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It is rare for a case from the New York Appellate Division to be as significant as *People v. Hamilton*.[1] The case, however, was the first New York appellate court decision to hold that a defendant might vacate his conviction if he could demonstrate that he was "actually innocent" of the crime of which he was charged. Although the precedential force of the decision is limited to the Second Department, trial courts throughout the state are required to follow *Hamilton* unless or until the appellate court in their own Department rules on the issue.[2] Courts throughout the state are thus entertaining numerous "actual innocence" motions inspired by *Hamilton.*

While courts in some other states, including state appellate courts, have recognized actual innocence claims,[3] whether such claims should be recognized, and if so under what circumstances, is a very live issue in the federal courts and numerous state courts throughout the country. Examination of *Hamilton*, therefore, provides a useful way to consider issues that are of surpassing importance in criminal law and that will likely reoccur in cases throughout the country. As *Hamilton* goes further than many other courts have in considering the implications of actual innocence claims, consideration of *Hamilton* may be of considerable value to courts that consider actual innocence claims. *Hamilton* is a trailblazer, and its trail will repay careful study.

I. BACKGROUND

Before considering *Hamilton* itself, it is appropriate to consider briefly both New York's collateral relief statute and the types of "actual innocence" claims that might be asserted.

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* General Counsel, District Attorney of New York. The views expressed in this Article are the author's own and do not necessarily reflect the views of the District Attorney's Office.

1. 979 N.Y.S.2d 97 (App. Div. 2014).

2. *See* People v. Turner, 840 N.E.2d 123, 127 (N.Y. 2005); Mountain View Coach Lines v. Storms, 476 N.Y.S.2d 918, 920 (App. Div. 1984) ("[T]he doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule." (citations omitted)).

3. *See infra* notes 54–72 and accompanying text (discussing authority relied on by *Hamilton*).

A. New York's Collateral Relief Statute, CPL Section 440.10

Section 440.10 of New York's Criminal Procedural Law (CPL), like its federal counterparts, 28 U.S.C. §§ 2254 and 2255, sets forth certain grounds on which a convicted defendant may collaterally attack her conviction. Most of the grounds are well articulated and relatively narrow. Section 440.10(1)(a), for example, permits a collateral attack if it can be shown that the court in which the defendant was convicted did not have jurisdiction.[4] Other sections provide for collateral attack if the judgment of conviction was obtained by duress or fraud,[5] if the prosecutor presented material evidence at the trial that he knew to be false,[6] or if material evidence presented at the trial was "procured in violation of the defendant's" constitutional rights.[7]

Of particular importance to an evaluation of *Hamilton* is section 440.10(1)(g), which provides that a convicted defendant may collaterally attack her conviction on the ground that she has discovered powerful evidence that if known to the jury would likely have affected the outcome, and that could not have been discovered earlier even if the defendant had exercised due diligence.[8] Claims under this section are colloquially known as "newly discovered evidence" claims.

Section 440.10(1)(h) is also especially important for *Hamilton*. That section provides that a defendant may seek vacatur of her conviction if it is established that the defendant's judgment of conviction "was obtained in violation of a right of the defendant under the [New York or federal constitutions]."[9] Until last year, that section had been used to challenge convictions where a defendant's right to, for example, adequate counsel,[10] or the disclosure of exculpatory information,[11] had allegedly been violated. It thus complemented CPL section 440.10(1)(d), which, as noted above, addressed constitutional defects that led to particular evidence being adduced at a trial.[12] Section 440.10(1)(h) addressed constitutional defects that affected the trial but were not tied to particular pieces of evidence at the trial. As seen below, *Hamilton* vastly expanded the scope of section 440.10(1)(h).

In addition to the grounds for relief, section 440.10 also sets forth certain procedural requirements for collateral attack. Section 440.10(2) provides that the court *must* deny a collateral attack if the issue raised had been raised and rejected on the direct appeal of the conviction, if the appeal was pending and might decide the issue, or if the defendant failed to raise the

4. *See* N.Y. CRIM. PROC. LAW § 440.10(1)(a) (McKinney 2005).
5. *See id.* § 440.10(1)(b).
6. *See id.* § 440.10(1)(c).
7. *See id.* § 440.10(1)(d). The statute specifies other grounds for collateral attack, see generally *id.* § 440.10(1)(e), (f), (g-1) & (i), but they are not relevant to this Article.
8. *See id.* § 440.10(1)(g).
9. *See id.* § 440.10(1)(h).
10. *See, e.g.*, People v. Becoats, 984 N.Y.S.2d 720, 721 (App. Div. 2014).
11. *See, e.g.*, People v. Williams, 854 N.Y.S.2d 586, 589 (App. Div. 2008).
12. *See supra* note 7 and accompanying text.

issue on his direct appeal, although he might have done so.[13] Section 440.10(3) provides that the court *may* deny collateral relief if the defendant could have raised the issue—either prior to his sentence or in a previous collateral attack—but failed to do so,[14] or if he did raise the issue in a prior state or federal collateral attack, but the earlier court denied the claim.[15] Section 440.10(3) notes, however, that even if any of the circumstances allowing for (but not requiring) dismissal of the collateral motion are present, the court may still grant the collateral motion "in the interest of justice and for good cause shown" in the exercise of its discretion, if the motion is "otherwise meritorious."[16]

B. Actual Innocence, Freestanding Claims, and "Gateway Claims"

The intuitive idea of "actual innocence" is clear enough. A defendant who claims he is "actually innocent" is asserting, in simplest possible terms, that he did not do what he was convicted of doing. It is not simply that the evidence against him was insufficient for a jury to conclude beyond a reasonable doubt that he committed the crime of conviction. Nor is it that his rights were somehow violated by the government in the course of its prosecution of him. The defendant who would assert a claim of actual innocence is asserting, "I didn't do it."

It is worth pausing to note that however simple and straightforward such an assertion appears to be, it is, in fact, more complicated. There is a question about what the "it" is: Is the argument "I was not part of the conspiracy of which I was convicted (although I may have been part of another conspiracy)" a claim of actual innocence? Even though courts have repeatedly said that claims of actual innocence are not claims of insufficient evidence,[17] it is not entirely clear what the difference is. We never know what happened in any particular instance; we draw conclusions based on the evidence that we have.[18] At bottom, therefore, a claim of actual innocence *is* a claim about evidence. If it is not that the evidence at trial was insufficient to convict, it is that other evidence establishes—by some standard—that the defendant is in fact innocent.

There are two categories of actual innocence claims, gateway claims and freestanding claims.[19] Gateway claims work as follows: a defendant makes a showing that he is "actually innocent," and, if he satisfies the burden of making such a showing, is permitted to proceed to assert a claim for collateral relief even if he would otherwise be procedurally barred from

13. *See* N.Y. CRIM. PROC. LAW § 440.10(2)(a)–(c).
14. *See id.* § 440.10(3)(a), (c).
15. *See id.* § 440.10(3)(b).
16. *See id.* § 440.10(3).
17. *See, e.g.*, Bousley v. United States, 523 U.S. 614, 623 (1998) ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency." (citation omitted)).
18. Poventud v. City of New York, 750 F.3d 121, 143 (2d Cir. 2014) (en banc) (Lynch, J., concurring).
19. *See generally* Andre Mathis, *A Critical Analysis of Actual Innocence After* House v. Bell*: Has the Riddle of Actual Innocence Finally Been Solved?*, 37 U. MEM. L. REV. 813, 819–23 (2007).

doing so. To obtain such relief, however, he must still establish that there was some violation of his rights at trial that would, if there were no procedural barriers, entitle him to such relief. Thus, it is not the defendant's actual innocence that entitles him to relief but the underlying violation. The showing of actual innocence merely allows the defendant to advance his case under circumstances where he would otherwise be procedurally barred.[20]

Thus, a defendant might succeed in his gateway claim insofar as he is able to convince a court to consider whether his underlying conviction was marred by a constitutional defect, whereas, had he not made a gateway claim of actual innocence, he might not have been able to get the court to consider the argument. His petition might still be denied, however, because even if he is "actually innocent" there may have been no defect in his underlying conviction. Such a situation would obtain, for example, where a defendant, advised by fully competent counsel, knowingly and intelligently waives his right to trial and pleads guilty, and only later discovers that there was an alibi witness unknown to him at the time of his plea who could not have been discovered by him or anyone else at that time, even after diligent effort. There having been no defect in the underlying proceeding, the defendant's petition would be denied, even though he is or may be "actually innocent."

Freestanding claims are simpler to understand than gateway claims. A defendant who asserts a freestanding claim asserts simply: regardless of the presence or absence of errors at my underlying trial, I have a claim of innocence and should therefore be released from any criminal sanction or process. That means that even if the underlying trial was perfect—sufficient evidence, competent counsel, no violation of the defendant's rights—the defendant would be entitled to relief if he could show that he was, in fact, actually innocent.

II. *PEOPLE V. HAMILTON*

The defendant was convicted in 1993 of a 1991 murder. The key witness against the defendant was the victim's girlfriend and, although the defendant submitted a notice of alibi, naming two witnesses who claimed he was in New Haven, Connecticut at the time of the crime, neither testified at the defendant's trial.[21] One claimed to be too ill to testify, the other too frightened.[22] The defendant made a number of post-verdict and CPL section 440 motions. In one of them, he represented that the key prosecution witness had recanted her testimony, and he sought to introduce the testimony of his two additional alibi witnesses, allegedly unavailable at the time of his trial.[23]

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20. *See, e.g.*, McQuiggin v. Perkins, 133 S. Ct. 1924, 1931 (2013) ("[A] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief.").

21. People v. Hamilton, 979 N.Y.S.2d 97, 100 (App. Div. 2014).

22. *Id.*

23. *Id.*

The hearing court denied the defendant's motion and refused to hear the testimony of the new alibi witnesses. Most significantly, the hearing court held that "the affidavits of these witnesses, and their proposed testimony, did not constitute newly discovered evidence [CPL section 440.10(1)(g)], because the defendant had failed to establish that they could not have been located in time to testify at trial with the exercise of due diligence."[24]

Thirteen years later, the defendant moved again to vacate his conviction, this time arguing that "evidence of his alibi established his actual innocence."[25] He further argued that a "free-standing actual innocence claim exists separate and apart from a claim of newly discovered evidence,"[26] and that the claim had to be considered even if the evidence allegedly establishing actual innocence was not newly discovered.[27] The hearing court denied the defendant's motion,[28] and he appealed.

The Appellate Division reversed. The court first ruled that the mandatory procedural bars of CPL section 440.10(2)(a) and (c)—which provide, in substance, that a court hearing a collateral attack pursuant to CPL section 440.10, must deny any claim that has been or could have been raised on direct appeal—applied to claims of actual innocence generally, but it did not apply to Hamilton's case because Hamilton had not raised a claim of actual innocence on direct review "and the facts underlying his current claims did not appear in the record on direct appeal."[29]

The court further noted that Hamilton had raised his claim of actual innocence in prior CPL section 440.10 motions, and therefore the trial court had the discretion, pursuant to CPL section 440.10(3)(b) and (c) to deny the motion.[30] Noting the discretionary nature of these bars, however, the court summarily ruled that "there is no reason why the courts may not consider a credible claim of actual innocence in the exercise of discretion."[31]

Drawing the distinction between gateway claims and freestanding claims,[32] the court focused its attention on the latter.[33] The court turned to federal cases and concluded that while "[t]he [f]ederal courts have not resolved whether a prisoner may be entitled to habeas corpus relief based upon a freestanding claim of actual innocence,"[34] the U.S. Supreme Court "has recognized that 'a credible showing of actual innocence may allow a prisoner to pursue . . . constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief.'"[35]

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24. *Id*. at 101.
25. *Id*.
26. *Id*. at 102 (quoting from the affirmation submitted by defendant's counsel).
27. *Id.*
28. *Id*.
29. *Id*. at 103–04; *see also supra* note 13 and accompanying text.
30. *Id.* at 104; *see also supra* notes 14–15 and accompanying text.
31. *Id.* at 104.
32. *See supra* note 19 and accompanying text (discussing distinction between gateway and freestanding claims).
33. *Hamilton*, 979 N.Y.S.2d at 104–05.
34. *Id*. at 104.
35. *Id.* at 105 (quoting McQuiggin v. Perkins, 133 S. Ct. 1924, 1931 (2013)).

The *Hamilton* court termed this the "fundamental miscarriage of justice exception" to the procedural limitations on habeas relief.[36] The court noted, however, that the exception was limited to (1) "cases where the petition is based on a retroactive change of constitutional law," or to (2) cases in which

> "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and "the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[37]

Continuing to survey federal law, the court observed that "'actual innocence' means factual innocence, not mere legal insufficiency of evidence of guilt, and must be based upon reliable evidence which was not presented at trial."[38] It further noted that "[t]he standard of proof generally applied is proof of actual innocence by clear and convincing evidence,"[39] and that "in 'light of the new evidence, no juror, acting reasonably, would have voted [the defendant] guilty beyond a reasonable doubt.'"[40]

After surveying briefly the laws of other states,[41] the court finally considered the law of New York, noting that no appellate court had considered whether to recognize "a freestanding claim of actual innocence," although some trial courts had recognized the claim.[42] The court then made a series of rulings with broad significance.

First, the court held that "where the defendant asserts a claim of actual innocence, new evidence may be considered whether or not" it satisfies the requirements for "newly discovered evidence" (CPL section 440.10(g)) and "other legal barriers, such as prior adverse court determinations, which might otherwise bar further recourse to the courts."[43]

Second, the conviction of one who was "actually innocent" violated the due process clause of the state and federal constitutions because "a person who has not committed any crime has a liberty interest in remaining free from punishment."[44] The punishment of such a person, the court held, also violates the cruel and unusual punishment clause of the New York Constitution.[45] Therefore, the court held, the claim was cognizable under CPL section 440.10(1)(h), which allows for collateral relief from

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36. *Id*.
37. *Id.* (quoting 28 U.S.C. § 2244(b)(2)).
38. *Id*. (citing Bousley v. United States, 523 U.S. 614, 623–24 (1998); *Schlup*, 513 U.S. at 324).
39. *Id.* (citing 28 U.S.C. §§ 2244(b)(2), 2254(e)(2)).
40. *Id.* (quoting *McQuiggin*, 133 S. Ct. at 1928).
41. The *Hamilton* court's discussion of state and federal authority is further discussed below. *See infra* notes 54–72 and accompanying text.
42. *Hamilton*, 979 N.Y.S.2d at 107–08.
43. *Id*. at 107 (internal quotations and citations omitted).
44. *Id*.
45. *Id*. at 108.

convictions "obtained in violation of a right of the defendant under the [New York or federal constitutions]."[46]

Third, the defendant must establish his actual innocence by "clear and convincing evidence."[47] The court explained that "[m]ere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt, is insufficient, since a convicted defendant no longer enjoys a presumption of innocence, and in fact is presumed to be guilty."[48]

Fourth, a defendant who makes a "prima facie showing" of actual innocence is entitled to a hearing to allow him to make his showing by clear and convincing evidence.[49] The court defined a "prima facie showing," as "a sufficient showing of possible merit to warrant a further exploration."[50] The court held that the defendant had made such a showing because he had credibly alleged an alibi and the main witness against him had recanted her testimony and claimed that her testimony had been manipulated in the first place.[51]

Fifth, at the hearing, "all reliable evidence, including evidence not admissible at trial based upon a procedural bar . . . should be admitted."[52]

Sixth, the remedy, if the defendant establishes his innocence by clear and convincing evidence, is dismissal of the indictment. "There is no need to empanel another jury to consider the defendant's guilt where the trial court has determined, after a hearing, that no juror, acting reasonably, would find the defendant guilty beyond a reasonable doubt."[53]

The court remanded the case for a hearing on the defendant's "actual innocence." As of the time of this writing, the hearing has not started.

III. QUESTIONS IN *HAMILTON*'S WAKE

To say that *Hamilton* leaves unresolved questions in its wake is not to criticize it. Every important case, right or wrong, raises questions of application and interpretation. A list of some such questions follows.

A. Does Hamilton *Go Beyond Precedent?*

Hamilton correctly notes that under federal law a claim of actual innocence serves as a "gateway claim," but it is not clear that actual innocence is *itself* a ground on which collateral relief may be afforded under federal law. That is, once a petitioner establishes "actual innocence" he must still establish some other constitutional violation—often ineffective

46. N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2005).
47. *Hamilton*, 979 N.Y.S.2d at 108.
48. *Id.* (citing Schlup v. Delo, 513 U.S. 298, 314 n.42 (1995); Herrera v. Collins, 506 U.S. 390, 398 (1993)).
49. *Id.* at 108–09.
50. *Id.* at 108 (citing Goldblum v. Klem, 510 F.3d 204, 219 (3d Cir. 2007)).
51. *Id.* at 108–09.
52. *Id.* at 109 (citing People v. Cole, 765 N.Y.S.2d 477, 486 (Sup. Ct. 2003); *Schlup*, 513 U.S. at 328).
53. *See id.* ("[I]f the defendant prevails on his claim of actual innocence, a new trial would not be necessary.").

assistance of counsel.[54] Under federal law, a claim of actual innocence is not a "freestanding claim," such that once one establishes actual innocence—to whatever standard of proof—one is entitled to collateral relief. The court in *Hamilton* clearly goes beyond the federal cases.

Although *Hamilton* does not discuss it, there is, in fact, a very good reason that a state court might recognize a freestanding claim of actual innocence more readily than would a federal court, at least where such claims arise out of state criminal prosecutions. In considering collateral attacks on state criminal convictions, federal courts, unlike state courts, must consider the limits imposed by federalism. As the U.S. Supreme Court explained in *Herrera v. Collins*, "'[f]ederal courts are not forums in which to relitigate state trials.'"[55] Thus, that *Hamilton* goes beyond federal authority may be explained by the different stances and considerations of federal and state courts in considering collateral relief for state criminal convictions.

The court in *Hamilton* stated that "[a] number of states have recognized a freestanding claim of actual innocence, some by statute with specific limitations, and some by case law with less specific limitations."[56] Examination of the statutes that *Hamilton* cited shows, however, that the "specific limitations" are quite significant. Several of the statutes limit actual innocence to claims that are based on scientific evidence, some specifically referring to DNA.[57] Others limit such claims to those based on newly discovered evidence.[58] These are not strong support for *Hamilton*'s recognition of a broad, freestanding, actual innocence claim that might be based on evidence that is neither scientific nor newly discovered.[59]

Hamilton's reliance on cases from other states is similarly open to question:

- *Hamilton* cites the California Supreme Court case *In re Bell* in support of the proposition that "[a] number of states have recognized a freestanding claim of actual innocence . . . by case law,"[60] yet *Bell* expressly states that it is not relying on or recognizing a claim of actual innocence.[61]

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54. McQuiggin v. Perkins, 133 S. Ct. 1924, 1931 (2013).

55. 506 U.S. 390, 401 (1993) (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983)).

56. *Hamilton*, 979 N.Y.S.2d at 106 (footnotes omitted).

57. *See, e.g.*, ARK. CODE ANN. § 16-112-201 (2006) (requiring "scientific evidence"); DEL. CODE ANN. tit. 11, § 4504 (2007) (requiring DNA evidence); ME. REV. STAT. tit. 15, § 2138(10) (Supp. 2013) (requiring DNA evidence); OHIO REV. CODE ANN. § 2953.21 (LexisNexis 2010) (requiring DNA evidence); TENN. CODE ANN. § 40-30-117(a)(2) (2012) (requiring "new scientific evidence"); UTAH CODE ANN. § 78B-9-301 (LexisNexis 2012) (requiring DNA evidence).

58. *See* MD. CODE ANN., CRIM. PROC. § 8-301 (LexisNexis Supp. 2013) (requires newly discovered evidence); VA. CODE ANN. § 19.2-327.11 (Supp. 2013) (requires "previously unknown or unavailable evidence").

59. *But see* ARIZ. R. CRIM. P. 32.1(h) (2011) (codifying a broad freestanding actual innocence claim).

60. *Hamilton*, 979 N.Y.S.2d at 106.

61. *In re* Bell, 170 P.3d 153, 157 n.2 (Cal. 2007) ("Although we have not yet recognized on habeas corpus a claim of actual innocence untethered to any newly discovered evidence,

- *Hamilton* also relies on authority from Connecticut for this proposition,[62] even though, as *Hamilton* acknowledges, the most recent authority from Connecticut indicates that it is not clear that Connecticut recognizes a freestanding claim of actual innocence.[63]

- Another of the cases cited by *Hamilton* as recognizing a freestanding claim of actual innocence, *Illinois v. Washington*,[64] gave relief to the defendant, but only where the evidence establishing innocence was newly discovered: "We therefore hold as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process."[65] Thus, *Washington* does not provide support for the proposition that Illinois supports an actual innocence claim *simpliciter*, but only that it would recognize such a claim based on newly discovered evidence that was not available to the defendant at the time of the original trial.

- *Montoya v. Ulibarri*,[66] a New Mexico Supreme Court decision, recognized a claim of actual innocence, as did *Amrine v. Roper*,[67] a Missouri Supreme Court decision, and *Montana v. Beach*,[68] a Montana Supreme Court decision. *Montoya* expressly stated that the evidence establishing actual innocence did not have to be newly discovered,[69] while *Amrine* did not address the issue. *Montoya* is thus probably the out-of-state case that most strongly supports *Hamilton*.

Notably, in most of these cases, the remedy contemplated by the courts if the defendant prevailed was a new trial.[70] Only *Montana v. Beach* found that the defendant was entitled to be set free if he prevailed on his actual innocence motion.[71] Once again, *Hamilton* seems to have exceeded most of the authority on which it relied.

Finally, *Hamilton* also fundamentally expands the interpretation of CPL section 440.10(1)(h). That section had allowed for collateral relief when it could be shown that a defendant's constitutional rights at trial were

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we need not decide here whether such a claim would lie, inasmuch as petitioner's claim *does* rely on newly discovered evidence . . . ." (first emphasis added)).

62. *See Hamilton*, 979 N.Y.S.2d at 106 & n.3 (citing Gould v. Comm'r of Corr., 22 A.3d 1196 (Conn. 2011); Miller v. Comm'r of Corr., 700 A.2d 1108 (Conn. 1997); Summerville v. Warden, 641 A.2d 1356 (Conn. 1994)).

63. *See id.* at 106 (citing *Gould*, 22 A.3d at 1200 n.8).

64. 665 N.E.2d 1330 (Ill. 1996).

65. *Id.* at 1337.

66. 163 P.3d 476 (N.M. 2007).

67. 102 S.W.3d 541 (Mo. 2003).

68. 302 P.3d 47 (Mont. 2013).

69. *See Montoya*, 163 P.3d at 487.

70. *See* Gould v. Comm'r of Corr., 22 A.3d 1196 (Conn. 2011); *see also Washington*, 665 N.E.2d at 478; *id.* at 490 (McMorrow, J., concurring); *Amrine*, 102 S.W.3d at 549. In *Montoya v. Ulibarri* and *In re Bell*, the New Mexico and California Supreme Courts, respectively, found that the defendants had not met the burden of proof to establish actual innocence, and so the courts did not reach the issue of determining the appropriate remedy. *See In re* Bell, 170 P.3d 153, 157 n.2 (Cal. 2007); *Montoya*, 163 P.3d at 487–88.

71. *Beach*, 302 P.3d at 54 (stating that if a petitioner succeeds on a freestanding actual innocence claim, then "the petitioner is forever exonerated"; the case went on to hold, however, that the petitioner before the court had failed to prove his freestanding claim).

violated.[72] *Hamilton* provides that a conviction following a trial that is absolutely without procedural or other error may nevertheless be collaterally attacked (indeed, vacated and the indictment dismissed) upon a showing of actual innocence because, according to *Hamilton*, the result of the error-free trial is itself a due process violation.

B. What Evidence Will Be Admissible at an "Actual Innocence" Hearing?

Hamilton held that at an "actual innocence" hearing the court should consider "all reliable evidence, including evidence not admissible at trial based upon a procedural bar."[73] To what "procedural bars" is the court referring? Consider a statement by a non-testifying codefendant that tends to exculpate the defendant, and that the defendant claims should be admitted pursuant to the statement against penal interest exception to the rule against hearsay. Suppose further that the original trial court ruled that the statement was not a statement against penal interest. Is that ruling a "procedural bar"? The same question applies for almost any testimony or document that the defendant in the original trial unsuccessfully sought to introduce into evidence: Was the trial court's ruling—on grounds of hearsay, inauthenticity, undue prejudice or irrelevance—a "procedural bar"?

A related question is how the law-of-the-case doctrine would work in the section 440 context. Suppose a trial judge in the original criminal trial holds that a certain piece of evidence is inadmissible, and the defendant is convicted. The defendant appeals the judgment of conviction, alleging, among other things, that the exclusion of evidence was wrongful, but his argument is rejected and his conviction affirmed. Then the criminal defendant files a federal habeas petition, once again challenging, on federal constitutional grounds, the exclusion of the proffered evidence. Once again, his argument is rejected. Now, the defendant files an "actual innocence" claim pursuant to CPL section 440.10(h) and seeks to present the same piece of evidence before the section 440 court. Can the court consider the evidence or is it bound by the earlier decisions that have held it inadmissible?

The strong suggestion in *Hamilton* is that the rules of evidence do not apply, and the notion underlying the suggestion is that a proceeding to determine "actual innocence" is akin to an exercise of the court's equitable jurisdiction. It is not clear, however, why this should be so. After all, the rules of evidence developed to ensure that only reliable evidence came before a finder of fact, and there is no obvious reason that the rules should not apply at a section 440 hearing.

It is important to recognize that the questions of admissibility of evidence go both ways. For example, what of incriminating evidence that was

72. *See supra* notes 9–11 and accompanying text (discussing prior applications of CPL section 440.10(1)(h)).

73. People v. Hamilton, 979 N.Y.S.2d 97, 109 (App. Div. 2014).

suppressed before the underlying criminal trial not because it was unreliable but for some other reason—for example, that a defendant was not read his *Miranda* rights, or a search warrant was defective? Can the prosecution rely on that evidence at an actual innocence hearing, even though it was not entitled to rely on it at the underlying trial?

C. Should an Actual Innocence Claim Be Differently Analyzed Depending on Whether the Underlying Conviction Followed a Jury Trial or a Guilty Plea?

Should a court's ruling on a section 440.10(h) "actual innocence" petition depend in any way on whether the defendant was convicted pursuant to: (a) a jury trial, (b) a bench trial, or (c) a guilty plea? On the one hand, one might argue that how the defendant's underlying conviction arose is irrelevant to the merits of her petition—an underlying conviction is an underlying conviction. On the other hand, one might consider that a jury trial is the "gold standard" of criminal justice,[74] and therefore a petition following a jury verdict of guilty should be especially hard to upend.

Although this question has not been extensively litigated, it appears that most courts have held that they will not entertain actual innocence claims following guilty pleas.[75] As one court explained:

> A major theoretical support for permitting an actual-innocence challenge is that the conviction of and incarceration of an innocent person offends due process. But if that is so, where a defendant pleads guilty, any denial of due process is the result of his or her own doing. It is difficult to perceive how one who has voluntarily and knowingly pleaded guilty to a crime has wrongly been denied due process.[76]

It remains to be seen, however, whether a guilty plea would prevent any claim of innocence, or whether one who has pled guilty could still assert a gateway claim of innocence. That is, might a defendant who has pled guilty

74. Lafler v. Cooper, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting).

75. *See, e.g.*, State v. Westover, No. 2 CA-CR 2011-0319-PR, 2012 WL 432633, at *3 (Ariz. Ct. App. Feb. 10, 2012); People v. Barnslater, 869 N.E.2d 293, 306 (Ill. App. Ct. 2007) ("[W]e would strongly question whether a claim for relief under the Post-Conviction Hearing Act premised upon newly discovered evidence of actual innocence can suffice to raise a cognizable constitutional deprivation where the challenged conviction was entered pursuant to a plea of guilty."); Norris v. State, 896 N.E.2d 1149, 1153 (Ind. 2008); Majors v. State, 946 So.2d 369, 374 (Miss. Ct. App. 2006) ("Majors cannot now claim that he has newly discovered evidence which would have 'produced a different result' because his guilty plea essentially nullifies any argument that there is some undiscovered evidence which could prove his innocence."); People v. Cosey, No. 8131/97, slip op. at 25 (N.Y. Sup. Ct. May 20, 2013) (absent extraordinary circumstances, a defendant's guilty plea acts as a bar to an actual innocence hearing) (on file with the Fordham Law Review). Some courts have allowed for petitions of actual innocence even following a guilty plea. *See, e.g.*, Smith v. State, No. 58973, 2012 WL 765092, at *2 (Nev. Mar. 8, 2012); *Ex parte* Brown, 205 S.W.3d 538 (Tex. Crim. App. 2006) (considering a claim of actual innocence following a guilty plea but rejecting the claim on the merits).

76. *Cosey*, No. 8131/97, slip op. at 25.

be permitted to show her innocence and, if she succeeds in doing so, then attempt to show that her plea was somehow constitutionally defective?[77]

D. How Heavily Should the Court Weigh the Tardiness of the Application Against the Defendant?

CPL section 440.10(1)(g) provides for the vacatur of a conviction where newly discovered evidence compels such a result. The requirement that evidence be newly discovered serves an important purpose: it prevents defendants from holding back evidence, or not searching diligently for evidence, in connection with their underlying criminal trial, and then presenting new evidence before another judge, seeking to get a new trial entirely—another bite at the apple.

Hamilton would appear to suggest that the evidence that the defendant seeks to present pursuant to CPL section 440.10(1)(h) for her "actual innocence" claim need not be newly discovered. But were that so, there would be no limit to the defendant getting such a second (or third, or fourth) bite at the apple. At the very least, if the tardiness of the evidentiary showing is not a per se reason for rejecting the petition—as it would be were the petition sought pursuant to CPL section 440.10(1)(g)—the court should weigh the fact that a defendant's evidence was not presented at the original trial very heavily against the defendant, unless the defendant can give a convincing reason that the evidence was not presented in a timely fashion.

E. Why Is the Remedy Dismissal of the Indictment?

If the defendant prevails, *Hamilton* holds, then "the indictment should be dismissed pursuant to CPL [section] 440.10(4), which authorizes that disposition where appropriate."[78] It is important to recognize that the dismissal of an indictment is an extraordinary remedy. The typical remedy—expressly recognized by CPL section 440.10(4) and (5)—where newly discovered evidence casts doubt on the integrity of the conviction is to vacate the judgment of conviction and set the case for a new trial.[79] By vacating the conviction and allowing the case to be tried again, the court respects the roles of the grand jury (to indict), the prosecution (to present the case to a jury), and the jury (to determine, in light of all of the evidence whether the government has met its burden to prove guilty beyond a reasonable doubt).

The *Hamilton* court's ruling that the remedy for an actual innocence claim is dismissal of the indictment is especially notable because—CPL section 440.10(6)—provides for dismissal of the indictment in a particular circumstance: where the underlying conviction is for loitering for the

77. For example, the defendant suffered ineffective assistance of counsel, the defendant's plea was coerced and thus involuntary, or the defendant did not understand her rights and thus the plea was not knowing.

78. People v. Hamilton, 979 N.Y.S.2d 97, 109 (App. Div. 2014).

79. N.Y. CRIM. PROC. LAW § 440.10(4)–(5) (McKinney 2005).

purpose of engaging in prostitution or engaging in prostitution, and the defendant is the victim of a sex-trafficking crime.[80] That provision makes perfect sense, because one who is a victim of sex trafficking should not be criminally responsible for engaging in prostitution. The point, though, is that the legislature carefully distinguished between instances (the vast majority) in which a judgment must be vacated and the instance (prostitution by a sex-trafficking victim), where not only must the judgment be vacated, but the charging instrument must be dismissed as well. The legislature did not provide for mandatory dismissal of the charging instrument where the defendant's petition asserted an actual innocence claim under CPL section 440.10(1)(h).

What justification is there for the extraordinary remedy of dismissal of the indictment? The only explanation can be that the evidence presented to the court determining actual innocence is so overwhelming that it is clear that no juror could find that the defendant was guilty of the crime charged in the indictment, and that any prosecution would necessarily result in an order of dismissal. And this makes sense: if the evidence were such that the defendant *could not* be found guilty, then there is no reason to make him sit through the ordeal of a trial. Dismissal of the indictment is the proper remedy.

Almost. There are at least two problems with the explanation. The first is a practical one: in many cases, it will be exceedingly difficult for the court to be confident that a juror *could not* find that the defendant was guilty. There will be some cases where this standard is met. DNA exonerations come immediately to mind, but after those, there are very few. If one were to take the standard seriously—and it must be taken seriously—then any actual innocence motion that depends on an interested witness's credibility would have to be denied because it is virtually impossible to say that every juror would believe the interested witness. Yet, that is the standard that would have to be satisfied to dismiss the indictment.

Furthermore, once again the evidentiary standard on actual innocence motions raises complications. What if the court considering the actual innocence motion reaches its decision that the defendant has met his burden by relying on evidence that would be inadmissible at a criminal trial (again, think of the case of the codefendant's confession that exonerates the defendant)? The court cannot answer whether "any reasonable juror would vote to convict the defendant in light of this evidence" when the evidence that the court is considering could not be before the juror.

The ultimate point is not merely a matter of evidentiary sleight of hand, but of the separation of power within the criminal justice system. The actual innocence motion places the court in the place of the jury as the ultimate arbiter of guilt or innocence, and that is an extraordinary place for it to be. One must not overstate the point, for it is not unprecedented for the court to determine innocence; that is precisely what a judgment of acquittal following a verdict is. But such judgments following verdicts are rare.

80. *See id.* § 440.10(6).

Courts must take care that actual innocence judgments that result in the dismissal of indictments are rare, as well.

F. How Should the Court Weigh the Evidence That Was Presented at the Underlying Trial?

According to *Hamilton*, a court hearing an actual innocence claim must weigh the evidence of actual innocence against the weight of guilt. Typically, that evidence will reside in the trial record (assume for the moment that the underlying conviction was obtained pursuant to a trial, not a plea). Therefore a court hearing an actual innocence claim will presumably review the trial record, just as a court considering a newly discovered evidence claim does under CPL section 440.10(1)(g).

This weighing of evidence presents unusual problems, however, because it pits a live witness or witnesses (testifying on the defendant's behalf) against a cold, possibly very old, record. How is a judge to compare live witnesses against witnesses whose demeanors she cannot see, whose tone she cannot hear? It seems that the trial witnesses will be at a distinct disadvantage. Indeed, it is not even clear how the court would go about assessing the weight of the evidence adduced at trial. Would it consider the number of eyewitnesses? Is the evidence stronger if there are three than if there is one? Perhaps, but it would depend on the circumstances of their viewing and the clarity of their testimony. Can the court consider how long it took the jury to reach a verdict?[81] Is a fast verdict a sign that the evidence was strong, or that the jury was not diligent? Is a longer deliberation a sign that the case was close, or that the jury was thorough? Drawing any inferences from length of deliberation is probably unsound.

Furthermore, there is a lower limit below which the court cannot go in assessing the evidence from the trial. The evidence could not have been *too* weak, for it satisfied the proof beyond a reasonable doubt standard, which was presumably tested not only in the trial court but in the appellate courts as well. Once again, the point is that unless actual innocence hearings are to be opportunities for the courts to usurp entirely the role of the juries, findings of actual innocence must be the rare exception rather than the rule.

The problem of weighing the evidence is especially difficult when the underlying conviction is by a guilty plea.[82] The evidentiary record in such a case consists solely of a plea allocution. As Justice Scalia asked in a federal habeas case:

> [H]ow is the court to determine "actual innocence" . . . where conviction was based upon an admission of guilt? Presumably, the defendant will introduce evidence (perhaps nothing more than his own testimony) showing that he did not "use" a firearm in committing the crime to which

81. *See, e.g.*, People v. Bryant, 986 N.Y.S.2d 287, 289 (App. Div. 2014) (in granting motion based on actual innocence, court notes that the jury "deliberated for over 13 hours and, at one point, was deadlocked" implying that the length of deliberation and the deadlocking were the products of relatively weak evidence of guilt).

82. As noted above, many courts have refused to entertain claims of actual innocence following guilty pleas. *See supra* notes 74–75 and accompanying text.

> he pleaded guilty, and the Government, eight years after the fact, will have to find and produce witnesses saying that he did. This seems to me not to remedy a miscarriage of justice, but to produce one.[83]

G. What Must a Defendant Show to Be Entitled to an Evidentiary Hearing?

Hamilton presumes that the defendant will file a petition with some evidence—typically in the form of affidavits—that, if truthful, would establish his innocence. In *Hamilton* itself, for example, there were affidavits from witnesses who had not testified at Hamilton's trial, averring to his alibi.[84]

Plainly, if the claims in those affidavits were accepted as true, then Hamilton could not be guilty. The question is thus presented: When it is trying to determine whether to hold a hearing on the defendant's actual innocence, must the trial court accept the affidavits as truthful? If the court is required to accept the factual averments in the affidavits as truthful then it would appear that the court would have no choice but to order a hearing. The upshot will be that every case in which the defendant files a facially plausible claim of actual innocence will result in a hearing. But that answer would likely lead to chaos because virtually every conviction in which the defendant receives a lengthy period of incarceration would result in protracted actual innocence hearings long after the conviction. The criminal justice system would grind to a halt.

So, how can a court decide whether a hearing is warranted? Witnesses often recant their testimony, and the law is clear that such recantations are given slight weight by the courts.[85] How can a court decide—based on affidavits only—whether a recantation is valid? New witnesses, even biased ones, might be found to submit affidavits that support the defendant's innocence—the new witness may "recall," for example, that he was with the defendant at the time of the crime, or he overheard someone else admitting to the crime and exonerating the defendant, many years later. It is apparent that courts must apply some level of scrutiny to the affidavits that defendants will submit in their efforts to obtain an actual innocence hearing, but defining the level of scrutiny may prove to be a very difficult task.

H. Whither the Procedural Bars?

Defendants are absolutely barred from asserting claims that they could have made—or that they made and lost—on appeal.[86] *Hamilton* held that because the actual innocence claim was based on evidence that had not been

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83. Bousley v. United States, 523 U.S. 614, 631 (1998) (Scalia, J., dissenting).

84. *See* People v. Hamilton, 979 N.Y.S.2d 97, 100–01 (App. Div. 2014).

85. *See, e.g.*, People v. Smalls, 894 N.Y.S.2d 791, 793 (App. Div. 2010) ("It is well established that recantation evidence is inherently unreliable . . . ." (internal quotation and citations omitted)).

86. *See* N.Y. CRIM. PROC. LAW § 440.10(2)(a), (c) (McKinney 2005); *see also supra* note 13 and accompanying text.

presented at trial, the claim could not have been asserted on direct appeal, and therefore these provisions did not apply.[87] As to the discretionary bars of CPL section 440.10(3), the appellate court found that "there is no reason why the courts may not consider a credible claim of actual innocence in the exercise of discretion."[88]

But that leaves a question: *Could* a trial court, in the exercise of its discretion, determine that the discretionary bars apply even to a claim of actual innocence? In particular, one of the discretionary grounds on which a court might stand to deny a claim is that it was raised on a previous petition or could have been.[89] *Hamilton* held that it was not an abuse of discretion for a court to hear a claim of actual innocence notwithstanding that the discretionary bars might apply. It left open the question, however, whether it would be an abuse of the court's discretion to refuse to hear such a claim where the discretionary bar applied.

I. Is There a Sound Basis for the "Clear and Convincing Evidence" Burden of Proof?

Following the federal case law, and the cases from other states, *Hamilton* imposed the burden on the defendant to establish his actual innocence by "clear and convincing" evidence.[90] The problem with that holding is that it contradicts express statutory language, for CPL section 440 is very clear: section 440.30(6) provides that on any collateral attack "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion."[91]

Hamilton notes CPL section 440.30(6) but summarily distinguished it, stating that while that section applied a preponderance of the evidence standard, "with respect to a claim of actual innocence, as distinguished from a specific constitutional violation, a constitutional violation occurs only if there is clear and convincing evidence that the defendant is innocent."[92] In support, the court cited authority from other states or the opinions of trial level courts in New York.[93] The authority for the proposition is therefore still unclear.

CONCLUSION

Actual innocence is hard to resist. It is impossible not to feel outraged on behalf of those who are shown, indisputably, to have been wrongly convicted. DNA exonerations are blessings to justice.

And yet there must be finality to our system of criminal justice. Convictions must be final *sometime*. To allow extensive relitigation would

87. *See Hamilton*, 979 N.Y.S.2d at 103–04; *see also supra* note 29 and accompanying text.
88. *Hamilton*, 979 N.Y.S.2d at 104.
89. *See* N.Y. CRIM. PROC. LAW § 440.10(3)(b)–(c).
90. *See Hamilton*, 979 N.Y.S.2d at 105, 109.
91. N.Y. CRIM. PROC. LAW § 440.30(6).
92. *Hamilton*, 979 N.Y.S.2d at 108.
93. *Id.* (citing cases).

permit meritless claims to prevail, gaining strength as the passage of time erodes the truth, as witnesses die or their memories fade, as documents and evidence are lost or degraded. To allow such relitigation would also demean the guilty pleas and trials on which we all depend to resolve criminal cases.

Hamilton was doubtless well motivated—by the desire that an innocent man not be convicted of a crime. But closer examination of the broad generalities reveals the complications: that in most cases (DNA exonerations being an exception), we do not *know* with certainty what happened at the scene of the crime; that we can usually only draw inferences based on the evidence; that drawing such inferences is exactly what we ask juries to do; that unless evidence of innocence is newly discovered and could not reasonably have been discovered at the time of the defendant's trial, then a court's consideration of such evidence will inevitably undermine the validity of the jury's verdict—and ultimately, of the jury system itself. What is the point of a jury trial if a judge can look at evidence that could have been made available to the jury and make her own decision, contrary to what the jury decided?

Not only does *Hamilton* upset the balance between judges and juries, and deeply affect questions of finality, but it also challenges standard understandings of the separation of powers between the legislature and the courts. New York's collateral review statute is *very* detailed.[94] It does not have an actual innocence provision. That is not an oversight: as *Hamilton* notes, there was legislation pending in New York State at the time of the decision that would have specifically provided for actual innocence collateral attacks on judgments of conviction.[95] That proposed legislation would have provided for certain terms that *Hamilton* itself imposed (proof by clear and convincing evidence, and the remedy of outright dismissal of the accusatory instrument, rather than vacatur and remand for a new trial).[96] But the law was not enacted. *Hamilton* thus did judicially what the state did not do legislatively.

Whether *Hamilton* becomes a runaway train or a narrow exception to the finality of jury verdicts depends, in part, on the answers to the questions posed above, and doubtless others.

94. *See* N.Y. CRIM. PROC. LAW § 440.10–.70.

95. *See Hamilton*, 979 N.Y.S.2d at 107 n.4; *see also* S.B. 49A, 2013 Sen., Reg. Sess. (N.Y. 2013), *available at* http://open.nysenate.gov/legislation/bill/S49A-2013.

96. *See* S.B. 49A.