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REPORT BY THE CRIMINAL JUSTICE OPERATIONS AND CRIMINAL COURTS COMMITTEES IN SUPPORT OF AMENDING C.P.L. § 440 TO PROVIDE FOR ACTUAL-INNOCENCE CLAIMS

INTRODUCTION

Perhaps the most fundamental purpose of our criminal justice system and the rights provided by the New York Constitution is to insure that "the innocent go free." People v. Claudio, 83 N.Y.2d 76, 79 (1993). Although no appellate court in New York has held that there is a specific remedy for a claim of actual innocence, the Court of Appeals recognized long ago that, in the "[r]are instance" that a convicted defendant can "demonstrate his innocence," "the administration of justice would be subject to reproach if an implacable law of remedies were to close the door forever upon the hope of vindication." Matter of Kaufman, 245 N.Y. 423, 430 (1927); see also People v. Roselle, 84 N.Y.2d 350, 356 (1994). More recently, the Appellate Division, Second Department, echoed that sentiment in People v. Tankleff, 49 A.D.3d 160, 177 (2d Dept. 2007), saying:

> It is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent of a crime may be incarcerated or otherwise punished for a crime which he or she did not commit.

Several other states have held that "the conviction or incarceration of an actually innocent defendant is either unconstitutional or is, in and of itself, sufficient to vacate a conviction." People v. Coles, 1 Misc.3d 531, 540 (Sup. Ct. Kings Co. 2003).

Nevertheless, New York provides no clear remedy for a self-standing claim of actual innocence. Although several trial-level judges have now recognized that such a claim is cognizable under C.P.L. §440.10, no appellate court has so held. Therefore, despite a clear lower-court trend, there is as yet no binding New York law requiring courts to vacate a conviction if a defendant demonstrates his actual innocence. Thus, it remains up to individual trial-level judges to decide whether those with even the most compelling actual innocence claims can be granted relief.

The need to remedy this situation has been highlighted by events of recent decades, in which DNA testing has shown that conviction of the innocent is a far larger problem than it was once believed to be. Indeed, on Law Day of 2009, Chief Judge Jonathan Lippman formed the permanent Justice Task Force to examine and ameliorate the causes of wrongful convictions. A

year later, he reiterated his commitment to "eliminat[ing] the scourge of wrongful convictions which perpetuate the dual injustice of incarcerating the innocent and allowing the guilty to go free."

There is presently an Actual Innocence Justice Act of 2011 [S.729/A.6551] pending in the Legislature. This proposed legislation is similar to the Actual Innocence Justice Act of 2010 [S.6234-C/A.9736-B], which failed to be enacted in the last legislative session. Both legislative proposals seek to "clarif[y]" that convicted persons who can establish their innocence "have the right to challenge their convictions under the law, notwithstanding any other procedural or technical provisions of law that would have prevented them from doing so." See Bill Summaries for both S.729/A.6551 and S.6234-C/A.9736-B.

We believe that both essential fairness and New York's long tradition of protecting those accused of crimes require that New York recognize the right of innocent men and women to relief from their wrongful convictions. We also believe the time has come to codify that right so that every judge is unequivocally empowered to consider self-standing claims of actual innocence and provide relief if such a claim is established. While the Committees do not endorse any particular pending legislation, we strongly recommend that New York Criminal Procedure Law § 440.10 be amended to provide that a court shall vacate the judgment of conviction when it is established by clear and convincing evidence that the defendant is actually innocent.[1]

CURRENT STATUS OF LAW IN NEW YORK

A review of current case law demonstrates a growing judicial recognition that convictions should be vacated if defendants can demonstrate that they are actually innocent. Moreover, courts which have embraced the stand-alone substantive claim of actual innocence, have uniformly placed the burden of proof on the defense – generally to show innocence by clear and convincing evidence.

I. Federal Constitutional Claim

In Herrera v. Collins, 506 U.S. 390 (1993), the Court denied habeas corpus relief in a capital case where the new evidence claim was time barred in Texas state courts. After discussing the State's responsibility to determine guilt and innocence, 506 U.S. at 401, the Court stated,

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.[2]

[1] The Committees, which are comprised of both defense attorneys and prosecutors, support by overwhelming majority the concept of codifying actual innocence claims. They continue to study and have not yet taken a position on any particular statutory language.

[2] A different standard is used when the habeas petitioner alleges actual innocence to excuse a procedural bar to raising a separate federal constitutional error in federal court. See Schlup v. Delo, 513 U.S. 298 (1995).

506 U.S. at 400. The Court noted that the defendant could apply for executive clemency. 506 U.S. at 412.

In 2009, the Supreme Court revisited this constitutional issue in In re Davis, 557 U.S. __ , 130 S.Ct. 1 (2009), and remanded the case for a fact-finding hearing without specifically deciding whether the Constitution recognizes actual innocence as a stand-alone basis for relief. On remand to the United States District Court, the State of Georgia conceded that it would be unconstitutional to execute an innocent person while arguing that Davis had failed to demonstrate his innocence. In re Davis, Slip op 2010 WL 3385081 at * 37.

After finding a "national consensus among the states" that a "truly persuasive demonstration of innocence subsequent to trial renders punishment unconstitutional," Id. at *41 and *43, the District Court held that the Eighth Amendment barred execution of the innocent. Id. at *43. On the burden-of-proof question, the District Court held that the defendant had to show by "clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence." Id. at *45. Applying this standard, the District Court found that the defendant had not established innocence.

II. New York State Constitutional Claim

A few New York State lower courts have held that the New York State Constitution prohibits punishing an innocent person. However, no appellate court has found a claim of actual innocence under the C.P.L

In People v. Cole, 1 Misc. 3d 531 (Sup. Ct. Kings Co. 2003), Justice Leventhal held that conviction of an innocent person violates Sections 5 [cruel and unusual punishment] and 6 [due process] of Article I of the New York State Constitution. Justice Leventhal concluded: A convicted defendant raising a "free-standing claim of innocence," separate from any other alleged error, "must establish by clear and convincing evidence (considering the trial and hearing evidence) that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty." 1 Misc. 3d at 544.

In People v. Wheeler-Whichard, 25 Misc. 3d 690, 702 (Sup. Ct. Kings Co. 2009), Justice McKay held that a claim of actual innocence could be brought as a ground under C.P.L. § 440.10(1)(h) ("violation of a right of the defendant under the constitution of this state or of the United States.") The court vacated the conviction and dismissed the indictment after finding that the defendant had established his innocence by clear and convincing evidence. In Wheeler-Whichard, the Kings County District Attorney agreed that "if a defendant can prove his or her actual innocence, the defendant's continued incarceration would be fundamentally unfair and would, at the very least, violate the New York State Constitution." Memo, page 63.

In People v. Bermudez, 25 Misc. 3d 1226(A), *23 (Sup. Ct. New York Co. 2009), Justice Cataldo held that the New York State constitution enabled a "free-standing claim of actual innocence to be raised by post-conviction motion." The court vacated the conviction and dismissed the indictment upon finding that the defendant had proved his innocence by clear and convincing evidence.

A number of other lower courts in New York have declined to reach the issue after finding insufficient evidence of innocence. Review of these unpublished decisions shows some observations relevant to the claim's viability. For example, in People v. Days, 26 Misc. 3d 1205(A) (Westchester Co. 2009), the court noted that, "Virtually all of the trial courts to explicitly address the issue have concluded that such a claim may be raised." In People v. Bozella, 25 Misc.3d 1215(A) (Dutchess Co. 2009), the court began its analysis by acknowledging the "basic tenet of our legal system" that "[i]t is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent of a crime may be incarcerated or otherwise punished for a crime which he or she did not commit." (quoting People v. Tankleff, 49 A.D.3d 160, 177 (2d Dept. 2007)).

PAST ROADBLOCKS TO RELIEF

In People v. Tankleff, 49 A.D.3d 160 (2d Dept. 2007), a case that draws a lot of attention in the on-going actual-innocence debate, the Second Department ordered a new trial after finding that the lower court erred in rejecting the defendant's newly-discovered evidence claim under C.P.L. § 440.10(1)(g). With respect to the defendant's separate argument of actual innocence and his motion to dismiss the indictment, the Court held: "The defendant did not establish entitlement to this relief. In making our determination, we do not decide the contention, advanced by the defendant, that New York recognizes a free-standing claim of actual innocence that is cognizable by, or which may be addressed within the parameters of, CPL 440.10(1)(h)." 49 A.D.3d at 182.

As justification for the proposed amendment of C.P.L. § 440.10, the Sponsor's Memorandum in Support of S.729/A.6551 points to the trial court's initial rejection of Tankleff's motion to vacate his conviction. Tankleff's newly-discovered evidence arguments were rejected on due diligence grounds and the actual innocence claim was rejected "based on the court's finding that there exists no constitutional right to relief based on actual innocence." After citing data provided by the Innocence Project indicating that 26 DNA exonerations occurred in the State of New York over the past 20 years, the Sponsor's Memo underscores that no innocent person should remain in prison in New York State on a technicality. Id.

CONCLUSION

There is strong reason to believe that the actual-innocence claim will be recognized, eventually, in New York State – either in the courts or by legislative mandate. Nevertheless, trial courts currently have no clear authority for vacating the conviction – even if the defendant establishes innocence by clear and convincing evidence. We urge the Legislature to address the current statute's inadequacy as soon as possible so that trial judges know that they are free to "adjudicate reasonable claims of innocence without becoming entangled in legal uncertainties." See Sponsor's Memorandum in Support of S.729/A.6551.

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