Crafting Criminal Leave Applications:
An Update

By: Mark M. Baker *

Just over a year ago, on June 21, 1999, there was published in this column an article which I authored containing suggestions for the appellate practitioner as to how best to exhaust, for federal *habeas corpus* purposes,[1] preserved federal constitutional issues in the state record that would not otherwise be the main subject of a criminal leave application ("CLA") before the New York Court of Appeals.[2] Recent federal appellate decisions in this area have dramatically impacted upon the concepts earlier discussed.

The central premise of the earlier article was that in seeking to make a CLA as "leave-worthy" as possible, the practitioner should only raise those issues that would have a chance of inviting the attention of the Court of Appeals Judge assigned to the application. Thus, one should not further "dilute" the already slim likelihood of a grant by emphasizing other issues, which, though meritorious, would not in and of themselves capture the assigned judge's interest. The explanation for such circumspection was that, at best, a CLA has a less than 2% statistical chance of success.

A noted countervailing concern, however, was the daunting rule that before a federal court may even consider an otherwise cognizable, and procedurally preserved,[3] constitutional issue on the merits, there had to have been an exhaustion of state

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[1] 28 U.S.C. 2254.

[2] CPL 460.20.

[3] CPL 470.05(2).

remedies with respect to that issue.[4] That means that the constitutional question raised needed to have been "fairly presented" to New York's highest court.[5] Thus, I cautioned that what might be a sound strategy for purposes of preparing a CLA, would, on the other hand, virtually guarantee the denial of any future federal *habeas corpus* application on grounds of failure of exhaustion. As then explained: "The fact is that the best CLA strategy may turn out to have been the worst, as far as federal review of that state conviction is concerned."

In navigating the conflicting needs between these two concepts, I discussed certain decisions of the United States Court of Appeals for the Second Circuit.[6] Observing the differing results in that Court with respect to the exhaustion of state remedies in the highest Court of New York, I suggested that,

> [t]hese precedents instruct that if there is included in the CLA a footnote referencing other potential issues, or a separate section, perhaps entitled "Additional Issues to Be Raised If Leave is Granted," the assigned Judge will be well advised that those questions are not meant, by any means, to be the linchpin of the application, thereby -- hopefully -- not "diluting" an otherwise strong issue with a "weaker" one. On the other hand, following the virtually inevitable denial of the CLA, it can be fairly and comfortably urged in federal court that, at least the state had been placed on notice for purposes of the exhaustion requirement [footnote omitted].

Following the publication of the article, I received numerous letters containing questions raised by, and comments directed at the thoughts which I had expressed. I sought to respond to each of the correspondents. Interestingly, these letters were not only from practitioners,

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[4] 28 U.S.C. 2254 (b)(1)(A) & (c).

[5] O'Sullivan v. Boerkel, 526 U.S. 838, 119 S.Ct. 1728 (1999); Picard v. Connor, 404 U.S. 270, 275 (1971); see also, Jones v. Vacco, 126 F.3d 408, 413-414 (2d Cir. 1997); Dorsey v. Kelley, 112 F.3d 50, 52, n. 1 (2d Cir. 1997), citing Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990) (per curiam); Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991).

[6] See Grey v. Hoke. 933 F.2d 117 (2d Cir. 1991); Levine v. Commissioner of Correctional Services, Jones v. Vacco, 126 F.3d 408, 413-14 (2d Cir. 1997) and Harper v. Kelly, 704 F.Supp 375, 377-78 (S.D.N.Y. 1989), rev'd on other grounds, 916 F.2d 54 (2d Cir. 1990), cert. denied, 499 U.S. 943 (1991).

but, in large measure, from incarcerated persons across the state who ostensibly read the New York Law Journal on a rather religious basis.

In view of the interest and, indeed, confusion among professional and *pro se* litigants concerning this subject matter, two contrasting decisions of the Second Circuit which have been rendered in the past several months, and which strongly impact upon my original discussion, impel this sequel. My present purpose, therefore, is to go beyond what were then only educated suggestions, and demonstrate precisely how the United States Court of Appeals for this Circuit recently has disposed of these very concerns.

Morgan v. Bennett[7]

On February 28, 2000, in Morgan v. Bennett, the Second Circuit elaborately addressed the question of whether there had been an earlier exhaustion of state remedies of a specific federal constitutional issue which was raised in that *habeas corpus* proceeding. The Petitioner in Morgan essentially claimed two constitutional errors: a) issues relating to the infringement of his Sixth Amendment right to counsel, and b) the abridgment of his Sixth Amendment right to confrontation. The District Court had ruled against Morgan on the merits as to the right to counsel claims, and, relying in part on Grey v. Hoke,[8] had found that the confrontation claim was procedurally barred due to failure to exhaust state remedies.[9]

On appeal, the Court of Appeals first upheld the denial of the petition on the right to counsel issues.[10] However, with respect to the District Court's finding that the confrontation claim

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[7] 204 F.3d 360 (2d Cir. 2000).

[8] 933 F.2d 117, 119 (2d Cir. 1991).

[9] 1998 WL 315135 (E.D.N.Y.).

[10] 204 F.3d at 365-368.

had not been exhausted, the Court of Appeals disagreed. In the Second Circuit's view, the issue clearly had been exhausted in the New York Court of Appeals, and hence, that aspect of the petition was remanded to the District Court to consider the issue on the merits.

En route to it holding, the Second Circuit initially traced the rules for CLA's in the New York Court of Appeals. Specifically, the Court advised that in New York, a defendant who desires to pursue an appeal of the affirmance of his conviction by an intermediate appellate court may seek review by applying to the Court of Appeals for a certificate granting leave to appeal.[11] It was noted that under New York Court of Appeals rules, the initial application is to be sent to the Chief Judge, who then assigns the application to a particular judge.[12] The defendant or counsel is then advised, in a letter by the Clerk of the Court, of the judge who has been assigned to the application, with "supplemental" arguments, if any, invited to be sent directly to that designated judge.

In Morgan, the petitioner originally had appealed his conviction to the Appellate Division, asserting contentions in a brief filed by his attorney and in a supplemental brief filed *pro se*. The *pro se* brief included arguments, in addition to the deprivation of counsel claims, that the trial court had improperly precluded Morgan from impeaching a prosecutorial witness, in violation of his confrontation rights. After the Appellate Division affirmed, Morgan sought leave to appeal to the New York Court of Appeals. In an initial letter from his attorney to the Chief Judge, the following was included:

> "I am enclosing copies of the briefs filed in the Appellate Division and that Court's order and opinion. Please advise me of the judge designated to decide this application so that I may send that judge a follow-up letter in support of the

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[11] 104 F.3d at 369, citing CPL § 460.20.

[12] See 22 N.Y.C.R.R. § 500.10.

application. **We request this Court to consider and review all issues outlined in defendant-appellant's brief and pro se supplemental brief."**[13]

Thereafter, in the "supplemental" letter to the assigned judge, defense counsel only concentrated on issues relating to the right to counsel, even emphasizing a particular Point in the *pro se* brief that was specifically effected by a recent decision of the New York Court of appeals, and which thereby mandated a new trial. As noted, the District Court accepted the state's argument that this scenario amounted to a failure to exhaust the separate confrontation issue in New York's highest court, stating that the supplemental "letter, however, specifically addressed only two of petitioner's claims in a way that clearly suggested that these were the only issues on which leave was sought."[14]

Disagreeing and finding in favor of exhaustion, the Second Circuit stated:

> First, the present case differs significantly from Grey v. Hoke, in which the request for leave to appeal was made in a letter that mentioned one issue but did not mention two others as to which habeas relief was eventually sought. In the present case, in contrast, Morgan's initial letter to the Court of Appeals expressly "request [ed] this Court to consider and review all issues outlined in defendant-appellant's brief and pro se supplemental brief" submitted to the Appellate Division...That statement was sufficiently specific to alert the Court of Appeals that Morgan sought review of all of the issues raised in his pro se supplemental Appellate Division brief.
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> Second, we do not think it appropriate to infer that the New York Court of Appeals would construe counsel's second letter as eliminating issues as to which review had been expressly requested. The reference in the Court Clerk's Letter to "supplemental" arguments appears to indicate that follow-up letters would be considered in addition to, not in lieu of or as a limitation on, the issues raised in counsel's initial letter.
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> Finally, we think the substance of the second letter's reference to Point I G of the pro se brief made clear that that reference was meant simply as a supplement. In referring to that point, the letter simply called the Court's attention to a case that had been decided by the Court of Appeals "[a]fter appellant filed his pro se brief"...and stated it was Morgan's contention that reversal was required by that new case.

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[13] 204 F.3d at 369-70. Emphasis added by the Court of Appeals.

[14] 204 F.3d at 370, quoting 1998 WL 315135, at 8.

> Because counsel's initial letter expressly sought review of "all issues outlined in defendant-appellant's ... pro se supplemental brief"..., we conclude that Morgan fairly presented to the Court of Appeals the present confrontation claim, which was argued in his pro se supplemental brief, and thus satisfied the exhaustion requirement.[15]

Jordan v. Lefevre[16]

Less than three weeks later, on March 17, 2000, the Second Circuit handed down a decidedly contrasting decision in Jordan v. Lefevre. In that case, Petitioner Jordan raised several issues in his *habeas corpus* application, including a Batson[17] claim concerning the alleged prosecutorial bias in jury selection, lack of probable cause for his arrest, denial of a fair trial based on prejudicial judicial comments during *voir dire*, and the alleged coercion of the verdict.[18] The District Court had rejected all but the Batson claim as procedurally barred, based on the failure of Jordan to have exhausted his state remedies.[19]

Although the Second Circuit reversed, and granted the writ on Batson grounds, it agreed with the District Court that the additional claims had not been exhausted, based on its holding in Grey v. Hoke.[20] As it explained:

> In this case, Jordan forcefully argued his Batson claim in the first three paragraphs of his application for leave, but made no reference to his other claims. In the fourth paragraph of his counsel's letter to the New York Court of Appeals he asked that he be given permission to appeal "[f]or all of these reasons and the reasons set forth in his Appellate Division briefs." **Arguing a single claim at length and making only passing reference to possible other claims to be found in the attached briefs does**

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[15] 204 F.3d at 370-71

[16] 206 F.3d 196 (2d Cir. 2000).

[17] Batson v. Kentucky, 476 U.S. 79 (1986).

[18] 206 F.3d at 198.

[19] 22 F.Supp. 2d 259 (S.D.N.Y. 1998).

[20] 933 F.2d 117 (2d Cir. 1991).

> **not fairly apprise the state court of those remaining claims**. See Grey, 933 F.2d at 120. We conclude, as did the district court, that arguing one claim in his letter while attaching an appellate brief **without explicitly alerting the state court to each claim raised** does not fairly present such claims for purposes of the exhaustion requirement underlying federal habeas jurisdiction. Petitioner's counsel has the obligation to set out these arguments. Counsel may not transfer to the state courts the duty to comb through an applicant's appellate brief to seek and find arguments not expressly pointed out in the application for leave. Had appellant more clearly stated that he was pressing **all of the claims raised in the attached brief**, or had his letter made no argument in detail but rather only " 'request[ed that the Court of Appeals] consider and review all issues outlined in defendant-appellant's brief,' " the result here would be different and the remaining claims would have been fairly presented to the Court of Appeals. Morgan v. Bennett, 204 F.3d 360, 370-71 (2d Cir.2000).[21]

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The differing results in Morgan and Jordan are striking. While Petitioner Morgan highlighted only one issue in his later "supplemental" letter, he nevertheless earlier had advised the New York Court of Appeals that he wanted the Court to consider **all the issues** raised in his principal and *pro se* briefs before the Appellate Division, which then accompanied his initial application. This was found to constitute sufficient exhaustion of state remedies of all such issues for purposes of obtaining federal *habeas corpus* review on the merits.

In sharp contrast, Petitioner Jordan, while also addressing only one contention in his application to the New York Court of Appeals, never made reference to the other **issues**, other than ambiguously stating that "[f]or all of these reasons and the reasons set forth in his Appellate Division briefs," leave should be granted. That was insufficient. Yet, it appears that had he employed the term "all other issues" in his application, rather than vaguely citing other "reasons," the exhaustion doctrine would have been satisfied, even though he dwelt at length on the Batson claim alone.[22]

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[21] 206 F.3d at 198-199. Emphasis added.

[22] Compare Cowan v. Artuz, 96 F. Supp. 298, 306 (S.D.N.Y. 2000) (Petitioner's requesting in CLA to the Chief Judge to "consider issues one through five inclusive of the Appellant's brief" held to be sufficient exhaustion) to Mendez v. Artuz, 2000 WL 722613, *23-*26 (S.D.N.Y. 2000)

Conclusion

To be safe, in formulating the initial CLA to the Chief Judge, the *pro se* applicant or practitioner should always ask the New York Court of Appeals to consider **all issues** raised in the necessarily accompanying briefs to the intermediate appellate court. Thereafter, in a so designated "supplemental" letter to the assigned judge, the application may comfortably emphasize one main issue, without fear of forfeiting exhaustion as to the other claims included in the earlier briefs. On the other hand, emphasizing one issue, and merely referencing those additional **reasons** included in the earlier briefs will be insufficient for purposes of satisfying the exhaustion requirement.[23]

To be sure, the distinction in terms between "all issues" and "all reasons" may seem trivial. Yet, the Second Circuit has spoken and it now appears that for purposes of winning federal review on the merits, such an exaltation of linguistic form may very well amount to the all crucial difference between continued incarceration and freedom, not to mention effective representation and gross malpractice -- daunting distinctions, indeed.

(Petitioner's stating in CLA that "I am writing to supplement appellate briefs," without specifically mentioning subject issue later in contention in *habeas corpus* application, held not to constitute exhaustion, based on a comparison of Morgan to Jordan).

[23] Of course, the applicant is not required to emphasize any one issue, since the exhaustion requirement will be satisfied as long as some pointed reference is made to "all issues earlier raised in the intermediate appellate court briefs" in either the initial letter to the Chief Judge or the supplemental letter to the judge designated to hear the application. However, given the slim statistical chances for success of a CLA in the first instance, such a strategy of non-elaboration would amount to the sacrificing of any practical chance for winning leave to appeal to the New York Court of Appeals on the alter of hope for later attaining federal *habeas corpus* review.