

# VOICES FOR JUSTICE



**Firsthand Accounts of Innocent People Fighting for  
Access in New York's Post-Conviction Process**

*“Tell me the name of one innocent person that got out of prison for being quiet.”*

**Q.E.**

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## CONTENTS

- I. Acknowledgments
- II. Executive Summary
- III. Introduction
- IV. Method & Approach
- V. Voices of the Directly Impacted
  - a. Participants
  - b. What impact do wrongful convictions have on our criminal legal system?
    - A. Public Safety
    - B. Personal Harm of Wrongful Conviction
    - C. Trial Penalty in New York
  - c. How well does New York’s current post-conviction statute work?
    - A. Tiger Bar
    - B. Reflexive Denial of § 440 Motions
    - C. Procedural Bars to Hearings
    - D. Lack of Post-Conviction Discovery
    - E. Assignment of Counsel
    - F. Post-Conviction Access to Forensic Evidence
- VI. Challenging Wrongful Convictions in New York State
- VII. Future Opportunities

The following appendix items are located online. Please access the links below to view the following items:

[Current NY Statutory Scheme](#)  
[Questionnaires](#)

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## ACKNOWLEDGMENTS

On behalf of the coalition of organizations, attorneys, advocates, and students who have worked collectively to reform New York State’s post-conviction petition process, we thank Families and Friends of the Wrongfully Convicted, the exonerated people, and the people still fighting to prove their innocence for sharing the stories of their struggles challenging their wrongful convictions in New York State. By finding the strength and courage to share painful experiences, they can help others learn through their vulnerability. We extend our profound admiration and appreciation to them.

The Perlmutter Center for Legal Justice at Cardozo Law (PCLJ) was proud to take the lead in the creation of this report on behalf of the coalition. Special thanks are owed to the primary drafters of this report: Cardozo Law students Jillian Fantuzzi and Jessica Utnick, along with PCLJ Junior Staff Attorney Emily Lane, under the supervision of Sarah Chu, director of policy and reform at the PCLJ. They conducted interviews with the support of 2024 Dubin Fellows from the Shawn Carter Foundation including Joycelyn Dendy, Kenine Dieuveil, Aaomi Sailing, Raniyah Smith, and Brayan Yauri, under the supervision of Deputy Director Derrick Hamilton. The Legal Aid Society Wrongful Conviction Unit (LAS-WCU) also contributed significantly to the report. Legal Interns Rebecca Benor-Sussman, Emily Fabbrini, Annabel Riggio, and Christina Woller conducted interviews under the supervision of Supervising Attorney Elizabeth Felber. Interviews were also conducted by Jonathan Hiles of the Law Office of Thomas Hoffman, P.C. The report was designed by Bryan Jackson, director of digital communications and marketing at Cardozo Law School.

Over the last five years, a coalition of organizations and individuals have advocated for the passage of the Challenging Wrongful Convictions Act. Chief among them were organizations led by impacted communities including Families and Friends of the Wrongfully Convicted and VOCAL-NY. The coalition also includes the Center for Appellate Litigation, Innocence Project, The Legal Aid Society, New York County Defenders, and the Perlmutter Center for Legal Justice at Cardozo Law, as well as wrongful conviction practitioners Jonathan Hiles, Thomas Hoffman and Oscar Michelin. Last but not least, Rebecca Brown, policy advisor and founder of Maat Strategies LLC and Justice Strikeforce, has championed this effort from its inception, providing much appreciated expertise and insight.

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## EXECUTIVE SUMMARY

In 2018, the New York State Court of Appeals' decision in *People v. Natascha Tiger* created an insurmountable obstacle for wrongfully convicted individuals pursuing innocence claims. The ruling held that a guilty plea precluded persons accused of crime from challenging their conviction in the absence of newly discovered, exculpatory DNA evidence. This is a troubling fact given 97% of felony convictions and 99% of misdemeanor convictions in New York State are resolved by guilty plea.<sup>1</sup> The National Registry of Exonerations documented that 24% of all exonerated people across the United States pled guilty to crimes they did not commit. According to the Innocence Project, of the cases in which DNA evidence overturned an innocent individual's conviction, 12% of those innocent people pled guilty. This guilty plea bar has had a profound impact, effectively rendering a significant portion of innocent New Yorkers powerless in the post-conviction process by depriving them of the legal tools necessary to fight their cases.<sup>2</sup> Consequently, many innocent individuals remain incarcerated, serving lengthy and even full life sentences for crimes they did not commit. In addition to those denied relief due to the Tiger bar, many other innocent New Yorkers, who refused plea deals and were convicted at trial, remain wrongfully incarcerated due to gaps in New York's post-conviction statute, Criminal Procedure Law § 440.

This report explores the impact of wrongful convictions and barriers in the post-conviction process through the firsthand accounts of individuals who have navigated this process. We are incredibly grateful to the 25 courageous people who took the time and emotional resources to share their stories with us for this project. Among them are six exonerated people and 19 others who are still fighting to prove their innocence. Their stories illuminate the devastating personal and societal costs of wrongful convictions, the potentially coercive nature of plea bargaining, and the procedural and practical hurdles they face under CPL § 440. From the automatic denial of § 440 motions to the lack of access to counsel, post-conviction discovery, evidence, and appeals, these individuals detail a system stacked against them at every turn.

Drawing from their experiences, this report identifies key areas where New York's post-conviction law should be reformed to provide meaningful pathways to justice for the wrongfully convicted. Core recommendations include removing the Tiger bar on non-DNA innocence claims for those who pled guilty, allowing greater access to post-conviction discovery and forensic evidence, providing counsel to § 440 applicants with colorable, or plausible legal claims, ensuring a more equitable appeals process, and removing procedural bars to hearings when there is evidence of innocence. It is indisputable that the integrity of the criminal legal system is strengthened when a fair and robust post-conviction process is capable of responding when people are convicted of crimes they did not commit. By enacting these critical reforms, New York can take important steps to rectify the injustice of wrongful convictions, restore hope, and ensure a fair process for the innocent.

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1 National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers. "The New York State Trial Penalty: The Constitutional Right to Trial Under Attack," 2021. [https://www.nacdl.org/getattachment/1d691419-3dda-4058-bea0-bf7c88d654ee/new\\_york\\_state\\_trial\\_penalty\\_report\\_final\\_03262021.pdf](https://www.nacdl.org/getattachment/1d691419-3dda-4058-bea0-bf7c88d654ee/new_york_state_trial_penalty_report_final_03262021.pdf).

2 Since the Tiger decision, litigants who pled guilty are still permitted to bring ineffective assistance of counsel (IAC) claims. However, IAC claims are limited to problems in the trial record and precludes a litigant from raising newly discovered evidence that can support claims of innocence.

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## INTRODUCTION

In 2018, the New York State Court of Appeals delivered a decision in *People v. Natascha Tiger* that soon became an insurmountable obstacle for wrongfully convicted individuals pursuing innocence claims in the state. The *Tiger* decision was rendered in response to an appeal to vacate a criminal conviction. In 2014, Ms. Tiger was found guilty by a jury of harming a child with disabilities in her care. The child's injuries were later revealed to be caused by medication for a pre-existing medical condition, not abuse. The Orange County prosecutors challenged Ms. Tiger's appeal, arguing that under their interpretation of New York's post-conviction statute, CPL § 440 (hereafter, "§ 440 law"), she was barred by her prior guilty plea and their belief that evidence of her innocence was available at the time of her plea. The Court of Appeals agreed with the prosecution, holding in a 5-2 decision that Ms. Tiger's guilty plea precluded her from challenging her conviction in the absence of newly discovered, exculpatory DNA evidence.

Although Ms. Tiger was exonerated in 2023,<sup>3</sup> the negative impact of the 2018 decision by the state's highest court remains profound: innocent people persuaded or coerced into taking a guilty plea, often in fear of more serious repercussions, cannot challenge their convictions. This is a troubling fact given 97% of felony convictions and 99% of misdemeanor convictions in New York State are resolved by guilty plea.<sup>4</sup> The National Registry of Exonerations documented that 24% of all exonerated people across the United States pled guilty to crimes they did not commit. According to the Innocence Project, of the cases in which DNA evidence overturned an innocent individual's conviction, 12% of those innocent people pled guilty. The small fraction of DNA evidence available in criminal cases made the implications of the *Tiger* bar even more expansive, effectively rendering a significant portion of innocent New Yorkers powerless in the post-conviction process by depriving them of the legal tools necessary to fight their cases. Consequently, numerous innocent individuals remain behind bars serving out the totality of their sentences and, in many cases, their lives for crimes they did not commit.

The *Tiger* decision coincided with mounting frustration over gaps and procedural bars in the § 440 law that make it extremely difficult for innocent people to be exonerated, absent support from the district attorney's office. In response, some organizations dedicated to representing those affected by wrongful convictions began advocating for changes to the post-conviction process and drafted the Challenging Wrongful Convictions Act (CWCA). These groups not only sought to remedy the *Tiger* bar but address other procedural and practical barriers that innocent individuals face in the post-conviction process. Introduced in 2019, the bill finally passed both houses of the legislature in 2023 but was vetoed by the Governor. While the Governor supported the intent of overturning wrongful convictions and noted that she approved many criminal justice reforms since taking office as well as existing avenues for post-conviction relief, she stated in a veto memo that the bill was overly broad and would "create an unjustifiable risk of flooding the courts with frivolous claims."<sup>5</sup>

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3 Ms. Tiger was exonerated on the grounds of ineffective assistance of counsel because her attorney failed to consult with a medical expert who would have recognized that the child's burns were not caused by Ms. Tiger but by the medication the child was taking.

4 National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers. "The New York State Trial Penalty: The Constitutional Right to Trial Under Attack," 2021. <https://www.nacdl.org/getattachment/1d691419-3dda-4058-bea0-bf7c88d654ee/new-york-state-trial-penalty-report-final-03262021.pdf>.

5 Lewis, Rebecca C. "Hochul Finishes 2023 Business with No Pocket Vetoes - City & State New York." City & State New York, January 30, 2024. <https://www.cityandstateny.com/policy/2024/01/bills-still-awaiting-kathy-hochuls-signature-end-year/390373/>.

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Wrongfully convicted people and their families and supporters were devastated. How will the state ensure justice for the wrongfully convicted? To what degree are their lives and their dignity valued? This report seeks to explore these questions by asking the people who can speak to this experience firsthand. These are the views and the words of people who successfully achieved exoneration as well as people still fighting to prove their innocence in New York State. This report dovetails with a renewed push to reform the § 440 law in a manner that seeks to address the Governor’s stated concerns while ensuring justice for wrongfully convicted New Yorkers.

## **METHOD & APPROACH**

Interviewees were recruited by Families and Friends of the Wrongfully Convicted (FFWC), The Legal Aid Society Wrongful Conviction Unit (LAS-WCU), the Perlmutter Center for Legal Justice at Cardozo Law (PCLJ), and private law firms. Consent was requested before beginning the interviews which were recorded by interviewers and captured on digital audio and video recording when possible. When recordings could not be made, it was more difficult to document direct quotes. For people who were still fighting to prove their innocence, consent from their counsel was obtained before scheduling the interview. Interviews were conducted in-person at the Benjamin N. Cardozo School of Law, over Zoom, or over the phone at the participant’s preference. For people who were still incarcerated, interviews were conducted onsite at the prison or through legal calls arranged through the prison system.

Questionnaires designed for both groups of participants – exonerated people and people still fighting to prove their innocence – were administered and can be found in [Appendix I](#). Extra caution was exercised for the people still fighting to overturn their convictions, whom we chose not to identify by name for the purposes of this project.



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## VOICES OF THE DIRECTLY IMPACTED

### 1. Participants

The story of a person's wrongful conviction can be painful to tell. Sharing these accounts can take individuals back through the worst moments of their lives. We are incredibly grateful to the 25 courageous people who took the time and emotional resources to share their stories with us for this project. Among them are six exonerated people and 19 others who are still fighting to prove their innocence.

#### *Exonerated People*

Among the exonerated people, these six participants were all convicted at trial and spent a total of 142 years incarcerated. They filed a total of 15 § 440 applications with an average of 2.5 applications per person. Two of these individuals reported representing themselves pro se on their post-conviction petitions. Notably, at the time of exoneration, all six men had counsel. Among them, they received five post-conviction hearings in total. In preparing their cases, five of the six exonerated men used the Freedom of Information Law to access records in their cases. Their cases originated from four counties across the state of New York.

The exonerated participants included the following people:

#### [Shabaka Shakur](#)

[Shabaka Shakur](#) was convicted in 1989 of two counts of murder in the second degree in Kings County, New York. At the age of 24, Mr. Shakur was sentenced to 20 years to life. The factors contributing to his wrongful conviction included false confession, false accusation, official misconduct, and an inadequate legal defense. Mr. Shakur was exonerated in 2015 without the help of DNA evidence.

#### [Jeffrey Deskovic](#)

[Jeffrey Deskovic](#) was convicted of murder and rape in 1990 in Westchester County, New York. At the age of 17, Mr. Deskovic was sentenced to 15 years to life. The factors contributing to his wrongful conviction included false confession and official misconduct. He was exonerated in 2006 with the help of DNA evidence.

#### [Marty Tankleff](#)

[Marty Tankleff](#) was convicted of double homicide in 1990 in Suffolk County, New York. At the age of 19, Mr. Tankleff was sentenced to 50 years to life. The factors contributing to his wrongful conviction included false confession, false accusation, and official misconduct. DNA evidence did not play a role in his 2008 exoneration.



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### Everton Wagstaffe

Everton Wagstaffe was convicted of kidnapping and murder in 1993 in Kings County, New York. At the age of 24, he was sentenced to 12 and a half to 25 years. The factors contributing to his wrongful conviction included false accusation, official misconduct, and ineffective assistance of counsel or an inadequate legal defense. DNA evidence played a role in his 2015 exoneration.

### Sundhe Moses

Sundhe Moses was convicted of two counts of murder in the second degree, two counts of assault in the second degree, and gun possession in 1995 in Kings County, New York. At the age of 21, Mr. Moses was sentenced to 24 1/3 years to life. The factors contributing to his wrongful conviction included false confession, false accusation, and official misconduct. DNA evidence did not play a role in his 2018 exoneration.

### Earl Walters

Earl Walters was convicted of two separate abductions and robberies of two women in 1994 in Queens County, New York. At the age of 17, Mr. Walters was sentenced to 17 and a half to 40 years. The factors contributing to his wrongful conviction included mistaken eyewitness identification, a false confession, false accusation, official misconduct, and an inadequate legal defense. DNA evidence did not play a role in his 2018 exoneration.

### *People Still Fighting to Prove Their Innocence*

The people still fighting to prove their innocence took an enormous risk in speaking about their pending cases. Some are still incarcerated and some, while home, completed lengthy sentences for crimes they maintain they did not commit. These individuals are actively seeking to have their convictions overturned and due to the sensitive nature of their circumstances, precautions were taken to avoid identifying these participants in the report. When a full name is used in this report, it will indicate that the individual has been exonerated. If initials are used to represent a person, it will indicate that the individual is still fighting to be exonerated. The initials are coded and are not direct reflections of the individual's name.

Among the 19 people still fighting to prove their innocence, 15 are still incarcerated. Collectively, they have served nearly 550 years for crimes they did not commit with a mean of 28.7 years. All but one of these individuals was represented by counsel, although eight of them reported representing themselves *pro se* in the past. Only 37% of the people still fighting have cases pending before a Conviction Integrity Unit (CIU), a reminder that of New York's 62 counties, CIUs currently exist in only 16 and, even in these counties, have widely varying levels of funding and efficacy.<sup>6</sup> Indeed, some of these "CIUs" appear to exist in name only. Together, these individuals have filed at least 42 § 440 motions and were granted 7 hearings, with only two individuals granted hearings as *pro se* litigants. In preparing their cases, 89% of these participants used the Freedom of Information Law to access records. Their cases originated from four counties across the state of New York.

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<sup>6</sup> The 16 counties with CIUs are Bronx, Columbia, Dutchess, Erie, Kings (Brooklyn), Monroe, Nassau, New York (Manhattan), Oneida, Orange, Putnam, Queens, Richmond (Staten Island), Suffolk, Ulster, and Westchester.

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## 2. What Impact do Wrongful Convictions Have in Our Criminal Legal System?

### a. Public Safety

A wrongful conviction “occurs when a factually innocent person is convicted of a crime they did not commit.”<sup>7</sup> Every time a wrongful conviction occurs, the person who actually committed the crime remains undetected and free to continue to commit crimes. No one benefits from a wrongful conviction, especially not the larger public. Some leading contributors to wrongful convictions include eyewitness misidentification, false or misleading forensic science, the use of incentivized witnesses like jailhouse informants, official misconduct on the part of law enforcement, and false confessions. The pervasiveness of wrongful convictions is proof that the criminal legal system is not “infallible.”<sup>8</sup> To prevent wrongful convictions and strengthen public safety, New York State should focus on remedying these known contributors. According to the National Registry of Exonerations, among the 357 exonerations in New York, 68% included official misconduct, 37% included eyewitness misidentification, 19% included false or misleading forensic evidence, and 18% included false confessions.

To emphasize the need to improve New York’s § 440 law, **Marty Tankleff** stated that people must recognize reform for the public safety issue it is: “You need to show that this is a community safety issue. I mean, that’s the one thing I think a lot of people don’t ever want to discuss, at least law enforcement/prosecutors, that when an innocent person is in prison, the guilty party remains free to commit additional crimes.”

Indelible in New Yorker’s minds are the cases of the “Exonerated 5.” Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Korey Wise were wrongfully convicted of the brutal assault and rape of a young woman jogging through Central Park in 1989. While investigative resources were focused on these young boys, the person responsible for the crime went on to rape two more women, killing one, and was apprehended during the robbery of a third woman. **Jeffrey Deskovic** shared that the person who committed the murder for which Mr. Deskovic was wrongfully convicted was arrested three years later for committing another murder.

**Sundhe Moses** worried that in the course of advocating for improving pathways for the wrongfully convicted to demonstrate their innocence, policymakers may be misplacing their concerns. “[A]dvocating for innocent people isn’t Democratic or Republican or Independent, white or Black, it’s not that type of issue, and the reason why I say that is because I don’t think anybody believes that someone should be in prison for a crime that they didn’t commit.”

### b. Personal Harm of Wrongful Conviction

From 1989 to December 2024, a total of 4,046 years of life were stolen from New Yorkers who have been exonerated.<sup>9</sup> What does it mean to be wrongfully convicted and what is attached to those lost years of life?

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<sup>7</sup> Innocence Project. “Innocence Project: The Issues.” Innocence Project, 2024. <https://innocenceproject.org/the-issues/>.

<sup>8</sup> *Ibid.*

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Participants frequently detailed the loss of their most formative years behind bars. **L.H.** remarked that “four decades of my life [were] stolen that I can never get back and no amount of anything can ever give this back to me.” There is no remedy that can adequately erase the trauma experienced by people in prison nor give people their time back. For those who received life sentences, the hardships of the time spent behind bars also presented acute spiritual challenges.

**C.G.’s** mother died while he was incarcerated and he is estranged from his brother. He has many passions, including computer programming, that he never had the opportunity to pursue. He struggles daily with the life and career he could have had but for his incarceration.

For **Z.T.**, who received life without parole for a crime he did not commit, hope is even more difficult to cling to. In his view, an individual must become “an eternal optimist” in order to survive 25 years in prison. “[I]f I wasn’t so optimistic, what hope would I have...to stay out of trouble...it’s horrible the way they treat us.” **Z.T.** recounted the conditions of confinement wrongfully convicted individuals are subjected to—all while they are innocent. “It was also very embarrassing to face these charges,” said **L.H.**, who referenced the difficult time he faced in prison because of the nature of the crime for which he was wrongfully convicted.

The impact of wrongful convictions reaches beyond just harm to the individual. Each incarcerated person, whether they are wrongfully convicted or not, is someone else’s loved one. “[W]rongful convictions don’t just negatively impact the individual but their loved ones as well,” said **Marty Tankleff**. **Z.T.** echoed, “[w]hen we get locked up, it doesn’t just affect us, it affects our family as well. They get locked up too.” **L.B.** spelled out the harm to him and his family. “Nothing they do will erase the experiences and give me my time back. It had a profound impact on the family—if you have someone locked up, it impacts everyone in the family. You are constantly worried about them. It has such a profound effect—family members, children. Just the time that you lose. It is so valuable because tomorrow is not a promise to anybody. Just the time that you lost is something you can never get back.”

Families are painfully dismantled by wrongful convictions. **L.B.** described how his incarceration was experienced by his spouse, daughter, siblings, and parents. Several people discussed the destabilization and its short- and long-term consequences for their families. Not only did their wrongful convictions deprive their families of key parental figures but they often led to a total disruption of the home that involved family separation and financial fallout. **O.D.** shared that “it destroyed my world,” subjecting her children to foster care and her family to deterioration because the “glue of the family” was missing.

Wrongful convictions can impoverish families by depriving them of financially contributing household members. “Totally devastating,” was how **I.K.** recounted the financial impact of his wrongful conviction. “This has impacted my family for another generation. If you think of the effects on family members; I wasn’t able to provide for the economy of my family to help us move forward to help us attain the American dream.”

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9 Data from 357 New York exonerations between 1989 and December 2024 were provided by the National Registry of Exonerations. Years lost were calculated from the date of first conviction to the date of release [not exoneration].

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**Sundhe Moses** described how his family depleted their savings to hire an attorney. “[T]his is hard earned money that people saved, and you know, they couldn’t foresee the tragic thing, so it did take a financial and emotional toll.”

**R.I.** was the first person ever incarcerated in his family. It was a “new experience for all of us. No one has an idea of how to go about it.” He added that, “My family is supportive and does the best they can to make sure my sanity is intact to be sure I am still fighting and not letting this discourage me.” Wrongful convictions require individuals and their families to rely on shreds of optimism or hope throughout what is often the most stressful period of their lives. Imagine what **K.I.** and his family endured during what amounted to an entire life spent in prison. Falsely accused of a crime at the age of 17, **K.I.** was sentenced to 51 years to life.

### c. Trial Penalty in New York

Innocent persons accused of crime are often forced to decide between two terrible alternatives. They can either plead guilty to crime(s) they did not commit with hopes of a reduced sentence or go to trial and risk harsher sentencing. This difference between the smaller sentence offered to a person accused of crime in a plea bargain prior to trial versus the larger sentence the person accused of crime could receive if they elect to go to trial is called the “trial penalty” or “trial tax.” A 2019 report by the New York State Association of Criminal Defense Lawyers and the National Association of Criminal Defense Lawyers<sup>10</sup> found that persons accused of crime who went to trial received sentences averaging 7 years longer than those who pled guilty to similar charges. In some cases, the trial penalty is far larger: innocent persons accused of crime who refused plea offers carrying 10 or fewer years in prison have received sentences of over *90 years in prison* after trial.<sup>11</sup> Consequently, over 95% of criminal cases in New York end in plea bargains rather than trials.

The trial penalty is a key feature of mass incarceration because the carceral system would break down without plea bargains given the volume of cases. Paradoxically, efforts to minimize case volume through the trial penalty coerce innocent people to plead guilty, not only to serious violent felony crimes, but also more quotidian misdemeanors which can dramatically alter the course of a person’s life. The report found the effect of the trial penalty was particularly profound in violent felonies and drug cases.

**O.K.** became a cautionary trial penalty tale. In 1998, during a short window when Governor Pataki reinstated the death penalty in New York, **O.K.** took a chance at trial in a capital case and was ultimately wrongfully convicted in the criminal phase of the trial. Before the penalty phase when the jury was to deliberate on whether to recommend the death penalty, **O.K.** took a plea of life without parole, forever limiting his capacity to fight his conviction. **O.K.** could not have known that the New York Court of Appeals would rule the death penalty unconstitutional in New York less than a decade later, or that the *Tiger* bar would effectively close the door on his innocence claims, leaving **O.K.** in prison for life.

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<sup>10</sup> National Association of Criminal Defense Lawyers and New York State Association of Criminal Defense Lawyers. “The New York State Trial Penalty.”

<sup>11</sup> As reported by New York attorneys representing clients in post-conviction.

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After his exoneration, **Jeffrey Deskovic** became a lawyer and now has a client who pled guilty to a crime he didn't commit. "And they just kept telling him, look, you're a Black male and the female accusing you was a white woman from upstate New York, you're going to lose the trial." That client took a plea only for his post-conviction attorneys to uncover a trove of evidence of his innocence that his trial lawyer did not find.

### 3. How Well Does New York's Current Post-Conviction Statute Work?

#### a. *Tiger* bar

The *Tiger* decision in 2018 was the event that triggered the subsequent advocacy work to reform the § 440 law. It has effectively prohibited innocent individuals who pled guilty and had no DNA evidence in their case from arguing their innocence before a court. As a result, a large population of innocent individuals are left with their hands tied and resigned to serve out their years, and in many cases their lives, behind bars. Plea bargaining was created to increase system efficiency by settling a criminal case pre-trial. In the current state of affairs, it forces innocent people to choose between maintaining their innocence and ensuring they have a future outside prison walls. Due to the overwhelmingly coercive nature of the plea-bargaining process, many innocent individuals have pleaded guilty.

Why would an innocent person plead guilty to a crime they did not commit? A report by the National Registry of Exonerations found that innocent people who pled guilty almost always received lighter sentences than those convicted at trial.<sup>12</sup> While the average plea discount is approximately 20-30%, they have been reported to be as high as 80% for adults and 95% for youth.<sup>13</sup> In New York, only eight percent of exonerated people had initially pleaded guilty,<sup>14</sup> a reflection of the legal bar that exists in non-DNA cases. Beginning in 2019 to the present day, after the *Tiger* decision (June, 2018), 89 exonerations took place in New York. Among them, only 15% involved people who pled guilty. Of these 13 exonerations, eight were the result of partnerships with CIUs. Of the five remaining exonerations, one was Natascha Tiger, of the eponymous case law, who was exonerated in 2023. The other four cases included:

- Thomas Shafer, with the help of **Jeffrey Deskovic**, was exonerated of a theft that did not occur.
- Desheen Evans, whose prostitution conviction was later recognized as human trafficking (exonerated 2021).
- Jason Serrano was exonerated in a drug possession case where body camera evidence was later found and proved that the arresting officer planted the evidence (exonerated 2021).
- Irving Turrell was framed for a drug sale that never occurred. His innocence was uncovered after the district attorney's office came across his case while investigating the arresting officer for multiple instances of framing and perjury (exonerated 2019).

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12 National Registry of Exonerations. "Innocents Who Plead Guilty." National Registry of Exonerations, November 24, 2015. <https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf>.

13 Wilford, Miko M., and Annmarie Khairalla. "Innocence and Plea Bargaining." In *A System of Pleas*, edited by Vanessa A. Edkins and Allison D. Redlich, 1st ed., 132-50. Oxford University Press New York, 2019.

14 National Registry of Exonerations. "Exoneration Detail List," 2024. <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>.



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The trend is clear. Since the *Tiger* decision, exonerations of people who pled guilty are few and far between. If won without the support of a CIU, they have occurred under extraordinary circumstances. Serrano, for instance, only received relief on grounds relating to the unlawful search of his car conducted by the police. In actuality, body worn camera footage showed law enforcement planting the very drugs they arrested him for, thereby demonstrating his actual innocence. Serrano pleaded guilty four days after the *Tiger* decision, preventing him from later claiming actual innocence. Innocent people who plead guilty need a procedural path to obtain post-conviction relief.<sup>15</sup> Scholars similarly warn, “Guilty pleas are too common for such a narrow safety valve. The legislature should react and build in strong protections for people forced by poverty or coercion into wrongly pleading guilty.”<sup>16</sup>

### **b. Reflexive Denial of § 440 Motions**

Both exonerated people and people fighting to prove their innocence described a prevailing perception that § 440 motions are automatically denied. The § 440 statutory scheme was intended to serve as a safety valve. When all other aspects of the criminal process failed and resulted in the wrongful conviction, the post-conviction process was intended as a mechanism to provide relief. Instead of providing relief, it has proven to become another barrier for innocent people.

**B.O.** explained how the speed at which his motions were denied supported his belief that denials were decided automatically. “[The judge] responded back in three hours. You never see how fast he was responding back to my 440s, I mean he was denying me, with bullcrap, with bullcrap, I mean I just had a two-month, almost three-month hearing on this case here, this is a serious case here.” **Q.E.** recalled a conversation with an individual who clerked for a judge who shared, “The judge told the clerk every post-conviction motion automatically goes in the disfavored motion pile and told him to look for any procedural bar to deny the motion on.”

In the view of the participants, many judges’ decisions were biased and automatically favored the prosecutorial theory. According to **G.G.**, “The district attorneys’ position automatically is to always procedurally bar you first—that’s how they move, and it gives that discretion to the judge. And sometimes judges don’t want to put that in their career and...if they have no way out—like, you know... procedurally bar it and I don’t have to entertain this in the event that, you know, I release this guy and something may happen, cause that’s what is on their mind.”

### **c. Procedural Bars to Hearings**

A theme expressed by both exonerated people and people fighting to prove their innocence was a sense that § 440 petitions are typically denied on procedural grounds rather than the merits of the case or in consideration of a person’s actual innocence.

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15 Sultan, Adnan. “Opinion: The Problem with Plea Bargains and How NY Can Help the Innocent.” *City & State NY*, May 22, 2023. <https://www.cityandstateny.com/opinion/2023/05/opinion-problem-plea-bargains-and-how-ny-can-help-innocent/386601/>.

16 Furst, Bryan. “On Wrongful Convictions: Texas Two-Steps Forward, New York One Back.” *Brennan Center for Justice*, January 11, 2019. <https://www.brennancenter.org/our-work/analysis-opinion/wrongful-convictions-texas-two-steps-forward-new-york-one-back>.

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For **Sundhe Moses**, “[t]he fight became trying to get the court to consider the merits of my claim, and that’s the fight for most people. Most people never get to the merits because of procedural bars, and procedural bars begin at trial.” Mr. Moses provided an example of a procedural argument in which he was held responsible for the inadequacy of his counsel. “[B]ecause the court, although you’re being represented, it’s just a representation, meaning that the higher court still says that you allowed it to go on, well what they are saying is that if you, as the defendant, see something that you don’t like, you do have the right to object yourself, even if the attorney doesn’t, but many citizens don’t know that, right...”

**B.O.** explained how procedural bars contradict the legislative intent of the § 440 law. “[T]hey procedurally bar you, saying you could have brought this evidence up before, or we heard it. But what you mean I never brought this evidence up before? What you talking about? So now with the actual innocence, with the standard, you could bring your old and new evidence, because with the new evidence that you bring it’s gonna corroborate your old evidence. So when you go, when you’re trying to explain that to them, they hit you with procedurally bar, no you brought this evidence before...”

**Q.E.** recalled being told that “Even if he wasn’t procedurally barred, the judge would have made [them] substantively barred because [the] judge determined on their own that the alibi was a ‘fabrication’...Under that statute, [the] judge determined the credibility of the alibi witness without even having an evidentiary hearing...”

“Procedural bars are subjective, because [prosecutors] may say that they turned things over, but if you simply do not have the files or evidence then it’s your word against theirs,” said **A.T.**, “the judges automatically side with the prosecution and defer to procedural bars. There’s no impartiality.” He described that in his case, the DA wrote a letter to the court saying that they turned over specific documents and included their serial numbers, but the documents were never itemized in the first place so there was no way to prove that he could be missing a number of pages.

**G.G.** perceived the procedural bars judges use to deny their motions were designed to block their petitions. “So what I was saying was like it’s pretty straight forward but they was trying to take any little thing like oh it’s not Brady, oh um like this is the DA’s notes and like they called them in, and she was like I don’t remember that but if I had any Brady I would have turned it over.”

**I.K.** concluded that “The legal system is interested in the finality of a conviction. So when there is evidence of innocence, they don’t want to consider any of it. They are interested in the finality of the case.”

#### **4. Lack of Post-Conviction Discovery**

In the post-conviction process, innocent people must often prove their innocence without the evidence they need. Prior to the passage of New York’s pretrial discovery reform law in 2019, discovery at the trial level was governed primarily by the *Rosario* rule, previously codified as New York Criminal Procedure Law § 240.45. The rule required that all written or recorded statements made by a testifying witness be turned over to the defendant. However, this rule extended to laboratory reports and other materials relating to the witness’s testimony and was only required to be produced after direct examination by the



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prosecution and before the defense began its cross-examination. Despite the requirement to turn evidence over, *Rosario* essentially created what many derided as “trial by ambush,” leaving defendants with little—or no—time to adequately investigate and review the prosecution’s evidence. Also, some prosecutors adopted a practice of disclosing *Rosario* material but not statements of non-testifying witnesses that constituted *Brady* material. A 2020 National Registry of Exonerations report on government misconduct<sup>17</sup> found official misconduct contributed to 54% of wrongful convictions and that the most frequent type of misconduct was *Brady* violations. Concealing exculpatory evidence occurred in 44% of exonerations.

To this day, persons accused of crime fighting to prove their innocence lack access to a full view of the evidence in their case—especially if it involved material the prosecution did not raise at trial. While the New York discovery law has revolutionized the access that persons accused of crime have to the evidence in their trial-level cases, there remains no such right in the post-conviction process, even though states from New Jersey to North Carolina have enabled post-conviction discovery for years.

**Marty Tankleff** highlighted the unique difficulties of discovery in the criminal legal system. “But in our system, you essentially get more access to discovery through a civil rights claim than if you’re charged with a crime. So, I think to me that is a huge obstacle because why is it when money is on the line—versus someone’s freedom—I get access to more...” As a result, he feels that the discovery issues serve to further skew the playing field against individuals. “Fair review never happens because you’re never in a position to fully present all of the evidence to the court. You know, quite often we know prosecutors are withholding information and the police are withholding information, so the jury never hears the whole truth.”

According to **Jeffrey Deskovic**, “Without having post-conviction discovery and without getting documents, you’re going to have one less way of chasing down a trail of evidence and investigative directions to...prove somebody’s innocence.”

Obtaining materials through discovery requests is often an impossible task. **Z.T.** shared the frustrating outcome that his “denials were all based on claims that the stuff should have already been turned over,” but they never were. Regardless of an incarcerated individual’s level of legal knowledge, **S.F.** felt the law needs to be revised to allow greater access to the documents and information necessary to fight their case and overcome the commonly invoked “due diligence” procedural bar. “[I]t is an impossible standard for an incarcerated person to reach. How can an incarcerated person without any resources meet this standard? Even with a lot of legal knowledge, we don’t have a platform for our voices to be heard. We need an outlet and a way to get justice and to get access to documents and information to fight our cases. Due diligence is an injustice.”

“I attempted many times to get police reports, DD5s (police investigation reports), etc., but the judge denied my requests every time, despite being specific,” said **Q.E.** “The judge claimed that most of the documents were turned over at trial. The judge used blanket denials and relied on

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<sup>17</sup> Gross, Samuel R, Maurice J Possley, Kaitlin Jackson Roll, and Klara Huber Stephens. “Government Misconduct and Convicting the Innocent.” National Registry of Exonerations: Newkirk Center for Science and Society: University of California Irvine, September 1, 2020.

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precedent set by the court who used the same blanket denials in the past (and therefore they always worked).” **Q.E.** hoped that any reform to the § 440 law would permit “a discovery request for shell casings, which could potentially lead to exculpatory evidence.” Since neither his DNA nor his fingerprints would be on the physical evidence, **Q.E.** hopes testing would ultimately prove that the witnesses were lying and that he took no part in the murder. For **Marty Tankleff**, “[t]here was forensic evidence that was favorable. There was a bloody knife imprint that was discovered,” however, “before my trial—it was never disclosed. There was evidence that could have been tested by DNA. But the post-conviction judge in 2006 and 2007 denied my right to DNA testing.”

Without the right to post-conviction discovery, innocent people have had to rely on Freedom of Information Law (FOIL) requests. FOIL was designed as a mechanism for the public to access government records. The purpose of the FOIL law is to promote government transparency and accountability, and FOIL allows any member of the public to access certain records. However, FOIL was never intended to replace discovery and also includes exemptions that prevent disclosure of critical types of case records. The FOIL process remains an ineffective strategy for providing individuals with the totality of the evidence in their case. For people wrongfully convicted of sex crimes, FOIL is a futile tool as that information is shielded from the public.

The FOIL process tends to be prolonged—lasting years—and unpredictable. **Sundhe Moses** was successful with his FOIL requests, but responses “took quite long,” a problem exacerbated when you “don’t have any knowledge of the law.” **Marty Tankleff** further added, “They take forever...I can tell you, though, I’ve submitted full letter requests to the Department of Corrections for things that are readily available and it’s been almost a year for me to try to get them. So they don’t work.” **Among people still fighting to prove their innocence, the long wait and often arbitrary outcomes are exasperating. T.D. filed a FOIL request and waited 3 years for an answer, only to be told the file was lost. Q.E. filed multiple requests, each taking about a year, and each ultimately denied.**

**Everton Wagstaffe** was met with resistance throughout the FOIL process. “For some reason the police department doesn’t want to turn over reports to us. Even though the judge ruled that I should get the file, it was never done.” **R.I.** didn’t have strong English skills when he was first incarcerated, so it took some time for him to learn English just to begin working on his case. Despite these efforts, **R.I.’s** FOIL requests were denied, and he remain unable to access case materials not introduced at trial.

Even when **G.G.** designed FOIL requests that met the required standard of specificity, they were denied. “[When given] a listing of everything in the case, I was like, ‘hold up, I don’t have this, I don’t have that,’ so I used that as a guide like, ‘I want this—you have this.’ They just denied me, like whatever I asked for they wouldn’t give me, they would give me something else.”

**S.F.** described the FOIL process as a “constant evil,” because when he first submitted over a dozen FOIL requests, they were flatly denied on the basis that the “records were not in existence.” However, over a period of years and as personnel turned over, **S.F.** finally received piecemeal documents, including a *Brady* document. When **S.F.** attempted to use those documents to support

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an appeal, they were barred for not exercising due diligence in discovering the material earlier despite the fact that earlier FOIL requests produced no documents. **T.D.** explained how even when he successfully received the documents requested through FOIL, they were always heavily redacted, which ultimately led to additional time spent going back and forth trying to get unredacted copies. **J.L.** submitted multiple FOILs, some were granted, and some were constructively denied due to time, meaning they took so long to respond that it was as if the request was rejected. **The documents that were received through C.G.'s pro se filings were "completely unhelpful" and highly redacted. Requests for a more comprehensive set of less redacted records were only granted after C.G. obtained an attorney.**

"I have made several FOIL requests," said **I.K.** "It's hard because I don't always know the names of the documents that I need...Every time, I would get different papers back. Sometimes I would get documents that I got before; sometimes I would get documents that I didn't get before. I never knew what the DA had and if I was getting everything." This process is especially frustrating when the innocent person learns of problems in their case and cannot effectively pursue them. This was the case for **I.K.**, "I was made aware that the detective in my case was doing a lot of illegal activities, such as forcing witnesses to testify, but they denied all records about the detective's wrongdoing."

## 5. Assignment of Counsel

In 1963, the United States Supreme Court (SCOTUS) decided *Gideon v. Wainwright*, a landmark case that established the right to legal counsel for criminal defendants who cannot afford an attorney. The Court agreed that the 14th Amendment's due process clause provides that a fair trial cannot be ensured unless a defendant has access to competent counsel. That same year, SCOTUS also decided *Douglas v. California*, which guaranteed the right to counsel in a defendant's direct appeal—the only appeal they are entitled to as of right. However, there is no such guarantee of counsel beyond these two phases of the criminal process. Consequently, legal representation is not a guarantee to individuals in the post-conviction process, especially indigent persons accused of crime whose access is further restricted to the limited population of appellate public defenders or non-profit legal organizations with § 440 experience. As a result, people fighting to prove their innocence after exhausting their direct appeals often file motions pro se, or "in one's own behalf" without the assistance of an attorney.

**B.O.** explained the vicious cycle experienced by those who cannot afford counsel. "I'm incarcerated, I'm indigent, I'm not rich, I don't have money. I mean, that's why a lot of us stay in prison, because we don't have money for an attorney, we don't have money for investigators, so a lot of us sit and rot in prison and die, some die..."

While **Sundhe Moses** felt fortunate to have had a strong educational background, he recalled "bumping into many people that couldn't read and write in prison, that were innocent" which led him to wonder, "Wow, how are they gonna get out, they couldn't even write a letter." He further added, "I never forget about that population when we are talking about...what were barriers... coming from underprivileged neighborhoods and seeing young kids and then some people can't read, they never finish high school, fifth grade reading level, there's no way they're gonna be able to advocate for themselves."

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While some exonerated people like Derrick Hamilton, Jabbar Collins, **Shabaka Shakur**, and others currently incarcerated have become famed “jailhouse lawyers,”<sup>18</sup> lacking counsel has a profound impact on an innocent person’s post-conviction plight.

“A lot of incarcerated people will write incredible briefs and motions, but they are all denied if the person is without representation. The men in prison knew this to be a common fact,” said **Earl Walters**. “[G]uys in prison would send their own writing to an attorney, and it would be sent with no edits, and those motions would be granted. An attorney’s signature will make all the difference.”

**Shabaka Shakur**, known for his legal writing expertise, developed this skill over time, but it took time for him to file successful motions that were not ultimately procedurally barred. “Yes, procedural bars were a common issue. I learned the law myself while in prison and represented myself for almost everything. Initially, it was easy for them to win against me, but once I got a grip on the law, their arguments became more about procedural issues.”

**V.H.** stressed the importance of counsel to combat the stigma associated with pro se cases. “There are a lot of innocent people in prison fighting to get out. But without access to an attorney, they have no chance because judges refuse to actually look at the case when it has a pro se label on it. Lots of people need this [bill] to pass in order to receive the help that they need. The people who are wrongfully convicted consistently reach out to every possible organization, but they do not always have the bandwidth to take on their cases.”

Pro se defendants also risk jeopardizing their legal cases. “Had I had counsel,” said **G.G.**, “they would have advised, ‘No let’s wait, let’s get all the evidence, let’s accumulate this,’ you know, and I moved prematurely at certain times with certain motions...”

**I.K.** emphasized the need for judges to understand that pro se litigants are doing their best with the limited resources at their disposal. “I know that the paperwork may not be done correctly, but that’s because we didn’t go to law school. We are learning from other men in here who are forced to learn this in the library. I don’t think that should be held against us.”

Without counsel, **Jeffrey Deskovic** estimated that his release was delayed by at least four years. “I didn’t have any money to hire an attorney or an investigator. Hence, I had to do a letter writing campaign for four years trying to get someone to take my case pro bono. So, the absence of a law that would grant post-conviction counsel has impact that extended my term of wrongful imprisonment for the four years that I didn’t have any representation that I wrote letters.” Similarly, **O.D.** wrote letters for ten years to different organizations, law firms, and attorneys, trying to get someone to help fight his case, but “kept hitting brick walls” and was frustrated by the lack of response from most of the organizations and individuals—even a response confirming that his letters were received would have been appreciated.

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18 Gonnerman, Jennifer. “Education of a Jailhouse Lawyer.” *The New Yorker*, June 13, 2016. <https://www.newyorker.com/magazine/2016/06/20/derrick-hamilton-jailhouse-lawyer>.

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**Everton Wagstaffe** explained that the lack of counsel often translated to a lack of investigation, especially for indigent individuals. “I don’t think the court should just deny any motion and not have the case investigated thoroughly. Just not doing it because the person can’t afford a lawyer is not good. There should be more room for people to have a fair chance.”

**Earl Walters** also noted that his FOILs were met with blanket denials—something he described as “a complete lack of justice.” He had to learn everything on his own from the law library, which was not an easy task due to “so many rules and regulations to deal with.” Not knowing his rights and the respective law, he often filed his FOIL applications in the wrong place. **G.G.** further emphasized how the FOIL request process is more favorable to individuals with counsel over those representing themselves pro se. “They don’t follow the [FOIL] statute requirement to respond if I am pro se, but if counsel files it, they’re gonna follow the statutory requirement and respond within a certain amount of days. So, even to obtain the evidence, counsel is profound in helping individuals to obtain the evidence they need to [litigate] their cases.”

Unlike most people fighting to prove their innocence, **Q.E.** had counsel from the beginning. He expressed gratitude and good fortune while also acknowledging that this wasn’t the case simply because **Q.E.** “magically persuaded all of these lawyers” to help. “There was no magic—all it took was a lawyer who genuinely believed in my innocence and that I was not guilty of the crime.”

Many of the participants shared the view that pro se representation was the biggest roadblock to getting a fair review. “The judges see that the person is pro se and choose to rubber stamp the denial without even giving it a second look,” said **L.B.** He noted that it doesn’t even seem to matter what your claim is—whether it is a really good pro se claim or frivolous claim—the dismissal is inevitable.

## 6. Post-Conviction Access to Forensic Evidence

Post-conviction litigation in New York heavily benefits people whose cases involve newly discovered DNA evidence. DNA has proven to be incredibly compelling given its ability to act as evidence of identity to prove one’s innocence. However, DNA evidence is by no means a panacea, proving insufficient as the sole basis for exonerations in many cases. First, DNA exonerations represent approximately 15% of all exonerations in the United States, in part because probative DNA evidence isn’t available in most criminal cases.<sup>19</sup> Second, there is a wide range of forensic evidence that is used more frequently in the criminal justice system. A study of the use of forensic evidence in a random sample of 1,000 reported felonies in five sites across the country found that DNA evidence, even when available, was analyzed only 6% of the time. The study also found that other types of evidence were analyzed more frequently, such as firearms evidence (8.5% of the time) and fingerprint evidence (17.4% of the time).<sup>20</sup> Lastly, biological evidence may have been lost, destroyed, or not preserved for future DNA testing. Unlike many

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19 Innocence Project. “Innocence Project: Research Resources.” Innocence Project, 2024. <https://innocenceproject.org/research-resources/>.

20 Anderson, James M., Carl F. Matthies, Sarah Michal Greathouse, and Amalavoyal V. Chari. “The Unrealized Promise of Forensic Science: An Empirical Study of Its Production and Use.” *Berkeley Journal of Criminal Law* 26, no. 1 (2021). [https://www.rand.org/pubs/working\\_papers/WR1242.html](https://www.rand.org/pubs/working_papers/WR1242.html).



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other states, New York has no law requiring that evidence be preserved post-conviction. Thus, in addition to losing property, the property that has been discovered may be improperly stored, contaminated, or degraded.<sup>21</sup>

### *Not Every Innocence Case has DNA Evidence*

Following *Tiger*, the only ways an individual who pled guilty could challenge their conviction were with new DNA evidence or ineffective assistance of counsel claims. Given how common guilty pleas and non-DNA cases are, this restriction greatly narrows the range of cases for which individuals can seek relief. According to the National Registry of Exonerations, DNA played a role in overturning only 17% of the approximately 3,492 convictions reversed or vacated between 1989 to 2023.<sup>22</sup> Approximately 24% of all exonerees (n=877) took guilty pleas and DNA only played a role in 8% of these plea cases.<sup>23</sup> If the *Tiger* bar were law in the other states that reviewed wrongful convictions in plea cases, more than 90% of innocent people who pled guilty would not have been able to demonstrate their innocence.

One consequence of the belief that DNA should be the primary tool for exoneration is that factfinders may begin to expect DNA evidence to establish innocence in all cases. **Sundhe Moses'** case is an example of this major obstacle, proving that a lack of DNA evidence does not in fact translate to an absence of innocence. "[T]here was a point during my conviction where I really wish that there was physical evidence, especially at the time that I was locked up. Because there was a time where only DNA cases were being exonerated. Non-DNA cases was non-existent that you would hear someone being exonerated unless clear conclusive evidence came forth somehow or another, but other than that, a non-DNA case was almost impossible to get out, and I was one that had a non-DNA case. There was no fingerprint evidence, there was no fire—there was literally nothing, my case was circumstantial."

For many people still fighting, there is a feeling of despondency that despite having extremely compelling evidence in their cases, they are at a disadvantage. **Q.E.** wished he had DNA or video footage in his case. "For innocence claims, any physical evidence is a luxury."

### *Access to Testing Forensic Evidence*

Even when forensic evidence is available, access to testing can still be denied, which harms not only the innocent petitioner but also public safety. **Jeffrey Deskovic** recounted, "Had there been a law in place that would have allowed me to get further DNA testing, you know, I could have been exonerated as early as 1998 rather than in 2006. Because we now know that the actual perpetrator's DNA was in the data bank because he killed a second victim three and a half years later. So, by that point, his DNA was in the data bank." Mr. Deskovic was excluded in pre-trial DNA testing, but sought further DNA testing using

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21 Fires at NYPD storage facilities have destroyed DNA and other forensic evidence in countless cases. See e.g. Corey Kilgannon et al., "Nightmare' Warehouse Fire Erases Evidence in Many Unsolved Cases," *N.Y. Times* (Dec. 14, 2022), available at <https://www.nytimes.com/2022/12/14/nyregion/police-warehouse-fire-evidence.html>

22 National Registry of Exonerations. "Exoneration by Year: DNA and Non-DNA," October 31, 2024. <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx>.

23 The National Registry of Exonerations. "Exoneration Registry," October 31, 2024. <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>.

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more advanced technologies post-conviction. The prosecutor in his county repeatedly denied his requests for DNA testing.

In 2020, **S.F.** finally saved enough money to hire an attorney and experts which were never hired by his defense attorney to refute evidence at trial. The prosecutor refused **S.F.’s** motion to access evidence for retesting. As a result, his expert only had access to ballistic findings and documentation from the original trial, not to the actual evidence. In this case, the court punished the person accused of crime for lack of due diligence even though **S.F.** complained at trial that his attorney did not hire the necessary experts. It took him years to raise the money to hire an attorney and experts. Similarly, **T.D.** is trying to get the murder weapon (a gun) and another knife retested to prove that none of his fingerprints are on the weapons, but he has been met with resistance from the prosecutor’s office. **L.B.** sought DNA testing for bullet casings but the requests were denied. **B.O.** also sought latent print testing on the gun involved in the crime. At the time of trial, **B.O.** was told that the prints were too smudged to analyze, but with advances in latent print comparison technology, **B.O.** believes that it would be possible to exclude him from the prints found on the gun.

Forensic testing can provide independent evidence that points to identity and is powerful evidence in wrongful conviction cases. Historically, forensic science experts have made claims beyond what the science could support and there is a better understanding in the present day of the limits of these methods and technologies. Research advancements may also provide new insights into the meaning of evidence in a case that were not available in the past. For all these reasons, access to forensic science testing is critical in post-conviction even if the evidence was previously tested decades ago at trial. Unfortunately, persons accused of crime who seek testing under the current post-conviction scheme can only do so with the agreement of the prosecution or by obtaining a court order.

## CHALLENGING WRONGFUL CONVICTIONS IN NEW YORK STATE

The Challenging Wrongful Convictions Act was designed to address current flaws in New York State’s post-conviction process and create more opportunities for innocent people to overturn their wrongful convictions. Although many of the exonerated people and people fighting to prove their innocence expressed feelings of despair and loss of trust in the system, they have overwhelmingly conveyed the critical need for those who have power, agency, or capacity to use their positions to facilitate the change that is needed in the § 440 law.

“The statute should be changed,” said **G.G.** “whether it is amended or just change it cause it is a possibility I could’ve been home before my sisters passed, before I lost them and I could have created memories with them before then because the evidence in my case is clear. But I never received a decision for four 440’s over a 20-year process. I never received a decision on the merits of any of those claims. Is that fair? No! Justice, the law, right? Let the law prevail... don’t hide behind the procedural bar.”



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Q.E. hoped that if changes to the § 440 law were enacted he would have access to a hearing where alibi witnesses that were never able to testify at trial would now be able to prove his innocence, which would allow the judge to determine whether the jury would have decided the case differently if those witnesses had testified. Further, in light of the fact that the actual participants admitted to the crime and exculpated him, he could potentially be granted a new trial.

The exonerated people and people fighting to prove their innocence that contributed to this report shared many concerns with the current post-conviction process, some cultural and others statutory, but stressed that the following areas should be prioritized by policymakers this year:

- 1. Remove the *Tiger bar*.** Research and past exonerations make clear that there is a wide range of reasons why innocent people plead guilty to crimes they did not commit. Innocent people often feel powerless when they are trapped in an overwhelmingly complex system that feels designed to expedite convictions rather than uncover the truth. The inherently coercive nature of the system, catalyzed by mass incarceration, enhances the risk of guilty pleas, and precluding non-DNA innocence claims makes that injustice total.
- 2. Provide more equitable access to appeals.** Currently, when a § 440 motion is denied, a person accused of crime does not have an automatic right to appeal. Instead, they must seek permission (“leave”) to appeal. Very few leave applications are granted. However, when a person accused of crime wins a § 440 motion, the prosecution may automatically appeal that decision. The opportunity to appeal the denial of a §440 motion offers safeguards in circumstances where a meritorious petition did not receive a thorough review. It was on appeal that the right to a freestanding claim of innocence was established in *People v. Hamilton*, 115 A.D.3d 12 (2d Dept. 2014).
- 3. Remove procedural bars to hearings when a person has evidence of innocence.** New York has a troubled history with discovery, evidence preservation, lack of CIUs across the state, and attendant uneven justice based on location. For these reasons, newly discovered evidence or effective presentation of evidence that can substantially support a claim of innocence should not be precluded because of technicalities. Courts should also consider that if an applicant is *pro se*, they may not have had the resources to raise claims in a timely manner.
- 4. Support post-conviction discovery.** Innocent people need access to the evidence that supports their claims or simply access to cases that were litigated at a time of limited discovery practices. Persons accused of crime should not be required to rely on the FOIL process for post-conviction access to evidence as it cannot replace criminal discovery. In cases involving sex offenses, access to discovery through FOIL is precluded altogether.
- 5. Support access to counsel.** Innocent people fighting to prove their innocence need the support of attorneys to help formulate their legal claims and ensure they do not unintentionally make decisions that negatively impact their access to the § 440 process.

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**6. Post-conviction access to forensic evidence.** Just as post-conviction DNA testing has been available to litigants in New York, other forms of forensic evidence testing should be as well. An expansion of this provision beyond its limitation to DNA evidence will accommodate more forms of physical evidence and facilitate improved testing as science evolves.

## FUTURE OPPORTUNITIES

In addition to the changes recommended in the Challenging Wrongful Convictions Act, exonerated people and people still fighting to prove their innocence identified additional opportunities to support innocent people navigating the post-conviction process.

**1. Encourage exoneree-judge interactions.** Judges have extraordinary power to grant hearings or deny action. [Marty Tankleff](#) suggested that one way to shift judicial perspectives and foster a deeper understanding of the challenges faced by wrongfully convicted individuals is to encourage more “...exonerees [to] come out publicly to meet the judges that have exonerated them.” These interactions could help judges better understand the perspective and challenges that people face when they are trying to prove their innocence in a setting that is devoid of resources.

**2. Evidence preservation.** New York lacks evidence preservation laws and New York City in particular has suffered from catastrophic events that resulted in the destruction of evidence warehouses. [Jeffrey Deskovic](#) advocates for evidence preservation best practices which, post-*Tiger*, can have life or death consequences. “What good is it that with technology we can do further DNA testing if the evidence is lost or destroyed?”

Advocates in New York will continue to work to expand opportunities for innocent people to fight their wrongful convictions. The post-conviction process was designed as a safety measure for people who were wrongfully convicted. New York’s Criminal Procedure Law (CPL) § 440 was written in 1970, before the concept of a wrongful conviction was generally accepted. Over the years, efforts have been made to adjust the law to incorporate practical or evidence-based changes that acknowledge how the criminal legal system has failed innocent people in the past, especially those who were indigent or part of historically overpoliced communities.

Just as we began with the words of a person fighting to prove their innocence, we close with the words of [O.K.](#):

“Thank you for giving me a voice. Please acknowledge the incarcerated individuals who are doing so much time and are doing great things behind the walls. At the end of the day, we are all human, and there’s no reason for me to be behind these walls...Give us opportunity...What else do you need me to do? I can do a lot more outside...I am not a monster. I am a human being. Give me an opportunity.”

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# APPENDIX I

## QUESTIONNAIRES

### Questionnaire for Exonerated People

1. Coalition Partner Making Contact
2. Name of Person Providing testimonial (will use initials to protect identity)
3. Year of conviction?
  - a. What were you convicted of?
4. County?
5. Judge?
6. When were you exonerated?
7. How were you exonerated?
  - a. Did a CIU have a role?
  - b. Or at the trial or appellate level?
8. What were the grounds for exoneration?
9. What also played a role, even if that wasn't the finding, e.g. beyond IAC?
  - a. Was there official misconduct?
10. Were you represented by counsel?
  - a. Attorney's name
11. How many post-conviction motions have you filed?
  - a. What issues did you raise?
  - b. What were the outcomes of each motion?
  - c. Did you seek leave to appeal if you were unsuccessful at the trial court level?
  - d. And what was the result?
12. If you didn't have representation: Were any of your pro se applications granted?
  - a. Was the successful application based on the same grounds as those raised pro se?
13. Have you ever been granted a hearing on your claims?
  - a. If so, did you have counsel then (and was it different from counsel named above)?
  - b. And what was the result of your claim?
14. At any stage, did you run into any procedural bars and what were they?
15. What roadblocks prevented you from getting a fair review?
16. Did you seek any re-testing of forensic evidence?
  - a. What was the evidence, e.g. DNA, ballistics?
  - b. And was your request granted and what was the result of any re-testing?
  - c. Was all the evidence in your case preserved?
    - i. Physical evidence?
17. Have you made efforts to obtain files and police requests through FOIL requests?
  - a. Were you successful?
  - b. How long did it take? (If you were unable to obtain this information through a FOIL request, and a CIU is involved in your case, were you ultimately successful in obtaining discovery?)

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18. What was the impact of this case on you personally?
    - a. On your loved ones?
  19. What else do you want to share that we aren't asking?

### **Questionnaire for People Still Fighting**

1. Coalition Partner Making Contact
2. Name of Person Providing testimonial (will use initials to protect identity)
3. Current status of case?
4. Year of conviction?
  - a. What were you convicted of?
5. County?
6. Judge?
7. Are you represented by counsel?
  - a. Attorney's name
8. Is your case pending before a Conviction Integrity Unit?
9. How many post-conviction motions have you filed, if any?
  - a. What issues did you raise?
  - b. What were the outcomes?
  - c. Did you seek leave to appeal if you were unsuccessful at the trial court level?
    - i. And what was the result?
  - d. If leave to appeal was granted, what was the outcome of the appeal?
10. If you don't have representation: Were any of your pro se applications granted?
11. Have you ever been granted a hearing on your claims?
  - a. If so, did you have counsel (and was it different from counsel named above)?
  - b. And what was the result of your claim?
12. At any stage, did you run into any procedural bars and what were they?
13. Did you seek any re-testing of forensic evidence?
  - a. What was the evidence, e.g. DNA, ballistics?
  - b. And was your request granted and what was the result of any re-testing?
  - c. Was all of the evidence in your case preserved?
    - i. Physical evidence?
14. Have you made efforts to obtain files and police requests through FOIL requests?
  - a. Were you successful?
  - b. How long did it take? (If you were unable to obtain this information through a FOIL request, and a CIU is involved in your case, were you ultimately successful in obtaining discovery?)
15. What roadblocks prevented you from getting a fair review?
16. What was the impact of this case on you personally?
  - a. On your loved ones?
17. What else do you want to share that we aren't asking?

