CRIMINAL LEAVE IN THE COURT OF APPEALS

A CASE OF IMPLICIT BIAS?

By Eugene F. Pigott Jr.[*]

On October 16, 2019, I delivered a lecture at the Albany Law School as part of the Hugh Jones Lecture Series.[1] In responding to the invitation to deliver this lecture, I contemplated two things: a topic of general interest, at least to the legal community, and one in which I could bring a modicum of unique experience. The topic, therefore, became *Criminal Leaves to Appeal to the Court of Appeals of the State of New York*. Below, in sum and substance, is my lecture. I have added a thought on how the current procedure may impact the way others may view the Court.

My point of view comes from twenty-five years as a trial lawyer, both civil and criminal; service on the board of trustees of the Legal Aid Society of Buffalo and Erie County, including a term as its president; and a judicial career that included time as a trial judge, associate justice of the Appellate Division, Fourth Department, Presiding Justice of that court, and ten years as an associate judge of the Court of Appeals.[2]

As a trial lawyer in a criminal case, one's duty and, therefore, point of view differs markedly from that of a judge. Applying one's knowledge and skill for the benefit of a single defendant who may be facing substantial time in prison is considerably different, and much more pressuring, than that of a judge who comes to the conflict with no prior commitment to any particular outcome.

That is not to say that the task of the judge is easier. A judge must consider the merits of a case, sometimes in the context of vastly different lawyering skills and preparation; confusing and differing testimony; and the application of appropriate law—whether or not

[*] I was a judge on the State of New York Court of Appeals, the state's highest court from 2006 to 2016, when I retired because of the state's mandatory retirement age of 70.

[1] ALBANY LAW SCHOOL, 2019 HUGH JONES MEMORIAL LECTURE: "THE COURT OF APPEALS: A VIEW FROM WESTERN NEW YORK" (Oct. 16, 2019), [https://perma.cc/X75Z-AEBU].

[2] *See Honorable Eugene F. Pigott, Jr.*, CT. OF APPEALS, STATE OF N.Y., https://nycourts.gov/ctapps/jpigott.htm [https://perma.cc/9DWN-9ENR]; *Eugene F. Pigott, Jr.*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/eugene-f-pigott-jr-2/ [https://perma.cc/R6NU-S3R5].

provided by the legal combatants. In the criminal context, unlike the civil, substantial liberty interests are often at stake.

Bringing this experience to bear, I offer the following thoughts about the handling of leaves to appeal to the Court of Appeals from our intermediate appellate courts. Ultimately, my view is that the process for seeking review by the state's highest court should be the same for civil and criminal cases. It may come as a surprise to the uninitiated that while civil cases receive the full panoply of process due a case or controversy,[3] criminal cases receive no such care.[4] Leave to appeal in criminal case is relegated to a *fast food* style of justice that, in my view and experience, can and almost certainly has led to injustice. I suspect this has been so on more than one occasion.

I. THE PROCESS

A criminal defendant, once convicted and sentenced, has an automatic right to appeal to the Appellate Division, New York's intermediate appellate court, in the Department of appropriate geographic jurisdiction.[5] The appeal, being *of right*, cannot be denied.

On the other hand, an appeal to the Court of Appeals requires a "certificate granting leave" and, except in rare instances, must come from one—and only one—of the judges of the Court.[6] The process calls for a letter seeking leave to appeal and the reasons it should be granted.[7] This Criminal Leave Application ("CLA") goes to the Chief Judge.[8] In a ministerial act, the Chief Judge distributes these applications randomly and in equal numbers among the members of the Court.[9]

The Court typically receives between 2,100 and 2,400 CLAs annually.[10] This means that each of the Court's seven judges typically receives in excess of 300 CLAs in the course of a year.[11] In each of those CLAs, the one judge to whom the application is

[3] *See* N.Y. C.P.L.R. §§ 5601–02 (McKinney 2021).

[4] *See* N.Y. CRIM. PROC. §§ 450.10 & 460.20 (McKinney 2021).

[5] *See* CRIM. PROC. § 450.10.

[6] *See* CRIM. PROC. § 460.20.

[7] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 500.20 (2022).

[8] *See* N.Y. CRIM. PROC. LAW § 460.20(3)(b).

[9] *See id.*

[10] *See* JOHN P. ASIELLO, 2020 ANNUAL REPORT OF THE CLERK OF THE COURT OF APPEALS app. 8 (2020), https://www.nycourts.gov/CTAPPs/news/annrpt/AnnRpt2020.pdf [https://perma.cc/K6N9-XMAT]. "In 2020, the Court and its Judges disposed of 3,008 matters, including 96 appeals, 1,070 motions, and 1,824 criminal leave applications." *Id.* at 3.

[11] *See id.* at app. 8.

distributed decides alone whether to grant or to deny an applicant the opportunity to appeal to the state's highest court.[12]

In a comprehensive article published in the *Albany Law Review* in April 2010, attorney Alan J. Pierce, a former law clerk at the Court of Appeals to Judge Richard D. Simons,[13] made the case for changing the CLA procedure.[14] He pointed out that:

- New York is one of only four states (the others being Rhode Island, New Hampshire and Virginia) that allow a single judge to decide whether to grant or deny leave in criminal cases; and the only one of the seven most populous states to permit this practice.[15]
- As early as 1982, the American Judicature Society, in a study known as the MacCrate Commission Report, recommended that CLAs be treated in the same fashion as civil appeals.[16]
- The New York State Bar Association's (NYSBA) Committee on Appellate Courts endorsed the MacCrate Commission's recommendation.[17]
- The NYSBA's Criminal Justice Section also endorsed that recommendation.[18]
- The Association of the Bar of New York City likewise supported the recommendation.[19]

The procedure of a single judge alone determining the fate of a particular CLA has faced additional criticism including:

- The judge deciding the CLA may or may not choose to permit oral argument in chambers.[20]

[12] *See* CRIM. PROC. § 460.20.

[13] Honorable Judge Simons served on the New York State Court of Appeals from 1983 to 1997. *See* Marjorie S. McCoy & David E. McCraw, *Richard Duncan Simons*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/biography/richard-duncan-simons/ [https://perma.cc/V6TD-USWZ]. He served as Acting Chief Judge from 1992 to 1993. *See id.*

[14] *See generally* Alan J. Pierce, *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*, 73 ALB. L. REV. 765, 765, 767 (2010).

[15] *See id.* at 771.

[16] *See id.* at 772–73.

[17] *See id.* at 767–68, 772–73.

[18] *See id.* at 793–94.

[19] *See id.* at 785.

[20] *See id.* at 773.

- The inconvenience or distance of the judge's chambers oftentimes affects the manner in which an application is heard, in person or remotely.[21]

The foregoing, among other factors, creates a lack of uniformity, both in processing and very likely in the results as well.[22]

II. THE NUMBERS

In a series of studies, Professor Vincent Bonventre of Albany Law School, an expert on the Court of Appeals and former law clerk at the Court of Appeals to Judges Matthew J. Jasen and Stewart F. Hancock, Jr.,[23] has, on several occasions, tracked the frequency of CLA grants and denials and questioned the efficacy and fairness of the current procedure.[24] For example, in 2019, on his *New York Court Watcher* blog,[25] Professor Bonventre reported the findings of his research on the numerical granting of CLA's over the years and lamented the stark disparities among the judges.[26] He noted that CLA decision-making is "inconsistent and inequitable."[27] He explained that, "whether or not a criminal appeal will be granted—i.e., whether the Court of Appeals will ever review a decision of a lower court—depends in large measure on the luck of the draw."[28]

Professor Bonventre then chronicled the disparity in 2018 of as much as 13 to 1 between particular judges in the number of CLAs

---

[21] *See id.*

[22] *See id.* at 801–02.

[23] *Vincent M. Bonventre*, ALBANY L. SCH., https://www.albanylaw.edu/faculty/faculty-directory/vincent-bonventre [https://perma.cc/L79B-HM7X].

[24] *See, e.g.*, Vincent M. Bonventre, *NYCOA: Criminal Appeals (Part 2)—Annual Totals Through the Years*, N.Y. CT. WATCHER (Feb. 14, 2019), http://www.newyorkcourtwatcher.com/2019/02/nycoa-criminal-appeals-part-2-annual.html [https://perma.cc/NC3R-83Q3] [hereinafter *Annual Totals*]. Since 2009, Professor Bonventre has reported his research and provides commentary on CLA grants and denials. *See* Vincent M. Bonventre, *NY Court of Appeals: Granting Criminal Appeals—Up, Down, Now Up Again? (Part 5: When Did the Grants Drop?)*, N.Y. Ct. Watcher (Nov. 30, 2009), http://www.newyorkcourtwatcher.com/2009/11/ny-court-of-appeals-granting-criminal_28.html [https://perma.cc/ESR2-MVPV].

[25] NEW YORK COURT WATCHER, http://www.newyorkcourtwatcher.com [https://perma.cc/S6NX-J2BT].

[26] *See* Vincent M. Bonventre, *NYCOA: Criminal Appeals—Who's Granting & Who's Granting Less*, N.Y. CT. WATCHER (Feb. 12, 2019), http://www.newyorkcourtwatcher.com/2019/02/nycoa-criminal-appeals-whos-granting.html [https://perma.cc/66EB-4T6U] [hereinafter *Who's Granting*]; Bonventre, *Annual Totals*, *supra* note 24.

[27] Bonventre, *Who's Granting*, *supra* note 26.

[28] *Id.*

they had granted.[29] He also found a disparity of approximately 3 to 1 over the past thirty years in the number of CLAs granted by the Court as a whole, depending on the Chief Judge in office at the time.[30] He noted that "[w]hile the raw data does not explain the [disparities] in CLA grants, it does reveal [disparities] so dramatic that it is very hard to believe that it is mere accident and not the result of either a deliberate change in policy or some other significant phenomenon."[31]

III. ONE JUDGE'S ADMITTEDLY FLAWED PROCESS

How the judges handle their assigned CLAs has never, to my knowledge, been discussed or prescribed by the court. I suspect that some judges delegate the task of initially reviewing the stacks of CLAs that arrive in chambers to a law clerk. Because I preferred to review each case myself, I did not do that. Then, after I had finished my lone review, I would schedule a conference with the lawyers. Because of the distance between my home chambers in Buffalo and the offices many of the attorneys, I would usually conduct these conferences over the phone. Having read the submissions and conferenced with the attorneys, I would then make my determination whether to grant or deny the application to appeal. As simple as that process might appear, in my view it is seriously flawed. The following examples illustrate my point.

A. People v. Nature Finch

On December 13, 2012, I granted Nature Finch leave to appeal.[32] He had been convicted in the City Court of Syracuse of two counts of trespass and one count of resisting arrest.[33] His appeal to Onondaga County Court resulted in a reversal of the trespass counts, but an affirmance of the resisting arrest conviction.[34] I had a simple reason for granting leave in this relatively minor case of little consequence

[29] *See id.* (noting that over the same one-year period, one judge had granted thirteen CLAs and two of the judges had granted only one).

[30] *See* Bonventre, *Annual Totals*, *supra* note 24 (examining the number of CLA grants during the tenures of Chief Judges Sol Wachtler, Judith Kaye, Jonathan Lippman, and early Janet DiFiore).

[31] *See* Vincent M. Bonventre, *NY Court of Appeals: Steep Cut in Criminal Cases (Part 2)*, N.Y. CT. WATCHER (May 7, 2018), http://www.newyorkcourtwatcher.com/2018/05/ny-court-of-appeals-steep-cut-in.html [https://perma.cc/5BQZ-Y8NS].

[32] People v. Finch, 982 N.E.2d 621 (N.Y. 2012) (granting leave to appeal).

[33] *See* People v. Finch, 15 N.E.3d 307, 309 (N.Y. 2014).

[34] *See id.*

to the criminal law of New York State or the jurisprudence of the Court of Appeals: I knew both of the appellate attorneys well. They had each appeared before the Appellate Division, Fourth Department on several occasions during my time as a Justice on that court, and they had both acquitted themselves well.

During my CLA conference with the attorneys, a convivial discussion ensued about the book and movie, *To Kill a Mockingbird*, the attorney in that work, Atticus Finch, and any possible relationship between that attorney and Nature Finch, the defendant seeking leave to appeal. I advised counsel that I would look forward to them arguing their case before the full court and granted the CLA in this relatively inconsequential case. My reasons could certainly be termed less than substantial—and certainly not "a question of law which ought to be reviewed by the court of appeals."[35]

On May 13, 2014, in a 4–3 decision authored by Judge Robert Smith, the Court of Appeals actually reversed the county court and dismissed the defendant's remaining resisting arrest conviction.[36] Two of the dissenting judges objected to the fact that the Court even considered the defendant's argument.[37] They insisted that the defendant had not properly raised his claim below and, therefore, had not preserved it for our court's review.[38]

The merits of the respective positions of the majority and two separate dissenting opinions have been cited numerous times in subsequent cases around the state.[39] My point here is that, regardless of the merits of any given case, one judge can impose a whim on the rest of the court, perhaps waste the court's valuable time and resources, and create precedent where none may have been needed.

B. People v. Anthony Oddone

On April 14, 2010, Anthony Oddone was convicted of manslaughter in the first degree and sentenced to twenty-two years in prison.[40] On appeal to the Appellate Division, Second Department, the sentence

[35] *See* N.Y. CRIM. PROC. § 460.20 (McKinney 2021).

[36] *See Finch*, 15 N.E.3d at 310.

[37] *See id.* at 315–16 (Abdus-Salam, J., dissenting); *id.* at 328 (Read, J., dissenting).

[38] *See id.* at 315 (Abdus-Salam, J., dissenting); *id.* at 328 (Read, J., dissenting).

[39] As of January 2022, this case had been cited fifty-five times. *People v. Finch*, WESTLAW, https://1.next.westlaw.com (search in search bar for "15 N.E.3d 307"; then choose "Cases" from the "Citing References" dropdown) [https://perma.cc/UAN4-ULNM].

[40] *See* People v. Oddone, 932 N.Y.S.2d 149, 149 (App. Div. 2011).

was reduced to seventeen years, but otherwise the conviction was affirmed.[41]

The case grew out of an altercation between the defendant, a college student who was home on summer break, and a bouncer at a pub in Suffolk County.[42] During the altercation, the bouncer was seriously injured and, two days later, he died.[43] Following what the Appellate Division described as "a lengthy trial and nine days of deliberation," a jury found the defendant guilty of first degree manslaughter and sentenced him to twenty-two years imprisonment.[44] On appeal, the Appellate Division reduced the sentence by five years, but affirmed the conviction.[45]

The defendant's application for leave to appeal to the Court of Appeals was distributed in accord with the court's normal process.[46] The CLA was then denied by the single judge to whom it was assigned.[47]

However, the case subsequently took an unusual turn. The judge who issued the denial passed away.[48] Thereafter, when the defendant moved for reconsideration of that denial, the motion was randomly assigned to me. Upon my examination of the record and hearing of the attorneys' arguments, I was troubled by a number of issues arising from the very long trial and the nine days of jury deliberation. I decided that I alone should not be making the final decision in this case and so I granted the CLA.[49]

Following briefing by the parties, oral arguments in our courtroom, conferencing and all else that goes into decision-making, the Court of Appeals unanimously reversed the defendant's conviction and ordered a new trial.[50] Ultimately, the defendant pleaded guilty to a lesser charge of manslaughter in return for a sentence of "time served," and was released from custody.[51]

---

[41] *See id.* at 149–50.

[42] *See id.* at 150.

[43] *See id.*

[44] *See id.*

[45] *See id.* at 149–50.

[46] *See supra* Part I.

[47] People v. Oddone, 970 N.E.2d 438, 438 (2012).

[48] *See* Dennis Hevesi, *Theodore T. Jones Jr., Judge on New York's Top Court, Dies at 68*, N.Y. TIMES (Nov. 9, 2012), https://www.nytimes.com/2012/11/10/nyregion/theodore-t-jones-jr-new-york-appeals-court-judge-dies-at-68.html [https://perma.cc/H2N7-6J4V].

[49] People v. Oddone, 988 N.E.2d 536, 536 (2013).

[50] *See* People v. Oddone, 3 N.E.3d 1160, 1166 (2013).

[51] *See* Kathryn G. Menu, *Oddone Sentenced to Time Served*, SAG HARBOR EXPRESS (Mar. 25, 2014), https://sagharborexpress.com/oddone-sentenced-to-time-served/ [https://perma.cc/G96N-5BTU].

Once again, the decision of one judge in denying a CLA would have ended this case. Only an unusual assignment to a second judge, who then granted the CLA, resulted in a reversal. Regardless of the merits of the respective judges' decisions on the defendant's application to the Court of Appeals, our court was once again subjected to a lone judge's decision. Fortunately for the defendant, his application was ultimately granted and his conviction reversed.

C. People v. Racky Ramchair

Defendant Racky Ramchair's journey through the justice system brings into sharp relief the idea that criminal cases are relatively simple and straightforward, such that a one-judge review at the state's highest court is sufficient.

Mr. Ramchair's alleged crimes occurred in April and May of 1995.[52] The first of his three trials on the charges of first and second degree robbery ended in a mistrial.[53] The second did as well.[54] Following his third trial, in April 1997, Ramchair was convicted on both counts[55] and sentenced to ten to twenty years in prison.[56] Thereafter, Ramchair's appeal to the Appellate Division took six years to be resolved.[57] In 2003, that court ultimately affirmed his convictions.[58]

The following September, Ramchair filed a four-page, *pro se*, habeas corpus petition in federal court.[59] He claimed that his counsel was ineffective at the Appellate Division.[60] But the federal court returned the matter to the state courts on the ground that Ramchair had not exhausted his state appellate remedies.[61]

In February of 2007, now twelve years after his first trial and conviction, Ramchair finally received a hearing at New York's highest court.[62] In a brief opinion by yours truly, the Court of

---

[52] Ramchair v. Conway, No. 04 CV 4241 (JG), 2005 U.S. Dist. LEXIS 25852, at *1–2 (E.D.N.Y. Oct. 26, 2005).

[53] *See* People v. Ramchair, 864 N.E.2d 1288, 1289 (N.Y. 2007).

[54] *See id.*

[55] *See* People v. Ramchair, 764 N.Y.S.2d 725, 726 (App. Div. 2003).

[56] *See Conway*, 2005 U.S. Dist. LEXIS 25852, at *21.

[57] *See Ramchair*, 764 N.Y.S.2d at 726.

[58] *See id.*

[59] Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, Ramchair v. Conway, No. 04 CV 4241 (JG), 2005 U.S. Dist. LEXIS 25852 (E.D.N.Y. Oct. 26, 2005).

[60] *See Conway*, 2005 U.S. Dist. LEXIS 25852, at *1.

[61] *See id.* at *54.

[62] *See* People v. Ramchair, 864 N.E.2d 1288 (N.Y. 2007).

Appeals unanimously affirmed the order of the Appellate Division, thereby sustaining Ramchair's convictions.[63]

That was not, the end of the story, however. Ramchair, having now exhausted his state court remedies, returned to federal court. This time, following two more years of litigation on Ramchair's habeas corpus petition, the federal court in 2009 found that "his trial more than 12 years ago was fundamentally unfair."[64] Among the reasons was an improper lineup identification, made worse by ineffective counsel on appeal.[65] The court granted the writ, vacated Ramchair's convictions, and held that he was entitled to a new trial—not simply a new state appeal.[66] That decision was then affirmed by the Second Circuit Court of Appeals the next year.[67]

A few months later, that same year, the State elected not to retry Mr. Ramchair, the charges against him were dismissed, and he was released.[68] Ramchair's saga demonstrates how complicated and difficult criminal appeals can be.

IV. A FINAL THOUGHT

It seems clear to me, based on my ten years of experience on the Court of Appeals, with the foregoing being just a few examples of the cases that came before this one judge, that the Court should seriously consider the recommendation of nearly every interested party, commission, and association that has studied the procedure for CLAs. Applications seeking an appeal in criminal cases should be treated with the same degree of collective-court deliberation as motions for leave to appeal in civil cases.

Recently, the Courts of New York, recognizing the "solemn obligation to take a leadership role in addressing . . . [t]he existence or even the perception of bias or racism anywhere in our [court system]," commissioned a study of policies and practices of the state's courts regarding issues of racial bias and fairness.[69] Following that study, the commission made a number of findings and proposals,

[63] *See id.* at 1290–91.

[64] *See* Ramchair v. Conway, 671 F. Supp. 2d 371, 374 (E.D.N.Y. 2009).

[65] *See id.* at 374, 381.

[66] *See id.* at 386.

[67] Ramchair v. Conway, 601 F.3d 66, 78 (2d Cir. 2010).

[68] *See* Ramchair v. Conway, 725 F. Supp. 2d 361, 362 (E.D.N.Y. 2010).

[69] *See Letter from Janet DiFiore, Chief Judge of the State of New York* (Oct. 29, 2020), https://nycourts.gov/whatsnew/pdf/JDFletter-jehjohnson.pdf [https://perma.cc/QFW5-5NS9].

noting that "[t]he sad picture that emerges is, in effect, a second-class system of justice for people of color in New York State."[70]

Not addressed by the study was the issue which is the subject of this article. Nevertheless, it cannot be lost on anyone familiar with the Court of Appeals' CLA process, that the difference in procedures for seeking and receiving an appeal in the state's highest court between civil and criminal cases inevitably impacts criminal litigants, disproportionately poor and persons of color, much more than civil litigants. Justice calls for change. As attorney Alan J. Pierce wrote in this law review in 2010: "*[i]f the system is not working[,] let's fix it[!]*"[71]

[70] *See* JEH C. JOHNSON, REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN THE NEW YORK STATE COURTS 2–4 (2020), https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf [https://perma.cc/CE6W-22AA].

[71] *See* Pierce, *supra* note 14, at 765 (emphasis added).