

440 motion sample

[Court Type] of the State of New York

[County]: PART __

The People of the State of New York,

— against —

[Defendant Full Name],

Defendant-Petitioner.

Ind. No. _____

Affirmation in Support of Motion to
Vacate the Judgment of Conviction

[Attorney], an attorney duly admitted to practice law in the courts of the State of New York, herby affirms under penalty of perjury:

1. I am a [position in office/firm], and I represent [Defendant full name] on a motion to vacate the judgment of conviction in the above-captioned case. *See* Ex. 1 (Order of Assignment), at A. 1.[\[1\]](#)
2. On [date], [Mr./Ms. Client] was convicted, after a [bench/jury] trial, of [e.g., one count of (offense), N.Y. Penal Law § _____, and one count of (offense), N.Y. Penal Law § _____]. [Client] was sentenced [e.g., as a second felony/second violent felony/persistent violent felony offender] to [a determinate/an indeterminate] term of [sentence (include PRS if applicable)]. *See* Ex. 2 (Sentence and Commitment Order), at A. 2. [Client] [e.g., remains incarcerated pursuant to this judgment].
3. I make this affirmation in support of [Client]’s motion to vacate the judgment of conviction, pursuant to N.Y. C.P.L. § 440.10(1)(h), on the ground that [they/she/he] was denied the right to the

effective assistance of counsel where defense counsel: [e.g., (1) failed to consult with an expert or present at trial expert testimony on _____ factors; (2) failed to intervene or object where _____; (3) failed to properly counsel [client] on _____; and (4) improperly consented to allowing in _____ evidence.] See U.S. Const. amends. VI, XIV; N.Y. Const. art. I, § 6; *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Baldi*, 54 N.Y.2d 137 (1981); see also *People v. Benevento*, 91 N.Y.2d 708 (1998); N.Y. C.P.L. § 440.10(1)(h).

4. The following exhibits are annexed hereto and made a part of the Motion to Vacate the Judgment of Conviction:

- Exhibit 1 is a copy of the Order of Assignment;
- Exhibit 2 is a copy of the Sentence and Commitment Order;
- Exhibit 3 is a copy of [e.g., Indictment No. _____];
- Exhibit 4 is a copy of [e.g., the felony complaint];
- Exhibit 5 is a copy of [e.g., an affidavit by _____ expert Dr. _____];

- Exhibit 6 is a copy of [e.g., an affidavit by Mr./Ms. Name];
- Exhibit 7 is a copy of [e.g., the affirmation of trial defense counsel _____];
- [etc.].

5. All statements of fact in this affirmation are made upon information and belief, based on a review of the record on appeal; documents received from and communications with trial defense counsel [Name]; communications with [e.g., Dr. Name, Title, Place of Work]; and communications with [Client].

6. [Client] reserves the right to supplement this motion upon the discovery of additional evidence that supports [their/her/his] legal claims.

FACTUAL AND PROCEDURAL BACKGROUND

7. [Full Name of Client] was charged, under indictment [xxxx-xxxx], of [offenses in indictment]. See Ex. 3 (Ind. No. xxxx-xxxx), at A. 3-6. The charges arose out of the [e.g., mid-day September 3,

2014 fatal shooting of (full name of decedent) in a chaotic scene in front of an apartment complex].

See Ex. 4 (Felony Complaint), at A. 7.

8. [Client] was arrested on [date] at about [time]. See Ex. __ (Grand Jury Testimony of Det. Name), at A. 8-12, after [e.g., he had been placed into a lineup and identified as the shooter by [Name, relationship of person to client, e.g., stranger]. See T. 34. A felony complaint was drafted and executed on [date]. See Ex. 4, at A. 7.
9. On [date], pre-trial hearings and trial began. See T. 81-84.
10. On [date], [Client] was convicted of [offense(s)]. On [date], [Client] was sentenced to [e.g., an aggregate term of 25 years to life in prison]. See S. 14-15.

A. Pre-Trial Proceedings

a. [e.g., Jury Trial Waiver Allocation]

11. On [date], [e.g., Justice Name questioned Client after a bench conference with counsel, as to whether Client wanted to waive a jury trial. T. 57. (Continue to fill in with facts from this proceeding—highlighting the errors by counsel and/or the court.)]

b. [e.g., The Wade Hearing]

12. On [date], during the pre-trial suppression hearing, [e.g., the prosecution presented testimony from one witness, Detective Full Name, the lead detective on the case, H. 14, who testified as to his investigation and to the identification procedures employed. Det. Name went to _____ Hospital on [date] and spoke to friends of [name of decedent/complainant] but did not receive any information about suspects. H. 16-17. (Continue to fill in with facts from this proceeding—highlighting the errors by counsel and/or the court.)]

B. Trial

13. Trial began on [date] [e.g., with testimony from a law enforcement officer. Opening statements were made on [date]. The jury/Court rendered its guilty verdict on [date], T. 594-95, and [Client] was sentenced on [date], S. 19.]

14. The prosecution presented [e.g., five] witnesses, including [e.g., Police Officer Name from the NYPD Crime Scene Unit and Police Officer Name, the first-responding officer to the scene of the crime; Name, the decedent's father; the medical examiner; and the eyewitness Ms. Name. Additionally, the prosecution and defense entered a stipulation that the four shell casings recovered from the crime scene had all been fired from the same firearm. Defense counsel did not present any evidence.]

a. [e.g., Law Enforcement Testimony]

15. Police Officer [Full Name], the first officer, [along with his/her partner,] to arrive at the crime scene, [e.g., testified to her initial observations and to the timing of the arrival of EMS. On [date], at about [time], Officer Name received a radio call of "male shot." T. 295-96. (Continue to fill in details of the relevant testimony.)]

16. [E.g., The decedent was pronounced dead at [time]. T. 422. The medical examiner testified describing the gunshot wounds suffered by Mr. [decedent's name], including a fatal gunshot wound to the left side of the chest. T. 388. (Continue to fill in details of the relevant testimony.)]

17. [E.g., Police collected physical items of evidence from the crime scene, including (the decedent's property, clothing, etc.). T. 99. Per a stipulation entered at trial, an NYPD firearms analyst would have testified that the four shell casings had been fired from the same firearm and that the deformed bullet found in the decedent's body could not be compared to the shell casings. T. 489-90. (Continue to fill in details of the relevant testimony.)]

b. [e.g., The Eyewitness's Inconsistent and Contradictory Account]

18. [e.g., [Eyewitness Name], the prosecution's only purported eyewitness, gave inconsistent testimony at trial that often contradicted her prior statements to police and to the grand jury. When confronted

with these inconsistencies, Ms. Name quibbled with the accuracy of the prior police reports and grand jury minutes calling them mistaken and wrong. *See, e.g.*, T. 199-205, 269-70; *see also* Ex. ____ (Grand Jury Testimony of Name of Witness), at A. 23-28.]

19. [Mr./Ms. Name] testified that [(fill in details of witness's account)].

c. [e.g., Defense Case]

20. At the conclusion of the prosecution's case, defense counsel [e.g., moved for a directed verdict on the ground that Ms. Name's testimony was incredible as a matter of law. T. 402. Defense counsel argued that Ms. Name's testimony did not make sense in light of Officer Name's account and that only one version could be true. T. 399-400. (Continue filling in relevant details of trial defense counsel's argument.) The Court denied defense counsel's motion. T. 412-13.]

21. After the defense rested, [e.g., having presented no evidence, defense counsel again requested a directed verdict of acquittal stating that the prosecution failed to prove all of the elements of the crime. T. 416. The Court denied the motion. T. 421.]

d. [e.g., Summations]

22. On summation, defense counsel argued that [(fill in relevant details)].

23. During the prosecutor's summation, the prosecutor [e.g., misstated key evidence relating to (fill in relevant details)].

e. [e.g., Verdict and Sentence]

24. On [date], the [jury/Court] found [Client] guilty of [offense(s)]. The court also adjudicated [Client] [e.g., a second violent felony offender]. T. 596.

25. On [date], the Court sentenced [Client] to [e.g., an indeterminate term of 25 years to life for the count of murder in the second degree and a determinate term of 15 years of incarceration and five years of post-release supervision for the count of criminal possession of a weapon in the second degree, sentences to run concurrently. S. 26.]

C. The Direct Appeal

26. [(Leave out this section if the direct appeal has not yet been perfected. However, be sure to note that the 440 Motion is being filed prior to the direct appeal in your affirmation, e.g., in paragraph 2.)] Undersigned counsel filed [Client's] direct appeal brief on [date], arguing that [e.g., the verdict was not supported by legally sufficient evidence and was against the weight of the evidence; [Client] was deprived of his right to a fair trial where the prosecutor misrepresented the evidence in summation; and the Court erred in failing to suppress the eyewitness's identifications of [Client]]. On [date], the prosecution filed its response brief. [Client's] reply brief was filed on [date]. [Their/Her/His] conviction was affirmed on [date], see *People v. Client*, XXX A.D.3d XXX (XX Dep't 2021), with leave to appeal to the Court of Appeals denied on [date], see *People v. Client*, XX N.Y.3d XXXX (2021).

D. The Instant Motion

27. [Client] respectfully requests this Court vacate the judgment of conviction, pursuant to N.Y. C.P.L. § 440.10(1)(h), on the ground that [they/she/he] was denied his right to the effective assistance of counsel. [Client's] trial counsel was ineffective under both the federal and state constitutions. See U.S. Const. amends. VI, XIV; N.Y. Const. art. I, § 6; *Strickland*, 466 U.S. at 687; *Baldi*, 54 N.Y.2d at 146; *Benevento*, 91 N.Y.2d at 713-14.
- a. [e.g., Expert Affidavit]

28. From [date through date], undersigned counsel consulted with Dr. [Name], [title at work place],[2] requesting that Dr. [Name] provide an overview and summary of psychological research on factors that [fill in details here]. *See, generally*, Ex. 5 (Dr. Name Affidavit), at A. 3-5.
29. In [their/her/his] report, Dr. [Name] underscored that [fill in big-picture conclusion here].
30. Dr. [Name] detailed that [fill in details of report and opinions here and in the following paragraphs].

b. [e.g., Client Name's Affidavit]

31. On [date], [Mr./Ms. Name] signed an affidavit for this motion. *See* Ex. 6 (Affidavit of Client), at A. 34-35. [E.g., He explained that his family retained trial defense counsel [name] to represent him for trial in this case.] [Mr./Ms. Name] further stated that:

[(Can copy sections verbatim from the affidavit if and where relevant to the grounds being raised.)]

Ex. 6 (Affidavit of Client), at A. 34-35.

c. [e.g., Trial Defense Counsel's Affirmation]

32. On [date], [Name of Trial Defense Counsel], [Client's] trial defense counsel, signed an affirmation related to [their/her/his] recollections of [their/her/his] representation of [Client] at trial. Ex. 7 (Affirmation of Attorney Name), at A. 32-33.
33. First, trial defense counsel stated that [fill in details from the affirmation or copy and paste relevant sections from the affirmation].

SUMMARY OF THE ARGUMENT

34. I make this affirmation in support of [Client's] motion to vacate the judgment of conviction on the ground that [they/she/he] was denied the right to the effective assistance of counsel. N.Y. C.P.L. §

440.10(1)(h). [Client's] trial counsel was ineffective under both the federal and state constitutions. See U.S. Const. amends. VI, XIV; N.Y. Const. art. I, § 6; *Strickland*, 466 U.S. at 687; *Baldi*, 54 N.Y.2d at 146; *Benevento*, 91 N.Y.2d at 713-14. To vacate a conviction based on ineffective assistance of counsel, a defendant must show (i) that “counsel’s performance was deficient” and (ii) that “the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. 668 at 687. The New York State Constitution requires counsel to have provided a defendant with “meaningful representation.” *People v. Baldi*, 54 N.Y.2d 137, 146 (1981). The New York State constitutional standard “offers greater protection than the federal test” because it “does not require a defendant to fully satisfy the prejudice test of *Strickland*.” *People v. Caban*, 5 N.Y.3d 143, 155 (2005) (internal quotations omitted).

35. Where defense counsel was ineffective for [their/her/his] failures to: [list errors here], [Client's] Motion to Vacate the Judgment of Conviction should be granted. See N.Y. C.P.L. § 440.10(1)(h). In the alternative, a hearing should be ordered to resolve any disputed issues of fact. See N.Y. C.P.L. § 440.30(5).

Dated: [Date]
[City], New York

Signature

[Attorney], Esq.

[Office Name]

[Office Address]

[Work Email]

[Work Phone]

[\[1\]](#) The appendix is separately bound and attached to this motion. The first volume of the appendix, which contains the exhibits to the motion, will be cited as “Ex. __, at A. __”. The transcripts of the hearings will be cited as “H. __,” the transcripts of the trial will be cited as “T. __,” and the transcripts of the sentencing proceeding will be cited as “S. __.”

[\[2\]](#) [Dr. Name] [e.g., holds a Ph.D. in psychology from the University of School (1992). (Can discuss details of work experience, including any experience testifying as an expert witness; any authoring of articles or books on topic of expertise, etc.)]. Ex. XX (CV), A. at 70.

Last updated on December 29, 2022.

[Print](#)

[Table of Contents](#)