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

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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

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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 publicly 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.

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 5601\(^3\) 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

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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. 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. The application should be made to a justice who was on the panel that heard the appeal, and the Fourth Department makes this mandatory by rule.

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. 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. Under the “Rule of Four,” the consent of four justices is required for the grant of a petition for certiorari.

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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.


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. It appears that all other states require that the highest court in the state review criminal leave applications as a full bench. 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.

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;

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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).


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

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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

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* 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.
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.”

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. 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. The Court’s decision in *People v. LaValle*, 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. The total number of civil opinion“ in the 1970s.

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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.”).


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.

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>
<thead>
<tr>
<th>Year</th>
<th>Total # of Appeals Decided</th>
<th>Civil Motions For Leave</th>
<th>Civil Motions Granted</th>
<th>% Civil Motions Granted</th>
<th>Criminal Leave Apps.</th>
<th>Criminal Leave Apps. Granted</th>
<th>% Criminal Leave Granted</th>
<th>Criminal Leave Apps. Per Judge</th>
<th>% Includes some applications assigned in previous year.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>225</td>
<td>1,093</td>
<td>74</td>
<td>6.8</td>
<td>2,637</td>
<td>53</td>
<td>2.0</td>
<td>376</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>2007</td>
<td>185</td>
<td>1,100</td>
<td>77</td>
<td>7.0</td>
<td>2,382</td>
<td>36</td>
<td>1.5</td>
<td>349</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>2006</td>
<td>189</td>
<td>1,021</td>
<td>61</td>
<td>6.0</td>
<td>2,436</td>
<td>52</td>
<td>2.1</td>
<td>348</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>2005</td>
<td>196</td>
<td>967</td>
<td>61</td>
<td>6.3</td>
<td>2,383</td>
<td>42</td>
<td>1.8</td>
<td>353</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>2004</td>
<td>185</td>
<td>905</td>
<td>75</td>
<td>8.3</td>
<td>2,644</td>
<td>46</td>
<td>1.8</td>
<td>367</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>2003</td>
<td>176</td>
<td>1,053</td>
<td>86</td>
<td>8.2</td>
<td>2,601</td>
<td>37</td>
<td>1.4</td>
<td>397</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>2002</td>
<td>176</td>
<td>1,013</td>
<td>71</td>
<td>7.1</td>
<td>2,724</td>
<td>46</td>
<td>1.7</td>
<td>388</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>2001</td>
<td>176</td>
<td>1,115</td>
<td>72</td>
<td>6.5</td>
<td>2,840</td>
<td>43</td>
<td>1.5</td>
<td>404</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>2000</td>
<td>170</td>
<td>1,088</td>
<td>54</td>
<td>5.0</td>
<td>2,863</td>
<td>51</td>
<td>1.8</td>
<td>448</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1999</td>
<td>208</td>
<td>1,209</td>
<td>94</td>
<td>7.8</td>
<td>2,799</td>
<td>44</td>
<td>1.6</td>
<td>402</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1998</td>
<td>198</td>
<td>1,202</td>
<td>91</td>
<td>7.6</td>
<td>2,982</td>
<td>57</td>
<td>1.9</td>
<td>451</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1997</td>
<td>260</td>
<td>1,215</td>
<td>96</td>
<td>7.9</td>
<td>2,944</td>
<td>56**</td>
<td>3.7</td>
<td>438</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1996</td>
<td>295</td>
<td>1,309</td>
<td>126</td>
<td>9.6</td>
<td>3,018</td>
<td>53**</td>
<td>1.8</td>
<td>400</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1995</td>
<td>340</td>
<td>1,265</td>
<td>124</td>
<td>9.8</td>
<td>3,140</td>
<td>89**</td>
<td>2.8</td>
<td>452</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1994</td>
<td>249</td>
<td>1,027</td>
<td>109</td>
<td>10.6</td>
<td>2,798</td>
<td>113**</td>
<td>4.0</td>
<td>423</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1993</td>
<td>296</td>
<td>948</td>
<td>113</td>
<td>12.0</td>
<td>3,351</td>
<td>81**</td>
<td>2.4</td>
<td>500</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1992</td>
<td>306</td>
<td>886</td>
<td>73</td>
<td>8.2</td>
<td>2,822</td>
<td>76**</td>
<td>2.7</td>
<td>413</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1991</td>
<td>293</td>
<td>1,051</td>
<td>106</td>
<td>10.1</td>
<td>2,841</td>
<td>74**</td>
<td>2.6</td>
<td>416</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1990</td>
<td>287</td>
<td>967</td>
<td>114</td>
<td>11.8</td>
<td>2,827</td>
<td>78**</td>
<td>2.8</td>
<td>438</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1989</td>
<td>295</td>
<td>1,069</td>
<td>123</td>
<td>11.5</td>
<td>2,534</td>
<td>91**</td>
<td>3.6</td>
<td>408</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1988</td>
<td>369</td>
<td>933</td>
<td>82</td>
<td>8.8</td>
<td>2,439</td>
<td>73**</td>
<td>3.0</td>
<td>404</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1987</td>
<td>369</td>
<td>989</td>
<td>143</td>
<td>14.5</td>
<td>2,490</td>
<td>98**</td>
<td>3.9</td>
<td>416</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
<tr>
<td>1986</td>
<td>494</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>2,508</td>
<td>13**</td>
<td>0.52</td>
<td>405</td>
<td>Includes some applications assigned in previous year.</td>
</tr>
</tbody>
</table>

* 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.

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:

[The 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>
<thead>
<tr>
<th>Year</th>
<th>1st Dep’t</th>
<th>2d Dep’t</th>
<th>3d Dep’t</th>
<th>4th Dep’t</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>2</td>
<td>9</td>
<td>2</td>
<td>8</td>
<td>21</td>
</tr>
<tr>
<td>2003</td>
<td>11</td>
<td>7</td>
<td>2</td>
<td>7</td>
<td>26</td>
</tr>
<tr>
<td>2004</td>
<td>7</td>
<td>5</td>
<td>1</td>
<td>6</td>
<td>19</td>
</tr>
<tr>
<td>2005</td>
<td>12</td>
<td>4</td>
<td>3</td>
<td>6</td>
<td>25</td>
</tr>
<tr>
<td>2006</td>
<td>8</td>
<td>2</td>
<td>4</td>
<td>7</td>
<td>21</td>
</tr>
<tr>
<td>2007</td>
<td>15</td>
<td>2</td>
<td>5</td>
<td>6</td>
<td>28</td>
</tr>
<tr>
<td>2008</td>
<td>17</td>
<td>6</td>
<td>9</td>
<td>12</td>
<td>44</td>
</tr>
<tr>
<td>Total/Average</td>
<td>72/10</td>
<td>35/5</td>
<td>26/4</td>
<td>52/7</td>
<td>184/26</td>
</tr>
</tbody>
</table>

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>
<thead>
<tr>
<th>Year</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Cases Decided</td>
<td>4 of 46</td>
<td>14 of 49</td>
<td>8 of 59</td>
<td>9 of 62</td>
<td>11 of 50</td>
<td>15 of 53</td>
</tr>
<tr>
<td>Percentage</td>
<td>8%</td>
<td>29%</td>
<td>13%</td>
<td>15%</td>
<td>22%</td>
<td>28%</td>
</tr>
</tbody>
</table>

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. 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.

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 Court’s 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:

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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

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).
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.
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).
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).
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. 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. 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.

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. 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. 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. 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.

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...
from the full Court of Appeals.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{79}

\textsuperscript{74} Id. at 19.
\textsuperscript{75} Id.
\textsuperscript{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).
\textsuperscript{77} See supra tbl.2; FINAL REPORT, supra note 2, at 19.
\textsuperscript{78} See supra tbls.3, 4; FINAL REPORT, supra note 2, at 19–20.
\textsuperscript{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. This is especially true given the substantial liberty interests at stake in comparison with the financial interests that predominate in civil matters. 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. 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.

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.

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.

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.\textsuperscript{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.\textsuperscript{87}

The committee did not, however, propose language including this recommendation in its proposed changes to CPL 460.20.\textsuperscript{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.\textsuperscript{89} With this additional change, the committee recommended legislation amending CPL 460.20 to fully implement its recommendations.\textsuperscript{90}

\textsuperscript{86} COMM. RECOMMENDATIONS, supra note 61, at 3–4.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 4.
\textsuperscript{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].
\textsuperscript{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

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has declined dramatically in recent years, not only in absolute terms but as a percentage of its overall caseload,” 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. 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.” 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.”

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.” 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.” 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.”

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

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.

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." 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." 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.

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
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 Jurisdiction . . . .\textsuperscript{104} 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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{107}

C. The NYSBA’s Adopted Recommendation

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

\textsuperscript{104} Id.
\textsuperscript{105} Id. at 8.
\textsuperscript{106} Id.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{109}

The letter further stated that “our Association makes three additional recommendations, as proposed by our Criminal Justice Section.”\textsuperscript{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.”\textsuperscript{111}

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{119}

More important\textsuperscript{[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.\textsuperscript{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

\textsuperscript{117} Id. at 3.
\textsuperscript{118} Id. at 6.
\textsuperscript{119} Id.
\textsuperscript{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:


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. 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.

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.\textsuperscript{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

\textsuperscript{126} See New York State Court of Appeals, 2005–2010 Court Calendars, http://courts.state.ny.us/ctapps/ernews.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

\footnotesize{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. 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.

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.” 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.”

Statistics show that the rate of criminal leave grants has fluctuated from approximately three percent in the late 1980s to early 1990s, 129

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.
to less than two percent in the recent years, and perhaps now is on the increase for several years.\footnote{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.”\footnote{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.”\footnote{135} As an example, “[d]efense attorneys cite \textit{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,”\footnote{136} even though the man was not arrested for the rape until years after the indictment.\footnote{137} This is a significant constitutional issue and one of “first impression” in New York according to the unanimous First Department decision.\footnote{138} Leave to appeal was denied, however, by a judge of the Court of Appeals.\footnote{139}
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

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¹⁴⁰ 570 F.3d 490 (2d Cir. 2009).
¹⁴¹ Id. at 493.
¹⁴² Id. at 502–06.
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.

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.

Henry v. Poole, 409 F.3d 48 (2d Cir. 2005) (finding that the state court’s rejection of petitioner’s ineffective assistance of counsel claim was objectively unreasonable application of Supreme Court’s Strickland standard).