The New York State Court of Appeals
Criminal Leave Application Practice Outline

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Criminal Leave Application Practice Outline -- Index

The rules of all four Departments of the Appellate Division require assigned or retained defense counsel in that court to advise defendants of their right to appeal, and to timely file an application for leave to appeal to the Court of Appeals in the event of the intermediate appellate court's affirmance or modification of the defendant's conviction, if the defendant requests that such application be made. Thus, even intermediate appellate court counsel having no intention of pursuing an appeal to this Court must be familiar with the procedure for timely filing a Criminal Leave Application, as it is part of that counsel's representation responsibilities.

The best place to start for anyone not experienced in this area is by reading the applicable statutes and rules. Fortunately, in the area of Criminal Leave Applications to Judges of this Court, this is not a daunting task -- the relevant sections of articles 450 and 460 of the Criminal Procedure Law (CPL) and Rule 500.20 of the Court of Appeals Rules of Practice can be read and re-read in just a few minutes. A few other sources that may be helpful are Meyer, The Defense Point of View, The Defender, Spring 1987, p 27; 25 Ostertag and Benson, General Practice in New York, §§ 39.37 - 39.57; and Karger, Powers of the New York Court of Appeals §§ 20:1 - 21:18 (3d ed rev).

The outline below is designed to summarize the above statutes and rule and other pertinent provisions and serve as a convenient reference. In the event of any conflict between the text of an applicable Court rule or Court decision and a statement in this outline, the rule or decision controls. The information in this outline is intended only as a research guide, and is not a substitute for professional advice or individual legal research.

I. Necessity for criminal leave application

No appeal currently lies as of right in criminal cases. CPL 450.70 and CPL 450.80 provide for appeals as of right in cases involving the death penalty. However, in People v LaValle, 3 NY3d 88 (2004), the Court of Appeals held the death penalty sentencing statute unconstitutional, and in People v Taylor, 9 NY3d 129, 155 (2007), the Court stated unequivocally, "the death penalty sentencing statute is unconstitutional on its face." Thus, at present, all appeals to the Court of Appeals in criminal cases must be from an order of an intermediate appellate court and must be by permission (see CPL 450.90).

II. Definition of criminal case

CPL 1.20(16) defines a criminal action as an action that "commences with the filing of an accusatory instrument against a defendant in a criminal court," and CPL 1.20(18) defines a criminal proceeding as "any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action." As a general rule, we are talking about cases with a "People v _____" caption.

Some cases using "People v _____" captions are not criminal cases and are governed by the civil appeal provisions of the CPLR. Examples of these are:

(1) appeals pursuant to CPL 330.20(21)(c) (commitment order);

(2) proceedings for remission of forfeiture of bail (see CPL article 540; People v Public Serv. Mut. Ins. Co. [Robinson], 37 NY2d 607, 610 [1975]);

(3) appeals of orders determining level of notification under the Sex Offender Registration Act (see Correction Law § 168-d[3]).

Additionally, criminal actions and/or proceedings under the CPL do not include "quasi-criminal" proceedings which are also governed by the civil appeal provisions of the CPLR. Examples of these are:

(1) habeas corpus (People ex rel. _____)(art 70 of the CPLR); and

(2) CPLR article 78 proceedings to review prison disciplinary determinations, parole determinations, etc., or to compel or prohibit a judge or prosecutor from taking some action within a criminal action.

III. Orders appealable

A. CPL 450.90(1)

CPL 450.90(1) specifies some of the orders from which a criminal leave application may be made. Provided that a certificate granting leave to appeal is issued, an appeal may be taken to the Court of Appeals:

(1) from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court

pursuant to CPL 450.10 (appeal as of right to intermediate appellate court by defendant), 450.15 (appeal to intermediate appellate court by defendant by permission [see People v Jones, 24 NY3d 623, 633-634 [2014] [defendant granted leave to appeal to intermediate appellate court from denial of CPL 440.10 motion]), or 450.20 (appeal as of right to intermediate appellate court by the People);

(2) from an order granting or denying a motion to set aside an order of an intermediate appellate court on the ground of ineffective assistance or wrongful deprivation of appellate counsel; and

(3) from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court from an order entered pursuant to CPL 440.46 (motion for resentence; certain controlled substance offenders).

It is important to note, however, that subdivision (3) above does not make all orders disposing of controlled substance resentencing applications appealable (see People v Bautista, 7 NY3d 838 [2006] [denial of defendant's motion to be resentenced pursuant to the Drug Law Reform Act of 2005 not appealable to the Court of Appeals]; People v Sevencan, 12 NY3d 388 [2009] [order informing defendant of the resentence to be imposed under the Drug Law Reform Act of 2004 not appealable to the Court of Appeals]).

B. **Intermediate appellate court order dismissing appeal**

CPL 470.60 allows for an appeal from an order of an intermediate appellate court dismissing an appeal thereto (see CPL 470.60[3]). Such an appeal may be based either upon the ground that the dismissal was invalid as a matter of law or upon the ground that the dismissal constituted an abuse of discretion.

C. **Intermediate appellate court 460.30 order**

An order of an intermediate appellate court granting or denying a motion for an extension of time under CPL 460.30 is appealable to the Court of Appeals if the order states that the determination was made on the law alone (see CPL 460.30[6]).

IV. Orders not appealable - examples

Appeals in criminal cases are strictly limited by the Criminal Procedure Law.

Absent a statutory provision authorizing an appeal to the Court of Appeals, a Judge of the Court cannot grant leave to appeal. Applications for leave to appeal from non-appealable orders are dismissed.

Some examples of orders that are not appealable to the Court of Appeals:

(1) an order of single judge or justice of an intermediate appellate court denying leave to appeal from an order of a trial-level court denying a motion pursuant to CPL article 440 (see People v Grossman, 87 NY2d 1003 [1996]; People v Corso, 85 NY2d 883 [1995]). However, when a judge or justice of the intermediate appellate court grants leave to appeal from a trial court order denying a CPL article 440 motion (see CPL 450.15, 460.15), the order of the intermediate appellate court deciding the appeal from the denial of the CPL article 440 motion is appealable to the Court of Appeals, provided a certificate granting leave to appeal is issued (see People v Jones, 24 NY3d 623, 633-634 [2014]);

(2) an order denying a motion for reargument or renewal;

(3) an order denying a motion for poor person relief, the assignment of counsel, or other ancillary relief.

V. Limitations

A. Order not adverse or partially adverse

Generally, the intermediate order of the appellate court must be adverse or partially adverse to the appellant for a criminal leave application to properly lie.

An intermediate appellate court order of affirmance is adverse to the party who was appellant in that court. An intermediate appellate court order of reversal is adverse to the party who was respondent in that court. An intermediate appellate court order of modification is partially adverse to each party (see CPL 450.90[1]).

In this connection, it is important to note the difference between adverse under CPL 450.90(1) and aggrieved under CPLR 5511. Aggrievement under CPLR 5511 often may be a broader concept (see People v Griminger, 71 NY2d 635, 641 [1988] [Appellate Division order of reversal of two judgments of conviction and sentence and remand for further proceedings was not adverse to defendant, who was the appellant in that court, and was not appealable by the defendant to the Court of Appeals, notwithstanding that defendant was "aggrieved" by the denial of portions of his pretrial motion]).

B. Reversal or modification

Where the order of the intermediate appellate court is one of reversal or modification, an appeal lies when the Court of Appeals determines that the intermediate appellate court's determination of reversal or modification was "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal or modification" (CPL 450.90[2][a]), or the corrective action taken or directed by the intermediate appellate court was illegal (CPL 450.90[2][b], 470.10).

On whether the intermediate appellate court's determination was on the law or the facts, it should be stressed that it is not what the intermediate appellate court says, but what the Court of Appeals determines is the basis for the reversal or modification that controls (see People v Giles, 73 NY2d 666, 670 [1989]).

Determinations that have been held not to satisfy the requirement of CPL 450.90(2)(a) include instances where the reversal or modification:

> (1) is in the interest of justice (e.g., on an unpreserved issue [see People v Dercole, 52 NY2d 956, 957(1981); compare with People v Cona, 49 NY2d 26, 33-34 (1979) (where the question of preservation itself presented a law-based reversal upon which jurisdiction was predicated)]);
>
> (2) is based on an exercise or substitution of discretion (conclusion that trial court improvidently exercised discretion, as opposed to a conclusion that trial court abused its discretion [see People v Baker, 64 NY2d 1027, 1028 (1985)]);
>
> (3) is based on a question of fact;
>
> (4) is based on a mixed question of law and fact (see People v Harrison, 57 NY2d 470, 477-478 [1982] [e.g., probable cause, consent, custody]);
>
> (5) is based on a determination that the verdict is contrary to the weight of the evidence (but sufficiency rather than weight is a law determination).

C. **Other limitations**

Even if the order is otherwise appealable, an application for leave to appeal will be dismissed if:

> (1) a previous application for leave to appeal has been made (see People v McCarthy, 250 NY 358, 361 [1929]);

(2) the defendant dies, in which case the prosecution abates (see People v Parker, 71 NY2d 887 [1988]); or

(3) the defendant is unavailable to obey the mandate of the Court. As stated in People v Genet, 59 NY 80, 81 (1874), "[t]he whole theory of criminal proceedings is based upon the idea of the defendant being in the power, and under the control of the court, in his person." Thus, this Court has consistently dismissed appeals where a defendant has absconded (see People v Smith, 44 NY2d 613 [1978]). In People v Del Rio, 14 NY2d 165 (1964), the Court dismissed where a defendant voluntarily absented himself by consenting to deportation. Compare, however, People v Diaz, 7 NY3d 831 (2006), a case where defendant was involuntarily deported and the Court dismissed without prejudice to an application by defendant to reinstate the appeal should defendant return to the Court's jurisdiction. The Court noted that defendant's absence did not "mandate dismissal of the appeal," but rather presented "a situation analogous to that of mootness." (id. at 832).

VI. To whom criminal leave application may be made

As opposed to civil motions for leave to appeal, where a litigant can seek leave to appeal from both the Appellate Division and the Court of Appeals, only one criminal leave application may be made (see People v McCarthy, 250 NY 358, 361 [1929]; People v Corso, 85 NY2d 883 [1995]).

A. Appellate Division orders under CPL 450.90(1)

When a motion for leave to appeal is made from an Appellate Division order described in CPL 450.90(1), the application may be made to either a Justice of the Appellate Division or a Judge of the Court of Appeals (see CPL 460.20[2][a]).

In the Court of Appeals, the application is made to the Chief Judge of the Court (see Court of Appeals Rules of Practice 500.20[a]). The Chief Judge directs the assignment of each application to a Judge of the Court through the Clerk of the Court. Applicants may not choose the Judge to whom it is assigned (see Court of Appeals Rules of Practice 500.20[c]).

CPL 460.20(2)(a)(ii) provides that if the application is to a Justice of the Appellate Division, you may direct your application to any Justice of the Appellate Division Department that entered the order sought to be appealed from. Although the statute does

not provide further, in each Department an applicable Appellate Division rule gives greater specificity. The First Department provides that the application "shall be addressed to the court for assignment to a justice" (22 NYCRR § 600.8 [d][2]). The Second and Fourth Departments have rules that provide that the application may be made to any Justice that sat on the panel that decided the case (see 22 NYCRR § 670.6[d]; 22 NYCRR § 1000.13[p][4][iii]). The Third Department rule states that the application "may, but need not be, addressed to a named justice" (22 NYCRR § 800.3).

B. **Appellate Division order of dismissal**

An application for leave to appeal from an Appellate Division order of dismissal may only be made to a Judge of the Court of Appeals (see CPL 470.60[3]).

C. **Appellate Division order granting or denying a motion for an extension of time to take an appeal**

An application for leave to appeal from an Appellate Division order granting or denying a CPL 460.30 motion for an extension of time may be made only to a Judge of the Court of Appeals (see CPL 460.30[6]).

D. **Order of an intermediate appellate court other than the Appellate Division**

An application for leave to appeal from an order of an intermediate appellate court other than the Appellate Division may be made only to a Judge of the Court of Appeals (see CPL 460.20[2][b]).

VII. Time within which application must be made

A. Generally

A criminal leave application must be made within 30 days after service upon the appellant of a copy of the order sought to be appealed (see CPL 460.10[5]). Service upon the appellant's attorney will start the running of the 30-day period (see People v Wooley, 40 NY2d 699 [1976]). A motion for reargument in the Appellate Division does not stay the 30-day period in which to make a 460.20 application.

B. Extension of time

CPL 460.30 provides authority for the Court of Appeals to entertain a motion for

an extension of time to file a CPL 460.20 criminal leave application. The application is only available to a defendant, not the People (see CPL 460.30[1]).

(1) **When to make motion**

The motion must be made with due diligence after the time for the making of a criminal leave application has expired, but in no case more than one year thereafter (see CPL 460.30[1]).

(2) **How to make motion**

"The motion must be in writing and upon reasonable notice to the People and with opportunity to be heard" (CPL 460.30[2]). The motion should be made in compliance with Rules 500.20(g) and 500.21 of the Court of Appeals Rules of Practice.

(3) **Grounds for motion**

The motion must specify that the failure to bring a timely CPL 460.20 application resulted "from (a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to the defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant" (CPL 460.30[1]).

VIII. Form and content of criminal leave application to Judge of Court of Appeals

A. Form

The application itself should be in letter form, sent to the attention of the Clerk of the Court, with a copy sent to opposing counsel, the adverse party or both, as circumstances warrant (formal affidavit of service not required). Note, however, that the application may be made "first orally and then in writing" (CPL 460.20 [3][b]).

B. Content

(1) The letter should state:

(a) That an application has not been made to a Justice of the Appellate Division;

(b) Whether there are any co-defendants and, if so, the status of their appeals;

(c) The issues sought to be raised on appeal to the Court of Appeals, why such issues are reviewable and leaveworthy, and where such issues are preserved in the record; and

(d) Whether oral argument is sought.

(see Rule 500.20[a] of the Court of Appeals Rules of Practice)

(2) Material to be provided with application

(a) One copy of each brief submitted by the parties below (including pro se supplemental briefs);

(b) The order and decision of the intermediate appellate court sought to be appealed from; and

(c) All other relevant opinions of the courts below, and any other papers to be relied upon in furtherance of the application.

(see Rule 500.20[b] of the Court of Appeals Rules of Practice)

IX. Process

A. Submission of papers

Once the application is assigned, the appellant will have three weeks to submit additional papers, if any. The respondent will then have two weeks to submit responsive papers. There is no right to reply.

B. Oral argument

A request for oral argument will not automatically entitle one to an oral hearing. If

the Judge determines that oral argument is warranted, a member of the Judge's staff will contact counsel to schedule either an in-person or a telephone conference.

C. **Time to decide**

There is no set time in which an application is decided. It varies from Judge to Judge and on the complexity of the issues raised.

X. **Factors considered in deciding applications**

A. **Limited reviewability or nonreviewability**

(1) Preservation

Generally, the Court of Appeals cannot review unpreserved errors of law (see People v Hawkins, 11 NY3d 484 [2008]). It does not have interest of justice jurisdiction like the intermediate appellate courts. Thus, generally, issues need to be raised in the courts below, most often in the trial court, to be preserved and present an issue of law for this Court's review.

In this regard, however, litigants should be aware that certain matters are regarded as "mode of proceedings" errors, and such errors need not be preserved to be reviewed by the Court of Appeals (see People v Ahmed, 66 NY2d 307, 310 [1985]).

(2) Mixed questions of law and fact

It is important to note that with mixed questions, the Court's review is generally limited to whether there is any support in the record for the Appellate Division determination (see People v Bradford, 15 NY3d 329 [2010]; People v Konstantinides, 14 NY3d 1 [2009]).

(3) Excessive Sentence

The Court of Appeals is not empowered to review a sentence on the ground of excessiveness (see People v Thompson, 60 NY2d 513, 521 [1983]; People v Discala, 45 NY2d 38, 44 [1978]).

(4) Weight of the Evidence

Unlike the Appellate Division, the Court of Appeals has no power to engage in a weight of the evidence analysis in a non-capital criminal case

(see People v Bleakley, 69 NY2d 490 [1987]).

Please note that issues which relate to nonreviewability in an affirmance posture may create nonappealability in a reversal or modification context (see part IV B, supra).

B. **Other certiorari factors**

(1) Whether the law is well settled

(a) Discuss whether this is a case of first impression; and

(b) Mention whether there is a split in the Appellate Division Departments.

(2) Significance and novelty of issue

(a) Note whether the case involves a recent United States Supreme Court decision and, if so, how it should be interpreted in New York. Also, mention whether the case involves the construction of new state statutory provisions.

(b) Explain why this case may otherwise present an issue of statewide importance.

(3) Case specific factors

The Court will consider how well the case is presented by the attorneys, both in terms of quality of arguments and focus on key issues.

XI. **Stays**

A. **Not automatic**

With rare exception (see CPL 460.40[1] and CPL 460.40[2]), the taking of an appeal by either party does not stay a judgment, sentence or order of either a criminal court of original jurisdiction or an intermediate appellate court. CPL 460.60 provides the procedures for moving for a stay.

B. **Making the application**

An application pursuant to CPL 460.60 must be made upon reasonable notice. The

application may be made immediately after the entry of the order sought to be appealed or at any subsequent time during the pendency of the appeal. Only one application may be made under CPL 460.60 (see 460.60[2]).

The stay request may be made in the letter application for leave to appeal or in a separate letter. The request must state whether the relief sought has previously been requested, whether defendant is incarcerated or at liberty and, if at liberty, the conditions thereof and any surrender date (see Rule 500.20[f] of the Court of Appeals Rules of Practice).

C. **Order issued**

A judge to whom a 460.20 criminal leave application has been assigned may issue an order "both (i) staying or suspending the execution of the judgment pending the determination of the application for leave to appeal, and, if that application is granted, staying or suspending the execution of the judgment pending the determination of the appeal, and (ii) either releasing the defendant on his own recognizance or continuing bail as previously determined or fixing bail pursuant to the provisions of article five hundred thirty" (CPL 460.60 [1][a]).

D. **When stay not available**

A stay is not available to those convicted of certain crimes. A judge who is otherwise authorized pursuant to CPL 460.60 to issue an order of recognizance or bail pending the determination of an appeal may do so unless the defendant received a class A felony sentence or a sentence for any class B or class C felony offense defined in article 130 of the Penal Law (sex offenses) committed or attempted to be committed by a person 18 years of age or older against a person less than 18 (see CPL 530.50).

CPL 460.60 provides that a stay may be issued only if the judgment or order includes a sentence of imprisonment (see 460.60[1][a]; but see People v Letterlough, 86 NY2d 259, 263 [1995]).

E. **Continuation of stay**

If within 120 days after the issuance of a certificate granting leave to appeal, the appeal has not been argued or submitted in the Court of Appeals, a stay order issued under CPL 460.60(1) terminates. Thus, if the need arises, a defendant should move under CPL 460.60(3) to extend the time for argument or submission of the appeal to a date beyond the 120-day period and for a continuation of the stay until such time as the appeal is decided.

XII. **Reargument or reconsideration**

Requests for reargument or reconsideration should be in letter form addressed to the Clerk of the Court, with proof of service on the adverse party. Such requests are assigned to the Judge who ruled on the original application. The application must be made within 30 days after the original application was decided, unless otherwise permitted by the assigned Judge. A request for reargument or reconsideration shall not be based on the assertion of new arguments, "except for extraordinary and compelling reasons" (Rule 500.20[d] of the Court of Appeals Rules of Practice). Only one application for reconsideration per party of a specific criminal leave application is permitted (see id.).

XIII. **Withdrawal of criminal leave application**

A request to withdraw a criminal leave application must be in writing and, if made on behalf of a defendant, shall also be signed by the defendant. It shall contain an indication of service of one copy upon all parties. If the request is made by a defendant personally, and the defendant is represented, proof of service upon defense counsel must be made. The request is submitted to the Judge assigned the criminal leave application (Rule 500.8[c] of the Court of Appeals Rules of Practice).

XIV. **Miscellaneous practice pointers**

If you are requesting a stay, call your adversary first to see if you can reach any sort of agreement before contacting the Clerk's Office or the Judge assigned to your application.

For criminal proceedings originating in local criminal courts, you should indicate whether the underlying proceedings were recorded by a court stenographer or, if not, whether an affidavit of errors was filed with the intermediate appellate court (see CPL 460.10; People v Epakchi, 31 NY3d 1007 [2018]; People v Flores, 30 NY3d 229 [2017]).

It is the applicant's burden to establish appealability and reviewability on a criminal leave application (see Rule 500.20[a][4]).

If you wish to continue your representation as assigned counsel after leave to appeal is granted, you must move to be assigned (Rule 500.21 governs general motion practice).

If your application for assignment is granted, you should, within ten days after the issuance of the order granting your motion for assignment, serve and file a preliminary appeal statement as required by Rule 500.9.

If you work in a large office, include your direct-dial telephone number in all correspondence.