issues worthy of appeal, that would be no further review (in cases where at least one member of the panel found meritorious issues, a full appeal would proceed). If at least one member of the panel found there to be something worthy of appeal, an appeal on the merits would follow.

Judge Bright further noted that under the present system, where the pet. cert. application must be filed within ten days of judgment, the petitioner may be unable to adequately identify appealable issues, whereas under a procedure requiring the pet. cert. to be filed with the appellate court, there would be an improved avenue for identifying and presenting appealable issues.

Judge Bright reported on data from the appellate court docket for the period September 2015 to July 2019. Of 4975 cases filed, 10% (480) were habeas corpus cases. Of cases with published opinions (including summary memorandum decisions), habeas cases comprised 17.5%. For non-habeas cases, memorandum decisions were issued in 16% of cases. For habeas cases, the figure is 40% -- i.e., in 40% of habeas cases, following full briefing and record review on the merits, the court concluded there was not sufficient merit to warrant a written opinion. Judge Bright further noted that the reversal rate in habeas appeals during the same four years was 5.6%, compared to an average reversal rate of 20 to 25%. Habeas reversals constituted 19 cases during this period of time, six of which were appeals taken by the state in which the habeas trial court's granting of a petition was reversed.

Judge Sferrazza expressed a preference for the proposal advanced by Judge Bright, under which pet. cert. was considered solely at the appellate court level, noting three reasons: (1) having the trial court make an initial decision adds an unnecessary extra step; (2) having the appellate court review the pet. cert. would reduce the number of appellate Anders briefs; and (3) it is awkward for the habeas trial judge to be put a position of deciding whether another reasonable jurist would disagree with his or her own decision.

There was some discussion whether the proposal to cut off review at the appellate court may be deemed a usurpation of the Supreme Court's discretion to conduct further review. Judge Bright noted that the right to a habeas appeal is a legislative decision since there is no constitutional right. Judge Sferrazza suggested that the task force consider a motion for review to the Supreme Court from the appellate court's denial as the final form of review.

Judge Bishop added that the benefits in proposal advanced by Judge Bright, locating the pet. cert. process at the appellate court level alone, included shortening the time for consideration of an appeal, and reduction in the burden on both the public defender's office and the states attorney's office.

Professor Everett questioned how abbreviated a process pet. cert. can be if there is a need to perfect the record to be persuasive with the appellate panel. As a practical matter, it may not save time and money having to wait for a transcript and wait for a complete enough record to make whatever cogent arguments are to be made based on the record. He noted that it should not be assumed that the written memorandum of decision by the habeas trial court in rendering judgment may not provide a full account of the issues, and the pet .cert. process may therefore require the more time-consuming development of a full record. Judge Bright responded that the time to file a petition could be 60 or even 90 days to give sufficient time to get the record and the transcript, decide whether there are issues worthy of appeal, and put them in a ten-page petition for certification. He stated that if even half of the cases currently disposed of via summary decisions, requiring full briefing, were to be disposed of by denying the pet. cert., the attorney's work would be shortened.

Attorney Bourn asked whether, under Judge Bright's proposal, the standard for a pet cert would be the same as at present – i.e., whether the proffered issues were wholly frivolous. Judge Bright indicated that it would.

States Attorney Killen indicated support for Judge Schuman's proposal which retained the trial judge's involvement as part of the pet. cert. process. He suggested the trial judge should be involved because he or she is familiar with the case and the details of the trial court proceedings. Input by the trial judge, and by the state's attorney, at the pet. cert. process would help inform the ultimate process at the appellate court level. He stated there is something akin to this two-level process, with advisory input from the habeas trial judge, under the federal system.

Judge Sferrazza noted that with the current pet. cert. form, the trial judge input is unlikely to be very informative, because the form provides only for one of two alternative boxes to be checked – grant or deny -- which does not contribute much to the review process. He noted that the trial judge would have already written his opinion and explained it in the record. Attorney Killen responded that if the trial judge also was expected to provide input for the pet. cert. process under the new proposal, it would open the likelihood of more insight as to the reasons for the trial court's denial of permission to appeal.

Judge Bishop questioned the purpose of an advisory opinion from the trial court. Once a case is out of the trial court, its job is done and it would be up to the appellate court to decide appealability. Attorney Killen responded that it may not be apparent to an appellate court that is getting the case for the first time that the petitioner is making statement of facts that are contrary to the habeas findings. Judge Bright noted that would mean asking the habeas court to write another opinion in a very busy court. Judge Schuman clarified that his proposal did not require the habeas judge to render a second opinion as to appealability, but rather to simply identify those cases that, in its view, warranted the appeal.

Attorney Bourn asked if the appeal would be limited to the issues certified by the appellate court. She stated that would mean the petitioner would have to do a full review of the case and present all of the issues in the petition that they intended to raise on appeal. Judge Bishop suggested that appellate courts do not have the need that the Supreme Court has, to limit a briefing just to the issues upon which pet. cert. was granted. Since it is the first appeal for the habeas petitioner, the court should be open to hearing claims that were not included in the pet. cert. Judge Bright agreed.

Attorney Bourn introduced the public defender proposal by saying they tried to balance protecting their clients with reducing the number of appeals getting full review. She understood that the overarching purpose of certification was the elimination of frivolous appeals. She then reviewed the standard definitions of frivolous and presented a flow chart of the current pet. cert. procedure. She pointed out that if the pet. cert. gets denied, the briefs have to address two questions – whether the habeas court abused its discretion in denying cert. as well as the merits of the claims that were raised. The claims are limited to the issues included in the pet. cert. because it is impossible to show an abuse of discretion in the habeas court's denial of an issue that was not presented.

Attorney Bourn reiterated that the major criticism of the current pet. cert. process is its inability to screen out frivolous appeals since everyone is given the right to full appellate briefing and argument. The dilemma she said is that the habeas judge is better informed, but leaving the final judgement to him or her does not allow review when there is error, and in her experience, the habeas court gets the pet. cert. ruling wrong with some frequency. The flip side of that is that a different decision maker needs a lot of information about the case. Even in relatively straightforward cases, to give the court everything it would need to know about the case in 10 pages is challenging; and even more so in cases with a complex procedural history. Identifying all the issues that need to be raised, prioritizing them in terms of those most likely to have success, and explaining everything in 10 pages is a tall order. She warned that having a quick time table, short pet. cert. and not allowing people to have an appeal may have consequences such as wrongful conviction, increased federal habeas as well as IAC claims, and a revival of writ of error as a means of appellate review.

Attorney Bourn then outlined the public defender's proposal for reforming the current pet. cert. process in habeas cases. She suggested that the habeas appellant's brief should serve as the basis for pet. cert. review, with a corresponding change to the Anders rule to allow dismissal of the appeal by the appellate court. Making the brief serve double duty as the petition for certification in the first instance would ensure that the court was provided the information needed to determine whether there was a question meriting full review. If the appeal survived this frivolity test, the appellee would then be required to file its brief, and the case would be ripe for consideration on the merits. But if the appellate court found there to be no non-frivolous issue raised by the petitioner's brief, the appeal would be dismissed and the appellant could petition the Supreme Court. This would eliminate the full appellate process for all appeals not certified. Allowing for dismissal under these circumstances should satisfy the concerns underlying Anders, and thereby bar the petitioner from thereafter prosecuting an appeal as a pro se.

Judge Schuman pointed out that the proposal required the public defender's office to fully brief the case, which he viewed as problematic in cases that end up failing not

withstand the frivolity threshold. He also noted that the appellate court would be deciding the pet. cert. issue without hearing from the State.

Attorney Bourn responded that from the perspective of the petitioner's counsel for appeal, there is very little difference in the amount of work needed to write an adequate pet. cert and a full brief, particularly given the dispositive nature of the pet. cert. decision under the proposed change. Unlike the pet. cert. process to the Supreme Court from the Appellate Court, the proposed new habeas process would involve cases in which there was no developed appellate record already available, and the lawyer preparing the potentially dispositive pet. cert. papers would need to obtain and review the underlying habeas trial record, and research and identify potentially appealable issues without the benefit of an underlying appeal having already been presented and available.

There then was a discussion about the time that should be allowed to file a petition for certification under the new proposals. It was agreed that obtaining a transcript would take several weeks or more. Judge Bright suggested 60 to 70 days should be enough. Attorney Bourn explained that under current practice, most appeals are handled by an assigned appellate counsel. There is a lead time of several weeks at least in processing the assignments and in assembling the habeas trial level and other necessary materials in order for assigned counsel to undertake their work on the appeal. Attorney Bourn also noted that there are a limited number of appellate lawyers equipped to handle such cases, and that requiring the entire process to be completed within a 60-day time period would be difficult in many cases.

Co-chair Rosenthal added that habeas appeals can be unusually complex, both because of complicated procedural law that surrounds such cases, and because of the extensive record involving prior proceedings – sometimes multiple prior proceedings -- that often extend farther back than a normal appeal.

Attorney McGraw pointed out that requiring a quick turn-around would not have any impact on the appellate court's work load. Judge Bright concurred, but added that the system does a disservice to people when the outcome is dragged out unnecessarily, especially when it is clear to all parties that the issues have little chance of winning. States Attorney Killen commented on the public defender proposal. He indicated that the appellate court should be the final arbiter of whether or not the appeal should proceed, but also suggested that the habeas trial court and the state's attorney's office should have input on certification.

It was agreed that the task force consideration of pet. cert. reform should be continued at the November meeting. There was also discussion on the other items that should be considered at that meeting, including agenda items not reached at the October meeting: (1) the issue of habeas pretrial processes that might address the significant number of cases withdrawn on the eve of trial (after sitting on the trial list sometimes for years); (2) how to address DOC concerns with habeas cases involving conditions of confinement; and (3) proposals for addressing the issue of successive habeas petitions.

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

The meeting was adjourned at 4:09PM.