

STATE OF NEW YORK

2878--A

Cal. No. 32

2023-2024 Regular Sessions

IN ASSEMBLY

January 30, 2023

Introduced by M. of A. AUBRY, KIM, TAYLOR, FORREST, BURGOS, REYES, HEVE-SI, FAHY, O'DONNELL, MITAYNES, ANDERSON, MAMDANI, JACKSON, CLARK, SIMON, GONZALEZ-ROJAS, SEAWRIGHT, CARROLL, GALLAGHER, DARLING, BURDICK, CRUZ, EPSTEIN, HUNTER, MEEKS, WEPRIN, KELLES, L. ROSENTHAL, OTIS, COOK, DINOWITZ, SEPTIMO, GIBBS, DICKENS, GLICK, DAVILA, HYNDMAN, PRETLOW, RAMOS, TAPIA, LUNSFORD, ARDILA, SIMONE, RAGA, SHIMSKY, ALVA-REZ, DE LOS SANTOS, BORES, LEVENBERG, WALKER -- read once and referred to the Committee on Codes -- advanced to a third reading, passed by Assembly and delivered to the Senate, recalled from the Senate, vote reconsidered, bill amended, ordered reprinted, retaining its place on the order of third reading

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

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

LBD00806-05-3

1 § 2. Section 440.10 of the criminal procedure law, paragraph (g-1) of
2 subdivision 1 as added by chapter 19 of the laws of 2012, paragraph (h)
3 of subdivision 1, paragraph (a) of subdivision 3 and subdivision 4 as
4 amended and subdivisions 7 and 8 as renumbered by chapter 332 of the
5 laws of 2010, paragraph (i) of subdivision 1 and subdivision 6 as
6 amended by chapter 629 of the laws of 2021, paragraph (j) of subdivision
7 1 as amended by chapter 131 of the laws of 2019, paragraph (k) of subdivi-
8 sion 1 as amended by chapter 92 of the laws of 2021, paragraphs (b)
9 and (c) of subdivision 2 as amended by chapter 501 of the laws of 2021,
10 and subdivision 9 as added by section 4 of part 00 of chapter 55 of the
11 laws of 2019, is amended to read as follows:

12 § 440.10 Motion to vacate judgment.

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

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

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

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

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

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

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

38 (g) New evidence has been discovered [~~since the entry of a judgment~~
39 ~~based upon a verdict of guilty after trial, which could not have been~~
40 ~~produced by the defendant at the trial even with due diligence on his~~
41 ~~part and which~~] or become available that, when viewed alone or with
42 other evidence, is of such character as to create a reasonable probabil-
43 ity that had such evidence been received at the trial or discovered
44 prior to trial or plea agreement that the verdict or plea would have
45 been more favorable to the [~~defendant; provided that a motion based upon~~
46 ~~such ground must be made with due diligence after the discovery of such~~
47 ~~alleged new evidence~~] applicant. Types of new evidence shall include,
48 but not be limited to newly available forensic evidence or evidence that
49 has either been repudiated by the expert who originally provided the
50 opinion at a hearing or trial or that has been undermined by later
51 scientific research or technological advances; or

52 (g-1) [~~Forensic DNA~~] In cases involving the forensic testing of
53 evidence performed since the entry of a judgment, [~~(1) in the case of a~~
54 ~~defendant convicted after a guilty plea, the court has determined that~~
55 ~~the defendant has demonstrated a substantial probability that the~~
56 ~~defendant was actually innocent of the offense of which he or she was~~

1 ~~convicted, or (2) in the case of a defendant convicted after a trial,~~
2 the court has determined that there exists a reasonable probability that
3 the verdict or plea offer would have been more favorable to the [~~defend-~~
4 ~~ant~~] applicant, or the applicant would have rejected the plea offer.

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

12 (i) The judgment is a conviction where the [~~defendant's~~] applicant's
13 participation in the offense was a result of having been a victim of sex
14 trafficking under section 230.34 of the penal law, sex trafficking of a
15 child under section 230.34-a of the penal law, labor trafficking under
16 section 135.35 of the penal law, aggravated labor trafficking under
17 section 135.37 of the penal law, compelling prostitution under section
18 230.33 of the penal law, or trafficking in persons under the Trafficking
19 Victims Protection Act (United States Code, title 22, chapter 78);
20 provided that

21 (i) official documentation of the [~~defendant's~~] applicant's status as
22 a victim of sex trafficking, labor trafficking, aggravated labor traf-
23 ficking, compelling prostitution, or trafficking in persons at the time
24 of the offense from a federal, state or local government agency shall
25 create a presumption that the [~~defendant's~~] applicant's participation in
26 the offense was a result of having been a victim of sex trafficking,
27 labor trafficking, aggravated labor trafficking, compelling prostitution
28 or trafficking in persons, but shall not be required for granting a
29 motion under this paragraph;

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

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

39 (j) The judgment is a conviction for [~~a class A or unclassified~~] any
40 misdemeanor entered prior to the effective date of this paragraph and
41 satisfies the ground prescribed in paragraph (h) of this subdivision.
42 There shall be a rebuttable presumption that a conviction by plea to
43 such an offense was not knowing, voluntary and intelligent, based on
44 ongoing collateral consequences, including potential or actual immi-
45 gration consequences, and there shall be a rebuttable presumption that a
46 conviction by verdict constitutes cruel and unusual punishment under
47 section five of article one of the state constitution based on such
48 consequences; or

49 (k) The judgment occurred prior to the effective date of the laws of
50 two thousand [~~twenty-one~~] twenty-three that amended this paragraph and
51 is a conviction for an offense as defined in [~~subparagraphs~~] subpara-
52 graph (i), (ii), (iii) or (iv) of paragraph (k) of subdivision three of
53 section 160.50 of this part, or a misdemeanor under the former article
54 two hundred twenty-one of the penal law, in which case the court shall
55 presume that a conviction by plea for the aforementioned offenses was
56 not knowing, voluntary and intelligent if it has severe or ongoing

1 consequences, including but not limited to potential or actual immi-
2 gration consequences, and shall presume that a conviction by verdict for
3 the aforementioned offenses constitutes cruel and unusual punishment
4 under section five of article one of the state constitution, based on
5 those consequences. The people may rebut these presumptions[]; or

6 (1) Any offense in the state of New York that an intermediate appel-
7 late court, court of appeals, or United States federal court with juris-
8 isdiction over New York state law issues has deemed in violation of the
9 constitution of this state or of the United States, or any other right
10 under state or federal law.

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

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

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

27 (c) [~~Although sufficient facts appear on the record of the proceedings~~
28 ~~underlying the judgment to have permitted, upon appeal from such judg-~~
29 ~~ment, adequate review of the ground or issue raised upon the motion, no~~
30 ~~such appellate review or determination occurred owing to the defendant's~~
31 ~~unjustifiable failure to take or perfect an appeal during the prescribed~~
32 ~~period or to his or her unjustifiable failure to raise such ground or~~
33 ~~issue upon an appeal actually perfected by him or her unless the issue~~
34 ~~raised upon such motion is ineffective assistance of counsel; or~~

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

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

41 ~~(a) Although facts in support of the ground or issue raised upon the~~
42 ~~motion could with due diligence by the defendant have readily been made~~
43 ~~to appear on the record in a manner providing adequate basis for review~~
44 ~~of such ground or issue upon an appeal from the judgment, the defendant~~
45 ~~unjustifiably failed to adduce such matter prior to sentence and the~~
46 ~~ground or issue in question was not subsequently determined upon appeal.~~
47 ~~This paragraph does not apply to a motion based upon deprivation of the~~
48 ~~right to counsel at the trial or upon failure of the trial court to~~
49 ~~advise the defendant of such right, or to a motion under paragraph (i)~~
50 ~~of subdivision one of this section; or~~

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

~~(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.~~

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

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

(a) dismiss and seal the accusatory instrument, or

(b) order a new trial, or

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

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

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

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

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

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

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

1 such other accusatory instruments; and such is the case even though such
2 order dismisses the main accusatory instrument underlying the judgment.

3 ~~[9-]~~ 8. Upon granting of a motion pursuant to paragraph (j) of subdivi-
4 sion one of this section, the court may either:

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

7 (b) Vacate the judgment and order a new trial wherein the [~~defendant~~]
8 applicant enters a plea to the same offense in order to permit the court
9 to resentence the [~~defendant~~] applicant in accordance with the amendato-
10 ry provisions of subdivision one-a of section 70.15 of the penal law.

11 § 3. Section 440.20 of the criminal procedure law, subdivision 1 as
12 amended by chapter 1 of the laws of 1995, is amended to read as follows:
13 § 440.20 Motion to set aside sentence; by [~~defendant~~] applicant.

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

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

55 3. [~~Notwithstanding the provisions of subdivision one, the court may~~
56 ~~deny such a motion when the ground or issue raised thereupon was previ-~~

~~ously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a prior motion or proceeding in a federal court, unless since the time of such determination there has been a retroactively effective change in the law controlling such issue. Despite such determination, however, the court in the interest of justice and for good cause shown, may in its discretion grant the motion if it is otherwise meritorious.~~

4.] An order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence the [~~defendant~~] applicant in accordance with the law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 3. (a) An applicant who is in a position adequately to raise more than
6 one ground should raise every such ground upon which he or she intends
7 to challenge the judgment or sentence. If the motion is based upon the
8 existence or occurrence of facts, the motion papers [~~must~~] may contain
9 sworn allegations thereof, whether by the [~~defendant~~] applicant or by
10 another person or persons. Such sworn allegations may be based upon
11 personal knowledge of the affiant or upon information and belief,
12 provided that in the latter event the affiant must state the sources of
13 such information and the grounds of such belief. The [~~defendant~~] appli-
14 cant may further submit documentary evidence or information supporting
15 or tending to support the allegations of the moving papers.

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

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

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

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

53 ~~(ii) the defendant has made his or her motion after five years from~~
54 ~~the date of the judgment of conviction, provided, however, that this~~
55 ~~limitation period shall be tolled for five years if the defendant is in~~
56 ~~custody in connection with the conviction that is the subject of his or~~

~~her motion, and provided further that, notwithstanding such limitation periods, the court may consider the motion if the defendant has shown: (A) that he or she has been pursuing his or her rights diligently and that some extraordinary circumstance prevented the timely filing of the motion; (B) that the facts upon which the motion is predicated were unknown to the defendant or his or her attorney and could not have been ascertained by the exercise of due diligence prior to the expiration of the statute of limitations; or (C) considering all circumstances of the case including but not limited to evidence of the defendant's guilt, the impact of granting or denying such motion upon public confidence in the criminal justice system, or upon the safety or welfare of the community, and the defendant's diligence in seeking to obtain the requested property or related relief, the interests of justice would be served by considering the motion;~~

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

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

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

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

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

~~(ii) a court shall deny the defendant's motion for forensic DNA testing where the defendant has made his or her motion more than five years after entry of the judgment of conviction, except that the limitation period may be tolled if the defendant has shown: (A) that he or she has~~

1 ~~been pursuing his or her rights diligently and that some extraordinary~~
2 ~~circumstance prevented the timely filing of the motion for forensic DNA~~
3 ~~testing; (B) that the facts upon which the motion is predicated were~~
4 ~~unknown to the defendant or his or her attorney and could not have been~~
5 ~~ascertained by the exercise of due diligence prior to the expiration of~~
6 ~~this statute of limitations; or (C) considering all circumstances of the~~
7 ~~case including but not limited to evidence of the defendant's guilt, the~~
8 ~~impact of granting or denying such motion upon public confidence in the~~
9 ~~criminal justice system, or upon the safety or welfare of the community,~~
10 ~~and the defendant's diligence in seeking to obtain the requested proper-~~
11 ~~ty or related relief, the interests of justice would be served by toll-~~
12 ~~ing such limitation period.]~~

13 (b) Where the applicant's motion for relief requests the performance
14 of any other testing of forensic evidence or any physical evidence
15 secured in the case, the court shall grant the application for testing
16 of such evidence, upon its determination that had the results of testing
17 of forensic or other physical evidence been available at the time of
18 trial or plea, there is a reasonable probability that the verdict would
19 have been more favorable to the applicant.

20 (c) (i) In conjunction with the filing of a motion under this subdivi-
21 sion, the court may direct the people to provide the [~~defendant~~] appli-
22 cant and his or her counsel with information in the possession of the
23 people concerning the current physical location of the specified
24 evidence and if the specified evidence no longer exists or the physical
25 location of the specified evidence is unknown, a representation to that
26 effect and information and documentary evidence in the possession of the
27 people concerning the last known physical location of such specified
28 evidence.

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

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

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

1 ~~ant, or in a case involving a plea of guilty, if the results had been~~
2 ~~available to the defendant prior to the plea, a reasonable probability~~
3 ~~exists that the conviction would not have resulted]~~ applicant. For
4 purposes of this subdivision, a "keyboard search" shall mean a search of
5 a DNA profile against the databank in which the profile that is searched
6 is not uploaded to or maintained in the databank.

7 ~~[2. If it appears by conceded or uncontradicted allegations of the~~
8 ~~moving papers or of the answer, or by unquestionable documentary proof,~~
9 ~~that there are circumstances which require denial thereof pursuant to~~
10 ~~subdivision two of section 440.10 or subdivision two of section 440.20,~~
11 ~~the court must summarily deny the motion. If it appears that there are~~
12 ~~circumstances authorizing, though not requiring, denial thereof pursuant~~
13 ~~to subdivision three of section 440.10 or subdivision three of section~~
14 ~~440.20, the court may in its discretion either (a) summarily deny the~~
15 ~~motion, or (b) proceed to consider the merits thereof.]~~

16 ~~[3.]~~ 5. Upon considering the merits of the motion, the court must
17 grant it without conducting a hearing and vacate the judgment or set
18 aside the sentence, as the case may be, if:

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

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

23 (c) The sworn allegations of fact essential to support the motion are
24 either conceded by the people to be true or are conclusively substanti-
25 ated by unquestionable documentary proof.

26 ~~[4.]~~ 6. Upon considering the merits of the motion, the court may deny
27 it without conducting a hearing if:

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

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

34 ~~(c)]~~ An allegation of fact essential to support the motion is conclu-
35 sively refuted by unquestionable documentary proof; or

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

42 ~~[5.]~~ 7. If the court does not determine the motion pursuant to ~~[subdi-~~
43 ~~visions two, three or four]~~ subdivision five or six, it must conduct a
44 hearing and make findings of fact essential to the determination there-
45 of. The ~~[defendant]~~ applicant has a right to be present at such hearing
46 but may waive such right in writing. If he or she does not so waive it
47 and if he or she is confined in a prison or other institution of this
48 state, the court must cause him or her to be produced at such hearing.

49 ~~[6.]~~ 8. At such a hearing, the ~~[defendant]~~ applicant has the burden of
50 proving by a preponderance of the evidence every fact essential to
51 support the motion. At the hearing, either party shall receive a daily
52 copy of the hearing minutes, upon request.

53 ~~[7.]~~ 9. Notwithstanding any other provision of this section, when the
54 applicant raises a colorable claim of relief pursuant to this article,
55 the court shall not summarily deny the motion on the ground that the
56 applicant previously moved for relief under this article.

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

4 § 5. Subdivision 4 of section 450.10 of the criminal procedure law, as
5 amended by chapter 671 of the laws of 1971 and as renumbered by chapter
6 516 of the laws of 1986, is amended to read as follows:

7 4. An order, entered pursuant to [~~section 440.40, setting aside a~~
8 ~~sentence other than one of death, upon motion of the People~~] article
9 four hundred forty of this title, shall be authorized to an intermediate
10 appellate court as a matter of right.

11 § 6. Subdivision 5 of section 450.10 of the criminal procedure law is
12 REPEALED.

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

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

39 § 8. Severability. If any provision of this act, or any application of
40 any provision of this act, is held to be invalid, that shall not affect
41 the validity or effectiveness of any other provision of this act, or of
42 any other application of any provision of this act, which can be given
43 effect without that provision or application; and to that end, the
44 provisions and applications of this act are severable.

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