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NEW YORK STATE ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS

An Affiliate of the National Association of Criminal Defense Lawyers | Founded in 1986

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May 6, 2019

Hon. James Gaughran  
Chair, Local Government Committee  
New York State Senate  
848 Legislative Office Building  
Albany, New York 12247

Dear Senator Gaughran:

The New York State Association of Criminal Defense Lawyers (NYSACDL) is the largest statewide criminal defense bar association in New York. Part of our mission is to make recommendations relevant to the quality and methods employed in the State's criminal justice system, while considering the financial requirements imposed upon government.

NYSACDL joins the New York State Defenders Association, the Chief Defenders Association of the State of New York, and the New York City Bar Association in strongly supporting S.3672 (Sen. Bailey). This bill, currently in the Local Governments Committee, seeks to amend New York County Law Section 722 to remedy a small but significant problem regarding the scope of appellate counsel's authority. Essentially, the amendment would allow counsel assigned to a criminal appeal to conduct post-trial motion practice as part of their appellate assignment. This provision would enhance and hasten the process of redressing wrongful convictions, at minimal expense, since compensation for such representation will be provided for within the Office of Indigent Legal Services budget.

Almost every exoneration of a wrongly convicted defendant comes about via post-trial motion practice pursuant to New York Criminal Procedure Law (CPL) Section 440.10, as opposed to a direct appeal. That is because the common causes of wrongful convictions – *Brady* violations, flawed forensic science, false confessions, and ineffective assistance of trial counsel – cannot be demonstrated by the trial record alone, and often includes off-the-record facts to be pleaded and proven. Currently, section 722 only provides for the assignment of an attorney to an indigent defendant's CPL 440.10 motion where the appellate court has already ordered an evidentiary hearing on the motion. Such assignments are very rare. Most of the inartfully drafted *pro se* CPL 440.10 motions are summarily denied.

The practical result of the current scheme is that assigned lawyers are understandably reluctant to investigate and evaluate possible true innocence, ineffective assistance of trial counsel, false confessions, etc. because they can never be sure of getting paid.

The quality of representation provided to poor persons should not hinge on whether appointed lawyers are part of an institutional public defense organization (salaried) or individually assigned. S.3672 will reconcile New York's disparate compensation scheme which has resulted in a two-tiered system of appellate representation. The human consequences of this inequality are real and sometimes devastating. Moving this bill out of Committee to allow the full Senate to vote on it this session will raise the overall level of appellate practice in the state.

The Appellate Standards & Best Practices of the State Office of Indigent Legal Services requires counsel assigned to a direct appeal to determine whether an investigation into a possible CPL 440.10 motion is warranted and, if appropriate, to do an investigation and make a motion. This bill would allow assigned counsel to meet these requirements.

The Assembly counterpart of S.3672, A.748 (AM Cook), passed the Assembly unanimously on February 2nd. We urge you to put S.3672 on an upcoming Local Governments Committee meeting agenda so the bill can be considered by the full Senate accordingly.

We appreciate your consideration of this issue and would be happy to answer any questions you may have regarding this important legislation.

Respectfully,

A handwritten signature in black ink, appearing to read 'Lori Cohen', with a stylized flourish at the end.

Lori Cohen, Esq.  
President

CC: Senator Jamaal T. Bailey  
Senator Patty Ritchie  
Senator George A. Amedore, Jr.  
Senator John E. Brooks  
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