

# Connecticut General Assembly

## Habeas Corpus Matters Task Force

Merit Lajoie & Kenneth Rosenthal, Esq.  
Co-chairpersons



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

### MEETING MINUTES

Wednesday, November 20, 2019

2:00 PM in Room 2B of the LOB

Co-Chair Merit Lajoie called the meeting to order at 2:00 PM.

The following committee members were present:

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

Absent were: Sen. Gennaro Bizzarro

The minutes of the October 15 meeting were amended for grammatical errors and approved.

Judge Sferrazza announced that today was his last meeting because he was retiring and moving out of state. The Committee thanked him for his service.

#### Follow-up Discussion of Habeas Appeals Procedures (Pet Cert)

Judge Schumann said that the Judicial Branch representatives had discussed the proposals from the October meeting, and agreed with Judge Bright's proposal that allowed either the petitioner or the respondent to file a petition directly with the appellate court instead of with the trial judge.

After consulting with his colleagues on the Appellate bench, Judge Bright said there were three responses to the proposals from the October meeting. They agreed that appeals need not be limited to what was set forth in the petitions for certification. They expressed a strong preference that the pet cert process be an adversarial process; they would like to hear from both the Public Defender Office and the States Attorney before making a decision. Finally, they did not understand the need for a lengthy period of time to file a petition.

Attorney Bourne explained that the process of writing a petition in the proposed process would be quite lengthy because the appellate attorney would have to carefully frame the issues to be convincing to the appellate court who was not familiar with the case. Since there would be no chance for appeal, the outcome of the client could be severe if a mistake were made. She also indicated a resources problem, because there were a limited number of attorneys working on habeas appeals, there was a backlog.

Judge Bishop suggested that the trial lawyer should do the petition and appeal since they were familiar with the case. Chief Public Defender Rappillo responded that appeals lawyers have to be specially qualified. They need to understand appellate law, understand appellate process, understand standard of review, and know how to perfect a record.

There was discussion on how long appeals currently take. Attorney Bourne said the standard time for writing an appeals brief was 150 days. Attorney Killen said it was the same for the State's Attorney's office because there was a backlog. Judge Bishop noted that was indicative of a lack of resources. Attorney Rosenthal suggested that those issues be discussed in a separate working group. Chief Public Defender Rappillo suggested that anyone who wanted to serve on a pet cert working group send an email to the chairs. The group could then set up times and find a space to meet. She said the meeting place had to be publicly accessible.

### Successive Petitions

Attorney McGraw, Director of the Innocence Project, presented a proposal to handle successive petitions. She first reviewed the history of habeas corpus law nationally and in Connecticut. (See attached notes).

Regarding successive petitions, Attorney McGraw indicated that the Public Defenders proposed the following: an inmate could file a first petition without a screening, and then a second to exercise his or her right to challenge effective assistance of counsel in the first, but the third petition would be screened by the Public Defender Post-Conviction Unit. Qualified individuals with expertise in post conviction litigation from the office would review the prior proceedings and determine whether there was a non-frivolous issue that warranted assignment of counsel. They would not decide the case. If the petition was lacking in merit, they would so certify to the court or to OCPD/CTIP and explain why.

Attorney McGraw explained that this proposal would eliminate any concern that a petition is pursued for the financial benefit of counsel and would eliminate the need for filing Anders briefs. It would involve minor changes to the practice book and perhaps the creation of a separate docket or some other way to manage the tracking and timing of filings for purposes of Connecticut statutes and Federal ed puc issues. The state would still have available to it those provisions of Statute 54- 470 that allow motions to dismiss as well as all its other defenses such as procedural default, res judicata, etc.

Attorney McGraw then described the Massachusetts system of reviewing petitions. (See attached notes) She also noted, for consideration by the task force, that the ABA Standard on Postconviction Remedies provides 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.

[https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_post\\_conviction\\_toc/](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_post_conviction_toc/)

There was then a discussion on whether the proposal would bypass the Connecticut Supreme Court's Lozada decision that allowed a habeas on a habeas if it was attacking the prior ineffective assistance of counsel because it was mandatory under state statute to provide counsel. Attorney McGraw said the proposal does keep the statutory right to counsel in the first filing

and in the second, but a petitioner does not get a third or later habeas attorney unless a post-conviction litigator identifies a non-frivolous issue.

### Wrongful Convictions

Attorney McGraw concluded her presentation with a concern that the Task Force may be unduly minimizing the harm to wrongfully convicted individuals of excessive delay and drawn out proceedings. She pointed out that more than 19 individuals wrongfully convicted in Connecticut had served a total of 406 years in prison. The lengthy habeas proceedings in these cases she said can be traced to: the withholding of Brady material by the police and prosecution, the lack of post-conviction discovery and changes in forensic science.

Attorney Feldman, the State Campaign Director, National Innocence Project, gave a presentation advocating a statewide open file discovery system that would reduce the number of state habeas petitions filed for Brady violations and for ineffective assistance of counsel regarding evidence, and would help prevent wrongful convictions in the first place. She said that 15 of the 23 exonerees cases in Connecticut involved the withholding of evidence and cost the state \$54 million in compensation. She said better pretrial discovery laws and the complete sharing of information between the police and attorneys would ensure fair and accurate outcomes on the front end of the system and avoid time consuming and costly litigation on the back end of the system.

Scott Lewis, an exoneree in 2014 after serving 19 years in prison and several unsuccessful state habeas cases, described how his original criminal trial would have had a different outcome if there had been open file discovery. The defense would have had information about prior investigations by the police and about contradictions in witness testimony.

### Conditions of Confinement Cases

Attorney Nicole Anker, the Department of Correction designee on the task force, introduced several representatives of the Department of Correction that had come to share information supporting her position that conditions of confinement habeas should be addressed by the Task Force. She said that the legislation creating the task force was very broad and did not carve out any particular type of habeas, and that conditions cases were a significant part of the habeas work load, and if they were not resolved and moved through the system efficiently, it affected all the other habeas. Attorney Zenobia Graham-Days added that many of the problems in criminal conviction cases apply to the conditions of confinement cases as well.

Steven Strom, Assistant Attorney General, said that conditions of confinement cases are about a third of habeas cases, 500-600 cases last year, and that medical cases sometimes take two or three years, because of early interventions, mediations and pretrials. He said the AG office needed more resources to handle those cases. Even though the inmate population is decreasing, he said the number of petitions is not.

Attorney Strom reported that courts vary on how they dispose of, at times allowing pro se conditions of confinement cases to proceed that he believes should be dismissed under controlling cases from the Supreme Court. Another problem is the withdrawal of cases on the eve of trial after pretrial preparation work has been undertaken.

Co-chair Lajoie asked whether petitioners are refile after they have withdrawn a case on the eve of trial. Attorney Graham-Days said they were. She thought they were incentivized to do that because they are not required to withdraw the prior case with prejudice.

Co-Chair LaJoie asked whether the risk reduction and earned credit cases first go through the department's administrative processes or go straight to the habeas process. Attorney Graham-Day said that the petitioners often skipped the internal procedures since there was no requirement that they utilize them.

Judge Sferazza asked what the Attorney General's position was on taking conditions of confinement issues out of the habeas arena entirely and making them an administrative appeal as any other state directive. Erik Lohr, the Assistant Attorney General who oversees defensive litigation in prisoner cases, stated that the AG's office had not arrived on a position on how conditions of confinement should be handled. He recommended that a working group be formed to consider that issue and others related to conditions of confinement habeas litigation.

Co-Chairman Attorney Rosenthal repeated a concern raised at a previous meeting that there needed to be someone on the task force who could speak from the petitioner's point of view on conditions of confinement habeas. He noted that because there was no right to counsel in conditions of confinement cases, there is usually no attorney representing the petitioners.

Judge Bright pointed out that there typically was counsel appointed for risk reduction and earned credit cases, and that one of the attorneys that handles those cases could be invited to be part of the group. Attorney Bourne explained that counsel was appointed in those cases because risk reduction constituted a challenge to the inmate's conviction and sentence and not conditions of confinement.

Judge Bishop pointed out that there were very different types of conditions of confinement cases and they should be recognized as possibly needing separate remedies.

There was further discussion on who could represent the inmate point of view for addressing conditions of confinement issues. Professor Everett serves as the prisoner advocate on the UConn Health Center Institutional Review Board (IRB) and suggested that the committee might find an inmate or former inmate that would be a good addition. Attorney Rosenthal suggested attorneys from prisoner's rights organizations.

State Representative Maria Horn requested that the task force make clear in their proposals to the legislature the human resources implications of problems in the habeas process and any proposals to address them.

Attorney Rosenthal summarized the tasks for the next meeting:

Pet Cert - form the working group on pet cert and meet before the next Task Force's meeting

Successive Petitions - hear from the state's attorney on successive petitions and finish the discussion on the Post-Conviction Unit's proposal

Conditions of Confinement Habeas - bring ideas about whom to invite to be on the task force to represent the inmate's point of view, and form another working group

It was moved and approved to skip the December meeting so that the pet cert working group would have time to meet. The next meeting of the task group will be January 15th.

The meeting was adjourned at 4:09PM.