

2908

2011-2012 Regular Sessions

I N   A S S E M B L Y

January 21, 2011

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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 ASSEM-  
BLY, DO ENACT AS FOLLOWS:

1     Section 1. Subparagraph (ii) of paragraph (i) of subdivision 1 of  
2     section 440.10 of the criminal procedure law, as added by chapter 332 of  
3     the laws of 2010, is amended and a new paragraph (j) is added to read as  
4     follows:  
5     (ii) official documentation of the defendant's status as a victim of  
6     sex trafficking or trafficking in persons at the time of the offense  
7     from a federal, state or local government agency shall create a presump-  
8     tion that the defendant's participation in the offense was a result of  
9     having been a victim of sex trafficking or trafficking in persons, but  
10    shall not be required for granting a motion under this paragraph[.]; OR  
11    (J) NEW EVIDENCE CONSISTING OF FORENSIC DNA TEST RESULTS HAS BEEN  
12    DISCOVERED SINCE THE ENTRY OF JUDGMENT BASED UPON A PLEA OF GUILTY,  
13    WHICH WAS NOT AVAILABLE TO THE DEFENDANT PRIOR TO THE PLEA AND WHICH IS  
14    OF SUCH CHARACTER AS TO CREATE A PROBABILITY THAT HAD SUCH EVIDENCE BEEN  
15    KNOWN BY THE DEFENDANT PRIOR TO THE ENTRY OF A PLEA OF GUILTY THAT THE  
16    PLEA WOULD NOT HAVE BEEN ENTERED; PROVIDED THAT A MOTION BASED UPON SUCH  
17    GROUND MUST BE MADE WITH DUE DILIGENCE AFTER THE DISCOVERY OF SUCH  
18    ALLEGED NEW EVIDENCE.  
19    S 2. Subdivision 5 of section 440.10 of the criminal procedure law is  
20    amended to read as follows:  
21    5. Upon granting the motion upon the ground, as prescribed in para-  
22    graph (g) of subdivision one, that newly discovered evidence creates a  
23    probability that had such evidence been received at the trial the  
24    verdict would have been more favorable to the defendant in that the  
25    conviction would have been for a lesser offense than the one contained

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

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1 in the verdict, OR AS PRESCRIBED IN PARAGRAPH (J) OF SUBDIVISION ONE,  
2 THAT NEWLY DISCOVERED EVIDENCE CONSISTING OF FORENSIC DNA TEST RESULTS  
3 CREATES A PROBABILITY THAT HAD SUCH EVIDENCE BEEN KNOWN BY THE DEFENDANT  
4 PRIOR TO THE ENTRY OF A PLEA OF GUILTY THAT THE PLEA WOULD NOT HAVE BEEN  
5 ENTERED, the court may either:

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

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

10 S 3. Subdivision 1 of section 440.20 of the criminal procedure law, as  
11 amended by chapter 1 of the laws of 1995, is amended to read as follows:

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

40 S 4. Paragraph (a) of subdivision 1-a of section 440.30 of the crimi-  
41 nal procedure law, as amended by chapter 138 of the laws of 2004, is  
42 amended and a new paragraph (c) is added to read as follows:

43 (a) Where the defendant's motion TO VACATE A CONVICTION OR JUDGMENT  
44 requests the performance of a forensic DNA test on specified evidence,  
45 INCLUDING BODILY FLUIDS, BIOLOGICAL SAMPLES, AND PHYSICAL OBJECTS, and  
46 upon the court's determination that [any] evidence containing deoxyribo-  
47 nucleic acid ("DNA") was [secured] OBTAINED in connection with the  
48 COLLECTION OF EVIDENCE FROM THE CRIME SCENE OR OTHER RELEVANT LOCATIONS,  
49 INVESTIGATION OR PREPARATION OF THE CASE, NEGOTIATION FOR DISPOSITION OR  
50 trial resulting in the judgment, the court shall grant the application  
51 for forensic [DNA] testing FOR DNA of such evidence upon its determi-  
52 nation that if a DNA test had been conducted on such evidence, and if  
53 [the] EXCULPATORY results had been AVAILABLE TO THE DEFENDANT FOR  
54 PRETRIAL PROCEEDINGS OR POST TRIAL PROCEDURES OR admitted [in the] AT A  
55 trial resulting in the judgment, there exists a reasonable [probability]

1 POSSIBILITY that the verdict OR OTHER PROCEEDINGS OR PROCEDURES would  
2 have been more favorable to the defendant.

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

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

11 (C) IN CONNECTION WITH A PENDING MOTION MADE PURSUANT TO THIS SECTION,  
12 THE COURT MAY DIRECT, BY ORDER OR ISSUANCE OF A SUBPOENA, THE PROSECUTOR  
13 OR OTHER AGENCY OF THE STATE OR LOCAL GOVERNMENT TO PROVIDE THE PETI-  
14 TIONER WITH INFORMATION, INCLUDING DOCUMENTS, NOTES, LOGS OR REPORTS,  
15 RELATING TO PHYSICAL ITEMS COLLECTED IN CONNECTION WITH THE CASE WHERE  
16 IT IS LIKELY THAT SUCH PHYSICAL ITEMS, IF SUBJECTED TO DNA TESTING,  
17 WOULD MEET THE TEST SET OUT IN PARAGRAPH (A) OF THIS SUBDIVISION. THE  
18 COURT MAY ORDER STATE OR LOCAL AGENCIES TO PROVIDE REASONABLE ASSISTANCE  
19 AND TAKE REASONABLE STEPS TO LOCATE RECORDS OR ITEMS WHICH ARE ASSERTED  
20 TO HAVE BEEN LOST OR DESTROYED. THE COURT ORDER MAY DIRECT EFFORTS TO  
21 LOCATE THE ITEMS IN STATE OR LOCAL GOVERNMENT OFFICES, PUBLIC OR PRIVATE  
22 HOSPITALS AND LABORATORIES, AND OTHER FACILITIES.

23 S 5. This act shall take effect immediately.