



REPORT ON PROPOSED LEGISLATION CREATING STATEWIDE BODY TO REVIEW WRONGFUL CONVICTIONS

With the recent advent of DNA technology, a number of cases have emerged in which scientific evidence has conclusively demonstrated the wrongful conviction of an innocent person. The worst nightmare for virtually anyone involved in the criminal justice system is that he or she will have a hand in such a conviction. When a wrongful conviction does come to light, the responsible reaction is to try to ensure that it never happens again.

One response to DNA exoneration cases is New York Assembly Bill A04317, introduced on February 2, 2007.¹ The stated purpose of the bill is to create a AState Commission for the Integrity of the Criminal Justice System.@

Another response has been the Governor=s recent proposed bill on DNA evidence,² portions of which would create an Office of Wrongful Conviction Review within the Division of Criminal Justice Services.

This report will discuss each of these legislative initiatives, and highlight some aspects of each that could be modified to achieve a more effective proposal that would be of greatest benefit to the criminal justice system.

THE ASSEMBLY BILL

The Assembly proposal would create a Statewide Commission on Wrongful Convictions. The Commission would be a ten-member body that would meet at least four times a year. At those meetings, the Commission would review cases of former defendants who were subsequently determined to be innocent of the crimes of which they had been convicted. The Commission would have independent power to conduct investigations, hold hearings, and make findings of fact in order to determine the cause or causes of certain wrongful convictions. Within sixty days of making such determinations, the Commission would be required to issue a preliminary written report of its findings of fact and conclusions, plus any recommendations to

¹ The bill was referred to the Judiciary Committee on the same day it was introduced; shortly thereafter, on April 24, 2007, the bill was also referred to the Codes and Ways and Means Committees. The same bill was also introduced previously as A4084 during the 2005-2006 legislative session, and it was previously referred to the Judiciary, Codes, Ways and Means, and Rules Committees during that session. Before that, the bill was introduced as A9190 during the 2003-2004 legislative session, and it too was previously referred to the Judiciary Committee. It has never been presented to the Assembly for a vote and the Senate has never introduced the same or a similar bill.

² Legislative Bill Drafting Commission (12036-04-7).

prevent wrongful convictions from recurring under similar circumstances in the future. Within one hundred and twenty days after making its preliminary report, the Commission would be required to issue its report and recommendations regarding a particular case. The report and recommendations would be made available to the public, and would be delivered to the Governor, the Attorney General, the Chief Judge of the Court of Appeals, and various other governmental entities. The Commission is also charged with preparing an annual report including, among other things, the number of cases accepted for formal and informal investigations, the number of completed investigations, and the status of any pending investigations.

While the goal in the creation of this Commission is certainly laudable, as a practical matter it is not workable under the current scheme proposed by certain members of the Assembly.

I. The Bill=s Requirement That a Person Previously Convicted Be ASubsequently Determined to Be Innocent@ Before His or Her Case Will Be Considered by the Commission Needs to Be Reconsidered.

Article 23 of the Judiciary Law, which is the article that will govern the State Commission for the Integrity of the Criminal Justice System should the proposal become law, delineates which cases will be reviewed by the Commission:

Whenever a person who has been convicted of a crime or adjudicated a youthful offender is subsequently determined to be innocent of such crime or offense and exonerated, the commission shall conduct an investigation, hold hearings on, and make findings of fact regarding the wrongful conviction in order to determine the cause or causes of the wrongful conviction.

Proposed Section 902, lines 5-10. This provision should be reworded. The goal of the Commission is to investigate Ainstances of wrongful convictions@ (see Memorandum in Support of Legislation) so that future such instances may be avoided. To further this goal most effectively, the Commission should examine cases of wrongful convictions that are brought to the attention of the Commission. The Assembly proposal, however, uses words that define the class of cases that may be brought to the attention of the Commission in a way that will limit the ability of the Commission to act and, as a result, will be unhelpful to its ultimate goal. By limiting the group of cases that the Commission may consider to those in which a person has been Asubsequently determined to be innocent,@ the Commission will not have the ability to consider other significant cases of wrongful convictions; the Commission=s independent review of these cases as well will undoubtedly benefit the criminal justice system and provide additional avenues of proposed change to prevent such wrongful convictions from recurring in similar situations.

Although wrongful convictions will surely be discovered whenever there has been a judicial finding of innocence, they may also be discovered in a variety of cases that do not result in a finding of innocence. Wrongful convictions may be discovered when convictions are

reversed or vacated on numerous other grounds, including for example the legal insufficiency of the evidence adduced at trial, the ineffective assistance of counsel, the withholding of exculpatory material by the prosecution, or the erroneous admission of prejudicial evidence. When criminal convictions are reversed on appeal, or vacated pursuant to a motion to vacate judgment, the reviewing court rarely makes a determination of innocence³ but, rather, typically focuses on the issues raised by the defendants in the proceedings under review. Indeed, actual innocence in and of itself does not generally provide an independent basis for relief from a wrongful conviction. On direct appeal to the Appellate Division, the reviewing court may focus on the legal sufficiency or weight of the evidence (see Criminal Procedure Law sections 470.15[4] [b], [5]), and the grounds upon which a trial court may vacate a judgment are enumerated in Criminal Procedure Law section 440.10 (1) (a) - (h); those grounds do not include innocence.³ And, regarding federal habeas relief, the Supreme Court has declared that A[c]laims 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.@ Herrera v. Collins, 506 U.S. 390, 400 (1993); accord Townsend v. Sain, 372 U.S. 293, 317 (1963) (The existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.@). Thus, by limiting the class of cases that may be reviewed by the Commission to those instances where there has been a determination of innocence, the legislative proposal will, in a very practical sense, prevent the Commission from examining those cases where further independent examination might most benefit the criminal justice system as a whole.

Alternatively, an effective legislative proposal should allow the Commission to examine cases where there is a real concern that an innocent person has been wrongfully convicted. Judicial referral would be one appropriate mechanism for such cases to be examined further. A more effective proposal would have the Commission review any criminal or juvenile case involving a wrongful conviction whenever a judge familiar with the case, upon reversing, vacating, or setting aside a conviction, or granting habeas corpus relief, has a reasonable basis to conclude that an innocent person was wrongly convicted and review by the Commission may lessen the likelihood of a similar wrongful conviction from occurring in the future.@ This allows a judge, ruling on grounds other than Ainnocence,@ to refer a case to the Commission for its independent review whenever such review is likely to prevent similar wrongful convictions from occurring. It also grants a judge the discretion not to refer a case where an innocent person has been wrongfully convicted where there is likely nothing to be gained by such time-consuming and costly review (discussed further below). This would occur where, for example, the reviewing judge is aware of peculiar facts and circumstances related to a particular case that are not likely to reoccur and are so unique that the Commission would not likely be able to make recommendations for reform to prevent their reoccurrence. This language would broaden the pool of cases the Commission could hear, but would prevent the Commission from conducting extensive and costly proceedings that are not likely to benefit the criminal justice system as a whole. As such, it is entirely consistent with the purpose of the Commission as stated in the present bill: AThe commission shall review any criminal or juvenile case involving a wrongful conviction and recommend reforms to lessen the likelihood of a similar wrongful conviction occurring in the future.@ Proposed Section 902, lines 1-4.

³ Criminal Procedure Law section 440.10(1)(g) does permit the court to vacate a judgment of conviction where Anew evidence has been discovered . . . which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.@

Other participants in the criminal justice system should be able to call a matter to the Commission's attention as well. District Attorneys may be privy to certain information warranting a referral, as may other people directly involved in a particular case. In addition, in a case where relief has been granted under the Unjust Conviction and Imprisonment Act (Court of Claims Act, section 8-b), referral to the Commission would certainly seem to be appropriate. Lastly, the Commission itself should be able to choose a case or cases for its independent review, and also to determine how much of an inquiry is appropriate in any particular matter.

II. The Proposed Commission Members Will Not Be Able to Perform their Duties Effectively.

Under the proposed legislation, there is a substantial concern that the Commission will be unable to discharge its investigative duties in an effective manner. Among other responsibilities, the Commission has the power and responsibility to conduct investigations and hearings, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, [and] require production of any books, records, documents or other evidence.^Y Proposed Section 903(3). Simply put, the Commission would bear a great responsibility to investigate different aspects of these criminal cases using the full panoply of investigative tools available to a prosecutor's office. These investigations are likely to be highly fact-intensive, unusually sensitive in nature given their subject matter, and particularly demanding in terms of resources and personnel. As constituted and funded, the Commission lacks the necessary resources and personnel to investigate these cases appropriately.

First, the Commission members, while likely to be highly accomplished and influential in their fields, are not going to have the time necessary to engage in sufficiently thorough investigations. The members, as established by the Assembly's proposed legislation, would be as follows: (1) the commissioner of criminal justice services, (2) a representative of a law enforcement agency, (3) a criminal defense attorney, (4) a member of a victims rights advocacy organization, (5) a representative of the forensic science field,[@] (6) a representative of prosecution services,[@] (7) a retired judge or justice of the New York State court system; (8) a law professor, (9) a member of the public appointed by the temporary president of the Senate, and (10) a member of the public appointed by the speaker of the Assembly. Proposed Section 901. These commissioners, each of whom is expected to serve without compensation, are obligated to meet at least four times per year. Undoubtedly, the Commission would have the experience and skill necessary to conduct thorough investigations. However, it will not have the time or focus. A proper investigation simply cannot be conducted by meeting a handful of times per year and with long breaks between meetings. The organization of, and participation in, a serious investigation of this nature will undoubtedly be a consuming, full-time job, requiring the total commitment of the investigator and other participants over an extended period of time. The constitution of the Commission is plainly inconsistent with this, and is likely to result in either badly flawed investigations, limited or incomplete ones, or none at all that have been conducted in the manner anticipated by the proposal.

A second concern, which is related to the first, is that the proposed legislation does not provide for a staff of attorneys or investigators who will perform the necessary work, such as reviewing the files, interviewing large numbers of witnesses, and, if necessary, conducting factual hearings. Without a sizeable, full-time staff of trained investigators, the Commission will be unable to meet its responsibilities under the proposed legislation.

A third concern relates to the ability of the Commission to collect documents and interview witnesses controlled or utilized by a District Attorney=s Office. Even the best-intentioned District Attorney=s office may be unwilling or unable to release documents and information it collected during a grand jury investigation or an investigation leading up to trial. Additionally, a District Attorney=s office or police department may be unwilling to divulge the names and addresses of witnesses, confidential informants, or undercover agents. Therefore, the investigative function of the proposed Commission may lead to significant tensions between prosecutors= offices and the Commission. These are disputes that may ultimately be won by the prosecutor=s office, especially if it can show that it is continuing to investigate some aspect of the case and that the divulging of certain information may impair that ongoing investigation. There is, therefore, a legitimate concern that this dynamic will cause the Commission to lose credibility as it finds itself unable to launch the types of investigations envisioned by the statute.

III. The Legislature Must Allocate Sufficient Funds for the Commission to Work Effectively.

Surprisingly, the Assembly proposal includes no provision for the funding of such an important Commission, including its investigators and other staffed assistants. Proposed Section 903(2) specifically envisions that the Commission will employ Aofficers, investigators and employees.@ The proposal also provides no funding for the investigations, hearings, document production, record distribution and storage, subpoenas, office space, reimbursement expenses, and numerous other tangential necessities to the smooth functioning of the Commission. It is therefore not surprising that the bill drafter was able to include in the bill=s ANew York State Assembly Memorandum in Support of Legislation@ a statement that A[t]he bill costs relatively little.@ Memorandum at 2. The Memorandum also provides that Athe commission is authorized to receive, without cost, assistance, information, data and records@ from various state agencies. Memorandum at 2. But for small understaffed District Attorneys= offices, for example, having to reproduce dozens of boxes of material, or having to send employees to provide testimony at Innocence Commission hearings, may be expenses that cannot easily be borne by the offices. To make the Commission work as effectively as practical and possible, there has to be a sufficient funding allocation to cover all reasonable costs of the Commission=s work.

IV. There are other Miscellaneous Problems with the Proposal that Should Be Reconsidered and Modified Before the Bill Proceeds Further.

In addition to the infirmities highlighted above, there are several more minor problems with the Assembly bill that should be looked at more closely so that the bill may be an effective tool for reform.

- * The bill does not mention how far back in time the Commission will go to examine cases of wrongful convictions.
- * The files concerning wrongfully convicted individuals should be sealed by the time the case is brought to the attention of the Commission.
- * The Memorandum in Support of the Legislation includes in the section entitled A Purpose or General Idea of Bill@ that the Commission will investigate instances of wrongful convictions in felony cases, yet the actual wording of the bill contains no mention that the cases that may be considered must be felonies.
- * The bill includes in the section concerning its obligation to file yearly reports a reference to the number of cases accepted for A formal and informal investigation,@ yet nowhere in the proposal does the statute differentiate between formal and informal investigations. Indeed, the language of the proposal seems to anticipate formal investigations only. It is difficult to anticipate how informal investigations into wrongful convictions could be accomplished and useful in recommending reforms to the Criminal Justice System as a whole.
- * The bill includes the Commissioner of Criminal Justice Services to serve as a member of the Commission. If other changes are not made to the composition of the Commission, the provision should include alternatively a designee of the Commissioner, since the Commissioner is not likely to have the time to serve effectively in light of all the Commissioner=s other responsibilities.
- * The prosecutor and defense attorney -- those individuals with the most useful information about how the former defendant was wrongfully convicted -- should be more directly involved in the work of the Commission for that particular case. In its current format, those individuals may only be A invite[d] . . . to submit a reply within sixty days to the commission concerning the findings of fact and recommendations in the report@ of the Commission after it has been written. Proposed Section 903 (5).
- * The subpoena compliance, document production, testimony, etc. that is expected of certain individuals and governmental agencies is likely to be time-consuming and costly and there has been no allowance for the time and efforts involved by those individuals summoned by the Commission.

THE GOVERNOR=S BILL

Within a comprehensive proposal for reform that includes, among other things, extensive DNA sample collections and requirements for the preservation of such evidence, access by defendants to DNA evidence, procedures for certain post-conviction relief, amendments to the Court of Claims Act regarding claims for unjust convictions, and certain limitations on motions to vacate judgment that include time limitations for their proper filing,

the Governor additionally proposes to amend the Executive Law by adding a new section 837-s. This section would create an AOffice of Wrongful Conviction Review@ within the State=s Division of Criminal Justice Services (DCJS). The Office would Aconduct reviews of criminal or juvenile cases Y involving wrongful convictions and consider whether there may be possible reforms that could protect against similar wrongful convictions occurring in the future.@ Governor=s Proposal at Section 6. The Governor=s proposal provides for A participation by prosecutors, defense attorneys, former judges, and other experts in relevant fields.@ Id. Like the Assembly bill, the Governor=s proposal only allows for review of a case where the former defendant was A subsequently determined to be innocent.@ Id. In such a case, the grand jury minutes will be disclosed to the Office (Governor=s Proposal at Section 8), the criminal file will become unsealed (Governor=s Proposal at Section 7), and the Office will be able to receive from any court, agency, department or other similar office, any assistance or information it needs to carry out its powers and duties effectively (Governor=s Proposal at Section 6). Regarding past cases, the Office will review, at a minimum, all cases in which DNA evidence resulted in an exoneration. Id. The Office will make available an annual report detailing the number of cases it has reviewed and its findings, including the cause or causes of any wrongful convictions it has investigated. Id.

The Governor=s proposal shares a major flaw with the Assembly=s, in that it limits review to cases where a former defendant was A subsequently determined to be innocent.@ As noted in this report=s Section I, *ante*, this does not allow for review of other significant cases that resulted in wrongful convictions. Similarly, the proposal does not detail how cases get to the Office of Wrongful Conviction Review in the first place. It also requires the Office to review all such cases A of innocence@ even where the case may involve such unique circumstances that the reason for the wrongful conviction is not reasonably likely to occur again.

The Governor=s bill shares certain of the Assembly bill=s additional flaws that are set out in section IV, *ante*. Among these are that compliance with the Office=s demands for documents, materials, and assistance is likely to be burdensome on smaller agencies, and no allowance is made for compensating those agencies for the time and resources they expend. Also, no provision is made for potential conflicts with ongoing civil litigation arising from the unlawful conviction. Moreover, although the proposal says the Office=s reviews A shall include participation by prosecutors [and] defense attorneys,@ the nature of such participation is unspecified and vague and, like the Assembly version, does not seem to make sufficient direct use of the individuals with the most valuable information about how the former defendant was wrongfully convicted.

However, the Governor=s bill seemingly meets the concerns expressed in Sections II and III of this report, *ante*, concerning the provision of necessary resources in manpower, authority, and funding for the Office to carry out its appointed task. As an arm of an existing State agency, the Office of Wrongful Conviction Review would presumably be sufficiently staffed and funded to carry out its investigations. In addition, the Governor=s proposal contains specific provisions providing the Office with access to records otherwise sealed under Criminal Procedure Law section 160.50(1), and grand jury proceedings otherwise secret under Criminal Procedure Law section 190.25(4). The same concern identified in subheading II, *ante*, about providing confidential information that a prosecutor=s office may

not be comfortable disclosing, exists with the Governor=s proposal. It is also possible that former defendants may want uncomplimentary documents or information to remain sealed and confidential. Furthermore, while the Governor=s proposal does discuss how far back in time the Office will go in its investigations, its direction in this regard may not be the most beneficial. The bill requires the Office to go back in time indefinitely, at least until the beginning of the DNA era, and examine each DNA exoneration case. However, by again highlighting a particular class of cases for review, other cases equally worthy, if not more worthy, of review may be overlooked. Alternatively, cases that are referred -- whether by members of the judiciary or otherwise -- that include in the referral a reasonable basis to believe that the system could benefit from such review, would likely be a more fruitful starting place, and would most likely provide the most valuable group of prior cases to look at for possible reform.

Although some aspects of the Governor=s proposal fill crucial gaps in the Assembly version, the improvements come at a price: rather than being an independent commission, the Office of Wrongful Conviction Review would be an arm of DCJS, a law enforcement agency. An independent commission would likely be more aggressive in its pursuit of uncovering injustice and making recommendations. And, the positions of the designated Commission members in the Assembly version, if they had the time and resources to devote to reviewing cases of wrongful convictions that are likely to promote reform, would certainly provide a more independent perspective than those in an Office staffed by employees of only one branch of government.

CONCLUSION

Although, on its face, the proposed creation of an AInnocence Commission@ or AWrongful Conviction Review Office@ seems potentially beneficial, both of the proposals currently before the Legislature are flawed in several significant respects. Each of the proposals should be looked at more closely by participants in the criminal justice system, with an eye toward creating a Commission that is set up to better effectuate all that the proposals seek to accomplish. Either an amended version of A04317 or the Governor=s Bill, or a different version altogether, would create a Commission better positioned to identify faults in the criminal justice system with an aim toward improving the quality of justice in New York State.

The Assembly proposal was an important start to the discussion concerning the creation of an Innocence Commission. The Governor=s Bill improved upon that proposal in some respects, but includes other less desirable aspects. Nonetheless, the discussion should be continuing and ongoing, until a better legislative alternative is designed.

This report was prepared by the Committee on Criminal Justice Operations.