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2019 Hugh Jones
Memorial Lecture

The Court of Appeals:
A View from Western New York

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October 16, 2019

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**The Fund for Modern Courts and
Albany Law School**

**Present the
2019 Hugh R. Jones Memorial Lecture
The Court of Appeals: A View from Western New York**

October 16, 2019

Agenda

5:30pm – 6:00pm

Registration

6:00pm – 6:10pm

Welcome and Introductions

Alicia Ouellette, President and Dean
Albany Law School

Stephen P. Younger, Director
Fund for Modern Courts

Hon. Janet DiFiore
Chief Judge of the State of New York

6:10pm – 7:00pm

Speaker

Hon. Eugene F. Pigott, Jr.
Senior Associate Judge of the NYS Court of Appeals (Ret.)

The Court of Appeals: A View from Western New York

Judge Pigott will provide his perspective on the appellate process based on his experience as both a civil and criminal trial lawyer for 25 years and as a judge, Appellate Division justice, (including Presiding Justice) of the Appellate Division Fourth Judicial Department and his 10 years as an Associate Judge of the New York Court of Appeals.

7:00pm

Reception

The 2019 HUGH R. JONES MEMORIAL LECTURE

The Court of Appeals: A View from Western New York

October 16, 2019

Speaker Biographies

HON. JANET DIFIORE is Chief Judge of the Court of Appeals and of the State of New York. She was born in 1955 in Mount Vernon, N.Y. She graduated from C.W. Post College, Long Island University (B.A. 1977) and from St. John's University School of Law (J.D. 1981). She was admitted to the Bar of the State of New York in 1982. Chief Judge DiFiore served as an Assistant District Attorney in the Westchester County District Attorney's Office from 1981–1987, and from 1994–1998 as Chief of the Office's Narcotics Bureau. From 1987–1993, Chief Judge DiFiore practiced law with the firm of Goodrich & Bendish. In 1998, she was elected a Judge of the Westchester County Court, presiding over criminal and civil matters and sitting by designation in the Family Court, Surrogate's Court, and Supreme Court. She served as a County Court Judge until 2002, when she was elected a Justice of the New York State Supreme Court. As a Supreme Court Justice, she served as Supervising Judge of the Criminal Courts of the 9th Judicial District. In 2005, Chief Judge DiFiore resigned from the bench and was elected Westchester County District Attorney. She served in this position from 2006–2016. On December 1, 2015, Governor Andrew Cuomo nominated her to the position of Chief Judge of the Court of Appeals and the State of New York. On January 21, 2016, her nomination was confirmed by the New York State Senate.

DEAN ALICIA OUELLETTE '94 is the 18th President and Dean of Albany Law School. As Dean, she led the law school in the development, adoption, and implementation of a new strategic plan, and led and consummated an institutional affiliation with the University at Albany. She has introduced to the Law School innovative educational programs, including several Master of Science degrees, with a suite of degrees taught fully online. Prior to her appointment as Dean, she served as Associate Dean for Academic Affairs and Intellectual Life and a Professor of Law. Her research focuses on health law, disability rights, family law, children's rights, and human reproduction. Her book, *Bioethics and Disability: Toward a Disability Conscious Bioethics*, was published in 2011 by Cambridge University Press. She has authored numerous articles published in academic journals such as the *American Journal of Law and Medicine*, the *Hastings Center Report*, the *American Journal of Bioethics*, the *Hastings Law Journal*, the *Indiana Law Journal* and *Oregon Law Review*. Before joining the law faculty, Dean Ouellette served as an Assistant Solicitor General in the New York State Office of the Attorney General. As ASG, Dean Ouellette briefed and argued more than 100 appeals on issues ranging from termination of treatment for the terminally ill to the responsibility of gun manufacturers for injuries caused by handguns. Before that, Dean Ouellette worked in private practice and served as a confidential law clerk to Judge Howard A. Levine on the New York State Court of Appeals. She has continued her advocacy work

in select cases and was lead counsel on the law professors' brief submitted in support of same-sex couples who sought the right to marry in New York State. Dean Ouellette received her A.B. from Hamilton College and her J.D. from Albany Law School, where she was Editor-in-Chief for the *Albany Law Review*.

HON. EUGENE PIGOTT, JR., Senior Associate Judge of the Court of Appeals (Ret.), was born in Rochester, N.Y., in September 1946. He graduated from LeMoyne College (B.A.1968). Judge Pigott served on active duty in the United States Army from 1968 to 1970. While in the service, he was stationed in the Republic of Vietnam, serving as a Vietnamese interpreter. He graduated from SUNY at Buffalo School of Law (J.D. 1973) and was admitted to the Bar of the State of New York in 1974. Judge Pigott practiced law in Buffalo, N.Y., with the firm of Offermann, Fallon, Mahoney & Adner from 1974 to 1982. In 1982 he was appointed Erie County Attorney and served in that position until 1986. In 1986 he became chief trial counsel for the firm of Offermann, Cassano, Pigott & Greco. On February 4, 1997, he was appointed to the New York State Supreme Court by Governor George E. Pataki and thereafter was elected to a full 14-year term. In 1998 he was designated to the Appellate Division, Fourth Department and was appointed Presiding Justice on February 16, 2000. On August 18, 2006, he was nominated by Governor Pataki to the Court of Appeals. His nomination was confirmed by the New York State Senate on September 15, 2006.

STEPHEN P. YOUNGER, ESQ., a Patterson Belknap partner and Past President of the NYS Bar Association, is a leading commercial litigator in both federal and state courts with more than 30 years of experience. He is also well known for his ADR work. Mr. Younger frequently argues appeals, particularly in New York appellate courts. He is often called on to serve as an arbitrator or mediator in high-stakes matters. Mr. Younger serves as Editor of the *New York Commercial Division Practice Guide* and is a Co-Editor of the *Commercial Division Blog*. He was Counsel to the New York State Commission on Judicial Nomination, which nominates New York's Court of Appeals Judges, and he is a member of the Governor's First Department Judicial Screening Committee. Mr. Younger is Chair of the Board of the Historical Society of the New York Courts; Vice Chair of the New York International Arbitration Center; and serves as New York's State Delegate to the American Bar Association. He is a longtime Trustee of Albany Law School; Past President of Albany Law School's National Alumni Council; and a member of the Board of Directors of the Fund for Modern Courts. Before joining Patterson Belknap, Mr. Younger served as Law Clerk to the Hon. Hugh R. Jones, Associate Judge of the New York Court of Appeals. He graduated from Albany Law School in 1982 and Harvard College in 1977.

People v Finch, 23 N.Y.3d 408 (2014)

15 N.E.3d 307, 991 N.Y.S.2d 552, 2014 N.Y. Slip Op. 03424

23 N.Y.3d 408, 15 N.E.3d 307, 991
N.Y.S.2d 552, 2014 N.Y. Slip Op. 03424

****1** The People of the State
of New York, Respondent

v

Nature G. Finch, Appellant.

Court of Appeals of New York

28

Argued January 16, 2014

Decided May 13, 2014

CITE TITLE AS: People v Finch

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Onondaga County Court (Anthony F. Aloia, J.), dated August 23, 2012. The County Court order, insofar as appealed from, affirmed that part of a judgment of the Syracuse City Court (Stephen J. Dougherty, J.) which had convicted defendant, after a jury trial, of resisting arrest.

HEADNOTES

Crimes

Appeal

Preservation of Issue for Review

() Where a defendant has unsuccessfully argued before trial that the facts alleged by the People do not constitute the crime charged, and the court has rejected the argument, the

defendant need not specifically repeat the argument in a trial motion to dismiss in order to preserve the point for appeal. Defendant, who was arrested on three separate occasions for trespassing at a federally-subsidized apartment complex despite being an invited guest of one of the tenants and charged with resisting arrest on the third occasion, preserved for appeal his argument, made unsuccessfully at arraignment in City Court on one of the criminal trespass charges, that the arresting officer lacked probable cause to arrest him for trespass because the officer knew that the tenant had invited defendant to be on the premises. City Court ruled definitively on the legal argument that defendant made on appeal, and having received an adverse ruling, defendant did not need to specifically urge the same theory again in support of his motion to dismiss for insufficiency of the evidence at trial. Although a challenge to the sufficiency of the accusatory instrument at arraignment is conceptually different from a challenge based on the proof at trial, and often an issue decided in one proceeding will not be the same as the issue presented in another, here the issue was the same. Moreover, although defendant's initial argument was addressed to a trespass count and not the probable cause element of the resisting arrest count, once the court held that an invited guest whose license has been withdrawn by management is a trespasser, it necessarily followed that the officer did not lack probable cause to arrest defendant for trespass on the ground that he was an invited guest.

People v Finch, 23 N.Y.3d 408 (2014)

15 N.E.3d 307, 991 N.Y.S.2d 552, 2014 N.Y. Slip Op. 03424

Crimes

Resisting Arrest

Probable Cause for Arrest

() In defendant's prosecution for resisting arrest following his third arrest for trespassing while he was an invited guest of a tenant at a federally-subsidized apartment complex, the evidence was insufficient for a jury to find, beyond a reasonable doubt, that the arresting officer had probable cause to believe defendant guilty of trespass. A person commits resisting arrest when he "intentionally prevents or attempts to prevent a police officer . . . from effecting an authorized arrest" (Penal Law § 205.30), and an arrest is only authorized if it was premised on probable cause. At the time of the first trespassing *409 arrest—a month before the third arrest—defendant's status as the tenant's guest, and his and the tenant's claim that he was therefore entitled to enter the property, were forcefully brought to the arresting officer's attention by the tenant, as reflected in a video recording made by the tenant. The officer did not recall being told at the time of the first arrest that defendant claimed to be the tenant's guest, though he admitted that defendant claimed to be watching his son two weeks later, at the time of the second arrest—a clear indication that he claimed to be there with the approval of the child's mother. Accordingly, a jury could not have found, beyond a reasonable doubt, that the officer did not know at the time of the first arrest that defendant was present with the tenant's consent, and if he knew that on that occasion, he could readily have inferred that the same

was true when he arrested defendant again on the third occasion. Thus the third arrest lacked probable cause.

RESEARCH REFERENCES

Am Jur 2d, Appellate Review §§ 575, 618; Am Jur 2d, Arrest §§ 128, 129.

Carmody-Wait 2d, Arrest or Other Detention; Post-Arrest Procedure §§ 177:11, 177:12; Carmody-Wait 2d, Appeals in Criminal Cases §§ 207:18, 207:19.

LaFave, et al., Criminal Procedure (3d ed) § 3.3.

McKinney's, Penal Law § 205.30.

NY Jur 2d, Criminal Law: Procedure §§ 3454–3456; NY Jur 2d, Criminal Law: Substantive Principles and Offenses §§ 160, 1439, 1442, 1443, 1447–1451.

ANNOTATION REFERENCE

See ALR Index under Appeal and Error; Arrest; Probable Cause; Resisting Arrest.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: preserv! /5 appeal & trial /5 argu! /s motion /3 dismiss!

POINTS OF COUNSEL

People v Finch, 23 N.Y.3d 408 (2014)

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Hiscock Legal Aid Society, Syracuse (*Philip Rothschild* of counsel), for appellant.

The charge of resisting arrest was insufficient as a matter of law because police knew that Nature Finch was an invitee of a tenant, his trespass arrest was for being at the tenant's apartment complex, and the only basis for that arrest was a police stay-away order to Mr. Finch that police had no authority to issue. (¶ *People v Scott*, 26 NY2d 286; ¶ *Zwerin v Geiss*, 38 Misc 2d 306; *People v Graves*, 76 NY2d 16; ¶ *People v Munafo*, 50 NY2d 326; *Sky Four Realty Co. v State of New York*, *410 134 Misc 2d 810; ¶ *People v Konikov*, 160 AD2d 146; *People v Brozowski*, 53 AD2d 706; ¶ *People v Messina*, 32 Misc 3d 318; ¶ *People v Leonard*, 62 NY2d 404; ¶ *People v Peacock*, 68 NY2d 675.)

William J. Fitzpatrick, District Attorney, Syracuse (*Joseph Centra* and *James P. Maxwell* of counsel), for respondent.

The police officer had a reasonable belief that defendant was committing a crime when the officer arrested defendant on May 27, 2009, and thus the People presented sufficient proof that defendant was guilty of resisting arrest.

(¶ *People v Gray*, 86 NY2d 10; *People v Hines*, 97 NY2d 56, 97 NY2d 678; ¶ *People v Hawkins*, 11 NY3d 484; *People v Bynum*, 70 NY2d 858; *People v Sweeney*, 15 AD3d 917; ¶ *People v Gonzalez*, 99 NY2d 76; ¶ *People v Contes*, 60 NY2d 620; ¶ *Jackson v Virginia*, 443 US 307; ¶ *People v Jensen*, 86 NY2d 248; ¶ *People v Peacock*, 68 NY2d 675.)

OPINION OF THE COURT

Smith, J.

We hold that, where a defendant has unsuccessfully argued before trial that the facts alleged by the People do not constitute the crime charged, and the court has rejected the argument, defendant need not specifically repeat the argument in a trial motion to dismiss in order to preserve the point for appeal. We also hold that the argument defendant makes here has merit, and requires reversal of his conviction for resisting arrest. **2

I

Calleasha Bradley was a tenant at Parkside Commons, a federally-subsidized apartment complex in Syracuse. Defendant, who did not live in the complex, was the father of Bradley's child. Bradley and defendant met with Nicole Smith, the Parkside Commons property manager, and asked her to allow defendant to come on the property to visit his son. After verifying that defendant had not "had any trouble" for a period of about two years, Smith gave him permission to visit, but warned him that, because of a "no loitering policy," defendant "would need to be with his son, not at various points of the property doing other things."

On April 28, 2009, James Quatrone and Todd Hood, police officers patrolling Parkside Commons, saw defendant and three other adults in the lobby of one of the buildings, with a marijuana cigarette in the vicinity. The officers arrested defendant for trespassing. Bradley was not present during the April 28

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*411 arrest, but while Quatrone was waiting with defendant for a car to the Justice Center, Bradley emerged from a building, made a video (but not audio) recording of the event on her cellphone, and expressed her unhappiness about the officers' actions in strong terms. While witnesses' recollections of what was said differ, the evidence (described in more detail below) shows conclusively, in our view, that Quatrone knew as of April 28 that defendant was on the property with Bradley's consent.

After the April 28 incident, Smith revoked the permission she had given defendant to visit his son, and informed the police that defendant was no longer allowed at Parkside Commons. Defendant nevertheless continued to enter the property, at Bradley's invitation. Quatrone arrested him twice more for trespassing, on May 12 in the lobby of another building and on May 27 in a parking lot.

The May 27 arrest led to the resisting arrest charge that is the subject of this appeal. On being told that day that he was under arrest, defendant replied: "You can't arrest me." Quatrone told defendant to turn around and tried to pull his arm behind his back; defendant tried to walk away. Quatrone grabbed him and, with the help of other officers, forcibly handcuffed him. Defendant made the handcuffing difficult by pressing his arm against the hood of a car with his body.

Defendant was charged with three counts of criminal trespass and one of resisting arrest. A jury in City Court acquitted him of the

first trespass charge, relating to April 28, but convicted him on the remaining counts.

County Court reversed defendant's convictions for trespass, but affirmed the resisting arrest conviction. In County Court's view, defendant could not be a trespasser because he was Bradley's invited guest: "[A] tenant with a lease to a specific apartment in an apartment complex has the inherent right to invite guests and . . . those guests . . . are licensed and privileged to be in or upon the property" (internal quotation marks omitted). County Court concluded, however, that Quatrone had probable cause to arrest defendant and that therefore the **3 resisting arrest conviction was valid.

A Judge of this Court granted defendant leave to appeal (*People v Finch*, 20 NY3d 986 [2012]). The People cross-moved for leave to appeal from the reversal of the trespass convictions, but the cross motion was dismissed as untimely (20 NY3d 1098 [2013]), and the resisting arrest conviction is therefore the only *412 one before us. We agree with defendant that the evidence is insufficient to support that conviction, and we reverse.

II

() Before reaching the merits, we must decide whether defendant has preserved for appeal his argument that Quatrone lacked probable cause to arrest him for trespass on May 27 because Quatrone knew that Bradley had invited defendant to be on the premises. We hold that the argument is preserved.

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Defendant made that argument at virtually the earliest possible moment—at arraignment in City Court on one of the criminal trespass charges. Challenging the sufficiency of the accusatory instrument, defendant argued that the police failed “to understand why somebody might be there . . . who might have license to be there by the tenants.” Later in the same proceeding, he argued that the court “should dismiss” the charge unless defendant had been excluded “in compliance with [Bradley’s] rights as tenant.” He added that the court should be “even more skeptical” of the case because “this woman who lives in that, saying he’s got a right to be there . . . should be good enough. Who’s got a right to say that he can’t be there? It’s her premises. She’s entitled to have guests and family members there.”

The City Court Judge responded by specifically rejecting the view that Bradley could consent, over management’s objection, to defendant’s presence: “What the law says is . . . either she makes her peace with the management or she moves out . . . if she said, ‘I want to have this person here because he’s the father of my child,’ she makes her peace with the management.” Unlike our dissenting colleagues (*see* dissenting op of Abdus-Salaam, J. at 429-430 [hereafter, the dissent]), we do not read this ruling as being directed solely to the conditions of pretrial release; the ruling followed only moments after defense counsel’s request: “you should dismiss.” But the more important point is that City Court ruled definitively on the legal argument that defendant makes on this appeal. Having received an adverse ruling,

defendant did not specifically urge the same theory again in support of his motion to dismiss for insufficiency of the evidence at trial. But he did not have to: once is enough (*People v Mahboubian*, 74 NY2d 174, 188 [1989] [insufficiency claim preserved by pretrial motions, “even though defendants did not specifically seek dismissal on that basis at the close of the People’s evidence”]).

413** As a general matter, a lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected (*People v Jean-Baptiste*, 11 NY3d 539, 544 [2008] [having made a specific motion to dismiss for legal insufficiency, defendant was not required to make the same point as an exception to the charge]; *4** *People v Payne*, 3 NY3d 266, 273 [2004] [“We decline to . . . elevate preservation to a formality that would bar an appeal even though the trial court . . . had a full opportunity to review the issue in question”]). When a court rules, a litigant is entitled to take the court at its word. Contrary to what the dissent appears to suggest, a defendant is not required to repeat an argument whenever there is a new proceeding or a new judge.

It is true that a challenge to the sufficiency of the accusatory instrument at arraignment is conceptually different from a challenge based on the proof at trial, and that often an issue decided in one proceeding will not be the same as the issue presented in another. But here the issue was the same. It is also true that defendant’s initial argument was addressed to a trespass count and not the probable cause

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 element of the resisting arrest count. But once the court held that an invited guest whose license has been withdrawn by management is a trespasser, it necessarily followed that Quatrone did not lack probable cause to arrest defendant for trespass on the ground that he was an invited guest. The dissent's contrary view rests on a simple confusion. Of course the court's pretrial ruling could not resolve every aspect of "the fact-intensive issue of probable cause" (dissent at 431), and we do not suggest that it did. Our point is simply that the trial court could not, without abandoning the ruling it had already made, have accepted the specific argument that, in the dissent's view, defendant should have repeated when moving to dismiss the count at trial. It is clear to us that the repetition would have been an unnecessary ritual, and nothing the dissent says persuades us otherwise.

The dissent also points to the seeming oddity that defendant preserved the argument on which we now hold his arrest unlawful "weeks before [the arrest] happened" (dissent at 418). But there is nothing really odd about it. The resisting arrest count was properly joined with, and tried with, the three trespass counts, and the identical argument was applicable to all four counts. Neither authority nor common sense gives any support to the idea that in such a situation a defendant must, to preserve an already rejected argument, make it again whenever a new ***414** count (whether based on earlier or later events) is added. Not even the dissent goes that far; the dissent asserts not that the argument we find preserved was addressed to the wrong counts, but that it was made at the

wrong time—before trial, not during trial. We have explained why we disagree.

The dissent relies on two of our precedents, *People v Gray* (86 NY2d 10 [1995]) and *People v Hines* (97 NY2d 56 [2001]), both of which deal with the need to preserve insufficiency claims by a trial motion to dismiss. Neither of those cases addresses the precise issue here—whether a sufficiency argument specifically made and rejected before trial must be repeated at trial. This case does not require us to reconsider either *Gray* or *Hines*, and we do not do so, but we decline to read those cases as broadly as the dissent does.

We held in *Gray* "that where a defendant seeks to argue on appeal . . . that the People have failed to establish the defendant's knowledge of the weight of drugs, preservation of ****5** that contention is required by an appropriate objection" (86 NY2d at 18 [footnote omitted]). We further held that an "appropriate objection" meant one that specifically identified the flaw in the People's proof. Thus a general motion to dismiss that did not specifically raise the knowledge-of-the-weight issue was inadequate to preserve it. We explained that this requirement enables trial courts to avoid error, and also alerts the People to the claimed deficiency in the proof, thus giving them a chance to correct it and so advance "the truth-seeking purpose of the trial" (*id.* at 21).

We do not retreat from—indeed, we reaffirm—*Gray's* statement of the importance of, and the reasons for, the preservation rule. Nor do

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we doubt that a specific claim of insufficiency was properly required in *Gray*, and is required in most other cases. This does not imply, however, that a specific objection in a trial motion to dismiss is always necessary where, as is true in this case, such a requirement will not significantly advance the purposes for which the preservation rule was designed. There will be cases, of which this is one, where the lack of a specific motion has caused no prejudice to the People and no interference with the swift and orderly course of justice.

Insistence on specificity in a dismissal motion is amply justified where the People might have cured the problem if their attention had been called to it. This may well have been true in *415 *Gray* itself; if the defendant there had flagged the knowledge-of-narcotic-weight issue, the People might have reopened their case to supply the missing proof. The specificity requirement is also justified in another class of cases—those involving alternative grounds for criminal liability, where a defendant's failure to point out a flaw may lead to his conviction on an unsound theory, though a sound one was available. Thus in considering the appeals of defendants convicted of depraved indifference murder before our cases drew a clear distinction between that crime and intentional murder, we have enforced the rule of *Gray* strictly, mindful of the possibility that a less strict approach could benefit defendants “who committed vicious crimes but who may have been charged and convicted under the wrong section of the statute” (*People v Martinez*, 20 NY3d 971, 977 [2012, Smith, J., concurring],

quoting *People v Suarez*, 6 NY3d 202, 217 [2005, G.B. Smith, Rosenblatt and R.S. Smith, JJ., concurring]; see also *People v Jean-Baptiste*, 11 NY3d 539, 542 [2008]; *People v Hawkins*, 11 NY3d 484 [2008]).

But while the rule of *Gray* is generally a sound one, an overbroad application of it would raise the disturbing possibility that factually innocent defendants will suffer criminal punishment for no good reason. Thus in this case, it seems highly likely not merely that the People failed to prove defendant guilty of criminal trespass and resisting arrest, but that he was actually innocent of those crimes. As we explain below, no one now disputes that Bradley had a right to invite defendant onto the Parkside Commons property as her guest, unless some special factor, such as a lease provision or regulation, deprived her of that right. The People produced **6 no evidence that any such lease provision or regulation existed, and that omission could hardly have been an oversight—defendant asserted a defense based on his status as Bradley's guest at the very outset of the case, and also emphasized the point during the presentation of evidence at trial, though he did not specifically repeat it at trial in his dismissal motion. There is no reason to think that the absence of that repetition prejudiced the People at all; the People assert no such prejudice—indeed, they do not advance here the preservation argument that the dissent adopts. If we were to agree with the dissent that *Gray* requires us to affirm in this case, we would in all likelihood be upholding

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the conviction of an innocent man, without significantly advancing any valid purpose.

The dissent responds by saying, essentially, that procedural rules do sometimes require us to uphold convictions of people *416 who may be innocent, and that the task of avoiding such injustices must sometimes be left to the Appellate Division, which has interest-of-justice jurisdiction (dissent at 435-436). True enough; but procedural rules should be so designed as to keep unjust results to a minimum. We think our interpretation of *Gray* serves that end better than the dissent's.

In *Hines*, we said that a defendant who had made a specific motion to dismiss at the close of the People's case, and had thereafter called witnesses and testified in his own behalf, had not preserved the argument that he specifically made because he did not make another motion to dismiss for insufficiency at the close of all the evidence. Judge George Bundy Smith, the author of *Gray*, dissented from this conclusion, asserting that “[s]ince defendant raised the sufficiency issue at the close of the People's case, he can raise it again on an appeal” (97 NY2d at 66 [Smith, J., dissenting]). Another Judge Smith, the author of the present opinion, has twice expressed doubt that *Hines* was correctly decided (see *Payne*, 3 NY3d at 273 [R.S. Smith, J., concurring]; *People v Kolupa*, 13 NY3d 786, 787 [2009, Smith, J., concurring]; see also *People v Santiago*, 22 NY3d 740 [2014] [mentioning, but not addressing, an argument that *Hines* should be overruled]). But we need not consider now these criticisms of the *Hines* result. We hold

only that *Hines* does not establish a general rule that every argument once made and rejected must be repeated at every possible opportunity. Specifically, the argument that defendant here made at arraignment did not need to be repeated in his trial motion to dismiss.

III

() On this appeal, the People do not challenge County Court's conclusion that defendant, having been invited onto the Parkside Commons premises by Bradley, was not a trespasser, but do argue that there is sufficient evidence that he committed the crime of resisting arrest on May 27. A person commits resisting arrest when he “intentionally prevents or attempts to prevent a police officer . . . from effecting an authorized arrest” (Penal Law § 205.30). An arrest is “authorized” if, but only if, it “was premised on probable cause” (¶¶ **7 *People v Jensen*, 86 NY2d 248, 253 [1995]; see ¶¶ *People v Peacock*, 68 NY2d 675, 676-677 [1986]). Thus the merits question before us is whether, on the assumption that defendant was in fact innocent of criminal trespass, there was nevertheless sufficient evidence for a jury to find, beyond a reasonable doubt, that Quatrone had probable cause on *417 May 27 to believe him guilty of that crime. We conclude that the evidence of probable cause was insufficient.

It is critical to our holding that on April 28—a month before the arrest now in issue—defendant's status as Bradley's guest, and his and Bradley's claim that he was therefore entitled to enter the property, were forcefully brought to Quatrone's attention. The April 28

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arrest caused Bradley to come out of her building, “yelling” in Quatrone’s description, “screaming” in that of Quatrone’s fellow officer Hood. Hood was asked if Bradley was screaming “You can’t arrest him. He’s my guest. Why are you arresting him? He’s not trespassing.” Hood disputed the words, but not the substance: “No. It was much more obscene than that.”

Quatrone did not recall being told on April 28 that defendant claimed to be Bradley’s guest though he admitted that defendant claimed to be watching his son two weeks later, on May 12—a rather clear indication that he claimed to be there with the approval of the child’s mother. But in light of the undisputed fact, reflected in a video recording, that Bradley enthusiastically espoused defendant’s cause in Quatrone’s presence, we do not see how a jury could find, beyond a reasonable doubt, that Quatrone did not know on April 28 that defendant was present with Bradley’s consent. And if Quatrone knew that on April 28 (or on May 12), he could readily have inferred that the same was true when he arrested defendant again on May 27. Thus the May 27 arrest lacked probable cause.

In so holding, we do not adopt any universal rule applicable to encounters between police officers and people they believe to be trespassers in public housing projects. The question of when nonresidents of public housing may be treated as trespassers is complicated (*see generally* Elena Goldstein, *Kept Out: Responding to Public Housing No-Trespass Policies*, 38 Harv CR-CL L Rev

215 [2003]). The rule relied on by County Court, that one who has been invited by a tenant cannot be a trespasser, may be generally correct, but it is not immutable. A lease provision or regulation might permit management, at least in some circumstances, to override a tenant’s wishes.

Here, there is no evidence that any relevant lease term or regulatory provision existed; but we do not hold that even where that is true, a trespassing arrest of someone who claims to be a tenant’s guest necessarily lacks probable cause. An arresting officer should not generally be required to consult the lease or *418 regulations before acting. An officer need not “conduct a mini-trial” before making an arrest (*Brodnicki v City of Omaha*, 75 F3d 1261, 1264 [8th Cir 1996]). In many situations an officer may be justified in accepting without independent verification a property manager’s assertion that management is entitled to decide who may enter the property. Under the circumstances of this case, however, where both the facts showing **8 defendant not to be a trespasser and their legal significance had been pointed out to Quatrone a month earlier, he was not so justified.

Accordingly, the order of County Court, insofar as appealed from, should be reversed and the information dismissed.

Abdus-Salaam, J. (dissenting). On this appeal, defendant maintains that the People failed to adduce sufficient trial evidence showing that he unlawfully resisted a valid arrest

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supported by probable cause to believe he was trespassing. More particularly, defendant urges, the trial evidence did not establish that the landlord of the residence of his girlfriend, Calleasha Bradley, had the authority to extinguish the license defendant had received from her to remain on the premises, and therefore the landlord's order to remove defendant from the property could not have reasonably caused the police to suspect him of trespass when they conducted the third trespass arrest at issue in this case. However, at trial, defendant did not attack the legal sufficiency of the evidence on that basis, and thus he failed to preserve his claim for this Court's review.

Nonetheless, the majority maintains that defendant preserved his legal sufficiency claim (*see* majority *op* at 412-415). Central to the majority's opinion in this regard is defendant's argument at an arraignment on charges other than those that resulted in defendant's trial and conviction for resisting arrest. Significantly, at the time defendant made the objection cited by the majority, the incident that led to the disputed conviction here had not even occurred yet. In other words, the majority concludes that, by challenging at arraignment the facial sufficiency of an information charging trespass based on an *earlier* occurrence, defendant successfully challenged the legal sufficiency of the trial evidence, which had not been presented at the time of the objection, at a *future* trial on a *distinct* resisting arrest charge, which had not yet been filed, arising from actions that defendant would not take until two weeks *after* the objection. Thus, the majority seems

to believe that defendant specifically argued that his future arrest would be unlawful, and that he would be blameless for resisting it, weeks before it happened. *419 Is the majority seriously suggesting that trespass arrestees are blessed with such precognition?

Sadly, the majority displays nothing remotely similar to the foresight it attributes to defendant, for its resolution of this case is so patently inconsistent with precedent and common sense that it can only be viewed as the odd outcome of an even odder case. Given the many fatal flaws infecting the majority's opinion, which are set forth in detail below, I do not subscribe to the majority's time-bending and obfuscatory approach. Accordingly, I dissent and would affirm on the ground of lack of preservation without reaching the merits.

I

On April 28, 2009, defendant was arrested for trespassing at Parkside Commons, which was the development containing Bradley's building. The next day, the People filed a misdemeanor information charging defendant with criminal trespass in the third degree (*see* **9 Penal Law § 140.10 [a]), and they attached a supporting deposition completed by the property manager of Parkside Commons, Nicole Smith, in which she averred that she had given the police the right to arrest anyone who had no lawful business on the property or had been previously warned to refrain from trespassing there. That same day, a judge arraigned defendant on the information.

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At that arraignment, defense counsel asserted that the information was invalid because it did not state that the officers had inquired as to whether defendant had a right to be on the premises, and counsel complained that the police had arrested defendant merely because he was not carrying some unspecified paperwork previously provided to him by the judge. Noting that it was “just talking about this, this accusatory instrument right, right now,” the arraignment court initially indicated that it was inclined to require the People to allege that defendant was not on the premises by permission of a resident, but the court ultimately did not follow up on this issue.

On May 12, 2009, defendant was arrested as a result of a new incident of trespassing at Parkside Commons. The next day, defendant was arraigned, by the same judge who had presided over his arraignment in his prior trespass case, on a misdemeanor information charging him with third-degree trespass and including Smith's affidavit. At the arraignment on this second of what would eventually be three trespass cases, defense *420 counsel asserted that the information did not comply with the CPL's verification provisions (*see* CPL 100.30 [1]), and he added that the supporting document filled out by Smith “d[id]n't work to give the police officers the ability to understand why somebody might be there” at the development where Bradley lived. Bradley, who was in the courtroom, commented that the police had arrested defendant even though he had been visiting his son and had keys to Bradley's apartment.

After discussing the verification issue, the court granted defendant pretrial release on the condition that he not return to Bradley's development. In response, counsel objected to that release condition, saying it was unfair because Smith's supporting deposition was stale and did not show that the landlord had excluded defendant from the subject premises “in compliance with [Bradley's] rights as a tenant.” The court replied that the release condition was fair and did not unduly limit defendant's ability to see his child because Bradley might be able to negotiate with the landlord to allow defendant to come onto the premises.

On May 27, 2009, roughly two weeks after defendant's second arrest and arraignment, he was arrested for trespassing and resisting arrest at Parkside Commons. The People filed an information charging defendant with criminal trespass in the third degree and, for the first time, resisting arrest (*see* Penal Law § 205.30). The information consisted of sparse allegations regarding defendant's struggle with a police officer during defendant's third arrest for trespassing at Parkside Commons, and the People once more attached Smith's affidavit to the accusatory instrument. Defendant filed a written motion to dismiss the information for failure to state a prima facie case of resisting arrest (*see* CPL 100.40, 170.30 [1] [a]; 170.35 [1] [a]), **10 generally challenging the lawfulness of the arrest.

On May 28, 2009, a new judge arraigned defendant on this latest information. The court told defendant to stay away from Parkside

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Commons, and defendant replied that he wished to visit his child there. The court informed defendant that he should “take something with [him] that sa[id] [his] kids live[d] there” and that he “better talk to [his] attorney about it.” Neither defendant nor the court discussed whether defendant's third arrest was supported by probable cause, the validity of the charges generally, or defendant's statements at his prior court appearances on the previously filed charges arising from his first and second arrests. After the arraignment pertaining to defendant's third arrest, defendant's three cases were joined for *421 trial because the same individuals witnessed the relevant events in each of defendant's three cases and the evidence of defendant's history of trespassing was relevant to all three cases.

In comparison to the misdemeanor information charging defendant with resisting arrest, the trial testimony revealed far more about Smith's authority and her interactions with the police officers who patrolled Parkside Commons. Smith testified that, as the property manager of Parkside Commons, she was responsible for evicting tenants, enforcing the rules and regulations in their leases, and “prevent[ing] people from coming on the property who ha[d] no purpose for being there.” Parkside Commons had a broad anti-loitering policy, and tenants' guests could enter and remain on the property only “[a]s long as they are with who they are suppose[d] to be with.” The landlord employed Syracuse police officers to patrol the development, and Smith authorized them to arrest trespassers and other violators of the anti-

loitering policy. On the landlord's behalf, Smith regularly identified for the officers individuals who were to be removed from the property. In the exercise of those duties and powers, Smith explained the anti-loitering policy to defendant and Bradley, and she told them that defendant could not be on the premises unless he was accompanying his son. The officers' trial testimony further clarified their beliefs about Smith's mandate from the landlord. According to the officers, they regularly checked in with Smith at the start of their shift, and as their primary contact with the landlord, Smith routinely informed them of trespassers and other removable persons.

Defendant's trial attorney questioned the officers about their knowledge, or lack thereof, concerning defendant's status as Bradley's guest, and counsel inquired into Smith's role at the property. In addition, counsel extensively cross-examined Smith and the officers about whether Parkside Commons was sufficiently “fenced or otherwise enclosed in a manner designed to exclude intruders” as required by the third-degree trespass statute (§ Penal Law § 140.10 [a]). The witnesses explained that, although the development's security measures had some gaps and needed some repair, the property was largely enclosed by a fence, secured by electronic locks, and under video surveillance.

At the end of the People's case, defense counsel made a motion for a trial order of dismissal premised primarily on the open nature of the development. Counsel posited that, **11 because the evidence showed that Parkside

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Commons was not completely *422 enclosed by a fence, defendant could not have committed third-degree trespass by entering the premises without permission (see Penal Law § 140.10 [a]). As counsel saw it, given their knowledge that the premises were not fully enclosed, the officers lacked probable cause to arrest defendant for third-degree trespass on each occasion on which they did so. Counsel also contended that the landlord and the officers had not adequately warned defendant that he could not be on the premises, as they had failed to provide him with written notice to that effect. The trial court denied counsel's motion, deeming the issues raised by counsel to be questions for the jury to decide.

Defendant testified and also called Bradley to the stand. In their telling, Smith had informed defendant that he could be at Parkside Commons. However, Smith had declined to give defendant written permission to remain on the property, and she had told defendant to try to stay inside Bradley's building, to avoid contact with the police and to "have an escort with [him]" when wandering the grounds. Defendant and Bradley also testified that the police officers had known of defendant's alleged license to be on the premises and yet had still arrested defendant for trespass. Following this additional description of Smith's role in this case, defense counsel renewed her dismissal motion, elaborating only on the supposed lack of adequate fencing surrounding Parkside Commons. The court denied the renewed motion. Subsequently, the jury deliberated on the trial evidence and

convicted defendant of, inter alia, resisting arrest.

After the jury's verdict, defense counsel filed a motion to set aside the verdict pursuant to CPL 330.30. For the first time, counsel challenged the legal sufficiency of the trial evidence on the ground that Smith had only granted the police the authority to arrest trespassers and not those, such as defendant, who were invitees on the premises. Counsel further contended that Smith had not barred defendant from the property or notified him that he could not be there, and therefore the police had no basis to suspect that he was knowingly trespassing and no authority to arrest him. The court denied the CPL 330.30 motion and sentenced defendant.

II

The preservation doctrine "frequently accounts for the disposition of criminal cases in this Court" by preventing our review of legal issues not properly framed in the nisi prius court (*People v Hawkins*, 11 NY3d 484, 491 [2008]; see NY Const, art VI, § 3; *423 CPL 470.05 [2]; *People v Kelly*, 5 NY3d 116, 119 [2005]; *People v Gray*, 86 NY2d 10, 18-20 [1995]). We have repeatedly held that in order to preserve an appellate claim that the evidence at trial was legally insufficient to support a conviction, a defendant must file a motion for a trial order of dismissal specifically directed at the same insufficiency alleged on appeal (see *People v Hines*, 97 NY2d 56, 61-62 [2001]; *People v Finger*, 95 NY2d 894, 895 [2000]; *Gray*, 86 NY2d at 18-20). Where

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the defendant attacks the sufficiency of the trial evidence on grounds that are specific, but not the same as the ones later raised on appeal, the defendant fails to preserve his or her appellate contention (*see People v Carncross*, 14 NY3d 319, 324-325 [2010]; *Hawkins*, 11 NY3d at 493; ****12** *People v Lawrence*, 85 NY2d 1002, 1004-1005 [1995]; *People v Cona*, 49 NY2d 26, 33 n 2 [1979]).

The timing of the defendant's objection is equally important for preservation purposes. A timely objection to the sufficiency of the trial proof must be made during trial, not before or after, because the objection “alerts all parties to alleged deficiencies in the evidence” presented at trial and “advances the truth-seeking purpose of the trial” (*Gray*, 86 NY2d at 21; *see Hawkins*, 11 NY3d at 492-493). A motion to dismiss made during trial and prior to deliberations also “advances the goal of swift and final determinations of the guilt or nonguilt of a defendant” (*Gray*, 86 NY2d at 21).

As the trial unfolds and new evidence sheds light on the subject of a previous objection, the defendant naturally must apprise the court of any complaints about the new proof to the extent it bears on his or her prior argument. To that end, if the defendant makes a sufficiently specific objection to the legal sufficiency of the trial evidence at the close of the People's case, the defendant must still move to dismiss at the end of the defense case to preserve his or her legal sufficiency claim (*see People v Kolupa*, 13 NY3d 786, 787 [2009]; *Hines*, 97 NY2d at 61). A similar concept applies to legal sufficiency claims posttrial; where the

defendant makes the relevant assertion with the requisite specificity for the first time in a CPL 330.30 motion, the defendant fails to preserve his or her legal sufficiency claim, notwithstanding that the defendant has finally brought his or her trial-level and appellate arguments into proper alignment (*see Hines*, 97 NY2d at 61; *see also People v Johnson*, 92 NY2d 976, 978 [1998]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]). Our insistence that the defendant object to the legal sufficiency of the evidence at a particular time and ***424** procedural stage comports with our recognition that, generally, “[t]he purposes and requirements of the preservation rules are not satisfied by intertwining and piggy-backing distinct procedural steps of the criminal proceeding” (*People v Russell*, 71 NY2d 1016, 1017 [1988]).

Here, defendant did not preserve his claim that, because there was no evidence that Bradley's lease allowed the landlord to exile him from the property once Bradley had permitted him to stay there, the police could not have reasonably relied upon Smith's objections to defendant's presence on the property to arrest him. In that regard, even charitably construed, defendant's motion for a trial order of dismissal included the following propositions: (1) defendant had legitimately entered the buildings and common areas of Parkside Commons because the fence did not completely exclude the public from wandering onto the premises; (2) the police had no good faith basis to arrest defendant because they knew that the fence did not surround the whole property; (3) Nicole Smith had not in fact told defendant or the police that

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defendant could not stay on the property; and
(4) Smith and the police had not adequately
notified defendant that he was prohibited
from coming to Parkside Commons. Defendant
made no legal argument about tenants' rights at
trial. **13

By contrast, defendant now claims that the People failed to prove the legitimacy of the landlord's and the officers' orders that defendant stay away from the premises because "[t]hey never produced the lease or showed any reservation of the landlord's right to extinguish or curtail the tenant's right to grant license," and that consequently the police officers had no reasonable cause to arrest defendant for trespassing in violation of a proper exclusion order from the landlord. In other words, below, defendant contested, at most, whether Smith and the police had provided him with adequate notice to justify an arrest, whereas now he disputes that Smith had adequate authority to tell him to stay off the property, regardless of the sufficiency of any notice. Thus, defendant did not raise his current challenge to the sufficiency of the evidence in his motion for a trial order of dismissal, and his claim is unpreserved (*see Carncross*, 14 NY3d at 324-325; *Hawkins*, 11 NY3d at 493). Of course, since he did not adequately preserve his claim at trial, defendant's motion to set aside the verdict pursuant to CPL 330.30 was ineffective in curing that preservation failure (*see Hines*, 97 NY2d at 61).

Contrary to the majority's contention, defendant's arguments at arraignment on trespass charges arising from his *second* *425

arrest did not preserve his current legal sufficiency claim with respect to the evidence that he unlawfully resisted his *third* arrest. For, even had defendant made these arguments at the arraignment on the charges related to the third arrest, his legal sufficiency claim would not be preserved. As noted above, a defendant can preserve a challenge to the legal sufficiency of the trial evidence only if he or she raises it in support of a motion for a trial order of dismissal, and we have never held that a defendant's other motions, whether made pre- or posttrial, present to this Court a question of law as to sufficiency of the trial evidence supporting the conviction. Indeed, as a matter of logic, if a defendant fails to preserve a legal sufficiency claim when he or she initially moves for a trial order of dismissal on specific grounds but does not later renew that motion at the end of the defense case (*see Hines*, 97 NY2d at 61-62), the defendant just as surely fails to preserve such a claim when the defendant fails to challenge the legal sufficiency of the trial evidence for reasons similar to those for which he previously assailed the accusatory instrument. In both cases, the defendant's failure at trial to redirect his or her argument to the proof later challenged on appeal is fatal to our review.

Notably, a challenge to the facial sufficiency of the accusatory instrument, such as the one defendant made below, cannot be equated with a claim that the trial evidence is insufficient to support a conviction. In moving to dismiss an accusatory instrument before trial, a defendant asserts that the pleadings, even if true, would be insufficient to allege a prima facie case of the

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15 N.E.3d 307, 991 N.Y.S.2d 552, 2014 N.Y. Slip Op. 03424 relevant offense and provide reasonable cause to believe that the defendant had committed it (*see generally* *People v Dreyden*, 15 NY3d 100, 102-104 [2010]; *People v Kalin*, 12 NY3d 225, 228-232 [2009]). In making that motion, the defendant does *not*, however, necessarily alert the trial court to the distinct claim that the trial evidence is legally insufficient to support a finding of guilt beyond a reasonable doubt (*see generally* *People v Danielson*, 9 NY3d 342, 349 [2007]).

Indeed, the defendant cannot make such a claim prior to trial because he or she does not know the exact nature of the People's forthcoming proof at trial and cannot specifically identify any shortcoming in that evidence. The defendant's arguments in support of a pretrial motion to dismiss the information may be rendered frivolous or moot by developments in the proof at trial. If the defendant does not explain to the court whether *426 some variation of his or her prior complaint about the accusatory instrument applies to the newly adduced trial evidence or why the trial evidence is not sufficient to address the defendant's concerns, the court lacks specific knowledge of the defendant's potential claim of trial error. In the absence of such knowledge, the trial court cannot address the deficiency in the evidence subsequently alleged on appeal, as the defendant has never uttered a word about the legal impact of the witnesses' testimony and the trial exhibits on the issues he or she raised before trial. Thus, the primary rationales for the preservation doctrine, namely the complete development of the defendant's claim and the

swift determination of guilt or non-guilt, would be undermined were appellate review permitted under such circumstances (*see Hawkins*, 11 NY3d at 492).

This case illustrates the point. At the time defendant filed his written motion to dismiss the information charging him with resisting his third arrest, he challenged only bare-boned allegations surrounding his arrest. The arraignment court decided only the legal significance of those averments and nothing else. Later, at trial before a different judge, the trial court heard Smith's and the officers' testimony detailing the landlord's regulations applicable to all tenants, Smith's power to enforce those regulations and other lease provisions, and her representation of her authority to the police. Once that additional information came out at trial, the new judge had no way of knowing whether defendant wanted to argue that such evidence did not establish the officers' reasonable belief that Smith had validly ordered defendant's removal from the property, whether defendant thought that any issues he had raised pretrial were now moot in light of the trial proof, or whether defendant simply preferred to have the jury decide his fate without making a potentially losing legal sufficiency claim. Given that defendant never marshaled the trial evidence, or lack thereof, to allow the court to make an informed decision at a time when it could have most readily prevented a conviction founded on purportedly insufficient evidence, the court was deprived of the opportunity to "advanc[e] both the truth-seeking purpose of the trial and the goal of swift

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15 N.E.3d 307, 991 N.Y.S.2d 552, 2014 N.Y. Slip Op. 03424 and final determination of guilt or nonguilt of . . . defendant" (*Hawkins*, 11 NY3d at 492).

Moreover, by insisting that defendant should have attacked the sufficiency of the trial evidence by elaborating on his generalized pretrial motion challenging the adequacy of the information's allegations regarding the lawfulness of the arrest, *427 I do not suggest that he was compelled to repeat the same objection ad nauseam after the trial court had rejected it. Certainly, defendant did not have to reargue his prior complaints about the adequacy of the *accusatory* **15 *instruments* arising from his second and third arrests. However, he was required to contest the adequacy of the *trial evidence* that he unlawfully resisted his third arrest for the first time if he wished to challenge the evidence as legally insufficient on appeal (*cf.* *People v Jean-Baptiste*, 11 NY3d 539, 544 [2008] [where the defendant made a specific motion for a trial order of dismissal in compliance with the traditional preservation doctrine, he did not have to attack the jury instructions on similar grounds as he was not challenging the instructions]; *People v Mahboubian*, 74 NY2d 174, 188 [1989] [in a case which predated the *Gray/Lawrence/Hines* framework that requires a timely and specific trial motion of dismissal and that holds CPL 330.30 motions to be inadequate to preserve legal sufficiency claims, defendant preserved a claim that the allegations in the indictment, even if true, could not possibly constitute the charged crimes, as he not only made a pretrial motion to dismiss the indictment on that ground, but also raised the issue during and after trial by: (1) requesting jury

instructions based on a similar theory; and (2) making a particularized CPL 330.30 motion that, according to the record, the trial court treated as a proper motion to dismiss for insufficiency of the evidence]).¹

In any event, even if defendant could have preserved his present claim by raising it in a pretrial motion, he did not move to dismiss the accusatory instrument charging him with resisting arrest on the grounds he now advances. First, it must be *428 emphasized that defendant **16 never argued, either before or during trial, that his third arrest was not supported by probable cause because the landlord had no authority to have him removed from Parkside Commons. In his written pretrial motion to dismiss the information, defendant generally alleged that the resisting arrest charge could not stand because it was premised on an arrest unsupported by probable cause to believe he was a trespasser. And, at arraignment on the charges which led to defendant's resisting arrest conviction for trying to forestall his third arrest, defense counsel voiced no complaint about the landlord's authority to exclude him from the premises in disregard of Bradley's invitation. As discussed, at trial, the defense advanced no theory of tenants' rights whatsoever. Thus, defendant never even challenged the accusatory instrument on the basis he presently urges, much less asserted his current claim in a motion for a trial order of dismissal.

As for defense counsel's arguments at arraignment in defendant's second case, counsel mostly contended that the accusatory

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instrument had to be dismissed due to lack of proper verification, and he merely added that Smith had not adequately informed the officers of the reasons for defendant's exclusion from the property. The only point at which counsel challenged Smith's authority to throw defendant out of Parkside Commons came not in the course of his request to have the information dismissed, but rather in response to the court's separate directive that defendant stay away from the property as a condition of his pretrial release. Thus, defendant never successfully asserted that the information in his second trespass case was facially insufficient based on the absence of sworn allegations of Smith's authority under the lease, nor did he contest the legal sufficiency of the trial evidence on that basis.

In short, the trial judge was *never* alerted to any deficiency in the proof and had no practical opportunity to grant defendant the relief he now seeks; in fact, had the judge reviewed the pretrial proceedings regarding each of the three informations, he would not have discovered any property rights claim related to defendant's third arrest or to the probable cause element of the resisting arrest charge. Therefore, defendant's current claim is unpreserved.

III

The majority concedes that defendant's motion for a trial order of dismissal was inadequate to preserve his appellate claim *429 (*see* majority op at 412), and it also acknowledges that “a challenge to the sufficiency of

the accusatory instrument at arraignment is conceptually different from a challenge based on the proof at trial, and that often an issue decided in one [context] will not be the same as the issue presented in another” (*id.* at 413). Additionally, notwithstanding the majority's glossing over the timing of defense counsel's pretrial arguments and the order of relevant events (*see id.* at 412), even the majority does not pretend that the trial judge actually knew of defendant's current legal sufficiency claim or had an opportunity to address it in any way.

Nonetheless, the majority posits that defendant's pretrial motion relating to his *second* arrest preserved the issue of whether the trial proof was legally sufficient to show that the **17 arresting officer reasonably believed that the landlord had the right to exclude defendant from the premises during his *third* arrest (*see id.* at 412-413). However, for the reasons stated in detail above, this conclusion is flawed because: (1) defendant failed to make any tenants' rights objection whatsoever to the charges or trial evidence pertaining to his third arrest, which had not occurred at the time he made the argument cited by the majority; (2) defendant drew the *arraignment court's* attention to his pretrial arguments in his second case, not the *trial court's*; and (3) in those pretrial arguments, defendant raised a different issue regarding the pleadings and his release conditions, not the issue he now raises regarding the trial evidence.

By quoting the judge at the second arraignment as saying, “[W]hat the law says is . . . either she makes her peace with the management

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15 N.E.3d 307, 991 N.Y.S.2d 552, 2014 N.Y. Slip Op. 03424 or she moves out” (*id.* at 412), the majority presumably means to indicate that the arraignment judge held, as a matter of law, that a landlord’s command always governs a person’s access to the property, notwithstanding a tenant’s invitation. And, so the argument must go, there was no need for defendant to alert the new judge at trial to this issue because, after the proclamation of that judge’s colleague, defendant had no reason to hope for or try to obtain a different ruling regarding the trial evidence. Leaving aside for the moment the majority’s evident assumption that the trial court was required to know the precise nature of the arraignment court’s oral rulings, the arraignment court did not actually make the ruling that the majority attributes to that court. Specifically, the arraignment court commented on Bradley’s need to make peace with the landlord not in response to defendant’s arguments in support of his motion to dismiss the accusatory instrument *430 pertaining to his second arrest, but rather in response to his challenge to the conditions of his pretrial release pending resolution of the trespass charge in the second information. Thus, the arraignment court ruled on “[w]hat the law says” about a defendant’s need to take all available steps to comply with pretrial release conditions, not what it says with respect to the validity of criminal trespass and resisting arrest charges.

The majority seems to think that the arraignment court ruled that the evidence at trial would necessarily be legally sufficient to support a conviction for resisting arrest and trespass as long as the testimony bore out

the allegations of Smith’s authority contained in the accusatory instrument (*see id.* at 412). But given that a court is categorically prohibited from finding the trial evidence legally insufficient prior to trial (*see Matter of Holtzman v Goldman*, 71 NY2d 564, 568-574 [1988] [concluding that a trial court is subject to a writ of prohibition when it issues a decision concluding that the evidence is legally insufficient to support a conviction prior to trial]; *see also People v Spellman*, 233 AD2d 254, 255-256 [1st Dept 1996]), the arraignment court surely had no power to issue an order declaring that the trial evidence would be absolutely legally sufficient in advance of trial. Both defense counsel and the arraignment court must have known, then, that the court had no power to settle the issue of the necessary trial proof of the landlord’s and the police’s mandate, and defendant could not have **18 “take[n] the court at its word” (majority op at 413) on that issue for purposes of trial because any “words” the court might have wasted on the sufficiency of the potential trial proof would have been utterly devoid of legal effect. By falsely portraying the arraignment court’s pretrial rulings on defendant’s various arguments as the functional equivalent of a pretrial ruling on the legal sufficiency of the evidence, the majority gives decisive legal and preservation effect to an imagined order entered in excess of the court’s jurisdiction, thus adding to the absurdity of its misconception of the court’s pretrial comments.²

*431 Additionally, it is demonstrably false that “once the court held that an invited guest whose license has been withdrawn by

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15 N.E.3d 307, 991 N.Y.S.2d 552, 2014 N.Y. Slip Op. 03424 management is a trespasser, it necessarily followed that Quatrone did not lack probable cause to arrest defendant for trespass on the ground that he was an invited guest” (majority op at 413). After all, a police officer may lack probable cause to arrest a defendant even if it later turns out that the defendant committed the crime for which he or she was arrested (*see e.g.* *People v De Bour*, 40 NY2d 210, 221-226 [1976] [holding the arrest of defendant unlawful, though it turned out that he was guilty of illegal gun possession]). Had the arraignment court endorsed the legal theory cited by the majority with respect to the second trespass prosecution against defendant, the court still could not have determined whether Officer Quatrone had probable cause to arrest defendant for trespassing a third time without learning the circumstances surrounding the third arrest, which could only have been revealed by Smith's and Quatrone's trial testimony. For, even if Smith had the absolute authority to order defendant to be removed from the premises, Quatrone's power to arrest defendant was uncertain, as it depended on his knowledge of Smith's authority, the existence of a presently active removal directive regarding defendant on May 27 and Quatrone's awareness of any such directive. Because the court's pretrial statements could not have resolved the fact-intensive issue of probable cause, the court's rejection of defendant's pretrial assertions about his **19 second trespass prosecution could not have preserved defendant's claim that his third arrest was unlawful.³

Moreover, assuming the arraignment court ruled that Smith could lawfully exclude defendant from the development at the *432 time of his second arrest, the arraignment court had no occasion to decide whether Smith still had that authority when defendant was arrested for the third time, especially since management could have changed its loitering policies or consented to defendant's presence after the second arrest. As defendant undoubtedly understood, the arraignment court discussed his release conditions and ability to come onto the property only under the circumstances as they existed at the time of his second arrest, not as they might evolve thereafter.

IV

Given its bold declaration that this particular case is not covered by the general rule requiring a dismissal motion at trial, one might assume that the majority's opinion contains ample authority for this position. Certainly, the majority purports to comply with existing preservation precedent (*see* majority op at 413-414). However, closer examination of the majority's opinion reveals that no legal authority actually supports its finding that defendant's claim is preserved.

Take, for example, this quote from the majority's opinion, characterizing, or rather mischaracterizing, our holding in *People v Jean-Baptiste* as follows: “having made a specific motion to dismiss for legal insufficiency, defendant was not required to make the same point as an exception to the

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15 N.E.3d 307, 991 N.Y.S.2d 552, 2014 N.Y. Slip Op. 03424 charge” (majority op at 413). This is meant to be taken as precedent, I suppose, **20 for the notion that a defendant’s assertion of a legal claim early in a proceeding necessarily preserves a related challenge to the subsequently presented trial evidence and similar complaints about all subsequent rulings or proceedings. However, *Jean-Baptiste* holds no such thing. In that case, the defendant made a specific motion to dismiss on legal sufficiency grounds at trial and, on appeal to us, raised the exact same claim to argue that reversal of his conviction was required (see ¶ *Jean-Baptiste*, 11 NY3d at 541-544). We found that the defendant had preserved his legal sufficiency claim for our review, and we merely rejected the People’s claim that the defendant needed to object on the same grounds to the court’s jury instructions about the elements of the crime, reasoning that the defendant had adequately objected to the proof and did not need to object to the jury instructions which he was not specifically challenging on appeal (see ¶ *id.* at 544). Clearly, then, *Jean-Baptiste* does not stand for the proposition that an objection at arraignment *433 on a prior charge can preserve a legal sufficiency claim with respect to a newly filed set of charges arising from a subsequent incident, where such charges happen to be consolidated with the previous charge for trial due to considerations of judicial economy.

The majority also relies on this quotation from *People v Payne*: “[w]e decline to . . . elevate preservation to a formality that would bar an appeal even though the trial court . . . had a full opportunity to review the issue

in question” (majority op at 413 [quoting ¶ *People v Payne*, 3 NY3d 266, 273 (2004)]). Surely, one might think, this shows that a motion for a trial order of dismissal is a mere formality and that, as long as a judge had the chance to consider a defendant’s claim somewhere along the line, the defendant need not comply with the “formal” aspects of our preservation doctrine. Right? Well, no, not really. In fact, we have never previously viewed the need for a specific and timely motion for a trial order of dismissal as a formality, and we have repeatedly disposed of cases for failure to meet that very requirement (see e.g. ¶ *Hawkins*, 11 NY3d at 493; ¶ *Gray*, 86 NY2d at 22-26; *People v Bynum*, 70 NY2d 858, 859 [1987]). As for *Payne*, the defendant in that case actually made a timely motion for a trial order of dismissal directed at the legal sufficiency of the evidence, and the court reserved decision on that motion until the close of all the evidence. Thus, defendant’s motion to dismiss remained pending, and the trial court had the opportunity to decide it in light of all the trial evidence (see ¶ *Payne*, 3 NY3d at 273). Indeed, as we said in the passage from which the majority selectively quotes:

“Where, however, the court has reserved decision, the defendant has preserved a claim of insufficiency, and the *trial court* would then rule on the ¶ CPL 290.10 motion as if the motion were made at the close of all the evidence. We decline to expand *Hines* and elevate preservation to a formality that would bar an appeal even though *the trial court, aware that the motion was pending,*

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had a full opportunity to review the issue in question.” (*id.* [emphasis added]).

Obviously, here, no trial motion to dismiss was pending, and defendant never alerted the trial court to any legal sufficiency claim. Accordingly, notwithstanding the majority's brief references **21 to *Payne* and *Jean-Baptiste*, the legal basis of the majority's holding remains unexplained and inexplicable.

*434 Unable to come up with any authority to support its own opinion, the majority unconvincingly attempts to distinguish some of the cases I have cited in support of mine. For example, the majority tries to casually brush aside *People v Hines* (97 NY2d 56 [2001], *supra*), saying, “*Hines* does not establish a general rule that every argument once made and rejected must be repeated at every possible opportunity” (majority op at 416). In doing so, the majority sets up a straw man, as neither I nor the Court in *Hines* has characterized that precedent in such a manner. What *Hines* and its progeny do establish, however, is that even where the defendant timely objects to the quality of the proof during trial, he must renew that objection at the end of the presentation of all the evidence (*see Kolupa*, 13 NY3d at 787; *People v Lane*, 7 NY3d 888, 889 [2006] [defendant failed to preserve his legal sufficiency claim because “(a)fter defendant presented his own evidence, he did not renew his earlier argument”]; *Hines*, 97 NY2d at 61). It follows that, if a defendant cannot preserve a legal sufficiency claim by objecting at an “earl [y] . . . moment” (majority op at 412) at trial without renewing that same objection

later, he or she surely cannot preserve such a claim by objecting to an accusatory instrument in an earlier case without redirecting that argument toward the trial evidence regarding a subsequent crime at least once—not at “every possible opportunity” (*id.* at 416)—at the close of the evidence at the consolidated trial encompassing the earlier case and the later one.

The majority spends the rest of its discussion of *Hines* recounting oft-rejected criticisms leveled at that precedent by the author of the majority opinion (*see* majority op at 416). However, the majority wisely retreats from any modification or overruling of *Hines*, presumably in acknowledgment of its stare decisis effect and the reliance placed upon it by the trial courts (*see* majority op at 414). At the very least, the majority seems to recognize that it has no basis to alter *Hines* because no party to this litigation has asked us to take that step or even to read *Hines* in the mistaken way the majority now does.

Strangely, the majority claims to “reaffirm”

People v Gray (86 NY2d 10 [1995], *supra*), and its “statement of the importance of, and the reasons for, the preservation rule” (majority op at 414), but the majority then immediately relies on matters of policy to sidestep that precedent, which is so clearly fatal to its analysis (*see id.* at 415). None of the policy issues identified by the majority ever have, or should, exempt a case from the clear and long-standing *Gray/Bynum* rule of preservation.

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435** For example, the majority believes that the People could not have cured the deficiency in the proof now alleged on appeal had defendant properly raised his claim below, and that consequently there is no reason to demand defendant's compliance with *Gray*'s requirement of a dismissal motion at trial (*see* majority op at 414-415). However, we have never held that the People's ability to rebut a dismissal motion with additional evidence is a prerequisite to the *22** application of the *Gray/Bynum* rule. In *Gray*, we identified the possibility that the People might promptly address a gap in the evidence as just one of the many reasons a specific trial motion should be required in virtually all cases, and thus we observed that a focused motion for a trial order of dismissal advances the purposes of the preservation doctrine not only where the People can present more evidence, but also in cases where a particularized trial motion would enable the efficient resolution of the defendant's guilt or non-guilt, advance the truth-seeking purpose of the trial and, most importantly, "bring the claim to the *trial court's* attention" (*Gray*, 86 NY2d at 20-21 [emphasis added]). As discussed earlier in this opinion, defendant's pretrial arguments utterly failed to advance this last goal, whereas a proper motion for a trial order of dismissal would have done so. In relying so heavily on the alleged absence of prejudice to the People, the majority ignores the manifest unfairness its decision inflicts on the trial court, which had no knowledge of defendant's present claim, and the inefficiency of addressing the adequacy of the trial evidence for the first time on appeal rather than at trial.

The majority further urges that defendant did not have to preserve his legal sufficiency claim via a particularized and timely motion for a trial order of dismissal because he might be innocent (*see* majority op at 415). But, the majority's pronouncement is difficult to reconcile with our repeated holdings that, where a defendant is wrongfully convicted of a crime consisting of elements that could not possibly match his or her conduct, neither due process, the common law nor any statute relieves the defendant of the obligation to preserve the issue for this Court's review via a particularized motion for a trial order of dismissal (*see* *Gray*, 86 NY2d at 22 [rejecting claim that due process mandates review of a conviction based on legally insufficient evidence even in the absence of a specific dismissal motion at trial]; *People v Dekle*, 56 NY2d 835, 837 [1982] [concluding that due process does not exempt a defendant from the ***436** traditional preservation rule despite the possibility that defendant did not commit the actual crime charged but rather was convicted based on the erroneous legal theory set forth in jury instructions]). If a defendant has a colorable claim of actual innocence, the intermediate appellate court has the power to review his or her unpreserved legal sufficiency claim, and thus there is no reason to excuse the defendant's preservation failure for fear that the defendant cannot obtain appellate review of the allegedly wrongful conviction (*see* CPL 470.15 [6] [a]; *Gray*, 86 NY2d at 22).

Moreover, both the majority's assumption that defendant is probably innocent and its belief

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that the People could not have proven otherwise are belied by the majority's own assertion that a relatively minor variation in the proof here could have sustained defendant's conviction for resisting arrest. In particular, if the majority is correct in stating that "[a] lease provision or regulation might permit management, at least in some circumstances, to override a tenant's wishes," and that an arresting police officer need not always consult a tenant's lease to eject the tenant's purported guest (majority op at 417), then upon proper notice that defendant was attacking the sufficiency of the evidence regarding the lawfulness of management's removal order **23 and the officer's execution thereof, the People might have submitted proof that either a relevant lease provision existed or that the officer suspected it did, thus fully curing the purported deficiency in the evidence. The majority speculates that the People must not have had that proof because they did not use it to rebut defendant's pretrial complaints about his second arrest (*see id.* at 415). But at that stage, defendant's third arrest had not occurred, and even with respect to the trespass charges arising from his second arrest, the People heard no assertion from defendant that the absence of proof about the lease terms would render the trial evidence insufficient to support a conviction. Thus, the People had no reason to think they needed the lease or comparable evidence to put on a legally sufficient case at trial, and there is no indication in the record that they could not have met a proper dismissal motion with proof sufficient to support defendant's resisting arrest conviction. In light of the thin line the majority draws between guilt and innocence in situations

such as the one defendant found himself in on May 27, it is hard to credit the majority's claim that defendant is highly likely to be innocent and that the People could not have filled the alleged gap in the proof in response to a *437 proper dismissal motion, and thus the majority's unsupported proclamations cannot excuse defendant's preservation failure.

V

In sum, I conclude that we cannot review defendant's legal sufficiency claim. Accordingly, I vote to affirm the order of the County Court.

Read, J. (dissenting). From time immemorial the New York Court of Appeals has required a claim of insufficient evidence to support a criminal conviction to be preserved for appellate review by a motion to dismiss made at the close of evidence and specifically directed at the same error alleged on appeal (*see People v Hawkins*, 11 NY3d 484 [2008]; *People v Gray*, 86 NY2d 10 [1995]; *see also* Henry Cohen & Arthur Karger, Powers of the New York Court of Appeals § 199 at 748-749 [1952]). As Judge Abdus-Salaam's dissent illustrates, the way in which the majority purports to honor that principle here is downright bizarre. As a consequence, those who follow our criminal jurisprudence closely will no doubt conclude that the majority was willing to abandon preservation to reach the merits. Notably, the Court of Appeals has not traditionally been known for

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such expediency. I am optimistic that today's adventure in result-oriented decisionmaking will be looked upon in retrospect as an aberration, not a harbinger.

Order, insofar as appealed from, reversed and information dismissed.

****24** Chief Judge Lippman and Judges Pigott and Rivera concur with Judge Smith; Judge Abdus-Salaam dissents in an opinion in which Judges Graffeo and Read concur; Judge Read in a separate dissenting opinion.

FOOTNOTES

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Footnotes

- 1 Significantly, we have pronounced a similar requirement for evidentiary objections, rejecting the notion that a defendant's pretrial objection to the admission of evidence can preserve the grounds for those objections for appellate review in the absence of a renewal of the objection during trial (see *People v Middleton*, 54 NY2d 42, 49 [1981] ["(A) defendant may not, having failed to object to the admission of evidence on Fourth Amendment grounds, point to the fact that the issue had been raised in some other context earlier in the proceeding as preserving the evidence question"]). Along those lines, there is Appellate Division precedent holding that a pretrial motion to dismiss the indictment does not preserve a claim that the trial evidence was legally insufficient to support a conviction (see *People v Dowdell*, 89 AD3d 1430, 1430 [4th Dept 2011], *lv denied* 18 NY3d 923 [2012]; *People v Casiano*, 40 AD3d 528, 529-530 [1st Dept 2007], *lv denied* 9 NY3d 990 [2007]). In addition to the logic of our preservation precedent in the legal sufficiency context, these authorities persuade me that a pretrial motion to dismiss a misdemeanor information cannot preserve an attack on the sufficiency of the trial evidence.
- 2 The majority's assertion that, to "preserve an already rejected argument," a defendant need not "make it again whenever a new count (whether based on earlier or later events) is added" (majority op at 413-414), reflects the majority's misunderstanding of the record. The People did not add a new count to one of their two existing trespass prosecutions against defendant arising from his first two arrests, but instead initiated an entirely new prosecution by filing a new accusatory instrument charging defendant with trespass and resisting arrest on May 27. At the time defendant complained about his release conditions prior to trial, that third prosecution had not begun, and the court had not accepted or rejected any legal argument in that case.
- 3 According to the majority, "the trial court could not, without abandoning the ruling it had already made, have accepted the specific argument that, in the dissent's view, defendant should have repeated when moving to dismiss the count at trial" (majority op at 413). But, again, the "trial court" did not make any ruling on the issue of the officer's authority to arrest defendant; the arraignment court, at proceedings related to defendant's second trespass arrest, made the comments cited by the majority. And, as explained in detail above, the arraignment court did not make any ruling on the lawfulness of defendant's third arrest, much less a ruling on which defendant could have relied. Thus, had the trial court been given the opportunity to determine the sufficiency of the trial evidence for the first time at the close of the People's and defendant's cases, the trial court would not have had to abandon any prior decision issued by it or the arraignment court.

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****1** Douglas Warney, Appellant

v

State of New York, Respondent.

(Claim No. 114826.)

Court of Appeals of New York

Argued February 8, 2011

Decided March 31, 2011

CITE TITLE AS: Warney

v State of New York

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered February 11, 2010. The Appellate Division affirmed an order of the Court of Claims (Renée Forgens Minarik, J.), which had granted defendant's motion to dismiss the claim and dismissed the claim.

Warney v State of New York, 70 AD3d 1475, reversed.

HEADNOTES

State

Unjust Conviction and Imprisonment Act

Motion to Dismiss—Evidentiary Support

() On a motion to dismiss a claim arising under the Unjust Conviction and Imprisonment Act (Court of Claims Act § 8-b), which provides a mechanism for innocent persons who were unjustly convicted and imprisoned to recover damages, no evidentiary support is necessary to support the allegations of claimant's pleading, except where expressly indicated by the statute. Although a claimant must submit documentary evidence supporting certain facts pursuant to subdivision (3) of section 8-b, the pleading standard articulated in subdivision (4) thereof, requiring that facts be stated in sufficient detail to permit the court to find that claimant is likely to succeed at trial, lacks any analogous requirement. Because the State, in waiving its sovereign immunity from suit, has consented to have its liability determined in accordance with the same rules of law as applied to actions in the Supreme Court, except where superseded by the Court of Claims Act or Uniform Rules of the Court of Claims, the familiar standard governing motions to dismiss in Supreme Court is presumed appropriate. Therefore, the Court of Claims, like other trial courts, should accept the facts as alleged in the claim as true and in evaluating the likelihood of success at trial it should avoid making credibility and factual determinations. Accordingly, a claimant who meets the evidentiary burdens described in subdivision (3) and makes detailed allegations with respect to the elements described in subdivision (4) is entitled to an opportunity to prove the allegations at trial (Court of Claims Act § 8-b [5]).

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State
Unjust Conviction and Imprisonment Act
Motion to Dismiss—Factual and Credibility
Determinations

() The Court of Claims prematurely dismissed a claim arising under the Unjust Conviction and Imprisonment Act (Court of Claims Act § 8-b) at the pleading stage based in large part on factual and credibility determinations that were inappropriate at that stage of the litigation. Although the claimant alleged that his confession was coerced, the court concluded that the evidence did not “indicate” that it was, even though the proper inquiry was whether claimant’s allegations, if true, demonstrated a likelihood of success at trial, *429 and not whether they were supported by convincing evidence. Assuming the truth of claimant’s allegations, as must be done, the police used “coercive tactics” and threats to induce his confession and claimant thus adequately pleaded that he was coerced into adopting the false confession. The Court of Claims also found that claimant made an incriminating statement that constituted conduct contributing to his conviction under the act although he never admitted to making that statement. Accepting claimant’s allegations as true, it is presumed that he never made the statement in question.

State
Unjust Conviction and Imprisonment Act
Conduct Contributing to Conviction

() In a claim arising under the Unjust Conviction and Imprisonment Act (Court of Claims Act § 8-b), claimant’s early conversations with the police did not “cause or bring about his own conviction” (Court of Claims Act § 8-b [4] [b]) and thereby bar recovery under the act. A claimant’s conduct bars recovery under the statute only if it was the proximate cause of conviction. Here, while claimant acknowledged that he initiated contact with the police, triggering the questioning that ultimately led to his false confession and conviction, he also alleged that he was “severely mentally impaired,” and that the police knew of his mental illness. Moreover, it was the police department’s alleged mishandling of the ensuing investigation that ultimately resulted in claimant’s conviction.

RESEARCH REFERENCES

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 6, 428; Am Jur 2d, Penal and Correctional Institutions §§ 208, 209.

Carmody-Wait 2d, Actions in the Court of Claims §§ 120:22, 120:24, 120:44, 120:45.

LaFave, et al., Criminal Procedure (3d ed) § 6.2.

McKinney’s, Court of Claims Act § 8–b.

NY Jur 2d, Criminal Law: Procedure §§ 610–612, 616; NY Jur 2d, Government Tort Liability §§ 7, 156, 157, 335, 341.

Warney v State of New York, 16 N.Y.3d 428 (2011)

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Prosser and Keeton, Torts (5th ed) § 131.

ANNOTATION REFERENCE

Construction and application of state statutes providing compensation for wrongful conviction and incarceration. 53 ALR6th 305.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: unjust /2 conviction & detailed /s allegation & motion /3 dismiss

POINTS OF COUNSEL

Neufeld Scheck & Brustin, LLP, New York City (*Peter J. Neufeld, Deborah L. Cornwall, Anna Benvenuti Hoffmann* and *430 *Sarah A. Crowley* of counsel), and *Easton Thompson Kasperek, LLP*, Rochester (*Donald Thompson* of counsel), for appellant.

I. Nothing Mr. Warney did bars him from compensation under Court of Claims Act § 8-b. (¶ *Ivey v State of New York*, 80 NY2d 474; *Rivers v State of New York*, 152 Misc 2d 332; *Williams v State of New York*, 87 NY2d 857; *Stevenson v State of New York*, 137 Misc 2d 313; *Mike v State of New York*, 11 Misc 3d 384; *Britt v State of New York*, 260 AD2d 6; *Smith v State of New York*, 24 Misc 3d 1234[A], 2009 NY Slip Op 51744[U]; *Dillon v Dean*, 158 AD2d 579; *Benaquista v Municipal Hous. Auth. of City of Schenectady*, 212 AD2d 860; ¶ *Bisceglia v International Bus. Machs.*, 287 AD2d 674.) II. The claims court may not consider evidence outside a Court of Claims

Act § 8-b claim or make credibility findings on a motion to dismiss pursuant to CPLR 3211. (*Vigliotti v State of New York*, 24 AD3d 1217; ¶ *Webb v State of New York*, 18 AD3d 648; *Barnes v State of New York*, 153 AD2d 968; ¶ *Leon v Martinez*, 84 NY2d 83; *Solomon v State of New York*, 146 AD2d 439; *Dozier v State of New York*, ¶ 134 AD2d 759; *Klemm v State of New York*, 170 AD2d 438; *Grimaldi v State of New York*, 133 AD2d 97; *Fudger v State of New York*, 131 AD2d 136; *Moses v State of New York*, 137 Misc 2d 1081.)

Eric T. Schneiderman, Attorney General, New York City (*Alison J. Nathan, Frank K. Walsh, Barbara D. Underwood, Andrew D. Bing* and *Andrea Oser* of counsel), for respondent.

The claim was properly dismissed because claimant's own conduct caused or brought about his conviction. (*People v Wiggins*, 16 Misc 3d 1136[A], 2007 NY Slip Op 51715[U]; *People v Crews*, 74 AD3d 983; ¶ *People v Green*, 250 AD2d 143; *People v Lea*, 144 AD2d 863; ¶ *Lepkowski v State of New York*, 1 NY3d 201; ¶ *Long v State of New York*, 7 NY3d 269; *Fudger v State of New York*, 131 AD2d 136, 70 NY2d 616; *Berger v City of New York*, 260 App Div 402, 285 NY 723; *Reed v State of New York*, 78 NY2d 1; *David W. v State of New York*, 27 AD3d 111, 7 NY3d 709.)

Emery Celli Brinckerhoff & Abady LLP, New York City (*Andrew G. Celli, Jr.*, and *Debra Greenberger* of counsel), and *Nathalie Gilfoyle* for American Psychological Association, amicus curiae.

I. Confessions that are voluntary as a matter of law can be unreliable in fact. II. Certain

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947 N.E.2d 639, 922 N.Y.S.2d 865, 2011 N.Y. Slip Op. 02478 factors predictably increase the risk of false confessions. (1 *Atkins v Virginia*, 536 US 304.) *Patterson Belknap Webb & Tyler LLP*, New York City (*Joshua A. Goldberg*, *Elizabeth H. Shofner* and *Anna Skiba-Crafts* of counsel), *Keith A. Findley*, *University of Wisconsin Law School*, *431 Madison, Wisconsin, *Steven A. Drizin*, *Northwestern University School of Law*, Chicago, Illinois, and *Daniel S. Medwed*, *S.J. Quinney College of Law at the University of Utah*, Salt Lake City, Utah, for The Innocence Network, amicus curiae.

The mere fact that a confession was deemed “voluntary” for purposes of admitting it at a criminal trial does not mean that it was “uncoerced” so as to bar Court of Claims Act § 8-b relief. (*People v Green*, 73 AD3d 805; *People v Camacho*, 70 AD3d 1393; 1 *Dickerson v United States*, 530 US 428.)

OPINION OF THE COURT

Ciparick, J.

Claimant Douglas Warney spent over nine years incarcerated for a murder he did not commit. The primary evidence against him was a confession that contained non-public details about the crime. Warney now seeks damages under 1 Court of Claims Act § 8-b, the Unjust Conviction and Imprisonment Act. We conclude that Warney's confession and other **2 statements and actions the State attributes to him do not, on the facts as alleged here, warrant dismissal of his claim on the ground that he caused or brought about his conviction.

The facts as stated in the claim and record below are as follows. On January 3, 1996, Rochester Police Department (RPD) officers found William Beason dead in his home, stabbed 19 times in the neck and chest. The following day, Warney called the RPD to provide information about the murder, and was interviewed in his home by an officer. According to the officer's trial testimony, Warney told her that he had been shoveling snow outside “William's” house when he saw his cousin go inside, and that the cousin later admitted to Warney that he had killed Beason.

Warney alleges that he has an IQ of 68, was in special education until he dropped out of school in eighth grade, and was suffering at the time of the Beason investigation from AIDS-related dementia. Additionally, the RPD was aware of his mental condition when it began questioning him about the Beason murder, as officers had transported Warney to a psychiatric facility two weeks earlier for pulling fire alarms and reporting false incidents to the police.

On January 6, 1996, two RPD officers brought Warney to the police station for questioning. The claim alleges that they used “escalating coercive tactics to force . . . Warney to make statements or admissions concerning the murder,” and one of them *432 verbally abused and threatened him. It further alleges that the officers denied Warney's request for an attorney.

Warney gave a series of increasingly inculpatory statements, initially blaming his cousin, but eventually confessing to murdering

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Beason on his own. He signed a detailed written confession stating that, acting alone, he had stabbed Beason repeatedly. The confession contained numerous details that allegedly corroborate crime scene evidence that the RPD had intentionally held back from the public.¹ The claim alleges that the officers fed these details to **3 Warney, creating “a false sense of the confession's reliability,” and coerced him into adopting the detailed confession as his own.

At central booking, an officer not involved in the investigation asked Warney how he was doing. According to the officer's testimony, he responded, “[n]ot good. I've got a body,” slang for having killed someone. In contrast, Warney testified that he said, “I'm being charged with a body.”

On February 13, 1996, a grand jury indicted Warney on two counts of second degree murder. Before trial, Supreme Court denied Warney's motion to suppress his statements to police, finding that he “initiated most contacts with the police and then freely volunteered information to them,” that he never requested an attorney, and that “no threats or promises were ever made to [him] and no fraud or tricks were used to solicit statements.” At trial, Warney's signed confession was the primary evidence against him, although he testified that it was coerced and manufactured by the police. The prosecutor emphasized that the confession contained details that, in his words during closing, “only the killer would have known about.”

Warney was convicted of both second degree murder counts on February 12, 1997. Supreme Court sentenced him on February 27, 1997 to imprisonment for 25 years to life on each count, to run concurrently. The Appellate Division affirmed (*433 *People v Warney*, 299 AD2d 956 [4th Dept 2002]) and leave to this Court was denied (299 NY2d 633 [2003]).

Warney consistently maintained his innocence and sought to conduct DNA testing on biological crime scene evidence. Although his application to access this evidence was denied, the People submitted the material for testing, which resulted in a DNA profile that did not match Warney. In March 2006, nine years after Warney's conviction, the Combined DNA Index System (CODIS) database yielded a match, a man named Eldred Johnson. The RPD discovered that fingerprints from the crime scene matched Johnson's and, on May 11, 2006, Johnson confessed that, acting alone, he had murdered Beason.² As a result, on May 16, 2006, Supreme Court vacated Warney's conviction and set aside his sentence pursuant to § 40.10 (1) (g) on the grounds of newly discovered evidence.

Warney now seeks damages under § 8-b of the Court of Claims Act for the years he spent wrongly incarcerated. His claim alleges that he “did not cause or contribute to his own wrongful arrest, conviction, or incarceration,” but rather his conviction “was the direct result of the intentional and malicious actions of members of the [RPD] who fabricated and coerced a false confession from . . . a man whom they

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947 N.E.2d 639, 922 N.Y.S.2d 865, 2011 N.Y. Slip Op. 02478 knew had a history of serious mental health **4 problems.” The State moved to dismiss the claim for failing to state facts in sufficient detail to demonstrate that Warney is likely to succeed at trial in proving that he did not bring about his own conviction.

Court of Claims granted the State's motion and dismissed the claim. It was ““not convinced” that only the perpetrator and police could have known many of the details contained in the confession, and noted that Warney “does not indicate how he was coerced by police to give a false confession.” Moreover, the court held that Warney, “by his own actions, which included calling the police to tell them he had information about the murder, trying to frame an innocent man for the crime, and . . . volunteering that he had ‘a body’ . . . did cause or bring about his own conviction.” Warney appealed.

The Appellate Division affirmed, reasoning that a criminal defendant who gave an uncoerced false confession that was presented to the jury at trial could not subsequently bring an action under section 8-b, and that Warney failed to adequately allege that his confession was coerced (see *434 *Warney v State of New York*, 70 AD3d 1475, 1476 [4th Dept 2010]). The Appellate Division also found that Warney brought about his own conviction by making other incriminating statements, and by approaching the police falsely claiming to have information about the murder (see *id.*). We granted Warney leave to appeal (14 NY3d 883 [2010]) and now reverse.

§ 8-b, the Unjust Conviction and Imprisonment Act, provides a mechanism for “innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned . . . to recover damages against the state” (Court of Claims Act § 8-b [1]; see also *Ivey v State of New York*, 80 NY2d 474, 479 [1992]). It offers claimants who meet its strict pleading and evidentiary burdens “an available avenue of redress over and above the existing tort remedies” (Court of Claims Act § 8-b [1]).

To present a claim under the statute, a claimant must “establish by documentary evidence” that (a) the claimant was convicted of a crime, sentenced to a term of imprisonment, and served at least part of the sentence; (b) the claimant was pardoned on the ground of innocence or, alternatively, the conviction was reversed or vacated and the accusatory instrument was dismissed; and (c) the claim is not time-barred (Court of Claims Act § 8-b [3]). Here, the State does not dispute that Warney met this initial burden.

The statute further requires that the claim “state facts in sufficient detail to permit the court to find that claimant is likely to succeed” in meeting his or her burden at trial of proving by clear and convincing evidence that, as relevant here, (a) “he did not commit any of the acts charged in the accusatory instrument” and (b) “he did not by his own conduct cause or bring about his conviction” (Court of Claims Act § 8-b [4]). “If the court finds after reading the

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claim that claimant is not likely to succeed at trial, it shall dismiss the claim” (¶ Court of Claims Act § 8-b [4]). **5

() The parties here debate whether, in addition to being sufficiently detailed, the allegations in the pleading must have evidentiary support. We now clarify that no such support is necessary, except where expressly indicated by the statute. Although a claimant must submit documentary evidence supporting certain facts pursuant to ¶ Court of Claims Act § 8-b (3), the pleading standard articulated in ¶ Court of Claims Act § 8-b (4) lacks any analogous requirement. Because the State, in waiving *435 its sovereign immunity from suit, has consented to have its liability “determined in accordance with the same rules of law as applied to actions in the supreme court,” except where superseded by the Court of Claims Act or Uniform Rules for the Court of Claims (Court of Claims Act § 8; see also 22 NYCRR 206.1 [c] [matters not covered by the Court of Claims Act or Uniform Rules for the Court of Claims are governed by the CPLR]), we presume that the familiar standard governing motions to dismiss in Supreme Court is appropriate here (see ¶ CPLR 3211). Therefore, Court of Claims, like other trial courts, should “accept the facts as alleged in the [claim] as true” (¶ Leon v Martinez, 84 NY2d 83, 87 [1994]).

Of course, ¶ section 8-b still imposes a higher pleading standard than the CPLR. Court of Claims must consider whether the allegations are sufficiently detailed to demonstrate a likelihood of success at trial (see ¶ Court of

Claims Act § 8-b [4]). “[T]he allegations in the claim must be of such character that, if believed, they would clearly and convincingly establish the elements of the claim, so as to set forth a cause of action” (*Solomon v State of New York*, 146 AD2d 439, 442 [1st Dept 1989]). In evaluating the likelihood of success at trial, Court of Claims should avoid making credibility and factual determinations (see *Klemm v State of New York*, 170 AD2d 438, 439 [2d Dept 1991] [“In the absence of serious flaws in a . . . statement of facts, the weighing of the evidence is more appropriately a function to be exercised at the actual trial” (quoting *Dozier v State of New York*, ¶ 134 AD2d 759, 761 [3d Dept 1987])]; *Solomon*, 146 AD2d at 445 [Court of Claims erred in “assess(ing) . . . the credibility of the evidence . . . (and) weighing . . . the evidence (which) is more appropriately a function to be exercised at the actual trial”]). In short, a claimant who meets the evidentiary burdens described in ¶ Court of Claims Act § 8-b (3) and makes detailed allegations with respect to the elements described in ¶ section 8-b (4) is entitled to an opportunity to prove the allegations at trial (¶ Court of Claims Act § 8-b [5]). With these principles in mind, we turn to the claim at issue here.

() Court of Claims' dismissal was based in large part on factual determinations that were inappropriate at this stage of the litigation. First, although Warney alleges in detail that his confession was coerced, the court concluded that “the evidence presented” did not “indicate” that it was. The court was “not convinced”

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947 N.E.2d 639, 922 N.Y.S.2d 865, 2011 N.Y. Slip Op. 02478 that, as Warney alleges, “only the police and the true perpetrator could have known many of the factual details” *436 in the confession. These findings were premature; the proper inquiry was whether Warney's allegations, if true, demonstrate a likelihood **6 of success at trial, not whether they were supported by convincing evidence. As the State concedes, a coerced false confession does not bar recovery under section 8-b because it is not the claimant's “own conduct” within the meaning of the statute.³ Assuming the truth of Warney's allegations, as we must, the police used “coercive tactics” and threats to induce his confession. The allegations describe how no member of the public other than the perpetrator could have known all the details contained in the confession—whether negligently or through intentional manipulation, police misconduct led to the inclusion of these details in Warney's statement. Thus, Warney has adequately pleaded that he was coerced into adopting the false confession.⁴

Second, Court of Claims determined that Warney's statement to an RPD officer, “‘I've got a body,” which was introduced against him at trial, was conduct contributing to his conviction. Warney has never admitted to making that statement, however, and his claim alleges that, as he maintained at trial, he actually said “I'm being charged with a body.” Accepting Warney's allegations as true, we presume that he never made this inculpatory statement. Determining what Warney said is purely a credibility determination, pitting his account against the officer's. The officer's

testimony is no more or less convincing, at this pleading stage, than Warney's account of the conversation.

() The State further argues that Warney's initial interactions with the RPD ought to bar him from recovery. We disagree. A claimant's statutory obligation to prove that “he did *437 not . . . cause or bring about his own conviction” (Court of Claims Act § 8-b [4] [b]) could conceivably be read as barring recovery when *any* action by the claimant caused or brought about the underlying conviction, no matter how indirectly. This reading, however, would bar recovery by every innocent claimant who inadvertently and unforeseeably played some small role in the chain of events leading to his **7 or her conviction. Instead, as we have previously suggested, a claimant's conduct bars recovery under the statute only if it was the “proximate cause of conviction” (*Ivey*, 80 NY2d at 482). Warney's early conversations with the RPD, as the events are described in his claim, did not cause or bring about his conviction within the meaning of the statute. While Warney acknowledges that he initiated contact with the RPD, triggering the questioning that ultimately led to his false confession and conviction, he alleges that he was “severely mentally impaired,” and that the RPD knew of his mental illness. Moreover, it was the RPD's alleged mishandling of the ensuing investigation that ultimately resulted in Warney's conviction.

In sum, the courts below inappropriately made credibility and factual findings, dismissing

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Warney's claim without giving him the opportunity to prove his detailed allegations that he did not cause or bring about his conviction. Because these allegations, taken as true, demonstrate a likelihood of success at trial, Warney is entitled to proceed with his claim, secure discovery, and obtain a disposition on the merits.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the defendant's motion to dismiss the claim denied.

Smith, J. (concurring). I agree with the result the majority reaches, and have no major quarrel with the general principles it states. I write separately to emphasize that the application of those principles in this case is easy, because this claimant appears, on the present record, to have an exceptionally strong case. Our decision today should not be read as implying that any claimant can, by skillful pleading, get a significantly weaker case past a motion to dismiss.

I

It may not be obvious from the majority opinion how compelling a case Warney's statement of claim presents. His confession, now known to be false, included a number of facts—many *438 of them recited in the majority's footnote 1 (at 432)—known only to the police and to the real murderer. It seems highly likely that the inclusion of these facts is the reason Warney was convicted. How, the prosecutor at Warney's trial asked rhetorically, could Warney have known these facts if he were innocent?

"How would he have known about a tissue wrapped in the form of a bandage if he hadn't had been in Mr. Beason's bathroom? Only the killer would have known about that and about the knife and about the towel with the blood on it and about the video tapes. . . . **8

"[H]e knew how Mr. Beason was dressed, and he described a nightshirt . . . The Defendant says he's cooking dinner, and he's particular about it, cooking chicken . . . Now, who could possibly know these things if you hadn't been inside that house, inside the kitchen? . . .

"The Defendant described the knife as being twelve inches, with ridges. I think [forensic testimony] said it was thirteen inches with the serrated blade."

Now that his innocence has been established, Warney echoes the prosecutor's question: How indeed could he have known all these facts? It is hard to imagine an answer other than that he learned them from the police. In short, the details set forth in Warney's 41-page statement of his claim, with 58 pages of annexed exhibits, point strongly to the conclusion that the police took advantage of Warney's mental frailties to manipulate him into giving a confession that contained seemingly powerful evidence corroborating its truthfulness—when in fact, the police knew, the corroboration was worthless.

The majority correctly holds that this sort of police conduct, if proved at trial, would be sufficient to show that Warney "did

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947 N.E.2d 639, 922 N.Y.S.2d 865, 2011 N.Y. Slip Op. 02478 not by his own conduct cause or bring about his conviction" (i.e. Court of Claims Act § 8-b [4] [b]). In general, a claimant who gives an uncoerced confession to a crime he did not commit should be found to have caused his own conviction (*see* Report of the Law Revision Commission to the Governor on Redress for Innocent Persons Unjustly Convicted and Subsequently Imprisoned [hereafter Commission Report], reprinted in 1984 McKinney's Session Laws of NY, at 2899, 2932 [listing "falsely giving an uncoerced confession of guilt" as among the acts of misconduct that justify rejecting a claim]). But a confession cannot *439 fairly be called "uncoerced" that results from the sort of calculated manipulation that appears to be present here—even if the police did not actually beat or torture the confessor, or threaten to do so. Thus, while Warney's claim does include the general allegation that the police threatened him "both physically and otherwise," I view this allegation as unnecessary—and, if it stood alone, obviously insufficient—to prevent dismissal of Warney's claim. The majority opinion, as I interpret it, does not disagree.

Of course it would be wrong to assume that the State cannot refute Warney's assertions. Claims that appear strong at the pleading stage do not always win. But I have no hesitation in concluding that Warney's claim states facts "in sufficient detail to permit the court to *9 find that claimant is likely to succeed at trial" (i.e. Court of Claims Act § 8-b [4]). The contrary decisions of the courts below seem to

me not just "premature," as the majority says (majority op at 436), but simply wrong.

II

I have emphasized the strength of Warney's claim because I am concerned that some of the majority's generalizations, made in the context of this very strong claim, will be misunderstood as requiring courts to uphold much weaker ones. I agree that, as a general matter, a claimant need not actually present his evidence as part of his claim; detailed allegations are enough. And I also agree that CPLR 3211 applies in actions under Court of Claims Act § 8-b, except to the extent that section 8-b imposes a more stringent pleading standard; thus, where there is a bona fide factual dispute, the claimant's allegations should be taken as true. That does not mean, however, that allegations implausible or unconvincing on their face are sufficient to prevent dismissal of a claim for unjust conviction and imprisonment. So to hold would be to read out of the statute provisions that the Legislature wrote in, in an attempt to balance two important, and competing, goals: to compensate people who have been unjustly convicted, but also to protect the State against the administrative burden, and the cost of nuisance settlements, that could result from having to litigate a large number of false claims.

In pursuit of the latter goal, the Legislature strengthened the tests normally applied to gauge the sufficiency of pleadings, requiring not only that a claim be stated in "detail"—itself a significant departure from the normal rule—but "in sufficient *440 detail to permit

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the court to find that claimant is likely to succeed at trial” (Court of Claims Act § 8-b [4]). Lest anyone miss the point, the Legislature added this sentence: “If the court finds after reading the claim that claimant is not likely to succeed at trial, it shall dismiss the claim, either on its own motion or on the motion of the state” (*id.*). The Report of the Law Revision Commission accompanying the proposed legislation that became Court of Claims Act § 8-b makes quite clear that this provision should have real teeth. The legislation is based, the Commission said, on:

“a careful balancing between the goal of compensating one who has been unjustly convicted and imprisoned, and society's dual interest of ensuring that only the innocent recover and of preventing the filing of frivolous claims. With respect to the latter, the Commission is most sensitive to the needs of the criminal justice system in that it does not want to overburden the staffs of the Attorney General and the District

Attorneys with the defense of frivolous claims.” **10 (Commission Report, 1984 McKinney's Session Laws of NY, at 2926.)

The Commission added: “Consequently . . . most cases will not survive a motion to dismiss. The few exceptions will be the ones appropriate for a full hearing on the claim of innocence” (*id.* at 2930). No one should conclude from today's decision that we have opened a loophole that will defeat this legislative goal.

Chief Judge Lippman and Judges Pigott and Jones concur with Judge Ciparick; Judge Smith concurs in result in a separate opinion in which Judges Graffeo and Read concur.

Order reversed, etc.

FOOTNOTES

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Footnotes

- 1 These corroborating details include: (1) that Beason was cooking chicken and mashed potatoes at the time of his murder; (2) that Beason was wearing a red-striped nightshirt; (3) that Beason was stabbed “about 15 or more” times with a 12-inch serrated knife; (4) that Beason's throat was slit; (5) that Beason's body was left on his bed, face up and eyes open; (6) that the perpetrator was wounded; (7) that the perpetrator cleaned his wound with “a paper towel,” which he discarded in the toilet; (8) that the perpetrator put intensive care lotion on his wound; and (9) that the back door and basement door were locked. Additionally, evidence was introduced at trial that Warney orally “confessed” that, prior to the murder, he and Beason had been watching a pornographic tape featuring two men.
- 2 Johnson pleaded guilty to second degree murder in March 2007.
- 3 Warney argues that the word “conduct” in the statute should be read as “misconduct,” as this reading is in line with clear legislative intent (see 1984 Report of the Law Revision Commission to the Governor on Redress for Innocent Persons Unjustly Convicted and Subsequently Imprisoned, reprinted in 1984 McKinney's Session Laws of NY, at 2899, 2932 [claimant should “have to establish that he did not cause or bring about his prosecution by reason of his own misconduct”]). Because he alleges that no conduct of his brought about his conviction, however, we find it unnecessary to consider whether such conduct must rise to the level of misconduct.

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- 4 The State contends that since Supreme Court ruled at a suppression hearing prior to the criminal trial that the confession was voluntarily given, it cannot be found in this action to have been coerced. We reject that contention and conclude that although the statement was admissible at the criminal trial, the judge there lacked many of the facts now stated in Warney's claim. Most importantly, the question of coercion must now be viewed in light of Warney's innocence.

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REFLECTIONS ON THE LIFE AND WORK OF THE HONORABLE HUGH R. JONES

*Stephen P. Younger**

As one of a small group who had the privilege of serving as a law clerk to the Honorable Hugh R. Jones, I had the unique opportunity of spending two and a half years working under Judge Jones's tutelage at the New York Court of Appeals. I can speak for all of my fellow clerks in saying that Judge Jones served as a teacher, mentor, and role model for us all, and in so doing he set the bar very high.

Judge Jones was a man of utmost honor, integrity, and fairness. He practiced law in a day when collegiality was still a virtue that lawyers cherished. He was fond of saying that a lawyer's reputation is his principal asset and that a lawyer's good word defines his reputation. Judge Jones always paid rigorous attention to what was the morally right course of action. He devoted many hours of his working life to civic, religious and charitable affairs in a diverse range of fields. In this aspect of his life, he set an extraordinary example of how lawyers are obligated to serve a higher calling.

Judge Jones brought to every legal problem an awesome intellect which cut through the deep thicket of arguments and counter-arguments to reach a logical holding and a fair result. The New York Times once called Judge Jones the "intellectual leader" of the Court of Appeals.¹ Despite the numerous cases and issues that the Court faced, Judge Jones had amazing focus which allowed him to dissect a case, no matter how complex, and reason to the right decision.

* J.D. 1982, Albany Law School (*magna cum laude*; Editor-in-Chief, *Albany Law Review*); B.A. 1977, Harvard College (*cum laude*, History). Law Clerk to the Hon. Hugh R. Jones, Associate Judge, New York Court of Appeals; Assistant Counsel, New York State Commission on Judicial Nomination; Staff Counsel, New York State Commission on Liability Insurance Crisis; Special Assistant Corporation Counsel in Trial Division of New York City Department of Law; Special Counsel, Bess Myerson Investigation.

¹ See David Margolick, *New York's Court of Appeals Faces Vast Changes as a New Era Begins*, N.Y. TIMES, Nov. 7, 1982, at 1; Laura Mansnerus, *Hugh R. Jones* (obituary), N.Y. TIMES, Mar. 6, 2001, at A19.

Having practiced law all of his professional life prior to joining the Court, Judge Jones strove for user-friendly opinions that could be readily accessed and understood by the practicing bar. Any one of Judge Jones's opinions can easily be identified because a succinct holding is always stated right up front in the first paragraph. It frustrated the Judge that other courts's opinions often rambled on without framing precisely the holding of the court. Judge Jones was always concerned about articulating a narrow holding which would not be overextended in future cases, and treated controlling legal precedent with respect. We would thus spend hours in chambers around a table, debating the wording of his draft opinions so as to ensure complete accuracy and precision.

Perhaps because of his acute intellect, Judge Jones always loved a good legal argument. Anyone who argued before him at the Court will remember his polite, but tough questioning of advocates. Behind the scenes, he loved to debate the outcome of cases often late into the night. I have never in my legal practice experienced as rigorous a legal argument as those I enjoyed with the Judge.

Judge Jones was fond of debating cases at the judges's internal conferences. He enjoyed trying to convince his colleagues on the Court of Appeals of the wisdom of his views. Nonetheless, once the Court reached a decision, Judge Jones was reluctant to dissent. He adopted a rule for himself that he would only dissent if a case raised a constitutional issue, which merited review by the U.S. Supreme Court, or encompassed a point worth recording in the event that a future panel might reconsider the issue.²

Judge Jones was very concerned about the institutional impression that the Court gave to the outside world, and wanted the public to understand that the Court spoke with a single voice. As a result, he would vote with the majority on decisions with which he in part disagreed, in order to preserve the integrity of the Court as an institution. He would sometimes circulate an internal dissent in the hopes of convincing his brethren of his position or, at least, of sharpening the logic of the majority opinion. He would promptly withdraw the dissent if the majority did not go along with his views.

Judge Jones was a towering individual. He cared deeply about his profession, his church, and most of all his family. In this way, he set a huge example for all of us. In my everyday practice, I often reflect on how Judge Jones might approach a particular problem or

² See Hon. Hugh R. Jones, *Cogitations on Appellate Decision-Making*, in 34 THE REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 543 (1979).

how he might deal with the growing tensions of modern-day legal practice. It comforts me to know that his spirit will always be with us and will help us through any difficult issues we may face.

Above all, despite his incredible intelligence, fortitude, and accomplishments, Judge Jones always maintained a sense of humor. Even in recent times as his health grew more frail, he always enjoyed a good laugh, whether about a recent event or a fond memory.

Before I joined the Judge, an Albany Law School professor told me the story of how his secretary had once placed a call to Judge Jones. As was his practice, Judge Jones answered the phone "Hugh R. Jones." The professor's secretary replied "I am not Jones, you are Jones." This powerful judge bellowed with laughter at this reply. I will never forget walking into the Judge's Chambers on my first day at work. I was immediately met with an outstretched hand, from a tall man with an erect posture saying "Hugh R. Jones." I had to do all I could to restrain myself from saying "I am not Jones, you are Jones."

Judge Jones's memory will live with and guide us always as he sets a high standard for all those who had the good fortune of being touched by him.



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IF THE SYSTEM IS NOT WORKING LET'S FIX IT: WHY SEVEN JUDGES ARE BETTER THAN ONE FOR DECIDING CRIMINAL LEAVE APPLICATIONS AT THE COURT OF APPEALS

*Alan J. Pierce**

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I. INTRODUCTION

One of the hottest issues in criminal appellate practice in New York in 2009 was the process by which the New York Court of Appeals decides which criminal cases to grant leave in and resolve. The reason for this is two-fold: (1) the percentage of criminal leave applications granted by the Court became so noticeably small (two percent or less) in recent years that many judges, commentators, and interested parties began to publically debate whether something has to be done to change the process; and (2) the process is very different for criminal leave applications, which are decided by a single member of the Court, versus civil motions for leave to appeal, which are acted upon and decided by the full seven members of the Court.

Thus, in the past year, Chief Judge Jonathan Lippman, two committees/sections of the New York State Bar Association ("NYSBA"), the NYSBA itself, and the New York City Bar Association's ("City Bar") Criminal Justice Operations Committee have all weighed in on the issue of the small percentage of criminal leave applications granted and the need for changes in the process at the Court of Appeals.

This article is based on work this author contributed as one of three members of a subcommittee of the NYSBA's committee on Courts of Appellate Jurisdiction ("Appellate Courts") that was asked in late 2007 to assemble information concerning New York's application procedures for leave to appeal to the Court of Appeals in criminal cases, and to make recommendations regarding possible changes to conform the criminal leave application procedures to the civil leave application procedures.¹ The subcommittee produced a final report after it (1) reviewed New York's criminal leave procedures and compared them to civil leave procedures; (2) examined criminal leave procedures in other jurisdictions; (3) examined the prior recommendations of the 1982 MacCrate Commission Report; (4) analyzed criminal leave grants by individual judges of the Court of Appeals over a ten-year period; (5) studied the recent historic caseload and motion burdens on the Court of Appeals; (6) reviewed available data on the number of criminal leave applications granted and likely made in the appellate division; (7) spoke with a number of members of the criminal bar; and (8) considered Chief Judge Lippman's recently reported concerns about perceived fairness in the criminal leave application process.²

This article follows the Appellate Courts Subcommittee's process and work and discusses in detail the final recommendations of the Appellate Courts Committee, the report and recommendations of the NYSBA Criminal Justice Section, the position adopted by the NYSBA Executive Committee and submitted to Chief Judge Lippman, the report of the City Bar Committee, and the initiatives of Chief Judge Lippman in 2009.

This article concludes by discussing why the Recommendation of the Appellate Courts Committee, as adopted by the NYSBA, should be adopted as the law of New York, with immediate passage of the necessary minor amendments to the Criminal Procedure Law

¹ The other two members of the subcommittee were Denise Hartman, Assistant Solicitor General of New York State, and Professor Michael Hutter of Albany Law School. This article gives this author an opportunity to publically thank both colleagues for the pleasure of working with them and the incredible hard work and careful thought and analysis that both contributed to the subcommittee's work and for allowing me to publish this article based in part on the work of the subcommittee.

Unless otherwise noted, the opinions expressed in this article are solely those of this author and not any other person or entity.

² See COMM. ON COURTS OF APPELLATE JURISDICTION, N.Y. STATE BAR ASS'N, FINAL REPORT OF THE SUBCOMMITTEE ON CRIMINAL VS. CIVIL LEAVE APPLICATIONS TO THE NEW YORK COURT OF APPEALS (2009), available at <http://www.nysba.org/Content/ContentFolders/SubstantiveReports/LeaveApplications61609.pdf> [hereinafter FINAL REPORT].

("CPL"). Thus, the procedures for criminal leave applications in the Court of Appeals should be brought into harmony with the Court's civil leave application process, such that criminal leave applications are decided by the full seven members of the Court rather than by one judge as is the current statutory practice.

II. CURRENT CIVIL AND CRIMINAL LEAVE MOTION PRACTICE IN THE COURT OF APPEALS

In most civil cases, assuming that the jurisdictional prerequisite of "finality" is satisfied, a party who does not have an appeal to the Court of Appeals as of right under CPLR 5601³ may seek leave to appeal to the Court of Appeals from either the appellate division or the Court of Appeals.⁴ A motion for leave to appeal in the Court of Appeals is addressed to and decided by the entire Court.⁵ The motion for leave is assigned to a reporting judge on a routine rotation basis, and a report, which is generally prepared by central staff under the supervision of the reporting judge, is circulated to all the judges of the Court. Leave is granted if any two judges vote in favor of granting leave.⁶ Similarly, civil leave applications made to the appellate division are addressed to a full panel—either four or five justices—of the court, usually the same panel that decided the appeal from which leave is sought. Generally, a majority of the justices comprising the motion panel must vote in favor of the motion in order for it to be granted.⁷ In a civil case, a party may first seek leave from the appellate division and, if denied, then move for leave in the Court of Appeals.⁸

The procedure for making and deciding criminal leave applications is significantly different, and is largely governed by CPL 460.20.⁹ In stark contrast to the "two bites" at a civil motion

³ See N.Y. C.P.L.R. 5601 (McKinney 1995).

⁴ See N.Y. C.P.L.R. 5602 (McKinney 1995). If the case originated in a "superior" court (supreme court, county court, surrogate's court, family court, or the court of claims), in an administrative agency, or in arbitration, and the order sought to be appealed is final, then the moving party has the "two bite" option of moving in either or both the appellate division and the Court of Appeals under CPLR 5602(a). *Id.* If the order sought to be appealed is non-final or the case originated in a "lower" court, then only the appellate division can grant leave to appeal under CPLR 5602(b). *Id.*

⁵ See C.P.L.R. 5602(a).

⁶ *Id.*

⁷ There is a specific rule to this effect in the Third Department. See N.Y. COMP. CODES R. & REGS. tit. 22, § 800.2(a) (1999). Although the other three departments do not have a published rule on this issue, it is understood to be the practice of all four departments.

⁸ See C.P.L.R. 5602(a).

⁹ N.Y. CRIM. PROC. LAW § 460.20 (McKinney 2005). The statute provides:

for leave to appeal first in the appellate division and, if unsuccessful, then in the Court of Appeals, only one leave application may be made in criminal cases under CPL 460.20. In most criminal cases, that one application can be made in either the appellate division or the Court of Appeals.¹⁰ This makes the criminal leave process and the method of decision by the applicable court more critical in a criminal case. A party filing a criminal leave application in the Court of Appeals addresses it to the chief

1. A certificate granting leave to appeal to the court of appeals from an order of an intermediate appellate court is an order of a judge granting such permission and certifying that the case involves a question of law which ought to be reviewed by the court of appeals.

2. Such certificate may be issued by the following judges in the indicated situations:

(a) Where the appeal sought is from an order of the appellate division, the certificate may be issued by (i) a judge of the court of appeals or (ii) a justice of the appellate division of the department which entered the order sought to be appealed.

(b) Where the appeal sought is from an order of an intermediate appellate court other than the appellate division, the certificate may be issued only by a judge of the court of appeals.

3. An application for such a certificate must be made in the following manner:

(a) An application to a justice of the appellate division must be made upon reasonable notice to the respondent;

(b) An application seeking such a certificate from a judge of the court of appeals must be made to the chief judge of such court by submission thereof, either in writing or first orally and then in writing, to the clerk of the court of appeals. The chief judge must then designate a judge of such court to determine the application. The clerk must then notify the respondent of the application and must inform both parties of such designation.

4. A justice of the appellate division to whom such an application has been made, or a judge of the court of appeals designated to determine such an application, may in his discretion determine it upon such papers as he may request the parties to submit, or upon oral argument, or upon both.

5. Every judge or justice acting pursuant to this section shall file with the clerk of the court of appeals, immediately upon issuance, a copy of every certificate granting or denying leave to appeal.

Id.

Notably, the New York State Constitution provides no restrictions or limitations on how criminal leave applications are addressed and decided in the Court of Appeals. As relevant, the constitution provides:

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

N.Y. CONST. art. VI, § 3.

¹⁰ If the appeal is from an appellate division order other than one dismissing the appeal in that court, the motion for leave to appeal may be granted by either a judge of the Court of Appeals or by a justice of the appellate division. See CRIM. PROC. LAW § 460.20(2)(a). If the appellate division order dismisses the appeal or the appeal is from an order of a lower appellate court, either the appellate term or a county court—each of which can hear appeals from still lower trial courts (New York City Criminal Court and district, city, town, and village courts)—the motion for leave to appeal can only be made to a judge of the Court of Appeals. See *id.* § 460.20(2)(b); § 470.60(3) (McKinney 2009).

judge, who together with the clerk of the court designates a single judge to review and decide the application, apparently on a regular rotation.¹¹ Similarly, a criminal leave application to the appellate division is reviewed by a single justice, but the party seeking leave chooses the individual justice (including any dissenting justice) to whom the application is made.¹² The application should be made to a justice who was on the panel that heard the appeal,¹³ and the Fourth Department makes this mandatory by rule.¹⁴

III. THE CRIMINAL LEAVE APPLICATION PROCESS IN OTHER JURISDICTIONS

The United States Supreme Court determines the vast majority of its cases by the grant of a writ of certiorari in both civil and criminal cases, and the full Court hears and determines each application in both types of cases.¹⁵ Thus, there is no distinction made in the Supreme Court between civil and criminal cases in the process and number of justices who decide whether to accept a civil versus a criminal appeal.¹⁶ Under the "Rule of Four," the consent of four justices is required for the grant of a petition for certiorari.¹⁷

¹¹ See *id.* § 460.20(3); N.Y. COMP. CODES R. & REGS. tit. 22, § 500.20(a), (c) (2008). As relevant here, Rule 500.20 entitled "Criminal Leave Applications" provides as follows:

Letter application. Applications to the Chief Judge for leave to appeal in a criminal case (CPL 460.20) shall be by letter addressed to 20 Eagle Street, Albany, NY 12207, and shall be sent to the clerk of the court, with proof of service of one copy on the adverse party. . . .

After the application is assigned to a Judge for review, counsel will be given an opportunity to serve and file additional submissions, if any, and opposing counsel will be given an opportunity to respond.

Assignment. The chief judge directs the assignment of each application to a judge of the court through the clerk of the court; counsel shall not apply directly to a judge or request that an application be assigned to a particular judge. The assigned judge shall advise the parties if an oral hearing on the application will be entertained.

N.Y. COMP. CODES R. & REGS. tit. 22, § 500.20(a), (c) (emphasis in original).

¹² See CRIM. PROC. LAW § 460.20.

¹³ See *People v. Dorta*, 48 N.Y.2d 818, 821, 386 N.E.2d 1081, 1082, 414 N.Y.S.2d 114, 115 (1978).

¹⁴ See N.Y. COMP. CODES R. & REGS. tit. 22, § 1000.13(p)(4)(iii) (2007).

¹⁵ See 28 U.S.C. § 1254 (2006).

¹⁶ *Id.* ("Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."); § 1257 (allowing writ of certiorari to review judgments or decrees rendered by the highest court of a state).

¹⁷ See *Agoston v. Pennsylvania*, 340 U.S. 844, 844 (1950). The "Rule of Four" is a practice of the United States Supreme Court that permits four of the nine justices to grant a writ of certiorari. REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 598-99 (Richard F. Wolfson & Philip B. Kurland eds., 2d ed.

Among the fifty state jurisdictions, New York is one of only four states (with New Hampshire, Rhode Island, and Virginia) that allow a single judge to decide whether to grant or deny leave to appeal in a criminal case.¹⁸ It appears that all other states require that the highest court in the state review criminal leave applications as a full bench.¹⁹ Of the full bench of the state's highest court, the number of judges necessary to grant leave to appeal in criminal cases varies widely, as follows:

- four states require two judges' consent to grant leave in a criminal case;
- twenty-two states require three judges' consent to grant leave in a criminal case;
- twelve states require four judges' consent to grant leave in a criminal case;
- three states require five judges' consent to grant leave in a criminal case; and
- three states have no discretionary review in criminal cases.²⁰

Of the seven largest states by population, only New York gives a single judge the discretion to grant or deny leave to appeal in a criminal case. The other six largest states require the following number of judges to consent from the highest court's full bench to grant a criminal leave application: California—four of seven;

1951). This is done specifically to prevent a majority of the Court from controlling all the cases it agrees to hear. *Id.* at 599. The Rule of Four is not required by the Constitution, any law, or even the Supreme Court's own published Rules. *Id.* at 598 ("It is the settled practice of the Supreme Court."). Rather, it is a custom that has been observed since the Court was given discretion over which appeals to hear by the Judiciary Act of 1891 and the Judiciary Act of 1925. ROBERT L. STERN & EUGENE GRESSMAN, *SUPREME COURT PRACTICE* 210 (4th ed. 1969). According to the Supreme Court's Web site and clerk's office, the Court currently decides approximately ten thousand certiorari petitions each year. See Supreme Court of the United States, The Justices' Caseload, <http://www.supremecourtus.gov/about/justicecaseload.pdf> (last visited Mar. 17, 2010).

¹⁸ N.Y. CITY BAR, REPORT OF THE CRIMINAL JUSTICE OPERATIONS COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK CONCERNING CRIMINAL LEAVE APPLICATION PROCEDURES IN THE COURT OF APPEALS 3-4 (2009), available at <http://www.nycbar.org/pdf/report/uploads/20071837-ReportonCriminalLeaveApplicationProceduresintheCourtOfAppeals.pdf> [hereinafter N.Y.C. BAR REPORT]; see also FINAL REPORT, *supra* note 2, at 4.

¹⁹ In Maine and Mississippi, the number of judges needed to grant leave to appeal apparently varies. No detailed information on the exact number who review criminal leave applications and the number required to grant an application could be determined. See CAROL R. FLANGO & DAVID B. ROTTMAN, NAT. CTR. FOR STATE COURTS, APPELLATE COURT PROCEDURES 112-13 tbl.3-2 (1998).

²⁰ See FINAL REPORT, *supra* note 2, at 4.

Texas—four of nine;²¹ Florida—four of seven; Illinois—four of seven; Pennsylvania—three of seven; and Michigan—four of seven.²²

IV. THE 1982 MACCRATE COMMISSION REPORT'S RECOMMENDATION TO STANDARDIZE THE CIVIL AND CRIMINAL LEAVE PROCEDURES IN THE NEW YORK COURT OF APPEALS

The Court of Appeals asked the American Judicature Society to undertake a study to assess the need for change in the appellate jurisdictions of the New York courts.²³ The study, known as the MacCrate Commission Report, was instrumental in reformulating the jurisdiction of the Court of Appeals from one dominated by appeals as of right to one dominated by discretionary leave grants.²⁴ The report identified as an area of concern the procedure by which criminal leave applications are reviewed.

In relevant part, the MacCrate Report stated:

With regard to criminal cases, the application is made to the chief judge, who then refers it to one of the associate judges for consideration and a ruling. The associate judge may in his discretion permit oral argument in chambers. This occurs in a small proportion of the applications, with some variation from judge to judge in the perceived need for such hearings. The assigned judge alone then makes the decision whether to permit the appeal.

It has been argued that the applications for leave to appeal to the Court of Appeals, whether in criminal or civil cases, should be handled alike. It is urged that if the Court's civil jurisdiction is made mainly discretionary as we recommend, it would be anomalous to have individual judges exercise this discretionary power in criminal cases while having the entire court responsible for the exercise of discretion in civil cases. On the other side, a majority of the

²¹ Texas has a separate state high court for criminal cases, the Texas Court of Criminal Appeals. The Supreme Court of Texas hears only civil cases. Texas Courts Online, Court Structure of Texas, <http://www.courts.state.tx.us> (last visited Mar. 17, 2010).

²² See FLANGO & ROTTMAN, *supra* note 19, at 111–12, 114 tbl.3-2. This information was confirmed, where possible, from the Web sites of the state courts in question.

²³ See ROBERT MACCRATE ET AL., APPELLATE JUSTICE IN NEW YORK (1982) [hereinafter MACCRATE COMM'N REPORT].

²⁴ See 1985 N.Y. Sess. Laws 744 (McKinney), which went into effect January 1, 1986 and was applied to every notice of appeal taken or motion for leave to appeal to the Court of Appeals made on or after such date. This amendment eliminated appeals as of right in civil cases from appellate division orders of reversal or substantial modification or containing a single dissent on a question of law.

judges of the Court of Appeals is of the opinion that the present procedure should be retained for criminal case applications. Such applications are said to present uncomplicated issues in most cases and to require the expeditious treatment that one-judge consideration can assure. Finally, the opportunity for oral argument in chambers is said by some to be salutary and useful.

With each associate judge now passing upon more than 250 criminal leave applications a year, a significant amount of judicial time is being dedicated to the present criminal leave granting procedure. While these applications do appear to be handled expeditiously and fairly, we doubt that adopting the procedure used for civil leave applications, with appropriate central staff support, would require any increase in the judicial time required to pass upon criminal leave applications; it may well be more efficient. Moreover, we have found that there are differences—possibly significant—in how the individual judges process the applications assigned to them. These differences include variations in the instructions provided and the requests made of counsel, as well as the treatment of counsels' requests for oral argument. In addition, the convenience or remoteness of the chambers of the judge to whom an application happens to be assigned may directly affect the manner in which the application is heard. Thus, bringing the procedure for criminal leave applications into harmony with other present civil leave procedure could be expected to achieve greater uniformity in processing and in results.²⁵

The MacCrate Commission recommended that "the civil leave mode be adopted for criminal leave applications,"²⁶ but its recommendation was not adopted as part of the changes in the Court of Appeals's jurisdiction that took effect in 1986.

V. ANALYSIS OF CRIMINAL LEAVE GRANTS BY INDIVIDUAL JUDGES OF THE COURT OF APPEALS

The number of criminal leave applications granted by each Court of Appeals judge can be gleaned from the motion decision tables in the Court of Appeals' Official Reports. For each criminal

²⁵ MACCRATE COMM'N REPORT, *supra* note 23, at 79–80.

²⁶ *Id.* at 80.

application for leave to appeal, those tables report whether the application was dismissed, denied, withdrawn, or granted. The tables also identify the judge who decided each application and the date of decision. An analysis of this data for the ten-year period from 1998 through 2007 is summarized in Table 1.²⁷

TABLE 1: CRIMINAL LEAVE GRANTS BY INDIVIDUAL JUDGES IN THE COURT OF APPEALS (1998-2007)											
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Avg.
Kaye	7	4	6	8	9	7	4	11	7	4	6.7
Ciparick	7	5	5	5	8	5	5	4	7	7	5.8
Titone	5										5.0
Bellacosa	16	10	3*								10.0
Levine	11	6	7	14	5						8.6
Wesley	9	6	5	3	2	1*					4.3
G.B. Smith	5	8	8	8	13	8	7	7	2*		7.3
Rosenblatt		4	12	1	5	7	10	7	9		6.9
Graffeo			0*	6	3	5	3	4	7	5	4.1
Read						1*	6	0	7	1	3.0
R. Smith							8	5	10	7	7.5
Pigott									1*	7	4.0
Jones										3*	3.0
Total Grants**	60	43	45	45	45	34	43	38	47	34	44
Average Grant/Judge	8.5	6.1	6.4	6.4	6.4	4.8	6.1	5.4	6.7	4.8	—
Crim. Leave Apps	2982	2799	2863	2840	2724	2601	2644	2383	2436	2371	2665
* Judge did not serve a full year. ** The numbers in this table were obtained by visually counting, by judge, the decisions granting or denying leave each year as reported in the Memorandum tables in the official New York Reports. The totals may differ from the totals reported in the Court of Appeals's Annual Reports because the totals there reflect the date of the leave application, not the date of decision.											

Analysis of this data shows that many of the current and former judges of the Court cluster around granting approximately six or seven criminal leave applications each year. Nevertheless, there is

²⁷ Analysis of figures recently provided by the Court of Appeals's Clerk's Office reflecting the total number of leave grants by judge over the ten-year period from 1999 to 2008 yields similar results. The average annual leave grants for individual judges ranged from 2.8 to 8.6, with a median of approximately seven criminal leave grants per year.

considerable variation from that average among certain current and former judges of the Court. Certain judges have averaged approximately nine criminal leave grants each year, while others have averaged approximately three. As a result, the average annual number of criminal leave grants by certain judges can be two to three times that of others.

From these raw numbers, certain inferences could be and have been drawn by various commentators on the Court. Because criminal leave applications are apparently randomly assigned among all of the judges of the Court in approximately equal numbers, some may infer that applicants for leave in criminal cases may not have equal opportunities for obtaining leave, depending on the judge to whom the application is assigned. An applicant may be viewed as having a higher likelihood of success in obtaining leave if the application is randomly assigned to one of the judges who has shown a higher propensity for granting leave. Conversely, an applicant may be viewed as having a lower likelihood of success in obtaining leave if the application is randomly assigned to a judge who historically has granted fewer leave applications.

This perception of unfairness, if not actual unfairness, weighs heavily in favor of changing the criminal leave application process to conform to the civil motion for leave application process where every application is considered by the full Court.

VI. THE CASELOAD AND MOTION BURDENS ON THE COURT OF APPEALS: A COMPARISON OF CIVIL AND CRIMINAL LEAVE APPLICATION STATISTICS

Over the years, significant events have affected the case and motion burdens on the judges of the Court of Appeals. Prior to the change in the jurisdiction of the Court of Appeals effective January 1, 1986 making the Court much more of a "certiorari" Court with substantial power to determine its own caseload, the Court of Appeals heard and determined more than five hundred appeals per year from 1980 through 1985.²⁸ The burden of the Court's pre-1986 caseload, together with its abandonment of the earlier practice of deciding appeals with the simple statement "Affirmed. No opinion," caused it to develop the "Sua Sponte Examination of Merits" ("SSM") procedure.²⁹ SSM appeals are selected for determination

²⁸ FINAL REPORT, *supra* note 2, at 9.

²⁹ See N.Y. COMP. CODES R. & REGS. tit. 22, § 500.4 (1984). The Court of Appeals did away with its decade's old practice of deciding appeals by the simple statement "Affirmed. No

without oral argument and solely on the record and briefs from the appellate division, together with “letter briefs” from counsel. Adopted in approximately 1984, this procedure used to be found in Court of Appeals Rule 500.4, and is now found at Rule 500.11 and is currently referred to as “Alternative Procedure for Selected Appeals.”³⁰

The reinstitution of the death penalty in 1995 and the resulting burden on the Court of Appeals to hear a direct appeal—taken as a matter of right—from the trial court where a sentence of death was pronounced and to engage in fact finding in such death penalty appeals caused the Court to increase the staff of the individual judges’ chambers and the central staff.³¹ For example, each individual judge received one additional law clerk, i.e., the chief judge went from having three to four law clerks, and each associate judge went from two to three law clerks.³² The Court’s decision in *People v. LaValle*,³³ holding the 1995 death penalty law unconstitutional, has eliminated this burden on the Court.

The number of total appeals decided by the Court has decreased dramatically since the early and mid-1980s, with the exception of 2008. Thus, the Court of Appeals decided fewer than two hundred appeals per year between 1999 and 2007. On average, 182 appeals were decided from 2000 through 2007.³⁴ The total number of civil

opinion” in the 1970s.

³⁰ The earliest reported decision this author could find containing a reference to submissions of counsel and Rule 500.4 is *Abrams v. Public Service Commission of New York*, 61 N.Y.2d 718, 460 N.E.2d 1106, 475 N.Y.S.2d 621 (1984). The current rule is found at N.Y. COMP. CODES R. & REGS. tit. 22, § 500.11 (2008).

³¹ See N.Y. CONST. art. VI, § 3; N.Y. CRIM. PROC. LAW §§ 400.27, 450.70 (McKinney 2005); 1995 N.Y. Laws 1.

³² See Daniel Wise, *Capital Punishment Proves to Be Expensive*, N.Y. L.J., Apr. 29, 2002, at 8 (“[T]he budget for the Court of Appeals has been increased by \$533,000 a year to provide each of its seven judges with an additional clerk to handle death-penalty work.”).

³³ 3 N.Y.3d 88, 817 N.E.2d 341, 783 N.Y.S.2d 485 (2004).

³⁴ By comparison, in the 2007 Term (October 1, 2007 through September 30, 2008), the United States Supreme Court decided seventy-three appeals. According to the Supreme Court’s Web site, “[f]ormal written opinions are delivered in [eighty] to [ninety] cases” per Term. Supreme Court of the United States, *supra* note 17.

It should also be noted that as part of the change in the Court’s jurisdiction resulting from the MacCrate Commission Report, in 1985 the New York State Constitution was amended to allow the Court of Appeals discretionary jurisdiction to review certified questions of state law from certain federal courts and other courts of last resort. See N.Y. CONST. art VI, § 3(b)(9). In 1986, the Court first promulgated Rule 500.17, providing that:

Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals or a court of last resort of any other state that determinative questions of New York law are involved in a cause pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.

N.Y. COMP. CODES R. & REGS. tit. 22, § 500.27 (2008).

leave applications has remained relatively stable, while the total number of criminal leave applications has declined since the high numbers of 1990 through 2001. In this twenty-five-year span, the

**TABLE 2:
COURT OF APPEALS TOTAL APPEALS AND
CIVIL VS. CRIMINAL LEAVE APPLICATIONS (1986–2008)**

Year	Total # of Appeals Decided	Civil Motions For Leave	Civil Motions Granted	% Civil Motions Granted	Criminal Leave Apps.	Criminal Leave Apps. Granted	% Criminal Leave Granted	Criminal Leave Apps. Per Judge
2008	225	1,093	74	6.8	2,637	53	2.0	376
2007	185	1,100	77	7.0	2,382	36	1.5	349
2006	189	1,021	61	6.0	2,436	52	2.1	348
2005	196	967	61	6.3	2,383	42	1.8	353
2004	185	905	75	8.3	2,644	46	1.8	367
2003	176	1,053	86	8.2	2,601	37	1.4	397
2002	176	1,013	71	7.1	2,724	46	1.7	388
2001	176	1,115	72	6.5	2,840	43	1.5	404
2000	170	1,088	54	5.0	2,863*	51	1.8	448
1999	208	1,209	94	7.8	2,799*	44	1.6	402
1998	198	1,202	91	7.6	2,982*	57	1.9	451
1997	260	1,215	96	7.9	2,944*	56**	3.7	438
1996	295	1,309	126	9.6	3,018*	53	1.8	400
1995	340	1,265	124	9.8	3,140	89	2.8	452
1994	249	1,027	109	10.6	2,798	113	4.0	423
1993	296	948	113	12.0	3,331	81	2.4	500
1992	306	886	73	8.2	2,822	76	2.7	413
1991	293	1,051	106	10.1	2,841	74	2.6	416
1990	287	967	114	11.8	2,827	78	2.8	438
1989	295	1,069	123	11.5	2,534	91	3.6	408
1988	369	933	82	8.8	2,439	73	3.0	404
1987	369	989	143	14.5	2,490	98	3.9	416
1986	494	NA	NA	NA	2,508	13	0.52	405

* Includes some applications assigned in previous year.

** Includes grants of fifty-four separate applications handled as a single appeal below and in the Court of Appeals.

These statistics are discussed and shown in graph form on pages 5–8 of the 2008 Annual Report of the Clerk of the Court of Appeals.³⁵

In 2005, Rule 500.17 was recodified as Rule 500.27. These “certified” appeals accepted and decided by the Court of Appeals under this new procedure are included in the number of total appeals decided each year in table 2. For example, in 2007, Rule 500.27 certification was the jurisdictional predicate for thirteen percent (17 of 135) of the civil appeals decided by the Court of Appeals.

³⁵ STUART M. COHEN, ANNUAL REPORT OF THE CLERK OF THE COURT 5–8 (2008).

highest percentage of *criminal* leave applications granted was just four percent in 1994—just before the reintroduction of the death penalty—while the *lowest* percentage of *civil* applications for leave to appeal granted was five percent in 2000.

Table 2 reflects the total appeals and civil and criminal motions statistics of the Court over the last twenty-five years.

VII. CRIMINAL LEAVE APPLICATIONS IN THE APPELLATE DIVISION

Unfortunately, there is limited historical information publically available regarding the number of criminal leave applications made to an appellate division justice in each of the four departments. The data available, however, indicates that very few criminal leave applications are made to an appellate division justice, and that when they are, it is almost exclusively in situations where that justice dissented from the order sought to be appealed. Thus, reported below are: (1) the number of criminal cases where there was at least one dissent in the appellate division from 2002 to 2008; and (2) the number of criminal cases decided by the Court of Appeals over the same time period where the jurisdictional predicate was the grant of leave by an appellate division justice. It appears that these statistics approximately reflect the number of criminal leave applications to an appellate division justice in each calendar year.³⁶

Historic information on the total number of criminal cases in which at least one justice dissented in each of the four departments of the appellate division was obtained through a Westlaw search. The following chart contains a breakdown by department for each of the calendar years in question and the totals for the period 2002–2008.

Notably, the actual number of criminal leave applications in the First Department in 2007 and 2008 are almost identical to the

³⁶ See N.Y. STATE BAR ASS'N, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE COURT OF APPEALS OF THE STATE OF NEW YORK 8–9 (David D. Siegel ed., 2d ed. 1991) [hereinafter NYSBA, PRACTITIONER'S HANDBOOK]. Professor Siegel writes:

[T]he certificate [granting leave to the Court of Appeals in a criminal case] may be granted either by a judge of the Court of Appeals or by a justice of the Appellate Division. Where there was no dissent in the Appellate Division, the usual practice is to seek leave from a Court of Appeals judge.

....
... If there was a dissent in the case, it is often the practice to make the application to a dissenting justice. This should not lead to the assumption by counsel that there will be an automatic grant of leave.

Id. (footnote omitted).

number of criminal cases in each year in which there was at least one dissent. According to the clerk's office, the First Department decided fourteen criminal leave applications in 2007 (eleven were granted, three were denied or dismissed), and in 2008, it received eighteen applications (ten were granted, eight were denied or dismissed). In addition, according to the Third Department's Clerk's Office, the Third Department entertained a total of seventy-

TABLE 3:
CRIMINAL APPEALS IN EACH DEPARTMENT WITH AT LEAST ONE DISSENT

	1st Dep't	2d Dep't	3d Dep't	4th Dep't	Total
2002	2	9	2	8	21
2003	11	7	2	7	26
2004	7	5	1	6	19
2005	12	4	3	6	25
2006	8	2	4	7	21
2007	15	2	5	6	28
2008	17	6	9	12	44
Total/Average	72/10	35/5	26/4	52/7	184/26

one criminal leave applications over the last ten years—or about seven each year—and granted thirteen of them, for an average of only a little more than one per year.

The annual reports of the Court of Appeals reflect the total number of criminal appeals decided by the Court in each calendar year, and the number and percentage of those criminal appeals in which the jurisdictional predicate was the permission of an appellate division justice. Table 4 reflects this information for 2003–2008.

TABLE 4:
CRIMINAL APPEALS DECIDED BY THE COURT OF APPEALS WHERE THE JURISDICTIONAL PREDICATE IS THE PERMISSION OF AN APPELLATE DIVISION JUSTICE

Year	2003	2004	2005	2006	2007	2008
Criminal Cases Decided	4 of 46	14 of 49	8 of 59	9 of 62	11 of 50	15 of 53
Percentage	8%	29%	13%	15%	22%	28%

Although there is no direct correlation between the year in which a case was decided in the appellate division where there was at least one dissent, and the year in which the Court of Appeals decides a criminal case where the jurisdictional predicate was the

permission of an appellate division justice, these numbers reflect several facts.³⁷ First, there are very few criminal cases in each calendar year in which at least one appellate division justice dissents. Certainly, the number is far less than the approximately twenty-five hundred criminal leave applications presented to and decided by the Court of Appeals each year for the past twenty-five years.

Second, assuming that most parties in a criminal case in which there was at least one dissent in the appellate division choose to seek leave from the dissenting appellate division justice rather than from the Court of Appeals, it appears that not every dissenting appellate division justice grants leave to appeal to the Court of Appeals.³⁸

Third, making the same assumption again, and further assuming that with few exceptions only losing parties who obtain a dissent opt to seek leave from the appellate division dissenter(s) rather than from the Court of Appeals, it appears reasonable to conclude that collectively, all four departments of the appellate division in any of the last seven calendar years would have received between nineteen and forty-four criminal leave applications per year (there was an average of twenty-six cases statewide with at least one dissent annually). Again, this number is minimal given the twenty-five hundred criminal leave applications on average decided in the Court of Appeals each year.

VIII. CHIEF JUDGE LIPPMAN'S INITIATIVES AND CHANGES IN THE PERCENTAGE OF CRIMINAL LEAVE GRANTS IN 2009

While the Appellate Courts Committee was completing its final report and recommendations in April 2009, Chief Judge Lippman publicly announced that he intended to review what has caused the number of criminal leave applications granted by the Court to decrease to such a small percentage of the applications submitted. A *New York Law Journal* article on April 22, 2009 entitled *Chief Judge to Review Why Court Accepts Few Criminal Appeals* discusses this issue and quotes Chief Judge Lippman extensively:

³⁷ The Court of Appeals decides cases within approximately eight months after the appeal is first filed or leave to appeal is granted. See, e.g., COHEN, *supra* note 34, at 4–5. Thus, comparing appellate division criminal case dissents for 2002–2008 and Court of Appeals criminal case decisions for 2002–2009 roughly correlates with the decision time for such cases.

³⁸ See NYSBA, PRACTITIONER'S HANDBOOK, *supra* note 36, at 8–9.

New York's new chief judge said he will review why the Court of Appeals agrees to review only one or two of every 100 criminal convictions that reach it.

"I want to make sure that on the criminal leave appeals . . . that everyone feels in this state that they've had their day in court," Chief Judge Jonathan Lippman said in an interview. "That is something that I think we have to take a step back and look at. Not because I know there is something wrong, but it's so important.

. . . .

Judge Lippman said he became more sensitive to the need for the courts to project the image of even-handedness in dealing with all criminal defendants, including indigent ones, as presiding justice of the Appellate Division, First Department, [for] 2007–09. He said he became more aware of the criminal leave grant percentages at the Court of Appeals while preparing to go through the screening process for chief judge beginning last year.

"Taking a look [at the numbers], I said 'I wonder why that's the case?' I know it's always been relatively low, but I think it's more so," the chief judge said.³⁹

The article also noted the concerns and comments of the criminal defense bar and that they welcomed this interest and review by the chief judge:

Defense attorneys applauded Judge Lippman for wanting to review leave patterns.

"We've seen a number of denials of leave applications presenting important unsettled questions, including some where there have been a split of the Appellate Divisions over the years," said Steven Banks, attorney-in-charge for the Legal Aid Society of New York City. "We welcome a fresh perspective from Judge Lippman to examine whether any changes are needed in this area."

Defense attorneys cited *People v. Martinez*, as presenting an issue that was seemingly ripe for Court of Appeals review. In it, a First Department panel ruled that an indictment that identified a defendant in a sexual attack case by his DNA markers was sufficient to satisfy his

³⁹ Joel Stashenko, *Chief Judge to Review Why Court Accepts Few Criminal Appeals*, N.Y. L.J., Apr. 22, 2009, at 1, 3 [hereinafter Stashenko, *Chief Judge to Review*].

constitutional right to notice. Judge Read denied leave to appeal in September 2008, however.⁴⁰

Subsequently, the Court of Appeals published a Notice to the Bar on its Web site on July 7, 2009. The notice states that:

In response to inquiries about the processing and determination of applications for leave to appeal to the Court of Appeals in criminal cases, Chief Judge Jonathan Lippman has appointed Associate Judge Robert S. Smith to serve as liaison to the public and the Bar on this subject. Chief Judge Lippman, who had declared his intention to review the criminal leave application process, made the appointment with the support of the full Court.⁴¹

In addition, the notice provides that "Judge Smith will address questions about the process, including the criteria considered by judges in reviewing leave applications and limitations on the Court's jurisdiction. He will not review determinations made in any particular case."⁴²

There is no indication from the Court's Web site or any other published reports that the Court of Appeals is considering any further action at this time relative to the criminal leave application process.

As noted in an article in the *New York Law Journal*, by the end of 2009 it was apparent to many Court of Appeals practitioners, commentators, and observers that Chief Judge Lippman's public comments in April about the very low percentage of criminal leave grants by the Court of Appeals, made only two months after he was confirmed, "were seen as a signal to members of his own Court of his concern about their handling of leave applications."⁴³ The article reported that the Court of Appeals "is beginning to take more criminal cases after a decade of what advocates for defendants say has been an inordinately low rate of granting leave to appeal."⁴⁴ In fact, the article noted that "[t]hrough October, judges on the Court of Appeals had granted leave in [sixty-eight] criminal cases, already the most in any calendar year this decade" and that although "leave

⁴⁰ *Id.* at 3 (citations omitted).

⁴¹ N.Y. STATE COURT OF APPEALS, NOTICE TO THE BAR RE: CRIMINAL LEAVE APPLICATIONS (2009), available at <http://www.courts.state.ny.us/ctapps/news/nottobar/CLA.final070709.pdf>.

⁴² *Id.* The notice also states that "[w]ritten questions and comments about the process may be directed to Judge Smith at Court of Appeals Hall, 20 Eagle Street, Albany, NY 12207-1095, or by e-mail at cla@courts.state.ny.us." *Id.*

⁴³ Joel Stashenko, *Criminal Leave Grants Begin to Increase Under Lippman's Prodding*, N.Y. L.J., Nov. 27, 2009, at 1 [hereinafter Stashenko, *Criminal Leave Grants*].

⁴⁴ *Id.*

grants are still rare . . . Court watchers and defense lawyers say it is significant that the Court has granted leave more than 3 percent of the time this year, compared to the 1.8 percent average since 1996.”⁴⁵ One criminal defense appellate attorney was quoted as saying “[m]ore is better and I think the perception, even if you are not one of the lucky ones to get there . . . [is] that you’ve had your day in court.”⁴⁶

The article notes that “most Court observers . . . attribute[] the apparent willingness of the judges to [grant] more criminal leave grants to Chief Judge Lippman.”⁴⁷ Moreover, the increase in leave grants is largely widespread among the judges through October 2009, with Chief Judge Lippman leading the way with fourteen leave grants (seven percent).⁴⁸ In addition, the other judges granted the following criminal leave applications in the first ten months: Ciparick—twelve; Smith—ten; Pigott—ten; Read—eight.⁴⁹ Chief Judge Lippman was quoted as saying that “it is important that Court members be seen as being ‘very diligent’ and ‘very serious’ in their approach to leave applications.”⁵⁰ In addition, he stated that: “[w]hat I am concerned about are not the numbers per se, but that there is the reality that everybody has their day in court and not only is that a reality, but there is a perception that is equally important.”⁵¹

With respect to the increased workload created by additional leave grants, the chief judge commented that the “additional grants have not added a burden to the Court so far. ‘Depending on the level of grants, there could come a time where you would reach a real measurable difference,’ he said. ‘Whatever it is at this point is nothing that we cannot handle.’”⁵² The current increased rate of leave grants will result in approximately thirty additional criminal cases decided by the Court each year.⁵³ A veteran appellate attorney from the Manhattan District Attorney’s office acknowledged that if the current increased rate of leave grants

⁴⁵ *Id.*

⁴⁶ *Id.* (quoting Lynn Fahey, Appellate Advocates).

⁴⁷ *Id.* at 5.

⁴⁸ *Id.*

⁴⁹ *Id.* The article does not state the number of criminal leave grants in this time period by Judges Graffeo and Jones, but together they would have granted leave in fourteen cases based on the data in the article.

⁵⁰ *Id.* (quoting Court of Appeals Chief Judge Jonathan Lippman).

⁵¹ *Id.* (quoting Court of Appeals Chief Judge Jonathan Lippman).

⁵² *Id.* (quoting Court of Appeals Chief Judge Jonathan Lippman).

⁵³ *Id.*

continues,

[it] will undoubtedly create more work for prosecutors.

But he said there would be a potential upside, too.

It is not a great thing from the prosecution's point of view narrowly, but from the viewpoint of the criminal justice system and the criminal bar as a whole, review in the highest court is definitely a good thing There are old [criminal] doctrines that seem out of place. The lower courts have to keep enforcing what the Court of Appeals said [thirty] years ago. . . . There are old doctrines that need re-examination.⁵⁴

Turning back to the increase in criminal leave grants in 2009 and potential changes in criminal leave process at the Court, the same appellate prosecutor acknowledged that the one-judge criminal leave grant rule at the Court of Appeals has a "Russian Roulette" aspect to it.⁵⁵ "Some judges might reject leave due to their personal ideologies about crime and criminal defendants Other applications could fail simply because issues involved in particular cases . . . hold little intellectual interest for judges assigned to review them, although they might capture the attention of other judges."⁵⁶ In his role as liaison on the criminal leave application issue, Judge Smith noted that "the Court has received only a handful of inquiries about the process, mainly from prisoners seeking review of their denial of leave," which he is prohibited from reviewing.⁵⁷ "I have not had a lot of inquiries coming in over the transom involving lawyers," Judge Smith said.⁵⁸ Judge Smith was quoted as saying that in meetings with members of the NYSBA and the New York County Lawyers' Association, "I had the feeling that the lawyers on the bar groups were glad that somebody was paying attention and they had quite a number of things to say."⁵⁹

⁵⁴ *Id.* (quoting Mark Dwyer) (first alteration added).

⁵⁵ *Id.* (quoting Mark Dwyer).

⁵⁶ *Id.* (quoting Mark Dwyer).

⁵⁷ *Id.* (quoting Court of Appeals Associate Judge Robert S. Smith).

⁵⁸ *Id.* (quoting Court of Appeals Associate Judge Robert S. Smith).

⁵⁹ *Id.* (quoting Court of Appeals Associate Judge Robert S. Smith). With respect to the increase in criminal leave grants by the Court of Appeals in 2009, see Barry Kamins, *Criminal Leave Grants: The New Frontier*, N.Y. L.J., Dec. 7, 2009, at 3, 7, and Postings of Vincent Martin Bonventre to the New York Court Watcher, <http://www.newyorkcourtwatcher.com/> (Oct. 27, 2009, 21:45 EST; Oct. 29, 22:09 EST; Nov. 5, 2009, 14:40 EST).

IX. CURRENT RECOMMENDATIONS FOR CHANGING CRIMINAL LEAVE APPLICATIONS AT THE COURT OF APPEALS

In 2009, there were no fewer than four separate recommendations for changing the criminal leave application process at the Court of Appeals. They came from the NYSBA's Appellate Courts Committee and Criminal Justice Section, the NYSBA's adopted recommendation, which was a variation of the recommendations of its Appellate Courts Committee and Criminal Justice Section, and the City Bar's Criminal Justice Operations Committee.

A. The NYSBA Appellate Courts Committee's Recommendations

The Appellate Courts subcommittee and committee considered four options: (1) maintain the existing criminal leave application procedures as codified at CPL 460.20; (2) conform the criminal leave application procedures to the current civil leave application procedures at both the Court of Appeals and the appellate division; (3) conform the criminal leave application procedures at the Court of Appeals to the current civil leave application procedures at that Court, but maintain the current criminal leave application procedures at the appellate division, and continue to permit only one criminal leave application to be made; and (4) conform the criminal leave application procedures at the Court of Appeals to the current civil leave application procedures at that Court, but maintain the current criminal leave application procedures at the appellate division level, and permit an applicant to make a second application to the Court of Appeals when an application to a single appellate division justice has been denied.⁶⁰

In its June 2009 recommendations, the committee formally adopted the findings and recommendations contained in the subcommittee's May 2009 final report, with one exception.⁶¹

⁶⁰ FINAL REPORT, *supra* note 2, at 16.

⁶¹ COMM. ON COURTS OF APPELLATE JURISDICTION, N.Y. STATE BAR ASS'N, RECOMMENDATIONS REGARDING APPLICATIONS FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS IN CRIMINAL CASES 1 (2009), available at <http://www.nysba.org/Content/ContentFolders/SubstantiveReports/LeaveApplications61609.pdf> [hereinafter COMM. RECOMMENDATIONS].

1. Criminal Leave Applications Should Be Decided by the Full Court of Appeals, but the Single Justice Rule in the Appellate Division Should Be Retained

The committee adopted in full the subcommittee's recommendations that: (1) "New York conform its criminal leave application procedures in the Court of Appeals to the current civil leave application procedures in that Court, whereby a motion for civil leave is addressed to and decided by the entire Court"; and (2) "New York retain its current criminal leave application procedures at the Appellate Division level, whereby criminal leave applications are addressed to and decided by a single Appellate Division [j]ustice" of his or her choosing, rather than having the application heard by a four or five justice panel of the court.⁶²

Notably, the committee made no recommendation regarding the form and content of criminal leave applications to the full Court of Appeals, which is governed by Court rules. Thus, it would be up to the Court of Appeals to decide whether to retain its less formal "letter application" procedure for criminal leave applications over the more formal "notice of motion" procedure in place for civil motions for leave to appeal, a consideration that is apparently very important to prosecutors and the criminal defense bar.⁶³

This recommendation was based on several factors supported by the data and information contained in the subcommittee's final report and described in sections II through VII of this article. First, the committee agreed with Chief Judge Lippman that New York's procedures should ensure that criminal defendants "have their day in court" and believed that the current system allows for at least the perception of unequal treatment and unfairness in the criminal leave application process at the Court of Appeals.⁶⁴ Second, as the MacCrate Commission noted, "bringing the procedure for criminal leave applications into harmony with the other present civil leave procedures could be expected to achieve greater uniformity in processing and results."⁶⁵ Given the different experiences and propensities that each judge brings to the Court, this is particularly

⁶² *Id.* at 2.

⁶³ *Id.* at 2 n.1; see N.Y. COMP. CODES R. & REGS. tit. 22, §§ 500.20(a), 500.21(d), 500.22 (2008). Under the Court's current rules, criminal leave applications are done on an original letter with service of one copy, whereas civil motions for leave to appeal require filing of an original and six copies and service of two copies.

⁶⁴ FINAL REPORT, *supra* note 2, at 17.

⁶⁵ *Id.* at 17 (quoting MACCRATE COMM'N REPORT, *supra* note 23, at 79).

desirable.⁶⁶ Third, New York is one of the very few states—and the only one among the largest seven states—that does not provide for consideration of criminal leave applications by the full Court.⁶⁷ Fourth, the number of decided appeals has declined significantly (from over 500 to about 180 per year) since the Court was resistant to the MacCrate Commission's recommendation to conform the civil and criminal leave procedures.⁶⁸ The number of criminal leave applications has also declined, and the size of the Court of Appeals's legal staff has increased, making it more palatable that the Court has the time and staff to accommodate this change.⁶⁹

At the appellate division level, the committee voted overwhelmingly that the “single justice” application process—which allows the losing party to seek leave to the Court of Appeals from an individual appellate division justice to be selected by the applicant—be retained.⁷⁰ The committee found this recommendation supported by several considerations. First, having a panel decide the application would significantly increase the workload and administrative burden of each department and each appellate division justice to an untenable level. This concern is particularly acute given the number of “new” criminal leave applications that could be anticipated and the current caseload burdens of each department, which exceed two-thousand appeals per year.⁷¹ Second, the prosecutors and criminal defense attorneys both welcome the option of speaking directly to the justice who dissented in their favor in seeking leave to appeal.⁷² Third, it is far more likely that leave will be granted by the dissenter(s) than by a majority of the panel that decided the appeal at the appellate division, thus providing more criminal cases to be decided by the Court of Appeals.⁷³

2. Uncertainty Over the “One Bite” Rule

The subcommittee also recommended that the current “one bite” rule be retained in criminal cases so that an applicant may only seek leave to appeal *either* from a single appellate division justice *or*

⁶⁶ *Id.* at 17–18.

⁶⁷ *Id.* at 18.

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ *Id.*; COMM. RECOMMENDATIONS, *supra* note 61, at 2.

⁷¹ FINAL REPORT, *supra* note 2, at 18.

⁷² *Id.*

⁷³ *Id.*

from the full Court of Appeals.⁷⁴ In recommending no change in this aspect of the current criminal leave application process, the subcommittee's overriding concern was the potential that an enormous administrative burden would be placed on the justices of the appellate division if the "two bite" procedure, allowed in civil appeals, were adopted in criminal cases. Moreover, the empirical evidence collected by the subcommittee led it to believe that this increased burden would not lead to any significant increase in the number of criminal leave applications granted by appellate division justices.⁷⁵

All four departments of the appellate division require that in the event of an adverse decision on appeal, *both retained and assigned counsel* to criminal defendants must advise the defendant in writing of the right to apply for leave to appeal to the Court of Appeals and to request the assignment of counsel on such an appeal. If the client timely requests that such application be made, counsel must do so.⁷⁶

The table in Part VI of this article reflects that between 1986 and 2008, the Court of Appeals has decided approximately twenty-six hundred criminal leave applications on average per year.⁷⁷ In addition, the charts and information contained in Part VII reflect that: (1) very few criminal cases each year give rise to at least one dissent in the appellate division; (2) these few cases are the most likely cases—and in reality are almost exclusively the cases—in which a losing party seeks leave from an individual appellate division justice as opposed to making an application to the Court of Appeals to be randomly assigned to one judge under the current rule; (3) even when an appellate division justice dissents it is no guarantee that he or she will grant leave; and (4) very few applications for leave to appeal to the Court of Appeals are made to an individual appellate division justice each year in criminal cases.⁷⁸ Moreover, this information is not readily available or known to the practicing bar. In fact, it is reasonable to expect that most practitioners believe that if an appellate division justice dissents he or she will grant leave to appeal in a criminal case.⁷⁹

⁷⁴ *Id.* at 19.

⁷⁵ *Id.*

⁷⁶ *Id.*; see N.Y. COMP. CODES R. & REGS. tit. 22, §§ 606.5(b)(2) (App. Div. 1st Dep't), 671.4 (App. Div. 2d Dep't), 821.2(b) (App. Div. 3d Dep't), 1022.11(b) (App. Div. 4th Dep't) (2008).

⁷⁷ See *supra* tbl.2; FINAL REPORT, *supra* note 2, at 19.

⁷⁸ See *supra* tbls.3, 4; FINAL REPORT, *supra* note 2, at 19–20.

⁷⁹ FINAL REPORT, *supra* note 2, at 20.

Thus, despite the futility of seeking leave in a criminal case from an individual appellate division justice when there has been no dissent, there is the substantial possibility that adoption of the “two bite” aspect of the civil leave process to criminal leave applications would result in duplicate criminal leave applications in both the appellate division and the Court of Appeals.⁸⁰ This is especially true given the substantial liberty interests at stake in comparison with the financial interests that predominate in civil matters.⁸¹ Accordingly, adoption of the “two bite” rule in criminal cases will certainly increase the total number of criminal leave applications in the appellate division, and could exponentially increase the number from approximately thirty to as many as two thousand or more per year in the appellate division.⁸² Moreover, the subcommittee was of the view that, despite the administrative burdens created by duplicate criminal leave applications under adoption of the “two bite” rule in criminal cases, this would likely not significantly increase the total number of criminal leave applications granted.⁸³

In addition to these administrative burdens, the subcommittee viewed retaining the current “single justice” and “one bite” rules in criminal cases versus civil cases as a justified “trade-off.” Civil leave applicants seemingly have a higher hurdle to overcome to get their case before the Court of Appeals based on appellate division action—requiring either a two-justice dissent for an appeal as of right or permission of a majority of the court.⁸⁴

The subcommittee and the committee shared the sentiment that ideally there should be complete harmony between the civil and criminal leave application procedures in both the appellate division and the Court of Appeals. Neither felt that they could overlook or ignore, however, the presumably enormous administrative burden that would be placed on the justices of the appellate division if the “two bite” approach of the civil leave process was applied to criminal leave applications.⁸⁵

In adopting its final recommendations, there was substantial discussion and the committee was divided on this third issue of the “two bite” rule. Ultimately, the committee voted to adopt a variation of the subcommittee’s third recommendation to retain the

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 21; see N.Y. C.P.L.R. 5601(a)–(b), 5602(b) (McKinney 1995).

⁸⁵ FINAL REPORT, *supra* note 2, at 21.

current “one bite” rule.⁸⁶ Thus, the committee adopted the following recommendations:

If there is at least one dissent in the Appellate Division, a criminal leave applicant may first seek a certificate from a single Appellate Division Justice and if denied, then make application for leave in the Court of Appeals;

If there is no dissent in the Appellate Division, only one criminal leave application may be made, either to a single Appellate Division Justice or to the Court of Appeals.⁸⁷

The committee did not, however, propose language including this recommendation in its proposed changes to CPL 460.20.⁸⁸

The committee met in September 2009 with Judge Robert Smith, the designated liaison to the public by Chief Judge Lippman, to informally discuss the committee’s proposed recommendations. In October 2009, the committee issued an addendum to its recommendations incorporating into the proposed amendment to CPL 460.20 the rule found in CPLR 5602(a) for civil motions for leave, which provides that criminal leave applications decided by the full Court of Appeals would be granted upon the approval of two judges.⁸⁹ With this additional change, the committee recommended legislation amending CPL 460.20 to fully implement its recommendations.⁹⁰

⁸⁶ COMM. RECOMMENDATIONS, *supra* note 61, at 3–4.

⁸⁷ *Id.*

⁸⁸ *Id.* at 4.

⁸⁹ See COMM. ON COURTS OF APPELLATE JURISDICTION, N.Y. STATE BAR ASS’N, ADDENDUM TO THE RECOMMENDATIONS REGARDING APPLICATIONS FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS IN CRIMINAL CASES (2009), available at <http://www.nysba.org/Content/ContentFolders/SubstantiveReports/AddendumtoRecommendations10609.PDF> [hereinafter ADDENDUM TO RECOMMENDATIONS].

⁹⁰ *Id.* at 2–3. The committee proposed that CPL 460.20 be amended to read as follows: Certificate granting leave to appeal to court of appeals:

1. A certificate granting leave to appeal to the court of appeals from an order of an intermediate appellate court is an order granting such permission and certifying that the case involves a question of law which ought to be reviewed by the court of appeals.
2. Such certificate may be issued by the court of the appeals or by a justice of the appellate division in the indicated situations:

- (a) Where the appeal sought is from an order of the appellate division, the certificate may be issued by (i) the court of appeals or (ii) a justice of the appellate division of the department which entered the order sought to be appealed.

- (b) Where the appeal sought is from an order of an intermediate appellate court other than the appellate division, the certificate may be issued only by the court of appeals.

- (c) Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals.

3. An application for such a certificate must be made in the following manner:

- (a) An application to a justice of the appellate division must be made upon reasonable

On June 16, 2009, the final report and recommendations were sent to the NYSBA President, Michael Getnick, pursuant to the executive committee rule requiring the committee to submit reports five business days before the committee could release the official report to Chief Judge Lippman as the opinions of the committee. On June 29, the committee was advised that President Getnick wanted the recommendations to be considered by the executive committee, with the aim of making the recommendation into a NYSBA report before it became public or was sent to the Court of Appeals. As part of this process, the recommendations and all the supporting data and documentation were sent to the Criminal Justice Section for its review and comment prior to executive committee deliberation.

B. The NYSBA Criminal Justice Section's Recommendations

After it received the Appellate Courts Committee's Final Report and Recommendations and supporting documentation, the NYSBA Criminal Justice Section Association formed its own committee in August 2009 to review the criminal leave application process at the Court of Appeals and provide comments on the issues. The Criminal Justice Section issued its own report in the form of a letter to President Getnick dated October 9, 2009, which discussed: (1) the Court's criminal caseload since 1996; (2) leave application procedures since the early 1970s; (3) the benefits of oral argument on criminal leave applications at the Court; (4) the need for changes in internal court procedures; (5) the Appellate Courts' Report and Recommendations; and (6) the Appellate Courts Committee's recommendations for changes.⁹¹

The report notes that the Court of Appeals's "criminal caseload

notice to the respondent;

(b) An application seeking such a certificate from the court of appeals must be made in writing to the clerk of the court of appeals. The clerk of the court must then notify the respondent of the application.

4. A justice of the appellate division to whom such an application has been made may in his discretion determine it upon such papers as he may request the parties to submit, or upon oral argument, or upon both.

5. Every justice acting pursuant to this section shall file with the clerk of the court of appeals, immediately upon issuance, a copy of every certificate granting or denying leave to appeal.

Id.

⁹¹ Letter from Jim Subjack, Chair, N.Y. State Bar Ass'n Criminal Justice Section, to Michael E. Getnick, President, N.Y. State Bar Ass'n 1-2 (2009), *available at* <http://www.nysba.org/Content/NavigationMenu41/November62009AgendaItems/LeaveAppealLetter.pdf>.

has declined dramatically in recent years, not only in absolute terms but as a percentage of its overall caseload,”⁹² and reported that from 1994 to 1998, forty-one percent of the appeals decided by the Court of Appeals were criminal, but for the period 2004–2008, only twenty-eight percent of decided appeals were criminal.⁹³ The report states that “[t]hese numbers are of great concern to the members of the Criminal Justice Section We can perceive no reduced need for legal direction from the Court of Appeals in the criminal law arena.”⁹⁴ The report recommends “a return to the days when criminal appeals occupied about [forty percent] of the Court’s calendar” and that regardless of how criminal leave applications are decided “we believe the public interest requires that more applications be granted.”⁹⁵

In addition, the report states that oral argument on criminal leave applications or what it refers to as “criminal leave hearings” benefit both the Court and the criminal bar, but “[h]ave [b]ecome [n]on-[e]xistent.”⁹⁶ It noted that beginning in the early 1970s and continuing through Chief Judge Wachtler’s tenure in the early 1990s “criminal leave hearings—conducted in chambers by the judge assigned a criminal leave application (CLA)—were the rule and not the exception,” and prosecutors and defense attorneys “would travel to the assigned judge’s chambers and, in the informal setting that always prevailed, they would give their reasons in support of, or in opposition to, a particular application.”⁹⁷ The report noted that each of the individual judges have an additional law clerk since the death penalty was reintroduced in 1995 (now judicially eviscerated), the Court’s central staff is larger, and the Court decides far fewer cases, but “there [were] virtually no criminal leave applications and/or telephone conferences . . . for at least the last 10–15 years.”⁹⁸

The report “fervently recommends that . . . the assigned judges should conduct either criminal leave hearings in chambers when

⁹² *Id.* at 1 (alteration of subheading capitalization).

⁹³ *Id.* at 2.

⁹⁴ *Id.*

⁹⁵ *Id.* at 3.

⁹⁶ *Id.*

⁹⁷ *Id.* CPL § 460.20(4) specifically notes the availability of such hearings: “a judge of the court of appeals designated to determine such an application, may in his discretion determine it upon such papers as he may request the parties to submit, or upon oral argument, or upon both.” N.Y. CRIM. PROC. LAW § 460.20(4) (McKinney 2005) (emphasis added).

⁹⁸ Letter from Jim Subjack, *supra* note 91, at 3–4.

practical, [or] telephone conferences when not.”⁹⁹ The report identifies three benefits of such hearings:

[(1)] it establishes and fosters contact, familiarity and cordiality between the judge assigned and the members of the bar . . . [which] is something clearly lacking in present day practice;

. . . [(2)] even if there is an ultimate denial of the CLA, the assigned judge, by virtue of the informal give and take with the [experienced and knowledgeable] attorneys that inevitably occurs at a criminal leave hearing, becomes necessarily exposed to a level of practicality that is inherent in the criminal justice process, but from which the judge might otherwise be isolated[; and]

. . . .

. . . [(3)] there would be greater feedback from the judge assigned . . . [and] practitioners would at least attain some understanding as to the judge's reasoning process.¹⁰⁰

The report also noted three other considerations of importance. First, “in contrast to the procedure for civil leave applications, there is no mechanism to ensure that the assigned judge receives input from other judges, even to the extent of discussing the issues raised by the leave application.”¹⁰¹ Second, “there is no formal procedure for submitting a reply after the opposing party has responded to the leave application. Upon receiving the response, the applicant must contact the assigned judge and seek permission.”¹⁰² Third, it advocated for the “continuation of the current rule permitting letter applications and oppose substituting [the more formal] motion practice” of civil motions for leave regardless of whether criminal leave applications are decided by one judge or the full Court.¹⁰³

In commenting on the Appellate Courts Committee's Recommendations, the Criminal Justice Report emphasized that above all it

believes that wherever possible the judges of the Court should determine leave applications after meeting with the litigants. That procedure would seem dependent on retention of the current leave procedure, under which

⁹⁹ *Id.* at 6.

¹⁰⁰ *Id.* at 5–6.

¹⁰¹ *Id.* at 6.

¹⁰² *Id.* at 7.

¹⁰³ *Id.*

applications are determined by a single Court of Appeals judge.

Otherwise, however, we would be supportive of the report of the Committee on Courts of Appellate Jurisdiction¹⁰⁴

In fact, it expressed the view that “[i]f the members of the Court are not inclined substantially to increase the numbers of leave conferences, the proposed change [of the Appellate Courts Committee] should be adopted.”¹⁰⁵ With respect to retention of the “one bite” rule, the Criminal Justice Section “reluctantly agree[d]” because “the potential administrative burden that would be placed on Appellate Division Justices would cause an insurmountable strain on the functioning of the Four Departments.”¹⁰⁶

In conclusion, the report recommended the following:

1. Increasing the percentage of the court’s calendar so that 40% of the caseload is comprised of criminal matters;
2. The criminal leave hearing forum between members of the bar and the court should be re-established;
3. Internal court guidelines should provide for discussion among the judges regarding the merits of criminal leave applications;
4. Procedures should be established to provide for a reply after the opposing party has responded to a criminal leave application;
5. Leave applications should continue to be made by letter application and motion practice should not be substituted;
6. If recommendation number 2 cannot be implemented, the position of the Committee on Courts of Appellate Jurisdiction should be adopted; [and]
7. This Committee should study the process through which leave to appeal is granted from the denials of post-judgment motions.¹⁰⁷

C. The NYSBA’s Adopted Recommendation

On November 6, 2009, the NYSBA Executive Committee met with

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 8–9.

representatives of the Appellate Courts Committee and the Criminal Justice Section to hear and evaluate their recommendations. As a result of this meeting and extensive discussion, the executive committee adopted a resolution reflecting the NYSBA's official position and recommendation. In short, the NYSBA adopted in full the recommendations and proposed legislation of the Appellate Courts Committee and adopted three recommendations of the Criminal Justice Section.¹⁰⁸

Pursuant to this resolution, NYSBA President Michael Getnick wrote to Chief Judge Lippman on January 6, 2010 to provide the NYSBA's recommendations in response to the Court's July 2009 request for comments on the criminal leave application process. In addition to enclosing the reports of the Appellate Courts Committee and Criminal Justice Section, the letter advised the chief judge that

the Court's criminal leave application procedures [should] be conformed generally to the current civil leave application procedures, by which a motion for leave is addressed to and decided by the entire Court. The report [of the Appellate Courts Committee] sets forth a proposed amendment to Criminal Procedure Law § 460.20 to implement this recommendation.¹⁰⁹

The letter further stated that "our Association makes three additional recommendations, as proposed by our Criminal Justice Section."¹¹⁰ Specifically, the additional recommendations were that (1) "[w]hatever the procedure for deciding criminal leave[] applications, the Court should revive the former practice of conducting leave hearings, in chambers when practical or by teleconference"; (2) "[p]rocedures should be established to provide for a reply to the opposing party's response to a criminal leave application"; and (3) "[c]riminal leave applications should continue to be made by letter application, not by formal motion practice."¹¹¹

¹⁰⁸ RESOLVED, that the Executive Committee approves the amendment of Criminal Procedure Law § 460.20 as proposed by the Committee on Courts of Appellate Jurisdiction and the recommendations set forth in numbered paragraphs 2, 4 and 5 of the report of the Criminal Justice Section, and hereby requests the two groups to create one report on an expedited basis for submission to the Court of Appeals.

Minutes of Executive Committee Meeting, N.Y. State Bar Ass'n 4 (Nov. 6, 2009), <http://www.nysba.org/Content/NavigationMenu41/January282010AgendaItems/November609XCminutes.pdf>.

¹⁰⁹ Letter from Michael E. Getnick, President, N.Y. State Bar Ass'n, to Hon. Jonathan Lippman, Chief Judge, N.Y. State Court of Appeals 1 (Jan. 6, 2010) (on file with author).

¹¹⁰ *Id.*

¹¹¹ *Id.*

D. The NYC Bar Report

In December 2009, the NYC Bar issued its "Report of the Criminal Justice Operations Committee of the Association of the Bar of the City of New York Concerning Criminal Leave Application Procedures in the Court of Appeals."¹¹² The report discusses the difference between New York's procedures for obtaining leave to appeal to the Court of Appeals in civil and criminal cases, how this differs from other jurisdictions, and the statistics demonstrating the very low percentage of criminal leave applications granted under the current system, especially since the early 1990s.¹¹³ It also points out that criminal cases used to make up about forty percent of the Court of Appeals' calendar, but that this has dropped since 1986 to approximately thirty percent.¹¹⁴ The NYC Report "outlines concerns over the fairness, and perceived fairness, of the current criminal leave application process and makes recommendations the committee believes would address those concerns without being unduly burdensome for the Court and criminal litigants."¹¹⁵

With respect to the perception of fairness, the report states:

The rates at which individual judges grant leave vary widely, are the subject of comment by various "court watchers," and result in individual judges gaining reputations as "good" or "poor" leave granters. The result is a widespread perception that this "luck of the draw" system treats those seeking leave in criminal cases unfairly. The perception of unfairness is especially troubling since leave in criminal cases is most often sought by the defendant and criminal defendants in New York are overwhelmingly indigent and disproportionately non-Caucasian.

... Criminal appellate practitioners regularly complain that leave is denied even in particularly leave-worthy cases, including those as to which different [d]epartments of the Appellate Division are split.¹¹⁶

The report notes that under the current procedures, the [Court of Appeals] judge designated to decide the application is under no obligation to confer with any other judges about it, and no mechanism exists for alerting other

¹¹² N.Y.C. BAR REPORT, *supra* note 18, at 1.

¹¹³ *See id.* at 1–2.

¹¹⁴ *Id.* at 5.

¹¹⁵ *Id.* at 2.

¹¹⁶ *Id.* at 1–2.

judges to its pendency. A leave application may actually present an issue that one or more judges would be particularly interested in having the Court consider, and yet leave may be denied without such judge(s) ever learning about the application.¹¹⁷

The report finds that “given both the widespread perception of unfairness engendered by the current ‘luck of the draw’ leave process and the marked decline in criminal leave grants in recent years, the current system should be substantially modified.”¹¹⁸ The report notes that during 2009, the percentage of criminal leave grants at the Court of Appeals has risen significantly but concludes that “[e]ven if the Court grants a higher percentage of leave applications in the coming years, the fact that the rate at which leave is granted can dip so low for a very substantial period of time remains a cause for serious concern.”¹¹⁹ The report also states that:

More important[ly], regardless of the leave grant rate at any given time, the one-judge, “luck of the draw” system creates a widespread perception that similarly situated applicants are not treated fairly. Leave applications that are equally meritorious and present equally important issues should have a roughly equal chance of success, so as to promote both fundamental fairness and the appearance of fundamental fairness.¹²⁰

Without identifying the Appellate Courts Committee’s Recommendations by name, the NYC Report rejects the committee’s central recommendation that criminal leave applications be heard and decided by the full Court of Appeals. After noting that many criminal leave applications are not meritorious and that the Court often does not even have jurisdiction to entertain the issues sought to be appealed, the report states:

For several practical reasons, we do not urge adoption of the civil leave motion model for criminal leave applications. First, doing so would greatly increase the number of leave motions the Court of Appeals would have to consider and decide. The Court currently considers between 1,000 and 1,100 civil leave motions a year and between 2,400 and 2,600 criminal leave applications. Adopting the civil leave system

¹¹⁷ *Id.* at 3.

¹¹⁸ *Id.* at 6.

¹¹⁹ *Id.*

¹²⁰ *Id.*

for criminal applications would more than triple the number of leave motions the Court must consider annually. This might require an increase in the Court's staff.

Additionally, a substantial number of the additional leave motions would involve cases in which the Appellate Division rules require counsel to apply for leave but in which the Court actually lacks jurisdiction to entertain and decide the only issue(s) the case presents.¹²¹

With respect to aspects of the current process that the NYC Bar would retain, the report states that "[w]e also believe that one aspect of the current criminal leave system is well worth retaining: that applications may be made by letter."¹²²

In conclusion, the NYC Bar Report set forth four recommendations as follows:

- a. Assign Each Leave Application to a Panel of [Three] Judges, With Leave to Be Granted if Any of the [Three] Judges Decides It Should;
- b. Disseminate To All Judges, in Point Heading Form, the Issues on Which Leave is Currently Being Sought, So They May Have Input If They So Desire;
- c. Provide the Automatic Right to File a Reply Leave Letter; [and]
- d. Make Clear to Appellate Division Justices that They Should Grant Leave Applications They Believe Have Merit.¹²³

X. CONCLUSION: WHY THE NYSBA'S RECOMMENDATION SHOULD BE ADOPTED NOW AND THE FULL COURT OF APPEALS SHOULD REVIEW AND DECIDE ALL CRIMINAL LEAVE APPLICATIONS

This author was a member of the Appellate Courts Subcommittee and Committee that prepared the final report and recommendations adopted by the NYSBA Executive Committee as the official position and recommendation of the NYSBA. Thus, it will come as no surprise that this author supports both the changes in the criminal leave application procedures recommended by the NYSBA and the

¹²¹ *Id.* at 7.

¹²² *Id.* at 8.

¹²³ *Id.* at 12. With respect to the submission of reply papers on criminal leave applications, it should be noted that it has long been the rule that reply papers are not allowed on civil motions for leave to appeal, and the Court's rules are silent on the submission of such papers. See N.Y. COMP. CODES R. & REGS. tit. 22, § 500.21 (2008).

passage of the legislation proposed in the NYSBA report. Rather than reiterate all the data and reasons for those recommendations set forth in detail above, this section addresses the primary reasons expressed for not changing the criminal leave application procedures at the Court of Appeals, and show why they are not insurmountable or good enough to delay these necessary modifications.

A. Fallacy No. 1: Full Court Review of Criminal Leave Applications Will Overwhelm the Court Administratively

Under the current one-judge rule in the Court of Appeals, each judge is responsible for reviewing and deciding approximately 375 to 400 applications each year. Almost everyone, including several Court of Appeals judges, acknowledges that many of these criminal leave applications are meritless or involve only issues that the Court has no jurisdiction to review, such as excessive sentence or unpreserved issues in general.¹²⁴ In the 1980s, the Court's central staff of attorneys played either no role (or at best a limited role) in reviewing criminal leave applications; thus, each judges' chambers—the judge and his or her individual law clerks—addressed and decided each criminal leave application.¹²⁵

By contrast, in civil cases, each motion for leave to appeal is addressed in a short central staff attorney report—prepared under the guidance of an individual judge assigned to report on each civil motion for leave on a random basis—which briefly sets forth the procedural history, facts, legal issues, and concludes with a recommendation to either grant or deny leave to appeal. Once the assigned judge signs off on the report, it is circulated to the other six judges and then “conferenced” (discussed at morning conferences of the judges) at the next oral argument session in Albany for a decision. If two judges vote in favor, leave to appeal is granted.

If criminal leave applications were decided by the full Court, the only change would be that each judge would be responsible for preparing (either with the assistance of a confidential law clerk or a

¹²⁴ See, e.g., N.Y.C. BAR REPORT, *supra* note 18, at 7; see also Kamins, *supra* note 59, at 3. Remember that the rules of all four departments require both retained and assigned counsel to make a criminal leave application simply because their client requests that they do so.

¹²⁵ As confidential law clerk to Judge Simons from 1984 to 1986, this author personally knows from his own experience and conversations at that time with confidential law clerks to the other six judges on the Court that each chambers handled criminal leave applications without any reports from a central staff attorney.

central staff attorney) and circulating a short report on the same number of applications each year that they now decide on their own. Given that some members of the Court and commentators believe that as many as thirty-five to fifty percent of the criminal leave applications are meritless or present unreviewable issues, that same percentage of these “reports” would be very short, even terse. When a more detailed report (perhaps three to five pages) is necessary, each judge will have to only have his or her thoughts and analysis—that would be performed anyway—set forth in type. This in itself will likely increase the value of the analysis, in addition to the benefit of the now mandated review and collective wisdom of six other judges on the substantial criminal leave applications where a full report is necessary.

When the Court resisted the MacCrate Report recommendation to conform the criminal leave application procedures to the civil leave process, the Court was still deciding over more than 500 appeals each year and they did not yet know how the changes in its civil jurisdiction implemented from the MacCrate Report would reduce its current caseload. But the Court is now deciding, on average, approximately 185 cases (civil and criminal) each year instead of over 500, a decrease of approximately sixty-seven percent since the mid-1980s. While many of these cases present complex issues, it is impossible to ignore that the Court now sits in Albany for oral argument approximately forty days per year with an average of four cases argued each day (about 160 appeals argued per year), whereas it used to sit for oral argument approximately seventy days per year with seven cases per day (about 500 appeals argued per year), thus allowing the judges to spend more time in home chambers now.¹²⁶

Notably, the NYSBA and its Appellate Courts Committee—and, ultimately, the Criminal Justice Section—were unanimous in their recommendations that the full Court should review and decide criminal leave applications just as it does civil motions for leave. The NYC Bar Report rejected this recommendation in favor of a three-judge review process whereby leave would be granted if any

¹²⁶ See New York State Court of Appeals, 2005–2010 Court Calendars, <http://courts.state.ny.us/ctapps/crtnews.htm> (last visited Mar. 31, 2010). The fact that there are only about four cases on the oral argument calendar each day currently and for several years now, as opposed to seven a day before the change in the Court's civil jurisdiction in 1986, is significant. Whereas each of the seven judges used to draw one case that was argued every day and have to report on it the next morning at conference on the recommended decision and basis therefore, now each judge only makes such a report approximately every other day during the argument session. This also allows for more time to prepare short reports on criminal leave applications.

one judge was in favor solely because of the administrative burden which “might require an increase in the Court’s staff.”¹²⁷ The problem is that the NYC Bar Report does not identify how three judges are going to address and decide each criminal leave application without the same increased burden of a written report by one member of the presumably three-judge “panel” who is assigned to report and recommend a disposition of the application. Moreover, this will result in a whole new process of three-judge panels that the Court has no experience with, whereas the civil motion for leave process is longstanding, well-engrained, and familiar to the members of the Court and its staff of attorneys. In addition, in this same portion of its report, the NYC Bar acknowledges that “a substantial number” of the additional leave applications would be meritless or unreviewable,¹²⁸ but fails to acknowledge that this would result in a short and simple report by the assigned judge to the full Court, thus reducing the administrative burden.

Make no mistake, having criminal leave applications decided by the full Court will somewhat increase the workload of each judge. No one should interpret these statements as an indication or inference that this author believes that the judges on the Court do not work enormously hard or that they have fewer or less significant responsibilities than past judges on the Court. It simply appears, from the public information available, that the increase in the work of the judges should not prevent this important change from happening and does not appear to outweigh the enormous benefits of making it happen.

B. Fallacy No. 2: With the Increase in Criminal Leave Grants in 2009, Legislative Changes and the Increased Administrative Burden on the Court Are Unnecessary

There are at least two readily apparent problems with the idea that the increase in criminal leave grants in 2009 takes care of the problem.

First, the fundamental problem to address—identified by the NYSBA, its Appellate Courts Committee and Criminal Justice Section, and the NYC Bar—was not just the low number of criminal leave grants, but the lack of fairness in how one criminal leave

¹²⁷ N.Y.C. BAR REPORT, *supra* note 18, at 7.

¹²⁸ *Id.*

application is treated versus another (depending on the “luck of the draw” or “Russian Roulette” one-judge decision rule) and how criminal versus civil applications for leave are treated.¹²⁹ These considerations are well-stated in the NYC Bar Report, which had the benefit of seeing the increase in criminal leave grants in 2009 since it was released in late December, as follows:

The result [of the current one-judge rule] is a widespread perception that this “luck of the draw” system treats those seeking leave in criminal cases unfairly. The perception of unfairness is especially troubling since leave in criminal cases is most often sought by the defendant and criminal defendants in New York are overwhelmingly indigent and disproportionately non-Caucasian.

....

... [R]egardless of the leave grant rate at any given time, the one-judge, “luck of the draw” system creates a widespread perception that similarly situated applicants are not treated fairly. Leave applications that are equally meritorious and present equally important issues should have a roughly equal chance of success, so as to promote both fundamental fairness and the appearance of fundamental fairness.¹³⁰

Second, even if one goal is to increase the number of criminal leave grants, the fact that leave grants increased in 2009 in both raw numbers and as a percentage of applications, and among most if not all the judges, does not mean that this increase will be permanent. As expressed by the NYC Bar Report, “[e]ven if the Court grants a higher percentage of leave applications in the coming years, the fact that the rate at which leave is granted can dip so low for a very substantial period of time remains a cause for serious concern.”¹³¹ Moreover, commentators believe this is the result of the “concern” expressed by the new chief judge or, alternatively, because he has “openly chastis[ed] his colleagues.”¹³² Statistics show that the rate of criminal leave grants has fluctuated from approximately three percent in the late 1980s to early 1990s,

¹²⁹ See FINAL REPORT, *supra* note 2, at 17; N.Y.C. BAR REPORT, *supra* note 18, at 1–2, 6. Arguably, one could say that the increase in the number of criminal leave grants was perhaps of at least equal concern with the perceived unfairness of the current procedure for the NYSBA Criminal Justice Section. See Letter from Jim Subjack, *supra* note 91, at 8–9.

¹³⁰ N.Y.C. BAR REPORT, *supra* note 18, at 1, 6.

¹³¹ *Id.*

¹³² Stashenko, *Criminal Leave Grants*, *supra* note 43, at 5.

to less than two percent in the recent years, and perhaps now is on the increase for several years.¹³³ This does not mean that over the next ten years the rate will not decline to less than two percent again.

C. Fallacy No. 3: There Are No Meritorious Cases Where the Current One-Judge Rule Has Resulted in the Denial of Leave to Appeal

Through this two-plus-year investigation of the criminal leave process at the Court of Appeals, this author has heard at least one current member of the Court state and/or quote other members of the Court as having made the statement: "Show me the meritorious criminal cases where we denied leave to appeal." It would appear that both subjectively and objectively, the answer is that there are some such cases.

First, the NYC Bar Report states that "[c]riminal appellate practitioners regularly complain that leave is denied even in particularly leave-worthy cases, including those as to which different Departments of the Appellate Division are split."¹³⁴ Steven Banks, attorney-in-charge for the Legal Aid Society of New York City, was quoted as saying that "[w]e've seen a number of denials of leave applications presenting important unsettled questions, including some where there have been a split of the Appellate Divisions over the years."¹³⁵ As an example, "[d]efense attorneys cite *People v. Martinez* as presenting an issue . . . seemingly ripe for Court of Appeals review. In it, a First Department panel ruled that an indictment that identified a defendant in a sexual attack case by his DNA markers was sufficient to satisfy his constitutional right to notice,"¹³⁶ even though the man was not arrested for the rape until years after the indictment.¹³⁷ This is a significant constitutional issue and one of "first impression" in New York according to the unanimous First Department decision.¹³⁸ Leave to appeal was denied, however, by a judge of the Court of Appeals.¹³⁹

¹³³ *Id.* at 1.

¹³⁴ N.Y.C. BAR REPORT, *supra* note 18, at 1–2.

¹³⁵ Stashenko, *Chief Judge to Review*, *supra* note 39, at 3.

¹³⁶ *Id.*; see also *People v. Martinez*, 52 A.D.3d 68, 855 N.Y.S.2d 522 (App. Div. 1st Dep't 2008), *leave denied*, 11 N.Y.3d 791, 896 N.E.2d 103, 866 N.Y.S.2d 617 (N.Y. 2008).

¹³⁷ *Martinez*, 52 A.D.3d at 70, 855 N.Y.S.2d at 524.

¹³⁸ *Id.* at 69, 855 N.Y.S.2d at 523; see also Noeleen G. Walder, *DNA Markers Found Ample for Indictment*, N.Y. L.J., Apr. 18, 2008, at 1.

¹³⁹ *Martinez*, 11 N.Y.3d 791, 896 N.E.2d 103, 866 N.Y.S.2d 617 (2008).

Second, there are more objective signs that meritorious claims are rejected in criminal leave applications, specifically when a writ of habeas corpus is issued by federal courts after the Court of Appeals has denied leave to appeal. One example of this is *Wilson v. Mazzuca*,¹⁴⁰ where the Second Circuit concluded that a federal habeas corpus writ must be issued because the defendant was denied the effective assistance of counsel in his 1995 Queens County robbery trial.¹⁴¹ The circuit's lengthy opinion sets forth in detail trial counsel's constitutional failures.¹⁴² What is more disturbing, however, is the response of the New York State courts to the defendant's claims and the clarity of the state courts' errors as described by the Second Circuit.¹⁴³

The trial judge sua sponte raised serious concerns about defense counsel's performance, but the appellate division concluded without explanation that the claim of ineffective assistance of counsel was "without merit," and the Court of Appeals denied leave to appeal.¹⁴⁴ The district judge denied the pro se petition.¹⁴⁵ The Second Circuit reversed and granted the petition for issuance of the writ. The court noted that Wilson had already served a prison sentence of nine-and-one-half years, and was discharged from parole as of March 2008, but this did not moot the appeal or petition.¹⁴⁶ Then, applying the highly deferential standard of review prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),¹⁴⁷ the Court held that "but for the substantial errors

¹⁴⁰ 570 F.3d 490 (2d Cir. 2009).

¹⁴¹ *Id.* at 493.

¹⁴² *Id.* at 502–06.

¹⁴³ See Posting of Normal A. Olch to Full Court Pass, *Second Circuit: State Defendant Denied the Effective Assistance of Counsel*, <http://www.fullcourtpass.com/2009/06/second-circuit-state-defendant-denied.html> (June 24, 2009, 13:10 EST).

¹⁴⁴ *People v. Wilson*, 272 A.D.2d 633, 709 N.Y.S.2d 415 (App. Div. 2d Dep't 2000), *leave denied*, 95 N.Y.2d 940, 744 N.E.2d 152, 721 N.Y.S.2d 616 (N.Y. 2000).

¹⁴⁵ *Wilson v. Mazzuca*, No. CV-01-2246, 2007 WL 952037 (E.D.N.Y. 2007), *rev'd*, 570 F.3d 490 (2d Cir. 2009).

¹⁴⁶ *Wilson*, 570 F.3d 490, 493 n.1 (2d Cir. 2009).

¹⁴⁷ The Second Circuit explained this standard of review as follows:

When [a] state court has adjudicated the merits of petitioner's claim, we apply the deferential standard of review established by [AEDPA], under which we may grant a writ of habeas corpus only if the state court's adjudication 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Where, as here, "a state court fails to articulate the rationale underlying its rejection of a petitioner's claim, and when that rejection is on the merits, the federal court will focus its review on whether the state court's ultimate decision was an unreasonable application of clearly established Supreme Court precedent.

Id. at 499 (quoting *Dolphy v. Mantello*, 552 F.3d 236, 238 (2d Cir. 2009); *Eze v. Senkowski*, 321 F.3d 110, 125 (2d Cir. 2003) (citations omitted)).

committed by trial counsel, there is a 'reasonable probability' that Wilson would not have been convicted. The state court's decision to the contrary was an unreasonable application of clearly established federal law"¹⁴⁸ under *Strickland v. Washington*.¹⁴⁹

Unfortunately, *Wilson* is only one of many examples of federal courts granting habeas corpus petitions for state court defendants whose motions for leave to appeal were denied by the Court of Appeals, in many cases after only summary or conclusory decisions at the appellate division.¹⁵⁰ Clearly, there is no guarantee that if the full Court had heard the criminal leave application it would have been granted and the constitutional error corrected.¹⁵¹

¹⁴⁸ *Id.* at 502–07.

¹⁴⁹ 466 U.S. 668 (1984).

¹⁵⁰ See, e.g., *People v. Jones*, 289 A.D.2d 962, 738 N.Y.2d 260 (App. Div. 4th Dep't 2001), *leave denied*, 98 N.Y.2d 652, 772 N.E.2d 614, 745 N.Y.S.2d 260 (2002) and *Jones v. West*, 555 F.3d 90, 93 (2d Cir. 2009) (holding that the trial court unreasonably applied *Batson* in finding that defendant failed to establish prima facie case of discrimination); *People v. Brinson*, 265 A.D.2d 879, 697 N.Y.S.2d 221 (App. Div. 4th Dep't 1999), *leave denied*, 94 N.Y.2d 860, 725 N.E.2d 1097, 704 N.Y.S.2d 535 (1999) and *Brinson v. Walker*, 547 F.3d 387 (2d Cir. 2008) (holding that the state trial court violated defendant's Confrontation Clause rights in robbery prosecution when it barred defendant from cross-examining victim about whether victim was fired from his job at restaurant for refusing to serve black patrons, and violation was not harmless); *People v. Hanson*, No. 2002-1043 OR CR, 2003 WL 21730001, at *1 (N.Y. Sup. App. Term June 5, 2003), *leave denied*, 100 N.Y.2d 582, 796 N.E.2d 484, 764 N.Y.S.2d 392 (2003) and *Hanson v. Phillips*, 442 F.3d 789 (2d Cir. 2006) (finding that the state appellate court's conclusion that petitioner knowingly, "voluntarily and intelligently" entered his guilty plea was an unreasonable application of *Boykin*); *People v. Jackson*, 266 A.D.2d 475, 698 N.Y.S.2d 887 (App. Div. 2d Dep't 1999), *leave denied*, 94 N.Y.2d 921, 729 N.E.2d 1159, 708 N.Y.S.2d 360 (2000) and *Jackson v. Edwards*, 404 F.3d 612 (2d Cir. 2005) (holding that the state trial court's refusal to give justification instruction violated due process and fatally tainted defendant's weapons conviction); *People v. Ryan*, 215 A.D.2d 786, 627 N.Y.S.2d 410 (App. Div. 2d Dep't 1995), *leave denied*, 86 N.Y.2d 801, 656 N.E.2d 614, 632 N.Y.S.2d 614 (1995) and *Ryan v. Miller*, 303 F.3d 231 (2d Cir. 2002) (holding that the state court unreasonably applied clearly established federal law when it allowed police officers' testimony in violation of Confrontation Clause); *People v. Burch*, 272 A.D.2d 855, 708 N.Y.S.2d 686 (App. Div. 4th Dep't 2000), *leave denied*, 95 N.Y.2d 904, 739 N.E.2d 1150, 716 N.Y.S.2d 645 (2000) and *Burch v. Millas*, 663 F. Supp. 2d 151 (W.D.N.Y. 2009) (finding that the state post-conviction court unreasonably found that counsel's failure to cross-examine state's psychological expert's rebuttal testimony was not ineffective assistance, warranting habeas relief); *People v. Gueits*, 10 A.D.3d 732, 781 N.Y.S.2d 916 (App. Div. 2d Dep't 2004), *leave denied*, 4 N.Y.3d 744, 824 N.E.2d 58, 790 N.Y.S.2d 657 (2004), and *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193 (E.D.N.Y. 2009) (holding that trial counsel was deficient in failing to present available DNA evidence, which prejudiced petitioner, and state court's rejection of ineffective assistance of counsel claim was an unreasonable application of Supreme Court law); *People v. Massillon*, 289 A.D.2d 103, 734 N.Y.S.2d 162 (App. Div. 1st Dep't 2001), *leave denied*, 97 N.Y.2d 731, 767 N.E.2d 161, 740 N.Y.S.2d 704 (2002) and *Massillon v. Conway*, 574 F. Supp. 2d 381 (S.D.N.Y. 2008) (holding that the state appellate court's finding of no ineffective assistance of counsel was contrary to clearly established federal law).

¹⁵¹ In fact, in one case, an appellate division justice granted the People's criminal leave application and the Court of Appeals reversed an appellate division finding of ineffective assistance of counsel, only to have the Second Circuit grant a writ of habeas corpus on just that issue. See *People v. Henry*, 95 N.Y.2d 563, 744 N.E.2d 112, 721 N.Y.S.2d 577 (2000) and

Because these defendants spent years in jail despite violations of their rights, however, even if only some of the applications were granted and corrected, it would be worth the extra work at the Court of Appeals, and would also avoid the further litigation in federal court.

In conclusion, if the United States Supreme Court can hear and decide over ten thousand certiorari petitions collectively in civil and criminal cases each year, and almost every other state expects its highest court to decide criminal leave applications as a full court, then New York and its great Court of Appeals can do the same. We can then proudly say that in New York there is not only justice for all litigants, civil and criminal alike, but that we can perceive no sense of unfairness or injustice in how the Court of Appeals determines which important civil and criminal cases it will address and decide each year.

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