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Re: Codifying claims of ineffective assistance of counsel on appeal

Dear Mr. McDonnell:

We are writing on behalf of the New York City Bar Association's Criminal Justice Operations and Criminal Courts Committees regarding Proposal III(31) in the January 2011 Report of the Advisory Committee on Criminal Law and Procedure. This proposal would amend Criminal Procedure Law §450.65 to codify claims of ineffective assistance of appellate counsel. While we applaud the Advisory Committee for making this important proposal, we believe it can be strengthened in four key respects. The following is our analysis of the Advisory Committee's proposal and our suggested modifications.

Introduction

As the Court of Appeals has recognized:

> when a State grants a defendant a statutory right of appeal, due process compels States to make certain that criminal defendants receive the careful advocacy needed "to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over."

People v. West, 100 N.Y.2d 23, 28 (2003).

Nevertheless, no statutory remedy exists in New York for claims of ineffective assistance of counsel that relate to appellate, rather than trial-level, representation. To fill that gap, the Court of Appeals has turned, in a series of cases, to the traditionally flexible writ of error coram nobis. It has repeatedly invited the Legislature to codify the area, but the Legislature has not done so to date. As the coram nobis law has developed in this area, the treatment of claims of ineffective assistance of appellate counsel has come to differ very significantly from the treatment of claims of ineffective assistance of trial counsel.

The January 2011 Report of the Advisory Committee on Criminal Law and Procedure has proposed amending Criminal Procedure Law § 450.65 to codify claims of ineffective assistance of appellate counsel. We applaud the Advisory Committee for recognizing this important issue, but believe the proposal should be modified in order to set forth a procedure that is more complete, less cumbersome, and fairer to indigent defendants. In that vein, we make the following recommendations:

1) The Criminal Procedure Law should be amended to provide a specific mechanism for claims of ineffective assistance of appellate counsel, but with the understanding that this would not be a comprehensive codification of the writ of error coram nobis.

2) The claims encompassed in such a statute should include (a) ineffective assistance of counsel at the appellate level, (b) the deprivation of counsel at the appellate level, (c) the failure to perfect an appeal, and (d) the failure to file a timely notice of appeal.

3) The statute should allow appellate courts, in their discretion, to either consider or summarily reject successive applications, as trial courts currently do with successive 440.10 motions, and regardless of whether they are brought pro se or by counsel.

4) The statute should authorize the appellate court in which the issue is raised to do the following if it determines that a factual dispute exists that should be resolved: (a) request input from appellate defense counsel, and/or (b) refer the matter to the trial court or a judicial hearing officer for a hearing and fact findings.

1. Codification of Appeal-Related Claims of Ineffective Assistance of Counsel

Appeal-related claims of ineffective assistance of counsel should be codified for several reasons.

First, the Court of Appeals has repeatedly made clear that it favors codification over the piecemeal adaptation of the writ of error coram nobis in which it has had to engage to provide a remedy in this area. More than two decades ago, in People v. Bachert, 69 N.Y.2d 593 (1987), the Court first held that claims of ineffective assistance of appellate counsel could be brought by coram nobis, but it clearly saw this as a temporary solution, which would apply until the Legislature enacted a "particular and comprehensive remedy." 69 N.Y.2d at 596. Indeed, the Court expressed its "discomfiture" with the absence of a "comprehensive statutory mechanism" to address such claims, and "invite[d] the Legislature's prompt attention" to the need for a "more permanent solution." 69 N.Y.2d at 600. More recently, in People v. D'Alessandro, 13 N.Y.3d

216, 221 (2009), the Court noted that, despite its invitation, the Legislature had not enacted a statutory mechanism for such claims, forcing litigants to continue relying on the common-law writ.

Second, as the law has developed, claims of ineffective assistance are treated very differently if they relate to appellate counsel than if they relate to trial counsel. A trial judge may summarily reject a successive 440.10 motion alleging ineffective assistance of trial counsel. But defendants may file an unlimited number of coram nobis applications claiming ineffective assistance of appellate counsel and have them considered on the merits. See People v. D'Alessandro, supra (error for Appellate Division to treat second coram nobis application as merely a motion to reargue an earlier coram application). There seems little reason for ineffective assistance of counsel claims to be treated so differently.

Third, if codification is to be considered, we recommend several modifications to the Advisory Committee's proposed amendment of Criminal Procedure Law § 450.65. First, it does not encompass claims now recognized as encompassed by coram nobis: the claim that appellate counsel has unjustifiably failed to perfect an appeal, and the claim that trial counsel unjustifiably failed to file a timely notice of appeal. Second, it sets forth an unnecessarily cumbersome and potentially unfair leave process to deal with successive claims. Third, it favors successive applications made through counsel over those brought pro se, which may effectively unfairly impact indigent defendants, who are far less likely than those with funds to find an attorney who will bring a claim on their behalf.

We also recommend that any codification relate solely to ineffective assistance claims, and that it not purport to codify the writ of error coram nobis more broadly. The development of coram nobis as it relates to appellate ineffective assistance claims over the last 24 years points up the unique value of the writ as a flexible tool that can be adapted to deal with new situations that arise. In Bachert, the Court first applied it to ineffective assistance of appellate counsel claims. But it also noted that the writ had been applied earlier in several related contexts, including the failure of a court-appointed attorney to prosecute an appeal, the interference of correctional authorities with an appeal, and the indigence or insanity of the defendant preventing the perfection of an appeal. 69 N.Y.2d at 598.

In the years since Bachert, the Court has expanded the scope of coram nobis, holding recently, for example, that it encompasses both the deprivation of counsel in an intermediate appellate court, People v. Brun, 15 N.Y.3d 875 (2010), and the failure of trial counsel to file a timely notice of appeal to the intermediate appellate court. People v. Syville, 15 N.Y.3d 391 (2010).

No codification can or should purport to codify the writ itself. Its very flexibility and adaptability means that it continues to serve a particularly valuable purpose as, over time, new issues arise for which there is no clear statutory remedy.

2. Claims Any Statute Should Encompass

At a minimum, any statute codifying appeal-related ineffective assistance of counsel claims should encompass all of those the Court of Appeals has already recognized as encompassed in coram nobis. These include:

(A) ineffective assistance of counsel before an intermediate appellate court (Bachert, supra);

(B) the deprivation of counsel in an intermediate appellate court (Brun, supra);

(C) counsel's unjustifiable failure to prefect an appeal (see Bachert at 598); and

(D) the unjustifiable failure to file a timely notice of appeal to an intermediate appellate court (Syville, supra).

Since neither C nor D is encompassed in the Advisory Committee's proposal, we recommend that any legislation include these claims.

3. Consideration of Successive Applications

One of the oddities of coram nobis as it has developed is the vast discrepancy between the treatment given successive claims of ineffective assistance by trial counsel and that given successive claims of ineffective assistance by appellate counsel. A trial-related ineffectiveness claim, along with a variety of other trial-related claims, is brought under C.P.L. § 440.10, which allows the court to deny a 440 motion simply because one prior such motion was filed. In contrast, defendants complaining of ineffective assistance of their appellate attorneys may bring an unlimited number of repetitive claims.

Numerous defendants have made successive coram nobis applications, which are burdensome for the courts that must consider them, the prosecutors who must respond to them, and (to the extent their input is requested or required) appellate counsel. On the other hand, a second coram application may be meritorious. In both People v. Turner, 5 N.Y.3d 476 (2005), and People v. D'Alessandro, supra, 13 N.Y.3d 216 (2009), it was a second coram that succeeded. Any statute should contain some mechanism that strikes a fair and appropriate balance between allowing unlimited consideration of successive, meritless applications and insuring that meritorious applications are reviewed carefully even if a prior application was made.

We recommend that any statute adopt a similar mechanism to that contained in C.P.L. § 440.10(3), which provides that the court "may deny the motion" when "(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion" or "(c) Upon a previous motion . . . the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so," and also provides that, "in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious."

Adopting similar language would, we believe, strike an appropriate balance between the grant of meritorious claims and the ready disposition of repetitive or unmeritorious ones. It would have the added advantage of treating ineffective assistance of counsel claims similarly, regardless of whether they relate to trial or appellate counsel.

The Advisory Committee's proposal takes a different approach to this matter. It provides that, when there was a previous decision on the "ground or issue raised," the defendant must apply for permission (which would be granted by a single appellate judge) to file a second or subsequent motion "upon a showing of good cause, which shall include, but is not limited to,

establishing that any previous motion . . . was made by a defendant acting pro se, and where the current application is made by counsel."

We see three problems with the Committee's proposal. First, the procedure it establishes would be cumbersome. An application for permission would have to be made and decided. Then, if permission were granted by the single judge to whom it was referred, the application would have to be made to the full court. Thus, presumably, a meritorious application would require two successive filings by the defendant and two successive responses by the People, as is currently the practice for appeals from the denials of 440 motions, after which the Advisory Committee's proposal appears to be modeled.

Second, the leave application process as it exists now for appeals from the denial of 440 motions is widely seen as one of the least fair aspects of the criminal appeals process, with the ability to appeal resting on the decision of a single judge and therefore largely determined by the "luck of the draw." It would be unfortunate to extend such a hit or miss system to another area of the law.

Finally, it seems especially unfair to build a preference for counseled motions into the statute. The vast majority of convicted defendants are indigent and, unlike defendants with financial resources, will not be able to find counsel to bring a motion for them. There is no mechanism in the law for assigning counsel to represent such defendants. And indigent defendants functioning pro se may understandably take more than one try to seize on and persuasively present a meritorious appeal-related ineffective assistance issue.

4. Fact-Finding Options

Ideally, any statute should authorize the appellate court in which an appeal-related ineffective assistance claim is brought to take specific steps to resolve factual disputes that may arise in connection with that claim. Two aspects of any necessary fact-finding are of particular concern: (a) the extent to which the court may and should request input from appellate defense counsel, and (b) the extent to which it may refer the matter to another entity for the purpose of resolving factual disputes. The first issue involves ethical considerations; the second is primarily a logistical matter.

The Appellate Divisions vary as to whether and when they request or require input from former appellate counsel when a claim is made that he or she was ineffective. When counsel is routinely instructed to respond to every such claim, serious ethical considerations arise. At a minimum, counsel is placed in the difficult position of appearing to advocate against his or her former client and may be subject to a later claim that, by doing so, he or she exacerbated the harm from the primary ineffectiveness. Particular ethical problems will arise from the disclosure of confidential information, which is broadly defined to include "not only . . . matter communicated in confidence by the client but also . . . all information relating to the representation, whatever its source." American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 10-456, July 14, 2010, quoting Rule 1.6, comment 3. Furthermore, under Rule 1.6(b)(5), an attorney may respond to allegations of ineffectiveness only insofar as he or she "reasonably believes [it is] necessary" to do so.

These ethical concerns suggest strongly that appellate courts considering ineffective assistance claims should not routinely seek the input of former appellate counsel, especially since

the viability and relative merit of most unraised issues will be clear from the appellate record itself. On the other hand, there will obviously be some claims that turn on facts outside the record -- such as the attorney's discussions with the client about the risk of pursuing a particular appellate issue -- and therefore may require information from former appellate counsel. Statutory guidance would seem desirable to strike the correct balance and promote uniformity in this area.

As to the fact-finding process, appellate courts generally do not hold factual hearings and have no ready ability to do so. The Court of Appeals suggested in Bachert that the Appellate Division "even has the flexibility, should the need arise, to refer factual disputes for hearings to the nisi prius court or perhaps to judicial hearing officers," and could adopt rules governing such "referrals." 69 N.Y.2d at 600. But it would seem appropriate, if appeal-related ineffectiveness claims are to be codified, that such referrals be explicitly sanctioned by the governing statute rather than left to ad-hoc development in the various appellate courts of the State. Notably, such a mechanism is already codified in C.P.L. § 460.30(5) for the determination of motions for permission to file late notices of appeal or leave applications.

For these reasons, we would propose that any legislation include the explicit authorization that, in the event that the appellate court determines that disposition of the motion requires the resolution of a factual dispute, it may (a) solicit factual information from former appellate counsel, and/or (b) refer the matter to the trial court or a judicial hearing officer for the purpose of conducting any necessary hearing and providing findings of fact to the appellate court.

Thank you for your consideration. Please feel free to contact us if you would like to discuss these issues further.

Very truly yours,

Robert Dean

Robert Dean, Chair
Criminal Courts Committee

James Branden, Chair
Criminal Justice Operations Committee

Cc: Hon. Joseph Lentol
Chair, New York State Assembly Codes Committee

Hon. Stephen Saland
Chair, New York State Senate Codes Committee