STATE OF NEW YORK

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Cal. No. 32

2023-2024 Regular Sessions

IN ASSEMBLY

January 30, 2023

Introduced by M. of A. AUBRY, KIM, TAYLOR, FORREST, BURGOS, REYES, HEVESI, 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, ALVAREZ, 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:

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

§ 440.00 Definition.

As used in this article, the term "applicant" means a person previously convicted of a crime who is applying for relief under this article.

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

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

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

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

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

§ 440.10 Motion to vacate judgment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(k) The judgment occurred prior to the effective date of the laws of two thousand [~~twenty-one~~] **twenty-three** that amended this paragraph and is a conviction for an offense as defined in [~~subparagraphs~~] **subparagraph** (i), (ii), (iii) or (iv) of paragraph (k) of subdivision three of section 160.50 of this part, **or a misdemeanor under the former article two hundred twenty-one of the penal law,** in which case the court shall presume that a conviction by plea for the aforementioned offenses 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 for the aforementioned offenses constitutes cruel and unusual punishment under section five of article one of the state constitution, based on those consequences. The people may rebut these presumptions[~~.~~]**; or**

(l) Any offense in the state of New York that an intermediate appellate court, court of appeals, or United States federal court with jurisdiction over New York state law issues has deemed in violation of the constitution of this state or of the United States, or any other right under state or federal law.

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

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue**. However, if all of the evidence currently before the court was not duly considered previously by the court, the court shall grant the motion or order the hearing**; or

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

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

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

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

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

~~(b) The ground or issue raised upon the motion was previously 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 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; 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

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

[~~9.~~] 8. Upon granting of a motion pursuant to paragraph (j) of subdivision one of this section, 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~~] applicant enters a plea to the same offense in order to permit the court to resentence the [~~defendant~~] applicant in accordance with the amendatory provisions of subdivision one-a of section 70.15 of the penal law.

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

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

1. At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the [~~defendant~~] applicant, set aside the sentence upon the ground that it was unauthorized, illegally imposed, exceeded the maximum allowed by law, obtained or imposed in violation of the defendant's constitutional rights, or was otherwise invalid as a matter of law. Where the judgment includes a sentence of death, the court may also set aside the sentence upon any of the grounds set forth in paragraph (b), (c), (f), (g) or (h) of subdivision one of section 440.10 as applied to a separate sentencing proceeding under section 400.27, provided, however, that to the extent the ground or grounds asserted include one or more of the aforesaid paragraphs of subdivision one of section 440.10, the court must also apply [~~subdivisions~~] subdivision two [~~and three~~] of section 440.10, other than paragraph [~~(d)~~] (c) of [~~subdivision two of~~] such [~~section~~] subdivision, in determining the motion. In the event the court enters an order granting a motion to set aside a sentence of death under this section, the court must either direct a new sentencing proceeding in accordance with section 400.27 or, to the extent that the defendant cannot be resentenced to death consistent with the laws of this state or the constitution of this state or of the United States, resentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Upon granting the motion upon any of the grounds set forth in the aforesaid paragraphs of subdivision one of section 440.10 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

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

3. [~~Notwithstanding the provisions of subdivision one, the court may 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.

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

3. (a) An applicant 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. If the motion is based upon the existence or occurrence of facts, the motion papers [~~must~~] **may** contain sworn allegations thereof, whether by the [~~defendant~~] **applicant** or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The [~~defendant~~] **applicant** may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers.

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

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

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

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

~~(ii) the defendant has made his or her motion after five years from the date of the judgment of conviction; provided, however, that this limitation period shall be tolled for five years if the defendant is in 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~~

~~been pursuing his or her rights diligently and that some extraordinary circumstance prevented the timely filing of the motion for forensic DNA testing; (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 this 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 tolling such limitation period.~~]

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

(c) (i) In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the [~~defendant~~] **applicant and his or her counsel** with information in the possession of the people concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence.

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

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

[~~(c)~~] **(d)** In response to a motion under this paragraph, upon notice to the parties and to the entity required to perform the search the court may order an entity that has access to the combined DNA index system ("CODIS") or its successor system to compare a DNA profile obtained from probative biological material gathered in connection with the investigation or prosecution of the [~~defendant~~] **applicant** against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon a court's determination that (1) such profile complies with federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking such a comparison, and that the data meet state DNA index system and/or national DNA index system criteria as such criteria are applied to law enforcement agencies seeking such a comparison and (2) if such comparison had been conducted, [~~and if the results had been admitted in the trial resulting in the judgment,~~] a reasonable probability exists that the verdict would have been more favorable to the [~~defend-~~

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

[~~2. If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by unquestionable documentary proof, 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

[~~(d)~~] (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 four hundred forty of this title, shall be authorized to an intermediate appellate court as a matter of right**.

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

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

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

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

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