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Supporting Assembly Bill A.4239

Opposing Article VII Budget Bill *(Public Protection and General Government – Part D)*

The Chief Defenders Association of New York (CDANY), an association of New York chief defenders, the individuals who lead public defense offices and programs across New York State, supports Assembly Bill A.4239. We believe A.4239 advances the goals of fundamental fairness and integrity of convictions without over-burdening law enforcement.

Governor Andrew Cuomo's Article VII budget bill (Public Protection and General Government – Part D) is the *same bill* previously introduced by The Innocence Project in 2015. CDANY, along with the New York State Association of Criminal Defense Lawyers (NYSACDL) and defense providers raised concerns about this bill detailed in the formal NYSACDL Memo (See attached memo). Those concerns have not changed, and for those same reasons, Part D of the Governor's Bill should not be passed.

CDANY supports measures designed to reduce the chances of a wrongful arrest and/or conviction. For this reason, we fully support Assembly Bill A.4239. This memo sets forth the concerns with the Governor's Bill and the reason that we strongly oppose that bill, as well as noting the manner in which many of those concerns are addressed in Assembly Bill A.4239. We applaud the Assembly and the parties involved in drafting this Bill. This Bill goes a long way to ensure the integrity of our justice system and protect the rights of New Yorkers who face criminal accusations.

Electronic Recoding of Interrogations

CDANY opposes the Governor's Bill on recording interrogations because the bill limits recording to those times when the person is legally deemed to be "in custody." The requirement that a person be deemed "in custody" creates a loophole that would apply in nearly all situations. Assembly Bill A.4239 addresses this concern. The Assembly Bill mandates that all stages of the interrogation must be recorded. Recording the entire interview will not only assist the court in determining the legal admissibility of such statements, but also help the jury determine whether a statement was coerced or is otherwise unreliable, as when the defendant appears to be parroting facts and details provided to him by the police. We applaud the Assembly for making this necessary change and mandating recording of the entire interrogation for the specified offenses.

We also oppose the Governor's bill because the number of specified offenses for which recording of interrogations is mandated is too limited. Assembly Bill A.4239 expands the list to include all A1 felonies and all violent felony offenses. While we would hope to see a future bill that expands recording to include **all** interrogations, we believe that the Assembly Bill moves further in the right direction and therefore support passage of this bill.

Photo Array Identification

A.4239 would not only demand compliance with statutorily-mandated best practices as a pre-condition for admission of a pre-trial photo identification, it also requires that all aspects of the pre-trial identification proceeding be videotaped, thereby promoting fairness, increased accuracy and providing incomparable discovery material in eyewitness identification cases.

We therefore oppose Governor Cuomo's Article VII budget bill (Public Protection and General Government – Part D) and support A.4239.

Conclusion

The Chief Defenders Association of New York opposes Governor Cuomo's Article VII budget bill (Public Protection and General Government – Part D) and supports A.4329.



NYSACDL

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OF CRIMINAL DEFENSE LAWYERS

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Memorandum in Support of Part D of A.3005-B

Integrity in Interrogation & Eyewitness Identification

The New York State Association of Criminal Defense Lawyers strongly supports Part D of A.3005-B (the Assembly one-house budget bill) which includes the same provisions included in A.4239 which was recently passed in the Assembly. The bill contains crucially important recommendations to foster the public's confidence in, and integrity of, law enforcement investigations in connection with interrogations and eyewitness identification protocols.

Our organization, an affiliate of the National Association of Criminal Defense Lawyers, 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 operation of quality the State's criminal justice system, while considering the financial requirements imposed upon government.

The best practices proposed in Part D of A.3005-B will bring New York into line with the movement nationwide to achieve greater confidence in the criminal justice process. This should be compared to Governor Cuomo's FY18 budget proposal (Article VII budget bill – Public Protection and General Government – Part D) which adopts verbatim a wholly inadequate 2015 bill which also attempted to address how police conduct interrogations and identification procedures. Similarly, the recent Senate one-house budget bill (Part D of S.2005-B) provides far too many exceptions available to police to accomplish meaningful reform.

Unlike the Governor's bill and Senate bill, the Assembly bills require police to record many more interrogations (A-1 felonies and all violent felonies), mandates that both non-custodial and custodial parts of the interrogation be recorded, and closes loopholes in the Governor's bill and Senate bill that would otherwise give police license to evade a recording requirement.

It is noteworthy that all three recommended bills would legislatively countermand a 1966 Court of Appeals ruling in People v. Caserta, 19 N.Y.2d 18 (1966), and allow evidence of pre-trial photo identifications as part of the prosecution's case in chief. In the Caserta decision, the Court of Appeals precluded law enforcement hearsay testimony and documentary evidence supporting (bolstering) the eyewitness' testimony about any previous out-of-court identification. We agree with that

holding. This Association opposes any proposed legislative override of the long-standing legal principle set forth in Caserta. The reasoning the Court of Appeals provided in its Caserta decision is simple and has withstood fifty years of challenges by prosecutors in the State's appellate courts:

The reasons for this rule are well understood. One of the most stubborn problems in the administration of the criminal law is to establish identity by the testimony of witnesses to whom an accused was previously unknown, from quick observation under stress or when, as here, there was no particular reason to note the person's identity. Where the opportunity for observation is limited and the opportunity and ability of the witness to identify the defendant is questionable, it is all too easy to bolster such testimony by calling a succession of witnesses who swear that they saw and heard him identify the same person upon previous occasions. This tends to give the idea to a jury that there is an impressive amount of testimony to identification when such is really not the fact. As for previous identification from photographs, not only is it readily possible to distort pictures as affecting identity, but also where the identification is from photographs in the rogues' gallery (even though the name or number on the picture has been excinded) the inference to the jury is obvious that the person has been in trouble with the law before. Such an inference is accentuated where the defendant fails to take the witness stand.

While that objection applies to all proposals, A.3005-B is a vastly superior bill because it would demand compliance with statutorily-mandated best practices as a pre-condition for admission of a pre-trial photo identification. Importantly, A.3005-B would require that all aspects of the pre-trial identification proceeding be videotaped, thereby promoting fairness and increased accuracy, while providing incomparable discovery material in eyewitness identification cases. (The Governor's and Senate's renditions make videotaping or audiotaping voluntary and grants eyewitnesses veto authority over recording.)

As per the Innocence Project, over the past three decades 223 wrongful convictions have been overturned in the state. Two of the leading contributing factors in these cases were false confessions and eyewitness misidentification. Despite these startling statistics, New York remains one of 26 states that has yet to require recording interrogations and one of 31 states that still lacks safeguards to prevent eyewitness misidentifications.

NYSACDL recommends the adoption of the provisions included in part D of A.3005-B in 2017 if New York is to finally join other leading states in adopting meaningful reform to restore integrity to police investigations and reduce the prospect of further wrongful convictions.