S T A T E O F N E W Y O R K

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I N A S S E M B L Y

May 18, 2010

Introduced by M. of A. LAVINE -- read once and referred 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:

Section 1. Paragraph (h) of subdivision 1 and subdivision 5 of section 440.10 of the criminal procedure law are amended to read as follows:

(h) NEW EVIDENCE CONSISTING OF FORENSIC DNA TEST RESULTS HAS BEEN DISCOVERED SINCE THE ENTRY OF JUDGMENT BASED UPON A PLEA OF GUILTY, WHICH WAS NOT AVAILABLE TO THE DEFENDANT PRIOR TO THE PLEA AND WHICH IS OF SUCH CHARACTER AS TO CREATE A PROBABILITY THAT HAD SUCH EVIDENCE BEEN KNOWN BY THE DEFENDANT PRIOR TO THE ENTRY OF A PLEA OF GUILTY THAT THE PLEA WOULD NOT HAVE BEEN ENTERED; PROVIDED THAT A MOTION BASED UPON SUCH GROUND MUST BE MADE WITH DUE DILIGENCE AFTER THE DISCOVERY OF SUCH ALLEGED NEW EVIDENCE; OR

(I) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, OR AS PRESCRIBED IN PARAGRAPH (H) OF SUBDIVISION ONE, THAT NEWLY DISCOVERED EVIDENCE CONSISTING OF FORENSIC DNA TEST RESULTS CREATES A PROBABILITY THAT HAD SUCH EVIDENCE BEEN KNOWN BY THE DEFENDANT PRIOR TO THE ENTRY OF A PLEA OF GUILTY THAT THE PLEA WOULD NOT HAVE BEEN ENTERED, the court may either:

(a) Vacate the judgment and order a new trial; or

(b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

S 2. Subdivision 1 of section 440.20 of the criminal procedure law, as 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. At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. Where the judgment includes a sentence of death, the court may also set aside the sentence upon any of the grounds set forth in paragraph (b), (c), (f), (g) [or], (h) OR (I) of subdivision one of section 440.10 as applied to a separate sentencing proceeding under section 400.27, provided, however, that to the extent the ground or grounds asserted include one or more of the aforesaid paragraphs of subdivision one of section 440.10, the court must also apply subdivisions two and three of section 440.10, other than paragraph (d) of subdivision two of such section, in determining the motion. In the event the court enters an order granting a motion to set aside a sentence of death under this section, the court must either direct a new sentencing proceeding in accordance with section 400.27 or, to the extent that the defendant cannot be resentenced to death consistent with the laws of this state or the constitution of this state or of the United States, resentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Upon granting the motion upon any of the grounds set forth in the aforesaid paragraphs of subdivision one of section 440.10 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

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

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

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

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

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

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

S 4. This act shall take effect immediately.