11/20/19 TESTIMONY OF DARCY McGRAW, DIRECTOR OF THE CONNECTICUT INNOCENCE PROJECT BEFORE THE HABEAS CORPUS TASK FORCE

OVERVIEW OF THE WRIT OF HABEAS CORPUS

CORNERSTONE OF BRITISH AND AMERICAN CRIMINAL LAW

- Has played a unique role in both British Common Law and American systems of justice.
- As early as 1215, Magna Carta referenced a prohibition against "unlawful imprisonment".
- First recorded use of this law 1305; First Habeas Corpus Act passed by British Parliament in 1641.
- In America, written into the constitution even prior to the Bill of Rights.
- CT Supreme Court: the principal purpose of the writ of habeas corpus is to serve as a *bulwark against convictions that violate fundamental fairnes*s." (Emphasis added; internal quotation marks omitted.) *Lozada v. Warden,* 223 Conn. 834, 840, 613 A.2d 818 (1992).
- Habeas court is a court of equity: fairness is the inquiry. The remedy is an extraordinary one.
- Connecticut Supreme Court has consistently interpreted the writ to incorporate ideas of due process and fundamental fairness. See, Birch v. Commissioner, Birch v. Comm'r of Correction, No. 20136, 2019 WL 2494788, at 11 (the state has an "affirmative obligation to review any relevant test reports before [a witness'] testifying so as to reasonably ensure that his testimony…accurately reflect [s] the findings of those tests. To conclude otherwise would permit the state to gain a conviction on the basis of *false or misleading testimony* even though the error readily could have been avoided if the witness merely had exercised due diligence; such a result is clearly incompatible with the principles enunciated in *Brady* and its progeny.") (Emphasis added) Id.

- Three principal questions involved in recent history of Habeas Corpus:

I. Have the courts so expanded the writ so as to distort its function?

Professor James Liebman, one of America's leading scholars of habeas corpus law: What is remarkable about the writ is not that its function has been distorted. What is truly remarkable is its *constancy*. James Liebman, Federal Habeas Corpus Practice and Procedure, Sixth Ed. 1988. The focus is and has always been on due process of law.

II. Is the only or predominant rationale of the writ to protect people against false criminal convictions?

Professor Liebman writes that the petitioner's apparent guilt should heighten, not diminish, the scrutiny of the procedures by which he was convicted and sentenced, referring to the "local spirit" that can be brought to bear on an unpopular person

accused of crime. Liebman, sura, p. 14. He emphasizes that habeas courts do not adjudicate guilt or innocence. "The point here is that Habeas corpus is—and in this country has always been—a remedy for unlawful detention…." This is consistent with the enormous resources put into death penalty litigation nationally. He also reviews the emergent federal habeas law regarding claims of innocence.

- In recent years, due mainly to the development of scientific breakthroughs such as genetic testing, we know that wrongful convictions occur with greater frequency than was previously believed.
- Whereas previously it was the fundamental belief of scholars and those who practiced in the criminal justice system that we could hope only for a fair trial, and that the search for the truth established by our jury system within the confines of the rules of evidence was our best hope for a just result.
- Indeed, the concept of the "actual or factual innocence" in the criminal law is a relatively new one. (Friendly, Henry J. (1970) "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," *University of Chicago Law Review*: Vol. 38: Iss. 1 ,Article 9.)

III. **Does the writ have a special role with respect to capital cases**? We do not need to review this question in the wake of Santiago.

RELATIONSHIP BETWEEN STATE AND FEDERAL HABEAS

- Traditionally the federal courts have been the last bastion of protecting the constitutional rights of accused person.

- Under AEDPA and Pinholster, that role is severely restricted. And that of state habeas proceedings is therefore heightened. Cullen v. Pinholster, 563 U.S. 170 131 S.Ct. 1388 179 L.Ed.2d 557.(Holding that federal habeas review can be decided only with respect to the state court record, regardless of the constitutional violations alleged.)

POLICY QUESTIONS FOR CONNECTICUT

- Connecticut's legislature has taken an expansive view of the writ compared with other jurisdictions, as evidenced by our statutory right to counsel and to an evidentiary hearing in habeas matters. General Statutes
- In order to address this outlier situation, in 2012 the General Assembly enacted statutory changes that went into effect in 2014. General Statutes Sec. 52-470 (amended 2012). Those changes created a new limitation on access to court, with the perhaps unintended consequence of a flood of petitions into the system on the part of inmates who feared losing the opportunity to challenge their convictions.

- Along with that increase in petitions filed over the years 2014-2016, however, the new statute created a presumption of unreasonable delay when the new statute of limitations has not been adhered to. This provides an offsetting means of eliminating repetitive petitions or claims that are not cognizable in habeas.
- That problem has for the most part corrected itself (Statistics from the Judicial Branch.)
- We are well aware that there are inmates who continue to file non-meritorious petitions, either because they don't want to give up because they don't believe any of their lawyers have listened to them or done a proper investigation, or they do not believe all the evidence has been produced and/or properly vetted.
- I believe this will always happen to some extent.
- However, in some cases, they are right.

PROPOSAL FOR DEALING WITH SUCCESSIVE PETITIONS

- That is why I am proposing a system of screening for right to counsel after the petitioner's right to a first habeas, and his right to challenge the effective assistance of habeas counsel (Lozada) have been exercised.
- That means that *after the first two petitions* as of right have been filed, any additional petitions would be screened by qualified individuals in my office before counsel would be appointed.
- Screening by our agency would eliminate any concern that a petition is being pursued for the financial benefit of counsel.
- CTIP is also the best agency to work directly with the petitioner to determine validity.
- If the lawyer screening the petition deems it lacking in merit, he/she will so certify to the court or to OCPD/CTIP. This can be accomplished in a number of ways, and eliminates the need for filing Anders briefs. [1]
- Obviously under the system that I have proposed, the petitioner can proceed pro se at this point, but the state should be able to make good use of the provisions allowing the state to file motions to dismiss.

[1] In Massachusetts, this certification is made directly to the Office of Chief Counsel, stating that counsel does not believe that a petition for post-conviction relief can be amended to state a claim relief, and recommending whether to appoint counsel. The certificate can also be filed directly with the court. For example, Oregon Revised Statutes Annotated Sec. 138.590 (5) relating to post-conviction petitions permits counsel to file an affidavit with the court stating counsel's belief that there is no basis for relief set forth in the pro se petition, even if amended. Although Oregon's statutory framework differs significantly from our own, such a provision can be adapted for Connecticut to make the screening procedure set forth herein workable.

BASED IN PART ON MASSACHSETTS SYSTEM

- I have based this proposal on a modified version of Rule 30 of the MA General Laws of Criminal Procedure. This system was adopted by our sister New England state in 2001, as amended to 2019.
- Based on my conversations with my counterpart, the Director of the Massachusetts Innocence Project, this system has worked without major problems.
- This is significantly due to the PD system making determinations as to who gets counsel appointed.
- MA has no statute of limitations for post-conviction petitions. The initial filing may be granted at "any time", and appointment of counsel is discretionary with the court. The discretion to appoint counsel has been delegated to the PD's office and the PD is given wide latitude.
- Essentially, in repeat filing cases, MA PD staff (or lawyers on their approved list) are engaged to determine whether there are any "new issues." Any grounds not raised the first time are "waived" unless the court in its discretion allows it to go forward, or unless the basis could not reasonably have been raised. The standard is where "justice may not have been done."
- The 2018 amendment to the MA statute also permits motions for new trial based on new forensic evidence. The court has discretion to appoint counsel for purposes of drafting motions and investigating claims under this section.
- This rule was a significant departure from previous MA practice, which was a kind of combination of a writ of habeas corpus and a writ of error.
- It is based on FR Crim. P 33, 35; ABA Standards relating to Post-conviction Remedies (Approved Draft 1968), and the Maine post-conviction statute, from which it borrowed. Like the federal rule, it uses an "interest of justice" standard.
- However, using a modified version of the ABA Standards Relating to Post-Conviction Remedies, it advances a single, comprehensive post-conviction remedy for both factual and legal claims.
- Importantly, the ABA Standard holds that *statutes of limitations for claims seeking post-conviction relief are "unsound,"* and allows for relief in cases where the United States or the state constitution have been violated, new evidence not discoverable at the time of trial becomes available, or changes in the law that would likely lead to a different outcome. The denial of the motion for new trial is appealable. The standard is whether there is a "substantial risk that a miscarriage of justice has occurred."

EXAMPLES WHERE SCREENING CAN HELP

- We in the Habeas Corpus Unit (CTIP/Post-conviction Unit?) are well aware that certain inmates continue to file petitions even in the absence of meritorious claims. We deal with these individuals daily.
- Bear in mind under the current procedure, once a petitioner has filed a pro se petition, he is already assigned counsel, and, in the second habeas, counsel has been required to determine whether a credible argument in favor of a NON-FRIVOLOUS issue can be presented. Indeed, it is his ethical obligation to pursue any such issue, regardless of the likelihood of success.
- However, it is painfully clear that many such petitions have no real chance of going anywhere, and the interests of justice are not best served in pursuing some of these claims. Good lawyers (who are conscientious) will do a very good job preparing, thus using resources that could better be devoted to other cases.
- From my vantage point, this is where the real concern about resources being diverted from more meritorious claims should focus. This is where a screening process, involving lawyers from the post-conviction unit with expertise in post-conviction litigation reviewing the prior proceedings to determine whether there is a non-frivolous issue to warrant assignment of counsel, should occur.
- This process would involve perhaps a separate docket (to protect filing deadlines) or minor change to the practice book for these cases.

WRONGFUL CONVICTIONS

- In the meantime, we continue to experience wrongful convictions. It concerns me that I hear members of this Task Force minimize the harm, or claim that it is a rare occurrence. This is by no means our experience.

The National Registry of Exonerations, created in 1989 at the University Of Michigan School Of Law, to keep track of the increasing problem of wrongful convictions nationally. A review of that registry shows that CT has had no fewer than 23 exonerations as defined by the registry. A review of those cases leads to the undeniable impression that with few exceptions, the excessive delay and drawn out proceedings before these individuals were released can be traced to:

1. Withholding of Brady material;
2. Lack of post-conviction discovery;
3. Changes in forensic science.

I am well aware that in some cases there may remain disagreement about whether the person is “guilty”. I would remind everyone however that every one of these cases these individuals have won their freedom.

However, almost on a daily if not weekly basis, I receive emails from the Innocence Network relating the exoneration, re-sentencing, or sentence modification in cases from

across the country in which the decision to release these individuals has been made because of significant perceived problems with the evidence or conduct of the cases. I received one such email this morning from the Wisconsin Innocence Project. The majority of these cases involve state court rulings.

As for Connecticut, in reviewing the registry in preparation for testifying today, I counted those cases that I am familiar with since my time at CTIP:

AT LEAST 19 INDIVIDUALS; TOTAL YEARS SERVED IN PRISON: 406