

Testimony of

The Legal Aid Society of the City of New York

at a joint public hearing on

Legislation Addressing Wrongful Convictions  
and the State DNA Database

Presented to:

Assembly Standing Committee on Codes  
Assembly Standing Committee on Correction

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May 31, 2007  
Albany, N.Y.

The Legal Aid Society welcomes the opportunity to testify at this joint hearing that you have convened to explore how to reduce instances of wrongful convictions, and to review proposed legislation to expand the statewide DNA Database.

Since 1876, The Legal Aid Society has provided free legal services to New York City residents who are unable to afford private counsel. Annually, through our criminal, civil and juvenile offices in all five boroughs, our staff handles about 275,000 cases for poor families and individuals. The services we provide reflect the entire gamut of the needs of our clients, from immigration representation for the newest arrivals, to health care benefits for the oldest New Yorkers. By contract with New York City, the Society serves as the primary defender of poor people prosecuted in the State court system. We strive to prevent wrongful convictions through our trial, appellate and post-conviction representation, as well as through ongoing attorney training. Our Special Litigation Unit has been particularly active in providing advice and information to clients and attorneys regarding the State DNA Identification Index, and in litigating issues that have arisen concerning the implementation of the DNA statute.

Legal Aid is appearing today to express our concern regarding S.5848, the Governor's program bill on DNA evidence, that recently passed the Senate and is under consideration in the Assembly. Certain provisions in this legislation are worthwhile, but others would harm our clients and others similarly situated. Several bills introduced in the Assembly collectively offer a stronger, smarter and fairer response to the problem of wrongful convictions, and to questions regarding the proper role of the DNA Databank.

We are particularly troubled by Sections 11-14 of the Governor's bill, which would create unprecedented procedural barriers to defendants' motions to vacate their convictions under Criminal Procedure Law Article 440. These provisions are not germane to a bill that deals

primarily with DNA evidence. Furthermore, these procedural barriers would be a giant step backward in our ongoing efforts to ensure fairness and accuracy in the criminal justice system.

The central concept of the bill, the expansion of the State DNA Databank to include DNA profiles from all persons convicted of a Penal Law felony or misdemeanor, would enhance, to some degree, the crime-solving capacity of law enforcement. However, we feel that in practice, this additional expansion of the Databank, following so quickly upon last year's substantial expansion, would divert resources away from other crime-prevention efforts that promise more substantial benefits.

We also believe that any expansion of the Databank should be accompanied by certain procedural measures, detailed below, to safeguard the fairness of the DNA collection process, particularly during the transitional period when DNA samples are being collected from persons who were convicted before the law's effective date, but are still under supervision and, therefore, subject to DNA collection.

Finally, we generally support the bill's provisions to enhance opportunities for DNA testing at a defendant's request, both pre-trial and post-conviction, as well as the provision that would create a mechanism to assess the causes of wrongful convictions, but we believe these provisions can and should be strengthened. Our detailed suggestions, many of which are found in pending Assembly legislation, are set forth below.

#### **Changes in CPL Article 440**

The proposed legislation would amend C.P.L. §440.10 in two ways that could significantly curtail access to the courts for defendants whose convictions run afoul of New York State and federal constitutional standards. Defendants whose innocence might ultimately be established are among those whose access to the court would be restricted. For that reason and

because the amendments are unnecessary to rectify any existing problems, we oppose them.

Section 12 of the proposed legislation would amend C.P.L. §440.10 by, *inter alia*, adding a new paragraph (e) to Section 2 of the statute, the section outlining situations in which a trial court “must deny” a defendant’s motion. Proposed paragraph (e) adds to the mandatory denial provisions those cases in which a defendant has previously brought an unsuccessful C.P.L. §440.10 motion. The sole exception to this mandatory bar arises when the successor motion is predicated on “newly discovered evidence” as defined in paragraph 1(g) of the statute.

The proposed amendment is unnecessary. Paragraph (c) of Subsection 3 of the existing C.P.L. §440.10 statute – the discretionary “may deny” subsection – already empowers a court to deny a defendant’s motion whenever a 440 motion has previously been made and denied so long as the ground raised in the subsequent motion could have been included in the original one. This paragraph allows a court to deny a successor motion whenever that denial is in the interest of justice. There is simply no reason to divest trial judges of the authority to entertain successor 440 motions on the merits when the sound exercise of discretion so dictates.

This proposed amendment is also unfair. Many defendants file their original C.P.L. §440.10 motion *pro se*, in the immediate wake of their convictions based on mis-advice received from so-called jailhouse lawyers. At this time, while a notice of appeal has been filed, appellate counsel has yet to be assigned. Sound policy is not served when such onerous and irrevocable consequences arise from the filing of uncounseled motions, often made without any real understanding of their implications. As a result of this amendment, serious constitutional defects involving, for example, Brady violations and the ineffective assistance of counsel – defects that come to light only after careful investigation by appellate counsel – would remain forever unaddressed.

This amendment is also unfair to defendants who filed an unsuccessful 440 motion before the amendment's enactment. By its terms, the amendment would seemingly require the denial of any successor 440 motion (except those covered by the narrow newly-discovered-evidence exemption) by these defendants. These defendants, however, had no notice at the time that they filed their original 440 motions that such filing would mandatorily bar a successor motion.

Section 14 of the proposed legislation would amend C.P.L. §440.10 by adding a new subdivision 8, which would create a statute of limitations of one year from the date on which the judgment becomes final for C.P.L. §440.10 motions. The sole exception under subdivision 8 would be "newly discovered evidence" motions made pursuant to subdivision 1(g) of C.P.L. §440.10 so long as the defendant makes the motion with due diligence after the discovery of the new evidence. In addition, Section 12 of the legislation would add a new paragraph (f) to section 2 of C.P.L. §440.10, requiring a trial judge to deny a motion brought outside these newly enacted time limits.

Once again these amendments are unnecessary and unfair. They are unnecessary because New York law already authorizes a court to deny a C.P.L. §440.10 motion if a defendant has not acted diligently in bringing it. *People v. Friedgood*, 58 N.Y.2d 467 (1983). *Friedgood* thus allows a court to deny a motion where the defendant has not acted with dispatch in bringing it before the court. This laches-type doctrine adequately protects the People against prejudice that might result from undue delay without the rigidity and potential unfairness of a statute of limitations.

The proposed statute of limitations also threatens to leave many wrongful convictions in place. Although the amendment would exempt newly discovered evidence claims, this alone does not suffice to ensure innocent defendants access to justice. Recent history demonstrates

that many wrongful convictions of innocent defendants are unearthed (initially at least) not through newly discovered evidence claims, but through constitutional claims of ineffective assistance, Brady violations and other forms of misconduct.

As drafted, the statute of limitations provision would, for example, bar consideration of a Brady claim brought more than a year after a defendant's conviction became final even if the State had suppressed the material in question until that point. Similarly, a claim based on the constitutionally material perjury of a prosecution witness would be barred – unless the defendant could meet the onerous newly discovered evidence standard – even if the perjury did not, and could not have, come to light until after the limitations period had expired. The same bar would preclude redress of claims regarding ineffective or conflicted defense counsel even when the information necessary to mount the claim remained secret for more than a year after finality.

In addition, in the event that the death penalty is reinstated in New York (either legislatively or by judicial decision), the statute of limitations provision as drafted would potentially work significant injustice. Because the sole exception refers to newly discovered evidence of “innocence,” newly emergent mitigation evidence, which bears not on guilt or innocence but on the propriety of a death sentence, would not be covered. Because evidence of mitigation, as well as evidence of penalty ineffectiveness by counsel, often does not emerge until long after the judgment becomes final, the proposed amendment raises the specter of death sentences wrongly left in place. Moreover, in many death penalty exoneration cases, the evidence of actual innocence has emerged long after the conviction became final while the defendant challenged his sentence collaterally based on penalty-phase related errors. If the State closes the courthouse to such challenges one year after the conviction becomes final, then the tragic result may be a wrongful execution, carried out before the exonerating proof of innocence

has emerged.

Finally, the statute of limitations amendment is silent as to its impact on defendants whose conviction will have been final for more than a year at the time of enactment. This, too, adds a significant element of uncertainty and could result in a flood of motions from defendants who fear that their right to raise potential claims is about to be permanently eclipsed.

### **The “all crimes” DNA Databank**

Replacing the current lengthy list of “designated” offenses with “any Penal Law felony or misdemeanor” would simplify the statute, but we should bear in mind that the Databank already encompasses all persons convicted of sex offenses or violent offenses, including misdemeanors. Adding the additional non-violent misdemeanors would bring only marginal benefit in identifying perpetrators of serious felonies, compared to previous expansions of the Databank. On the other hand, the expansion may overtax the State’s forensic laboratories that develop DNA profiles, causing inefficiency and potentially delaying the analysis of evidence from crime scenes. While the State could launch a crash program of extra funding to eliminate the developing backlog of DNA samples to be analyzed, we believe that a more balanced and effective allocation of crime-prevention resources would steer funds toward treatment for substance abusers, interventions to assist at-risk youth, greater efforts to help persons seeking to re-enter the job market after serving prison or jail sentences, and beefing up the woefully inadequate funding of indigent defense statewide, as recommended recently by Chief Judge Kaye’s commission on this subject.

Sections 2 and 3 of the Governor’s bill enhance and clarify existing provisions on how DNA samples are to be obtained from designated offenders. One troubling provision authorizes the use of “reasonable force” to collect DNA samples.

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. We 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.

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.

Another provision of the bill 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 bill should further 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. In our experience, almost all offenders who initially refuse to provide samples will comply, after an attorney, or judge, explains their obligation to them.

Finally, in this regard, the bill should explicitly outlaw an illegal practice which some judges and court officers in New York City have developed, in which designated offenders who refuse to provide DNA samples to Police Officers during pre-arraignment detention on new charges are not brought before the Court for arraignment. This is not, nor should it be, a lawful way to enforce the provisions of the Executive Law. A new paragraph should be added to the statute, 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.”

### **Expanded pre-trial and post-conviction DNA testing**

We generally support the provisions contained in Sections 10 and 15 of the bill,

authorizing a Court to order, at the defendant's request, comparison of crime-scene DNA profiles with profiles contained in the state or national DNA Databank, even where a defendant who pled guilty is seeking vacatur of his conviction based on newly-discovered DNA evidence.

As demonstrated by the Innocence Project, DNA exonerations have clearly shown that some innocent people plead guilty, whether because they were induced to confess falsely, because they lacked adequate legal representation, or for other legitimate reasons. However, we prefer the language of Assembly bills A.8047 and A.8048, which would accomplish the needed reforms more clearly, without unnecessary language creating a separate standard for evaluating applications by defendants who pled guilty, and which would authorize courts to order comparisons of crime-scene evidence with state and national fingerprint databases, as well as DNA databases.

Two provisions of the bill, not limited to DNA evidence, address the role of prosecutors and judges in cases of newly-discovered evidence that exonerates or may exonerate a convicted defendant.

Section 16 requires that a prosecutor do what ethical prosecutors already do: if they become aware of new evidence that "substantially tends to exonerate" the defendant, they must notify the court, which shall notify the defendant. Thereupon the court, "if appropriate," shall appoint defense counsel. We find it hard to conceive of such a case where it would not be "appropriate" to appoint counsel, and therefore recommend language that would require the court to appoint counsel in this case if the defendant requests counsel and is financially unable to retain counsel. Additionally, we would broaden the language to encompass the prosecutor's acquisition of new "information," not strictly limited to "evidence."

Section 17 would codify a prosecutor's power to vacate a judgment on the ground that

the defendant is “actually innocent.” The bill as drafted permits, but does not require, the court to release the defendant pending a hearing, if the court does not summarily grant the motion to vacate. Inasmuch as ethical prosecutors don’t even proceed against persons whom they believe are “actually innocent,” the law should not grant judges unlimited power to hold such persons in custody. We propose that a proviso be added to this section stating that if the court orders a hearing on the prosecutor’s motion, and has not already released the defendant on bail or recognizance, the court must do so if the hearing has not commenced within 30 days of the order granting a hearing, unless the hearing is delayed with the defendant’s consent, or is delayed because of a compelling fact or circumstance precluding commencement of the hearing.

#### **Other matters**

Like the Innocence Project, we prefer an independent commission, like that proposed in A. 4317, to an office of Wrongful Conviction Review, fully contained in the executive branch, proposed in Section 6 of the Program Bill. We also believe that Bill A.8046, authorizing the Commission on Forensic Science to set a mandatory minimum period for the preservation of blood, tissue and other forensic samples from crime scenes, is far preferable to the weaker language in Section 5 of the Program Bill, directing the Commission to develop “voluntary guidelines” for the collection and preservation of such evidence. We concur with the Innocence Project in recommending that legislation also address the need to catalog existing biological evidence so that innocent persons do not languish in prison for years because evidence is purportedly “lost” before it is found.

With regard to the Statute of Limitations extension proposed in Section 9 of the Program Bill, we do not oppose this, but we prefer the mechanism of “John Doe indictments” as proposed in Bill A.3687, Section 11. We also suggest a technical amendment, replacing the word

“defendant” with the word “offender” in describing situations where the identity of the offender is unknown.

Certain other provisions, contained in A.3687 but not in the Governor’s bill, deserve consideration. We particularly support measures to eliminate unauthorized “local” databanks containing DNA profiles of persons who have never been convicted of any crime (A. 3687, § 6); to require that DNA samples collected by law enforcement from persons who voluntarily provide samples be destroyed, if the person providing the sample is not linked to any crime (A. 3687, §§ 7 and 9), and to require that courts advise defendants, as part of plea allocutions, that the defendant will be required to submit a DNA sample (A. 3687, § 13).

In conclusion, DNA is a welcome and powerful tool for convicting the guilty, freeing the innocent, and enhancing the efficiency of law enforcement. We believe, however, that this powerful technology should be employed with an ongoing concern for procedural fairness, substantial justice, and the legitimate privacy interests of our community.

