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Civil Rights Litigation

How To Get Out of Jail (If You're Innocent)

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The news these days is filled with stories about people who have spent years or decades in prison for crimes they did not commit. These exonerees (some represented by my law firm) include victims of mistaken witness identification, of coerced confessions, shoddy science, police or prosecutorial misconduct, or simply, mistakes. The DNA revolution sparked a wave of exonerations throughout the country, and made prosecutors, judges, and the general public question the reliability of many aspects of the criminal justice system.

According to a recent study, "a conservative estimate of the proportion of erroneous convictions of defendants sentenced to death in the United States from 1973 through 2004" is "4.1 percent."¹ It is estimated there are 2.4 million people in prison in the United States.² Assuming the percentage of wrongful convictions for all prisoners were 4.1 percent, then almost 100,000 people are wrongfully imprisoned in this country. It is reasonable to believe, however, that the wrongful conviction rate is higher for the general population than for prisoners on death row, whose cases generally receive far greater attention, resources, and scrutiny than the typical criminal case.

These extraordinary numbers perhaps explain a recent legal trend, relaxing the burden for criminal defendants to vacate their convictions. Nowhere is this trend more pronounced than in the case of [People v. Hamilton](#), 979 N.Y.S.2d 97 (2d Dept. 2014), which held that actual innocence is a ground for overturning a conviction in New York State.

CPL §440.10

First, a primer on N.Y. CPL §440.10, the New York statute that enables defendants to vacate their convictions post-judgment. Section 440.10 provides a few primary avenues to post-conviction relief, including:

- Lack of jurisdiction (440.10(1)(a));
- Police or prosecutorial misconduct, such as fraud, knowing use of false evidence, Brady violations, coercion, "[i]mproper and prejudicial conduct," or other constitutional violations (440.10(1)(b, c, d)); (*Brady v. Maryland*, 373 U.S. 83 (1963))

- A defendant's lack of competence (440.10(1)(e));
- The discovery of "[n]ew evidence...which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence" (440.10(1)(g)); and
- Post-judgment DNA testing demonstrating a "substantial probability" of actual innocence (in the case of defendants who pleaded guilty) or "a reasonable probability that the verdict would have been more favorable to the defendant" (in the case of defendants convicted after trial) (440.10(1)(g-1)).

For years, lawyers seeking to vacate convictions post-judgment have focused on two primary avenues of relief: police/prosecutorial misconduct, and the discovery of new evidence. Both routes to post-conviction relief are challenging. Police and prosecutorial misconduct are often difficult to prove. Even if proven, did the misconduct cause the conviction? New evidence claims are equally challenging. Is the evidence actually "new"? Could the defendant have discovered the evidence pre-judgment using due diligence? Even then, would the new evidence have created a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant? Was the new evidence motion made with due diligence after the discovery of such alleged new evidence?

Many wrongfully convicted defendants are not victims of police/prosecutorial misconduct, nor have they uncovered new evidence, or new material evidence, of innocence. These defendants are "wrongfully" convicted in the sense that they are actually innocent, and therefore it was wrong to convict them. Do these defendants have any hope of vacating their convictions?

'People v. Hamilton'

The answer in New York is now yes, under N.Y. CPL §440.10(1)(h), which provides for post-judgment relief where "[t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States." *Hamilton* held that "a freestanding claim of actual innocence is cognizable in New York, and that a defendant who establishes his or her actual innocence by clear and convincing evidence is entitled to relief" under this section.³

Derrick Hamilton was convicted by a jury of murder in the second degree, as a result of a 1991 shooting. Hamilton's conviction was based upon the trial testimony of the victim's girlfriend, Jewel Smith. Hamilton submitted a notice of alibi naming Kim Freeman and Alphonso Dixon as alibi witnesses, but presented neither in his defense, "because Dixon claimed to be too ill to appear at trial, and Kim Freeman claimed to be too frightened to appear." Smith later recanted her testimony; "exculpatory evidence [revealed] that Smith told police shortly after the crime that she did not witness the crime"; and defendant discovered "a new defense witness who claimed that she was with Smith inside a supermarket at the

time of the crime." At a hearing, "Smith claimed that she testified falsely against the defendant because the police threatened her with criminal prosecution and the removal of her children from her custody," a claim disputed by the prosecutor and the police.⁴

Post-sentencing, Hamilton moved for relief based on additional new evidence: "a purportedly newly discovered eyewitness who claimed that the defendant did not commit the crime," and "two allegedly newly discovered alibi witnesses who did not testify at trial and were not mentioned in the pretrial notice of alibi." The trial court denied the motion, concluding that the new eyewitness was not credible, and the alibi witnesses were not "new," because they could have been located "with the exercise of due diligence."⁵

In 2009, Hamilton moved again for post-conviction relief, raising a claim of actual innocence, and submitting new affidavits from yet two more alibi witnesses—the widow and daughter of Alphonso Dixon—as well as evidence that a detective "threatened Alphonso Dixon with arrest if he testified as an alibi witness on behalf of the defendant."⁶

The Second Department rejected Hamilton's "newly discovered evidence" claim, but entertained his actual innocence claim. The court noted that "[f]ederal courts have not resolved whether a prisoner may be entitled to habeas corpus relief based upon a freestanding claim of actual innocence," but that "[t]he Due Process Clause in the New York State Constitution provides greater protection than its federal counterpart as construed by the Supreme Court."⁷

The Hamilton court started with the basic proposition that "[i]t is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent of a crime may be incarcerated or otherwise punished for a crime which he or she did not commit." Because "a person who has not committed any crime has a liberty interest in remaining free from punishment, the conviction or incarceration of a guiltless person, which deprives that person of freedom of movement and freedom from punishment and violates elementary fairness, runs afoul of the Due Process Clause of the New York Constitution." And "because punishing an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment also violates the provision of the New York Constitution which prohibits cruel and unusual punishments." Because the imprisonment of an innocent person violates the New York Constitution, N.Y. CPL §440.10(1)(h) applies.⁸

The Standard

Under the Hamilton rule, a defendant must prove actual innocence, not a mere constitutional violation. The defendant must prove innocence by clear and convincing evidence. The evidence of actual innocence need not be new: Any reliable evidence of innocence can be considered. Not everyone, however, is entitled to a hearing on actual innocence: a defendant must first make a "prima facie showing of actual innocence," i.e., "a sufficient showing of possible merit to warrant a fuller exploration by the court."⁹

The hearing on actual innocence will be conducted before a judge, not a jury. "At the hearing, all reliable evidence, including evidence not admissible at trial based upon a procedural bar—such as the failure to name certain alibi witnesses in the alibi notice—should be admitted." And if the defendant meets the clear and convincing test, "the

indictment should be dismissed," with no possibility for retrial.¹⁰ In Hamilton's case, he met the prima facie test, and the Second Department therefore ordered a hearing on actual innocence.

The actual innocence test sweeps away many of the procedural obstacles to post-judgment relief, but one significant obstacle remains. If the actual innocence claim "was previously determined on the merits upon an appeal from the judgment," or there were sufficient facts on the record to raise the issue on appeal but no review occurred because of defendant's unjustifiable failure to perfect or raise the issue on appeal, the court will not entertain the motion. N.Y. CPL §440.10(2)(a, c).

A defendant will therefore have to go beyond the trial record to raise an actual innocence claim. As a tactical matter, a defendant would also do well not to raise actual innocence on direct appeal. The claim may defeat a subsequent actual innocence motion, and as a practical matter, an appellate court on direct appeal will rarely agree with an actual innocence argument based on the very same record upon which a jury found the defendant guilty beyond a reasonable doubt.

Practical Tips for Prisoners

Say you are an innocent defendant—an actually innocent defendant—seeking to get out of prison. You now have a potential legal avenue in New York State to get out of prison. How do you convince a lawyer to take your case?

We must start with the proposition that, though thousands of prisoners are innocent, the vast majority of prisoners are actually guilty. A prisoner seeking legal assistance must overcome the presumption of guilt attached to the criminal conviction. I have received many letters from inmates seeking assistance over the years, and I am hardly alone. What do lawyers look for when reading these letters?

Lawyers typically begin with evidence. What evidence was presented at trial? Was it a single eyewitness case, or were there many witnesses? What did each witness say? What was the physical evidence? Did the defendant testify? Who testified for the people and for the defendant? In short, how strong was this case? The more detail presented, the better. Short, summary letters simply claiming innocence are usually unpersuasive and unsuccessful.

What is the procedural history? Did the defendant take a plea, or was there a jury trial? How long did the jury deliberate? What arguments were made on direct appeal? Did the defendants previously make one or more Section 440 motions, or seek habeas relief? Include the judicial opinions on direct appeal and in any post-conviction motions.

What is the evidence of actual innocence? Did a witness recant? Did one or more new witnesses come forward? Is there an alibi? Is there the potential for DNA analysis of existing evidence? What actually happened? Defendants here are no longer in the world of reasonable doubt. The defendant must convince the lawyer that he or she simply did not commit the crime. Again, the more detail presented, the better.

Finally, who is the defendant? What is their educational background, employment background, family background? With whom can the lawyer speak to learn more about the defendant?

Conclusion

Nothing is more horrible than spending years in prison for a crime you did not commit. But there is hope. For civil rights lawyers like myself, few civil rights issues are more important than exonerating, and compensating, the truly innocent. In our system of justice, we all hope that the truth will ultimately prevail. With the Hamilton case, the quest for truth has now become a little bit easier.

Endnotes:

1. <http://www.pnas.org/content/111/20/7230.full>.
2. <http://www.prisonpolicy.org/reports/pie.html>.
3. *Hamilton*, 979 N.Y.S.2d at 100.
4. *Id.*
5. *Id.* at 100-101.
6. *Id.* at 101-102.
7. *Id.* at 104, 107 (quotation marks omitted).
8. *Id.* at 107-08.
9. *Id.* at 108 (quotation marks omitted).
10. *Id.* at 109.

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