Lozada– Ad Infinitum Problem

This problem arises only with respect to nested, ineffective assistance claims; therefore, any solution need not restrict or preclude an inmate's ability to seek redress for other claims, such as actual innocence, Brady violations, etc. through multiple habeas filings.

What is the ad infinitum problem?

Since 1992, in Connecticut petitioners may seek habeas relief for ineffective assistance claims that attack not only the representation provided by defense attorneys during their CRIMINAL case or DIRECT APPEAL but also that provided by their counsel in previous HABEAS matters; without limitations based on res judicata, successive petition prohibition, the passage of time, or number of prior, unfavorable habeas adjudications.

Why does this procedure exist in Connecticut?

Through case law that interpreted our public defender appointment statute, G.S.§51-296, and the phrase, "in any habeas corpus proceeding arising from a criminal matter," contained therein, so broadly as to pertain to an unending chain of habeas cases, each "arising" from an earlier habeas case, no matter how remote from the inmate's criminal case.

In *Lozada v. Warden*, 223 Conn. 834 (1992), our Supreme Court acknowledged that there is no constitutional right to appointment of counsel in habeas cases under the federal or state constitutions. The Court also recognized that a legitimate ineffective assistance habeas claim can only be made if a right to counsel exists.

The petitioner had already filed and lost a habeas case challenging his conviction based on the purported subpar representation of his criminal defense lawyer. He then filed another habeas case alleging that his habeas attorney was ineffective in attempting to prove that his criminal defense attorney was also ineffective. The habeas court followed federal precedent, and that of a large majority of states, and dismissed the case for failing to set forth a valid claim.

Our Supreme Court held that the earlier failure of the petitioner to prove ineffectiveness of defense counsel was not res judicata on that issue. Nor was the

second habeas a "successive" petition because the supposed errors by first habeas counsel were necessarily distinct from the mistakes of defense counsel in the criminal case.

Our Supreme Court reversed the habeas court and held that the state statute that required appointment of first habeas counsel conferred a concomitant right to competent counsel in that habeas case as well as in the original criminal case. The Court reasoned that if the first habeas case "arose" from a criminal matter, then so must the second level habeas filing. In reaching this conclusion, the court seems to have employed a "but for" analysis; that is, the second habeas case, a civil matter, would not have existed but for the first habeas case, also a civil matter, which would not have existed but for the criminal conviction. Therefore, the "habeas on a habeas" case also "arose" from a criminal proceeding, despite the intervening civil matter.

The respondent warned our Supreme Court that this "but for" logic creates a never-ending algorithm entitling habeas petitioners to file repeated claims of interlocking ineffectiveness. The Supreme Court brushed aside this prediction in a footnote stating that that result was "not this case."

In *Sinchak v. Commissioner*, 126 Conn. App. 684 (2011), our Appellate Court followed the the "expansive interpretation" set forth in *Lozada* and held that, if a habeas on a habeas claim "arises" from a criminal proceeding under §51-296, then an indigent petitioner asserting such a claim had, similarly, to be afforded next -level habeas counsel. Of course, this holding meant that the second level habeas counsel's performance also allowed for further habeas attack. This conclusion, in turn, would inexorably mandate appointment of third habeas counsel which would permit habeas on habeas on habeas claims. Repeat ad infinitum.

In *Kaddah v. Commissioner*, 324 Conn. 548 (2017), our Supreme Court recognized just such a claim based on this reasoning. That decision expressly left the problem for the legislature to correct by holding that this ad infinitum possibility stems from the language used by the legislature in §51-296, rather than by the Court's interpretation of that text.

How do other states deal which these claims?

In 2005, a dissenting opinion in a South Dakota Supreme Court decision noted that only eight states had adopted similar interpretations of their public

defender appointment laws, namely: Connecticut, South Dakota, Alaska, Colorado, Idaho, New Jersey, Maryland, and Iowa.

However, no state, except Connecticut, presently adheres to this procedure past the first-level, habeas claim of ineffective performance, and most of these eight states have abandoned or abrogated the case law that invoked the *Lozada* approach.

- In February 2014, the Idaho Supreme Court reversed itself and no longer follows the *Lozada* rule. See *Murphy v. State, 156 Idaho 389 (2014).*
- Alaska allows a *Lozada* claim but now denies appointment of counsel, thereby ending the cycle, *Grinols v. State*, 10 P.3d 600 (Alaska App. 2000).
- South Dakota eliminated the possibility through legislation, S.D. Statutes 21-27-4. "The ineffectiveness or incompetence of counsel, whether retained or appointed, during any collateral postconviction proceedings is not grounds for relief... ."
- Maryland also amended its statutes to disallow such claims. See, *Gray v. State*, 388 Md. 366 (2005).
- Pennsylvania did the same to restrict ineffective assistance claims to first habeas counsel only. See, *Commonwealth v. Priovolos*, 552 Pa. 364, 368 (1998). Also, Pennsylvania enforces a strict, one-year statute of limitations for such claims which are not tolled by counsel's ineffective assistance.
- Colorado has enacted a similar statute. See, *Silva v. People*, 156 P3d 1164 (Colo. App. 2005). Also, appointment of counsel occurs only after the public defender's office has determined that the petitioner's postconviction claim has merit; that is, appointment is discretionary and no right to effective counsel attaches.
- Iowa also employs a strict statute of limitations of three years which is not tolled by the ineffectiveness of postconviction counsel, *Holmes v. State*, 683 N.W. 2d 127 (Iowa App. 2004).
- North Dakota allows first habeas counsel's performance to be raised in a second habeas, *Johnson v. State*, 681 N.W.2d 769(2004).
- Kansas considers the ineffective assistance of postconviction counsel, but in the context of an appellate court's granting/denial of an extension of time to appeal, *Brown v. Kansas*, 278 Kan. 481 (2004).
- Similar situation for Vermont, *In re Babson*, 197 Vt. 535 (2014).