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Statutory Overview of CPL 440.10 and 440.20

CPL 440.10: Collateral Attack on Judgment

Wrongful convictions are prevalent and involve both factually innocent people and those whose constitutional rights have been violated. In New York, over 340 people have had their convictions vacated and dismissed since 1989, which has collectively resulted in over 3,500 years of life lost to wrongful convictions (*see* Nat'l Registry of Exonerations—New York Exonerations).

CPL 440.10 motions seek post-conviction relief in New York State courts by challenging the legality of the conviction and requesting that the judgment be vacated. They generally must be used to present facts outside of the record. Thus, they are necessary in cases where the appellate record is insufficient to demonstrate a wrong suffered by the applicant.

Significantly, during the pendency of the appeal, assigned appellate counsel are now authorized by statute to investigate and, if warranted, file 440 motions, and to be compensated for such work (*see* County Law § 722 [assignment of counsel upon a criminal appeal includes authorization for representation by appellate counsel, or an attorney selected at the request of appellate counsel by the local assigned counsel program, on the 440 motion for both the preparation and the proceeding]).

I. Timing

When can a 440.10 motion be filed?

440.10 motions can be filed "[a]t any time after the entry of a judgment" (CPL 440.10 [1]). This is an unusually generous provision for movants and stands in contrast to many other state post-conviction statutes with distinct time periods for moving to vacate.

Significantly, 440.10 motions are not the same as CPL 330.30 motions to set aside a verdict. 330.30 motions must be made presentence (and thus, prejudgment), and may only be made on limited grounds. Similarly, 440.10 motions are not substitutes for direct appeals, which are limited to the facts presented in the proceedings below and contained within the record on appeal (*see* CPL 440.10 [2] [b], [c]).

440.10 motions can and often should be brought *prior* to perfecting the direct appeal. If the motion is brought prior to the direct appeal but is ultimately denied, the trial or appellate attorney can file an application for leave to appeal to the intermediate appellate court requesting to consolidate the 440 issues with the issues on direct appeal. Courts are more likely to grant leave where they can determine the 440 issues along with the direct appeal.

In most instances, 440.10 motions alleging ineffective assistance of counsel (including conflict of interest) are best brought *prior* to the direct appeal. This is because the applicant has the ultimate burden of showing the absence of trial counsel's strategic or legitimate reasons for trial decisions or failures in the proceedings below. This information, which is outside of the record, must be provided in an affirmation by trial counsel annexed to the 440.10 motion, or, where trial counsel refuses to provide an affirmation, in post-conviction counsel's 440.10 affirmation.

However, it is important to note that CPL 440.10 was modified in 2021 so that there is no longer a bar that prohibits bringing an ineffective assistance of counsel 440 motion *after* the direct appeal has been perfected (*see* CPL 440.10 [2] [c] [directing that courts may no longer deny 440.10 motions raising ineffective assistance of counsel where the appeal is over, and sufficient facts appeared in the record to raise the issue, but it was not raised]).

Claims of newly discovered evidence under CPL 440.10 (1) (g) may be made prior to or after the direct appeal but must be made with "due diligence" after the discovery of the new evidence (*see* CPL 440.10 [1] [g]).

If a 440.10 motion is filed prior to the direct appeal, counsel must ensure that the appeal remains in good standing with the intermediate appellate court while undertaking the 440 investigation and litigation.

There is no statute of limitations on filing 440.10 motions. And there is no prescribed limit to the number of 440.10 motions that may be made. Significantly though, successive 440.10 motions are disfavored by courts unless the applicant has a strong reason for not having included a particular issue in the initial motion. The court may deny a subsequent 440.10 motion where the applicant could have "raise[d] the ground or issue underlying the present motion but did not do so" (CPL 440.10 [3] [c]; *see also* CPL 440.30 [1] [a]). Thus, counsel should advise their clients to hold off on filing any pro se 440 motions prior to counsel's investigation of the case.

II. Venue

Where should an applicant bring a 440 motion?

The motion must be brought in the court in which the judgment was entered (CPL 440.10 [1]). Once the motion is filed, it will generally be assigned to the judge who presided over the proceedings below. If that judge is no longer on the bench, the court will follow its own administrative procedure to assign a new judge to preside over the matter.

III. Grounds

On what grounds can an applicant bring a 440.10 motion?

CPL 440.10 (1) lists the potential grounds for relief. These include:

CPL 440.10 (1) (a): Court lacked jurisdiction over action or person.

- Relief may be obtained where there is a facially insufficient charging instrument (*see People v Levine*, 190 AD2d 643 [1st Dept 1999] [holding that it was proper to proceed pursuant to CPL 440.10 [1] [a] where there was a conflict between federal and state banking laws depriving the state court of jurisdiction over the action]; *People v Hoffman Floor Covering Corp.*, 179 Misc 2d 656 [Crim Ct, NY County 1999] [granting motion due to insufficient accusatory instrument]).
- This issue could be raised on direct appeal; however, if it was not, this provision allows for the jurisdictional challenge to be brought at any time.
- This is a rarely used provision. More often, convicted individuals will seek state habeas corpus relief, which has the advantage of being filed in the jurisdiction where the individual is being held, not the court where judgment was entered.

CPL 440.10 (1) (b): Judgment procured through duress, misrepresentation, or fraud on the part of the court or prosecutor.

- Relief may be obtained where the applicant sufficiently alleges prosecutorial or judicial wrongdoing that affected the verdict or induced the plea (*see People v Valerio*, 176 AD3d 1625 [4th Dept 2019] [vacating the judgment and holding that the reduction of the applicant's preexisting sentence for prior offense nullified the benefit promised by the court, which was material to the decision to plead guilty]; *People v Seeber*, 94 AD3d 1335 [3d Dept 2012] [finding that a police forensic scientist's overstatements in a forensic report regarding fibers found on the victim's mouth and gloves worn by the defendant was a misrepresentation by an individual acting on behalf of the prosecution and warranted vacatur of the guilty plea]).

- This provision is mostly used with pleas. And any claim that a guilty plea was induced by coercion can be refuted by a record that shows that the applicant entered a knowing, intelligent, and voluntary plea. Thus, the applicant must provide evidence in the 440.10 motion showing that he pleaded guilty because of the court or prosecutor's misrepresentations (*see Santobello v New York*, 404 US 257 [1971] [holding that a guilty plea induced by an unfulfilled promise should be vacated, or the promise honored]).
- Even though 440.10 (1) (b) specifically addresses fraud on the part of the court or prosecution, this provision has also been used to vacate the judgment where defense counsel was not qualified to practice law and represent the defendant (*see People v Williams*, 140 Misc 2d 136 [Sup Ct, Queens County 1988] [defense attorney improperly presented himself as a properly admitted attorney when he had, in fact, been disbarred]).

CPL 440.10 (1) (c): Material evidence adduced at the trial resulting in judgment was false and was, prior to the entry of the judgment, known by the prosecutor or court to be false.

- To prevail on a motion under this provision, the applicant must provide actual evidence of the prosecutor's or court's knowledge that material testimony was false. Furthermore, if the challenged testimony was struck from the record, the applicant must demonstrate that this remedy was inadequate.
- This provision is most often invoked where a cooperating witness who was given promises of leniency testifies that he did not receive such promises (*see People v Savvides*, 1 NY2d 554 [1956] [seminal case holding that the prosecutor should have corrected the witness' false testimony to expose that he "had reason to expect lenient treatment for continued cooperation"]).
- This provision may also be asserted more generally regarding the false presentation of evidence by the prosecution (*see People v Vernon*, 136 AD3d 1276 [4th Dept 2016] [remitting where the court below failed to explicitly rule on the applicant's claim that "the prosecutor knowingly presented evidence he knew to be false in the form of the grand jury testimony of the witness who refused to testify"]).

CPL 440.10 (1) (d): Material evidence adduced by the prosecution at the trial resulting in the judgment was procured in violation of the applicant's constitutional rights.

- Under this provision, the applicant may claim any of the following: the prosecution elicited a tainted in-court identification; the applicant's out-of-court statements were illegally introduced into evidence; illegally seized evidence was improperly introduced into evidence; and testimony of codefendants was improperly admitted against the applicant, as well as other constitutional claims that address the affirmative introduction of

illegal evidence (*see People v Ellsworth*, 131 AD2d 109 [3d Dept 1987] [vacating the judgment pursuant to the applicant's motion under 440.10 (1) (d) and (1) (h) where counsel was ineffective for failing to request a *Mapp* hearing, and finding merit in the applicant's claim that the evidence seized from him should have been suppressed]).

CPL 440.10 (1) (e): During the proceedings resulting in the judgment, the applicant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings.

- A claim of mental infirmity may be raised with respect to the trial, the plea, or the sentence (*see People v Cartagena*, 92 AD2d 901 [2d Dept 1983] [vacating the guilty plea and remitting where the defendant's presentence report and statement at sentencing should have "alerted the court to the possibility that the defendant was an 'incapacitated person'"]).
- A hearing into a claim under 440.10 (1) (e) must be ordered if there is a reasonable basis to conclude that the applicant was incompetent (*see People v Adamo*, 174 AD3d 1228 [3d Dept 2019] [remitting and ordering a hearing under CPL 440.10 (1) (e) in an attempted murder case where the applicant demonstrated that he was suffering from mental health issues and provided proof that he had a genetic deficiency that negatively affected his ability to metabolize antidepressant and antipsychotic medications]). Submission of psychiatric reports may provide sufficient indicia of incompetence (*see id.*).

CPL 440.10 (1) (f): Improper and prejudicial conduct not appearing in the record occurred during trial, which, if it had appeared in the record, would have required a reversal on appeal.

- This provision encompasses many types of claims and may overlap with other provisions of the statute. While the provision appears broad, it is limited by its own terms, including that it only applies to trial cases and issues with reversible consequences (*see e.g. People v Colon*, 13 NY3d 343 [2009] [vacating judgment where the prosecution failed to disclose the extent to which it assisted a witness in exchange for her testimony, including assisting with the relocation of her grandparents by contacting NYCHA]).
- *Rosario* claims are most appropriately raised under this provision since it is applicable to improper and prejudicial conduct (*see People v Banch*, 80 NY2d 610 [1992] [remitting case to trial court for a new suppression hearing and trial based on *Rosario* violations]; *People v Jackson*, 78 NY2d 638, 647, 649 [1991] [remitting case for 440 hearing and finding that to prevail under 440.10 (1) (f) the applicant "raising a *Rosario* claim by way of (440 motion) must make a showing of prejudice" by demonstrating "a reasonable possibility that the failure to disclose the *Rosario* material contributed to the verdict"]; *People v White*, 200 AD2d 351 [1st Dept 1994]

[reversing murder convictions and remanding for a new suppression hearing and trial based on the prosecution's *Brady* and *Rosario* violations]).

- Relief may be obtained where evidence supports claims concerning juror misconduct or misconduct of court officials or third parties with respect to the jury (*see People v Southall*, 156 AD3d 111 [1st Dept 2017] [reversing conviction where a juror's failure to disclose her application to the New York County District Attorney's Office deprived the defendant of a fair trial]; *People v Cephus*, 224 AD2d 706 [2d Dept 1996] [reversing conviction because juror failed to disclose that his son was an employee of the Kings County District Attorney's Office, knowing that his qualifications as a juror might have been challenged if he had made such disclosure]).

CPL 440.10 (1) (g): New evidence discovered since judgment based on verdict after trial, which could not have been produced at trial with due diligence and which creates a probability that the verdict would have been more favorable.

- A motion on this ground must be made with due diligence after discovery of new evidence (CPL 440.10 [1] [g]; *see People v Tankleff*, 49 AD3d 160 [2d Dept 2007] [vacating murder convictions and finding that the due diligence requirement should be measured against the applicant's available resources and the practicalities of the particular situation]).
- This provision only applies to trial convictions; it is unavailable to applicants who pleaded guilty (CPL 440.10 [1] [g]).
- To obtain relief, new evidence must: (1) be such that it will probably change the result of a new trial; (2) have been discovered since the trial; (3) be such that it could not have been discovered before the trial with due diligence; (4) be material to the issue; (5) not be cumulative; and (6) not be merely impeaching or contradicting (*see People v Salemi*, 309 NY 208 [1955] [seminal case listing factors that must be met for evidence to qualify as newly discovered]; *see also People v Fields*, 66 NY2d 876 [1985] [affirming order vacating conviction on ground of newly discovered evidence that consisted of a written statement given to the police which exculpated the applicant]; *People v Hargrove*, 162 AD3d 25 [2d Dept 2018] [affirming the decision to grant the applicant's motion to vacate after determining that evidence of prior police misconduct, if known to the court and jury, would have created a probability of a more favorable verdict]; *People v Lackey*, 48 AD3d 982 [3d Dept 2008] [vacating conviction and holding that complainant's subsequent conviction for filing a false statement was newly discovered evidence]; *People v Staton*, 224 AD2d 984 [4th Dept 1996] [remitting the matter to trial court for a 440 hearing to enable the court to assess the codefendant's credibility where his proffered testimony sought to exculpate the applicant]).
- It is implicit in the ground for vacating a judgment on new evidence that the evidence be admissible (*see People v Boyette*, 201 AD2d 490, 491 [2d

Dept 1994] [concluding that the 440 hearing court erred in vacating the judgment where the applicant failed to establish that the proffered evidence would have affected the verdict or "would even have been admissible at trial"]). Thus, inadmissible hearsay evidence will not support a newly discovered evidence claim (*see People v Thibodeau*, 31 NY3d 1155 [2018] [holding that the court did not abuse its discretion in rejecting the applicant's new evidence claim where the hearsay testimony of third-party culpability was inadmissible at trial under the exception for declarations against penal interest]).

CPL 440.10 (1) (g-1): Forensic DNA testing of evidence since entry of a judgment: (1) in the case of an applicant convicted after a guilty plea; or (2) in the case of an applicant convicted after a trial.

- Under this provision, based on DNA results, an applicant who has pleaded guilty must demonstrate a "substantial probability" that he is "actually innocent" (CPL 440.10 [1] [g-1]). In contrast, an applicant convicted after trial is held to the lesser standard that there is a "reasonable probability that the verdict would have been more favorable" (*id.*).
  - CPL 440.30 (1-a) provides the mechanism to request DNA testing on physical items of evidence in the case. The court must grant this application if there is a "reasonable probability that the verdict would have been more favorable" had the evidence been tested and the results been admitted at trial (CPL 440.30 [1-a] [a] [1]).
  - An applicant has an appeal as of right to the intermediate appellate court from a trial court's order denying a request for DNA testing (CPL 450.10 [5]).
- But if DNA testing is granted, and the motion under this provision is denied, the applicant must proceed by filing an application for leave to appeal to the intermediate appellate court in the same vein as for all CPL 440.10 motion denials.
- In a trial case, "[w]hile a defendant needs to show more than a mere possibility that the verdict would have been more favorable to him, he does not have to establish a virtual certainty that there would have been no conviction without the DNA evidence" (*People v Hicks*, 114 AD3d 599 [1st Dept 2014] [vacating conviction on DNA evidence]; *see also People v Robinson*, 214 AD3d 904 [2d Dept 2023] [vacating the judgment and remitting where "while not a 'virtual certainty,' there existed a reasonable probability that the verdict would have been more favorable to the defendant had the DNA evidence been admitted at trial"]; *People v White*, 125 AD3d 1372 [4th Dept 2015] [vacating conviction after DNA testing excluded applicant as source of DNA found in rape kit]).

CPL 440.10 (1) (h): The judgment was obtained in violation of the applicant's state or federal constitutional rights.

- This is a very broad provision that is used regularly for assorted claims, and particularly for ineffective assistance of counsel, *Brady*, due process, and actual innocence claims.
- Ineffective Assistance of Counsel Claims: A CPL 440.10 (1) (h) motion is the main vehicle for raising ineffective assistance of trial counsel claims. Both the federal and state constitutions guarantee every criminal defendant the right to the effective assistance of counsel. Under the federal standard, a defendant is entitled to reversal if he establishes that counsel's performance fell below an "objective standard of reasonableness" and that it prejudiced his case, i.e. "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different" (*Strickland v Washington*, 466 US 668 [1984]). New York law requires courts to determine whether counsel's performance "viewed in totality" amounted to "meaningful representation" (*People v Benevento*, 91 NY2d 708 [1998]; *People v Baldi*, 54 NY2d 137 [1981]) and considers the "cumulative effect" of the errors (*People v Wright*, 25 NY3d 769 [2015]).
    - Appellate courts are reluctant to consider ineffective assistance of counsel claims on direct appeal since counsel's strategic decision making is often not apparent from the record (see *People v Rivera*, 71 NY2d 705 [1988] [affirming the convictions and concluding that "it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure to request a particular hearing"]). There are exceptions to this rule, such as where a blunder cannot be explained away as a rational strategic choice (*see People v Brown*, 45 NY2d 852 [1978]), or where counsel has stated on the record the reason for his strategic choices (*see People v Nesbitt*, 20 NY3d 1080 [2013]).
    - In 2021, CPL 440.10 was modified so that courts may no longer deny 440.10 motions raising ineffective assistance of counsel claims where: the appeal is not perfected or is pending, and sufficient facts appear in the record to raise the issue; or, the appeal is over, and sufficient facts appeared in the record to raise the issue, but it was not raised (CPL 440.10 [2] [b], [c]).
- *Brady* Claims: The prosecution's failure to comply with its *Brady* obligation—to provide to defendants all information in its possession or control that is exculpatory to guilt—violates a defendant's state and federal rights to due process (*Brady v Maryland*, 373 US 83 [1963]). New York and federal courts employ different constitutional standards of materiality. Under the federal standard, there must be a reasonable *probability* that the failure to disclose affected the outcome of the proceedings (*see United States v Bagley*, 473 US 667 [1985]). Under the New York standard, where defense counsel specifically requested the undisclosed evidence, there need only be a reasonable *possibility* that failure to disclose contributed to the verdict of

guilt (*see People v Vilardi*, 76 NY2d 67 [1990]); however, there must be a reasonable probability where the request was not made.

- Actual Innocence Claims: Actual innocence as a freestanding claim, not dependent on newly discovered evidence, has been recognized in all the Appellate Division Departments (*see People v Hamilton*, 115 AD3d 12 [2d Dept 2014]; *People v Jimenez*, 142 AD3d 149 [1st Dept 2016]; *People v Mosley*, 155 AD3d 1124 [3d Dept 2017]; *People v Pottinger*, 156 AD3d 1379 [4th Dept 2017]).
    - The standard for obtaining a 440 hearing on an actual innocence claim is a fairly low bar—a prima facie showing of actual innocence, which is "a sufficient showing of possible merit to warrant a fuller exploration by the court" (*Jimenez*, 142 AD3d at 155-56; *Hamilton*, 115 AD3d at 27).
    - The standard for proving actual innocence, however, is higher. Actual innocence must be proven with clear and convincing evidence, which was not presented at trial (*see People v Velazquez*, 143 AD3d 126 [1st Dept 2016]; *Hamilton*, 115 AD3d at 27).
    - Significantly, actual innocence cannot be raised where the applicant pleaded guilty (*see People v Tiger*, 32 NY3d 91 [2018] [holding that actual innocence is not a ground for relief after a guilty plea because "a voluntary guilty plea is inconsistent with a claim of factual innocence"). In *Tiger*, the Court of Appeals left open the issue of whether actual innocence claims exist in trial cases (*see id.* at 103 n 9).

CPL 440.10 (1) (i): The judgment is a conviction where the applicant's participation in the offense was a result of having been a victim of human trafficking.

- This provision is also known as The Survivors of Trafficking Attaining Relief Together Act (START Act). To obtain relief, the movant must demonstrate by a preponderance of the evidence that her "participation in the offense was a result of having been a victim of . . . trafficking," pursuant to Penal Law §§ 230.34, 230.34-a, 135.35, 135.37, and 230.33, or under the Trafficking Victims Protection Act (USC, title 22, ch 78).
    - CPL 440.10 (1) (i) previously required that the at-issue conviction stem from a sex work-related arrest offense; this limitation was removed on November 16, 2021, when the START Act was signed into law.
- Official documentation of the applicant's status as a victim of trafficking, while not required, will create the presumption that the applicant's participation in the offense was a result of having been a victim of trafficking (CPL 440.10 [1] [i] [i]). A motion under this provision will be confidential (CPL 440.10 [1] [i] [ii]). And, upon the consent of all parties, the court may consolidate a motion under this provision into one proceeding to vacate judgments imposed by multiple courts (CPL 440.10 [1] [i] [iii]).

- If the court grants the motion on this provision, it must vacate the judgment "on the merits" and dismiss the accusatory instrument and "may take such additional action as is appropriate in the circumstances" (CPL 440.10 [6]).

CPL 440.10 (1) (j): The judgment is a misdemeanor conviction entered prior to April 12, 2019 that was obtained in violation of the applicant's state or federal constitutional rights with a rebuttable presumption that, due to ongoing immigration consequences, the conviction was obtained illegally.

- This provision provides a remedy in cases in which a noncitizen was sentenced before April 12, 2019 to any New York State A misdemeanor or unclassified misdemeanor that has immigration consequences.
- In 2019, the statute was amended, and this provision establishes two rebuttable presumptions of unconstitutionality with respect to a conviction of a class A or unclassified misdemeanor entered prior to April 12, 2019. First, if the judgment of conviction was by guilty plea, there is a rebuttable presumption that the plea was not knowing, voluntary, and intelligent due to "ongoing collateral consequences, including potential or actual immigration consequences" (CPL 440.10 [1] [j]). Second, if the judgment of conviction was by verdict, there is a rebuttable presumption that the judgment "constitutes cruel and unusual punishment" under Article 1, Section 5 of the New York Constitution (*id.*).
- The 2019 amendment also created newly added CPL 440.10 (9) to provide for remedies specific to vacaturs under the rebuttable presumptions in CPL 440.10 (1) (j). Upon granting of the motion, the court may either: "(a) With the consent of the people, vacate the judgment or modify the judgment by reducing it to one of conviction for a lesser offense; or (b) Vacate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant in accordance with the amendatory provisions of" Penal Law § 70.15 (1-a), which automatically reduces sentences of one year to 364 days (CPL 440.10 [9]).

CPL 440.10 (1) (k): The judgment occurred prior to the changes in New York's controlled substances laws and is a conviction for a marijuana offense with a rebuttable presumption that, due to ongoing immigration consequences, the conviction was obtained illegally.

- This provision provides a remedy to vacate marijuana-related convictions with immigration consequences. For such offenses, "the court shall presume that a conviction by plea . . . was not knowing, voluntary and intelligent if it has severe or ongoing consequences, including but not limited to potential or actual immigration consequences, and shall presume that a conviction by verdict . . . constitutes cruel and unusual punishment" under Article 1, Section 5 of the New York Constitution (CPL 440.10 [1] [k]).

- If the court grants the motion on this provision, it must vacate the judgment and dismiss the accusatory instrument and "may take such additional action as is appropriate in the circumstances" (CPL 440.10 [6]).

IV. Procedural Bars and Obstacles

What are the mandatory procedural bars?

CPL 440.10 (2) sets forth mandatory procedural bars to prevent a motion to vacate from being used as a substitute for a direct appeal. A motion *must be denied* where:

- The ground or issue was previously determined on appeal, unless there has been a retroactive change in the law since the appellate decision (CPL 440.10 [2] [a]);
- The judgment is, at the time of the motion, appealable or pending appeal and sufficient facts appear in the record on the ground or issue to permit appellate review, *unless the issue raised upon such motion is ineffective assistance of counsel* (CPL 440.10 [2] [b] [provision modified in 2021 to exempt 440.10 motions premised on IAC from dismissal]);
- Although sufficient facts appear in the record, there has been no appellate review due to the applicant's unjustifiable failure to take or perfect an appeal or raise the issue on an already perfected appeal, *unless the issue raised upon such motion is ineffective assistance of counsel* (CPL 440.10 [2] [c] [provision modified in 2021 to exempt 440.10 motions premised on IAC from dismissal]);
- The ground or issue relates only to the sentence and not to the validity of the conviction (CPL 440.10 [2] [d]).

What are the discretionary procedural obstacles?

The statute, pursuant to CPL 440.10 (3), also sets forth the following circumstances where a motion *may be denied* (but the court may grant the motion in its discretion "in the interest of justice and for good cause shown" if it is "otherwise meritorious"):

- Although facts in support of the ground or issue could with due diligence have been made to appear in the record to permit appellate review, the applicant unjustifiably failed to adduce such matter prior to the sentence, and the issue was not determined on appeal; however, this provision does not apply to the deprivation of the right to counsel or the court's failure to advise the applicant of such right (CPL 440.10 [3] [a]);
- The ground or issue has previously been determined on the merits in a proceeding by another court—New York state court or federal court—other than on direct appeal, unless there has been a retroactive change in the law on the issue (CPL 440.10 [3] [b]);
- Upon a previous 440.10 motion, the applicant could have raised the ground or issue but failed to do so (CPL 440.10 [3] [c]; *see also* CPL 440.30 [1] [a] [stating

that "a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he or she intends to challenge the judgment or sentence"]).

- Due to this provision, it is essential for counsel to raise all viable 440 claims in the initial motion and to advise clients to hold off on filing pro se 440 motions prior to counsel's investigation of the case.

V. Procedure for Determination of CPL 440 Motions

What is the form of the motion?

A 440 motion must be made "in writing and upon reasonable notice to the people" (CPL 440.30 [1] [a]). It should include a notice of motion; an affirmation that is numbered in paragraphs that sets out the statement of facts and annexes relevant documents and affidavits to the motion; and the legal argument, which may be set out as a memorandum of law. If the documentation provided by the applicant is voluminous, the motion may include an appendix.

The motion should raise every ground the applicant is in the position to raise, must contain "sworn allegations" of fact based on personal knowledge or on information and belief, and may contain additional documentary evidence supporting the motion (CPL 440.30 [1] [a]).

The prosecution may respond but is not required to (CPL 440.30 [1] [a]). Once "all papers of both parties have been filed" and "all documentary evidence or information" submitted, the court must determine whether the motion is determinable without a hearing "to resolve questions of fact" (*id.*).

How is a 440.10 motion determined without a hearing?

A 440.10 motion may be decided without a hearing in certain circumstances. First, if one of the procedural bars contained in CPL 440.10 [2] applies, the court *must deny* the motion; and, if one of the procedural obstacles contained in CPL 440.10 [3] applies, the court *may deny* the motion or proceed to consider the merits (CPL 440.30 [2]).

Second, upon consideration of the merits, the court *must grant* the motion without conducting a hearing if the moving papers allege a legal basis for relief supported by any necessary sworn factual allegations and the facts are conceded by the prosecution or conclusively substantiated by unquestionable documentary proof (CPL 440.30 [3]).

Finally, upon consideration of the merits, the court *may deny* the motion without conducting a hearing if: the moving papers allege no legal basis for relief (CPL 440.30 [4] [a]); the motion fails to contain sworn allegations tending to substantiate all essential facts (CPL 440.30 [4] [b]); an essential allegation of fact is conclusively

refuted by unquestionable documentary proof (CPL 440.30 [4] [c]); or an essential allegation of fact is contradicted by an official document or court record or is made solely by the applicant, and, under the circumstances, there is no reasonable possibility that such allegation is true (CPL 440.30 [4] [d]).

In ineffective assistance of counsel claims, prosecutors often argue for denial because the defense has not provided an affirmation from trial counsel explaining his strategic decisions. There is no such requirement (*see People v Mebuin*, 158 AD3d 121, 126-127 [1st Dept 2017]; *People v Bennett*, 139 AD3d 1350, 1351-1352 [4th Dept 2016]; *People v Radcliffe*, 298 AD2d 533, 534-535 [2d Dept 2002]). However, where an affirmation from trial counsel is unavailable, the 440 motion should be supported by post-conviction counsel's "affirmation detailing his conversation with trial counsel" raising any questions about counsel's performance and explaining that trial counsel "ultimately refused to submit an affirmation in support of the motion" (*People v McCray*, 187 AD3d 679, 680 [1st Dept 2020]).

When must a hearing be ordered and what are applicants' hearing rights?

If the motion is not summarily denied or granted, the court must hold a hearing (CPL 440.30 [5]). Once the applicant submits evidentiary allegations sufficient to raise an issue, a hearing should be held if "an essential fact [is] in dispute" (*People v Mackenzie*, 224 AD2d 173, 174 [1st Dept 1996] [finding that the prosecution's "bare denial" of the applicant's allegations was insufficient to deny the motion summarily]).

At the 440 hearing, the applicant has the "right to be present at such hearing but may waive such right in writing" (CPL 440.30 [5]). If an incarcerated applicant does not waive such right, then the court "must cause him to be produced" at the hearing (*id.*). In addition, indigent applicants are entitled to assigned counsel at 440 hearings (*see People v Mei Chen*, 26 AD3d 344 [2d Dept 2006]).

The defense has the burden of proving by a *preponderance of the evidence* every fact essential to support the motion (CPL 440.30 [6]).

Whether or not a hearing takes place, the court, upon determining the motion, must set forth on the record its findings of fact and conclusions of law, and the reasons for its determination (CPL 440.30 [7]).

When the court grants the motion, what are the possible remedies?

Generally, if the court grants the motion, it must vacate the judgment and either dismiss the indictment or order a new trial, or "take such other action as is appropriate in the circumstances" (CPL 440.10 [4]). If the motion was granted on the ground of newly discovered evidence and would have resulted in a conviction for a lesser offense, the court may either order a new trial, or, with the consent of the

prosecution, modify the conviction to the lesser offense and resentence the applicant (CPL 440.10 [5]). Where the court grants a new trial after vacating a trial conviction or a guilty plea and does not dismiss the indictment, the criminal action is generally restored to its pretrial status and the indictment is deemed to contain all the counts it originally contained (with certain specified exceptions) (CPL 440.10 [7], [8]).

What are the discovery obligations?

In cases where the applicant was convicted after a trial and the motion court has ordered an evidentiary hearing, CPL 440.30 (1) (b) gives the court discretion to direct the prosecution to produce or make available for inspection property in its possession or control upon a finding that such property would be probative to the determination of actual innocence. This provision is limited by concerns about the integrity of the property and public safety.

While nothing in Article 245 provides for discovery from the defense at a post-conviction 440 hearing, courts may still exercise their discretion to order discovery even without explicit statutory authority to do so. Furthermore, post-conviction counsel may wish to argue that the prosecution is under a continuing duty to disclose evidence that is favorable to the defendant (*see* CPL 245.20 [1] [k], 245.60).

Where the prosecution agrees to vacate a conviction, pursuant to CPL 440.10, it may condition a repleader on the applicant's waiver of discovery (*see* CPL 245.25 [3]; CPL 245.75 [2]).

VI. Procedure for Appellate Review

An appeal from the denial of a CPL 440 motion may be taken *only with permission* of one judge or justice of the intermediate appellate court to which the appeal is sought to be taken (CPL 450.15, 460.15).

Effective applications for leave to appeal to the intermediate appellate court are labor intensive and must include an affirmation laying out the procedural history and the statement of facts, a legal argument that is often formatted as a memorandum of law, and an appendix containing all the relevant documents from the litigation of the motion.

The case must "involve[] questions of law or fact which ought to be reviewed by the intermediate appellate court" (CPL 460.15 [1]). Thus, it is important to also raise any issues that were not addressed by the motion court (*see People v Vernon*, 136 AD3d 1276 [4th Dept 2016]).

Leave applications to the intermediate appellate court are time sensitive. "Within thirty days after service upon the defendant of a copy of the order sought to be

appealed, the defendant must make application . . . for a certificate granting leave to appeal" (CPL 460.10 [4] [a]).

If the application is granted, the appellant must "within 15 days" file a written notice of appeal along with the certificate granting leave to appeal in the court that issued the denial, except that, if the appeal is from a local criminal court where the underlying proceedings were not recorded by a court stenographer, the appellant must file either an affidavit of errors or a notice of appeal (CPL 460.10 [4] [b]).

The prosecution may appeal *as of right* 440 motion grants (CPL 450.20 [5], [6]).

CPL 440.20: Collateral Attack on Sentence

I. Upon Motion by the Applicant

An applicant may challenge a sentence under CPL 440.20 if it is "unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20 [1]). The motion may be made at any time after the entry of judgment in the court in which the applicant was sentenced (*id.*).

There are many types of sentencing issues that may be raised in a 440.20 motion, including but not limited to:

- The legality of a predicate conviction (*see People v Jurgins*, 26 NY3d 607 [2015] [vacating the "illegal determination that defendant [was] a second felony offender" based on an out-of-state predicate and remitting]; *People v Wahhab*, 205 AD3d 934 [2d Dept 2022] [affirming 440.20 grant setting aside the applicant's sentence where the prior federal conviction did not qualify as a predicate felony]; *People v Bell-Bradley*, 191 AD3d 1386 [4th Dept 2021] [reversing 440.20 denial and remitting where the issue of whether the applicant was properly sentenced as a second felony offender based on a federal conviction was not previously determined on the merits]; *People v Stinson*, 151 AD2d 842 [3d Dept 1989] [reversing 440.20 denial, setting aside sentence, and remitting for resentencing where the applicant's prior Connecticut conviction did not qualify as a predicate felony conviction]).
- The denial of the right to the effective assistance of counsel at sentencing.
- The legality of the court's determination, or lack thereof, as to whether an eligible youth will be afforded youthful offender treatment, pursuant to *People v Rudolph* (21 NY3d 497 [2013]).
- The legality of consecutive sentences and the legality of probation sentences.
- The denial of the defendant's right to speak before the imposition of the sentence (*see People v St. Clair*, 99 AD2d 982 [1st Dept 1984] [affirming judgment and finding that if defendant's right to speak at sentencing was violated, the issue would be "more properly raised" in a 440.20 motion]).

Claims that a legal sentence is harsh or excessive cannot be challenged in a 440.20 motion.

The motion court *must deny* a 440.20 motion to set aside a sentence where the ground or issue was previously determined on appeal unless there has since been a retroactive change in the law (CPL 440.20 [2]). Additionally, the court *may deny* a 440.20 motion to set aside the sentence where the ground or issue was previously determined on the merits upon a prior motion or proceeding in state court, other than an appeal, or in federal court, unless there has since been a retroactive change in the law (CPL 440.20 [3]). However, the court may grant the motion in its discretion "in the interest of justice and for good cause shown" if it is "otherwise meritorious" (*id.*).

An illegal sentence issue can be raised via a CPL 440.20 motion where the issue could have been, but was not, raised on direct appeal or where the issue was raised but was deemed unpreserved and the reviewing court declined to reach the merits in the interest of justice (*see People v Lashley*, 37 NY3d 1140, n [2021]; *People v Jurgins*, 26 NY3d 607, n 2 [2015]).

An order setting aside the sentence does not affect the validity of the underlying conviction (CPL 440.20 [4]). After entering such order, the court must resentence the applicant to a legal sentence (*id.*).

For details on seeking appellate review of an order denying a CPL 440.20 motion, refer to the earlier section entitled "Procedure for Appellate Review," which applies to all 440 motion denials.

II. Upon Motion by the Prosecution

The prosecution may, *within one year from entry of judgment*, move to set aside a sentence on the ground that it was invalid as a matter of law (CPL 440.40 [1]). However, the procedural bars that are applicable to an applicant on a post-conviction motion to set aside the sentence are also applicable to a motion by the prosecution (CPL 440.40 [2], [3]). The convicted person and the last known attorney must be notified of the motion, and the convicted person has a right to be present at any proceeding on the motion (CPL 440.40 [4]). If, as a result of the prosecution's motion, the convicted person is sentenced to a sentence more severe than the original sentence, the person's time for taking an appeal will be extended (CPL 440.40 [6]).