NEW YORK CITY BAR

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Hon. Eliot Spitzer
The Executive Chamber
State Capitol
Albany, NY 12224

Dear Governor Spitzer:

The New York City Bar Association has reviewed S5848 (Governor's Program Bill #29) that addresses issues relating to DNA evidence and aspects of the Criminal Procedure Law.

1) At the outset, we express our opposition to Section 14 of the legislation, which would establish a one year deadline for all motions under CPL 440.10 that do not involve claims of newly discovered evidence related to actual innocence. CPL 440.10 is designed to embrace all non-appellate post-judgment remedies and motions to challenge the validity of a judgment of conviction. The eight enumerated grounds contained within the section, provide relief for defendants who wish to collaterally attack a conviction because the basis for the challenge lies outside the appellate record. Since the Criminal Procedure Law was enacted in 1972, there has never been a statute of limitations on 440 motions. To impose such a deadline now would undermine the purpose of the section and most assuredly result in a miscarriage of justice.

The proposed legislation assumes that if new evidence conclusively proving innocence comes to light, the 440 section covering newly discovered evidence, i.e. (440.20(1)(g), will allow defendants to obtain their freedom. Therefore, it is argued, it is sufficient for innocent defendants that only 1(g) claims survive the one-year time bar.

In reality, however, most 1(g) claims are better situated under 440.20(1)(h) because they are, in essence, claims of ineffective assistance of counsel. In other words, it is argued by the prosecution that reasonably diligent counsel *could* have uncovered the exonerating evidence and produced it at trial. In many cases this is correct.

Thus, since these claims are better situated under 1(h), the proposed legislation will undoubtedly result in factually innocent defendants being unable to make appropriate motions after the one year deadline.

The proposed legislation would also be devastating in death penalty cases, should the death penalty be reinstated either legislatively or by court decision. Frequently, a defendant will wish to challenge an attorney's poor performance in establishing mitigating factors during the penalty phase of a capital case. Such a motion would be time barred after one year under the proposed legislation.

In addition, the proposed legislation would eliminate a critical avenue of relief for individuals who are not citizens and who are given incorrect or misleading information by attorneys about the consequences of a guilty plea. These individuals may face harsh immigration consequences years later and would be barred from challenging their convictions.

For all these reasons, we believe that any time restrictions on 440 motions would undermine the administration of justice.

The Association's additional comments on the legislation are as follows:

2) Sections 2 and 3 of the bill would enhance and clarify existing provisions on how DNA samples are to be obtained from designated offenders. One provision authorizes the use of "reasonable force" to collect DNA samples.

We believe the proposed language should be changed so that, instead of a public servant having custody of the defendant being authorized to use force if the defendant refuses to provide the sample, the public servant should be authorized to ask for a court order, on notice to the offender, authorizing the public servant to use reasonable force to collect the sample.

We note that courts already have the discretion to issue "force orders" on notice, and with an opportunity to be heard, when a defendant refuses a lawful direction to submit to fingerprinting, or appear in a line-up, or provide a bodily-fluid sample (*See People v. Brown*, 2007 WL 1148680 (Supreme Ct., Kings County, 2007), and *People v. Williams*, 163 M.2d 212 (Westchester County Ct., 1994)), but law enforcement officers have never openly asserted the authority to use force for this purpose without court order. To grant this authority would invite civil litigation over whether a "refusal" was genuine and whether force was "reasonable." Also, many defendants have legitimate questions about whether they are required to provide DNA, especially if they are required to do so under statutes enacted subsequent to their conviction and sentencing. Members of our criminal justice committees have seen cases, in the past year, in which authorities have attempted to take DNA samples from clients who are not covered by the existing statute and should not have been required to provide samples.

3) Section 3 of the legislation states that a probationer or parolee who "fails to provide a sample" upon notification by a court, correctional official or employee, probation or parole officer, or other law enforcement official or public servant, of his obligation to provide a sample, "shall be deemed to violate" the conditions of probation or parole. Our concern here relates to persons affected by the retroactive application of the law.
We oppose permitting the immediate seizure of persons who refuse to give samples even if they have neither been ordered by a court to provide the sample, nor had the opportunity to consult with counsel about their legal obligation. We submit that the bill should be amended to provide that if a public servant seeks to take a DNA sample from a designated offender who has not previously signed conditions of parole or probation specifying that he is to provide such a sample, the public servant must explain the legal basis for determining that the person is a designated offender, and afford the offender the opportunity to consult with counsel, or if that is not feasible, to appear forthwith before a court.

The legislation should provide that if the offender then provides the requested sample, after consultation with counsel or appearance before the court, he shall not be deemed to have violated the conditions of probation or parole. We believe that offenders who initially refuse to provide samples will comply, after an attorney, or judge, explains their obligation to them.

4) A new paragraph should be added to the legislation, probably to Executive Law § 995-c(3), providing that "Nothing in this Article shall relieve a Police Officer of his obligation to bring an arrested person before a court without unnecessary delay, pursuant to § 140.20 of the Criminal Procedure Law, or shall relieve a criminal court of its obligation to arraign a defendant pursuant to §§ 170.10 or 180.10 of the Criminal Procedure Law."

Based on the experiences of some of our members, we believe that the bill should expressly provide that Police Officers are not authorized to enforce a "designated offender's" obligation to provide DNA by refusing to present the defender for arraignment on a new charge.

5) In the Statute of Limitations provision (Section 9), the bill should refer to the "identity of the offender" being unknown, rather than the "identity of the defendant."

6) We recommend that language be added under Section 16 of the proposed bill such that, if the People "become aware of evidence that substantially tends to exonerate a convicted defendant" and notify the court of the existence of such evidence, the bill would require the Court to appoint counsel for the defendant if the defendant requests counsel and is financially unable to retain counsel.

7) We recommend that the prosecutor's authority to move to vacate convictions or take steps potentially leading to such motions should be broadened, including, but not limited to, a reference to "information," as opposed to "evidence," that tends to exonerate the defendant.

8) We recommend that a provision be added under Section 17 of the proposed bill such that, if the People move to vacate a judgment of conviction on the ground that the defendant is "actually innocent" of the charges and the Court neither grants the motion summarily, nor releases the defendant pending the determination of the motion, the bill would require the Court to release the defendant if the hearing on the motion has not commenced within 30 days, unless the hearing is delayed with the defendant's consent, or is delayed because of compelling facts or circumstances precluding commencement of the hearing.

Thank you for your consideration of these views.

Sincerely,

Barry Kamins
President of the New York City Bar Association