Exhausting State Remedies In Criminal Leave Applications:

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Consider the following scenario: Your client's judgment of conviction has just been unanimously affirmed in one of the four Departments of the Appellate Division (which occurs in about 95% of appeals taken as a matter of right to such intermediate appellate courts). As an experienced New York appellate attorney, you are undoubtedly well aware that there is only a 1.9% chance that a judge of the New York Court of Appeals will grant leave for further appeal to the state's highest court.[1]

Mindful of such a daunting statistic, you carefully tailor your criminal leave application ("CLA") so as to include only those issues that "involve[] a question of law which ought to be reviewed by the Court of Appeals,"[2] and thereby seek to separate the wheat from the chaff by not raising other substantive -- albeit, meritorious -- issues that have been previously addressed by the Court. Nonetheless, your CLA ultimately falls into that 98.1% of unsuccessful applications, and your client is denied permission for a further appeal. Unfortunately, that is not all that will have been lost.

The purpose of this article is to caution appellate counsel that by playing according to the time-honored rule noted above, and thereby only raising novel issues in the CLA, you will have precluded your client from seeking any further avenues of relief in the federal courts, arising out of state violations of federal constitutional rights, by way of a

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[1] According to the 1998 Annual Report of the Court of Appeals, of the 2982 CPL 460.20(2)(a)(i) Criminal Leave Applications decided by the seven judges of the Court in that year, there were 57 grants, averaging 9 per judge. (These statistics do not reflect those determinations by Justices of the Appellate Divisions, acting on applications pursuant to CPL 460.20[2][a][ii].)

[2] CPL 460.20(1).

petition for a writ of *habeas corpus*.[3] Ironically, as a direct consequence of having made the CLA as "leave-worthy" as possible, by limiting the issues sought to be reviewed in the New York Court of Appeals, you will assuredly have forfeited your client's ability to litigate additional, and otherwise well-preserved questions of federal constitutional significance, even though they would not necessarily have been the kind that would have captured the imagination of a Court of Appeals judge reviewing the merits of a CLA.[4]

I. The Successful Criminal Leave Application

At first blush, it would appear that the best -- if not the only -- chance for success in a CLA, is to call your assigned Judge's attention to a single novel or otherwise severely contentious issue that ought to be reviewed by the full Court.[5] As a former member of the Court of Appeals has observed,

> The probability of a grant will be enhanced if it can be shown that there is conflict between the intermediate appellate courts of New York that have passed on the issue, or that though New York intermediate courts have not

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[3] 28 U.S.C. 2254.

[4] This discussion presupposes that there has been no procedural default, and, hence, that all issues have been properly preserved in state court. See, e.g., Reyes v. Keane, 118 F.3d 136, 138 (2d Cir. 1997) ("A State prisoner who fails to object...in accordance with state procedural rules procedurally forfeits that argument on federal habeas corpus review"). See also, CPL 470.05(2).

[5] There is no "judge shopping" in seeking leave to appeal directly from the Court of Appeals pursuant to CPL 460.20(2)(a)(i). By statute (CPL 460.20[3][b]), the Chief Judge, upon receipt of the CLA which is directed to the Clerk of the Court, randomly designates one of the seven judges to entertain the application. On the other hand, when the application is made to a Justice of the Appellate Division pursuant to CPL 460.20(2)(a)(ii), the applicant chooses a desired judge. Practically, a wise practitioner would only travel this latter route in the event a Justice has dissented from the Appellate Division majority's affirmance. Even then, however, there is no guarantee that the chosen Justice will grant the application. Nonetheless, given the severely tenuous chances for success before a judge of the Court of Appeals, it would seem more prudent to pursue this latter avenue of relief in the event of a thoughtful dissent in the Appellate Division.

> passed on it or have been unanimous in their conclusion, the Court of Appeals has not reviewed it and the result below is in conflict with the law on the point as declared by appellate courts of other states or of the federal system. Likewise it will be greatly increased if you can point to another case involving the same point in which leave has already been granted...[footnote omitted].[6]

In this effort, according to former Associate Judge Bernard S. Meyer, it would be much wiser to omit issues from your CLA which do not fit within that category. As Judge Meyer sees it, "...the probability of a grant with respect to a strong point may be diluted if it is presented together with a number of weaker points."[7]

Judge Meyer's position is undoubtedly informed by the comfort level resulting from the fact that "...argument of the appeal if leave is granted is not limited to the point or points mentioned in the application..."[8] According to this school of thought, the practitioner need not raise non "leave-worthy" issues in the CLA since, in the event leave is granted, they can still be litigated before the full Court. That is because "[u]pon an appeal to the court of appeals from an order of an intermediate appellate court affirming a judgment, sentence or order of a criminal court, the court of appeals may consider and determine not only questions of law which were raised or considered on appeal to the intermediate appellate court, but also any question of law involving alleged error or defect in the criminal court proceedings resulting in the original criminal court judgment, sentence or order, *regardless of whether such question was raised, considered or determined upon the appeal to the intermediate*

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[6] Criminal Leave Applications: The Defense Point of View, Bernard S. Meyer, The Defender, Spring, 1987, p. 70.

[7] Id. at p. 69.

[8] Id.

appellate court."[9]

This advice is certainly well-taken, insofar as a case would not contain any cognizable issues of federal constitutional significance. On the other hand, in the event federal issues are indeed extant, such a rule of thumb becomes rather short-sighted in that it is unrealistically "grant"-oriented. It simply does not contemplate the reality that leave for a further appeal to the Court of Appeals will most likely **not** be granted, and will in fact be denied. So, what happens then -- viz., when only leave-worthy issues are raised in the CLA, and leave is denied? If the next logical step -- as it would normally be -- is a petition for a writ of *habeas corpus* in the appropriate United States District Court with respect to preserved federal constitutional issues, then, hold on: you may have a slight problem. *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*.

II. Federal *Habeas Corpus*: Exhaustion of State Remedies

Succinctly stated, before the federal courts can even entertain an otherwise cognizable, and procedurally preserved,[10] constitutional issue on the merits, there has to have been an exhaustion of state remedies with respect to that issue.[11] Practically, what this means is that the controlling constitutional question needs to have been "fairly presented" to the

[9] CPL 470.35(1); emphasis added.

[10] CPL 470.05(2).

[11] 28 U.S.C. 2254 (b)(1)(A) & (c).

Court of Appeals, New York's highest court.[12]

Otherwise stated, a *habeas corpus* petitioner needs to have "informed the state court [of last resort] of both the factual and the legal premises of the claims he asserts in federal court."[13] In this regard, it must be demonstrated that "the nature of presentation of the claim [was]... likely to alert the [state's highest] court to the claim's federal nature."[14]

To be sure, the exhaustion doctrine is not to be read in an illogical and fastidious manner, amounting to "chapter and verse."[15] Nevertheless, there need be **some** mention of the contemplated federal issues to a judge of the New York Court of Appeals so that it can be later validly claimed that this state's highest court was at least put on notice of, and thereby afforded the opportunity to rectify, the purported federal constitutional defect.[16]

But, here is the rub: If the time-honored advice for a successful CLA is followed, and the "weaker" issues have indeed been omitted so as not to "dilute" the strength of those that are more "leave-worthy," *then there has been no exhaustion of state remedies*

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[12] 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).

[13] Daye v. Attorney General, 696 F.2d 186, 191 (2d Cir. 1982) (en banc).

[14] Id., at 192.

[15] Id., at 194.

[16] Where claims have not been actually exhausted, yet are no longer capable of being raised in state court (e.g., a second CLA is not allowed, and collateral review as to that issue, by way of a motion to vacate judgment, is precluded by CPL 440.10[2][c]), they are "deemed exhausted." In that event, a *habeas* petitioner must show "cause" for the failure to have raised the issue in state court and "prejudice" resulting from the alleged defect. See, Bossett v. Walker, 41 F.3d 825, 828-829 (2d Cir. 1994), cert. denied, 514 U.S. 1054 (1995); Grey v. Hoke, 933 F.2d 117, 120-121 (2d Cir. 1991), citing Wainwright v. Sykes, 433 U.S. 72 (1977).

of such additional issues. That is not an insignificant problem.

Notably, just because an issue may be "weaker" for purposes of "leave-worthiness," does not mean it is weak on its merits, and hence, not worthy of later *habeas* review. Rather, the subject issue may be of a nature and type that the New York Court of Appeals has considered many times, thereby precluding the chances of leave being granted within that 1.9%, yet, it remains compelling on its merits.[17] However, if it was not raised in the CLA, it cannot be raised in the federal petition, at pains of tainting an otherwise meritorious application with an unexhausted issue, thereby requiring the entire *habeas* petition to be dismissed.[18]

III. Demonstrating Exhaustion, While Not Sacrificing "Leave-Worthiness"

Recent experience has suggested that there is a method of approach which at least tends to reconcile these seemingly incompatible, if not overtly conflicting strategies. Indeed, it is one thing to simply articulate an issue in passing, so as to exhaust it; it is wholly another to predicate the thrust of the CLA upon it, thereby causing it to become a "diluter" of an otherwise "leave-worthy" application.

As noted, case law suggests that mere passing references will suffice to satisfy

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[17] See, e.g., Jones v. Vacco, 126 F.3d 408 (2d Cir. 1997) (issue of the ban on a defendant's contact with his attorney during a portion of trial held to be worthy of *habeas* relief, despite its not having been a novel question when earlier presented to the New York Court of Appeals in a CLA).

[18] See, Rose v. Lundy, 455 U.S. 509(1982), holding that a mixed *habeas corpus* petition, containing both exhausted and unexhausted claims, must be dismissed without prejudice. In the event of such a dismissal without prejudice, the Petitioner has the option of either returning to state court in order to litigate the unexhausted claims (in New York, perhaps in a CPL 440.10 motion to vacate judgment), or amending the petition by deleting the unexhausted claims.

the exhaustion requirement.[19] To appreciate this concept fully, consider Grey v. Hoke.[20] There, although that petitioner had attached his Appellate Division Brief, containing prosecutorial misconduct and improper sentencing issues, to his letter application to the New York Court of Appeals, he never made any further reference to those claims in the course of his application. Under those circumstances, the Second Circuit concluded that,

> [t]he fair import of petitioner's submission to the [New York] Court of Appeals, consisting of his brief to the Appellate Division that raised three claims and a letter to the Court of Appeals arguing only one of them, was that the other two had been abandoned. The only possible indication that the other two claims were being pressed was the inclusion of a lengthy brief originally submitted to another court. This did not fairly apprise the court of the two claims. We decline to presume that the New York Court of Appeals has "a duty to look for a needle in a paper haystack."...[citations omitted] ("Federal judges will not presume that state judges are clairvoyant."). For a federal court to hold that a state court had the opportunity to rule on a constitutional claim as to which no ruling was requested, and then to rule on the merits of the claim itself, would undermine the very considerations of comity that the rules of exhaustion were designed to protect....[citation omitted].[21]

In a similar vein, the case of Levine v. Commissioner of Correctional Services,[22] is instructive. There, not until submitting a "reply" letter did that petitioner first "...pick up on the double jeopardy theme..."[23] before the New York Court of Appeals. Under

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[19] Compare, 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) to Grey v. Hoke, 933 F.2d 117, 119-120 (2d Cir. 1991) and Levine v. Commissioner of Correctional Services, 44 F.3d 121, 124-125 (2d Cir. 1995), cert denied, 117 S.Ct. 1112 (1997).

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

[21] 933 F.2d at 120.

[22] 44 F.3d 121 (2d Cir. 1995), cert denied, 117 S.Ct. 1112 (1997).

[23] 44 F.3d at 125.

such circumstances, the Second Circuit determined that,

> ...there is no provision for a "reply" from Levine to the state's "responsive communications." Levine's reply letter was therefore a creature of his own making. Furthermore, all materials from Levine had to be mailed by January 26, 1993. Levine's reply letter was dated February 8, 1993. Accordingly, the double jeopardy claim was not fairly presented to the Court of Appeals, and we affirm the district court's dismissal of the habeas petition on exhaustion grounds.[24]

Contrastingly, in Jones v. Vacco,[25] there was a mere reference to the deprivation of "constitutional right to counsel," amidst citations to relevant case law and elaboration upon oral argument. That was held to be sufficient to defeat the state's lack of exhaustion contention, even though that petitioner's CLA had referred only to the "overnight" ban on consultation with counsel, and not to the entire four-day ban which was the specific subject of the later *habeas corpus* petition. Likewise, in Harper v. Kelly,[26] there was a reference to the Fourteenth Amendment in that petitioner's Appellate Division brief involving two issues. Thereafter, those issues were included in the brief submitted with the CLA to the New York Court of Appeals. That mere passing reference was held sufficiently exhaustive of state remedies, even though the CLA only "highlighted" one of the claims.

These 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

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[24] Id.

[25] 126 F.3d 408, 413-14 (2d Cir. 1997).

[26] 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).

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.[27]

IV. Conclusion

There are certainly no guarantees in Criminal Leave practice in the New York Court of Appeals, given the 1.9% success rate, that the very mention of additional issues to be raised will not impel the assigned judge to reject the application outright. To be sure, that busy judge may be disinclined to saddle the full Court with the task of addressing a host of non-"leave worthy" issues, even if the application does indeed present at least one question that deserves to be reviewed by the state's highest court.

On the other hand, if any of those non-"leave-worthy" issues are left unmentioned, and thereby unexhausted, absent a showing of "cause" and "prejudice,"[28] they will certainly need to be omitted from any later *habeas corpus* application as well, at pains of ensuring an outright dismissal of the proceeding in its entirety.[29] So, **at a minimum**, appellate counsel should make a passing reference to such additional issues in the CLA,

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[27] See, e.g., Peter Lee v. Glenn S. Goord, et. al., Civ. 98-1925 (TCP) (E.D.N.Y., December 16, 1998) (accepting argument that there had been exhaustion of state remedies based on reference to subject issue in a footnote in the CLA).

[28] See, n. 16, *ante*.

[29] Rose v. Lundy, 455 U.S. 509(1982).

without "highlighting" them.[30] After all, with a 1.9% chance from the gate, counsel will at least set the stage for federal court, while not really forfeiting anything in New York which would have been otherwise truly attainable.[31]

[30] 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).

[31] On June 7, 1999, the United States Supreme Court reaffirmed the rule articulated herein that before the exhaustion requirement can be satisfied, cognizable federal constitutional claims must be presented to the highest court of a state, even where the likelihood that such court will except review is minimal. Thus, in O'Sullivan v. Boerkel, __U.S.__, 1999 WL 358692 (97-2048), the Court, in a 6-3 decision, concluded that even though there is no absolute right to review by a state's highest court, where there is at least a right to seek such review, "...state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate process."