

STATE OF NEW YORK

6319--B

2025-2026 Regular Sessions

IN SENATE

March 10, 2025

Introduced by Sens. MYRIE, CLEARE, COMRIE, FAHY, FERNANDEZ, GONZALEZ, HARCKHAM, JACKSON, MAY, RAMOS, RIVERA, SALAZAR, SEPULVEDA, SERRANO -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- recommitted to the Committee on Codes in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the criminal procedure law and the judiciary law, in relation to motions to vacate judgment; to amend the criminal procedure law, in relation to making conforming changes; to amend the county law, in relation to assigning counsel in connection with an appeal; 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
8 was 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) the offense for which the applicant was convicted was subsequently
15 reduced to a lesser degree offense by the legislature and such reduction

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

LBD00248-11-6

1 has been made retroactive by the legislature or by controlling judicial
2 authority; or

3 (c) the undisputed act or acts for which the applicant was convicted
4 have been subsequently determined by controlling judicial authority to
5 have been legally insufficient, as of the date of the commission of the
6 crime, to have satisfied the elements of the crime for which the appli-
7 cant was convicted, but were legally sufficient to support conviction
8 for a lesser degree offense on the date of such commission.

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

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

27 § 440.10 Motion to vacate judgment.

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

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

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

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

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

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

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

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

1 (ii) New evidence has been discovered since the entry of a judgment
2 based upon a guilty plea, which could not have been produced by the
3 applicant prior to the entry of the guilty plea even with due diligence
4 on the applicant's part and which is of such a character as to create a
5 reasonable probability that the applicant was actually innocent of the
6 offense and the underlying conduct for which they were convicted.

7 [~~(g-1) Forensic DNA~~] (iii) In cases involving the forensic testing of
8 evidence performed since the entry of a judgment, [~~(1) in the case of a~~
9 ~~defendant convicted after a guilty plea, the court has determined that~~
10 ~~the defendant has demonstrated a substantial probability that the~~
11 ~~defendant was actually innocent of the offense of which he or she was~~
12 ~~convicted, or (2) in the case of a defendant convicted after a trial,~~]
13 the court has determined that there exists a reasonable probability
14 that:

15 (A) in the case of an applicant convicted after a guilty plea, that
16 the defendant is actually innocent; or

17 (B) in the case of an applicant convicted after trial, that the
18 verdict would have been more favorable to the [defendant] applicant.

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

23 (i) The judgment is a conviction where the [~~defendant's~~] applicant's
24 participation in the offense was a result of having been a victim of sex
25 trafficking under section 230.34 of the penal law, sex trafficking of a
26 child under section 230.34-a of the penal law, labor trafficking under
27 section 135.35 of the penal law, aggravated labor trafficking under
28 section 135.37 of the penal law, compelling prostitution under section
29 230.33 of the penal law, or trafficking in persons under the Trafficking
30 Victims Protection Act (United States Code, title 22, chapter 78);
31 provided that:

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

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

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

50 (j) The judgment is a conviction for [~~a class A or unclassified~~] any
51 misdemeanor entered prior to the effective date of this paragraph and
52 [~~satisfies the ground prescribed in paragraph (h) of this subdivision~~]
53 the applicant faces ongoing collateral consequences, including potential
54 or actual immigration consequences based on a possible or imposed
55 sentence of three hundred sixty-five days. There shall be a rebuttable
56 presumption that a conviction by plea to such an offense was not know-

1 ing, voluntary and intelligent, based on ongoing collateral conse-
2 quences, including potential or actual immigration consequences, and
3 there shall be a rebuttable presumption that a conviction by verdict
4 constitutes cruel and unusual punishment under section five of article
5 one of the state constitution based on such consequences; or

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

18 (1) The offense for which the applicant was convicted has been held to
19 be unconstitutional under the federal or state constitutions by the
20 court of appeals, an intermediate appellate court or a U.S. court with
21 jurisdiction over New York.

22 2. The court must grant a hearing where:

23 (a) the moving papers allege a ground constituting a legal basis for
24 motion;

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

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

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

34 3. Notwithstanding the provisions of subdivision one of this section,
35 the court [~~must~~] shall deny a motion to vacate a judgment when:

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

42 (b) The judgment is, at the time of the motion, appealable or pending
43 on appeal, and sufficient facts appear on the record with respect to the
44 ground or issue raised upon the motion to permit adequate review thereof
45 upon such an appeal unless the issue raised upon such motion is ineffec-
46 tive assistance of counsel. This paragraph shall not apply to a motion
47 under paragraph (i) of subdivision one of this section; or

48 (c) Although sufficient facts appear on the record of the proceedings
49 underlying the judgment to have permitted, upon appeal from such judg-
50 ment, adequate review of the ground or issue raised upon the motion, no
51 such appellate review or determination occurred owing to the [~~defend-~~
52 ~~ant's~~] applicant's unjustifiable failure to take or perfect an appeal
53 during the prescribed period or to [~~his or her~~] the applicant's unjusti-
54 fiable failure to raise such ground or issue upon an appeal actually
55 perfected by [~~him or her~~] them unless the issue raised upon such motion
56 is ineffective assistance of counsel; or

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

5 [~~3-~~] 4. Notwithstanding the provisions of subdivision one of this
6 section, the court may deny a motion to vacate a judgment when:

7 (a) Although facts in support of the ground or issue raised upon the
8 motion could with due diligence by the [~~defendant~~] applicant have readi-
9 ly been made to appear on the record in a manner providing adequate
10 basis for review of such ground or issue upon an appeal from the judg-
11 ment, the [~~defendant~~] applicant unjustifiably failed to adduce such
12 matter prior to sentence and the ground or issue in question was not
13 subsequently determined upon appeal. This paragraph does not apply to a
14 motion based upon deprivation of the right to counsel at the trial or
15 upon failure of the trial court to advise the [~~defendant~~] applicant of
16 such right, or to a motion under paragraph (i) of subdivision one of
17 this section; or

18 (b) The ground or issue raised upon the motion was previously deter-
19 mined on the merits upon a prior motion or proceeding in a court of this
20 state, other than an appeal from the judgment, or upon a motion or
21 proceeding in a federal court; unless since the time of such determi-
22 nation there has been a retroactively effective change in the law
23 controlling such issue or the applicant has submitted new evidence that
24 could not have been previously produced with the exercise of due dili-
25 gence that materially advances the claim; or

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

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

33 (d) When making a determination under paragraphs (b) and (c) of this
34 subdivision, the court must consider whether the applicant was unrepres-
35 ented by counsel on the previous motion, was incarcerated at the time
36 it was filed, and any other fact or circumstance that may have limited
37 or impeded the applicant's ability to adequately raise or argue such
38 ground or issue.

39 [~~4-~~] 5. For purposes of paragraphs (g) and (h) of subdivision one of
40 this section, an applicant is actually innocent, where they prove that
41 they did not commit the crime for which they were convicted or that the
42 crime of conviction did not occur. If the court concludes that there is
43 a reasonable probability that the applicant is actually innocent, the
44 court shall vacate the conviction or convictions and order a new trial.
45 If the court concludes by clear and convincing evidence that the appli-
46 cant is actually innocent of the crime, the court shall vacate the
47 conviction or convictions and dismiss with prejudice.

48 6. If the court grants the motion, it must, except as provided in
49 subdivision [~~five or six~~] seven, eight or eleven of this section, vacate
50 the judgment, and must either:

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

52 (b) order a new trial, or

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

54 [~~5-~~] 7. Upon granting the motion upon the ground, as prescribed in
55 paragraph (g) of subdivision one of this section, that newly discovered
56 evidence creates a probability that had such evidence been received at

1 the trial the verdict would have been more favorable to the [~~defendant~~
2 applicant] in that the conviction would have been for a lesser offense
3 than the one contained in the verdict, the court may either:

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

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

8 [~~6-~~] 8. If the court grants a motion under paragraph [~~(i)~~-or-paragraph
9 ~~(k)~~] (g) or (h) when the basis for relief is actual innocence as estab-
10 lished by clear and convincing evidence, or under paragraph (i) or (k)
11 of subdivision one of this section, it must vacate the judgment [~~and~~] on
12 the merits, dismiss the accusatory instrument, seal the judgment, and
13 may take such additional action as is appropriate in the circumstances.
14 In the case of a motion granted under paragraph (i) of subdivision one
15 of this section, the court must vacate the judgment on the merits
16 because the [~~defendant's~~] applicant's participation in the offense was a
17 result of having been a victim of trafficking.

18 [~~7-~~] 9. Upon a new trial resulting from an order vacating a judgment
19 pursuant to this section, the indictment is deemed to contain all the
20 counts and to charge all the offenses which it contained and charged at
21 the time the previous trial was commenced, regardless of whether any
22 count was dismissed by the court in the course of such trial, except (a)
23 those upon or of which the [~~defendant~~] applicant was acquitted or deemed
24 to have been acquitted, and (b) those dismissed by the order vacating
25 the judgment, and (c) those previously dismissed by an appellate court
26 upon an appeal from the judgment, or by any court upon a previous post-
27 judgment motion.

28 [~~8-~~] 10. Upon an order which vacates a judgment based upon a plea of
29 guilty to an accusatory instrument or a part thereof, but which does not
30 dismiss the entire accusatory instrument, the criminal action is, in the
31 absence of an express direction to the contrary, restored to its
32 [~~prepleading~~] pre-pleading status and the accusatory instrument is
33 deemed to contain all the counts and to charge all the offenses which it
34 contained and charged at the time of the entry of the plea, except those
35 subsequently dismissed under circumstances specified in paragraphs (b)
36 and (c) of subdivision [~~six~~] eight of this section. Where the plea of
37 guilty was entered and accepted, pursuant to subdivision three of
38 section 220.30, upon the condition that it constituted a complete dispo-
39 sition not only of the accusatory instrument underlying the judgment
40 vacated but also of one or more other accusatory instruments against the
41 [~~defendant~~] applicant then pending in the same court, the order of vaca-
42 tion completely restores such other accusatory instruments; and such is
43 the case even though such order dismisses the main accusatory instrument
44 underlying the judgment.

45 [~~9-~~] 11. Upon granting of a motion pursuant to paragraph (j) of subdivi-
46 sion one of this section, the court may either:

47 (a) With the consent of the people, vacate the judgment or modify the
48 judgment by reducing it to one of conviction for [~~a-lesser~~] an alterna-
49 tive offense; or

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

54 § 3. Section 440.20 of the criminal procedure law, subdivision 1 as
55 amended by chapter 1 of the laws of 1995, is amended to read as follows:
56 § 440.20 Motion to set aside sentence; by [~~defendant~~] applicant.

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

30 2. Notwithstanding the provisions of subdivision one of this section,
31 the court [~~must~~ may] deny such a motion when the ground or issue raised
32 thereupon was previously determined on the merits upon an appeal from
33 the judgment or sentence, unless since the time of such appellate deter-
34 mination there has been a retroactively effective change in the law
35 controlling such issue.

36 3. Notwithstanding the provisions of subdivision one of this section,
37 the court may deny such a motion when the ground or issue raised there-
38 upon was previously determined on the merits upon a prior motion or
39 proceeding in a court of this state, other than an appeal from the judg-
40 ment, or upon a prior motion or proceeding in a federal court, unless
41 since the time of such determination there has been a retroactively
42 effective change in the law controlling such issue. Despite such deter-
43 mination, however, the court in the interest of justice and for good
44 cause shown, may in its discretion grant the motion if it is otherwise
45 meritorious.

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

50 § 4. Section 440.30 of the criminal procedure law, subdivisions 1 and
51 1-a as amended by chapter 19 of the laws of 2012 and the opening para-
52 graph of paragraph (b) of subdivision 1 as amended by section 10 of part
53 LLL of chapter 59 of the laws of 2019, is amended to read as follows:

54 § 440.30 Motion to vacate judgment and to set aside sentence; procedure.

55 1. (a) [~~A~~ An application for assignment of counsel for a] motion to
56 vacate a judgment pursuant to section 440.10 or 440.11 of this article

1 and a motion to set aside a sentence pursuant to section 440.20 of this
2 article must be made in writing by a pro se applicant, and upon reason-
3 able notice to the people [~~Upon the motion, a defendant~~] and to the
4 court in which the judgment and sentence were entered. The applicant
5 shall provide the court with a plain statement of the legal claim or
6 claims the applicant intends to raise.

7 (b) If, after reviewing the applicant's legal claim, the court finds
8 that there is a reasonable possibility that the applicant is entitled to
9 relief under this article, it shall assign an attorney to further pursue
10 the claim.

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

13 (d) If, at the time of such applicant's request for assignment of
14 counsel, the sentencing judge or justice no longer sits in the court in
15 which the sentence was imposed, the request shall be randomly assigned
16 to another judge or justice of the court.

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

20 2. (a) In connection with the preparation before filing or proceeding
21 after filing of a motion pursuant to section 440.10 of this article, and
22 upon a showing that the prospective applicant or applicant has sought
23 the requested material from former trial counsel and, where applicable,
24 former appellate counsel without success, the court must order the
25 people to produce discovery material that is potentially relevant to the
26 investigation or presentation of an identifiable claim under this arti-
27 cle. A motion for discovery under this paragraph must be brought upon
28 notice to the people and may be made in anticipation of the filing of a
29 motion to vacate a felony judgment of conviction or after such motion
30 has been filed. The court shall deny a request made pursuant to this
31 paragraph where the applicant intends to or has challenged a judgment of
32 conviction that is not a felony defined in section 10.00 of the penal
33 law, or the requested material is otherwise contained in accessible
34 court files.

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

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

41 (d) Nothing in this section shall be construed to limit the power to
42 subpoena evidence pursuant to section 610.20 of this chapter.

43 3. (a) An applicant who is in a position adequately to raise more than
44 one ground should raise every such ground upon which [~~he or she intends~~]
45 they intend to challenge the judgment or sentence. If the motion is
46 based upon the existence or occurrence of facts, the motion papers must
47 contain sworn allegations thereof, whether by the [~~defendant~~] applicant
48 or by another person or persons. Such sworn allegations may be based
49 upon personal knowledge of the affiant or upon information and belief,
50 provided that in the latter event the affiant must state the sources of
51 such information and the grounds of such belief. The [~~defendant~~] appli-
52 cant may further submit documentary evidence or information supporting
53 or tending to support the allegations of the moving papers.

54 (b) The people may file with the court, and in such case must serve a
55 copy thereof upon the [~~defendant~~] applicant or [~~his or her~~] their coun-
56 sel, if any, an answer denying or admitting any or all of the allega-

1 tions of the motion papers, and may further submit documentary evidence
2 or information refuting or tending to refute such allegations.

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

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

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

35 ~~(ii) the defendant has made his or her motion after five years from
36 the date of the judgment of conviction, provided, however, that this
37 limitation period shall be tolled for five years if the defendant is in
38 custody in connection with the conviction that is the subject of his or
39 her motion, and provided further that, notwithstanding such limitation
40 periods, the court may consider the motion if the defendant has shown:
41 (A) that he or she has been pursuing his or her rights diligently and
42 that some extraordinary circumstance prevented the timely filing of the
43 motion; (B) that the facts upon which the motion is predicated were
44 unknown to the defendant or his or her attorney and could not have been
45 ascertained by the exercise of due diligence prior to the expiration of
46 the statute of limitations; or (C) considering all circumstances of the
47 case including but not limited to evidence of the defendant's guilt, the
48 impact of granting or denying such motion upon public confidence in the
49 criminal justice system, or upon the safety or welfare of the community,
50 and the defendant's diligence in seeking to obtain the requested proper-
51 ty or related relief, the interests of justice would be served by
52 considering the motion;~~

53 ~~(iii) the defendant is challenging a judgment convicting him or her of
54 an offense that is not a felony defined in section 10.00 of the penal
55 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 been conducted on such evidence, and if the~~] results [~~had~~] been available at the time of the trial or plea and had been admitted in the trial resulting in the judgment, there [~~exists~~] is a reasonable probability that the verdict or plea offer 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)(i) In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the [~~defendant~~] applicant and the applicant's 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

1 location of the specified evidence is unknown, a representation to that
2 effect and information and documentary evidence in the possession of the
3 people concerning the last known physical location of such specified
4 evidence.

5 (ii) If there is a finding by the court that the specified evidence no
6 longer exists or the physical location of such specified evidence is
7 unknown, [~~such information in and of itself shall not be a factor from~~
8 ~~which any inference unfavorable to the people may be drawn by the court~~
9 ~~in deciding a motion under this section]~~ the court may impose an appro-
10 priate remedy.

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

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

38 [~~2. If it appears by conceded or uncontradicted allegations of the~~
39 ~~moving papers or of the answer, or by unquestionable documentary proof,~~
40 ~~that there are circumstances which require denial thereof pursuant to~~
41 ~~subdivision two of section 440.10 or subdivision two of section 440.20,~~
42 ~~the court must summarily deny the motion. If it appears that there are~~
43 ~~circumstances authorizing, though not requiring, denial thereof pursuant~~
44 ~~to subdivision three of section 440.10 or subdivision three of section~~
45 ~~440.20, the court may in its discretion either (a) summarily deny the~~
46 ~~motion, or (b) proceed to consider the merits thereof.~~

47 3.] 5. Where the applicant's motion for relief requests the perform-
48 ance of any other forensic testing of evidence secured in the case, the
49 court shall grant the application for testing of such evidence, upon its
50 determination that had the results of forensic testing of evidence been
51 available at the time of trial or plea and been favorable to the appli-
52 cant, there is a reasonable probability that the outcome would have been
53 more favorable to the applicant.

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

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

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

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

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

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

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

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

18 ~~(d) An allegation of fact essential to support the motion (i) is~~
19 ~~contradicted by a court record or other official document, or is made~~
20 ~~solely by the defendant and is unsupported by any other affidavit or~~
21 ~~evidence, and (ii) under these and all the other circumstances attending~~
22 ~~the case, there is no reasonable possibility that such allegation is~~
23 ~~true.~~

24 5.] 7. If it appears by conceded or uncontradicted allegations of the
25 moving papers or of the answer, or by unquestionable documentary proof,
26 that there are circumstances which require denial thereof pursuant to
27 subdivision two of section 440.10 of this article or subdivision two of
28 section 440.20 of this article, the court must summarily deny the
29 motion. If it appears that there are circumstances authorizing, though
30 not requiring, denial thereof pursuant to subdivision three of section
31 440.10 of this article or subdivision three of section 440.20 of this
32 article, the court may in its discretion either (a) summarily deny the
33 motion, or (b) proceed to consider the merits thereof.

34 8. The court must grant a hearing where:

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

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

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

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

46 9. If the court does not determine the motion pursuant to [subdivi-
47 sions two, three or four] subdivision six or seven of this section, it
48 must conduct a hearing and make findings of fact essential to the deter-
49 mination thereof. The [defendant] applicant has a right to be present at
50 such hearing but may waive such right in writing. If [he] the applicant
51 does not so waive [it] such right and if [he is] they are confined in a
52 prison or other institution of this state, the court must cause [him]
53 them to be produced at such hearing.

54 [6.] 10. At such a hearing, the [defendant] applicant has the burden
55 of proving by a preponderance of the evidence every fact essential to
56 support the motion.

1 ~~[7-]~~ 11. Regardless of whether a hearing was conducted, the court,
2 upon determining the motion, must set forth on the record its findings
3 of fact, its conclusions of law and the reasons for its determination.

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

6 2-a. In an appeal pursuant to subdivision three or four of section
7 450.10 of this title from an order entered pursuant to section 440.10,
8 440.11 or 440.20 of this title denying a motion to vacate a judgment or
9 sentence, when the applicant proceeded without counsel in the court
10 below after having applied for and been denied counsel under subdivision
11 one of section 440.30 of this title, except when the court properly
12 refused to assign counsel based on the applicant's financial ability to
13 retain counsel, the intermediate appellate court may reverse the order,
14 direct the court to assign counsel, and remit the matter for de novo
15 consideration. Such corrective action is authorized when the intermedi-
16 ate appellate court determines that additional factual or legal develop-
17 ment is necessary and appropriate in the interest of justice to properly
18 resolve the merits of the applicant's legal claim or claims. Nothing in
19 this subdivision shall be construed to limit an intermediate appellate
20 court's authority to remit a matter to the trial court for further
21 proceedings in any other circumstance.

22 § 6. Section 450.10 of the criminal procedure law, as amended by chap-
23 ter 671 of the laws of 1971, subdivisions 1 and 2 as amended by chapter
24 671 of the laws of 1984, subdivision 3 as added and subdivision 4 as
25 renumbered by chapter 516 of the laws of 1986, and subdivision 5 as
26 added by chapter 560 of the laws of 1999, is amended to read as follows:

27 § 450.10 Appeal by ~~[defendant]~~ petitioner to intermediate appellate
28 court; in what cases authorized as of right.

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

32 1. A judgment other than one including a sentence of death~~[, unless~~
33 ~~the appeal is based solely upon the ground that a sentence was harsh or~~
34 ~~excessive when such sentence was predicated upon entry of a plea of~~
35 ~~guilty and the sentence imposed did not exceed that which was agreed to~~
36 ~~by the defendant as a condition of the plea and set forth on the record~~
37 ~~or filed with the court as required by subdivision five of section~~
38 ~~220.50 or subdivision four of section 340.20,]~~.

39 2. A sentence other than one of death, as prescribed in subdivision
40 one of section 450.30~~[, unless the appeal is based solely upon the~~
41 ~~ground that a sentence was harsh or excessive when such sentence was~~
42 ~~predicated upon entry of a plea of guilty and the sentence imposed did~~
43 ~~not exceed that which was agreed to by the defendant as a condition of~~
44 ~~the plea and set forth in the record or filed with the court as required~~
45 ~~by subdivision five of section 220.50 or subdivision four of section~~
46 ~~340.20,]~~ of this title.

47 3. An order denying a motion, made pursuant to section 440.10 or
48 440.11 of this title, to vacate a judgment other than one including a
49 sentence of death; provided however that the intermediate appellate
50 court, may, after motion by the people upon notice to the petitioner,
51 dismiss the notice of appeal on the grounds that the motion to vacate
52 the judgment is unsupported by sworn statements of fact or is wholly
53 unsupported by law or by any good faith argument in support of an exten-
54 sion thereof.

55 4. An order denying a motion, made pursuant to section 440.20 or
56 440.46-a of this title, to set aside a sentence other than one including

1 a sentence of death; provided however that the intermediate appellate
2 court may, after motion by the people upon notice to the petitioner
3 dismiss the notice of appeal on the grounds that the motion to vacate
4 the sentence is unsupported by sworn statements of fact or is wholly
5 unsupported by law or by any good faith argument in support of an exten-
6 sion thereof.

7 5. A sentence including an order of criminal forfeiture entered pursu-
8 ant to section 460.30 of the penal law with respect to such forfeiture
9 order.

10 [4.] 6. An order, entered pursuant to section 440.40 of this title,
11 setting aside a sentence other than one of death, upon motion of the
12 People.

13 [5.] 7. An order denying a motion, made pursuant to subdivision
14 [~~one-a~~] four of section 440.30 of this title, for forensic DNA testing
15 of evidence.

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

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

20 1. An appeal by the [~~defendant~~] petitioner from a sentence, as
21 authorized by subdivision two of section 450.10, may be based upon the
22 ground that such sentence either was (a) invalid as a matter of law, or
23 (b) harsh or excessive. A sentence is invalid as a matter of law not
24 only when the terms thereof are unauthorized but also when it is based
25 upon an erroneous determination that the [~~defendant~~] petitioner had a
26 previous valid conviction for an offense or, in the case of a resentence
27 following a revocation of a sentence of probation or conditional
28 discharge, upon an improper revocation of such original sentence. [~~An~~
29 ~~appeal by the defendant from a sentence, as authorized by subdivision~~
30 ~~three of section 450.15, may be based upon the ground that such sentence~~
31 ~~was harsh or excessive.~~]

32 § 9. Subdivision 1 of section 450.90 of the criminal procedure law, as
33 amended by chapter 31 of the laws of 2019, is amended to read as
34 follows:

35 1. Provided that a certificate granting leave to appeal is issued
36 pursuant to section 460.20, an appeal may, except as provided in subdi-
37 vision two, be taken to the court of appeals by either the defendant or
38 the people from any adverse or partially adverse order of an intermedi-
39 ate appellate court entered upon an appeal taken to such intermediate
40 appellate court pursuant to section 450.10, [~~450.15,~~] or 450.20, or from
41 an order granting or denying a motion to set aside an order of an inter-
42 mediate appellate court on the ground of ineffective assistance or
43 wrongful deprivation of appellate counsel, or by either the defendant or
44 the people from any adverse or partially adverse order of an intermedi-
45 ate appellate court entered upon an appeal taken to such intermediate
46 appellate court from an order entered pursuant to section 440.46 or
47 section 440.47 of this chapter. An order of an intermediate appellate
48 court is adverse to the party who was the appellant in such court when
49 it affirms the judgment, sentence or order appealed from, and is adverse
50 to the party who was the respondent in such court when it reverses the
51 judgment, sentence or order appealed from. An appellate court order
52 which modifies a judgment or order appealed from is partially adverse to
53 each party.

54 § 10. Subdivision 4 of section 460.10 of the criminal procedure law is
55 REPEALED.

1 § 11. Paragraph (a) of subdivision 1 of section 460.60 of the criminal
2 procedure law, as amended by chapter 168 of the laws of 1981, is amended
3 to read as follows:

4 (a) A judge who, pursuant to section 460.20 of this [~~chapter~~] article,
5 has received an application for a certificate granting a defendant leave
6 to appeal to the court of appeals from an order of an intermediate
7 appellate court affirming or modifying a judgment including a sentence
8 of imprisonment[~~7~~] or a sentence of imprisonment, [~~or an order appealed~~
9 ~~pursuant to section 450.15 of this chapter,~~] of a criminal court, may,
10 upon application of such defendant-appellant issue an order both (i)
11 staying or suspending the execution of the judgment pending the determi-
12 nation of the application for leave to appeal, and, if that application
13 is granted, staying or suspending the execution of the judgment pending
14 the determination of the appeal, and (ii) either releasing the defend-
15 ant on [~~his~~] their own recognizance or continuing bail as previously
16 determined or fixing bail pursuant to the provisions of article five
17 hundred thirty of this chapter. Such an order is effective immediately
18 and that phase of the order staying or suspending execution of the judg-
19 ment does not become effective unless and until the defendant is
20 released, either on [~~his~~] their own recognizance or upon the posting of
21 bail.

22 § 12. Subdivision 4 of section 722 of the county law, as amended by
23 chapter 141 of the laws of 2008, is amended to read as follows:

24 4. Representation according to a plan containing a combination of any
25 of the foregoing. Any judge, justice or magistrate in assigning counsel
26 pursuant to sections 170.10, 180.10, 210.15 and 720.30 of the criminal
27 procedure law, or in assigning counsel pursuant to subdivision one of
28 section 440.30 of the criminal procedure law, or in assigning counsel to
29 [~~a defendant~~] an applicant when a hearing has been ordered in a proceed-
30 ing upon a motion, pursuant to article four hundred forty of the crimi-
31 nal procedure law, to vacate a judgment or to set aside a sentence or on
32 a motion for a writ of error coram nobis, or in assigning counsel to an
33 applicant in connection with an appeal therefrom pursuant to section
34 450.10 or 450.20 of the criminal procedure law, or in assigning counsel
35 pursuant to the provisions of section two hundred sixty-two of the fami-
36 ly court act or section four hundred seven of the surrogate's court
37 procedure act, or in assigning counsel to [~~a defendant~~] an applicant
38 when a case has been calendared for consideration of resentencing pursu-
39 ant to subdivision four of section six hundred one-d of the correction
40 law or when a court is otherwise called upon to consider whether a prop-
41 er term of post-release supervision was imposed as part of a determinate
42 sentence, shall assign counsel furnished in accordance with a plan
43 conforming to the requirements of this section; provided, however, that
44 when the county or the city in which a county is wholly contained has
45 not placed in operation a plan conforming to that prescribed in this
46 subdivision or subdivision three of this section and the judge, justice
47 or magistrate is satisfied that a conflict of interest prevents the
48 assignment of counsel pursuant to the plan in operation, or when the
49 county or the city in which a county is wholly contained has not placed
50 in operation any plan conforming to that prescribed in this section, the
51 judge, justice or magistrate may assign any attorney in such county or
52 city and, in such event, such attorney shall receive compensation and
53 reimbursement from such county or city which shall be at the same rate
54 as is prescribed in section seven hundred twenty-two-b of this article.
55 When a case has been calendared for consideration of resentencing pursu-
56 ant to subdivision four of section six hundred one-d of the correction

1 law or when a court is otherwise called upon to consider whether a prop-
2 er term of post-release supervision was imposed as part of a determinate
3 sentence, the attorney appointed should be the attorney who appeared for
4 the [~~defendant~~] applicant in connection with the judgment or sentence
5 or, if the [~~defendant~~] applicant is currently represented concerning
6 [~~his or her~~] their conviction or sentence or with respect to an appeal
7 from [~~his or her~~] their conviction or sentence, such present counsel.

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

10 7. The chief administrator of the courts shall collect data and report
11 every year in relation to applications and motions filed pursuant to
12 article four hundred forty of the criminal procedure law, broken down by
13 each section of such article to include motions filed pursuant to
14 sections 440.10, 440.11, 440.20, 440.40, 440.46, 440.46-a, and 440.47 of
15 the criminal procedure law. Information to be collected and disclosed
16 shall include the raw number of both applications and/or motions filed
17 in each county and on appeal in each judicial department. Information
18 shall include the top conviction charge for each application or motion;
19 when pro se applicants request assignment of counsel pursuant to subdi-
20 vision two of section 440.30 of the criminal procedure law, whether or
21 not counsel was assigned; the outcome of each motion filed, whether
22 denied without hearing, denied with hearing, vacatur granted, or other;
23 and the average length of time motions under article four hundred forty
24 of the criminal procedure law remain pending for each county. Such
25 report shall aggregate the data collected by county and judicial depart-
26 ment. The data shall be aggregated in order to protect the identity of
27 individual applicants. The report shall be released publicly and
28 published on the websites of the office of court administration and the
29 division of criminal justice services. The first report shall be
30 published twelve months after this subdivision shall have become a law,
31 and shall include data from the first six months following the effective
32 date of this subdivision. Reports for subsequent periods shall be
33 published annually thereafter.

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

40 § 15. This act shall take effect on the sixtieth day after it shall
41 have become a law and shall apply to all motions filed on or after such
42 effective date, and to motions filed prior to such effective date that
43 are pending on such effective date either in the trial court or on
44 appeal, and to motions for which the applicant's time to seek permission
45 to appeal has not expired by such effective date.