

# STATE OF NEW YORK

10131

## IN ASSEMBLY

May 6, 2024

Introduced by M. of A. AUBRY -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law and the judiciary law, in relation to motions to vacate judgment; and to repeal certain provisions of the criminal procedure law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The criminal procedure law is amended by adding two new  
2 sections 440.00 and 440.11 to read as follows:

3 § 440.00 Definition.

4 As used in this article, the term "applicant" means a person previous-  
5 ly convicted of a crime who is applying for relief under this article.

6 § 440.11 Motion to vacate judgment; change in the law.

7 1. At any time after the entry of a judgment obtained at trial or by  
8 plea, the court in which it was entered may, upon motion of the appli-  
9 cant, vacate such conviction upon the ground that the applicant was  
10 convicted of any offense in the state of New York which has been subse-  
11 quently decriminalized and is thus a legal nullity.

12 2. If the court grants a motion under this section, it shall vacate  
13 the conviction on the merits, dismiss the accusatory instrument, seal  
14 the conviction, and may take such additional action as is appropriate in  
15 the circumstances.

16 § 2. Section 440.10 of the criminal procedure law, paragraph (g-1) of  
17 subdivision 1 as added by chapter 19 of the laws of 2012, paragraph (h)  
18 of subdivision 1, paragraph (a) of subdivision 3 and subdivision 4 as  
19 amended and subdivisions 7 and 8 as renumbered by chapter 332 of the  
20 laws of 2010, paragraph (i) of subdivision 1 and subdivision 6 as  
21 amended by chapter 629 of the laws of 2021, paragraph (j) of subdivision  
22 1 as amended by chapter 131 of the laws of 2019, paragraph (k) of subdi-  
23 vision 1 as amended by chapter 92 of the laws of 2021, paragraphs (b)  
24 and (c) of subdivision 2 as amended by chapter 501 of the laws of 2021,  
25 and subdivision 9 as added by section 4 of part 00 of chapter 55 of the  
26 laws of 2019, is amended to read as follows:

27 § 440.10 Motion to vacate judgment.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 1. At any time after the entry of a judgment obtained at trial or by  
2 plea, the court in which it was entered may, upon motion of the [~~defend-~~  
3 ~~ant~~] applicant, vacate such judgment upon the ground that:

4 (a) The court did not have jurisdiction of the action or of the person  
5 of the [~~defendant~~] applicant; or

6 (b) The judgment was procured by duress, misrepresentation or fraud on  
7 the part of the court or a prosecutor or a person acting for or in  
8 behalf of a court or a prosecutor; or

9 (c) [~~Material evidence adduced at a trial~~] Evidence that was likely  
10 relied upon by a fact finder resulting in the judgment at trial or that  
11 was likely relied upon by any party as a basis for a plea agreement was  
12 false [~~and was, prior to the entry of the judgment, known by the prose-~~  
13 ~~cutor or by the court to be false~~]; or

14 (d) [~~Material evidence adduced by the people at a trial~~] Evidence that  
15 was likely relied upon by a fact finder resulting in the judgment at  
16 trial or that was likely relied upon by any party as a basis for a plea  
17 agreement was procured in violation of the [~~defendant's~~] applicant's  
18 rights under the constitution of this state or of the United States; or

19 (e) During the proceedings resulting in the judgment, the [~~defendant~~]  
20 applicant, by reason of mental disease or defect, was incapable of  
21 understanding or participating in such proceedings; or

22 (f) Improper [~~and prejudicial~~] conduct not appearing in the record  
23 occurred during a trial resulting in the judgment which conduct, if it  
24 had appeared in the record, would have [~~required~~] made possible a  
25 reversal of the judgment upon an appeal therefrom; or

26 (g) New evidence has been discovered [~~since the entry of a judgment~~  
27 ~~based upon a verdict of guilty after trial, which could not have been~~  
28 ~~produced by the defendant at the trial even with due diligence on his~~  
29 ~~part and which~~] or become available that, when viewed alone or with  
30 other evidence, is of such character as to create a reasonable probabili-  
31 ty that had such evidence been received at the trial or discovered  
32 prior to trial or plea agreement that the verdict or plea would have  
33 been more favorable to the [~~defendant, provided that a motion based upon~~  
34 ~~such ground must be made with due diligence after the discovery of such~~  
35 ~~alleged new evidence~~] applicant. Types of new evidence shall include,  
36 but not be limited to newly available forensic evidence or evidence that  
37 has either been repudiated by the expert who originally provided the  
38 opinion at a hearing or trial or that has been undermined by later  
39 scientific research or technological advances; or

40 (g-1) [~~Forensic DNA~~] In cases involving the forensic testing of  
41 evidence performed since the entry of a judgment, [~~(1) in the case of a~~  
42 ~~defendant convicted after a guilty plea, the court has determined that~~  
43 ~~the defendant has demonstrated a substantial probability that the~~  
44 ~~defendant was actually innocent of the offense of which he or she was~~  
45 ~~convicted, or (2) in the case of a defendant convicted after a trial,~~]  
46 the court has determined that there exists a reasonable probability that  
47 the verdict or plea offer would have been more favorable to the [~~defend-~~  
48 ~~ant~~] applicant, or the applicant would have rejected the plea offer.

49 (h) The judgment was obtained in violation of a right of the [~~defend-~~  
50 ~~ant~~] applicant under the constitution of this state or of the United  
51 States, including, but not limited to, a judgment entered, whether upon  
52 trial or guilty plea, against an applicant who is actually innocent. An  
53 applicant is actually innocent where the applicant proves by a prepon-  
54 derance of the evidence that no reasonable jury of the applicant's peers  
55 would have found the applicant guilty beyond a reasonable doubt; or

1 (i) The judgment is a conviction where the [~~defendant's~~] applicant's  
2 participation in the offense was a result of having been a victim of sex  
3 trafficking under section 230.34 of the penal law, sex trafficking of a  
4 child under section 230.34-a of the penal law, labor trafficking under  
5 section 135.35 of the penal law, aggravated labor trafficking under  
6 section 135.37 of the penal law, compelling prostitution under section  
7 230.33 of the penal law, or trafficking in persons under the Trafficking  
8 Victims Protection Act (United States Code, title 22, chapter 78);  
9 provided that

10 (i) official documentation of the [~~defendant's~~] applicant's status as  
11 a victim of sex trafficking, labor trafficking, aggravated labor traf-  
12 ficking, compelling prostitution, or trafficking in persons at the time  
13 of the offense from a federal, state or local government agency shall  
14 create a presumption that the [~~defendant's~~] applicant's participation in  
15 the offense was a result of having been a victim of sex trafficking,  
16 labor trafficking, aggravated labor trafficking, compelling prostitution  
17 or trafficking in persons, but shall not be required for granting a  
18 motion under this paragraph;

19 (ii) a motion under this paragraph, and all pertinent papers and docu-  
20 ments, shall be confidential and may not be made available to any person  
21 or public or private [~~entity~~] agency except [~~where~~] when specifically  
22 authorized by the court; and

23 (iii) when a motion is filed under this paragraph, the court may, upon  
24 the consent of the petitioner and all of the involved state [~~and~~] or  
25 local prosecutorial agencies [~~that prosecuted each matter~~], consolidate  
26 into one proceeding a motion to vacate judgments imposed by distinct or  
27 multiple criminal courts; or

28 (j) The judgment is a conviction for [~~a class A or unclassified~~] any  
29 misdemeanor entered prior to the effective date of this paragraph and  
30 satisfies the ground prescribed in paragraph (h) of this subdivision.  
31 There shall be a rebuttable presumption that a conviction by plea to  
32 such an offense was not knowing, voluntary and intelligent, based on  
33 ongoing collateral consequences, including potential or actual immi-  
34 gration consequences, and there shall be a rebuttable presumption that a  
35 conviction by verdict constitutes cruel and unusual punishment under  
36 section five of article one of the state constitution based on such  
37 consequences; or

38 (k) The judgment occurred prior to the effective date of the laws of  
39 two thousand [~~twenty-one~~] twenty-three that amended this paragraph and  
40 is a conviction for an offense as defined in [~~subparagraphs~~] subpara-  
41 graph (i), (ii), (iii) or (iv) of paragraph (k) of subdivision three of  
42 section 160.50 of this part, or a misdemeanor under the former article  
43 two hundred twenty-one of the penal law, in which case the court shall  
44 presume that a conviction by plea for the aforementioned offenses was  
45 not knowing, voluntary and intelligent if it has severe or ongoing  
46 consequences, including but not limited to potential or actual immi-  
47 gration consequences, and shall presume that a conviction by verdict for  
48 the aforementioned offenses constitutes cruel and unusual punishment  
49 under section five of article one of the state constitution, based on  
50 those consequences. The people may rebut these presumptions[~~-~~]; or

51 (l) Any offense in the state of New York that an intermediate appel-  
52 late court, court of appeals, or United States federal court with juris-  
53 isdiction over New York state law issues has deemed in violation of the  
54 constitution of this state or of the United States, or any other right  
55 under state or federal law.

1 2. Notwithstanding the provisions of subdivision one, the court [~~must~~  
2 may] deny a motion to vacate a judgment when:

3 (a) The ground or issue raised upon the motion was previously deter-  
4 mined on the merits upon an appeal from the judgment, unless since the  
5 time of such appellate determination there has been a retroactively  
6 effective change in the law controlling such issue. However, if all of  
7 the evidence currently before the court was not duly considered previ-  
8 ously by the court, the court shall grant the motion or order the hear-  
9 ing; or

10 (b) The judgment is, at the time of the motion, appealable or pending  
11 on appeal, and sufficient facts appear on the record with respect to the  
12 ground or issue raised upon the motion to permit adequate review thereof  
13 upon such an appeal unless the issue raised upon such motion is ineffec-  
14 tive assistance of counsel. This paragraph shall not apply to a motion  
15 under paragraph (i), (j), (k) or (l) of subdivision one of this section;  
16 or

17 (c) [~~Although sufficient facts appear on the record of the proceedings~~  
18 ~~underlying the judgment to have permitted, upon appeal from such judg-~~  
19 ~~ment, adequate review of the ground or issue raised upon the motion, no~~  
20 ~~such appellate review or determination occurred owing to the defendant's~~  
21 ~~unjustifiable failure to take or perfect an appeal during the prescribed~~  
22 ~~period or to his or her unjustifiable failure to raise such ground or~~  
23 ~~issue upon an appeal actually perfected by him or her unless the issue~~  
24 ~~raised upon such motion is ineffective assistance of counsel; or~~

25 (d)] The ground or issue raised relates solely to the validity of the  
26 sentence and not to the validity of the conviction. In such case, the  
27 court shall deem the motion to have been made pursuant to section 440.20  
28 of this article.

29 [~~3. Notwithstanding the provisions of subdivision one, the court may~~  
30 ~~deny a motion to vacate a judgment when:~~

31 ~~(a) Although facts in support of the ground or issue raised upon the~~  
32 ~~motion could with due diligence by the defendant have readily been made~~  
33 ~~to appear on the record in a manner providing adequate basis for review~~  
34 ~~of such ground or issue upon an appeal from the judgment, the defendant~~  
35 ~~unjustifiably failed to adduce such matter prior to sentence and the~~  
36 ~~ground or issue in question was not subsequently determined upon appeal.~~  
37 ~~This paragraph does not apply to a motion based upon deprivation of the~~  
38 ~~right to counsel at the trial or upon failure of the trial court to~~  
39 ~~advise the defendant of such right, or to a motion under paragraph (i)~~  
40 ~~of subdivision one of this section; or~~

41 ~~(b) The ground or issue raised upon the motion was previously deter-~~  
42 ~~mined on the merits upon a prior motion or proceeding in a court of this~~  
43 ~~state, other than an appeal from the judgment, or upon a motion or~~  
44 ~~proceeding in a federal court; unless since the time of such determi-~~  
45 ~~nation there has been a retroactively effective change in the law~~  
46 ~~controlling such issue; or~~

47 ~~(c) Upon a previous motion made pursuant to this section, the defend-~~  
48 ~~ant was in a position adequately to raise the ground or issue underlying~~  
49 ~~the present motion but did not do so.]~~

50 (d) Although the court may deny the motion under any of the circum-  
51 stances specified in this subdivision, in the interest of justice and  
52 for good cause shown it may in its discretion grant the motion if it is  
53 otherwise meritorious and vacate the judgment.

54 [~~4.]~~ 3. If the court grants the motion, it must, except as provided in  
55 subdivision [~~five~~] four or [~~six~~] five of this section, vacate the judg-  
56 ment, and must either:

1 (a) dismiss and seal the accusatory instrument, or

2 (b) order a new trial, or

3 (c) take such other action as is appropriate in the circumstances.

4 ~~[5-]~~ 4. Upon granting the motion upon the ground, as prescribed in  
5 paragraph (g) of subdivision one, that newly discovered evidence creates  
6 a probability that had such evidence been received at the trial the  
7 verdict would have been more favorable to the ~~[defendant]~~ applicant in  
8 that the conviction would have been for a lesser offense than the one  
9 contained in the verdict, the court may either:

10 (a) Vacate the judgment and order a new trial; or

11 (b) With the consent of the people, modify the judgment by reducing it  
12 to one of conviction for such lesser offense. In such case, the court  
13 must re-sentence the ~~[defendant]~~ applicant accordingly.

14 ~~[6-]~~ 5. If the court grants a motion under ~~[paragraph (i) or]~~ para-  
15 graph ~~[(k)]~~ (h), (i), (j), (k) or (l) of subdivision one of this  
16 section, it must vacate the judgment ~~[and]~~ on the merits, dismiss the  
17 accusatory instrument, seal the judgment, and may take such additional  
18 action as is appropriate in the circumstances. ~~[In the case of a motion  
19 granted under paragraph (i) of subdivision one of this section, the  
20 court must vacate the judgment on the merits because the defendant's  
21 participation in the offense was a result of having been a victim of  
22 trafficking-]~~

23 ~~7-]~~ 6. Upon a new trial resulting from an order vacating a judgment  
24 pursuant to this section, the indictment is deemed to contain all the  
25 counts and to charge all the offenses which it contained and charged at  
26 the time the previous trial was commenced, regardless of whether any  
27 count was dismissed by the court in the course of such trial, except (a)  
28 those upon or of which the ~~[defendant]~~ applicant was acquitted or deemed  
29 to have been acquitted, and (b) those dismissed by the order vacating  
30 the judgment, and (c) those previously dismissed by an appellate court  
31 upon an appeal from the judgment, or by any court upon a previous post-  
32 judgment motion.

33 ~~[8-]~~ 7. Upon an order which vacates a judgment based upon a plea of  
34 guilty to an accusatory instrument or a part thereof, but which does not  
35 dismiss the entire accusatory instrument, the criminal action is, in the  
36 absence of an express direction to the contrary, restored to its  
37 ~~[prepleading]~~ pre-pleading status and the accusatory instrument is  
38 deemed to contain all the counts and to charge all the offenses which it  
39 contained and charged at the time of the entry of the plea, except those  
40 subsequently dismissed under circumstances specified in paragraphs (b)  
41 and (c) of subdivision six. Where the plea of guilty was entered and  
42 accepted, pursuant to subdivision three of section 220.30, upon the  
43 condition that it constituted a complete disposition not only of the  
44 accusatory instrument underlying the judgment vacated but also of one or  
45 more other accusatory instruments against the ~~[defendant]~~ applicant then  
46 pending in the same court, the order of vacation completely restores  
47 such other accusatory instruments; and such is the case even though such  
48 order dismisses the main accusatory instrument underlying the judgment.

49 ~~[9-]~~ 8. Upon granting of a motion pursuant to paragraph (j) of subdivi-  
50 sion one of this section, the court may either:

51 (a) With the consent of the people, vacate the judgment or modify the  
52 judgment by reducing it to one of conviction for a lesser offense; or

53 (b) Vacate the judgment and order a new trial wherein the ~~[defendant]~~  
54 applicant enters a plea to the same offense in order to permit the court  
55 to resentence the ~~[defendant]~~ applicant in accordance with the amendatory  
56 provisions of subdivision one-a of section 70.15 of the penal law.

1 § 3. Section 440.20 of the criminal procedure law, subdivision 1 as  
2 amended by chapter 1 of the laws of 1995, is amended to read as follows:

3 § 440.20 Motion to set aside sentence; by [~~defendant~~] applicant.

4 1. At any time after the entry of a judgment, the court in which the  
5 judgment was entered may, upon motion of the [~~defendant~~] applicant, set  
6 aside the sentence upon the ground that it was unauthorized, illegally  
7 imposed, exceeded the maximum allowed by law, obtained or imposed in  
8 violation of the defendant's constitutional rights, or was otherwise  
9 invalid as a matter of law. Where the judgment includes a sentence of  
10 death, the court may also set aside the sentence upon any of the grounds  
11 set forth in paragraph (b), (c), (f), (g) or (h) of subdivision one of  
12 section 440.10 as applied to a separate sentencing proceeding under  
13 section 400.27, provided, however, that to the extent the ground or  
14 grounds asserted include one or more of the aforesaid paragraphs of  
15 subdivision one of section 440.10, the court must also apply [~~subdivi-~~  
16 ~~sions~~] subdivision two [~~and three~~] of section 440.10, other than para-  
17 graph [~~(d)~~] (c) of [~~subdivision two of~~] such [~~section~~] subdivision, in  
18 determining the motion. In the event the court enters an order granting  
19 a motion to set aside a sentence of death under this section, the court  
20 must either direct a new sentencing proceeding in accordance with  
21 section 400.27 or, to the extent that the defendant cannot be resen-  
22 tenced to death consistent with the laws of this state or the constitu-  
23 tion of this state or of the United States, resentence the defendant to  
24 life imprisonment without parole or to a sentence of imprisonment for  
25 the class A-I felony of murder in the first degree other than a sentence  
26 of life imprisonment without parole. Upon granting the motion upon any  
27 of the grounds set forth in the aforesaid paragraphs of subdivision one  
28 of section 440.10 and setting aside the sentence, the court must afford  
29 the people a reasonable period of time, which shall not be less than ten  
30 days, to determine whether to take an appeal from the order setting  
31 aside the sentence of death. The taking of an appeal by the people stays  
32 the effectiveness of that portion of the court's order that directs a  
33 new sentencing proceeding.

34 2. Notwithstanding the provisions of subdivision one, the court  
35 [~~must~~] may deny such a motion when the ground or issue raised thereupon  
36 was previously determined on the merits upon an appeal from the judgment  
37 or sentence, unless since the time of such appellate determination there  
38 has been a retroactively effective change in the law controlling such  
39 issue. However, if all of the evidence currently before the court was  
40 not duly considered previously by the court, the court shall not deny  
41 the motion to vacate and instead shall order a hearing or grant the  
42 motion. Even if the court has already considered all of the evidence  
43 currently before the court, the court in the interest of justice and for  
44 good cause shown may grant the motion if it is otherwise meritorious.

45 3. [~~Notwithstanding the provisions of subdivision one, the court may~~  
46 ~~deny such a motion when the ground or issue raised thereupon was previ-~~  
47 ~~ously determined on the merits upon a prior motion or proceeding in a~~  
48 ~~court of this state, other than an appeal from the judgment, or upon a~~  
49 ~~prior motion or proceeding in a federal court, unless since the time of~~  
50 ~~such determination there has been a retroactively effective change in~~  
51 ~~the law controlling such issue. Despite such determination, however,~~  
52 ~~the court in the interest of justice and for good cause shown, may in~~  
53 ~~its discretion grant the motion if it is otherwise meritorious.~~

54 4.] An order setting aside a sentence pursuant to this section does  
55 not affect the validity or status of the underlying conviction, and

1 after entering such an order the court must resentence the [~~defendant~~  
2 applicant] in accordance with the law.

3 § 4. Section 440.30 of the criminal procedure law, subdivisions 1 and  
4 1-a as amended by chapter 19 of the laws of 2012 and the opening para-  
5 graph of paragraph (b) of subdivision 1 as amended by section 10 of part  
6 LLL of chapter 59 of the laws of 2019, is amended to read as follows:

7 § 440.30 Motion to vacate judgment and to set aside sentence; procedure.

8 1. [~~(a)~~ A] An application for assignment of counsel for a motion to  
9 vacate a judgment pursuant to section 440.10 or 440.11 of this article  
10 and a motion to set aside a sentence pursuant to section 440.20 of this  
11 article must be made in writing by a pro se applicant to the judge or  
12 justice who imposed the original sentence and upon reasonable notice to  
13 the people. [~~Upon the motion, a defendant~~]

14 (a) The court shall assign defense counsel in cases where there is a  
15 colorable claim of relief according to this article, in accordance with  
16 section seven hundred twenty-two of the county law. For the purpose of  
17 this section, a colorable claim is a claim that, taking the facts  
18 alleged in the application as true and viewed in a light most favorable  
19 to the applicant, would entitle the applicant to relief.

20 (b) If the judge decides not to assign counsel, they shall state the  
21 reasons for denying the request for assignment of counsel in writing.

22 (c) If, at the time of such applicant's request for assignment of  
23 counsel, the original sentencing judge or justice no longer works in the  
24 court in which the original sentence was imposed, then the request shall  
25 be randomly assigned to another judge or justice of the court in which  
26 the original sentence was imposed.

27 (d) Applicants already represented by counsel, either appointed pursu-  
28 ant to section seven hundred twenty-two of the county law or otherwise  
29 retained, are not required to file an application for assignment of  
30 counsel.

31 2. Upon the request of the applicant or his or her defense counsel,  
32 the court shall order:

33 (a) The people to make available a copy of its file of the case,  
34 including any physical evidence in the people's possession and grand  
35 jury minutes;

36 (b) The applicant's prior trial and appellate defense counsel to make  
37 available their complete files relating to the case;

38 (c) Court clerks and probation departments to make available the court  
39 files or probation records relating to the case; and

40 (d) Any law enforcement agency involved with the case to turn over its  
41 files of the case, including police reports, witness statements,  
42 evidence vouchers, or any other relevant records or evidence at its  
43 disposal.

44 (e) The court shall further ensure that any disclosure of evidence or  
45 property ordered pursuant to this subdivision may be subject to a  
46 protective order as defined in section 245.70 of this part, where appro-  
47 priate.

48 (f) Nothing in this section shall preclude the court from conducting  
49 an in camera inspection of evidence and issuing a protective order  
50 pursuant to section 245.70 of this part at the request of the prose-  
51 cution or defense.

52 3. (a) An applicant who is in a position adequately to raise more than  
53 one ground should raise every such ground upon which he or she intends  
54 to challenge the judgment or sentence. If the motion is based upon the  
55 existence or occurrence of facts, the motion papers [~~must~~] may contain  
56 sworn allegations thereof, whether by the [~~defendant~~] applicant or by

1 another person or persons. Such sworn allegations may be based upon  
2 personal knowledge of the affiant or upon information and belief,  
3 provided that in the latter event the affiant must state the sources of  
4 such information and the grounds of such belief. The [defendant] appli-  
5 cant may further submit documentary evidence or information supporting  
6 or tending to support the allegations of the moving papers.

7 (b) The people may file with the court, and in such case must serve a  
8 copy thereof upon the [defendant] applicant or his or her counsel, if  
9 any, an answer denying or admitting any or all of the allegations of the  
10 motion papers, and may further submit documentary evidence or informa-  
11 tion refuting or tending to refute such allegations.

12 (c) After all papers of both parties have been filed, and after all  
13 documentary evidence or information, if any, has been submitted, the  
14 court must consider the same for the purpose of ascertaining whether the  
15 motion is determinable without a hearing to resolve questions of fact.

16 ~~[(b) In conjunction with the filing or consideration of a motion to  
17 vacate a judgment pursuant to section 440.10 of this article by a  
18 defendant convicted after a trial, in cases where the court has ordered  
19 an evidentiary hearing upon such motion, the court may order that the  
20 people produce or make available for inspection property in its  
21 possession, custody, or control that was secured in connection with the  
22 investigation or prosecution of the defendant upon credible allegations  
23 by the defendant and a finding by the court that such property, if  
24 obtained, would be probative to the determination of defendant's actual  
25 innocence, and that the request is reasonable. The court shall deny or  
26 limit such a request upon a finding that such a request, if granted,  
27 would threaten the integrity or chain of custody of property or the  
28 integrity of the processes or functions of a laboratory conducting DNA  
29 testing, pose a risk of harm, intimidation, embarrassment, reprisal, or  
30 other substantially negative consequences to any person, undermine the  
31 proper functions of law enforcement including the confidentiality of  
32 informants, or on the basis of any other factor identified by the court  
33 in the interests of justice or public safety. The court shall further  
34 ensure that any property produced pursuant to this paragraph is subject  
35 to a protective order, where appropriate. The court shall deny any  
36 request made pursuant to this paragraph where:~~

37 ~~(i) (1) the defendant's motion pursuant to section 440.10 of this  
38 article does not seek to demonstrate his or her actual innocence of the  
39 offense or offenses of which he or she was convicted that are the  
40 subject of the motion, or (2) the defendant has not presented credible  
41 allegations and the court has not found that such property, if obtained,  
42 would be probative to the determination of the defendant's actual inno-  
43 cence and that the request is reasonable;~~

44 ~~(ii) the defendant has made his or her motion after five years from  
45 the date of the judgment of conviction; provided, however, that this  
46 limitation period shall be tolled for five years if the defendant is in  
47 custody in connection with the conviction that is the subject of his or  
48 her motion, and provided further that, notwithstanding such limitation  
49 periods, the court may consider the motion if the defendant has shown:  
50 (A) that he or she has been pursuing his or her rights diligently and  
51 that some extraordinary circumstance prevented the timely filing of the  
52 motion; (B) that the facts upon which the motion is predicated were  
53 unknown to the defendant or his or her attorney and could not have been  
54 ascertained by the exercise of due diligence prior to the expiration of  
55 the statute of limitations; or (C) considering all circumstances of the  
56 case including but not limited to evidence of the defendant's guilt, the~~

~~1 impact of granting or denying such motion upon public confidence in the  
2 criminal justice system, or upon the safety or welfare of the community,  
3 and the defendant's diligence in seeking to obtain the requested proper-  
4 ty or related relief, the interests of justice would be served by  
5 considering the motion;~~

~~6 (iii) the defendant is challenging a judgment convicting him or her of  
7 an offense that is not a felony defined in section 10.00 of the penal  
8 law; or~~

~~9 (iv) upon a finding by the court that the property requested in this  
10 motion would be available through other means through reasonable efforts  
11 by the defendant to obtain such property.~~

~~12 1-a.] 4. (a) [(1)] Where the [defendant's] applicant's motion requests  
13 the performance of a forensic DNA test on specified evidence, and upon  
14 the court's determination that any evidence containing deoxyribonucleic  
15 acid ("DNA") was secured in connection with the trial or the plea  
16 resulting in the judgment, the court shall grant the application for  
17 forensic DNA testing of such evidence upon its determination that [if a]  
18 had the DNA test [~~had~~] results been [~~conducted on such evidence, and if~~  
19 ~~the results had been admitted in the trial resulting in the judgment,~~  
20 available at the time of trial or plea, there [~~exists~~] is a reasonable  
21 probability that the verdict would have been more favorable to the  
22 [defendant] applicant.~~

~~23 [(2) Where the defendant's motion for forensic DNA testing of speci-  
24 fied evidence is made following a plea of guilty and entry of judgment  
25 thereon convicting him or her of: (A) a homicide offense defined in  
26 article one hundred twenty five of the penal law, any felony sex offense  
27 defined in article one hundred thirty of the penal law, a violent felony  
28 offense as defined in paragraph (a) of subdivision one of section 70.02  
29 of the penal law, or (B) any other felony offense to which he or she  
30 pled guilty after being charged in an indictment or information in supe-  
31 rior court with one or more of the offenses listed in clause (A) of this  
32 subparagraph, then the court shall grant such a motion upon its determi-  
33 nation that evidence containing DNA was secured in connection with the  
34 investigation or prosecution of the defendant, and if a DNA test had  
35 been conducted on such evidence and the results had been known to the  
36 parties prior to the entry of the defendant's plea and judgment thereon,  
37 there exists a substantial probability that the evidence would have  
38 established the defendant's actual innocence of the offense or offenses  
39 that are the subject of the defendant's motion; provided, however, that:~~

~~40 (i) the court shall consider whether the defendant had the opportunity  
41 to request such testing prior to entering a guilty plea, and, where it  
42 finds that the defendant had such opportunity and unjustifiably failed  
43 to do so, the court may deny such motion; and~~

~~44 (ii) a court shall deny the defendant's motion for forensic DNA test-  
45 ing where the defendant has made his or her motion more than five years  
46 after entry of the judgment of conviction, except that the limitation  
47 period may be tolled if the defendant has shown: (A) that he or she has  
48 been pursuing his or her rights diligently and that some extraordinary  
49 circumstance prevented the timely filing of the motion for forensic DNA  
50 testing; (B) that the facts upon which the motion is predicated were  
51 unknown to the defendant or his or her attorney and could not have been  
52 ascertained by the exercise of due diligence prior to the expiration of  
53 this statute of limitations; or (C) considering all circumstances of the  
54 case including but not limited to evidence of the defendant's guilt, the  
55 impact of granting or denying such motion upon public confidence in the  
56 criminal justice system, or upon the safety or welfare of the community,~~

~~1 and the defendant's diligence in seeking to obtain the requested proper-~~  
~~2 ty or related relief, the interests of justice would be served by toll-~~  
~~3 ing such limitation period.]~~

4 (b) Where the applicant's motion for relief requests the performance  
5 of any other testing of forensic evidence or any physical evidence  
6 secured in the case, the court shall grant the application for testing  
7 of such evidence, upon its determination that had the results of testing  
8 of forensic or other physical evidence been available at the time of  
9 trial or plea, there is a reasonable probability that the verdict would  
10 have been more favorable to the applicant.

11 (c) (i) In conjunction with the filing of a motion under this subdivi-  
12 sion, the court may direct the people to provide the [~~defendant~~] appli-  
13 cant and his or her counsel with information in the possession of the  
14 people concerning the current physical location of the specified  
15 evidence and if the specified evidence no longer exists or the physical  
16 location of the specified evidence is unknown, a representation to that  
17 effect and information and documentary evidence in the possession of the  
18 people concerning the last known physical location of such specified  
19 evidence.

20 (ii) If there is a finding by the court that the specified evidence no  
21 longer exists or the physical location of such specified evidence is  
22 unknown, [~~such information in and of itself shall not be a factor from~~  
23 ~~which any inference unfavorable to the people may be drawn by the court~~  
24 ~~in deciding a motion under this section]~~ the court may grant the appli-  
25 cant's motion and vacate the judgment upon a finding by the court that  
26 such evidence is unavailable due to malfeasance or neglect.

27 (iii) The court, on motion of the [~~defendant~~] applicant, may also  
28 issue a subpoena duces tecum directing a public or private hospital,  
29 laboratory or other entity to produce such specified evidence in its  
30 possession and/or information and documentary evidence in its possession  
31 concerning the location and status of such specified evidence.

32 [~~(e)~~] (d) In response to a motion under this paragraph, upon notice to  
33 the parties and to the entity required to perform the search the court  
34 may order an entity that has access to the combined DNA index system  
35 ("CODIS") or its successor system to compare a DNA profile obtained from  
36 probative biological material gathered in connection with the investi-  
37 gation or prosecution of the [~~defendant~~] applicant against DNA databanks  
38 by keyboard searches, or a similar method that does not involve upload-  
39 ing, upon a court's determination that (1) such profile complies with  
40 federal bureau of investigation or state requirements, whichever are  
41 applicable and as such requirements are applied to law enforcement agen-  
42 cies seeking such a comparison, and that the data meet state DNA index  
43 system and/or national DNA index system criteria as such criteria are  
44 applied to law enforcement agencies seeking such a comparison and (2) if  
45 such comparison had been conducted, [~~and if the results had been admit-~~  
46 ~~ted in the trial resulting in the judgment,~~] a reasonable probability  
47 exists that the verdict would have been more favorable to the [~~defend-~~  
48 ~~ant, or in a case involving a plea of guilty, if the results had been~~  
49 ~~available to the defendant prior to the plea, a reasonable probability~~  
50 ~~exists that the conviction would not have resulted]~~ applicant. For  
51 purposes of this subdivision, a "keyboard search" shall mean a search of  
52 a DNA profile against the databank in which the profile that is searched  
53 is not uploaded to or maintained in the databank.

54 [~~2. If it appears by conceded or uncontradicted allegations of the~~  
55 ~~moving papers or of the answer, or by unquestionable documentary proof,~~  
56 ~~that there are circumstances which require denial thereof pursuant to~~

~~subdivision two of section 440.10 or subdivision two of section 440.20, the court must summarily deny the motion. If it appears that there are circumstances authorizing, though not requiring, denial thereof pursuant to subdivision three of section 440.10 or subdivision three of section 440.20, the court may in its discretion either (a) summarily deny the motion, or (b) proceed to consider the merits thereof.]~~

[3-] 5. Upon considering the merits of the motion, the court must grant it without conducting a hearing and vacate the judgment or set aside the sentence, as the case may be, if:

(a) The moving papers allege a ground constituting legal basis for the motion; and

(b) Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations thereof; and

(c) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof.

[4-] 6. Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(a) The moving papers do not allege any ground constituting legal basis for the motion; or

(b) ~~[The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one, or~~

~~(c)]~~ An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or

[4-] (c) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document~~[, or is made solely by the defendant and is unsupported by any other affidavit or evidence,]~~ and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

[5-] 7. If the court does not determine the motion pursuant to ~~[subdivisions two, three or four]~~ subdivision five or six, it must conduct a hearing and make findings of fact essential to the determination thereof. The ~~[defendant]~~ applicant has a right to be present at such hearing but may waive such right in writing. If he or she does not so waive it and if he or she is confined in a prison or other institution of this state, the court must cause him or her to be produced at such hearing.

[6-] 8. At such a hearing, the ~~[defendant]~~ applicant has the burden of proving by a preponderance of the evidence every fact essential to support the motion. At the hearing, either party shall receive a daily copy of the hearing minutes, upon request.

[7-] 9. Notwithstanding any other provision of this section, when the applicant raises a colorable claim of relief pursuant to this article, the court shall not summarily deny the motion on the ground that the applicant previously moved for relief under this article.

10. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

§ 5. Subdivision 4 of section 450.10 of the criminal procedure law, as amended by chapter 671 of the laws of 1971 and as renumbered by chapter 516 of the laws of 1986, is amended to read as follows:

4. An order, entered pursuant to ~~[section 440.40, setting aside a sentence other than one of death, upon motion of the People]~~ article

1 four hundred forty of this title, shall be authorized to an intermediate  
2 appellate court as a matter of right.

3 § 6. Subdivision 5 of section 450.10 of the criminal procedure law is  
4 REPEALED.

5 § 7. Section 216 of the judiciary law is amended by adding a new  
6 subdivision 7 to read as follows:

7 7. The chief administrator of the courts shall collect data and report  
8 every year in relation to applications and motions filed pursuant to  
9 article four hundred forty of the criminal procedure law, broken down by  
10 each section of such article to include motions filed pursuant to  
11 sections 440.10, 440.20, 440.40, 440.46, 440.46-a, and 440.47 of the  
12 criminal procedure law. Information to be collected and disclosed shall  
13 include the raw number of both applications and/or motions filed in each  
14 county and on appeal in each judicial department. Information shall  
15 include the top conviction charge for each application or motion; when  
16 pro se applicants request assignment of counsel pursuant to subdivision  
17 two of section 440.30 of the criminal procedure law, whether or not  
18 counsel was assigned; the outcome of each motion filed, whether denied  
19 without hearing, denied with hearing, vacatur granted, or other; and the  
20 average length of time motion under article four hundred forty of the  
21 criminal procedure law remains pending for each county. Such report  
22 shall aggregate the data collected by county and judicial department.  
23 The data shall be aggregated in order to protect the identity of indi-  
24 vidual applicants. The report shall be released publicly and published  
25 on the websites of the office of court administration and the division  
26 of criminal justice services. The first report shall be published twelve  
27 months after this subdivision shall have become a law, and shall include  
28 data from the first six months following the effective date of this  
29 subdivision. Reports for subsequent periods shall be published annually  
30 thereafter.

31 § 8. Severability. If any provision of this act, or any application of  
32 any provision of this act, is held to be invalid, that shall not affect  
33 the validity or effectiveness of any other provision of this act, or of  
34 any other application of any provision of this act, which can be given  
35 effect without that provision or application; and to that end, the  
36 provisions and applications of this act are severable.

37 § 9. This act shall take effect on the sixtieth day after it shall  
38 have become a law.