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

INTRODUCTION

In the wake of several highly-publicized DNA exonerations<sup>1</sup>, the legal community has scrutinized both the root causes of such wrongful convictions and the adequacy of existing legal remedies.<sup>2</sup> For their part, the Criminal Justice Operations and Criminal Courts Committees (the “Committees”)<sup>3</sup> – acknowledging an uncontroversial truth – issued a joint report last year condemning convictions of the innocent as inconsistent with the fundamental purpose of the criminal justice system.<sup>4</sup> Quoting *People v. Tankleff*, 49 A.D.3d 160, 177 (2d Dept. 2007), we observed that 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 he or she did not commit.” Moreover, finding that New York State’s existing provisions inadequately provided for the vindication of an actual innocence claim, the Committees “strongly recommend[ed]” that the New York State Legislature enact legislation to authorize motions to vacate convictions based on proof of actual innocence.

At the time of the Committees’ report, legislation originally proposed, in 2009, by then-State Senator Eric Schneiderman was pending in the state Legislature to amend the Criminal Procedure Law (“C.P.L.”) § 440.10 to permit a court to grant a post-conviction motion to vacate

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<sup>1</sup> See *Know the Cases, Innocence Project*, <http://www.innocenceproject.org/know> (Last visited December 6, 2011).

<sup>2</sup> See Zalman, M., *An Integrated Justice Model of Wrongful Convictions*, 74 Alb. L. Rev. 1465, 1469 (2010).

<sup>3</sup> The Criminal Justice Operations Committee is comprised of prosecutors and criminal defense attorneys who analyze the legal, social and public policy aspects of criminal justice issues facing New Yorkers today. The Criminal Courts Committee, also comprised of prosecutors and criminal defense attorneys, studies the workings of the Criminal Term of the New York State Supreme Court and the New York City Criminal Court.

<sup>4</sup> See *Report In Support of Amending C.P.L. § 440.10 to Provide for Actual-Innocence Claims*, dated March 2011 (<http://www.nycbar.org/pdf/report/uploads/20072067-ReportrecommendingtheamendmentofCPL440.10toallowpost-judgmentreliefbasedonactualinnocence.pdf>).

a judgment based on an “actual innocence” claim.<sup>5</sup> The Sponsors Memorandum cited existing “procedural hurdles” that hindered defendants from fully vindicating their rights and kept courts from correcting “miscarriages of justice.” While the Committees were not prepared at that time to endorse the specific language of the proposed legislation, the Committees did, in principle, support codifying judges’ obligations to vacate a conviction upon the defendant’s showing of actual innocence, by clear and convincing evidence.

The Actual Innocence Act has since been reintroduced and is currently pending as A.6551-A/S.79-A (sponsored by Assembly Member O’Donnell and Senator Peralta). Because New York’s Legislature still has not acted to codify what the Committees see as an important remedy, we have returned to this subject. Hoping to move the conversation forward, we make the following recommendations regarding the proposed legislation.

### ACTUAL INNOCENCE JUSTICE ACT OF 2012

The proposed legislation<sup>6</sup> would amend C.P.L. § 440.10(1) by adding a new subsection, § 440.10(1)(j), to provide that the court, at any time after judgment, may vacate the judgment upon the ground that,

*the defendant is actually innocent of the crime or crimes of which he or she was convicted. For purposes of this paragraph, a defendant is actually innocent where it is established by clear and convincing evidence that no trier of fact would have convicted the defendant under a reasonable doubt standard and in light of all available evidence.*

In addition, C.P.L. § 440.10 would include a new “gateway” provision, to allow access to postconviction relief, without being barred by the statute’s various procedural hurdles. To this end, a new proposed subsection, C.P.L. § 440.10(9), provides:

*Notwithstanding any other provision of this section, the court must address the merits of any claim for relief when the claimant can show, in light of all available evidence, that there exists a reasonable probability that he or she is actually innocent.*

This new provision not only clears the way for litigation of the actual innocence claim itself, but also requires the court to consider other challenges to the validity of the conviction, despite procedural bars, if the defendant can show a reasonable probability of innocence.

Finally, as to the proper relief, the proposed bill would amend C.P.L. § 440.10(4) to state:

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<sup>5</sup> See The Actual Innocence Justice Act of 2009, introduced October 19, 2009 (S.6234).

<sup>6</sup> Our proposed changes to the statute are set forth in the attached Addendum, along with the Committees’ recommended modifications.

If the court grants the motion, it must, except as provided in subdivision five or six of this section, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances. *If the defendant has established by clear and convincing evidence that he or she is actually innocent, in that no trier of fact would have convicted the defendant of the offense or offenses under a reasonable doubt standard and in light of all available evidence, the court shall dismiss the accusatory instrument.*

## RECOMMENDED CHANGES TO THE BILL

The Committees continue to support amendment of C.P.L. § 440.10 to provide for actual innocence claims but, upon examining the specifics of the proposed legislation, we make the following recommendations for change:

### 1. Burden of Proof

#### A. *Clear and Convincing Standard*

The proposed legislation requires the litigant to establish: “by clear and convincing evidence that no trier of fact would have convicted the defendant under a reasonable doubt standard.” The Committees recommend, instead, that the litigant be required to establish actual innocence “by clear and convincing evidence,” without reference to the reasonable doubt standard.

As reported last year, the Committees support the clear and convincing evidence standard for the actual innocence claim. The Supreme Court has stated that,

[The] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

Schlup v. Delo, 513 U.S. 298, 325 (1995) (quoting In re Winship, 397 U.S. 358, 370 (1970)).

Clear and convincing evidence is “evidence which ‘produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.’” Cruzen v. Director, Missouri Dept. Of Health, 497 U.S. 261, 285 n 11 (1990), quoting In Re Jobes, 529 A.2d 434, 441 (NJ 1987) (approving standard for use in decisions to terminate life-sustaining medical treatment). New York appellate courts have described this standard as “evidence which makes it highly probable that the alleged activity actually occurred.” People v. Stewart, 61 A.D.3d 1059,

1059-60 (3<sup>rd</sup> Dept. 2009)(citations omitted); Matter of Eichner (Fox), 73 A.D.2d 431, 468 (2d Dept. 1980) (same).

In People v. Wheeler-Whichard, 25 Misc.3d 690, 702 n 42 (Sup. Ct. 2009), where the court recognized a free-standing claim of actual innocence, the court noted that both the defense and the Kings County District Attorney urged the court to adopt the clear and convincing standard, which the court did. The Committees agree that the high clear and convincing standard appropriately takes into account society's counterbalancing interest in finality of jury verdicts and the risk of inaccurate fact-finding years after the crime's commission.

B. *No Trier of Fact Would Have Convicted the Defendant Under the Reasonable Doubt Standard*

The proposed legislation, however, qualifies the rigorous clear-and-convincing standard by creating the more ambiguous formulation that the defense need only establish "by clear and convincing evidence that no trier of fact would have convicted the defendant under the reasonable doubt standard." We believe that this is not the appropriate burden of proof.

This proposed formulation appears in People v. Cole, 1 Misc. 3d 531, 542 (Sup. Ct. Kings Co. 2003),<sup>7</sup> the first reported case in New York to recognize a freestanding claim of actual innocence. Review of the papers filed in Wheeler-Whichard, Memorandum at page 65, n. 27, reveals that the Kings County District Attorney there urged the court not to follow the lead of the Cole court, characterizing the Cole articulation of the standard as a less-demanding burden of proof.

Other New York courts have used the clear and convincing standard without the reasonable doubt gloss contained in the proposed statute. See People v. Bermudez, 25 Misc. 3d 1226(A), \*22 (Sup. Ct. New York Co. 2009) (granted relief); People v. Days, 26 Misc.3d 1205(A), \*15 (County Ct. Westchester Co. 2009)(in dicta).

The Committees believe that the proper inquiry should be whether the litigant can prove actual innocence to the court, as opposed to whether no reasonable juror could convict.

2. Evidence to be Considered

The proposed legislation permits the court to consider "all available evidence." The Committees recommend that the legislation make clear that the fact-finder would not be limited to considering only admissible evidence. For this reason, the Committees propose the following language: "To determine actual innocence, the court shall consider all reliable information, without regard to its admissibility under the rules of evidence."

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<sup>7</sup> Some commentators have criticized the clear and convincing standard as too onerous, noting that C.P.L. §§ 440.10, 440.30 presently provide that newly-discovered evidence challenges must be accepted if the defendant proves, by a preponderance of the evidence, that the result of a new trial, if granted, "probably" would be different, based on the entire record before the hearing court. See Garber, G.A. and Vaughan, A, *Actual-Innocence Policy, Non-DNA Innocence Claims*, N.Y.L.J., April 4, 2008, at 4. This lower burden of proof, however, is more appropriate to newly-discovered evidence claims where the relief is reversal and a new trial, rather than dismissal of the charges.

When the issue is whether an individual is actually innocent, the hearing court should be permitted to weigh all trustworthy information in reaching its decision. The fact-finder's mandate is no longer, as in trial, to assess legal sufficiency of the evidence of guilt. The Supreme Court, in Schlup, stated, in regard to whether a habeas petitioner had sufficiently shown innocence to excuse procedural default:

[T]he habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted wrongly ... wrongly excluded or to have become available only after trial."

Schlup, 513 U.S. at 328 (quoting Judge Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L. Rev. 142, 160 (1970)). As the Schlup Court further noted, when the "focus" of the inquiry is "actual innocence," the court should consider a "broader array of evidence."<sup>8</sup> For that reason, the Committees recommend that the statutory language spell out specifically that the hearing court shall consider "all reliable information, without regard to its admissibility under the rules of evidence."

### 3. Applicability to Guilty Pleas

The proposed legislation, by omitting any reference to "a verdict of guilty after trial," as required by the newly-discovered evidence ground articulated in C.P.L. § 440.10 (1) (g), does not limit the actual innocence ground for relief to convictions after trial. As discussed below, the Committees support extending the relief to defendants who have pled guilty but recommend that the relief be limited, by adding the following language to the proposed amendment to C.P.L. § 440.10(4), regarding the appropriate relief in cases where actual innocence has been proved:

*If the conviction resulted from a guilty plea and the defendant did not plead guilty to the full indictment or the guilty plea was entered in satisfaction of other charges, actual innocence means that the defendant is actually innocent of the offense to which he or she pled guilty as well as actually innocent of all charged offenses of the same or greater degree as the offense to which he or she pled guilty. Upon granting relief under this paragraph, the court shall reinstate any lesser charges of which the defendant has not demonstrated that he or she is actually innocent.*

The Committees recognize that innocent people occasionally may plead guilty in the face of strong evidence that they are not at that time capable of rebutting. As commentators and scholars have pointed out, "[e]ven an innocent defendant may rationally prefer a specified lenient

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<sup>8</sup> See also People v. Cole, 1 Misc. 3d at 543 (To determine actual innocence, the court should consider "the trial and hearing evidence" "whether in admissible form or not").

sentence to the risk of a much harsher sentence resulting from a wrongful conviction at trial.”<sup>9</sup> The argument that due process is violated when an innocent person is incarcerated applies with no less force when the conviction is obtained by a trial or a guilty plea. Ex Parte Tuley, 109 S.W.3d 388, 392 (Tex. Crim. App. 2003). Other states have also permitted claims of actual innocence after the conviction was obtained by a plea of guilty.<sup>10</sup>

Moreover, in Bousley v. United States, 523 U.S. 614 (1998), the Supreme Court permitted a defendant who pled guilty to plead “actual innocence” to excuse his procedural default in a habeas petition. The Court remanded because the District Court had not addressed the actual innocence claim. The Supreme Court held that, on remand, “the Government should be permitted to present any admissible evidence of petitioner’s guilt even if that evidence was not presented during petitioner’s plea colloquy . . . In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner’s showing of actual innocence must also extend to those charges.”

Making explicit the availability of actual innocence claims to defendants who have pled guilty would provide an avenue of relief to individuals such as Jesse Friedman, who was the subject of the documentary, *Capturing the Friedmans*. The documentary revealed information, previously unknown to the defendant, Jesse Friedman, that formed the basis for his motion to vacate the conviction – several years after his plea of guilty to numerous counts related to allegations of abuse of several children. Although the Second Circuit denied relief, it did take the extraordinary measure of requesting a “reinvestigation or development of a complete record in a collateral proceeding” in order to determine whether Friedman’s conviction should be vacated. Friedman v. Rehal, 618 F.3d 142, 160 (2<sup>nd</sup> Cir. 2010). The court noted that “considering the facts of the case and the circumstances that caused him to plead guilty, this case may be one in which the ... courts may be particularly sympathetic to a proceeding seeking such relief.” Id. at 159.

The Committees recognize that guilty plea convictions raise special concerns and do not support giving the defendant a windfall if he or she was guilty of other offenses covered by the plea bargain. We believe our proposed language avoids this result.

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<sup>9</sup> See Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 Cardozo L.Rev. 2295, 2297 (2006).

<sup>10</sup> See D.C. Code § 22-4135(g)(4) [“If the conviction resulted from a plea of guilty, and other charges were dismissed as part of a plea agreement, the court shall reinstate any charges of which the defendant has not demonstrated that the defendant is actually innocent.”]; N.C.G.S.A. § 15A-1468 [In cases where the convicted person entered and was convicted on a plea of guilty, if all of the eight voting members of the North Carolina Innocence Commission conclude there is sufficient evidence of factual innocence to merit judicial review, the case shall be referred to the senior resident superior court judge in the district of original jurisdiction.]

Some courts, however, have questioned the availability of the actual innocence relief after a guilty plea. See People v. Barnslater, 869 N.E.2d 292, 302 (Ill. App. 1<sup>st</sup> Dist. 2007) (In *dicta*, the court “strongly questioned” whether a claim of actual innocence, under the Illinois Post Conviction Hearing Act, can arise after a guilty plea).

4. Proposed “Reasonable Probability” of Innocence Standard To Allow Passage Through Gateway Of Procedural Barriers

The proposed bill provides a gateway through the procedural bars currently in place under C.P.L. §§ 440.10 (2) & (3), if the litigant can show a “reasonable probability” of innocence. For example, such a litigant may raise a Brady complaint or other constitutional error, even if there was a prior unsuccessful 440 motion on different grounds. The proposed “gateway” provision would also facilitate litigation of newly-discovered evidence claims, upon a showing of probable innocence.

New York courts have noted the potential for unfairness of the various procedural obstacles that currently impede litigants from advancing claims of newly-discovered evidence. For example, in People v. Bermudez, 25 Misc.3d 1226(A) (Sup. Ct. Kings Co. 2009), the court lamented that “if new evidence overwhelmingly demonstrates a defendant’s actual innocence but could have been discovered by the time of trial by the exercise of due diligence, it would not meet the requirements of C.P.L. 440.10(1)(g).”<sup>11</sup> Beyond that, the current statute requires litigants to make hard decisions. In People v. Tankleff, 49 A.D.2d 160, 180 (2d Dept. 2007), the Appellate Division, in reversing on newly-discovered evidence grounds, despite a gap of 13 years between conviction and the postconviction motion, observed that the “body of new evidence” required “time to accumulate.” Yet, it takes a very patient litigant – particularly if incarcerated – to wait for all the hoped-for pieces of the puzzle to be in place. Understandably, a litigant is tempted to make successive applications, as new evidence develops.

The Committees support the proposed gateway provision with the “reasonable probability of innocence” burden of proof. As the Supreme Court has recognized in the context of a similar provision in the habeas corpus statute, “in appropriate cases, the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration.” Schlup, 513 at 320, quoting Murray v. Carrier, 477 U.S. 478, 495 (1986). As with New York’s proposed legislation, the appropriate burden of proof to pass through procedural barriers was held to be a showing that the error “probably” led to conviction of an innocent person.

Conclusion

The Sponsors Memo for the Actual Innocence Justice Act asserts that “[t]hese amendments are intended to require judges to treat claims of actual innocence with the seriousness they warrant, and to permit them to adjudicate reasonable claims of innocence.” The Committees believe that the proposed legislation, along with the Committees’ suggested changes, effectively meets this important goal. We urge the Legislature to enact these amendments to C.P.L. § 440.10.

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<sup>11</sup> See also People v. Cole, 1 Misc. 3d 531, 535 (Sup. Ct. Kings Co. 2003).