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I N S E N A T E

May 18, 2010

Introduced by Sen. SCHNEIDERMAN -- read twice and ordered printed, and
when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to vacating
judgments based upon forensic DNA tests

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Paragraph (h) of subdivision 1 and subdivision 5 of section
2 440.10 of the criminal procedure law are amended to read as follows:
3 (h) NEW EVIDENCE CONSISTING OF FORENSIC DNA TEST RESULTS HAS BEEN
4 DISCOVERED SINCE THE ENTRY OF JUDGMENT BASED UPON A PLEA OF GUILTY,
5 WHICH WAS NOT AVAILABLE TO THE DEFENDANT PRIOR TO THE PLEA AND WHICH IS
6 OF SUCH CHARACTER AS TO CREATE A PROBABILITY THAT HAD SUCH EVIDENCE BEEN
7 KNOWN BY THE DEFENDANT PRIOR TO THE ENTRY OF A PLEA OF GUILTY THAT THE
8 PLEA WOULD NOT HAVE BEEN ENTERED; PROVIDED THAT A MOTION BASED UPON SUCH
9 GROUND MUST BE MADE WITH DUE DILIGENCE AFTER THE DISCOVERY OF SUCH
10 ALLEGED NEW EVIDENCE; OR
11 (I) The judgment was obtained in violation of a right of the defendant
12 under the constitution of this state or of the United States.
13 5. Upon granting the motion upon the ground, as prescribed in para-
14 graph (g) of subdivision one, that newly discovered evidence creates a
15 probability that had such evidence been received at the trial the
16 verdict would have been more favorable to the defendant in that the
17 conviction would have been for a lesser offense than the one contained
18 in the verdict, OR AS PRESCRIBED IN PARAGRAPH (H) OF SUBDIVISION ONE,
19 THAT NEWLY DISCOVERED EVIDENCE CONSISTING OF FORENSIC DNA TEST RESULTS
20 CREATES A PROBABILITY THAT HAD SUCH EVIDENCE BEEN KNOWN BY THE DEFENDANT
21 PRIOR TO THE ENTRY OF A PLEA OF GUILTY THAT THE PLEA WOULD NOT HAVE BEEN
22 ENTERED, the court may either:
23 (a) Vacate the judgment and order a new trial; or
24 (b) With the consent of the people, modify the judgment by reducing
25 it to one of conviction for such lesser offense. In such case, the
26 court must re-sentence the defendant accordingly.
27 S 2. Subdivision 1 of section 440.20 of the criminal procedure law, as
28 amended by chapter 1 of the laws of 1995, is amended to read as follows:

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 1. At any time after the entry of a judgment, the court in which the
2 judgment was entered may, upon motion of the defendant, set aside the
3 sentence upon the ground that it was unauthorized, illegally imposed or
4 otherwise invalid as a matter of law. Where the judgment includes a
5 sentence of death, the court may also set aside the sentence upon any of
6 the grounds set forth in paragraph (b), (c), (f), (g) [or], (h) OR (I)
7 of subdivision one of section 440.10 as applied to a separate sentencing
8 proceeding under section 400.27, provided, however, that to the extent
9 the ground or grounds asserted include one or more of the aforesaid
10 paragraphs of subdivision one of section 440.10, the court must also
11 apply subdivisions two and three of section 440.10, other than paragraph
12 (d) of subdivision two of such section, in determining the motion. In
13 the event the court enters an order granting a motion to set aside a
14 sentence of death under this section, the court must either direct a new
15 sentencing proceeding in accordance with section 400.27 or, to the
16 extent that the defendant cannot be resentenced to death consistent with
17 the laws of this state or the constitution of this state or of the
18 United States, resentence the defendant to life imprisonment without
19 parole or to a sentence of imprisonment for the class A-I felony of
20 murder in the first degree other than a sentence of life imprisonment
21 without parole. Upon granting the motion upon any of the grounds set
22 forth in the aforesaid paragraphs of subdivision one of section 440.10
23 and setting aside the sentence, the court must afford the people a
24 reasonable period of time, which shall not be less than ten days, to
25 determine whether to take an appeal from the order setting aside the
26 sentence of death. The taking of an appeal by the people stays the
27 effectiveness of that portion of the court's order that directs a new
28 sentencing proceeding.

29 S 3. Paragraph (a) of subdivision 1-a of section 440.30 of the crimi-
30 nal procedure law, as amended by chapter 138 of the laws of 2004, is
31 amended and a new paragraph (c) is added to read as follows:

32 (a) Where the defendant's motion TO VACATE A CONVICTION OR JUDGMENT
33 requests the performance of a forensic DNA test on specified evidence,
34 INCLUDING BODILY FLUIDS, BIOLOGICAL SAMPLES, AND PHYSICAL OBJECTS, and
35 upon the court's determination that [any] evidence containing deoxyribo-
36 nucleic acid ("DNA") was [secured] OBTAINED in connection with the
37 COLLECTION OF EVIDENCE FROM THE CRIME SCENE OR OTHER RELEVANT LOCATIONS,
38 INVESTIGATION OR PREPARATION OF THE CASE, NEGOTIATION FOR DISPOSITION OR
39 trial resulting in the judgment, the court shall grant the application
40 for forensic [DNA] testing FOR DNA of such evidence upon its determi-
41 nation that if a DNA test had been conducted on such evidence, and if
42 [the] EXCULPATORY results had been AVAILABLE TO THE DEFENDANT FOR
43 PRETRIAL PROCEEDINGS OR POST TRIAL PROCEDURES OR admitted [in the] AT A
44 trial resulting in the judgment, there exists a reasonable [probability]
45 POSSIBILITY that the verdict OR OTHER PROCEEDINGS OR PROCEDURES would
46 have been more favorable to the defendant.

47 (I) TO DETERMINE WHETHER THE REQUEST FOR DNA FORENSIC TESTING SHOULD
48 BE GRANTED, THE COURT SHALL CONSIDER THE AVAILABILITY OF NEWLY DEVELOPED
49 TESTS AND ADVANCES IN TECHNOLOGY THAT MAY MAKE IT POSSIBLE TO OBTAIN
50 EXCULPATORY DNA TEST RESULTS THAT WERE NOT PREVIOUSLY OBTAINED.

51 (II) A DEFENDANT WHO PLEADED GUILTY MAY SEEK DNA TESTING UNDER THIS
52 SUBDIVISION. A GUILTY PLEA SHALL NOT BAR THE MAKING OF THE REQUEST FOR
53 TESTING AND THE MOTION TO VACATE THE CONVICTION OR JUDGEMENT SHALL NOT
54 BE DENIED BECAUSE THE DEFENDANT PREVIOUSLY PLEADED GUILTY IN THE CASE.

55 (C) IN CONNECTION WITH A PENDING MOTION MADE PURSUANT TO THIS SECTION,
56 THE COURT MAY DIRECT, BY ORDER OR ISSUANCE OF A SUBPOENA, THE PROSECUTOR

1 OR OTHER AGENCY OF THE STATE OR LOCAL GOVERNMENT TO PROVIDE THE PETI-
2 TIONER WITH INFORMATION, INCLUDING DOCUMENTS, NOTES, LOGS OR REPORTS,
3 RELATING TO PHYSICAL ITEMS COLLECTED IN CONNECTION WITH THE CASE WHERE
4 IT IS LIKELY THAT SUCH PHYSICAL ITEMS, IF SUBJECTED TO DNA TESTING,
5 WOULD MEET THE TEST SET OUT IN PARAGRAPH (A) OF THIS SUBDIVISION. THE
6 COURT MAY ORDER STATE OR LOCAL AGENCIES TO PROVIDE REASONABLE ASSISTANCE
7 AND TAKE REASONABLE STEPS TO LOCATE RECORDS OR ITEMS WHICH ARE ASSERTED
8 TO HAVE BEEN LOST OR DESTROYED. THE COURT ORDER MAY DIRECT EFFORTS TO
9 LOCATE THE ITEMS IN STATE OR LOCAL GOVERNMENT OFFICES, PUBLIC OR PRIVATE
10 HOSPITALS AND LABORATORIES, AND OTHER FACILITIES.

11 S 4. This act shall take effect immediately.