http://www.victimsofthestate.org/NY/indexNYC.html

Bronx County, NY
Marion Coakley
Oct 14, 1983
Marion Coakley was convicted of raping Olga Delgado. The crime occurred in Delgado's room at the Bronx Park Motel. Delgado, her boyfriend, Gabriel Vargas, and Delgado's brother-in-law, Jorge Rios each independently described the rapist as a dark complexioned black male with a Jamaican accent, about 26-28 years old, with a short "afro" haircut. Rios identified Coakley from a photo lineup and got the other two to agree that he was the perpetrator.
Coakley was 28 years old. However, he was light complexioned and had no Jamaican accent. He had no "afro" haircut when arrested two days later. Coakley maintained that he had been at a Bible study meeting at the time of the crime and eight witnesses confirmed his alibi. Coakley also demanded, took, and passed a polygraph test. At trial, the jury was forced to resolve a difficult dilemma – eyewitnesses against alibi witnesses. The jury convicted Coakley. Coakley's post-conviction counsel then gathered serological tests and other new evidence. Twenty-five months after the trial, this evidence convinced a court to set aside the conviction. The DA then agreed to dismiss the charges. (When Justice Fails) (News Articles) [1/07]

http://www.nytimes.com/1987/09/26/nyregion/after-2-years-test-result-casts-doubt-on-rape-verdict.html?pagewanted=all&src=pm

New York Times; Sep 26, 1987; pg. 29

After 2 Years, Test Result Casts Doubt on Rape Verdict

By SELWYN RAAB

On an autumn night in 1983, a gunman broke into a motel room in the Bronx where he raped a woman and then forced her to accompany him on a terrifying car ride to her apartment.

Two days later, Marion Coakley, who was then 28 years old, was arrested for the crime after he was identified by the victim and picked out of a lineup by two men who said they had seen the rapist's face. A jury, relying on the testimony of the three prosecution witnesses and disregarding alibi evidence, needed only six hours of deliberations to convict Mr. Coakley of rape and robbery. He was sentenced to a prison term of 5 to 15 years.

But now, after Mr. Coakley has served two years in prison, defense lawyers say they have obtained forensic evidence -- a serology, or blood, analysis -- that "conclusively proves" he was not the rapist.

An analysis completed in July shows that Mr. Coakley has blood type "A" while semen from the rapist that was found on the victim's undergarments is from a man who has blood type "B."

At Mr. Coakley's trial in June 1985, the presiding judge, Justice David Levy of State Supreme Court in the Bronx, refused to grant the defense an adjournment to complete the serology analysis. Thus, the jury heard no evidence about the blood types.

Based largely on the analysis prepared by Dr. Robert Shaler, the former chief of serology in the City Medical Examiner's Office, a new team of defense lawyers filed an appeal earlier this month in State Court to overturn the conviction.

Mr. Coakley's new lawyers, in their appeal, say that Justice Levy declined to postpone the trial in June 1985 on the ground that the Legal Aid Society lawyer who was then representing Mr. Coakley should have done a better job in preparing his case.

In explaining why the serology evidence was not presented at the trial, defense lawyers said in their brief, "If competent expert testimony could be obtained within the time limits of the trial, the judge indicated he would hear it; if not, Judge Levy declared, 'then the defendant is going to suffer.'"

"It was terribly unfair for the judge to deny the adjournment because the defense lawyer had not done a good job," Barry C. Scheck, director of clinical education at the Benjamin N. Cardozo Law School and who is representing Mr. Coakley in the appeal, said in an interview. "It was horrendous for the judge to say the defendant would have to suffer as a consequence."

"It's a matter of opinion," Justice Levy said, replying to Mr. Scheck's assertion that his ruling prejudiced Mr. Coakley's constitutional right to a fair trial. "We'll see what the appellate court says about it. There is often lack of preparation on both sides."

A hearing to release Mr. Coakley on bail pending the outcome of the appeal is set for Tuesday in the Appellate Division of State Supreme Court in Manhattan. Mr. Coakley is an inmate at the state's Green Haven Correctional Facility in Stormville, N.Y.

'What Am I Doing Here?'

"I wake up every morning and say to myself: 'What am I doing here? I don't belong here,'" Mr. Coakley said yesterday in a telephone interview from

---

`What am I doing here? I don't belong here.'

Green Haven, a maximum-security' prison. "I'm not a criminal; I'm not a dangerous person. Why was my freedom taken away?"

Edward V. McCarthy, a spokesman for the Bronx District Attorney, Mario Merola, said the prosecution would not oppose the bail request. "We had three solid witnesses," Mr. McCarthy said. "If they are claiming incompetent counsel for the defense, we are not responsible. We also are not responsible for the blood tests."

No date has been scheduled for a hearing on the appeal for a new trial or dismissal of the charges. Mr. McCarthy said the prosecution's position would be disclosed at the hearing.

The rape occurred at the Bronx Park Motel at 2500 Crotona Avenue in the East Tremont section on Oct. 13,1983.

Light From Television Set

At Mr. Coakley's trial, the 36-year-old woman who was raped and a male companion testified that a gunman managed to open a locked door and burst into their room. Except for the light from a 19-inch television screen, the man and the woman said, there was no illumination in the room.

After locking the man in the bathroom, the gunman raped the woman and stole about $300 in cash and jewelry from the couple. The woman testified that the rapist demanded

more money. He forced her into her car and with her sitting besides him drove about two miles to her apartment in the West Farms section of the Bronx.

When the woman's brother-in-law opened the door to her apartment, the rapist fled.

Although the gunman warned her not to look at him and sometimes covered her head with a towel, the woman testified, she saw his face for several seconds. Her male companion and her brother-in-law testified that they, too, had briefly seen the rapist's face.

In the courtroom, the three witnesses singled out Mr. Coakley as the assailant.

Previous Arrest

Mr. Coakley, a janitor and factory worker, was implicated through a photograph. Several hours after the crime, the rape victim picked Mr. Coakley's photo from a group shown to her by detectives. His photo was in the rape and robbery suspects' file because he had been arrested on a rape charge in the Bronx in 1982.

That charge had been dismissed after the complainant failed to appear for any court hearings. The appeal in the motel rape case notes that the woman who made the earlier rape complaint had a police record as a prostitute and that Mr. Coakley had told the police she had accompanied him willingly to his apartment for what he thought was a tryst. Mr. Coakley maintains that she become angered when he refused to give her any money.

Three defense alibi witnesses, including a minister, testified that at the time of the rape in the motel, Mr. Coakley was four miles away, attending a Bible study meeting near his home in the Molt Haven section of the Bronx. Prosecutors challenged the testimony, contending that the witnesses were mistaken about the time.

"There was someone in the Bronx who was a look-alike for Marion Coakley," asserted Mr. Scheck, the defense lawyer. "Mistaken identification is the leading cause of innocent people being convicted; everybody in the criminal justice system knows that."

Issue of Routine Testing

Mr. Coakley's case, the lawyer asserted, points out the need for prosecutors to obtain blood typings of semen in all rape cases. City law-enforcement officials said such testing was not routinely requested by local prosecutors because testimony that the defendant's blood type is the same as that found in the semen is generally inadmissible as evidence.

"There is little return for prosecutors to do so," Mr. Scheck said. "At best it shows that the defendant's blood type is the same as millions of other people and if it is a different type then the prosecution's case is lost."

Defense lawyers, he added, rarely seek such analysis because it is costly and the most accurate findings require testing as soon as possible after the crime when the police and the prosecution are in control of evidence.

Marion Coakley in a police photograph taken when he was arrested in October 1983.

The appeal also asserts that the conviction should be reversed because Mr. Coakley was ineffectively defended by the Legal Aid Society. Pat Bath, a spokesman for the Society, which represents indigent defendants, said the private agency would have no immediate comment.

In citing other reasons for a new trial, the defense charged that prosecutors withheld evidence that could have aided Mr. Coakley. The brief said the prosecution concealed information that the rape victim and her companion had brought a $10 million civil suit against the motel and that the conviction of Mr. Oakley would bolster their case. The civil suit is still pending.

According to the brief, detectives and prosecutors improperly influenced the three identification witnesses through false reports that Mr. Coakley was a suspect in other rape cases.

Asked how he felt about the witnesses who identified him as the rapist, Mr. Coakley, said: "I forgive them. I have nothing against them. Anybody can make a mistake, but this sure was a big one."

http://www.nytimes.com/1987/09/30/nyregion/based-on-new-evidence-a-rape-suspect-is-freed.html

New York Times; Sep 30, 1987; pg. B3

Based on New Evidence, a Rape Suspect Is Freed

A Bronx man convicted of rape and robbery was ordered released from prison without bail yesterday after defense lawyers said they had uncovered evidence that proved the man was innocent. He will remain free pending a hearing on a new trial.

The prisoner, Marion Coakley, was found guilty in 1985 at a trial in the Bronx before tests were completed comparing his blood type to the rapist's blood type in semen found on the victim's clothes. A defense affidavit says the completed tests show that the rapist and Mr. Coakley have different blood types.

Justice John Carro of the State Supreme Court Appellate Division ordered the 32-year-old Mr. Coakley freed in his own recognizance from Green Haven Correctional Facility in Stormville. A hearing for a new trial is set for Nov. 4 before the Administrative Judge of the Bronx, Justice Burton B. Roberts.

"Based on the new evidence it would have been a terrible injustice for Mr. Coakley to continue sitting in a cell awaiting a decision on a new trial," Peter Neufeld, a defense lawyer, said after the bail hearing.

New York Times; Dec 16, 1987; pg. B1

26 Months in a Prison, Wrongly

By SELWYN RAAB

After being imprisoned 26 months as a convicted rapist, Marion Coakley heard himself declared an innocent man yesterday by a judge and prosecutors in a brief hearing in a Bronx courtroom.

The judge, Justice Burton B. Roberts of State Supreme Court, said a "miscarriage of justice" in Mr. Coakley's case could have been avoided if a test had been conducted to compare his blood type with the blood type of semen found on the victim's underclothes.

Mr. Coakley has been free since his release from a state prison last September, pending the outcome of his appeal for a new trial.

Apologizing to Mr. Coakley for his imprisonment, Justice Roberts, the administrative judge in the Bronx, called on the district attorneys in the city to order routine serology tests on semen in rape cases.

Mr. Coakley, 32 years old, was convicted in June 1985 before an analysis compared his blood and semen with

Continued on Page B5

Jailed as Rapist, A Man in Bronx Wins a Reversal

Continued From Page B1

that of the rapist. The jury heard no evidence about the blood types, and Mr. Coakley was sentenced to 5 to 15 years in prison by Justice David Levy, who presided at the trial.

The original tests had been requested by a lawyer for the Legal Aid Society who represented Mr. Coakley at his trial. But the tests were never completed. A new team of appeals lawyers had the tests completed last July, and Mr. Coakley had type A, and the rapist's semen was from a man with type B.

"The frightening thing in this case," Justice Roberts said in addressing Mr. Coakley, "is the fact that you were positively identified in a lineup. Yet the serology evidence established that you could not have been the person who committed this crime."

City law-enforcement officials said prosecutors did not generally request blood typings of semen because testimony that the defendant's blood type is the same as that found in the semen left by the rapist or sex offender was generally inadmissable as evidence for the prosecution. In effect, defense lawyers said, the tests can really only help the defendant.

Last Christmas at Attica

Justice Roberts, a former District Attorney who is known for his strong opinions from the bench, said prosecutors should order semen tests in all cases, to exonerate innocent suspects.

Justice Roberts ordered the conviction voided and dismissed the charges after two assistant district attorneys, Robert L. Shepherd and Mitchell Garber, said there was insufficent evidence to retry Mr. Coakley.

After the hearing, Mr. Coakley, smiling broadly, vigorously shook the hands of Justice Roberts, the prosecutors and Barry C. Sheck and Peter Neufeld, the lawyers who had uncovered the evidence that freed him, In an interview, Mr. Coakley said he recalled spending most of last Christmas alone in a cell in the Attica prison.

Marion Coakley

Mr. Coakley, a construction worker, said this Christmas he would be with his parents and relatives in his hometown of Beaufort, S.C.

At Crotona Ave. Motel

"I prayed hard for my freedom in Attica," he said. "And it has come true."

"I have no hostility against the people who testified against me," he added as he left the Supreme Court Building at the Grand Concourse and 161st Street. "I hope they find the person who committed the crime."

Mr. Coakley's imprisonment stemmed from a rape Oct. 13, 1983, in the Bronx Park Motel at 2500 Crotona Avenue, near 180th Street in the East Tremont section.

The victim, a 36-year-old woman, testified that she was with a man when a gunman slipped into the room. Although the room was dark except for the light from a television screen, the woman and man testified they were able to see the rapist's face.

After locking the man in the bathroom, the gunman raped the woman and stole $300 and jewlery. The woman testified that the gunman, demanding more money, forced her to accompany him as he drove her to her apartment in the West Farms section. During the two-mile trip, she said, he ordered her to cover her face with a towel.

Marion Coakley, Claimant, v. State of New York, Defendant (Claim No. 77025)

Claim No. 77025, Motion No. M-41610, Cross Motion No. CM-42100

Court of Claims of New York

150 Misc. 2d 903*; *571 N.Y.S.2d 867*; *1991 N.Y. Misc. LEXIS 296

May 2, 1991

NOTICE: [*1]** EDITED FOR PUBLICATION

HEADNOTES

State -- Unjust Conviction and Imprisonment Act -- Newly Discovered Evidence

1. In a claim brought pursuant to the Unjust Conviction and Imprisonment Act (*Court of Claims Act § 8-b*) arising out of claimant's conviction for rape and robbery, the court need not decide the issue of whether serological evidence showing that it was not possible for claimant to have been the perpetrator was newly discovered within the meaning of *CPL 440.10 (1) (g)* since the Supreme Court Justice who set aside claimant's conviction determined that it was. Although the court under *section 8-b* may be able to say that a vacating court or reversing tribunal did things for reasons in addition to those stated, the present court may not ignore that which was done or the reasons given for doing it. Accordingly, inasmuch as the vacating Justice found the serological evidence to be newly discovered and explicitly vacated the judgment based in large part thereon, such evidence was newly discovered within the meaning of *CPL 440.10 (1) (g) (see, Court of Claims Act § 8-b [3] [b] [ii]*).

State -- Unjust Conviction and Imprisonment Act -- Due Process Grounds for Reversing Criminal Conviction

2. Criminal judgments of conviction which are vacated or reversed on due process grounds are not ipso facto beyond the ambit of the Unjust Conviction and Imprisonment Act (*Court of Claims Act § 8-b*) since the test is not whether an overturning court labels prior errors as being due process violations, but what exactly the violations were, where they fit into the *CPL 440.10* scheme, and to what extent they evidence innocence, since a precondition to obtaining relief under *section 8-b* is that the vacatur or reversal be under a ground evidencing innocence of the claimant, whether constitutionally mandated or not *(see, Court of Claims Act § 8-b [5] [b] [ii]*). Accordingly, notwithstanding a reversing tribunal's labeling of the basis for its decision as a denial of due process or an equivalent phrase, provided that the grounds employed satisfied, or possibly could satisfy, approved paragraphs of *CPL 440.10*, the claimant is eligible for relief.

State -- Unjust Conviction and Imprisonment Act -- Grounds for Reversing Criminal Conviction -- Ineffective Assistance of Trial Counsel

3. In a claim brought pursuant to the Unjust Conviction and Imprisonment Act (*Court of Claims Act § 8-b*) arising out of claimant's conviction for rape and robbery, the presence of a finding that claimant lacked effective assistance of counsel at his trial in the vacating or reversing court's decision should not automatically disqualify the claimant for relief under the Act, since the inquiry must be what evidence did such ineffective counsel fail to adduce or exclude, and where does that material fall in the *section 8-b* list of prerequisites. Accordingly, while the Supreme Court Justice who vacated claimant's conviction tangentially based vacatur on the ineffective assistance of claimant's attorney and the Trial Judge's improper denial of an adjournment in order for an expert witness to perform additional serological tests, the result of both was that overwhelming evidence of claimant's innocence was excluded from his trial, and that satisfies *section 8-b*.

State -- Unjust Conviction and Imprisonment Act -- Negligence of Claimant's Attorney Not to be Imputed to Claimant

4. In a claim brought pursuant to the Unjust Conviction and Imprisonment Act (*Court of Claims Act § 8-b*) arising out of claimant's conviction for rape and robbery, the State's contention that claimant, through the negligence of his trial counsel in failing to arrange for additional serological testing which would have proved claimant's innocence, brought about his own conviction *(see, Court of Claims Act § 8-b [5] [d]*), is untenable since even assuming that the alleged negligence of claimant's attorney should be imputed to claimant (which would be unwarranted), claimant neither admitted guilt nor engaged in the type of wrongful conduct which would cause a conviction. The most that can be said is that he would be guilty of negligent trial preparation, and that is more akin to an error of trial strategy than the wrongful conduct which the Legislature was attempting to avoid compensating when it enacted *section 8-b*. Moreover, although defendant allegedly made statements to the Grand Jury which were contradicted by his alibi witnesses, those statements were not introduced at trial and, hence, any alleged inconsistency could not have contributed to claimant's conviction.

State -- Unjust Conviction and Imprisonment Act -- Alleged Negligence of Claimant's Legal Aid Attorney at Criminal Trial

5. In a claim brought pursuant to the Unjust Conviction and Imprisonment Act (*Court of Claims Act § 8-b*), the State may not avoid liability to the extent that it establishes that the alleged negligence of claimant's Legal Aid attorney at his criminal trial, even if not imputed to claimant, caused his conviction, since the Legal Aid attorney was appointed pursuant to the mandates of the State and Federal Constitutions, and both he and the District Attorney are part of the same system. Accordingly, inasmuch as the State would not, under the statutory scheme, be able to avoid liability even were it able to ascribe the conviction to the wrongdoing of a local prosecutor, it should not be able to avoid it were it able to assign the fault to a court-appointed defense attorney.

COUNSEL: *Peter J. Neufeld* and *Barry C. Sheck* for claimant.

Robert Abrams, Attorney-General (Susan J. Pogoda of counsel), for defendant.

JUDGES: Gerard M. Weisberg, J.

OPINION BY: WEISBERG

OPINION

[*905] [868]** OPINION OF THE COURT

On the night of October 13, 1983, a man broke into a room at the Bronx Park Motel and robbed Olga Delgado and Gabriel Vargas at gunpoint. He locked Mr. Vargas in the bathroom and then raped Ms. Delgado. After the rape, the man demanded more money. Ms. Delgado offered to take him to her house in her car, where she assured him, more money would be found. The perpetrator drove the victim to her home. There, he noticed her brother-in-law, Jose Rios, standing in the doorway and fled.

Subsequently, Mr. Vargas, Mr. Rios and Ms. Delgado positively identified claimant as the perpetrator and he was arrested. Claimant, protesting his innocence, maintained that he was at a Bible study meeting at the time of the rape/robbery and produced a number of alibi witnesses. The defense was predicated on the theory of mistaken identity, the witnesses being Hispanic and the claimant black. The Legal Aid Society defended **[***2]** claimant.

After a jury trial, claimant was convicted of rape in the first degree and robbery in the first degree. On August 26, 1985, he was sentenced to an indeterminate term of 5 to 15 years in prison and began serving his sentence on that day. Subsequently, claimant's present attorneys were substituted for the Legal Aid Society.

While in prison, additional serological tests were conducted comparing the blood type found in a semen stain on the victim's underwear with the claimant's blood type. Based on the results of these tests, scientific advances in the field, and additional information which had come to present counsel's attention, they moved to vacate the judgment pursuant to *CPL 440.10*. Specifically, with respect to the serological material, it was alleged that the new evidence established that claimant could not have been the robber/rapist.

On December 15, 1987, Justice Burton B. Roberts, presiding in Supreme Court, Bronx County, set aside claimant's conviction principally pursuant to *CPL 440.10 (1) (g)* **[**869]** based on "newly discovered [serological] evidence." He specifically found that there was clear and convincing newly discovered evidence that would have **[***3]** exonerated claimant. Indeed, pointing to the **[*906]** serological evidence alone, Justice Roberts stated to claimant that "the serological evidence establishes that you could not have been the individual who was the donor of the semen [found on the complainant's underwear] and therefore could not have committed this crime." He then dismissed the indictment in the interest of justice on the joint motion of the defense and the District Attorney citing, among other factors, the new evidence. This action pursuant to *Court of Claims Act § 8-b* ensued. Damages for unjust conviction and imprisonment are sought.

Claimant then moved for summary judgment with respect to liability. The State opposed the motion on, among other grounds, that it had not completed its discovery, particularly the examinations of claimant and Dr. Robert Shaler. It also cross-moved to dismiss for a failure to state a cause of action. Pursuant to *CPLR 3212 (f)* and *Zuckerman v City of New York (49 NY2d 557*), by an interim opinion and order dated June 15, 1990, we adjourned the motions pending the completion of discovery. That has now been accomplished.

Based thereon, we find that there is no question **[***4]** of fact as to the following. The *CPL 440.10* motion was held on November 23 and December 1, 1987, before Justice Roberts. With the consent of the court and the parties, it was agreed that the issues relating to the serological evidence would be considered first and the District Attorney would then determine its position based on what was adduced.

Justice Roberts first heard testimony that prior to the criminal trial, an evidentiary *Frye* hearing had been held before Justice David Levy to determine the admissibility of certain anticipated scientific evidence. *(See, Frye v United States, 293 F 1013* [1923].) At that proceeding, Dr. Robert Shaler, Director of Serology of the Office of the Chief Medical Examiner for the City of New York, testified that he had examined stains in the rape victim's panties and concluded that sperm was present. He then determined, through separate tests of Ms. Delgado and the claimant, that they were both "secretors" (i.e., they belonged to the 80% group of the population wherein blood group substances are found in all bodily fluids), and that Ms. Delgado was blood type B, and that the claimant was blood type A. Dr. Shaler then tested the panty **[***5]** stain and found blood group substances B and H meaning that the donors (i.e., the rapist and Ms. Delgado) could be blood types B or O. Since the claimant was blood type A, Dr. Shaler concluded, in a report dated April 18, 1984, that **[*907]** Marion Coakley could not be responsible for the sperm present in the victim's panties. Inasmuch as Ms. Delgado denied having sex with anyone except the rapist that day, the rapist could be the only person responsible for the presence of sperm.

Subsequent to his written report, however, Dr. Shaler had second thoughts. He reasoned that because the claimant was a "low level" secretor, it could have been possible that his secretion level was so low on any given day that the tests were not sensitive enough to detect their presence. Therefore, at the *Frye* hearing he qualified his original finding by stating that additional tests needed to be performed to confirm the findings, and that without such confirmation he could not adhere to his April 18, 1984 conclusion to a reasonable degree of scientific certainty. The defense attorney had not undertaken to have those tests performed although arguably he should have been on notice of the potential **[***6]** problem several months earlier. The court, not wishing to delay the trial any longer, refused to adjourn the case so that the tests could be performed. Based on Dr. Shaler's inability to offer an unqualified opinion concerning the conclusions to be drawn from the tests, all serological evidence was suppressed at trial, notwithstanding its potential to completely exonerate the claimant.

Dr. Shaler also testified before Justice Roberts. He stated that subsequent to claimant's conviction he conducted further **[**870]** tests which showed that claimant's secretion levels never went so low as to be undetectable. Moreover, independent studies by other experts in the field had confirmed that an individual's secretion levels do not vary significantly. Thus, Dr. Shaler determined that his original examination results were correct, and that he could state, with a reasonable degree of scientific certainty, that claimant was excluded as a possible donor of the sperm present in the victim's panties.

The District Attorney then joined with the defense in requesting that claimant's conviction be vacated and the indictment dismissed. In its application, the People stated: "Whether it is examined **[***7]** as newly discovered evidence, ineffective assistance of trial counsel, or error of the trial court, the serological evidence should have been presented to the jury, and upon any or all grounds, the judgment of conviction must be vacated." In addition, based on this evidence, a palm print and the other material which had not been made available to the defense, and would presumably be offered at a retrial, the **[*908]** District Attorney concluded that it could not sustain its burden of proof and moved for a dismissal. *(Cf., CPL 210.40*.)

The State opposes claimant's motion on several grounds. We will treat them *seriatim*. First, the State argues that the serological evidence which served in large part as the basis for the vacatur of claimant's judgment was not newly discovered, Justice Roberts' characterization of it as such notwithstanding. It reaches this conclusion on the theory that the additional blood tests Dr. Shaler conducted after claimant's conviction could and therefore should have been done prior thereto. As to the subsequent advances in scientific knowledge, defendant asserts that they had in fact been first published prior to the *Frye* hearing. Therefore **[***8]** a question of fact requiring trial exists as to whether Dr. Shaler should have known of them.

While we have serious doubts as to the correctness of the State's analysis of whether the serological evidence was newly discovered within the meaning of *CPL 440.10 (1) (g)*, we need not decide the issue. Justice Roberts determined that it was. Although under *Court of Claims Act § 8-b*, we may be able to say that a vacating

court or reversing tribunal did things for reasons in addition to those stated, that is not to say that we can ignore that which was done or the reasons given for doing it. Justice Roberts found the serological evidence to be newly discovered and explicitly vacated the judgment based in large part thereon. It was therefore newly discovered within the meaning of *CPL 440.10 (1) (g)*. Inasmuch as that paragraph is one of the enumerated statutes in *Court of Claims Act § 8-b (3) (b) (ii)*, the vacatur of the judgment satisfies that provision of the act unless, as the State next argues, Justice Roberts' consideration of the related ineffective counsel and lack of due process grounds invalidates it. In other words, as we understand defendant's argument, since ineffective **[***9]** assistance of counsel and denial of due process are not approved grounds under that clause of *section 8-b*, the vacatur based even in part thereon does not qualify for relief.

First, we reject the notion that judgments vacated or reversed on due process grounds ipso facto are without the act. While *section 8-b* does exclude claimants whose convictions were overturned for constitutional violations in general *(compare, Court of Claims Act § 8-b [5] [b] [ii], with CPL 440.10 [1] [d], [h]*), the underpinnings of most, if not all, of the specifically approved paragraphs are also constitutional in nature. *(See, Gordon v State of New York, 141 Misc 2d 242*.) For example, is not a conviction obtained as the result of the **[*909]** fraud or duress of a court or prosecutor or upon perjured testimony one obtained in violation of the accused's due process rights? *(See, CPL 440.10 [1] [b], [c]*; *Mott v State of New York, 138 Misc 2d 916*.) Yet these are approved grounds. Why then are some constitutionally mandated reversals within the statute while others not? The answer may be found in its legislative history.

[871]** The New York Law Revision **[***10]** Commission found that judgments were often reversed or vacated on constitutional grounds having little to do with innocence. (1984 Report of NY Law Rev Commn [Report], 1984 McKinney's Session Laws of NY, at 2928-2929.) For example, the commission observed, illegally seized evidence might justify a reversal but, at the same time, provide no evidence that the claimant was innocent. *(Ibid.)* The Legislature, therefore, included as a precondition to obtaining relief under *section 8-b* that the vacatur or reversal be under a ground evidencing innocence whether constitutionally mandated or not. *(See, Court of Claims Act § 8-b [5] [b] [ii]*.) Thus, the test is not whether an overturning court labels prior errors as being due process violations but what exactly the violations were, where they fit into the *CPL 440.10* scheme and to what extent they evidence innocence.

In fact, although little discussed in the case law, that is exactly what *section 8-b* directs us to do with respect to reversals under *CPL 470.20 (1)*. That provision authorizes an intermediate appellate court to reverse and remand a conviction for errors which "deprived [the defendant] of a fair trial" or in **[***11]** the "interest of justice". *Section 8-b* then tells us that such a claimant will still qualify for relief if but only if the grounds relied on were those set forth as acceptable under *CPL 440.10*. In other words, notwithstanding a reversing tribunal's labeling of the basis for its decision as a denial of due process or an equivalent phrase, provided that the grounds employed satisfied (or possibly could satisfy) the approved paragraphs of *CPL 440.10*, the claimant is eligible for relief. That this may require us to look behind a decision cannot be denied. But again, that is not to say we can change what has been done or subtract grounds already determined. We do, however, have a statutory obligation to reevaluate what was done in light of the requirements of *section 8-b* to see if its preconditions have been met.

Moreover, the same analysis applies with respect to claims of ineffective assistance of counsel. The presence of such a finding in a vacating or reversing court's decision **[*910]** should not automatically disqualify the claimant. Rather the inquiry must be what evidence did such ineffective counsel fail to adduce or exclude and where does that material fall in the *section* **[***12]** *8-b* list of prerequisites.

Applying the foregoing, while Justice Roberts tangentially based the vacatur on the ineffective assistance of claimant's Legal Aid attorney and the Trial Judge's improper denial of an adjournment in order for Dr. Shaler to perform the additional serological tests, the result of both was that overwhelming evidence of claimant's innocence was excluded from the trial. This satisfies *section 8-b*.

The State next asserts that claimant, through the negligence of his Legal Aid attorney, brought about his own conviction. Apparently defendant is arguing that the attorney's negligence in failing to arrange for additional serological testing should be imputed to claimant. We disagree.

Court of Claims Act § 8-b (5) (d) requires that a claimant establish by clear and convincing evidence that he or she did not cause or bring about the conviction. In its report, the Law Revision Commission listed five examples of misconduct that would bar relief under this paragraph. These are giving an uncoerced confession of guilt, removing evidence, attempting to induce a witness to give false testimony, attempting to suppress testimony or concealing the guilt of another. (Report, **[***13]** 1984 McKinney's Session Laws of NY, at 2932.) We have held this list to be illustrative and found other, yet similar, conduct to have violated the provision. *(Moses v State of New York, 137 Misc 2d 1081* [offering a false alibi]; *see also, Alexandre v State of New York*, NYLJ,

Mar. 31, 1989, at 24, col 1 [willingness to work with unlicensed handgun within reach contributed to conviction for illegal possession], *affd on other grounds 168 AD2d 472, appeal dismissed 77 NY2d 925*; **[**872]** *Vann v State of New York*, NYLJ, Apr. 30, 1990, at 28, col 3 [knowing receipt of property stolen from victim contributed to murder conviction].)

In all of these cases, and the commission's illustrations, the claimant was or would have been individually engaging in wrongful conduct or, in the case of a confession, admitting guilt. To be contrasted is a case like *Lanza v State of New York (130 AD2d 872, 874)* where the Third Department rejected the argument that the claimant's failure to testify at trial contributed to his conviction. That tribunal said "We do not believe that the Legislature intended such second-guessing **[*911]** of trial strategy in determining **[***14]** whether a person contributed to his conviction, especially in light of the examples of misconduct cited by the Law Revision Commission." *(Lanza v State of New York, supra, at 874.*) Even assuming we imputed the Legal Aid's alleged negligence to claimant (which we think unwarranted), claimant neither admitted guilt nor engaged in wrongful conduct. The most that can be said is that he would be guilty of negligent trial preparation. This is more akin to an error of trial strategy than the wrongful conduct which the Legislature was attempting to avoid compensating when it enacted *section 8-b*. *(See, Ivey v State of New York*, Ct Cl, Mar. 12, 1990, NeMoyer, J. [appeal pending].)

Defendant also argues that claimant made statements to the Grand Jury which were at odds with what his alibi witnesses testified to at trial, thereby contributing to his conviction. The simple answer is, as claimant's counsel points out, that it could hardly have been inconsistent since the prosecution declined to offer it at the criminal trial. In any event, the fact that it was not introduced establishes that any alleged inconsistency could not have contributed to his conviction.

Lastly, the State **[***15]** asserts that there exist questions of fact which require a trial and therefore prohibit the granting of summary judgment, namely, to what extent the Legal Aid's alleged negligence caused the conviction.

Implicit in this argument is the theory that the State may avoid liability to the extent it establishes that the Legal Aid's alleged negligence caused the conviction, even where not imputed to the claimant. To be clear, the issue of contribution or indemnity vis-a-vis the State and the Legal Aid Society is not before us and we are therefore not passing on it. The question is, assuming the conviction was caused in whole or in part by the negligence of the Legal Aid attorney in presenting a defense, what effect does that have on the State's liability to the claimant? While we agree with the Assistant Attorney-General that this is a case of first impression, we think the answer is none.

Referring again to the legislative history of *section 8-b*, the statute was enacted as a response to the perceived inequities which existed under prior law with respect to innocent people who were convicted of crimes. Traditionally their only recourse was through private statutes or actions for false **[***16]** arrest or malicious prosecution where many of the participants were absolutely or qualifiedly immune. (Report, 1984 McKinney's **[*912]** Session Laws of NY, at 2906-2914.) To rectify this the commission proposed legislation which would compensate the innocent who had been wrongfully convicted regardless of fault or a lack thereof by the Judge, prosecutor or other local participants. Moreover, since the District Attorney was representing the People of the State, it was concluded that if compensation was warranted, it should be paid by the State despite the prosecutor's local municipal employment. (Report, *id.*, at 2922-2926.)

Applying the foregoing, as the District Attorney prosecuted on behalf of the State, claimant's Legal Aid attorney was appointed pursuant to the mandates of the Constitutions of this State and the United States. Both counsel were part of the same system. Since the State would not be able to avoid liability even were it able to ascribe the conviction to the wrongdoing of a local prosecutor, it should not be able to avoid it **[**873]** were it able to assign the fault to a court-appointed defense attorney. * [The court then concluded that the serological **[***17]** evidence and other undisputed facts established all elements of claimant's cause of action and granted his motion for summary judgment on the issue of liability.]

* Whether the result would be the same had the defense counsel been privately retained is an issue which we do not address.

[Portions of opinion omitted for purposes of publication.]

http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1006&context=lawfaculty&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3D%2522THE%2BINADEQUACY%2BOF%2BEXISTING%2BREMEDIES%2BIN%2BTORT%2BAND%2BCIVIL%2522%26source%3Dweb%26cd%3D1%26ved%3D0CCMQFjAA%26url%3Dhttp%253A%252F%252Fdigitalcommons.pace.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1006%2526context%253Dlawfaculty%26ei%3DicQFUPyIEMLX0QH5nuHiCA%26usg%3DAFQjCNESKyJQ4fzSlKgzarWNzLxnejqVPQ#search=%22INADEQUACY%20EXISTING%20REMEDIES%20TORT%20CIVIL%22

11. THE INADEQUACY OF EXISTING REMEDIES IN TORT AND CIVIL RIGHTS LAW FOR THOSE WHO HAVE BEEN WRONGLY CONVICTED AND LATER EXONERATED

1. The Crime

On October 13,1983, Olga Delgado and Gabriel Vargas spent the night at the Bronx Park Motel in New York City. In the early morning hours a stranger broke into their room asking for money. The robber locked Mr. Vargas in a closet and raped Ms. Delgado. Still unsatisfied, the stranger demanded more money, and Ms. Delgado proposed driving him to her home where she promised cash could be found The stranger took the bait and drove Ms. Delgado to her apartment complex. When he saw the silhouette of someone else, Ms. Delgado's brother-in-law, Jose Rios, at the apartment door, the rapist fled, abandoning the car near the Bronx Park Motel.

2. The Investigation

The police were called. The car was discovered and dusted for prints. Ms. Delgado, Mr. Vargas and Mr. Rios each independently described the perpetrator as a black male with a dark complexion, about 26-28 years old, 5 feet 7 inches tall, weighing about 150-160 pounds, with a mustache, a "beard" or "stubbleyyo f chin hair and a short "afro" haircut Later that night, while Ms. Delgado was taken to Jacobi Hospital where a rape kit was prepared, Mr. Rios and Mr. Vargas were taken to the photo room of the police precinct to look through photo trays. They were told to go directly to one of the officers with any photograph either one of them recognized and not to show it to each other. Nonetheless, when Rios saw Marion Coakley's photograph, he took it over to Vargas and said, "This is the man." Vargas agreed. When Ms. Delgado arrived at the station house from the hospital, she was shown a photo-array from which she, too, selected Mr. Coakley. The record does not reflect what the police may have said to any of the witnesses, nor what either of the witnesses may have said to Mrs. Delgado as she viewed the various photographs.

Marion Coakley was arrested two days later and positively identified in a lineup viewed by Mr. Vargas, Mr. Rios and Ms. Delgado. Mr. Coakley is black, but not dark complexioned He does not have a Jamaican accent, and on the day of

36. Coakky v State ofNerv York, 571 NYS 2d 867 (NY Ct C1 1991), af'd, 640 NYS 2d 500

(NYAD 1 Dept 1996) (determining state's liabiity for the previously determined wrongful

conviction
under New York State's Court of Claims Act § 8-b). See section IV of this article. (discussing
§ 8-b in detail). I am familiar with the case because Peter Neufeld and Barry Scheck represented Marion Coakley, post-conviction. I participated in drafting Mr. Coakley's Appellate
Division brief responding to New York State's appeal from the favorable Court of Claims decision.

his arrest did not have an Afro, long or short. He is mildly retarded. He was 28 years old at the time, and had been working at various part and full-time positions while living in the Bronx with his sister. The police had a copy of his photograph because Mr. Coakley had been arrested previously.

3. The Defense and the Trial

From the day of his arrest, Marion Coakley protested his innocence. He maintained always that he had been at a bible study meeting at the time of the crime, and he immediately produced eight alibi witnesses. All eight witnesses were interviewed by the prosecutor's office within days of the arrest. Significantly, Marion Coakley also demanded, took, and passed a polygraph test.37 At mal, the jury was forced to resolve a difficult dilemma-eyewitnesses against alibi witnesses. The jury convicted him. Mr. Coakley was sentenced to prison for an indeterminate term of from five to fifteen years.

4. Post-Conviction

For many wrongfully convicted persons the story ends at sentencing. Marion Coakley was lucky. Twenty-five months later, post-conviction counsel turned up enough "newly discovered" evidence to convince the court to set aside the conv i ~ t i o nan~d~ th e Office of the District Attorney of Bronx County to dismiss the indictment in the interest of justice.39

B. FACTUAMLI STAKESA ND LEGALE RRORINS THE COAKLEY

1. Mistaken Eyewitness Identification

Marion Coakley was convicted because three eyewitnesses incorrectly identified him as the perpetrator.4 In retrospect, the eyewitnesses' testimony, which

37. Even though the polygraph instrument and test have been refined and improved since the District of Columbia Circuit Coua held in Ftye v United States, 293 F 1013 (DC Cir 1923),
that the results of polygraph examinations are inadmissible at trial because the technique was
not generally accepted in the relevant scientific community, most state courts still do not admit
polygraph evidence. Likewise, the Supreme Court, holding that the military's per se rule excluding
polygraph evidence does not violate a criminal defendant's Sixth Amendment right to present
a defense, stated that "there is simply no consensus that polygraph evidence is reliable." UnitedSiaies v Scheffer, 523 US 303, a t , 11 8 S Ct 1261, 1265 (1998).

38. See NY Crim Proc Law § 440.100 (McKinney's Consolidated Laws of NY 1994).
39. See N.Y. Crim. Proc. Law §220.10(i)(g) (McKinney Consolidated Law of N.Y. 1994).
40. Thirty years ago, in People v Wade, 388 US 218,227 (1967), the Supreme Court noted that
mistaken identifications may have been responsible for more miscarriages of justice than any
other factor. Borchard attributes at least 29 erroneous convictions to mistaken eye-witness
identification. See Cotlvicfing the Innocent (cited note 3). Recent psychological studies have discovered
a great deal about eyewitness identification and about identification techniques. Many false
identifiers are highly sincere in their false identification and that in turn results in their being as
persuasive as eyewitnesses who have made accurate identifications. Gary L. Wells, et al, Acmraq,
Cotlfinence and Juror Percqtions in Eyewitness Idetrt$cahn, 64 J Applied Psycho1 440 (1979). Re-

persuaded the jury to convict, seems particularly unreliable since each of the witnesses had a limited opportunity to observe the perpetrator. From the moment he broke into the motel room, the stranger instructed his victims, at gunpoint, not to look at him. During much of the incident, Ms. Delgado was forced to wear a bath-size towel over her face and head. Moreover, the only light in the motel room emanated from the video image on the television screen. Consequently, up until the time that the stranger and Ms. Delgado got into her car, Ms. Delgado only saw the stranger's face "a couple of times."

While driving in the car, Ms. Delgado remembered looking at the man's face in the reflection of the rear-view mirror, as he adjusted it, and being scared when his eye caught hers. From that point on, throughout the entire drive to her apartment, Ms. Delgado was too frightened to look at the stranger again.

Mr. Rios, who was the first to identify Mr. Coakley's photograph from the police trays, only glimpsed the stranger from behind the doorway of Ms. Vargas's apartment Mr. Vargas was locked in a closet for a good part of the incident

2. Non-disclosure of Evidence Helpful to the Accused

Evidence which might have caused the jury to think more skeptically about the strength of the eyewitnesses' testimony was not revealed to defense counsel. Just four days after the crime, Mr. Vargas and Ms. Delgado hired an attorney to initiate a lawsuit against the Bronx Park Motel. The $10 million suit was filed on January 26, 1984, a year and a half before Mr. Coakley's criminal trial began. When the criminal trial started, discovery in the civil suit was well under way, and Ms. Delgado had been examined by a psychiatrist hired by the civil defendant The District Attorney's office and the police knew about the civil suit before and during the trial, but nonetheless failed to disclose this to the defense.

When they testified against Mr. Coakley, Ms. Delgado and Mr. Vargas knew that the motel management was claiming as a defense to their civil suit that no rape or forced enty had ever occurred and that the whole incident was a pretext to sue the moteL Mr. Vargas and Ms. Delgado expressed concern in a private conversation with the police, prior to their testifying at the criminal bial, that the outcome of the criminal case might affect their civil suit In she* the pending $10 million civil suit provided Delgado and Vargas with what they perceived to be a huge stake in the outcome of the criminal case. The jury never knew about searchers have found that the human mind is so suggestive that memories can even be implanted.

See general&, Elizabeth F. Loftus and James M. Doyle, Eyem'tness Testimoy: Civil and Criminal3d Edition 1997 referring particularly to Stephen J. Ceci and Maggie Bruck, SuggestiIn'lify ofthe Child Witness: A AHorical Review and Synthe*, 113 Psychol L Bull 403 (1993), and Luus, C.A.E. & Wells, G.L. The Malleability of Eyewitness Confidence: Co-m'tness and Perseverance Ef jcfs, 79 J. Applied Psychol. 719-724 (1995). Beginning to doubt the reliability of eyewitness testimony, federal courts have become more receptive to admitting expert testimony on the subject of eyewitness identification. United States Brien, 59 F3d 274 (1st Cir 1995), and United States v Rincon, 28 F3d 921 (9th Cir 1994), where the First and Ninth Circuits, although affirming lower court decisions excluding expert testimony, held that there might be occasions where such testimony would be admissible.

the interest these victims had in the outcome of the criminal prosecution, nor could it weigh the effect such an interest would have had on the apparent certainty of their identification or their overall credibility as witnesses.'"

Moreover, in a psychiatric evaluation conducted pursuant to her civil suit, Delgado revealed that she had been seeing a psychiatrist prior to the raperobbery and that, as a result of the rape, she had experienced severe emotional trauma and psychological shock. She was confmed to her bed for three weeks and to her home for four months. For the two years preceding trial and during the trial itself, Delgado was being medicated due to her psychological problems. Significantly, she revealed to the doctor that whenever she saw other blacks on the street, she thought they looked just like the perpetrator.

The defense was never informed, and so the jury never learned, that another witness, Edith Thompson, a chambermaid at the Bronx Park Motel, reported seeing a person fitting the description of the perpetrator and failed to select Mr. Coakley's photograph out of an array that was shown to her the night of the crime. Ms. Vargas and Mr. Delgado are light-skinned Hispanics and the perpetrator

they described was a dark-skinned black. Edith Thompson, on the other hand, is black.42

3. Incomplete Police Investigation

Additionally, evidence that pointed to suspects other than Mr. Coakley was not pursued by the police. For example, Olga Delgado testified that she remembered the stranger's adjusting the rearview mirror of her car as he drove her home. When the car was recovered, the police carefully dusted it for prints. A palm print was lifted from the rear view mirror. The police never compared this print with Mr. Coakley's palm, and elimination prints were never obtained. After Mr. Coakley's conviction, post-conviction counsel compared the palm print to Ms. Coakley as well as to the usual drivers of the car, Ms. Delgado and Mr. Vargas. The prints matched none of these people.

41. Eventually, the lawsuit against the motel was settled for over $100,000. (Conversation with Allen Zaroff, Esq., counsel for Olga Delgado and Gabriel Vargas, Oct 14,1998).

42. Studies show that eyewitnesses are more likely to correctly identify a person from their own racial background. This is known as the "own-race" phenomenon. In fact, "false-positives" (the positive identification of the wrong individual) occur nearly 30 percent more frequently in cross-racial identifications than in intra-racial identification. Additionally, false-positive identifications are even more likely to result when a white subject attempts to identify a black individual.

The "own-race" phenomenon has been attributed to a number of factors: including the belief by the identifiers that minority group members redy do "all look alike"; the fact that white identifiers are more likely to attribute guilt to persons of a different race; and the fact that white identifiers expect to identify a black person. Sheri Lynn Johnson, Cmss RocialIdenh~cation Errors in Criminal Cases, 69 Cornell L Rev 934 (1984).

4. The Expert Witness Waffles

Finally, the jury never heard the most persuasive evidence of Marion Coakley's innocence. When Ms. Delgado was taken to the hospital after the rape, semen was found on her underwear. Since Ms. Delgado denied having had sexual intercourse with anyone else that day, only the rapist could have been the person responsible for the presence of sperm. Prior to the trial, the defense secured a court order compelling serological tests to compare blood type groupings from Mr. Coakley with the groupings from the semen stains. Tests were conducted by Dr. Robert Shaler, who was then the Director of Serology at the New York City Medical Examiner's Office. The results of the comparison showed that Mr. Coakley was a type A .secretor and that only type B was present in the rape kit

sample. In a report prepared prior to trial, Dr. Shaler concluded that Mr. Coakley "could not be the donor of the semen."43

Unfortunately for Mr. Coakley, before the trial was scheduled to commence, Dr. Shaler decided that he was no longer completely certain that the tests conclusively excluded Mr. Coakley. Dr. Shaler worried that if Mr. Coakley were a low-level secretor, he might secrete so little blood group substance into his semen as to render it undetectable. In an effort to be cautious, Dr. Shaler informed that c o w at a pre-trial hearing, that he wanted to perform additional tests to determine the range of Mr. Coakley's secretion levels, particularly because, as of that date, there were no scientific studies publishing variation in ranges of secretion levels. The trial court ruled that no adjournment for additional tests would be granted and precluded all serological evidence.

Post-conviction, additional serological tests were conducted on multiple semen samples &om Mr. Coakley. These tests conclusively showed that Mr. Coakley always secreted sufficient amounts of blood group A so that if he had been the rapist, type A substance would have been present Moreover, two studies were published in the year following the trial which demonstrated that the variation in blood group substance secretion levels are relatively small. The additional test coupled with the publication of the new scientific studies led Dr. Shaler to conclude to a reasonable degree of medical certainty that Mr. Coakley could not have been the donor of the semen. If the court had granted an adjournment for the additional tests pre-trial, Marion Coakley might well have been acquitted44

43. Exclusion tests did not have to be conducted on Mr. Vargas because Ms. Delgado and Mr. Vargas had not engaged in sexual intercourse prior to the attack

44. Other non-evidentiary factors conspired to make it more difficult for Mr. Coakley to establish his innocence. He is slightly mentally impaired and thus unable to express himself as dearly as others. Also, he had been arrested before, and in New York State a defendant who elects to testify on his own behalf can be cross-examined about a prior record, unless the trial judge makes a pre-trial determination precluding the prosecutor from inquiring about it. Generally, trial judges limit questioning about the underlying nature of the charges, while permitting prosecutors to ask an accused whether he has ever been convicted of any felony, People v Berm+ 414 NYS 2d 645 (Sup Ct NY Cty 1979)- This compromise ruling normally dissuades defendants from taking the stand. In any event Mr. Coakley did not t e s q on his own behalf at trial.