DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

PRESIDENT
KATHLEEN B. HOGAN
WARREN COUNTY

To: Assembly Speaker, Sheldon Silver
Senator John L. Sampson, Senate Democratic Conference Leader

From: Kate Hogan, President and District Attorney of Warren County

Date: June 15, 2010

Re: Memo in Opposition

The District Attorneys Association of the State New York **OPPOSES** the following bills.

S7873 Duane/ A11089
Informant Testimony

S7867 Schneiderman/A11123 Lavine
440/Post Conviction DNA testing after guilty plea

S7893 Hassell-Thompson
Exculpatory evidence/ Brady/ Discovery

S7842-A Thompson/ A11052 O=Donnell
Eyewitness Identification Procedures

S7877 Perkins/ A5213a Lentol
Videotaping of Police Interrogations

S7868 Schneiderman/ A11150 Lancman
Court of Claims/Expungement of criminal records

The New York State District Attorneys Association is deeply committed to preventing wrongful convictions. The Association is an active participant in Chief Judge Lippman=s Justice Task Force in partnership with the judges, defense attorneys, forensic experts, victim representatives and legislative representatives who sit on this group. The Task Force is currently examining the very issues addressed by the above - referenced bills and will be making recommendations in the coming months. In our view, it is premature to enact legislation addressing these issues before the Task Force has an opportunity to weigh in.

3 COLUMBIA PLACE, ALBANY, NEW YORK 12210
TEL.: (518) 447-2496 FAX: (518) 447-2495
WEBSITE: DAASNY.ORG

District Attorneys Association=s Committee on the Fair and Ethical Administration of Justice:

In addition, the District Attorneys Association itself, in an effort to be proactive on the issues raised by the proposed legislation, has created a Committee on the Fair and Ethical Administration of Justice. A key focus of the Committee is the development of statewide law enforcement best practices that will promote fairness and reliability in the criminal justice system while protecting public safety and the rights of the accused and victims.

District Attorneys Association=s Best Practices Committee:

The Best Practices Subcommittee reflects the geographical diversity of the State with upstate and downstate, urban, rural and suburban representation. It meets monthly and has been building collaborative relationships with the over 550 police agencies around the State.

Statewide Identification Procedures:

In May of 2010, the first Best Practices protocol focusing on improved identification procedures was adopted by law enforcement agencies throughout the State including the State Police, the Association of Police Chiefs, the Association of Sheriffs, the New York City Police Department and the Municipal Training Council. A copy of the press release announcing the new guidelines for photographic and corporeal identifications and the guidelines themselves are attached. Pilots have already begun in 10 precincts in New York City, and police agencies in every area of the State are receiving training.

Among the advantages of these protocols, which were adopted after consultation with social scientists about what research showed would be the most effective ways to proceed, are that they carry no cost for the State or the counties, they are sensitive to regional differences in size and resources, and they are flexible and can be modified quickly as we learn more about what works best. The work of the Best Practices Subcommittee continues and will systematically focus on many of the issues addressed by the proposed bills.

In contrast, the bills referenced above impose a sweeping set of costly, highly elaborate and cumbersome unfunded mandates on police, prosecutors and counties that carry heavy sanctions, including the suppression of reliable evidence or reversal of valid convictions for technical failures to comply. In many instances, they require the early release of personal information about victims and witnesses that could endanger their safety or require procedures that victims would find traumatic such as videotaping them as they identify those responsible for the crimes against them.

The bills set unrealistic time periods for compliance and do not take into account the significant regional differences in geography and personnel across the State that would make their implementation impractical. They also will result in rigidly freezing procedures in place without allowing for innovation born of new information or experience. This will occur even if subsequent research or scientific developments demonstrate the ineffective nature of a particular mandated practice. In sum, the adoption of these proposals will not result in preventing the conviction of the factually innocent, but rather will increase the burdens on law enforcement and reduce the likelihood of convicting the actually guilty.

For these reasons, we oppose the bills. A brief outline of some of the specific concerns with each bill follows:

S7873 Duane/ A11089 Titus

Informant Testimony: The statute presumes that witnesses who receive assistance or protection in connection with their testimony, for example rape victims or domestic violence victims who may receive services such as counseling or those courageous enough to testify against gangs or organized criminal enterprises, are informants and, therefore, not worthy of belief.

Pursuant to the bill, the testimony of such a witness cannot be used unless the court finds that there is other credible and independent evidence connecting the defendant to the crime. The bill would erase decades of advances for rape and domestic violence victims by returning them to an era where they were treated differently than victims of any other type of crime and when the law essentially imposed a presumption that they were not to be believed.

In addition, information about their identity must be revealed early in the case, placing them at risk. Only a limited and ineffective protective order is authorized to protect the witness. Juries must be told to be cautious about such witness= credibility, which could jeopardize reliable evidence. The bill will have an obvious chilling effect on victims and witnesses who wish to cooperate with the police.

S7867 Schneiderman/A11123 Lavine

440/Post Conviction DNA Testing after Guilty Plea: This proposal will allow significant numbers of defendants who *already stood in court and swore that they were guilty* to drain law enforcement and tax dollars by seeking DNA testing without making any showing that a DNA test could prove their innocence. Victims will not have closure if cases can be re-opened after a guilty plea years after the case was supposedly over. Current law already allows defendants to seek DNA testing *before* they plead guilty, and, of course, after a conviction at trial.

The proposal would effectively alter the meaning of an admission of guilt in open court. It could also have the unintended consequence of encouraging guilty defendants to game the criminal justice system by securing the benefits of a plea and then, when there is nothing to lose, insisting on DNA testing. Significantly, it would require law enforcement to preserve, store and maintain every shred of physical evidence in every case for all time at great expense.

S7893 Hassell-Thompson

Exculpatory Evidence/Brady/Discovery: This proposal significantly expands a prosecutor=s discovery obligations to the point where witness safety is put at risk and the prosecutor is, in essence, required to do the work of the defense. The obligations placed on the prosecution are so demanding that little other work could be accomplished. Failure to meet the onerous demands of the statute can result in disciplinary action against the prosecution, suppression of evidence or reversal of convictions, with no similar standards imposed on the defense. New costly and lengthy court proceedings are mandated by the statute.

The definition of exculpatory material is expanded far beyond any common-sense meaning of the term, to include, for example, any information that would assist the defense attorney in moving to suppress physical evidence of guilt. The sanctions are likely to lead to the dismissal of cases for failure to deliver innocuous or duplicative material. The proposed time frame for disclosure of much of the information B within 28 days of the filing of an initial accusatory instrument B will inevitably encourage attempts to tamper with witnesses, particularly in those cases in which the careful prosecutor wishes to complete an investigation before a grand jury presentation.

S7842 Thompson/ A11052 O=Donnell

Eyewitness Identification Procedures: An identification should be judged by whether it is fair and reliable. Instead, the proposed bill codifies scores of technical procedures that can trigger lengthy litigation, adverse jury instructions and exclude evidence if technicalities are not followed. The proposed videotaping of witnesses= identifications will have a chilling effect on their cooperation and will be very expensive. As noted above, New York State Law Enforcement has recently adopted fair, reliable and robust identification guidelines that can be applied in all jurisdictions, large and small, around the state.

S7877 Perkins/ A5213a Lentol

Videotaping of Police Interrogations: The proposal requires videotaping of all custodial interrogations of the 170,000 felons arrested annually. The fiscal

implications of the bill are enormous. Failure to record a custodial statement could result in the suppression of an otherwise-reliable statement by a defendant.

Also of great concern is the scope of the proposal. Its definition sections related to A Custodial Interrogation@ and A Place of Detention@ would preclude most on-scene or squad car questioning of suspects. Clearly, the delay in questioning a suspect in many unfolding crimes will prove detrimental to a successful investigation and may delay the critical concern of first responding officers to locate additional crime victims, or ascertain the presence of weapons, or to facilitate the setting up of a sterile crime scene to gather forensic evidence. Any legislation that impedes this primary law enforcement mission runs contrary to sound public policy.

Using funding that was briefly made available by the State; many counties throughout New York have already begun voluntary pilot programs videotaping interrogations. Twenty-nine counties and the NYPD either have or are developing videotaping pilot programs. Funding for additional pilot programs would be far more helpful than a rigid, one-size-fits-all statewide unfunded mandate with suppression sanctions for failure to comply.

S7868 Schneiderman/ A11150 Lancman

Court of Claims/Expungement of criminal records: The current law only allows actually innocent defendants, who did not contribute to their conviction, to sue for damages in the Court of Claims. The bill changes that standard to allow defendants who have pleaded guilty or confessed to the crime to sue the state. This bill could open the floodgates to frivolous law suits that will be very expensive to litigate.