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S1279 (Bailey)/A5689 (Cruz)

An Act to amend the criminal procedure law, in relation to streamlining the assignment of appellate counsel for indigent criminal defendants

S1281 (Bailey)/A5688 (Cruz)

An Act to amend the criminal procedure law, in relation to facilitating appellate review of rulings that implicate issues of public concern

S1280 (Bailey)/A5687 (Cruz)

An Act to amend the criminal procedure law, in relation to appellate review of the fairness and appropriateness of an imposed sentence

April 28, 2021

Introduction: Procedural obstacles that undermine the right of indigent persons to file an appeal in criminal proceedings

Fairness in the criminal justice system cannot be ensured without the right of appeal. This right affords the accused an opportunity to expose misconduct on the part of police and prosecutors, as well as errors by a trial judge, which can lead to wrongful convictions and unjust sentences.

It is the most vulnerable among us – those with little money and a fragile social support system – whose rights are at greatest risk in a criminal prosecution. It is they who must rely on a court-appointed attorney to uphold their due-process rights. For this reason, in part, the legislature has granted the state's intermediate appellate courts (the Appellate Division) broad discretion to review convictions "as a matter of discretion in the interest of justice."¹ In a ruling issued by the state's highest court, the role of the appellate courts has been characterized as the "linchpin of our constitutional and statutory design."²

In recent years, however, prosecutors have been thwarting the right of appeal by demanding in all cases that individuals waive their appellate rights as a non-

¹ NY Criminal Procedure Law, § 470.15 [2] [c].

² *People v. Bleakley*, 69 N.Y.2d 490, 494 (1987).

negotiable price of a plea-bargained resolution. What's more, most courts require that indigent defendants seeking appellate review of trial court proceedings complete an onerous and complex application demonstrating that they remain eligible for assigned counsel.

These practices, in effect, suspend a defendant's statutory and constitutional protections against inadvertent error, racial bias, as well as fraud and abuse of process. The scope of these problems is great, as are the consequent harms. Official misconduct in criminal prosecutions is a well-documented, common occurrence – including police perjury, witness tampering, misconduct in interrogations, withholding exculpatory evidence, fabrication of evidence.³ [See, e.g., National Registry of Exonerations, Cite National Registry study]

It is equally well established that the victims of such misconduct are disproportionately Black people. Racial bias that makes Black people more likely to be arrested and prosecuted also makes them more susceptible to wrongful convictions and excessive sentences. And the harmful consequences – loss of liberty, trauma, poverty – are borne by Black families and communities.

Lawmakers have introduced legislation that would uphold –

1. the right to a court-appointed lawyer for purposes of pursuing an appeal in a criminal proceeding;
2. the right of a defendant to challenge, on appeal, the admissibility of questionable evidence; and
3. the right to seek appellate review regarding the fairness and reasonableness of a sentence.

This legislation is necessary not only to uphold the right of the accused to seek a higher court's review of the fairness and justness of a criminal prosecution, but also to deter conduct that causes wrongful prosecutions and false convictions. Unless rules and procedures afford due process of law to those facing criminal charges, the diminished respect American people have for the criminal legal system cannot be restored.⁴

The organizations that submit this memorandum call on lawmakers to approve the following legislative reforms.

³ See, e.g., Gross, Possley, Roll, and Stephens, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, National Registry of Exonerations, (Sept. 1, 2020).

⁴ A Cato Institute study based on a survey of Americans includes the following findings: 49 percent of respondents said “most” police officers think they are above the law; 46 percent said the police are “generally not” held accountable for misconduct; and 65 percent said they believe “police regularly racially profile Americans.” See Ekins, *Policing in America: Understanding Public Attitudes toward the Police*, Results from a National Survey, Cato Institute (2016).

- **Eliminate the complex, bureaucratic procedure that undermines a person’s right to a court-appointed attorney for purposes of appealing a conviction**

S1279/Bailey; A5689/Cruz

The Constitution requires that the government appoint an attorney to represent a person charged with a crime who is deemed indigent – unable to pay for his own defense. However, in order to seek an appeal of a conviction in New York, that person is often required to file with the court an application demonstrating that he or she remains eligible for a court-appointed attorney.

This application process has the effect of overriding the statutory right of an indigent defendant to appeal a conviction, or sentence, that may be based on error or misconduct. Most people represented by assigned counsel – in particular, non-citizens, young people, non-English speakers, those with mental illness or intellectual disabilities – are unable to negotiate the technical demands of establishing eligibility for assignment of appellate counsel. As a consequence, they often make repeated efforts to perfect applications that have been rejected by the court – or abandon the right to seek an appeal. The latter is the more common outcome.

This procedural constraint upon the right of appeal in criminal matters disproportionately affects people of color, especially Black people with limited financial resources, who are disproportionately the target of criminal investigations and prosecutions. A recent study, for example, found that 50 percent of all persons charged with a crime in New York County were Black, and that 94 percent of Black defendants charged with felony drug offenses were deemed indigent, and therefore eligible for a court-appointed lawyer.⁵

The remedy for this problem is simple: Authorize trial counsel – who is familiar with a defendant’s finances – to submit a sworn certification that the defendant remains eligible for assigned counsel, for purposes of pursuing an appeal. Upon such certification, the appellate court is directed to presume the defendant is indigent, and to assign counsel without undertaking an extensive and costly review.

The procedure is based on common sense: A person who is found to be indigent at the outset of a criminal prosecution, and therefore eligible for a court-appointed attorney, will most likely be indigent at the conclusion of a trial, when the right of appeal arises. And the procedure is not novel. It is used in civil courts and family court proceedings to determine eligibility for assigned counsel. The same procedure governs cases involving individuals who are subject to the Sex Offender Registry Act.

This proposed amendment to Section 380.55 of the Criminal Procedure Law is consistent with the legislature’s intent in enacting that provision, which authorizes a trial court to issue an order

⁵ Kutateladze, B. L., & Andiloro, N. R. Prosecution and Racial Justice in New York County (pp. 114-211, Rep.). Brooklyn, NY: Vera Institute of Justice (2018).

stating that the accused is eligible for assigned counsel, for purposes of pursuing an appeal. The problem is, courts routinely fail to exercise this authority. Trial courts in a small number of counties have a practice of granting a defendant indigent status for the duration of the criminal matter, including appeals. In most counties, however, defendants must on their own navigate the complex application process for obtaining assignment of appellate counsel.

This bill (S1279/A5689) would restore simplicity and fairness to procedures for assignment of counsel to eligible defendants seeking to appeal a conviction. The law, as amended, would save the courts time and money, and facilitate access to justice by those individuals who are the most vulnerable to wrongful conviction.

- **Eliminate a Catch 22 in the criminal procedure law that undermines the right to seek appellate review of convictions that might have been obtained with tainted evidence**

S1281/Bailey; A5688Cruz

If a prosecutor seeks to establish a person’s criminal liability by introducing evidence that may be unreliable or fraudulent, the accused has a right, based in statute and the state constitution, to seek the exclusion of that evidence from the prosecutor’s case. Should a trial judge permit the introduction of that evidence notwithstanding the defense attorney’s objection, the accused has the right to appeal that ruling to a higher court.

This right to challenge a court’s rejection of a motion to suppress evidence of questionable reliability is essential to vindicating the rights of the accused – and, to upholding the integrity of the criminal justice system. For this reason, state law permits a person who is the subject of a criminal prosecution to appeal a court’s rejection of a suppression motion “notwithstanding the fact that such judgment is entered upon a plea of guilty.”⁶

The legislature intended the appellate judges to serve as a check on trial court rulings regarding the reliability of evidence that may be tainted – for example, a coerced confession, witness identification based upon bias or manipulation in police line-up procedures, material evidence that might have been planted on the accused.

However, prosecutors have adopted a procedural tactic that undermines the right of the accused to challenge a court’s denial of a suppression motion; they condition the offer of a negotiated plea upon the defendant’s waiver of the right to appeal the trial court’s introduction of the contested evidence. This practice violates the legislature’s intent in enacting Section 710.70(2) of the Criminal Procedure Law, which grants appellate courts the ability to review suppression rulings, even if the defendant has pleaded guilty.

⁶ NY Criminal Procedure Law, §710.70 [2].

A court's ruling on the admissibility of evidence often determines the outcome of case. Without the right to appeal the court's order allowing the introduction of questionable evidence, and facing the prospect of a guilty verdict and a long prison term, the accused is caught in a procedural trap: Proceed to trial, or accept the terms of the prosecutor's deal, thereby waiving the right to seek higher court's review of the trial court's ruling on the admissibility of evidence.

A mandatory waiver of the right to appeal a court's ruling on a suppression motion subverts the rights of the accused, and creates an incentive for police and prosecutors to pursue a prosecution based upon unreliable evidence. This incentive has severely compromised the conduct of criminal trials. It is now standard practice for prosecutors to demand that defendants forgo the right to appeal a trial court ruling on suppression of evidence.⁷

It turns out that lawmakers had a well-founded concern that a person against whom the state has marshalled its formidable police powers may be vulnerable to the abuse of those powers, and must therefore be allowed to seek appellate review of trial court proceedings. A Justice Department analysis of prosecutions for possession of drugs and weapons – cases in which suppression rulings often determine a defendant's guilt or innocence – found that appellate courts reversed the outcome at trial in 16-29 percent of those cases.⁸

In many cases the appeals court threw out the trial court verdict because the prosecution had been tainted by the misconduct of police and prosecutors. There are many analyses that corroborate this observation. For example, a national study by the National Registry of Exonerations found that that official misconduct was a contributing factor in 54 percent of wrongful convictions that led to a defendant's exoneration.⁹

The victims of that misconduct – such as perjury, coerced confessions, witness tampering, destruction or withholding of exculpatory evidence – are disproportionately people of color. The wrongfully investigated, searched, arrested and prosecuted are also the wrongfully convicted – most often, Black people. A previous study by the National Registry of Exoneration concluded that “among other patterns . . . innocent Black people were 12 times more likely to be convicted of drug crimes than innocent white people” and that “Black people convicted of murder were 50 percent more likely to be innocent” than others who had been convicted of murder.¹⁰

The proposed legislation (S1281/A5688) would restore the legislature's clearly articulated rule that a person facing criminal prosecution has the right to appeal a trial court's ruling regarding the admissibility of evidence, and that this right is not waived when a prosecutor seeks to bar its exercise as a condition of a plea deal.

⁷ See *People v Batista*, 167 A.D.3d 69, 81 (2d Dept 2018).

⁸ Waters, Gallegos, Green, and Rozsi, *Criminal Appeals in State Courts*, Bureau of Justice Statistics (Sept. 2015).

⁹ Gross, Possley, Roll, and Stephens, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, National Registry of Exonerations, (Sept. 1, 2020), p. iii. (Police misconduct contributed to the false convictions in 35 percent of cases examined in the study; prosecutor misconduct contributed to false convictions in 30 percent of the cases. *Id.*, p.iv)

¹⁰ Gross, Possley, Stephens, *Race and Wrongful Convictions in the United States*, National Registry of Exonerations (2017).

• Prohibit the practice widely used by prosecutors of agreeing to a plea deal only when the accused waives the right to appeal a sentence that may be excessive

S1280/Bailey; A5687/Cruz

The Criminal Procedure Law (CPL) grants the courts of the state’s Appellate Division discretion to review, and to reduce, a criminal sentence in the interests of justice – for example, when a sentence reflects racial bias or is otherwise demonstrably unjust.¹¹ In drafting this provision of the law, the legislature determined that the authority to review a trial court’s sentencing order is of fundamental importance – so important, that the CPL provides that the appellate courts may review a sentence even when a defendant has pleaded guilty, and even when the contested sentence was accepted by the accused in the context of a plea bargain entered into with the state’s prosecutors.¹²

However, the state’s district attorneys have developed an end run around the CPL by requiring a defendant waive the right to seek review of a sentence as a condition of accepting a plea that resolves pending criminal charges.

No statute grants this unbridled bargaining power. Nor can the court serve as an effective counterweight to prosecutors’ demand that defendants waive their right of appeal: Judges do not have authority to enter plea bargains without a prosecutor’s consent. Nonetheless, case law has upheld this practice, essentially nullifying the authority of appellate judges to review a claim that a sentence is unjust.

Prosecutors argue that conditioning a plea bargain upon a defendant’s waiver of the right to appeal serves judicial efficiency by upholding the finality of court proceedings. The assertion is baseless. Finality may have been the goal of appeal waivers. The result has been exactly the opposite. The Center for Appellate Litigation, in New York, estimates that litigation related to contesting waivers of appeal has, in effect, doubled the workload of appellate courts and lawyers.¹³ In addition to drafting a fifteen-page brief demonstrating that a sentence is excessive, defense counsel must include another fifteen pages of analysis challenging the validity of the waiver as an abrogation of statutory and constitutional rights. The appellate prosecutor’s workload, and the court’s, is similarly doubled. The resulting body of case law has proved difficult for trial courts to follow, resulting in ever more complex and time-consuming litigation.

Such challenges consume extensive defense, prosecutorial and judicial resources. In addition to time and money, the suspension of due process carries additional costs – diminished fairness and justice for those who have been sentenced to excessive prison terms, and

¹¹ NY Criminal Procedure Law § 470.15 [2] [c].

¹² The authority to review a criminal sentence, as a check on unjust punishments, is vested exclusively in the Appellate Division, pursuant to Criminal Procedure Law § 470.15 [2] [c]. The New York State Constitution, Art. VI, §4(k), strictly prohibits any impingement upon this authority.

¹³ Interview with Robert Dean, Attorney in Charge, Center for Appellate Litigation, April 2021.

denied an opportunity to seek redress. As Judge Wilson, of the Court of Appeals, recently noted, “The game is not worth the candle.”¹⁴

The injustice worked by this practice of coercing a waiver of appellate rights is systemic. Most criminal prosecutions are resolved through a negotiated plea. And the harmful consequences of suspending the right to appeal the fairness of a plea deal is borne disproportionately by Black people – by those sentenced, and by their families and communities. A study of criminal case data conducted by the Manhattan District Attorney’s Office demonstrated that in 2010-2011 Black New Yorkers consistently faced the most criminal prosecutions, and accepted the most plea deals; they received the most unfavorable plea deals and the most severe sentences.¹⁵

The proposed amendment to the Criminal Procedure Law (S1280/A5687) would respect the legislature’s intent that the Appellate Division retain jurisdiction to review on appeal a claim that a sentence is excessive or otherwise unjust – notwithstanding a prosecutor’s attempt to preempt that authority by the terms of a plea bargain.

The amended law would eliminate a procedural tactic, used with increasing frequency, that usurps the authority of the appellate courts to review a sentence. This reform would uphold the due-process rights of the accused; it would correct a practice that diminishes trust in the criminal legal system.

Conclusion

There are many factors that contribute to unfair outcomes in criminal prosecutions, but the remedy must include access to the courts by right of appeal. The proposed bills are intended to simplify procedures for providing a court-appointed lawyer to eligible defendants who seek to appeal a verdict after trial – and, also, to uphold the right of a defendant to seek appellate review of evidentiary rulings and sentences that may have been based on error or official misconduct. Lawmakers are urged to approve the legislation.

¹⁴ *People v. Thomas*, 34 N.Y.3d 545, 587 (2019) (Wilson, J., dissenting)

¹⁵ Kutateladze, B. L., & Andiloro, N. R. *Prosecution and Racial Justice in New York County* (pp. 114-211, Rep.). Brooklyn, NY: Vera Institute of Justice (2018).