<u>The Wrongful Conviction Act</u>

(S.266 – Myrie/A. 98 – Quart)

In-Depth Explainer

March 4, 2021

The Wrongful Conviction Act, S. 266/A. 98, was drafted as a collaboration between formerly incarcerated people, grassroots advocates, public defenders, appellate defenders, post-conviction defense attorneys, innocence experts and immigration attorneys.

The bill is a comprehensive approach to addressing problems with New York's post-judgment statute, Criminal Procedure Law Article 440. Post-judgment motions are, in most cases, filed after a case has fully resolved on direct appeal.[1] These types of motions are utilized when new evidence that was not presented in the original case is found and brought before the court to determine if the convicted person's rights were violated. Yet our current law makes it extremely difficult to present these claims, difficult to obtain evidence, and contains multiple procedural roadblocks to success There is no right to a hearing, to discovery, or to appeal. Our bill would address all of these issues.

Specifically, our bill addresses four distinct issues that our experts identified as serving as barriers to justice in New York State. Yet as you will see, these issues interact with and inform one another. True justice requires the passage of this bill in its entirety.

Those issues are:

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[1] *But see,* In November 2019 a new law went into effect allowing direct appeals counsel to file 440 motions at the same time as the direct appeal to conserve judicial resources and ensure that people have appellate counsel to assist in drafting and investigating these claim. S.3672 (Bailey)/A. 748 (Cook), available at https://www.nysenate.gov/legislation/bills/2019/s3672.

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Finally, the bill replaces the term "defendant," used throughout Article 440, with the term "applicant." This is an effort to humanize the people seeking redress under CPL 440.[2] Changing this language was extremely important to directly impacted people.

This memo lays out each of these issues in detail and explains how the Wrongful Conviction Act solves these problems.

1. Vacatur for People Convicted of Acts That Are No Longer Crimes (Decrim issue)

Problem

In 2019 the New York State legislature passed, and the Governor signed, a law repealing our state's gravity knife prohibition. Earlier that year the United States District Court, Southern District of New York held that the gravity knife law was unconstitutionally vague.[3]

The Legal Aid Society estimated that at least 3,600 New Yorkers were prosecuted for gravity knife possession every year in New York City prior to repeal. Eighty-four percent were Black or Latino.[4] Before the 2019 repeal, thousands of people were convicted under an unconstitutional, arbitrary, and racially enforced law. These people should be allowed to have their convictions vacated.

Four other states and the District of Columbia already have statutes allowing people to seal their convictions for acts that have been decriminalized.[5] However, record sealing does not protect non-citizens from federal immigration enforcement. Thousands of the people prosecuted under the gravity knife law were immigrant construction workers or other tradesmen who used utility

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[2] For more details on the importance of using people-first language, visit http://prisonstudiesproject.org/language/.

[3] *Cracco v. Vance*, 376 F. Supp. 3d 304 (S.D.N.Y. Mar. 27, 2019).

[4] "Brief of Amicus Curiae Legal Aid Society in Support of Plaintiffs-Appellants Petition for Panel Rehearing En Banc," *Copeland v. Vance* (2nd Cir, brief filed July 13, 2018), available at https://kniferights.org/wp-content/uploads/2018/07/Legal_Aid_Society_amicus_brief_rehearing_en_banc.pdf.

[5] These jurisdictions are Connecticut, District of Columbia, Maryland, Massachusetts and Vermont. *See* CT ST § 54-142d; D.C. Code Ann. § 16-803.02(a); MD. Code Ann., Criminal Procedure §10-105(a)(11); Mass. Gen. Laws Ann. Ch. 276, §100K; Vt. Stat. Ann. tit. 13, § 7602(a)(1)(B).

knives they legally purchased at stores like Home Depot for their work. Some of those people faced immigration enforcement and deportation because of these arrests and convictions.[6] Vacatur is an extremely critical tool to ensure non-citizen defendants do not get deported or suffer other immigration consequences based on convictions for acts that are no longer crimes.

Solution

The Wrongful Conviction Act extends vacatur relief to people convicted of acts that are no longer a crime by amending CPL 440.10 and creating a new 440.11. The federal agency currently recognizes vacaturs based on the grounds specified in CPL 440.10 as presumptively valid under existing federal law. Including a vacatur provision for decriminalized offenses, without more, could take away that presumption of validity and harm non-citizens. We drafted a new 440.11 to allow U.S. citizens to seek vacatur anytime a crime is subsequently decriminalized by the legislature, while maintaining the presumption of validity for immigration purposes for the grounds specified in CPL 440.10.

Federal law recognizes state vacatur only if the vacatur is based on a substantive or procedural error in the conviction and is not based on post-conviction considerations like rehabilitation or immigration hardship. Because the Southern District found the gravity knife prohibition unconstitutional in 2018, a vacatur on that basis should be recognized under immigration law. However, existing CPL 440.10 language is insufficient to handle these circumstances. We drafted a new 440.10(1)(l) to address exactly this situation. This language would allow non-citizens convicted of the gravity knife offense, or any other offense found to be unconstitutional, to seek vacatur.

Relevant Provisions

- New section CPL 440.11 (P.1 lines 3-17)
    - Allows applicants to apply for vacatur if the applicant was "convicted of any offense in the state of New York which has been subsequently decriminalized and is thus a legal nullity" or if "There has been a change, whether substantive or procedural, in the law or laws applied in the process leading to the applicant's conviction where sufficient reason exists to allow retroactive application of the changed legal standard."

- New sub-section 440.10(1)(l) (P.4 lines 26-29)
    - Creates new ground for 440.10 vacatur if "Any offense in the state of New York that an intermediate appellate court, court of appeals, or United States federal court has deemed in violation of the constitution of this state or of the United States, or any other right under state or federal law."

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[6] *See, e.g.*, "Andrea Sáenz, Supervising Attorney for BDS' Immigration Practice, shared the story of "Ray," a black immigrant who was arrested on his way home from his warehouse job for possession of a knife he used for work. Ray was ultimately convicted of possessing an illegal weapon. As a result, he is currently in deportation proceedings." Brooklyn Defender Services, *BDS, LAS, VOCAL-NY and Others Urge Governor to Sign Gravity Knife Reform Bill*, Nov. 30, 2016, available at https://bds.org/bds-las-vocal-ny-others-urge-governor-to-sign-gravity-knife-reform-bill/.

2. Expanding One Day to Protect New Yorkers

Problem

Last year the legislature passed and the Governor signed the One Day to Protect New Yorkers Act, a law to protect immigrant New Yorkers from unanticipated collateral consequences, such as possible deportation, by making a minor tweak to the penal law to change the penalty for certain misdemeanor offenses from one year to 364 days. As part of that legislation, language was included to allow people with existing convictions to seek relief pursuant to the new law under CPL 440. However, some judges have been interpreting the One Day law restrictively, frustrating the legislative intent. Also left behind from the original legislation are people with low level felonies who would benefit from one day reductions in their sentences.

The One Day to Protect New Yorkers Act requires a technical fix and an expansion to ensure that people accused of any misdemeanor or violation, or sentenced to one year in prison on a D or E felony, can benefit from the law.

Solution

The Wrongful Conviction Act ensures that CPL 440.10(1)(j) applies to any person convicted of a misdemeanor and extends the law to people who received a sentence of one year for a D or E felony conviction to allow those people to also vacate their convictions to be resentenced to 364 days.

Relevant Provisions

The One Day to Protect New Yorkers fix language appears in the Wrongful Conviction Act beginning page 3 at line 41 through page 4 line 10 (amending sub-section (j) and creating a new sub-section (j-1) in CPL 440.10(1)). We also update, accordingly, 440.10(2)(b) (see page 4, line 44), 440.10(5) (page 5, line 42-46), and 440.10(9) (see page 6, line 17-29).

3. Survivors of Trafficking Attaining Relief Together (START) Act, S. 674 (Ramos)/A. 459 (Gottfried)

The Wrongful Conviction Act incorporates the language of the START Act, a bill that many organizations in our coalition have supported for years.

The START Act would increase opportunities for vacatur relief for survivors of human trafficking. Currently, vacatur law only allows human trafficking survivors to clear prostitution-related convictions from their record. The law's limited scope fails to account for the fact that many trafficking survivors are convicted for a variety of other offenses that arise from their trafficking situation. Survivors of human trafficking deserve a fresh start to their lives and a clear criminal record.

The START Act expands 440.10(1)(i) sealing to include any conviction that the defendant incurred as a result of sex or labor trafficking. The bill also improves privacy protections for people seeking vacatur relief under this statute.

Relevant Provisions

The START Act language appears on The Wrongful Conviction Act page 3, lines 3-40 (amending sub-section (i) of CPL 440.10(1)).

4. Wrongful Conviction Act (*People v. Tiger* Fix)

Problem

In 2018 the New York Court of Appeals in *People v. Tiger* ruled that actual innocence is not a ground for vacatur of the conviction if the defendant pled guilty at trial.[7] The court held that the only exception is if the applicant for relief can present DNA evidence demonstrating their innocence. The decision stands in stark contrast to other states that have come down in favor of allowing innocence claims to proceed in plea cases.[8]

The *Tiger* decision laid bare several critical issues with New York's post-conviction statute that prevent people who have been wrongfully convicted from obtaining relief, specifically:

(a) The extreme difficulty for a person to prove their **innocence** during post-conviction proceedings in New York, particularly when the case does not involve DNA evidence.

(b) New York bars relief under 440 in most cases if a person **pleaded guilty**, even if the person is innocent.

(c) Significant **procedural bars** exist to having the case dismissed outright.

(d) Enhanced due process is needed in 440 proceedings, including:

(i) Right to **counsel**
(ii) Right to **discovery**
(iii) Right to a **hearing**
(iv) Right to **re-test evidence**
(v) Right to **appeal**

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[7] 32 N.Y. 3d 91 (2018).

[8] The Appellate Court of Illinois (First District) recently considered this same issue in their state and held that they would not follow the precedent set by the New York Court of Appeals. After a discussion of the *Tiger* decision, the court held "After careful consideration, we conclude that a freestanding actual innocence claim may be brought after a guilty plea, and that a defendant need not challenge the knowing and voluntary nature of his or her plea to bring such a claim. The wrongful imprisonment of an innocent person violates procedural and substantive due process under the Illinois Constitution and, thus, a freestanding claim of actual innocence is cognizable under the Act." *People v. Shaw,* 2019 IL App (1st) 152994, decided June 20, 2019.

(a) Tiger Decision

The facts alleged in *People v. Tiger* made a strong case for innocence. Natascha Tiger was a registered nurse and caregiver for a ten-year-old severely disabled girl. In November 2011 she bathed her patient and subsequently noticed that the child's skin was red and peeling. The child's pediatrician said that the reaction was likely a reaction to a medication that the child was taking and referred the child to the Westchester Medical Center for treatment. At the hospital, the director of the Burn Unit concluded that the injuries were more consistent with a third-degree burn. Ms. Tiger later told the police the water was "very hot" while she bathed the child and even wrote the mother of the child an apology letter.

In 2012 Ms. Tiger was charged with five criminal counts, including Assault 2, a felony. In order to avoid a prison sentence, Ms. Tiger pleaded guilty to a lesser charge. Yet in a subsequent civil case against Ms. Tiger, a jury found that Ms. Tiger's care was not a substantial factor in the child's injuries. In 2014 Ms. Tiger filed a motion for 440.10 vacatur under the grounds of actual innocence and ineffective assistance of counsel at trial and provided substantial evidence that the injuries were caused by the child's medication, not the temperature of the water.[9]

The Court of Appeals held that, because Ms. Tiger pled guilty, and CPL 440.10(1)(g-1) only allows defendants to prove actual innocence through DNA evidence, Ms. Tiger was not eligible for vacatur of her conviction.

The Court's rationale was the same one courts in New York State regularly use to deny review for wrongfully convicted people: "conserving judicial resources and providing finality in criminal proceedings."[10]

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[9] "Defense counsel at the civil trial contended that Alejandra's burns were caused by a reaction to an antibiotic that had been administered to the child. They claimed that scalding was not the first cause that Alejandra's doctors considered. They claimed that the doctors opined that the burns could have been a product of Stevens-Johnson syndrome, which is a hypersensitive condition that is caused by an allergy, or Staphylococcal Scalded Skin syndrome, which is blistering that is caused by an infection. They noted that blistering continued during the days that followed Alejandra's admission to Westchester Medical Center, and they claimed that fresh blisters formed on Alejandra's left arm, which had not exhibited prior indication of an injury. They further claimed that a subsequent biopsy indicated Stevens-Johnson syndrome or a similar condition: toxic epidermal necrolysis. Defense counsel also contended that evidence contradicted the possibility of Alejandra's burns having been inflicted by water. They noted that Alejandra's showers were administered while the child was seated on a chair whose open bottom would have prevented scalding of her buttocks." New York Verdicts/Law.com, *Child's burns caused by allergy, not water, nurse claimed,* available at https://verdictsearch.com/verdict/nurse-not-liable-for-10-year-old-patients-burns-jury-says/.

[10] *Tiger* at 101.

Here are how the issues that we identified with the current CPL 440.10 played out in the *Tiger* decision:

- **Innocence** – Ms. Tiger was denied relief even though she presented strong evidence of her innocence (but not DNA evidence) – evidence so strong that a civil jury determined that she was not liable for the child's injuries.
- **Guilty plea** – Ms. Tiger was denied relief because she pleaded guilty to avoid a prison sentence, even though evidence would later point to her innocence and led a civil jury to believe that her actions were not a substantial component of the child's injuries.
- **Procedural bars** - The procedural bars that exist to relief in 440 cases make it extremely difficult for an indigent person to even have a judge ever look at their 440 claim, the way that Ms. Tiger, represented by private counsel, did.
- **Discovery** - Ms. Tiger had a civil trial prior to filing her 440 hearing during which she would have received full discovery, discovery she likely would not have received prior to her guilty plea under New York's old discovery law, CPL 240, or during post-conviction litigation.
- **Right to counsel** - Ms. Tiger, a nurse, had counsel to litigate her case.[11] An indigent person, particularly a person serving a prison sentence, typically does not have the resources to investigate and litigate this case all the way to the Court of Appeals.

In short, we believe the entire constellation of these reforms need to be enacted to provide innocent people, especially indigent people, the people most harmed by the government's War on Crime and Drugs, meaningful recourse for wrongful convictions.

(b) Innocence

Problem

New York State has a serious wrongful conviction problem. We rank third in the nation in numbers of wrongful convictions. Exonerees in our state have lost 2,765 years of their lives to wrongful convictions. The average exoneree spent 9.7 years in prison before exoneration.[12] Part of the problem is that CPL 440.10 have proven repeatedly an ineffective tool to ensure the vacatur and release of innocents. This must change.

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[11] The record is unclear whether Ms. Tiger funded her own defense, someone else funded it for her, or if she received pro bono representation.

[12] The National Registry of Exonerations, *Exonerations by State: New York*, available at http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last viewed Feb. 15, 2020).

Solution

Justice demands that people who are innocent must have a legal mechanism to present evidence and the court must be required to actually consider the evidence, whether or not a person pled guilty to avoid a prison sentence. We amend CPL 440.10 accordingly.
Relevant Provisions

The Wrongful Conviction Act explicitly addresses the actual innocence issue by amending CPL 440.10(1) subsections (g), (g-1), and (h) and creating a new section, 440.10(10). The amendments to (g) were crafted to ensure that where a defendant has new evidence that creates a reasonable probability that the verdict or plea would have been more favorable, the court should hear the applicant's claim.

- CPL 440.10(1)(g) – P. 2, lines 28-41:
    - We expand the definition of new evidence with the terms "shall include but not be limited by…"[13]
    - We broaden the ability of judges to consider that evidence ("when viewed alone of with other evidence").
    - We remove due diligence requirements that, in our experience, only serve as procedural bars to relief. [14]
    - The language "or discovered prior to trial or a plea agreement" is added to ensure that the new evidence can be considered in the 440 proceeding, even if that evidence might not be admissible at trial but could have lead to a dismissal of the charges or different plea.

- 440.10(1)(g-1) – P. 2, line 42-50
    - The law currently limits 440 relief to cases where the defendant has DNA evidence of actual innocence.
    - Our bill amends expands the potential for relief to cases involving forensic testing of evidence, not just DNA. This could include the re-testing of ballistics, hair matching, or any other forensic evidence used to convict a person.
    - It also makes clear that applicants can seek relief under this section even if they pled guilty.

- 440.10(1)(h) – P. 2, line 51 through P. 3, line 2

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[13] For example, the Court of Appeals held in 1991 that impeachment material "is not the sort of "newly discovered evidence" that would entitle a defendant to a new trial." *People v. Jackson*, 78 N.Y.2d 638 (N.Y. Ct App 1991) *(citing People v Powell*, 96 AD2d 610; *People v Wood*, 94 AD2d 849, 850).

[14] In *Tiger*, the court explained "By its express terms, [CPL 440.10(1)(g)] is inapplicable to judgments obtained by guilty pleas. Further, this provision has procedural limitations in that it contains two separate due diligence requirements: 1) that the evidence could not have been produced at trial with due diligence; and 2) the motion "must be made with due diligence after the discovery of [the] alleged new evidence."

- Subsection (h) applies to claims that the judgment was obtained in violation of the constitutional rights of the defendant.
- Our bill amends this section to make clear that the conviction of a person who is innocent violates the person's constitutional rights.
- The bill defines actual innocence as "where the applicant proves by a preponderance of the evidence that no reasonable jury of the applicant's peers would have found the applicant guilty beyond a reasonable doubt."

- 440.10(10) – P. 6, lines 34-41
  - The new 440.10(10) requires judges to grant a hearing and to address the merits of "colorable claims of actual innocence."
  - It also makes clear that "the court may not summarily deny the motion on the ground that the applicant previously moved for relief under this article."
  - This language was added to ensure that applicants who maybe have previously sought vacatur relief under existing law, whose claims were summarily denied, are not precluded from bringing these claims under the new law where they have a colorable claim of innocence.

(c) Guilty Pleas

Problem

New York's exoneration problem is intertwined with out guilty plea problem, as the *Tiger* case so clearly illustrates. In New York, 98 percent of felony cases resolve by plea agreements, not at trial.[15] Yet people who plead guilty have the lowest rates of exonerations because there are so many structural barriers to exoneration after a guilty plea in our state.[16]

For decades New Yorkers have felt the pressure to plead guilty, even to crimes they did not commit, because bail was set in their case in amounts they could not afford or because the pre-trial process lasted so long that after waiting months or years for the case to resolve they could wait no longer. Countless number of people pled guilty because of the pressure to plead even in cases where the evidence may not have supported a guilty plea or they were, in fact, innocent.

New York courts have held that people who pled guilty have very little recourse for relief under CPL 440. This interpretation of the statute is in stark contrast to the experiences of directly

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[15] Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until it's Too Late,* N.Y. TIMES, Aug. 7, 2017, available at https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?_r=0.

[16] Innocence Project, *Innocence Project and Members of Innocence Network Launch Guilty Plea Campaign*, Jan. 23, 2017, available at https://www.innocenceproject.org/guilty-plea-campaign-announcement/.

impacted communities who understand the enormous pressure to plead guilty to avoid years or decades in prison, be reunited with their families, hold on to their jobs or housing, or avoid deportation.

Here are just two cases where New York courts have held that people who pled guilty have no recourse under 440, relying on precedent from earlier courts.

- *People v. Brown* –
  - "Defendant is foreclosed from raising **[a claim for relief under 440.10(1)(c)]** in a case where he has pleaded guilty,"[17] and
  - "The contention of defendant that he was denied effective assistance of counsel **[under CPL 440.10(1)(h)]** does not survive his plea of guilty."[18]
- *People v. Cummings* –
  - **"CPL 440.10(1)(g)** is limited by its terms to evidence discovered 'since the entry of a judgment based upon a verdict of guilty after trial.' A defendant who pleads guilty may not thereafter move to vacate his judgment of conviction based on this ground."[19]

Solution

The Wrongful Conviction Act therefore amends 440.10 to clarify that the legislature intends for people who pleaded guilty to still be able to seek relief under CPL 440.10 if their rights were violated.

Examples of specific types of violations that are included in these amendments:

- Where exculpatory or other favorable evidence was hidden from the defendant (Brady material)
- Where police or other official misconduct was the basis for the evidence (search and seizure violations, witness intimidation, etc),
- People who can prove their rights were violated when they produce new evidence on their own (or other sources find the new evidence),
- Cases where a re-testing of forensic evidence shows a violation of the defendant's rights
- Where the defendant suffered other constitutional violations (typically ineffective assistance of counsel)

Relevant Provisions

- 440.10(1) (preliminary statutory language) - P.2 lines 4-5
  - Text added: "obtained at trial or by plea"

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[17] 815 N.Y.S. 2d 495 (Kings Co. Supreme, 2005) (citing *People v Dargento*, 755 N.Y.S.2d 535; *People v White*, 752 N.Y.S.2d 166, *lv denied* 99 N.Y.2d 5862; *People v Brown*, 245 N.Y.S.2d 799) (emphasis added).

[18] 815 N.Y.S. 2d 495 (Kings Co. Supreme, 2005) (citing *People v Williams*, 758 N.Y.S.2d 591, *lv denied* 100 N.Y.2d 589; *People v Burke*, 682 N.Y.S.2d 650, *lv denied* 93 N.Y.2d 851) (emphasis added).

[19] 2013 NY Slip Op 31340(U) (Kings Co. Supreme, decided May 24, 2013) (citing People v. Philips, 817 N.Y.S.2d 373 (2nd Dep't 2006).

- 440.10(1)(c) (Brady evidence) - P.2 lines 13-14
    - Text added: "or that was relied upon by any party as a basis for a plea agreement"

- 440.10(1)(d) (police or other misconduct) - P.2 lines 17-18
    - Text added: "or that was relied upon by any party as a basis for a plea agreement"

- 440.10(1)(g) (new evidence) - P.2 line 34 – text added: "or plea"

- 440.10(1)(g-1) (forensic evidence) - P.2 line 49-50 – text added: "or plea offer" "…or the applicant would have rejected the plea offer."

- 440.10(1)(h) (constitutional violations, such as ineffective assistance of counsel, or actual innocence) - P.2 lines 53-54 – text added: "whether upon trial or guilty plea,"

We believe that in all these types of wrongful conviction cases, courts should be required to consider the applicant's claim for relief and remand the case back to the trial court or vacate the conviction, as justice requires.

(d) Procedural bars to relief

In its current form, Article 440 makes clear that the default outcome for 440 claims should be denial. The first line of CPL 440.10(2) states: "Notwithstanding the provisions of subdivision one, the court ***must deny a motion to vacate judgment when***…"

And indeed, this is how the statute currently functions. Based on the knowledge and experience of our coalition, most 440 applications are summarily denied. In 2019 we submitted a FOIL request to the Office of Court Administration asking for data on how many 440 applications are submitted in each county and what the outcomes of those petitions are. We were informed that OCA does not compile this data and our FOIL request was denied.

But a simple review of the case law also shows that 440 applications are regularly and consistently denied without ordering a hearing. For example, in *People v. Cummings*, a trial court judge denied the applicant's 440 motion on the grounds that:

> C.P.L. §440.10(2)(c) requires the Court to deny a motion to vacate a judgment of conviction where there are sufficient facts on the record to have permitted an adequate review on appeal, and the defendant failed to raise the issue or issues with the appellate court. *See* C.P.L. §440.10(2)(c), People v. Jossiah, 2 A.D.3d 877, 769 N.Y.S.2d 743 (2nd Dep't 2003). The issue of whether Defendant's plea was knowing, voluntary, and intelligent is an issue that could have been raised on

direct appeal. However, Defendant failed to do so. As such, the Court must deny Defendant's motion without prejudice to renewal to an appellate court."[20]

Our bill addresses the issue of procedural bars with critical amendments to CPL 440.10(2)-(10) (see page 4, beginning line 30 through page 6, line 41) and CPL 440.20 (see pages 6-7)

Relevant Provisions

Bill text explanation for 440.10 motions (challenging the underlying judgment):

- 440.10(2) – (P. 4, lines 30-31, change "must" to "may")
  - This amendment would change the current default from denial to instead grant judges explicit authority to grant 440.10 motions or order hearings

- 440.10(2)(a) – (P.4, line 35-38 "However, if all of the evidence currently before the court was not duly considered previously by the court, the court shall grant the motion or order the hearing;"
  - This section currently limits subsequent 440.10 motions. We amend this sub-section to make clear that if the applicant is presenting new evidence previously not considered by the court, they must now consider it. This language ensures that people who have filed previous unsuccessful 440.10 motions have the opportunity to do so under the new law.

- 440.10(2)(b) – (P.4, line 42-43 "unless the issue raised in such a motion is ineffective assistance of counsel.")
  - This sub-section incorporates language from a pending OCA bill that has been before the legislature for the past ten years but has yet to pass.[21] Sub-section (b) typically prohibits review of 440.10 claims unless the matter cannot be decided on direct appeal. The amended language would allow IAC claims, which are best reviewed holistically, based upon matters both in the record and outside of it, to always be raised via CPL 440.10.

- 440.10(2)(c) (P.4 lines 46-52)
  - We delete the language from this sub-section in its entirety. Applicants for relief are typically procedurally barred from 440.10 claims, even if they have grounds for relief, "owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him." While this sub-section promotes judicial economy, it does so at the expense of

[20] 2013 N.Y. Misc. LEXIS 2645, 2013 NY Slip Op 31340(U) (Kings Co. Sup. Ct, decided May 24, 2013).

[21] An act to amend the criminal procedure law, in relation to claims of ineffective assistance of counsel in post-conviction motions, S. 6661 (Benjamin)/A. 1824 (Lavine) (2019-20), available at https://www.nysenate.gov/legislation/bills/2019/S6661.

convicted people's constitutional and statutory rights. This procedural bar must be eliminated.

- 440.10(2)(d) (P.4 lines 53-56, now the new sub-section (c))
  - Automatic Conversion - Currently, a person's application for 440 relief can be denied by the court if they file the wrong section number. CPL 440.10 covers relief for a wrongful conviction, while CPL 440.20 is the correct vehicle for relief for the wrong sentence. If someone files relief for a wrong sentence, but mistakenly puts 440.10 on the motion instead of 440.20, this new language ensures that courts can just "deem the motion to have been made pursuant to section 440.20 of this article." This is particularly critical for pro se applicants, who don't have legal expertise, but often have legitimate claims for either 440.10 or 440.20 relief. This also promotes judicial economy, so that applicants do not have to re-file the exact same document before the exact same judge.

- 440.10(3) (P. 5 lines 1-21)
  - Our bill eliminates this sub-section. All of this language currently serves to keep applicants out of court without meaningful judicial review. If the purpose of our law is to allow people who were wrongfully convicted to seek 440.10 relief, then this language must be eliminated.

<u>Bill text explanation for 440.20 motions (challenging the underlying sentence):</u>

- 440.20(1) (P.6, lines 48-49, adds language "exceeded the maximum allowed by law, obtained or imposed in violation of the defendant's constitutional rights, or was…")
  - Narrowly expands the grounds for 440.20 relief to comport with the constitution

- 440.20(2)(a) – (P.7, lines 24-29, adds language "However, if all of the evidence currently before the court was not duly considered previously by the court, the court shall grant the motion or order the hearing…"
  - This section currently limits subsequent 440.20 motions. We amend this sub-section to make clear that if the applicant is presenting new evidence previously not considered by the court, they must now consider it. This language ensures that people who have filed previous unsuccessful 440.20 motions have the opportunity to do so under the new law.

- 440.20(3) (P. 7 lines 42-47)
  - Corrects the Court of Appeal's recent decision in *People v. Thomas*, 33 N.Y.3d 1 (2019), that the original sentencing date controls for determining predicate status, even where that original sentence was vacated pursuant to 440.20.

(e) Enhanced Due Process Protections

New York is long overdue to increase due process protections for people filing CPL 440 claims to ensure fairness and allow courts to accurately assess claims of wrongful convictions. We have identified the need for a right to counsel, access to complete discovery, broader right to a hearing, the right to re-test evidence and the right to appellate review as crucial amendments to ensure wrongfully convicted people have a meaningful opportunity to seek and obtain relief under Article 440.

i. Right to counsel

Problem

Under Article 440 there is no provision for an absolute right to counsel in the absence of an evidentiary hearing, and assignment of counsel, other than for an evidentiary hearing, is discretionary.[22] While the trial court judge has the authority to assign counsel to applicants for 440 relief under the County Law, they infrequently do so.[23]

In New York State, our experience is that most people who file 440 applications are people in prison who file pro se. Case law is replete with judges commenting on the applicant's failure to properly plead the motion or cite case law, citing procedural bars to relief without ever ordering a hearing or appointing counsel.

For decades, low-income New Yorkers (overwhelmingly New Yorkers of color), were put through the criminal legal system without access to discovery while represented, in many cases, by overwhelmed, underpaid and under-trained public defenders. They were pressured by judges and prosecutors to plead guilty by the thousands, or risk mandatory minimums and years or decades in prison away from their families.

Solution

New York must create a right to counsel in post-conviction cases. Counsel is critical to ensure that claims are properly investigated and pleaded to avoid procedural bars and ensure review.

We based our right to counsel on language adopted by the legislature in the Domestic Violence Survivor's Justice Act in 2019. We believe that the language in that law should be inserted into

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[22] *People ex rel. Anderson v Warden, New York City Correctional Institution for Men*, 325 N.Y.S.2d 829 (N.Y. Sup. Ct. 1971).

[23] *See* CNT § 722.

CPL 440.30 to afford applicants for 440.10 relief the same right to counsel. Under this framework, the applicant for relief would file a petition to the court, and, if indigent, they can request the assignment of counsel and the judge must order it.

Relevant Provisions

The provisions related to the right to counsel are on page 8 (creating a new CPL 440.30(1)(b)).

Note: New CPL 440.30(1)(a) also includes language from the DVSJ which clarifies how courts should assign judges to hear 440 motions if the original trial judge no longer works for that court. This language is helpful for courts and consistent with existing practice.

ii. Discovery

Problem

In 2019 New York State passed comprehensive discovery reform, repealing the antiquated CPL 240 with the new CPL 245 that provides defendants going forward early access to broad discovery in criminal cases. The new law brings New York law in line with 36 other states and brings us from last to first in terms of access to criminal discovery.

But the law passed in 2019 did nothing for people convicted under the old law. Under the current CPL 440, judges are not required to compel disclosure of discovery, even where the applicant has made a showing that the discovery could prove their innocence.[24] We know that there are people sitting in New York State prisons who are innocent, either because of a guilty plea or conviction at trial, who never received the kind of evidence that accused people will under the new CPL 245.

Solution

The Wrongful Conviction Act creates new discovery procedures for post-conviction cases and eliminates existing language that severely limits discovery.

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[24] *See, e.g., People v Duran*, 2009 NY Slip Op 31488(U) (Sup. Ct. Kings Co. 2009) ("The defendant has filed a pro se motion for discovery of certain police documents for the apparent purpose of furthering his application to vacate the judgment of conviction under C.P.L. § 440.10. Discovery is a statutory and not a constitutional right. As "[t]here are no discovery provisions under the Criminal Procedure Law for motions under 440 of the CPL," the defendant's motion to obtain discovery of the police documents is denied. The defendant's motion to obtain post-conviction discovery of police documents is denied.") (internal citations omitted); *see also People v. Wright*, 225 A.D. 2d 430 (NY 1st Dept, 1996) ("On this appeal defendant's sole claim is that she is entitled to a new trial because she was not provided with copies of certain documents in the Office of the Chief Medical Examiner's file which pertain to the autopsy performed on the decedent in violation of the prosecution's statutory and voluntary disclosure obligations. Defendant's argument fails, however, because the undisclosed documents were not in the possession or control of the People, who exercised reasonable diligence in carrying out their discovery obligations.")(internal citations omitted).

First, the bill clarifies that the new CPL 245 should apply in CPL 440.10 and 440.20 proceedings. The sub-section also makes clear that protective orders and in camera inspections to protect witness safety, as codified in CPL 245.70, apply in post-conviction proceedings.

The bill also expands on existing CPL 245 in recognition that people challenging their convictions should have more access to material in post-conviction cases than at trial, not less. It thus requires court clerks and probation officers to open their files on the original case to the applicant and their attorney. The bill requires both trial counsel and appellate counsel to share their files with the applicant and their post-conviction attorneys to accurately investigate claims of ineffective assistance of counsel. Other states such as North Carolina require these kinds of files to be turned over as a matter of course in post-conviction proceedings.[25] New York must follow their lead.

Finally, this sub-section requires the prosecution and prior defense counsel to turn over all relevant discovery within 30 days of the court's discovery order. Experience tells us that if there is no deadline, discovery will not be turned over in a timely manner and we believe 30 days is sufficient time for defense counsel and prosecutor's offices to comply.

Relevant Provisions

- CPL 440.30(1)(c) – (P. 8, lines 17-41)
  - New discovery language

- 440.30(1)(b) (page 9, beginning at line 7, ending page 10 line 3).
  - Old discovery language is eliminated.

iii. Right to re-test evidence

Problem

About four out of five exonerations are achieved without DNA evidence, according to the National Registry of Exonerations.[26] Simon Cole, a criminology professor at UC Irvine and the director of the Registry, estimates that thousands—possibly tens of thousands—of

[25] North Carolina G.S. 15A-1415(f) (requires the State to make available to post-conviction counsel the complete files of all law-enforcement and prosecutorial agencies involved in the investigation and prosecution of the case. This statute also requires the defendant's trial and appellate counsel to make their complete files available to the defendant's post-conviction counsel.)

[26] The National Registry of Exonerations, Exonerations by Year: DNA and Non-DNA, available at http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last viewed Feb. 19, 2020).

innocent men and women may have been convicted.[27] The Innocence Project suggests that the number two contributor to wrongful convictions, involved 45% of the time, is faulty forensics. The Innocence Project defines faulty forensics as testimony that isn't scientifically vetted, exaggerated testimony, and forensic misconduct.

In 2019, Archie Williams was exonerated after being wrongfully convicted of rape and attempted murder in Baton Rouge, Louisiana in 1982. Mr. Williams first requested that his fingerprints be run against the national database in 1999, but prosecutors opposed the move and there was no statute entitling him to do so.[28] In 2019, after the Innocence Project stepped in, all it took was for technicians in a crime lab to run the fingerprints collected at the scene of a rape through a national database. Within hours, the experts had established a match with a serial rapist. According to the *New York Times*, only a handful of states allow post-conviction access to the fingerprint database, much less account for emerging technologies such as facial recognition. New York is not yet one of them.

Solution

Where there exists evidence that could exonerate someone, that evidence should be re-examined. This should not be limited only to DNA evidence, the current rule in CPL 440 cited in *Tiger*. Forensic analysis has improved significantly over recent decades, and much of what we thought was evidence 20 or 30 years now has far less probative value. Similarly, re-testing the same evidence used to convict someone in previous decades may now serve to exonerate them, as in the Archie Williams case. In order to address wrongful convictions, we must liberalize our rule regarding the re-testing of evidence in post-conviction cases.

The Wrongful Conviction Act removes existing barriers to testing of DNA and explicitly allows the testing of other forensic evidence.

Relevant Provisions

- CPL 440.30(2)(a)(i) - P. 10, lines 4-50
    - Eliminates existing barriers to DNA testing

- 440.30(2)(a)(ii) - P. 10, lines 51-56
    - Explicitly allows the testing of other kinds of forensic evidence

- 440.30(2)(b)(ii) - P. 11, lines 10-15
    - Addresses cases where the DNA evidence is "lost" and mandates vacatur in those cases.

- 440.30(2)(c) - P. 11, lines 34-39
    - Removes procedural bars related to DNA evidence

[27] Thomas Fuller, *He Spent 36 Years Behind Bars. A Fingerprint Database Cleared Him in a Few Hours*, N.Y. TIMES, March 21, 2019, available at https://www.nytimes.com/2019/03/21/us/fingerprint-database-archie-williams.html.

[28] *Id.*

iv. Right to a hearing

Problem

In most 440 decisions, judges make a determination on the papers, without ever ordering a hearing. Yet a hearing, where the applicant has the opportunity to present witnesses and evidence and cross-examine any witnesses presented by the prosecution, are a critical due process protection. People should get them in most cases, and always where there is a colorable claim of actual innocence.

Solution

The Wrongful Conviction Act eliminates language that allows judges to dismiss motions in most cases without a hearing.

Relevant Provisions

- CPL 440.30(2) - P. 11, lines 43-51
    - Eliminates language that allows judges to decide cases on the moving papers without a hearing

- CPL 440.30(4)(b) - P. 12, lines 10-13
    - Eliminates requirement that motion can be denied without a hearing if "an allegation is made solely by the defendant and is unsupported by any other affidavit or evidence." This sub-section frequently serves as a procedural bar to pro se incarcerated defendants who, without the right to counsel or discovery, have no ability to obtain such evidence.

- CPL 440.30(2) - P. 12, lines 10-13
    - Eliminates requirement that moving papers must contain "sworn allegations substantiating or tending to substantiate all of the essential facts…" This sub-section frequently serves as a procedural bar to pro se defendants.

- CPL 440.30(6) – P. 12, lines 31-32
    - Defense counsel should have a right to a daily copy of the hearing minutes, for cases that do proceed to a hearing. This is a critical tool to ensure that the applicant meets his or her burden to prove that relief should be granted. The technology exists, but currently defense counsel has to litigate this issue in every case, and are frequently denied.

- *See also* 440.10(10) – P. 6, lines 34-41

- The new 440.10(10) requires judges to grant a hearing and to address the merits of "colorable claims of actual innocence."
- It also makes clear that "the court may not summarily deny the motion on the ground that the applicant previously moved for relief under this article."
- This language was added to ensure that applicants who maybe have previously sought vacatur relief under existing law, whose claims were summarily denied, are not precluded from bringing these claims under the new law where they have a colorable claim of innocence.

v. Right to appellate review

Problem

Most 440 motions do not currently have the right to appellate review. As most motions are filed pro se, and hearings are rarely granted, this means that many claims never are reviewed by appellate courts tasked with ensuring justice. *Tiger* was the rare case that made it all the way to the Court of Appeals, thus illuminating many of the issues addressed by this bill. But Ms. Tiger was represented by counsel. *Tiger* is the perfect example of why appellate review is so critical, because it allows appellate courts to shine a light of disinfectant on what is happening in the lower courts. It also allows the legislature to know what is going on in both the lower and higher courts, showing them where exactly they must amend the law, if they disagree with the court's interpretation. For non-citizen defendants, this review is especially critical, because appellate courts do not have to review erroneous 440 denials for deported defendants even if the conviction on review was the basis for the deportation.

Solution

The Wrongful Conviction aCt creates a right to appellate review. Sections 5 and 6 of the bill address this issue exclusively.

Relevant Provisions

- CPL 450.10(4)- P. 12, lines 39-42
  - Establishes that applicants may appeal denials of 440 motions to an intermediate appellate court as a matter of right. Under current law, 440 appeals as of right are only allowed "upon motion of the People." This amendment ensures that the prosecutor is not given more rights under law than a defendant.

- 450.10(5) – P. 12, lines 40-42
  - Repeals the section in its entirety, which authorized appeals only of orders denying motions for forensic DNA testing of evidence.

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