

# STATE OF NEW YORK

7422

2025-2026 Regular Sessions

## IN ASSEMBLY

March 25, 2025

Introduced by M. of A. WALKER, KIM, TAYLOR, FORREST, REYES, HEVESI, MITAYNES, ANDERSON, MAMDANI, JACKSON, CLARK, SIMON, GONZALEZ-ROJAS, SEAWRIGHT, R. CARROLL, GALLAGHER, BURDICK, CRUZ, EPSTEIN, HUNTER, MEEKS, WEPRIN, KELLES, ROSENTHAL, OTIS, COOK, DINOWITZ, SEPTIMO, GIBBS, GLICK, DAVILA, HYNDMAN, RAMOS, TAPIA, LUNSFORD, SIMONE, RAGA, SHIMSKY, ALVAREZ, DE LOS SANTOS, BORES, LEVENBERG -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, the county 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 convicted  
5 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 the court in which it was  
8 entered may, upon motion of the applicant, vacate such conviction:

9 (a) Upon the ground that the applicant was convicted of an offense  
10 which has been subsequently decriminalized unless the legislature has  
11 expressly provided that decriminalization shall apply prospectively only  
12 and shall not apply to offenses committed before the effective date of  
13 such law; or

14 (b) Upon the ground that the offense for which the applicant was  
15 convicted was subsequently reduced to a lesser degree offense by the  
16 legislature and such reduction has been made retroactive by the legisla-  
17 ture or controlling judicial authority; or

18 (c) Upon the ground that the undisputed act or acts for which the  
19 applicant was convicted have been subsequently determined by controlling

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

LBD00248-01-5

1 judicial authority to have been legally insufficient, as of the date of  
2 the commission of the crime, to have satisfied the elements of the crime  
3 for which the applicant was convicted, but were legally sufficient to  
4 support conviction for a lesser degree offense on the date of such  
5 commission.

6 2. Upon granting relief pursuant to paragraph (a) of subdivision one  
7 of this section, the court shall vacate the judgment of conviction on  
8 the merits, dismiss the accusatory instrument and may take such addi-  
9 tional action as is appropriate in the circumstances. Upon granting  
10 relief pursuant to paragraph (b) or (c) of subdivision one of this  
11 section, the court shall modify the judgment to one of conviction for  
12 the appropriate lesser offense and re-sentence the applicant accord-  
13 ingly.

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

25 § 440.10 Motion to vacate judgment.

26 1. At any time after the entry of a judgment, the court in which it  
27 was entered may, upon motion of the [~~defendant~~ applicant], vacate such  
28 judgment upon the ground that:

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

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

34 (c) Material evidence adduced at a trial resulting in the judgment of  
35 conviction was false and was, prior to the entry of the judgment, known  
36 by the prosecutor or by the court to be false; or

37 (d) Material evidence adduced by the people at a trial resulting in  
38 the judgment was procured in violation of the [~~defendant's~~ applicant's]  
39 rights under the constitution of this state or of the United States; or

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

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

47 (g) (i) New evidence has been discovered [~~since the entry of a judg-~~  
48 ~~ment based upon a verdict of guilty after trial, which could not have~~  
49 ~~been produced by the defendant at the trial even with due diligence on~~  
50 ~~his part and which is of such character as to create a probability that~~  
51 ~~had such evidence been received at the trial the verdict would have been~~  
52 ~~more favorable to the defendant; provided that a motion based upon such~~  
53 ~~ground must be made with due diligence after the discovery of such~~  
54 ~~alleged new evidence~~]; or

55 [~~(g-1) Forensic DNA~~] (ii) New evidence has been discovered since the  
56 entry of a judgment based upon a guilty plea, which could not have been

1 produced by the applicant prior to the entry of the guilty plea even  
2 with due diligence on their part and which is of such a character as to  
3 create a reasonable probability that the applicant was actually innocent  
4 of the offense and the underlying conduct for which they were convicted.

5 (iii) In cases involving the forensic testing of evidence performed  
6 since the entry of a judgment, [~~(1) in the case of a defendant convicted~~  
7 ~~after a guilty plea, the court has determined that the defendant has~~  
8 ~~demonstrated a substantial probability that the defendant was actually~~  
9 ~~innocent of the offense of which he or she was convicted, or (2) in the~~  
10 ~~case of a defendant convicted after a trial,~~] the court has determined  
11 that there exists a reasonable probability that [~~the verdict would have~~  
12 ~~been more favorable to the defendant.]; (A) in the case of an applicant  
13 convicted after a guilty plea, that the defendant is actually innocent;  
14 or (B) in the case of an applicant convicted after trial, that the  
15 verdict would have been more favorable to the applicant; or~~

16 (h) The judgment was obtained in violation of a right of the [~~defend-~~  
17 ~~ant~~] applicant, under the constitution of this state or of the United  
18 States, including, but not limited to, a judgment entered, whether upon  
19 trial or guilty plea, against an applicant who is actually innocent; or

20 (i) The judgment is a conviction where the [~~defendant's~~] applicant's  
21 participation in the offense was a result of having been a victim of sex  
22 trafficking under section 230.34 of the penal law, sex trafficking of a  
23 child under section 230.34-a of the penal law, labor trafficking under  
24 section 135.35 of the penal law, aggravated labor trafficking under  
25 section 135.37 of the penal law, compelling prostitution under section  
26 230.33 of the penal law, or trafficking in persons under the Trafficking  
27 Victims Protection Act (United States Code, title 22, chapter 78);  
28 provided that

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

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

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

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

1 (k) The judgment occurred prior to the effective date of the laws of  
2 two thousand [~~twenty-one~~] twenty-five that amended this paragraph and is  
3 a conviction for an offense as defined in [~~subparagraphs~~] subparagraph  
4 (i), (ii), (iii) or (iv) of paragraph (k) of subdivision three of  
5 section 160.50 of this part, or a misdemeanor under the former article  
6 two hundred twenty-one of the penal law, in which case the court shall  
7 presume that a conviction by plea for the aforementioned offenses was  
8 not knowing, voluntary and intelligent if it has severe or ongoing  
9 consequences, including but not limited to potential or actual immi-  
10 gration consequences, and shall presume that a conviction by verdict for  
11 the aforementioned offenses constitutes cruel and unusual punishment  
12 under section five of article one of the state constitution, based on  
13 those consequences. The people may rebut these presumptions[]; or

14 (l) The offense for which the applicant was convicted has been held to  
15 be unconstitutional under the federal or state constitution by the court  
16 of appeals, an intermediate appellate court or a U.S. court with juris-  
17 isdiction over New York.

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

20 (a) The ground or issue raised upon the motion was previously deter-  
21 mined on the merits upon an appeal from the judgment, unless since the  
22 time of such appellate determination there has been a retroactively  
23 effective change in the law controlling such issue; or the applicant has  
24 submitted new evidence that could not have been previously produced with  
25 the exercise of due diligence that materially advances the claim; or

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

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

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

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

47 (a) Although facts in support of the ground or issue raised upon the  
48 motion could with due diligence by the [~~defendant~~] applicant have readi-  
49 ly been made to appear on the record in a manner providing adequate  
50 basis for review of such ground or issue upon an appeal from the judg-  
51 ment, the [~~defendant~~] applicant unjustifiably failed to adduce such  
52 matter prior to sentence and the ground or issue in question was not  
53 subsequently determined upon appeal. This paragraph does not apply to a  
54 motion based upon deprivation of the right to counsel at the trial or  
55 upon failure of the trial court to advise the [~~defendant~~] applicant of

1 such right, or to a motion under paragraph (i) of subdivision one of  
2 this section; or

3 (b) The ground or issue raised upon the motion was previously deter-  
4 mined on the merits upon a prior motion or proceeding in a court of this  
5 state, other than an appeal from the judgment, or upon a motion or  
6 proceeding in a [~~federal~~] court of this state, other than an appeal from  
7 the judgment, or upon a motion or proceeding in a federal court; unless  
8 since the time of such determination there has been a retroactively  
9 effective change in the law controlling such issue or the applicant has  
10 submitted new evidence that could not have been previously produced with  
11 the exercise of due diligence that materially advances the claim; or

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

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

19 4. For purposes of paragraphs (g) and (h) of subdivision one of this  
20 section, an applicant is actually innocent, where they prove that they  
21 did not commit the crime for which they were convicted or that the crime  
22 of conviction did not occur. If the court concludes that there is a  
23 reasonable probability that the applicant is actually innocent, the  
24 court shall vacate the conviction or convictions and order a new trial.  
25 If the court concludes by clear and convincing evidence that the appli-  
26 cant is actually innocent of the crime, the court shall vacate the  
27 conviction or convictions and dismiss with prejudice.

28 5. If the court grants the motion, it must, except as provided in  
29 subdivision [~~five~~] six or [~~six~~] seven of this section, vacate the judg-  
30 ment, and must either:

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

32 (b) order a new trial, or

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

34 [~~5-~~] 6. Upon granting the motion upon the ground, as prescribed in  
35 paragraph (g) of subdivision one of this section, that newly discovered  
36 evidence creates a probability that had such evidence been received at  
37 the trial the verdict would have been more favorable to the [~~defendant~~]  
38 applicant in that the conviction would have been for a lesser offense  
39 than the one contained in the verdict, the court may either:

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

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

44 [~~6-~~] 7. If the court grants a motion under paragraph [~~(i) or paragraph~~  
45 ~~(k)~~] (g) or (h), when the basis for relief is actual innocence as estab-  
46 lished by clear and convincing evidence, (i), (j) or (k) of subdivision  
47 one of this section, it must vacate the judgment [~~and~~] on the merits,  
48 dismiss the accusatory instrument, and may take such additional action  
49 as is appropriate in the circumstances. In the case of a motion granted  
50 under paragraph (i) of subdivision one of this section, the court must  
51 vacate the judgment on the merits because the [~~defendant's~~] applicant's  
52 participation in the offense was a result of having been a victim of  
53 trafficking.

54 [~~7-~~] 8. Upon a new trial resulting from an order vacating a judgment  
55 pursuant to this section, the indictment is deemed to contain all the  
56 counts and to charge all the offenses which it contained and charged at

1 the time the previous trial was commenced, regardless of whether any  
2 count was dismissed by the court in the course of such trial, except (a)  
3 those upon or of which the [~~defendant~~] applicant was acquitted or deemed  
4 to have been acquitted, and (b) those dismissed by the order vacating  
5 the judgment, and (c) those previously dismissed by an appellate court  
6 upon an appeal from the judgment, or by any court upon a previous post-  
7 judgment motion.

8 [~~8-~~] 9. Upon an order which vacates a judgment based upon a plea of  
9 guilty to an accusatory instrument or a part thereof, but which does not  
10 dismiss the entire accusatory instrument, the criminal action is, in the  
11 absence of an express direction to the contrary, restored to its  
12 [~~prepleading~~] pre-pleading status and the accusatory instrument is  
13 deemed to contain all the counts and to charge all the offenses which it  
14 contained and charged at the time of the entry of the plea, except those  
15 subsequently dismissed under circumstances specified in paragraphs (b)  
16 and (c) of subdivision [~~six~~] eight. Where the plea of guilty was entered  
17 and accepted, pursuant to subdivision three of section 220.30, upon the  
18 condition that it constituted a complete disposition not only of the  
19 accusatory instrument underlying the judgment vacated but also of one or  
20 more other accusatory instruments against the [~~defendant~~] applicant then  
21 pending in the same court, the order of vacation completely restores  
22 such other accusatory instruments; and such is the case even though such  
23 order dismisses the main accusatory instrument underlying the judgment.

24 [~~9-~~] 10. Upon granting of a motion pursuant to paragraph (j) of subdivi-  
25 sion one of this section, the court may either:

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

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

32 § 3. Section 440.20 of the criminal procedure law, subdivision 1 as  
33 amended by chapter 1 of the laws of 1995, is amended to read as follows:  
34 § 440.20 Motion to set aside sentence; by [~~defendant~~] applicant.

35 1. At any time after the entry of a judgment, the court in which the  
36 judgment was entered may, upon motion of the [~~defendant~~] applicant, set  
37 aside the sentence upon the ground that it was unauthorized, illegally  
38 imposed, or was otherwise invalid as a matter of law. Where the judg-  
39 ment includes a sentence of death, the court may also set aside the  
40 sentence upon any of the grounds set forth in paragraph (b), (c), (f),  
41 (g) or (h) of subdivision one of section 440.10 as applied to a separate  
42 sentencing proceeding under section 400.27, provided, however, that to  
43 the extent the ground or grounds asserted include one or more of the  
44 aforesaid paragraphs of subdivision one of section 440.10, the court  
45 must also apply [~~subdivisions~~] subdivision two [~~and three~~]  
46 440.10, other than paragraph (d) of subdivision two of such section  
47 determining the motion. In the event the court enters an order granting  
48 a motion to set aside a sentence of death under this section, the court  
49 must either direct a new sentencing proceeding in accordance with  
50 section [~~400.27~~] 440.27 or, to the extent that the [~~defendant~~] applicant  
51 cannot be resentenced to death consistent with the laws of this state or  
52 the constitution of this state or of the United States, resentence the  
53 [~~defendant~~] applicant to life imprisonment without parole or to a  
54 sentence of imprisonment for the class A-I felony of murder in the first  
55 degree other than a sentence of life imprisonment without parole. Upon  
56 granting the motion upon any of the grounds set forth in the aforesaid

1 paragraphs of subdivision one of section 440.10 and setting aside the  
2 sentence, the court must afford the people a reasonable period of time,  
3 which shall not be less than ten days, to determine whether to take an  
4 appeal from the order setting aside the sentence of death. The taking of  
5 an appeal by the people stays the effectiveness of that portion of the  
6 court's order that directs a new sentencing proceeding.

7 2. Notwithstanding the provisions of subdivision one, the court  
8 [~~must~~] may deny such a motion when the ground or issue raised thereupon  
9 was previously determined on the merits upon an appeal from the judgment  
10 or sentence, unless since the time of such appellate determination there  
11 has been a retroactively effective change in the law controlling such  
12 issue.

13 3. Notwithstanding the provisions of subdivision one, the court may  
14 deny such a motion when the ground or issue raised thereupon was previ-  
15 ously determined on the merits upon a prior motion or proceeding in a  
16 court of this state, other than an appeal from the judgment, or upon a  
17 prior motion or proceeding in a federal court, unless since the time of  
18 such determination there has been a retroactively effective change in  
19 the law controlling such issue. Despite such determination, however,  
20 the court in the interest of justice and for good cause shown, may in  
21 its discretion grant the motion if it is otherwise meritorious.

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

26 § 4. Section 440.30 of the criminal procedure law, subdivisions 1 and  
27 1-a as amended by chapter 19 of the laws of 2012 and the opening para-  
28 graph of paragraph (b) of subdivision 1 as amended by section 10 of part  
29 LLL of chapter 59 of the laws of 2019, is amended to read as follows:

30 § 440.30 Motion to vacate judgment and to set aside sentence; procedure.

31 1. (a) [~~A~~] An application for assignment of counsel for a motion to  
32 vacate a judgment pursuant to section 440.10 or 440.11 of this article  
33 and a motion to set aside a sentence pursuant to section 440.20 of this  
34 article must be made in writing [~~and~~] by a pro se applicant, upon  
35 reasonable notice to the people [~~Upon the motion, a defendant~~], to the  
36 court in which the judgment and sentence were entered. The applicant  
37 shall provide such court with a plain statement of the legal claim or  
38 claims the applicant intends to raise.

39 (b) The court may in its discretion assign counsel to the applicant;  
40 provided, however, the court should carefully consider assigning counsel  
41 where the applicant raises a colorable claim and assigning counsel would  
42 promote the fair administration of justice.

43 (c) If the court declines to assign counsel, it shall state the  
44 reasons for denying the request in writing.

45 (d) If at the time of the applicant's request for assignment of coun-  
46 sel, the sentencing judge or justice no longer sits in the court in  
47 which the sentence was imposed, the request shall be randomly assigned  
48 to another judge or justice of the court.

49 (e) Nothing in this subdivision shall be construed to limit the right  
50 of an applicant to the assignment of counsel when a court has ordered a  
51 hearing on a motion pursuant to this article.

52 2. (a) In connection with the preparation before filing or proceeding  
53 after filing of a motion pursuant to section 440.10, and upon a showing  
54 that the prospective applicant or applicant has sought the requested  
55 material from former trial counsel and, where applicable, former appel-  
56 late counsel without success, the court must order the people to produce

1 discovery material that is potentially relevant to the investigation or  
2 presentation of an identifiable claim under this article. A motion for  
3 discovery under this paragraph must be brought upon notice to the people  
4 and may be made in anticipation of the filing of a motion to vacate a  
5 felony judgment of conviction or after such motion has been filed. The  
6 court shall deny a request made pursuant to this paragraph where the  
7 applicant intends to or has challenged a judgment of conviction that is  
8 not a felony defined in section 10.00 of the penal law, or the requested  
9 material is otherwise contained in accessible court files.

10 (b) There shall be a presumption in favor of disclosure when consider-  
11 ing and deciding applications for discovery under paragraph (a) of this  
12 subdivision.

13 (c) The court may order that disclosure of evidence or property be  
14 subject to a protective order as subject to the grounds specified in  
15 section 245.70 of this part, where appropriate.

16 (d) Nothing in this section shall be construed to limit the power to  
17 subpoena evidence pursuant to section 610.20.

18 3. (a) An applicant who is in a position adequately to raise more than  
19 one ground should raise every such ground upon which [~~he or she intends~~]  
20 they intend to challenge the judgment or sentence. If the motion is  
21 based upon the existence or occurrence of facts, the motion papers must  
22 contain sworn allegations thereof, whether by the [~~defendant~~] applicant  
23 or by another person or persons. Such sworn allegations may be based  
24 upon personal knowledge of the affiant or upon information and belief,  
25 provided that in the latter event the affiant must state the sources of  
26 such information and the grounds of such belief. The [~~defendant~~] appli-  
27 cant may further submit documentary evidence or information supporting  
28 or tending to support the allegations of the moving papers.

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

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

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

1 ~~to a protective order, where appropriate. The court shall deny any~~  
2 ~~request made pursuant to this paragraph where:~~

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

10 ~~(ii) the defendant has made his or her motion after five years from~~  
11 ~~the date of the judgment of conviction, provided, however, that this~~  
12 ~~limitation period shall be tolled for five years if the defendant is in~~  
13 ~~custody in connection with the conviction that is the subject of his or~~  
14 ~~her motion, and provided further that, notwithstanding such limitation~~  
15 ~~periods, the court may consider the motion if the defendant has shown:~~  
16 ~~(A) that he or she has been pursuing his or her rights diligently and~~  
17 ~~that some extraordinary circumstance prevented the timely filing of the~~  
18 ~~motion; (B) that the facts upon which the motion is predicated were~~  
19 ~~unknown to the defendant or his or her attorney and could not have been~~  
20 ~~ascertained by the exercise of due diligence prior to the expiration of~~  
21 ~~the statute of limitations; or (C) considering all circumstances of the~~  
22 ~~case including but not limited to evidence of the defendant's guilt, the~~  
23 ~~impact of granting or denying such motion upon public confidence in the~~  
24 ~~criminal justice system, or upon the safety or welfare of the community,~~  
25 ~~and the defendant's diligence in seeking to obtain the requested prop-~~  
26 ~~erty or related relief, the interests of justice would be served by~~  
27 ~~considering the motion;~~

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

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

34 ~~1-a.] 4. (a) [(1)] Where the [defendant's] applicant's motion requests~~  
35 ~~the performance of a forensic DNA test on specified evidence, and upon~~  
36 ~~the court's determination that any evidence containing deoxyribonucleic~~  
37 ~~acid ("DNA") was secured in connection with the trial or the plea~~  
38 ~~resulting in the judgment, the court shall grant the application for~~  
39 ~~forensic DNA testing of such evidence upon its determination that [if a]~~  
40 ~~had the DNA test [~~had been conducted on such evidence, and if the~~]~~  
41 ~~results [~~had~~] been admitted in the trial resulting in the judgment,~~  
42 ~~there [~~exists~~] is a reasonable probability that the verdict would have~~  
43 ~~been more favorable to the [defendant] applicant.~~

44 ~~[(2) Where the defendant's motion for forensic DNA testing of speci-~~  
45 ~~fied evidence is made following a plea of guilty and entry of judgment~~  
46 ~~thereon convicting him or her of: (A) a homicide offense defined in~~  
47 ~~article one hundred twenty five of the penal law, any felony sex offense~~  
48 ~~defined in article one hundred thirty of the penal law, a violent felony~~  
49 ~~offense as defined in paragraph (a) of subdivision one of section 70.02~~  
50 ~~of the penal law, or (B) any other felony offense to which he or she~~  
51 ~~pled guilty after being charged in an indictment or information in supe-~~  
52 ~~rior court with one or more of the offenses listed in clause (A) of this~~  
53 ~~subparagraph, then the court shall grant such a motion upon its determi-~~  
54 ~~nation that evidence containing DNA was secured in connection with the~~  
55 ~~investigation or prosecution of the defendant, and if a DNA test had~~  
56 ~~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) (i) In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the [~~defendant~~] applicant and their 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 impose an appropriate remedy.

(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) 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

1 such comparison had been conducted, [~~and if the results had been admitted in the trial resulting in the judgment,~~] a reasonable probability  
2 exists that the verdict would have been more favorable to the [~~defendant, or in a case involving a plea of guilty, if the results had been~~  
3 ~~available to the defendant prior to the plea, a reasonable probability~~  
4 ~~exists that the conviction would not have resulted]~~ applicant. For  
5 purposes of this subdivision, a "keyboard search" shall mean a search of  
6 a DNA profile against the databank in which the profile that is searched  
7 is not uploaded to or maintained in the databank.

10 [~~2. If it appears by conceded or uncontradicted allegations of the~~  
11 ~~moving papers or of the answer, or by unquestionable documentary proof,~~  
12 ~~that there are circumstances which require denial thereof pursuant to~~  
13 ~~subdivision two of section 440.10 or subdivision two of section 440.20,~~  
14 ~~the court must summarily deny the motion. If it appears that there are~~  
15 ~~circumstances authorizing, though not requiring, denial thereof pursuant~~  
16 ~~to subdivision three of section 440.10 or subdivision three of section~~  
17 ~~440.20, the court may in its discretion either (a) summarily deny the~~  
18 ~~motion, or (b) proceed to consider the merits thereof.~~

19 3.] 5. Where the applicant's motion for relief requests the perform-  
20 ance of any other forensic testing of evidence secured in the case, the  
21 court shall grant the application for testing of such evidence, upon its  
22 determination that had the results of forensic testing of evidence been  
23 available at the time of trial or plea and been favorable to the appli-  
24 cant, there is a reasonable probability that the outcome would have been  
25 more favorable to the applicant; or

26 6. Upon considering the merits of the motion, the court must grant it  
27 without conducting a hearing and vacate the judgment or set aside the  
28 sentence, as the case may be, if:

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

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

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

36 [~~4. Upon considering the merits of the motion, the court may deny it~~  
37 ~~without conducting a hearing if:~~

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

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

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

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

52 5.] 7. If it appears by conceded or uncontradicted allegations of the  
53 moving papers or of the answer, or by unquestionable documentary proof,  
54 that there are circumstances which require denial thereof pursuant to  
55 subdivision two of section 440.10 or subdivision two of section 440.20,  
56 the court must summarily deny the motion. If it appears that there are

1 circumstances authorizing, though not requiring, denial thereof pursuant  
2 to subdivision three of section 440.10 or subdivision three of section  
3 440.20, the court may in its discretion either (a) summarily deny the  
4 motion, or (b) proceed to consider the merits thereof.

5 8. The court must grant a hearing where:

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

8 (b) the motion papers are based upon the existence or occurrence of  
9 facts and contain sworn allegations substantiating or tending to  
10 substantiate all the essential facts, as required by subdivision one of  
11 this section; and

12 (c) no allegation of fact essential to support the motion is conclu-  
13 sively refuted by unquestionable documentary proof; and

14 (d) allegations of fact essential to support the motion are not  
15 contradicted by a court record or other official document, thereby  
16 establishing the reasonable possibility that such allegations are true.

17 9. If the court does not determine the motion pursuant to [~~subdivi-~~  
18 ~~sions two, three or four~~] subdivision four or five, it must conduct a  
19 hearing and make findings of fact essential to the determination there-  
20 of. The [~~defendant~~] applicant has a right to be present at such hearing  
21 but may waive such right in writing. If [~~he does~~] they do not so waive  
22 [~~it~~] such right and if [~~he is~~] they are confined in a prison or other  
23 institution of this state, the court must cause [~~him~~] them to be  
24 produced at such hearing.

25 [~~6-~~] 10. At such a hearing, the [~~defendant~~] applicant has the burden  
26 of proving by a preponderance of the evidence every fact essential to  
27 support the motion.

28 [~~7-~~] 11. Regardless of whether a hearing was conducted, the court,  
29 upon determining the motion, must set forth on the record its findings  
30 of fact, its conclusions of law and the reasons for its determination.

31 § 5. Section 470.15 of the criminal procedure law is amended by adding  
32 a new subdivision 2-a to read as follows:

33 2-a. In an appeal pursuant to subdivision three or four of section  
34 450.10 from an order entered pursuant to section 440.10, 440.11 or  
35 440.20 denying a motion to vacate a judgment or sentence, when the  
36 applicant proceeded without counsel in the court below after having  
37 applied for and been denied counsel under subdivision one of section  
38 440.30, except when the court properly refused to assign counsel based  
39 on the applicant's financial ability to retain counsel, the intermediate  
40 appellate court may reverse the order, direct the court to assign coun-  
41 sel, and remit the matter for de novo consideration. Such corrective  
42 action is authorized when the intermediate appellate court determines  
43 that additional factual or legal development is necessary and appropri-  
44 ate in the interest of justice to properly resolve the merits of the  
45 applicant's legal claim or claims. Nothing in this subdivision shall be  
46 construed to limit an intermediate appellate court's authority to remit  
47 a matter to the trial court for further proceedings in any other circum-  
48 stance.

49 § 6. Section 450.10 of the criminal procedure law, as amended by chap-  
50 ter 671 of the laws of 1971, subdivisions 1 and 2 as amended by chapter  
51 671 of the laws of 1984, subdivision 3 as added and subdivision 4 as  
52 renumbered by chapter 516 of the laws of 1986, and subdivision 5 as  
53 added by chapter 560 if the laws of 1999, is amended to read as follows:

54 § 450.10 Appeal by [~~defendant~~] petitioner to intermediate appellate  
55 court; in what cases authorized as of right.

1 An appeal to an intermediate appellate court may be taken as of right  
2 by the [~~defendant~~] petitioner from the following judgment, sentence and  
3 order of a criminal court:

4 1. A judgment other than one including a sentence of death[~~, unless~~  
5 ~~the appeal is based solely upon the ground that a sentence was harsh or~~  
6 ~~excessive when such sentence was predicated upon entry of a plea of~~  
7 ~~guilty and the sentence imposed did not exceed that which was agreed to~~  
8 ~~by the defendant as a condition of the plea and set forth on the record~~  
9 ~~or filed with the court as required by subdivision five of section~~  
10 ~~220.50 or subdivision four of section 340.20,].~~

11 2. A sentence other than one of death, as prescribed in subdivision  
12 one of section 450.30[~~, unless the appeal is based solely upon the~~  
13 ~~ground that a sentence was harsh or excessive when such sentence was~~  
14 ~~predicated upon entry of a plea of guilty and the sentence imposed did~~  
15 ~~not exceed that which was agreed to by the defendant as a condition of~~  
16 ~~the plea and set forth in the record or filed with the court as required~~  
17 ~~by subdivision five of section 220.50 or subdivision four of section~~  
18 ~~340.20,].~~

19 3. An order denying a motion, made pursuant to section 440.10 or  
20 440.11, to vacate a judgment other than one including a sentence of  
21 death; provided however that the intermediate appellate court, may,  
22 after motion by the people upon notice to the petitioner, dismiss the  
23 notice of appeal on the grounds that the motion to vacate the judgment  
24 is unsupported by sworn statements of fact or is wholly unsupported by  
25 law or by any good faith argument in support of an extension thereof.

26 4. An order denying a motion, made pursuant to section 440.20, to set  
27 aside a sentence other than one including a sentence of death; provided  
28 however that the intermediate appellate court may, after motion by the  
29 people upon notice to the petitioner dismiss the notice of appeal on the  
30 grounds that the motion to vacate the sentence is unsupported by sworn  
31 statements of fact or is wholly unsupported by law or by any good faith  
32 argument in support of an extension thereof.

33 5. A sentence including an order of criminal forfeiture entered pursu-  
34 ant to section 460.30 of the penal law with respect to such forfeiture  
35 order.

36 [~~4.~~] 6. An order, entered pursuant to section 440.40, setting aside a  
37 sentence other than one of death, upon motion of the People.

38 [~~5.~~] 7. An order denying a motion, made pursuant to subdivision one-a  
39 of section 440.30, for forensic DNA testing of evidence.

40 § 7. Section 450.15 of the criminal procedure law is REPEALED.

41 § 8. Subdivision 1 of section 450.30 of the criminal procedure law, as  
42 amended by chapter 671 of the laws of 1984, is amended to read as  
43 follows:

44 1. An appeal by the [~~defendant~~] petitioner from a sentence, as  
45 authorized by subdivision two of section 450.10, may be based upon the  
46 ground that such sentence either was (a) invalid as a matter of law, or  
47 (b) harsh or excessive. A sentence is invalid as a matter of law not  
48 only when the terms thereof are unauthorized but also when it is based  
49 upon an erroneous determination that the [~~defendant~~] petitioner had a  
50 previous valid conviction for an offense or, in the case of a resentence  
51 following a revocation of a sentence of probation or conditional  
52 discharge, upon an improper revocation of such original sentence. [~~An~~  
53 ~~appeal by the defendant from a sentence, as authorized by subdivision~~  
54 ~~three of section 450.15, may be based upon the ground that such sentence~~  
55 ~~was harsh or excessive.]~~

1 § 9. Subdivision 4 of section 722 of the county law, as amended by  
2 chapter 141 of the laws of 2008, is amended to read as follows:

3 4. Representation according to a plan containing a combination of any  
4 of the foregoing. Any judge, justice or magistrate in assigning counsel  
5 pursuant to sections 170.10, 180.10, 210.15 and 720.30 of the criminal  
6 procedure law, or in assigning counsel pursuant to subdivision one of  
7 section 440.30 of the criminal procedure law, or in assigning counsel to  
8 [~~a defendant~~] an applicant when a hearing has been ordered in a proceed-  
9 ing upon a motion, pursuant to article four hundred forty of the crimi-  
10 nal procedure law, to vacate a judgment or to set aside a sentence [~~or~~  
11 ~~on a motion for a writ of error coram nobis~~], or in assigning counsel to  
12 an applicant in connection with an appeal therefrom pursuant to section  
13 450.10 or 450.20 of the criminal procedure law, or in assigning counsel  
14 pursuant to the provisions of section two hundred sixty-two of the fami-  
15 ly court act or section four hundred seven of the surrogate's court  
16 procedure act, or in assigning counsel to [~~a defendant~~] an applicant  
17 when a case has been calendared for consideration of resentencing pursu-  
18 ant to subdivision four of section six hundred one-d of the correction  
19 law or when a court is otherwise called upon to consider whether a prop-  
20 er term of post-release supervision was imposed as part of a determinate  
21 sentence, shall assign counsel furnished in accordance with a plan  
22 conforming to the requirements of this section; provided, however, that  
23 when the county or the city in which a county is wholly contained has  
24 not placed in operation a plan conforming to that prescribed in this  
25 subdivision or subdivision three of this section and the judge, justice  
26 or magistrate is satisfied that a conflict of interest prevents the  
27 assignment of counsel pursuant to the plan in operation, or when the  
28 county or the city in which a county is wholly contained has not placed  
29 in operation any plan conforming to that prescribed in this section, the  
30 judge, justice or magistrate may assign any attorney in such county or  
31 city and, in such event, such attorney shall receive compensation and  
32 reimbursement from such county or city which shall be at the same rate  
33 as is prescribed in section seven hundred twenty-two-b of this article.  
34 When a case has been calendared for consideration of resentencing pursu-  
35 ant to subdivision four of section six hundred one-d of the correction  
36 law or when a court is otherwise called upon to consider whether a prop-  
37 er term of post-release supervision was imposed as part of a determinate  
38 sentence, the attorney appointed should be the attorney who appeared for  
39 the [~~defendant~~] applicant in connection with the judgment or sentence  
40 or, if the [~~defendant~~] applicant is currently represented concerning  
41 [~~his or her~~] their conviction or sentence or with respect to an appeal  
42 from [~~his or her~~] their conviction or sentence, such present counsel.

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

45 7. The chief administrator of the courts shall collect data and report  
46 every year in relation to applications and motions filed pursuant to  
47 article four hundred forty of the criminal procedure law, broken down by  
48 each section of such article to include motions filed pursuant to  
49 sections 440.10, 440.20, 440.40, 440.46, 440.46-a and 440.47 of the  
50 criminal procedure law. Information to be collected and disclosed shall  
51 include the raw number of both applications and/or motions filed in each  
52 county and on appeal in each judicial department. Information shall  
53 include: (a) the top conviction charge for each application or motion;  
54 (b) when pro se applicants request assignment of counsel pursuant to  
55 subdivision two of section 440.30 of the criminal procedure law, whether  
56 or not counsel was assigned; (c) the outcome of each motion filed wheth-

1 er denied without hearing, denied with hearing, vacatur granted, or  
2 other; and (d) the average length of time motions under article four  
3 hundred forty of the criminal procedure law remain pending for each  
4 county. Such report shall aggregate the data collected by county and  
5 judicial department. The data shall be aggregated in order to protect  
6 the identity of individual applicants. The report shall be released  
7 publicly and published on the websites of the office of court adminis-  
8 tration and the division of criminal justice services. The first report  
9 shall be published twelve months after this subdivision shall have  
10 become a law, and shall include data from the first six months following  
11 the effective date of this subdivision. Reports for subsequent periods  
12 shall be published annually thereafter.

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

19 § 12. This act shall take effect on the sixtieth day after it shall  
20 have become a law and shall apply to all motions that are not final as  
21 of such effective date.