



CHIEF DEFENDERS ASSOCIATION OF NEW YORK

MEMORANDUM IN SUPPORT

S3672 (Bailey) /A748 (Cook)

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The Chief Defenders Association of New York ("CDANY") is an organization of the appointed Public Defenders, Conflict Defenders, Executive Directors of non-profit public defense offices and Administrators of Assigned Counsel Panels throughout the State. Our organizations collectively represent the vast majority of people prosecuted in every county of New York State – hundreds of thousands of people each year. Collectively, public defense offices represent close to 400,000 people in the criminal, family, and appellate courts of New York State every year.

CDANY strongly supports S3672 (Bailey) / A748 (Cook), which would amend section 722 of the County Law by allowing 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.

Almost every exoneration of a wrongly convicted defendant comes about via post-trial motion practice pursuant to CPL 440.10, as opposed to a direct appeal. That is because the common causes of wrongful convictions – Brady violations, junk science, false confessions, and ineffective assistance of trial counsel – cannot be demonstrated by the trial record alone, but must include 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 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.

Current section 722 does not provide compensation for appellate counsel to conduct investigations and construct careful pleadings. That means that assigned appellate counsel are not in a financial position to do the investigation and preliminary motion practice to bring 440.10 motions. As a result, they are brought years after the direct appeal is over, often on a pro se basis.

The problem is most acute for attorneys assigned via the Assigned Counsel Plan, as opposed to public defense offices with salaried employees. This bill would level the playing field.

Notably, this bill pertains only where appellate counsel is already being assigned to the direct appeal. It does not require appellate counsel to bring such motions as part of their representation, only permits them to do so where warranted. It does not pertain to pro se post-trial motions.

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 fiscal implications are minimal, since relatively few such motions are brought, and any additional expense would be offset by having the post-trial motion considered earlier (as part of the direct appeal process).