Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

REPORT BY THE CRIMINAL JUSTICE OPERATIONS COMMITEE AND CRIMINAL COURTS COMMITTEE

CODIFICATION OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

A. Introduction

As the Court of Appeals has recognized:

> when a State grants a defendant a statutory right of appeal, due process compels [It] 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*.

The Court of Appeals has repeatedly made clear, however, that it favors codification over the piecemeal adaptation of the writ 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.

B. The Statute We Propose

Because we agree that codification is desirable in this important area of the law, the Criminal Justice Operations Committee and the Criminal Courts Committee[1] of the New York City Bar Association propose the enactment of a statute as appears in Appendix A.

C. The Goals of Our Proposed Statute

This proposal, which is modeled after C.P.L. §440.10, seeks to achieve several goals. It seeks to:

- codify appeal-related claims of ineffective assistance of counsel without restricting the availability of the flexible writ of *coram nobis* in other areas of the law;
- encompass all the areas in which the writ has been recognized as providing relief for claims of ineffective assistance that relate to appeals and the appeal process;
- treat appeal-related claims of ineffective assistance of counsel in a manner fundamentally similar to that for trial-related ineffective assistance claims;
- provide an avenue for the resolution of appeal-related ineffective assistance claims that is simple, familiar, and non-discriminatory; and
- provide a specific mechanism for factual investigation and fact finding that recognizes both defense attorneys' ethical responsibilities and the natural limitations of appellate courts.

We recognize that, in several respects, the approach we recommend differs from that proposed in the January 2010 and 2011 Reports of the Advisory Committee on Criminal Law and Procedure.[2] We believe our approach has some distinct advantages over that proposal in that it is more complete, is less cumbersome, and treats defendants the same whether they are indigent or have the financial resources necessary to hire counsel.

[1] The Criminal Justice Operations Committee is comprised of prosecutors and criminal defense attorneys who analyze the legal, social and public policy aspects of criminal justice issues facing New Yorkers today. The Criminal Courts Committee, also comprised of prosecutors and criminal defense attorneys, studies the workings of the Criminal Term of the New York State Supreme Court and the New York City Criminal Court.

[2] *See* http://www.nycourts.gov/ip/judiciaryslegislative/2011-CriminalLaw&Procedure-ADV-Report.pdf. The proposal of the Advisory Committee has been introduced in the New York State Legislature. *See* S.4472 (Sen. Nozzolio), introduced in April 2011. The bill passed the Senate but has not been introduced in the Assembly.

D. Limiting the Codification of *Coram Nobis* to Appeal-Related Claims of Ineffective Assistance of Counsel.

We agree with the Advisory Committee Report that the Criminal Procedure Law should be amended to provide a specific mechanism for appeal-related claims of ineffective assistance of counsel, but should not seek to codify the writ of error *coram nobis* itself.

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 statute can or should purport to codify the writ itself. It's 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. We therefore propose a narrowly-drafted statute that encompasses only appeal-related claims of ineffective assistance of counsel.

E. Encompassing All the Appeals-Related Ineffective Assistance Claims For Which *Coram Nobis* is Currently Available.

The Court of Appeals has explicitly recognized the availability of relief through the writ of error *coram nobis* for four distinct types of appeal-related ineffective assistance claims. These are:

1. ineffective assistance of counsel before an intermediate appellate court (Bachert, *supra*);

2. the deprivation of counsel in an intermediate appellate court (Brun, *supra*);

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

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

We believe that any codification of the writ as it pertains to appeal-related ineffective assistance of counsel claims should provide an avenue of relief for all four types of claims. The Advisory Committee's proposal does not include either the unjustifiable failure to perfect an appeal or the

unjustifiable failure to file a timely notice of appeal. To enact a statute that does not encompass all four types of claims would risk narrowing the circumstances under which defendants are currently entitled to relief. At a minimum, it would create confusion as to what types of claims can be brought and how. We see codification as undesirable unless it recognizes and provides a mechanism for resolving all four currently-recognized types of claims.

F. Achieving Approximate Parity of Treatment Between Appeal-Related and Trial-Related Ineffective Assistance Claims.

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-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 appellate counsel may bring an unlimited number of repetitive corams 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). We see little reason for ineffective assistance of counsel claims to be treated so differently.

Successive *coram nobis* applications may be burdensome for the courts that must consider them, the prosecutors who must respond to them, and (to the extent information is requested or required of them) 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.

We believe that any statute should strike a fair and appropriate balance between allowing unlimited consideration of successive, meritless applications and insuring that meritorious applications are reviewed carefully by a full appellate panel even if a prior application was made.

We recommend adopting a mechanism similar to that contained in C.P.L. § 440.10(3)(b), which provides that the court "may deny the motion" when "[t]he ground or issue raised upon the motion was previously determined on the merits upon a prior motion," but 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, 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.

G. Treating Successive Applications in a Simple, Familiar, and Non-Discriminatory Manner.

In addition to providing some parity between appeal-related and trial-related ineffective assistance claims, we believe any codification should be simple to understand and follow, and should avoid discriminating, or appearing to discriminate against the indigent.

The codification we recommend would be both familiar to judges and attorneys, since it is drawn from C.P.L. §440.10, and simple to apply. In contrast, the Advisory Committee's proposal provides that, when there was a previous decision on the "ground or issue raised," the defendant must apply for permission to file a second or subsequent motion, which would be granted or denied by a single appellate judge, "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 believe this would establish an unnecessarily cumbersome procedure. 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.

Furthermore, 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 seemingly dependent on the "luck of the draw." We believe it would be unfortunate to extend such a system to another area of the law.

Even more troubling, the Advisory Committee's proposal favors successive applications made through counsel over those brought *pro se*, which may effectively discriminate against indigent defendants, who are far less likely than those with funds to find an attorney who will bring a claim on their behalf. It seems especially unfair to build a preference for counselled 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 indigent defendants in such proceedings. 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. To build a preference for counselled motions into the statute appears to officially sanction a potentially unfair -- and, at the very least, unseemly -- discrimination against the indigent and in favor of those with financial resources.

H. Providing a Mechanism for Factual Investigation and Fact Finding.

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: (1) the extent to which the court may and should request information from defense counsel, and (2) 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 information from former appellate counsel when a claim is made that he or she was ineffective. Counsel should not be found ineffective without being given the opportunity to be heard. But when counsel is

routinely instructed to respond to every 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 doing so 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. 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 notify former counsel of the claim, but not routinely seek information from former counsel, especially since the viability and relative merit of most issues will be clear from the 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 recommend a statute that includes 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 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.

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