

## Memorandum in Support COMMITTEE ON MANDATED REPRESENTATION & TASK FORCE ON WRONGFUL CONVICTIONS

COMR/TFWC # 1

February 1, 2019

A. 748

By: M of A Cook  
Assembly Committee: Codes  
Effective Date: Immediately

**AN ACT** to amend the county law, in relation to assignment of counsel

**LAW REFERRED TO:** Section 722 of the County Law

The New York State Bar Association's Task Force on Wrongful Convictions and Committee on Mandated Representation strongly support 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, as a majority of 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, and only permits them to do so where warranted. It does not pertain to pro se post-trial motions.

The State Bar's Standards for Providing Mandated Representation require assigned appellate counsel to undertake reasonable efforts to investigate the viability of a wrongful conviction claim, and pursue post-conviction relief if warranted. I-10(j). This bill would allow assigned counsel to meet this requirement.

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.

If this bill were to cause any additional expense it would be offset by having the post-trial motion considered earlier (as part of the direct appeal process). In the event, moreover, that an increase in post-conviction motion practice should ensue, upstate district attorneys' offices should receive a commensurate increase in funding.