CHAPTER 20

USING ARTICLE 440 OF THE NEW YORK CRIMINAL PROCEDURE LAW TO ATTACK YOUR UNFAIR CONVICTION OR ILLEGAL SENTENCE*

A. Introduction

If you have been convicted in a New York state court, it may be possible for you to challenge and overturn your conviction. Under certain circumstances (explained below), you may ask the trial court to either "vacate" (cancel) the judgment or "set aside" your sentence. You can make this request in a "motion" brought under Article 440 of the New York Criminal Procedure Law.[1][2] Part B of this Chapter explains what Article 440 motions are, why you may make a motion, and when a court will consider your motion. Part C explains how to make an Article 440 motion. Part D describes what usually happens after you make an Article 440 motion. Part E details the positive decisions possible through an Article 440 motion. Part F explains how to appeal a court's denial of your Article 440 motion. Part G summarizes important things to think about when making an Article 440 motion. Finally, Appendix B to this Chapter contains forms for filing Article 440 motions.

If you have been convicted in another state court (besides New York), see Appendix A for a list of similar post-conviction relief statutes from other states.

B. When to Use Article 440

1. What is an Article 440 Motion?

An Article 440 motion challenges the legality of your conviction or sentence.[3] If your Article 440 motion succeeds, you will receive a new trial or a new sentence. An Article 440 motion is not an "appeal"[4] and is not a substitute for an appeal or second appeal.[5] In an appeal, you request a higher court (i.e., the "appellate division" or a "court of appeals") to review errors of the trial court. In an appeal, you may only raise issues that were part of the trial record. The following list describes information included within your trial record. This information is usually part of a traditional appeal. The following information is <u>not</u> usually included in an Article 440 motion:

(1) The "complaint" and the "indictment,"
(2) The "minutes" of any "hearing to suppress evidence" (a hearing to exclude evidence resulting from an illegal search or seizure) and other hearings, and
(3) The report of the formal proceedings in the trial court. This includes:
    (a) the pleadings and motions made by both sides,

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1. A motion is a request to a court or judge asking for a ruling or order in your favor.

2. The laws pertaining to Article 440 motions can be found in §§ 440.10–440.70 of the New York Criminal Procedure Law ("N.Y. CRIM. PROC. LAW").

3. Other ways of attacking your conviction include filing an appeal, or a state or federal writ of habeas corpus. For information about how to file an appeal, please see Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence." For information about federal and state writ of habeas corpus, please see Chapter 13 of the *JLM*, "Federal Habeas Corpus," and Chapter 21 of the *JLM*, "State Habeas Corpus: Florida, New York, and Michigan;" These two chapters describe the federal writ of habeas corpus and the state writ of habeas corpus, respectively. Both of these writs can be used to obtain post-conviction relief for state and federal constitutional violations.

4. For more on how to appeal your conviction, see Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence."

5. *See* People v. Harris, 109 A.D.2d 351, 353, 491 N.Y.S.2d 678, 682 (2d Dept. 1985) (explaining that an Article 440 motion "is designed to inform the court of facts not reflected in the record and not known at the time of judgment that would, as a matter of law, undermine the judgment.").

(b) the minutes of a guilty plea if you made one,
(c) the minutes of the trial court, including objections made by both sides and court rulings,
(d) the charges to the jury, if it was a jury trial,
(e) the minutes of the arraignment and the sentencing,
(f) the minutes of any adjournment, and
(g) any trial testimony and evidence such as documents, photographs, reports, etc.

An Article 440 motion allows you to inform the trial court of facts that were not in the trial record. You would not be able to raise these facts on appeal[6] because appellate courts cannot consider facts not in the trial record.[7] There are two types of Article 440 motions: a "motion to vacate judgment" and a "motion to set aside sentence."

The first kind of motion, a motion to vacate a judgment, is found in Section 440.10 of the New York Criminal Procedure Law. This motion challenges the fairness and/or legality of your conviction. This motion attacks your conviction by stating that the trial court acted improperly when it found you guilty. If this motion is granted, you receive a new trial or appeal.

The second kind of motion, a motion to set aside your sentence, is based on Section 440.20 of the New York Criminal Procedure Law. This motion attacks your sentence by arguing that the punishment you received is too harsh for the crime. It does not challenge your guilt. For example, you can challenge your sentence if it exceeds the maximum sentence allowed by the law.

Article 440 was created to partially replace the remedy of "*coram nobis.*" Some courts may still refer to an Article 440 motion as a "writ of *coram nobis*."[8] A "writ of *coram nobis*" is an order by an appeals court to a lower court to consider facts not on the trial record, which might have changed the outcome of the lower court case if known at the time of trial. *Coram nobis* comes from common law, which means that it came from opinions written by judges on various cases (case law). Article 440, on the other hand, is a statute, which means that the New York state legislature passed the law. After a statute is passed, it is added to the state (or federal) code, so sometimes people refer to these laws as "codified."

A writ of *coram nobis* is not available in situations covered by Article 440.[9] However, in some situations, you can still use a writ of *coram nobis* even if an Article 440 motion is unavailable. For example, a *coram nobis* motion, not an Article 440 motion, should be used to raise a claim of ineffective assistance of appellate counsel (the lawyer who helped with your appeal).[10] However, you should still

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6. *See* People v. Bell, 161 A.D.2d 772, 772–773, 556 N.Y.S.2d 118, 119 (2d Dept. 1990) (holding that one cannot appeal directly based on matters outside of the record); People v. Piparo, 134 A.D.2d 295, 295, 520 N.Y.S.2d 621, 622 (2d Dept. 1987) (stating that facts not contained in the record are not reviewable on direct appeal).

7. *See* Martin v. Manhattan and Bronx Surface Transit Authority, 198 A.D.2d 160, 160 (1st Dept. 1993) (explaining that a court may not consider facts outside the record raised for the first time on appeal).

8. *See* People v. Crimmins, 38 N.Y.2d 407, 413–14, 343 N.E.2d 719, 724, 381 N.Y.S.2d 1, 6 (1975) (stating that motion to vacate judgment was formerly known as *coram nobis*); People v. Donovan, 107 A.D.2d 433, 443, 487 N.Y.S.2d 345, 352 (2d Dept. 1985) (stating that CPL 440.10 (that is, Article 440) is the codification into statutory law of common law post-judgment *coram nobis* proceedings); People v. Lyon, 143 Misc. 2d 690, 692–693, 541 N.Y.S.2d 702, 704 (Suffolk Cnty. Ct. 1989) (referring to CPL 440.10 as a post-judgment writ of *coram nobis*).

9. *See* People v. Perez, 162 Misc. 2d 750, 763, 616 N.Y.S.2d 928, 937 (Sup. Ct. Kings Cnty. 1994) (holding that writ of *coram nobis* is unavailable where an Article 440 motion is applicable).

10. *See* People v. Bachert, 69 N.Y.2d 593, 600, 509 N.E.2d 318, 323, 516 N.Y.S.2d 623, 628 (1987), *abrogated on other grounds by* People v. Andrews, 23 N.Y.3d 605, 993 N.Y.S.2d 236 (2014) (stating that a claim of ineffective assistance of appellate counsel is covered by a writ of *coram nobis* and not an Article 440 motion). You can file a *coram nobis* motion in New York claiming that you received ineffective assistance of appellate counsel, or that you were wrongfully deprived of appellate counsel. If the Appellate Division denies your *coram nobis* motion, you may be able to appeal the denial to the Court of Appeals. However, the denial of *your coram nobis* motion must have occurred on or after November 1, 2002, and you must first be granted a certificate of leave to appeal by either a judge of the Court of Appeals or a justice of the Appellate Division department that denied your motion. N.Y. CRIM. PROC. LAW § 450.90 (McKinney 2005); N.Y. CRIM. PROC. LAW § 450.90 practice cmnt. at 273 (McKinney 2005). See Part B(2)(a) of this Chapter for a discussion of the standard under which a court will examine ineffective assistance of trial counsel.

use an Article 440 motion for a claim of ineffective assistance of trial (versus appellate) counsel when the *trial record* does not contain sufficient facts for an appellate court to review your claim on appeal. Ineffective assistance of counsel occurs when your lawyer did not follow professional standards while representing you, and there is a reasonable probability that your lawyer's poor work negatively affected the outcome of your case.[11]

Article 440 replaced the remedy of state habeas corpus. State habeas corpus challenges the government's right to keep you in prison by making sure your imprisonment is legal. State habeas corpus is still available for New York state incarcerated people in some situations, but courts generally require you to make an Article 440 motion instead (most frequently, state habeas can still be used to challenge parole and bail decisions). The remedy for a habeas corpus violation is immediate release from custody. Under an Article 440 motion, the relief granted is not immediate release but rather a new trial, appeal, or sentence.[12]

2. What You Can Complain About in an Article 440 Motion

(a) Motion to Vacate Judgment

Article 440.10 lists eleven wrongs that you may complain about in a motion to vacate judgment.[13] These eight wrongs are as follows.

(1) The trial court lacked "jurisdiction" to decide your case.[14]

(2) The judge or prosecutor (or a person representing one of them) used fraud, "misrepresentation" (false statements), or "duress" (physical or undue psychological pressure) to secure your conviction.[15] However, you cannot simply claim that the judge or district attorney used fraud or misrepresentation.[16] You must support your Article 440 motion with specific facts in the form of an "affidavit" and, if possible, witnesses.[17]

(3) At trial, the prosecutor introduced (or the judge allowed in) "material evidence" (key evidence that significantly impacted the trial) which the prosecutor or judge knew was false at the time of trial.[18] Again, you cannot just state that the judge or district attorney knew certain facts were false, you must show that they knew the facts to be false.[19]

(4) The prosecutor introduced material evidence that was obtained in violation of your rights under the U.S. or New York State Constitutions.[20]

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11. See Chapter 12 of the *JLM*, "Appealing Your Conviction Based on Ineffective Assistance of Counsel," for more information.

12. See Chapter 21 of the *JLM*, "State Habeas Corpus: Florida, New York, and Michigan," for more information.

13. N.Y. CRIM. PROC. LAW §§ 440.10(1)(a)–(k) (McKinney 2005).

14. N.Y. CRIM. PROC. LAW § 440.10(1)(a) (McKinney 2005). For an explanation of jurisdiction, see Chapter 2 of the JLM, "Introduction to Legal Research."

15. N.Y. CRIM. PROC. LAW § 440.10(1)(b) (McKinney 2005).

16. *See* People v. Smith, 227 A.D.2d 655, 656, 641 N.Y.S. 2d 905, 907 (3d Dept. 1996) (finding that the defendant's claims of duress, fraud, and misrepresentation by the prosecution and the court, were conclusory and could not serve as a basis for vacating the judgment), People v. Gates, 168 A.D. 2d 995, 995, 564 N.Y.S.2d 938, 938 (4th Dept. 1990) (finding that an unsupported claim of fraud, without more, is not enough to overturn a conviction).

17. *See* People v. Saunders, 301 A.D. 2d 869, 872, 753 N.Y.2d 620, 624 (3d Dept. 2003) (finding that affidavits were insufficient to require an Article 440 hearing because they did not contain any supporting evidentiary facts useful to the defendant's case).

18. N.Y. CRIM. PROC. LAW § 440.10(1)(c) (McKinney 2005).

19. *See* People v. Brown, 56 N.Y.2d 242, 246–47, 436 N.E.2d 1295, 1297, 451 N.Y.S. 2d 693, 695 (1982) (upholding the trial court's denial of the defendant's motion to vacate judgment because the defendant's motion papers did not contain any evidence demonstrating that the prosecution was aware of the witness' false testimony).

20. N.Y. CRIM. PROC. LAW § 440.10(1)(d) (McKinney 2005). For more information on such violations, see *JLM*, Chapter 13, "Federal Habeas Corpus", which lists possible violations of the Constitution, and Chapter 21, "State Habeas Corpus," which lists possible violations of New York State's Constitution. Be aware you may not

(5) You could not understand or participate in the trial because you suffered from a mental disability of some kind.[21] For instance, in one case, an incarcerated person claimed in his Article 440 motion that he did not remember or understand his plea or the sentencing proceedings. In support of his motion, he noted that after the judgment he had been diagnosed with psychosis associated with brain trauma. In light of this fact, the court held that there should be a hearing on the individual's motion to vacate the conviction for manslaughter.[22]

(6) The record of your case failed to include "prejudicial" (improper and biased) conduct that occurred at your trial, and an appellate court would reverse the judgment against you if the conduct was in the record.[23] Such conduct includes the prosecutor's failure to supply you with "*Brady* material." *Brady* material is any evidence that the prosecutor has or that the prosecutor knows that is favorable to the defense and material to guilt or punishment.[24] This material is often referred to as "exculpatory evidence" (that is, evidence favorable to the defendant). To have a conviction overturned based upon the failure to produce *Brady* material, there must be a "reasonable probability" that the evidence would have affected the ultimate outcome of the trial.[25] However, if your trial was in a New York state court and your defense counsel made a specific request for the evidence in question, and the prosecutor did not give you that evidence, there need only be a "reasonable possibility" that the evidence would have changed the outcome.[26] The reasonable probability test is harder to satisfy than the reasonable possibility test. Under the reasonable probability test, the undisclosed evidence receives the same weight as it would have been given had it been introduced at trial. Thus, the trial court reviewing an Article 440 motion must determine how the evidence would have affected the

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be able to raise these constitutional violations if you raised them unsuccessfully on appeal. See Part B(3) of this Chapter.

21. N.Y. CRIM. PROC. LAW § 440.10(1)(e) (McKinney 2005).

22. People v. Hennessey, 111 A.D.3d 1166, 1167–1169, 975 N.Y.S.2d 502, 503–505 (3d Dept. 2013).

23. N.Y. CRIM. PROC. LAW § 440.10(1)(f) (McKinney 2005); *see also* People v. Letizia, 155 A.D.2d 952, 952–953, 547 N.Y.S.2d 767, 768 (4th Dept. 1989) (finding that where the record did not contain conduct claimed to be improper and prejudicial, the issue could be raised in an Article 440 motion); People v. Cleveland, 132 A.D.2d 921, 921, 518 N.Y.S.2d 477, 477–478 (4th Dept. 1987) (finding that defendant's claim that the District Attorney had previously represented him on other charges and was therefore disqualified from prosecuting him could be raised in an Article 440 motion since the conduct which was claimed to be improper and prejudicial did not appear in record).

24. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–1197, 10 L. Ed. 2d 215, 218 (1963) (holding that the suppression of evidence by the prosecution denied petitioner due process).

25. People v. McCray, 23 N.Y.3d 193, 198, 12 N.E. 3d 1079, 1081, 989 N.Y.S.2d 649, 651–652 (2014) ("Under Brady, a defendant is entitled to the disclosure of evidence favorable to his case 'where the evidence is material.' In New York, the test of materiality where ... the defendant has made a specific request for the evidence in question is whether there is a 'reasonable possibility' that the verdict would have been different if the evidence had been disclosed.") (citations omitted); *see also* People v. Garrett, 23 N.Y.3d 878, 891–892, 18 N.E.3d 722, 733, 994 N.Y.S.2d 22, 33 (2014) (explaining that, to satisfy the materiality prong of *Brady* test, there must be "a 'reasonable possibility' that [disclosure of specific documents] would have changed the result of the proceedings" and finding no "reasonable probability that disclosure ... would have changed the result of defendant's proceedings") (internal citations omitted); Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490, 506 (1995) (holding that for *Brady* purposes, "a 'reasonable probability' of a different result is ... shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial'") (quoting U.S. v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481, 492 (1985)).

26. *See* People v. Bond, 95 N.Y.2d 840, 843, 735 N.E.2d 1279, 1281, 713 N.Y.S.2d 514, 516 (2000) (vacating second degree murder conviction because a reasonable possibility existed that the result would have been different if prosecutor had disclosed, in response to a specific Brady request, key witness' denial of having seen the shooting); People v. Vilardi, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 920–921, 556 N.Y.S.2d 518, 523–524 (1990) (holding that a showing of a "reasonable possibility" that failure to disclose favorable evidence contributed to the guilty verdict is the appropriate standard under New York State constitutional law where the defendant has made a specific request for the exculpatory material); People v. Carver, 114 A.D.3d 1199, 1199–1200, 979 N.Y.S.2d 752, 752–753 (4th Dept. 2014) (reversing conviction of assault in the first degree because there existed a "reasonable possibility" that the timely disclosure of a 911 call recording specifically requested by the defendant would have changed the result of the case).

jury's deliberations. While you do not have to show that, with the evidence, you would not have originally been convicted, the evidence must be strong enough to call into question the fairness of your conviction.[27] On the other hand, the reasonable possibility test focuses on the evidence withheld, and the court must determine whether the failure to disclose it may have contributed to the verdict.[28] Additionally, the evidence in both cases must be admissible in court. For example, "polygraph" (lie detector) test results suggesting that a witness lied are of no use since they are not admissible as evidence.[29] *Brady* material may also include evidence in the possession of other law enforcement agencies involved in your prosecution (for example, FBI Crime Lab notes). However, if an out-of-state agency refuses to turn over materials, the prosecution cannot be held responsible for failure to disclose.[30]

(7) After your trial, you uncovered new evidence that you could not have discovered before or during your trial. To succeed on this ground, you must show that the evidence: (a) will probably change the result in your case if a new trial is granted, (b) was discovered after the trial, (c) could not have been discovered before or during the trial by the exercise of "due diligence" (proper research), (d) is material to the issue of your guilt, and (e) does not simply duplicate or contradict other evidence.[31] Furthermore, if you would like to make an Article 440 motion on the grounds of newly discovered evidence, you must make the motion within a reasonable time after you find the new evidence. If you were convicted after pleading guilty, you may use newly discovered forensic DNA testing of evidence for an Article 440 motion if the court decides that

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27. *See* People v. Wagstaffe, 120 A.D.3d 1361, 1364–1365, 992 N.Y.S.2d 340, 344 (2d Dept. 2014) (finding that "there was a reasonable probability that, had the prosecution identified these documents when delivering them to the defendants, the employment of these documents would have changed the outcome of the defendants' trial").

28. *See* People v. Bond, 95 N.Y.2d 840, 843, 735 N.E.2d 1279, 1281, 713 N.Y.S.2d 514, 516 (2000) (vacating second degree murder conviction because a reasonable possibility existed that the result would have been different if prosecutor had disclosed, in response to a specific Brady request, key witness' denial of having seen shooting); People v. Carver, 114 A.D.3d 1199, 1199–1200, 979 N.Y.S.2d 752, 752–753 (4th Dept. 2014) (reversing conviction of assault in the first degree because there existed a "reasonable possibility" that the timely disclosure of a 911 call recording specifically requested by the defendant would have changed the result of the case); People v. Williams, 50 A.D.3d 1177, 1180, 854 N.Y.S.2d 586, 590 (3d Dept. 2008) (finding a "reasonable possibility" existed of a different result if requested evidence that would have impeached a key witness had been properly disclosed); *cf.* People v. Phillips, 55 A.D.3d 1145, 1149, 865 N.Y.S.2d 787, 791 (3d Dept. 2008) (finding no "reasonable possibility" that disclosure of a witness's investigation for drug-related offenses would have produced a different result since witness's credibility was "already blemished" during cross-examination).

29. *See* People v. Garrett, 23 N.Y.3d 878, 892, 18 N.E.3d 722, 733, 994 N.Y.S.2d 22, 33 (2014) ("This Court has not squarely addressed whether ... inadmissible evidence may be considered 'material' under *Brady* so long as it 'could lead to admissible evidence'" (citations omitted)); People v. Mazyck, 118 A.D.3d 728, 730–731, 987 N.Y.S.2d 95, 98–99 (2d Dept. 2014) (holding that the defendant's purported statements, which would not be admissible because they were hearsay, could not be basis for vacating judgment of conviction under article 440). *But see* People v. Scott, 88 N.Y.2d 888, 890–891, 667 N.E.2d 923, 924, 644 N.Y.S.2d 913, 915 (1996) (finding that the failure to produce the scratch sheet from a polygraph examination of the witness is not grounds for vacating conviction in part because the polygraph results would have been inadmissible as evidence).

30. *See* People v. Santorelli, 95 N.Y.2d 412, 421–422, 741 N.E.2d 493, 497–498, 718 N.Y.S.2d 696, 700–701 (2000) (refusing to vacate conviction based upon prosecutor's failure to provide reports from a parallel FBI investigation where the FBI, "an independent Federal law enforcement agency not subject to State control," was unwilling to turn over the reports to the prosecutor).

31. N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005); *see also* People v. Watson, 993 N.Y.S.2d 645, 645, 2014 NY Slip Op 50927(U), ¶¶ 13–14, 43 Misc. 3d 1234(A), 1234A (Sup. Ct. Bronx County 2014) (setting standards for newly discovered evidence); People v. Smith, 108 A.D.3d 1075, 1075–1077, 968 N.Y.S.2d 786, 786–789 (4th Dept. 2013) (holding that the affidavit of a co-defendant, which merely contradicted earlier statements, did not constitute new evidence and could not serve as a basis for vacating judgment of the defendant's conviction for attempted second-degree murder, first-degree assault, and second-degree criminal possession of weapon); People v. Sherman, 372 N.Y.S.2d 546, 547–549, 83 Misc.2d 563, 564–565 (Sup. Ct. N.Y. County 1975) (holding that the indictment of a police officer who testified at trial and the investigation of a judge who signed the search warrant were not enough to grant an Article 440 motion).

you have demonstrated a substantial probability of innocence.[32] If you were convicted after a trial, you must show a reasonable probability that the newly discovered forensic DNA testing of evidence would have led to a more favorable verdict in order to use it for an Article 440 motion.[33]

(8) Your conviction was obtained in violation of your constitutional rights.[34] Chapter 13 of the *JLM*, "Federal Habeas Corpus," provides a long list of possible violations of your rights under the Constitution. You may raise any of these violations in your Article 440 motion as long as they are applicable to your case and your motion satisfies the conditions described in Part B(3) of this Chapter.[35] For example, if you do not include your constitutional attack in your direct appeal of your conviction, you will not be able to make an Article 440 motion based on that constitutional claim later on, unless your claim falls into one of the exceptions described in Part B(3) of this Chapter.[36]

(9) You were convicted after being arrested for prostitution, loitering for the purpose of prostitution, or prostitution in a school zone, and you participated as a victim of sex trafficking or labor trafficking or while compelling prostitution.[37] A person is guilty of compelling prostitution when he knowingly forces or intimidates a person less than eighteen years old to engage in prostitution.[38] If you would like to make an Article 440 motion on these grounds, you must make the motion within a reasonable time after you have ceased to be a victim of such trafficking or compelling prostitution. Reasonable concerns for your safety or the safety of family members and other victims of trafficking and compelling prostitution are considered in determining what counts as a reasonable time.[39] You do not need to have official documentation of your status as a victim of trafficking or compelling prostitution at the time of the offense in order to make an Article 440 motion, but if you do, it will create a presumption that your participation in the offense was a result of having been a victim of trafficking or compelling prostitution.[40]

(10) You were convicted of a class A or unclassified misdemeanor prior to August 28, 2019, and your conviction was obtained in violation of your constitutional rights.[41] If you file an Article 440 motion on these grounds, the court will presume that a conviction by plea was not knowing, voluntary and intelligent if it has severe and ongoing consequences. The court will also presume that a conviction by verdict for these offenses violates the state constitution.

(11) You were convicted of unlawful possession of marijuana in the second degree, which means you knowingly and unlawfully possessed marijuana, or you were convicted of unlawful possession of marijuana in the first degree, which means you knowingly and unlawfully possessed one or more substances containing marijuana and the substances weighed more

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32. N.Y. CRIM. PROC. LAW § 440.10(1)(g-1)(1) (McKinney 2005).

33. N.Y. CRIM. PROC. LAW § 440.10(1)(g-1)(2) (McKinney 2005).

34. N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2005).

35. As noted in Chapter 13 of the *JLM*, "Federal Habeas Corpus," "exhaustion" (doing all you can to get state courts to change your conviction or sentence) is required for a federal court to grant a writ of habeas corpus to a petitioner. *See* Bossett v. Walker, 41 F.3d 825, 828 (2d Cir. 1994) (stating that a federal court cannot grant a writ of habeas corpus "'unless the petitioner has exhausted state remedies'" or the state does not have corrective processes) (quoting 28 U.S.C. § 2254(b) (1988)). In many situations, you must raise a federal constitutional violation through an Article 440 motion in order to satisfy the exhaustion requirement. *See, e.g.*, U.S. ex rel. Cleveland v. Casscles, 479 F.2d 15, 19–20 (2d Cir. 1973) (finding that, in light of a new factual allegation, the petitioner should be required to raise an Article 440 motion with the state court before a district court could consider a possible constitutional violation).

36. *See* People v. Skinner, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934–935 (1st Dept. 1990) (holding that failure to raise an issue on appeal when defendant had knowledge to do so forecloses an Article 440 motion).

37. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005).

38. N.Y. PENAL LAW § 230.33 (McKinney 2008).

39. N.Y. CRIM. PROC. LAW § 440.10(1)(i)(i) (McKinney 2005).

40. N.Y. CRIM. PROC. LAW § 440.10(1)(i)(ii) (McKinney 2005).

41. N.Y. CRIM. PROC. LAW § 440.10(1)(j) (McKinney 2005).

than one ounce.[42] These judgments must have occurred prior to August 28, 2019. If you file an Article 440 motion on these grounds, the court will presume that a conviction by plea was not knowing, voluntary and intelligent if it has severe and ongoing consequences. The court will also presume that a conviction by verdict for these offenses violates the state constitution.

In addition to federal constitutional violations, you may also raise violations of your rights under the New York State constitution. These rights are generally very similar to your federal constitutional rights. For example, the law under both constitutions forbids attorneys from intentionally discriminating against people by race or gender in selecting a jury.[43] This claim could be raised as a violation of your rights under the New York State constitution and under the U.S. Constitution.

You should be aware that some of your rights under the New York State constitution are broader than the same rights under the U.S. Constitution. For example, the New York State constitution provides you with greater protection against unreasonable police searches than the U.S. Constitution.[44] The New York State constitution also provides you with greater protection against a court imposing a longer sentence upon you after a successful appeal.[45] In addition, the New York State constitution requires a prosecutor to supply you with more evidence than the U.S. Constitution requires.[46] Finally, your right to a lawyer is broader under the New York State constitution than the U.S. Constitution.[47]

You should include claims of state constitutional violations in your Article 440 motion. If you claim a violation of a specific federal constitutional provision (for example, the Fourth Amendment's prohibition against unreasonable searches and seizures), it is a good idea to cite the equivalent state constitutional provision (which, in this example, would be Article I, Section 12 of the New York State constitution).

Another example of state and federal constitutional violations that can be raised in an Article 440 motion is ineffective assistance of counsel at trial. This is a claim that states your lawyer did not comply with professional standards while representing you, and there is a reasonable probability your

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42. N.Y. CRIM. PROC. LAW § 440.10(1)(k) (McKinney 2005). For the definitions of unlawful possession of marijuana in the second and first degree, see N.Y. PENAL LAW § 221.05, 221.10 (McKinney 2008).

43. *See, e.g.*, People v. Kern, 75 N.Y.2d 638, 649–653, 554 N.E.2d 1235, 1240–1243, 555 N.Y.S.2d 647, 652–655 (1990) (discussing the New York State constitution's ban on racial discrimination in jury selection); *see also* Batson v. Kentucky, 476 U.S. 79, 84–98, 106 S. Ct. 1712, 1716–1724, 90 L. Ed. 2d 69, 79–89 (1986) (discussing the Federal Constitution's ban on racial discrimination in jury selection).

44. *See* People v. Dunn, 77 N.Y.2d 19, 25, 564 N.E.2d 1054, 1058, 563 N.Y.S.2d 388, 392 (1990) (finding that police use of a specially trained narcotics detection dog to conduct a "canine sniff" outside defendant's apartment is a search under the New York State constitution).

45. *See* People v. Van Pelt, 76 N.Y.2d 156, 161–162, 556 N.E.2d 423, 425–426, 556 N.Y.S.2d 984, 986–987 (1990) (finding that a sentence following retrial that was longer than the sentence from the first trial is presumed to be vindictive (that is, driven by anger, resentment, and/or revenge) and must be set aside, even if the second trial judge is different from the first trial judge).

46. *See* People v. Vilardi, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 920, 556 N.Y.S.2d 518, 523 (1990) (holding that where a specific discovery request made the prosecutor aware that defendant considered exculpatory (that is, favorable to the defendant) evidence important to the defense, the standard is "reasonable possibility" that not turning over the evidence contributed to the outcome, rather than "reasonable probability"); *cf.* People v. Lesiuk, 161 A.D.2d 21, 25, 560 N.Y.S.2d 711, 713 (3d Dept. 1990) (stating that the standard is "reasonable probability" where the prosecution has tried hard to produce a missing exculpatory police informant), *aff'd*, 81 N.Y.2d 485, 617 N.E.2d 1047, 600 N.Y.S.2d 931 (1993). The reasonable probability test is more difficult to satisfy than the reasonable possibility test. The difference between the tests is that under the reasonable probability test, the undisclosed evidence receives no more weight than it would have been given had it been introduced at trial. Thus, the trial court reviewing an Article 440 motion must determine how that evidence would have affected the jury's deliberations. On the other hand, the reasonable possibility test focuses on the evidence withheld, and the court must determine whether the failure to disclose it possibly contributed to the verdict.

47. *See* People v. Velasquez, 68 N.Y.2d 533, 536, 503 N.E.2d 481, 483, 510 N.Y.S.2d 833, 835 (1986) ("In this State the right to counsel, both as to the time of its attachment and as to its waiver, is broader than the protection afforded under Federal law.") (internal citation omitted). *See also* People v. Hobson, 39 N.Y.2d 479, 483–484, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 421–422 (1976) (detailing New York case law that extended protections for the defendant under the State constitution beyond those guaranteed by the Constitution).

case was negatively affected.[48] You should be aware that in New York, you may not make a claim of ineffective assistance of counsel solely because your lawyer unsuccessfully used a certain trial strategy—even if that strategy was offensive, outrageous,[49] daring, or innovative.[50] In addition, you cannot simply claim that your lawyer was ineffective. You must identify your lawyer's specific acts or omissions (failing to act)that you believe were so ineffective that you were deprived of your right to counsel. Then, you must also show that this lack of counsel prejudiced your defense so much that the trial was not a fair trial.[51] For example, it is unlikely that an error by counsel, even if professionally unreasonable, would result in setting aside the judgment if the error did not affect the outcome. However, if you can show that your attorney had a conflict of interest while representing you, and that this conflict made the attorney's performance worse, courts will presume that you were prejudiced.[52] Your attorney would have had a conflict of interest if your attorney had a work-related reason or a substantial personal reason to give you less than a full effort. One possible reason would be if your attorney, without telling you or the judge, also represented a witness who testified against you.[53]

(b) Motion to Set Aside Sentence

Unlike the Article 440.10 motion to challenge your conviction (discussed above), an Article 440.20 motion attacks your sentence as unauthorized, illegally imposed, or in some other way invalid.[54] A

48. See Chapter 12 of the *JLM* "Appealing Your Conviction Based on Ineffective Assistance of Counsel," for more information.

49. *See* People v. Sullivan, 153 A.D.2d 223, 226–227, 550 N.Y.S.2d 358, 359–360 (2d Dept. 1990) (holding that the defense attorney's reference to victims as "skells," "pimps," or "junkies" was not ineffective counsel because it is presumed to have been a part of trial strategy).

50. *See* People v. Baldi, 54 N.Y.2d 137, 151–152, 429 N.E.2d 400, 407–408, 444 N.Y.S.2d 893, 900–901 (1981) (holding that the defense attorney's strategy of testifying at his client's trial in an attempt to present an insanity defense was not ineffective assistance even though his being on the stand left his client without representation).

51. *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (stating you must first specify the error made by counsel, and then show that the error prejudiced your defense to such an extent that it affected the result of the trial). In New York, you are entitled to meaningful representation. People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981) ("So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met."). New York has retained the *Baldi* "meaningful representation" standard in preference to the federal *Strickland* standard in evaluating claims of ineffective assistance of trial counsel. Under the *Baldi* "meaningful representation" standard, showing prejudice is important but not required. Under the federal *Strickland* standard, you must show your defense was prejudiced. People v. Stultz, 2 N.Y.3d 277, 282, 810 N.E.2d 883, 886, 778 N.Y.S.2d 431, 434 (2004) (stating that the appropriate standard for effective assistance of counsel is the same meaningful representation standard as People v. Baldi). You should note, however, "meaningful representation" does not mean "perfect representation," but only reasonably competent representation. People v. Benevento, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998) (quoting People v. Modica, 64 N.Y.2d 828, 829, 476 N.E.2d 330, 331, 486 N.Y.S.2d 931, 932 (1985)).

52. *See* Cuyler v. Sullivan, 446 U.S. 335, 349–350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333, 347 (1980) (stating that a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice); Nix v. Whiteside, 475 U.S. 157, 176, 106 S. Ct. 988, 999, 89 L. Ed. 2d 123, 140 (1986) (noting that "conflict" does not include the one created by a client proposal that violates an attorney's ethical obligations); *see also* Winkler v. Keane, 812 F. Supp. 426, 431 (S.D.N.Y. 1993) (finding that existence of a contingency fee arrangement between defendant and his attorney does not amount to a per se claim of ineffective assistance of counsel); People v. Wandell, 75 N.Y.2d 951, 952, 554 N.E.2d 1274, 1275, 555 N.Y.S.2d 686, 687 (1990) (stating that an attorney must inform the client and the trial court of conflicting interests so that the court may conduct a record inquiry to determine whether the client understands the implications of the conflict); People v. Gomberg, 38 N.Y.2d 307, 314–316, 342 N.E.2d 550, 555, 379 N.Y.S.2d 769, 776–777 (1975) (holding that trial judge's inquiry into possible conflict of interest between defendants and their counsel, and defendants' opportunity to retain separate counsel, fulfilled attorney's obligation to protect defendants' rights).

53. See Chapter 12 of the *JLM*, "Appealing Your Conviction Based on Ineffective Assistance of Counsel," for more examples of conflicts of interest.

54. N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 2009).

sentence is unauthorized if it is longer than the law allows.[55] For example, third degree burglary, a Class D felony,[56] carries a maximum sentence of seven years if you are a first or second felony offender.[57] Thus, you could make an Article 440 motion to attack a sentence of seven years and one day for third degree burglary if you are a first or second felony offender. However, you could not attack a sentence of seven years. Even if this sentence is longer than sentences that other defendants received for the same crime, the law allows a seven-year sentence.[58] You cannot raise a claim that your sentence was too harsh or long under this motion as long as the sentence is allowed by law.[59]

In addition to the unauthorized sentence described above, there may be other reasons you can raise an Article 440 motion to set your sentence aside as illegal. Some of these grounds include:

(1) "Due process" errors in the sentencing procedures,[60]
(2) The sentencing court disregarded your "right of allocution," which means that the judge failed to ask you at your sentencing if you wished to address the court on your own behalf,[61]
(3) The sentencing court ignored your right to be present at sentencing,[62]

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55. *See* People v. Fuller, 119 A.D.2d 692, 692, 501 N.Y.S.2d 116, 116 (2d Dept. 1986) (changing sentence that was longer than maximum length of time for the crime committed).

56. N.Y. PENAL LAW § 140.20 (McKinney 2010). The N.Y. Penal Law describes and classifies every felony. In order to determine whether your sentence was authorized by law, you should first find out what class of felony you were convicted of by looking up your offense in the Penal Law. Burglary and related offenses, for example, are defined in § 140.05 through § 140.40 of the Penal Law. Then, you should check § 70.00 of the Penal Law, which specifies the longest and shortest terms of sentence that can be imposed for the various classes of felonies.

57. N.Y. PENAL LAW § 70.00(2)(d) (McKinney 2009).

58. *See* People v. Baraka, 109 Misc. 2d 271, 272–273, 439 N.Y.S.2d 827, 829–830 (Crim. Ct. N.Y. Cty. 1981) (holding that the court deciding an Article 440 motion has no authority to change a sentence that conforms to the Penal Law).

59. N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 2009); N.Y. Crim. Proc. Law § 440.20 practice cmt. (McKinney 2009). See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for more information on appeals.

60. *See* People v. Bellamy, 160 A.D.2d 886, 887–888, 554 N.Y.S.2d 320, 321 (2d Dept. 1990) (vacating sentence and finding that, while the judge had authority to vacate a previously-imposed minimum permissible sentence, defendant's right to due process was violated when the judge then imposed maximum permissible sentence, without offering any explanation for doing so).

61. N.Y. CRIM. PROC. LAW § 380.50(1) (McKinney 2009) gives you the right to make such a statement. To have your sentence set aside on this ground, you must show that, had your right been honored, you would have said or revealed something that would have required the court to conduct further inquiry before sentencing you. *See* People v. St. Claire, 99 A.D.2d 982, 982, 473 N.Y.S.2d 19, 20 (1st Dept. 1984) (stating that violation of right to allocution should be raised in Article 440.20 motion); People v. Quiles, 72 A.D.2d 610, 610, 421 N.Y.S.2d 119, 119–120 (2d Dept. 1979) (stating that where a defendant at sentencing raised the possibility of a defense that possibly negated his criminal intent, the trial court was required to conduct further inquiry); People *ex rel.* Boddingham v. La Vallee, 50 A.D.2d 692, 692, 375 N.Y.S.2d 477, 477–478 (3d Dept. 1975) (holding that defendant who was denied right of allocution is entitled only to resentencing and not release from incarceration); People v. Luchey, 41 A.D.2d 1023, 1023–1024, 343 N.Y.S.2d 997, 998 (4th Dept. 1973) (reversing sentence because the judge did not ask the defendant if the defendant wanted to speak during the sentencing proceeding).

62. N.Y. CRIM. PROC. LAW § 380.40(1) (McKinney 2018) gives you the right to be present at sentencing and at resentencing. *See* People v. Brown, 155 A.D.2d 608, 608, 547 N.Y.S.2d 664, 664 (2d Dept. 1989) (finding that the court's failure to produce the defendant at resentencing denied him his right to be present). You may waive this right if you are being charged with a misdemeanor or petty offense, in which case a court may sentence you in your absence. N.Y. CRIM. PROC. LAW § 380.40(2) (McKinney 2018). To succeed on an Article 440 motion based on a denial of this right, you must show that, if you were present, you would have said something that would have required the court to investigate your case further. However, your right to be present may have been forfeited by your actions if you were removed from the courtroom due to misbehavior after being warned that you would be sentenced without your presence. *See* People v. Herrera, 160 A.D.2d 416, 416, 554 N.Y.S.2d 30, 30–31 (1st Dept. 1990) (based on defendant's behavior, "it is clear that defendant voluntarily absented himself from the sentencing proceedings, thereby waiving such right"). You may also have forfeited your right to be present if you failed to appear after being advised that a sentence would be pronounced in your absence. *See* People v. Griffin, 135 A.D.2d 730, 731, 522 N.Y.S.2d 632, 634 (2d Dept. 1987) (holding that the defendant gave up his right to be present at his felony hearing and sentencing by not appearing even though "he knew when he refused to attend that the hearing court would proceed in his absence"). Finally, if you willfully failed to appear in order to ruin the sentencing

(4) The court violated your First Amendment right of free association by, for example, considering at sentencing your membership in a racist organization even though this membership was not relevant to any of the issues at your trial,[63]

(5) The court sentenced you as a second-time or third-time offender, but the prior conviction was obtained in violation of your constitutional rights or was in some other way invalid.[64] For example, you may challenge the constitutional validity of the prior convictions or the decision to count them as "predicates" (prior convictions). The most common error is the use of out-of-state convictions as predicate felonies. Your out-of-state conviction will only count as a felony if your criminal conduct would have been a felony in New York, or if in the other state your conduct was punishable by a sentence of more than one year imprisonment and is also punishable by a sentence of more than one year under New York law.[65] For example, a felony conviction in New Jersey of promoting prostitution by soliciting persons to patronize a prostitute cannot be used as a predicate felony in New York since the equivalent New York crime (promoting prostitution in the fourth degree) is a misdemeanor,[66]

(6) The court incorrectly imposed "consecutive sentences" (one sentence running after another) when you should have been sentenced to "concurrent sentences" (two sentences running at the same time).[67] In general, consecutive sentences cannot be imposed where (a) a single act constitutes two or more offenses, or (b) a single act constitutes one offense and is a material element of another.[68] For example, if you committed armed robbery, you can be charged with the crimes of robbery and weapons possession. However, you cannot be sentenced consecutively for these crimes, as they were part of the same act.

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process, your right to be present may have been forfeited by your actions. *See* People v. Corley, 67 N.Y.2d 105, 109–110, 491 N.E.2d 1090, 1092, 500 N.Y.S.2d 633, 635 (1986) (affirming the sentence imposed in the defendant's absence where the "defendant willfully absented himself from the court for the purpose of frustrating the sentencing process.").

63. *See* Dawson v. Delaware, 503 U.S. 159, 165–166, 112 S. Ct. 1093, 1097–1098, 117 L. Ed. 2d 309, 317–318 (1992) (holding that admitting evidence of the defendant's membership in racist gang at the capital sentencing proceeding was error because that evidence was not relevant to any issue in the punishment phase).

64. *See* People v. Simmons, 143 A.D.2d 153, 154, 531 N.Y.S.2d 928, 928–929 (2d Dept. 1988) (finding that the defendant's prior conviction for buying, receiving, and concealing stolen property under an Alabama statute that did not specify monetary value for stolen property was not a predicate (prior) felony for purposes of second felony offender status, as the New York statute required proof that the value of the stolen property exceeded $250). If you did not raise an objection at the time the prosecution identified to you the prior felony to be used for sentencing enhancement, an appeals court will not review this sentencing issue. *See* People v. Sullivan, 153 A.D.2d 223, 233, 550 N.Y.S.2d 358, 364 (2d Dept. 1990) ("When the defendant fails to raise an objection, and when, as a result, the legality of the sentence cannot be determined by this court upon the information contained in the appellate record, review as a matter of law should be denied."). If no objection was made due to mutual mistake, the appellate court can still reverse if the use of the predicate (prior) felony was clear error (meaning that it was apparent on the record that use of the predicate felony was error). *See* People v. Eason, 168 Misc. 2d 44, 46–47, 641 N.Y.S.2d 1018, 1020 (Sup. Ct. Queens Cty. 1996) (setting aside sentence where the defendant was improperly determined to be a second felony offender by mutual mistake because the prior felony had not yet been sentenced, making it unavailable as a predicate, and the error was clear on the record); *see also* N.Y. CRIM. PROC. LAW §§ 400.15(7)(b), 400.16, 400.20(6) (McKinney 2018), & 400.21(7)(b) (McKinney 2005).

65. N.Y. PENAL LAW § 70.06(1)(b)(i) (McKinney 2009).

66. *See* People v. Johnson, 127 A.D.2d 1003, 1003, 513 N.Y.S.2d 60, 6160 (4th Dept. 1987) (holding that a New Jersey felony conviction for promoting prostitution did not constitute a felony for New York sentencing purposes because the crime would have been a misdemeanor in New York, for which a term of imprisonment in excess of one year was not authorized).

67. *See* People v. Riggins, 164 A.D.2d 797, 797–798, 559 N.Y.S.2d 535, 536 (1st Dept. 1990) (finding that the court had no authority to change concurrent sentences to consecutive ones on its own without being asked to do so by either side).

68. *See* N.Y. PENAL LAW § 70.25(2) (McKinney 2009); People v. Jeanty, 268 A.D.2d 675, 679–681, 702 N.Y.S.2d 194, 200–201 (3d Dept. 2000) (holding that the lower court erred in making sentences, for robbery in the first degree and burglary in the first degree, consecutive to a felony murder sentence because the conduct constituting the robbery and burglary offense could have been a material element of the felony murder; however, the court also held that aggregate sentence of 75 years to life was proper).

Remember, a motion under Article 440.20 deals only with your sentence and has no effect on your underlying conviction. If your motion is granted, the court will vacate your sentence and resentence you in accordance with the law.[69]

(c) Request for DNA Testing

In a relatively new section of Article 440, a defendant may request in his 440 motion that a forensic DNA test be done on evidence introduced at trial.[70] The court will order that a test be done if it determines that the following requirements are met:

(1) Your 440 motion requests forensic testing on clearly identified specific and particular evidence,
(2) The evidence upon which you are requesting a DNA test was obtained in connection with the trial that resulted in your conviction, and
(3) There is a reasonable probability that if the results of a DNA test had been admitted at the trial, the verdict would have been more favorable to you.[71]

The third requirement is probably the most important one. The court will not order a DNA test if it believes there is no reasonable probability that the verdict would have been different even if you are right about the DNA test.[72] For more information on DNA testing, see Chapter 11 of the *JLM*, "Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence."

3. When You Can Get Relief Under Article 440

There are strict requirements for making a motion to vacate judgment under Section 440.10. In contrast, the requirements for making a motion to set aside a sentence under Section 440.20 are more relaxed. The requirements for making each type of motion are discussed separately below.

(a) When You Are Not Entitled to File a Motion to Vacate a Judgment Under Section 440.10

There are four circumstances in which the court must deny your motion to vacate a judgment under Section 440.10.[73] These four circumstances are:

(1) If your claim was raised on appeal and the court denied your complaint on the merits (in other words, when the appellate court considered your claims and decided that they were not sufficient to overcome your guilty conviction).[74] There is an exception to this rule. The exception applies when the law changed after your appeal was decided, and the courts apply the new law "retroactively" (in other words, the courts apply a new law to old cases which have been tried, decided, or appealed before the change in the law occurred).[75] The Court of Appeals will only give full retroactivity to new laws which aim to protect the fact-finding process from unreliably obtained information which relates directly and substantially to guilt or innocence (in other words, to prevent a defendant from being found guilty on unreliably obtained

69. N.Y. CRIM. PROC. LAW § 440.20(4) (McKinney 2005); N.Y. CRIM. PROC. LAW § 440.20 practice cmt. (McKinney 2005).

70. N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005).

71. N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005). See Footnote 39 of this Chapter for an explanation of "reasonable probability."

72. N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005); *see also* People v. Tookes, 167 Misc. 2d 601, 605–606, 639 N.Y.S.2d 913, 916 (Sup. Ct. N.Y. Cty. 1996) (finding no reasonable probability where: (1) there was no case for mistaken identity, (2) there was clear evidence of rape, (3) defendant failed earlier to pursue an enzyme analysis, and (4) a showing that defendant's DNA did not match the crime scene sample would not likely have resulted in a "verdict more favorable to the defendant"). See Footnote 39 of this Chapter for an explanation of "reasonable probability."

73. N.Y. CRIM. PROC. LAW § 440.10(2)(a)–(d) (McKinney 2005).

74. N.Y. CRIM. PROC. LAW § 440.10(2)(a) (McKinney 2005); *see, e.g.*, People v. Skinner, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934 (1st Dept. 1990) (holding that arguments raised and rejected on their merits on direct appeal may not be subsequently raised in an Article 440 motion).

75. N.Y. CRIM. PROC. LAW § 440.10(2)(a) (McKinney 2005).

information).[76] "Full retroactivity" means you can raise the new law in a post-conviction proceeding, such as an Article 440 motion, even though you were convicted and had appealed before the new law came into effect. However, full retroactivity has been applied very rarely in New York.[77] The courts decide whether a new rule should apply retroactively based on three factors:

(a) the new rule's purpose (that is, whether the purpose of the new law is to protect the fact-finding process from unreliably obtained information which relates directly to guilt or innocence),

(b) the extent of the reliance on the old rule (in other words, whether there were a great number of cases and, as a result, a large number of defendants were convicted and incarcerated under the old rule), and

(c) the effect on the administration of justice in applying the new rule retroactively (in other words, because the old rule applied to so many cases, making the new rule retroactive would result in too many over rulings and retrials, and it would over-burden the criminal courts. In such a situation, the courts are unwilling to apply the new rule retroactively).[78]

(2) You cannot make a Section 440.10 motion on the basis of an error that you may still raise in an appeal of your conviction, or that you have already raised in an appeal that is pending (an appeal is pending if the appeals court has not yet handed down a decision).[79] Remember,

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76. *See* People v. Laffman, 161 A.D.2d 111, 112–13, 554 N.Y.S.2d 840, 841 (1st Dept. 1990) ("Where a new rule ... has as its purpose preserving the fact-finding process from unreliably obtained information bearing directly and substantially on a defendant's guilt or innocence, the rule should be applied retroactively ...").

77. *See* People v. Hill, 85 N.Y.2d 256, 263–264, 648 N.E.2d 455, 458–459, 624 N.Y.S.2d 79, 82 (1995) (vacating the conviction and remanding for a new trial, holding that the new *Ryan* rule, which states that a defendant could only be found guilty if he had knowledge of the weight of the illegal drugs he possessed, should be applied retroactively to cases of sale of illegal drugs); People v. Laffman, 161 A.D.2d 111, 111–113, 554 N.Y.S.2d 840, 841 (1st Dept. 1990) (vacating the judgment and remanding for a new trial, holding that a standard applying to stationhouse identification procedures in a subsequent case should apply retroactively whether on direct review or collateral proceedings). *But see* People v. Pepper, 53 N.Y.2d 213, 221–222, 423 N.E.2d 366, 369–370, 440 N.Y.S.2d 889, 892–893 (1981) (finding the defendant was not entitled to retroactive application of a court decision that held that once an indictment or complaint has been filed, a defendant could not have waived his constitutional right to counsel unless in presence of counsel); People v. Douglas, 205 A.D.2d 280, 292, 617 N.Y.S.2d 733, 740 (1st Dept. 1994) (stating that the *Ryan* decision, which held that defendant's knowledge of drug weight was to be proved by the prosecution, will not be applied retroactively); People v. Byrdsong, 161 Misc. 2d 232, 234–235, 613 N.Y.S.2d 543, 544–545 (Sup. Ct. Queens Cty. 1994) (holding that the retroactivity of a rule, which stated that defendants generally had the right to be present during *Sandoval* hearings, was limited to only direct appeals and not to post-conviction hearings); People v. Alvarez, 151 Misc. 2d 697, 701, 573 N.Y.S.2d 592, 594–595 (Sup. Ct. Kings Cty. 1991) (stating that the *Van Pelt* decision, which held that a presumption of vindictiveness applies where a second sentence is higher after retrial than the original sentence, will not be applied retroactively).

78. *See* People v. Pepper, 53 N.Y.2d 213, 220–221, 423 N.E.2d 366, 369, 440 N.Y.S.2d 889, 891–892 (1981) (outlining the three-part test for retroactivity but holding that changes in the rules governing a defendant's right to pre-trial counsel applied retroactively only to cases still on direct review at the time of the change in law); *see also* People v. Mitchell, 80 N.Y.2d 519, 528–529, 606 N.E.2d 1381, 1386, 591 N.Y.S.2d 990, 995 (1992) (applying the three-part *Pepper* test in holding that a new state statutory right applied only prospectively and not retroactively because (1) the new rule did not fix any constitutional problems and only indirectly related to the fact-finding process, (2) the courts had substantially relied on the old rule, and (3) retroactive application would substantially burden the justice system); People v. Douglas, 205 A.D.2d 280, 289–290, 617 N.Y.S.2d 733, 738–739 (1st Dept. 1994) (holding that although there is a very good argument for the first prong of the test, retroactivity cannot apply because the second prong would not be met since the vast majority of drug cases relied on the old rule, and the third prong would therefore not be met because retroactivity would place a huge burden on the court system); People v. Perez, 162 Misc. 2d 750, 762–763, 616 N.Y.S.2d 928, 936 (Sup. Ct. Kings Cty. 1994) (observing that a certain new rule would not apply retroactively because retroactivity would violate the second and third prongs of this three-pronged test due to past substantial reliance and the potential for future substantial burden on the administration of justice).

79. N.Y. CRIM. PROC. LAW § 440.10(2)(b) (McKinney 2005); *see also* People v. Cooks, 67 N.Y.2d 100, 104, 491 N.E.2d 676, 678, 500 N.Y.S.2d 503, 505 (1986) (holding that if the record is sufficient for review of the issue on direct appeal, the issue cannot be also reviewed in an Article 440 motion); People v. Griffin, 115 A.D.2d 902, 904, 496 N.Y.S.2d 799, 801 (3d Dept. 1985) (denying the defendant's Article 440 motion because judgment was already

Article 440 is not a substitute for an appeal. However, you may complain in a Section 440.10 motion about an error without first appealing the error if your trial record does not contain sufficient facts to allow an appeals court to review the error.[80] For example, if you have found new evidence that could not have been available at the time of the trial, and therefore was not included in the record, yet would have been more favorable to you, you may bring a Section 440.10 motion directly.[81] But be very careful about deciding to use an Article 440 motion to complain about a decision without first bringing a direct appeal. The court reviewing your Article 440 motion decides if your trial record contains sufficient facts for an appeal. If the court finds that there are sufficient facts in your trial record for direct appeal, your Article 440 motion will be dismissed. If you did not also file or pursue a direct appeal, it may be too late to do so.[82] Sometimes there may be doubt as to whether there are sufficient facts in the record for an appeals court to review. In that situation, you should be careful to file a timely direct appeal, and you should not just rely solely on an Article 440 motion in case the motion is denied.[83] However, you may complain in a Section 440.10 motion without first appealing if you were a victim of sex trafficking.[84] In order to qualify for this exception, you must have been arrested for prostitution under N.Y. Penal Law § 230.00 or for loitering for the purpose of prostitution under N.Y. Penal Law § 240.37. Additionally, your participation in the offense must have been a result of having been a victim of sex trafficking.[85]

(3) An error cannot be brought up in an Article 440 motion unless you brought it up in your appeal or you have a good excuse for not raising the issue on appeal. If you appealed only your sentence and not your conviction or if you did not include the error in your appeal, then you may not bring up the error.[86] One example of a good excuse would be where the error was overlooked due to ineffective assistance of appellate counsel.[87] (But if you believe your lawyer was ineffective because your lawyer did not tell you of your right to appeal, you must make a motion instead under N.Y. Crim. Proc. Law Section 460.30.) Another good excuse is where an appeal seemed useless due to the state of the law at the time, but the law changed later and

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on appeal to the Appellate Division and defendant failed to demonstrate the existence of relevant new evidence not in the record). Part B(1) of this Chapter contains a list of information found in your trial record.

80. N.Y. CRIM. PROC. LAW § 440.10(2)(b) (McKinney 2005). See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for a full discussion of how to appeal your sentence and/or conviction.

81. N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005).

82. *See* People v. Cooks, 67 N.Y.2d 100, 104, 491 N.E.2d 676, 678, 500 N.Y.S.2d 503, 505 (1986) (holding that if the defendant could have raised the issue on direct appeal, the judge must dismiss the Article 440 motion); N.Y. CRIM. PROC. LAW § 440.10 practice cmt. (McKinney 2005) ("[S]hould the record be found by the motion court to have been sufficient for review of the point on direct appeal, the motion must be dismissed … and the defendant, having permitted the time for perfecting the appeal to elapse, will be left without a remedy.").

83. N.Y. CRIM. PROC. LAW § 440.10 practice cmt. (McKinney 2005).

84. N.Y. CRIM. PROC. LAW §§ 440.10(1)(i), (2)(b) (McKinney 2005).

85. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005) ("[A]nd the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law ... or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78)…")

86. N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 2005); *see, e.g.*, People v. Skinner, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934–935 (1st Dept. 1990) (holding that the defendant's failure to present his constitutional attack in his direct appeal prevented any consideration of it in an Article 440 motion); People v. Cunningham, 104 Misc. 2d 298, 302–304, 428 N.Y.S.2d 183, 187–188, (Sup. Ct. Bronx Cty. 1980) (holding that a court must deny an Article 440 motion where a defendant could have, but did not, raise the issue on direct appeal, despite a subsequent retroactively effective change in the law regarding that issue).

87. *See* N.Y. CRIM. PROC. LAW § 440.10 practice cmt. (McKinney 2009) (discussing that the writ of *coram nobis* "remains available as a remedy where one is required and none is provided by statue" and accordingly that the writ of *coram nobis* can be used to bring a claim of ineffective appellate counsel); *see also* People v. Bachert, 69 N.Y.2d 593, 599, 509 N.E.2d 318, 322, 516 N.Y.S.2d 623, 627 (1987) (holding that § 440.10 did not invalidate the writ of *coram nobis* and therefore review of ineffective counsel by the appellate court was available). See Footnote 10 of this Chapter for more discussion on a claim of ineffective assistance of counsel.

courts applied the new law retroactively. Because of those changes, you can argue that your conviction is fundamentally unfair.[88]

(4) The judge will deny your Section 440.10 motion if it is based on an issue that involves only the validity of your sentence, rather than your conviction.[89] Instead, you must complain about your sentence in a motion to set aside your sentence under N.Y. Crim. Proc. Law § 440.20, not Section 440.10.

(b) When You May File a Motion to Vacate Judgment Under Section 440.10

While a judge must deny your Section 440.10 motion in the four circumstances listed above, there are other circumstances in which a judge can deny, but is not required to deny, your Section 440.10 motion.[90] These circumstances are:

(1) You did not "preserve the issue for review on appeal." This means that you did one or more of the following things: (1) you did not object at the trial to errors that happened during the trial, (2) you did not ask the court to give a particular instruction to the jury, (3) you did not ask the court to make a ruling on an issue, (4) you did not present facts that would have supported your claim and that you should have found through due diligence (proper research), or (5) in some way you did not make sure that an issue would be in the trial record.[91] The following are examples of some of the issues you may raise in an Article 440 motion even though the issues were not preserved (kept) for review on appeal.

(a) You may complain that you received ineffective, or bad, assistance of counsel at trial, but your claim depends on what information is found in your trial record. Since the trial record does not usually contain details of your lawyer's performance at trial, the New York Court of Appeals believes that an Article 440 motion is usually better than an appeal for an ineffective assistance of counsel claim.[92] However, if the trial record does contain facts that would allow an appellate court to review a claim of ineffective assistance of counsel, it is important that you raise the claim on direct appeal.[93]

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88. *See* N.Y. CRIM. PROC. LAW § 440.10(3)(b) (McKinney 2005); N.Y. Crim. Proc. Law § 440.10 practice cmt. (McKinney 2009) (discussing how a court, under § 440.10(3)(b), may choose not to bar relief if there has been a retroactively effective change in law).

89. N.Y. CRIM. PROC. LAW § 440.10(2)(d) (McKinney 2005).

90. N.Y. CRIM. PROC. LAW §§ 440.10(3)(a)–(c) (McKinney 2005) (stating that although the court may deny the motion under any of the circumstances specified, in the interest of justice and for good cause shown, it can use its discretion to grant the motion and vacate the judgment.).

91. N.Y. CRIM. PROC. LAW § 440.10(3)(a) (McKinney 2005); *see* People v. Green, 177 A.D.2d 856, 857, 576 N.Y.S.2d 625, 626 (3d Dept. 1991) (holding denial of defendant's 440.10 motion was proper because his failure to object to prosecutor's use of peremptory challenges did not allow for the creation of a record subject to review); People v. Nuness, 151 A.D.2d 987, 988, 542 N.Y.S.2d 76, 77 (4th Dept. 1989) (holding that because defendant did not object at trial to prosecutor's failure to turn over police notes or request a hearing to determine the existence of the notes, the issue was not preserved for appeal and could not be raised in a § 440.10 proceeding); People v. Craft, 123 A.D.2d 481, 482, 506 N.Y.S.2d 492, 493 (3d Dept. 1986) (holding that the shackling of the defendant in the presence of the jury was not a basis for a § 440.10 motion because defendant did not object at trial nor request an instruction to the jury to disregard the shackling); People v. Donovon, 107 A.D.2d 433, 443–444, 487 N.Y.S.2d 345, 352–353 (2d Dept. 1985) (holding that because the defendant did not claim at trial that his confession was obtained in violation of his right to counsel, the defendant could not raise this issue for the first time in a § 440.10 motion). As explained in Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," you or your lawyer must protest errors that occur at trial when they happen in order to ensure that these errors will be reviewed on appeal.

92. *See* People v. Brown, 45 N.Y.2d 852, 853–854, 382 N.E.2d 1149, 1149–1150, 410 N.Y.S.2d 287, 287 (1978) (observing that since the record often does not provide enough information for appeal on effectiveness of counsel, an Article 440 motion is usually a better method for ineffectiveness of counsel claims); *see also* N.Y. Crim. Proc. Law § 440.10(3)(a) (McKinney 2005) (stating that a court may deny a motion to vacate a judgment where the defendant failed to raise an issue prior to sentencing, even though facts in support of the issue raised in the Article 440 motion could have easily appeared on the record had the defendant acted with due diligence, but also noting that "[t]his paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right.").

93. *See* People v. Gonzalez, 158 A.D.2d 615, 615, 551 N.Y.S.2d 586, 587 (2d Dept. 1990) (denying an Article

(b) You may raise an issue in your motion if you could not have raised the issue at trial because, at that time, you could not have discovered the important facts.[94] For example, in one Article 440 motion, a defendant complained that he was not told the prosecutor had an agreement with a witness against the defendant, even though defendant's counsel asked the prosecutor. The prosecutor had agreed to recommend a lesser sentence for the witness in exchange for the witness's testimony against the defendant. The trial court denied the motion because the defendant could have raised this issue at trial and the intermediate appellate court "affirmed" (approved) the trial court's order. But, the Court of Appeals disagreed, finding that the defendant could not have known of or discovered the agreement at the time of trial and, therefore, could not have raised the issue at trial.[95]

(c) You may claim that there was prejudicial or harmful newspaper publicity about your case before and during the trial. However, if you did not alert the trial court to such newspaper publicity, and therefore, this negative publicity was not included in the record for the appeals court to review, a judge may decide to deny a Section 440.10 motion which raises this issue.[96]

(d) You may claim that you were a victim of sex trafficking if you have been arrested for prostitution under N.Y. Penal Law § 230.00 or for loitering for the purpose of prostitution under N.Y. Penal Law § 240.37.[97] In addition, your participation in the offense must have been a result of having been a victim of sex trafficking under N.Y. Penal Law § 230.34 or trafficking in persons under the Trafficking Victims Protection Act.[98]

(2) A trial court can decide to either consider or reject a second motion to vacate the judgment (do away with it) as long as (i) the issue was not decided on direct appeal, and (ii) it was included in your first Article 440 motion.[99] Again, there is an exception to this rule if the law has changed since your earlier motion and the change has been held to apply retroactively (applying to a past event).[100]

(3) The third situation where a trial court can decide to grant or reject your motion is when you could have raised this issue in a previous Section 440.10 motion, but you did not. Unless you can show a good reason for not including the issue in your earlier motion, the court may deny your second motion.[101] It is important, therefore, that you include all possible supporting issues and complaints in your Section 440.10 motion. You may not be able to raise any additional issues that you leave out in another Article 440 motion.

(c) Alleging Omission of *Rosario* Materials

You may file a 440 motion if the government did not give you what is called "*Rosario* material." *Rosario* material is any recorded statement of a prosecution witness (including police officers) that the police or prosecution have in their possession that relates to the subject matter of the witness' trial

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440 motion in part due to the ineffectiveness of counsel's claims. Counsel's claims were based on matters in the record and the court held that they should have been raised on direct appeal rather than in an Article 440 motion).

94. *See* People v. Qualls, 70 N.Y.2d 863, 865–866, 517 N.E.2d 1346, 1347, 523 N.Y.S.2d 460, 461–462 (1987) (finding defendant could not have discovered evidence of the prosecutor's misconduct during trial, based on the prosecutor's misrepresentation of the substance of its cooperation agreement with a witness, and so defendant was granted a hearing on his Article 440 motion).

95. People v. Qualls, 70 N.Y.2d 863, 865–866, 517 N.E.2d 1346, 1347, 523 N.Y.S.2d 460, 461–462 (1987).

96. N.Y. CRIM. PROC. LAW § 440.10(3)(a) (McKinney 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. (McKinney 2009).

97. N.Y. CRIM. PROC. LAW § 440.10(1)(i)(i)–(ii) (McKinney 2009) (McKinney 2009).

98. N.Y. PENAL LAW § 230.34 (McKinney 2009), 22 U.S.C. § 7101 (2012).

99. N.Y. CRIM. PROC. LAW § 440.10(3)(b) (McKinney 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. (McKinney 2009).

100. N.Y. CRIM. PROC. LAW § 440.10(3)(b) (McKinney 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. (McKinney 2009).

101. N.Y. CRIM. PROC. LAW § 440.10(3)(c) (McKinney 2009); N.Y. Crim. Proc. Law § 440.10 practice cmt. (McKinney 2009).

testimony. By law, the prosecutor must give you those statements that relate to the witness' testimony at your trial.[102] But, note that even if the prosecutor failed to give you the *Rosario* materials, that does not mean that your conviction is automatically overturned. Instead, the court must find a "reasonable possibility" that the failure to give you such statements "materially" (substantially) contributed to a verdict against you. Only then will the court reverse your conviction on appeal because *Rosario* materials were not given to you.[103] Likewise, if you raise the issue of omitted (left out) *Rosario* materials in an Article 440 motion, the court will reverse your conviction only if you can prove that the omission of the materials was not harmless error (in other words, that the omission negatively affected your defense).[104] If you raise this claim for the first time in an Article 440 motion, you must show that there was a reasonable possibility that the failure to give you these statements contributed to the verdict against you.[105]

Furthermore, it is unlikely that a court will reverse your conviction for this reason if the material kept by the prosecution duplicates (repeats) material in the record,[106] or if the prosecution merely delayed in producing the material.[107] However, courts interpret "duplication" very narrowly. Unless

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102. N.Y. CRIM. PROC. LAW § 240.45(1)(a) (McKinney 2009); *see also* People v. Rosario, 9 N.Y.2d 286, 290–91, 173 N.E.2d 881, 883–84, 213 N.Y.S.2d 448, 450–51 (1961) (finding that the trial court should have turned over to defense counsel, on their request, statements given by prosecution witnesses before trial that related to their trial testimony, so that defense counsel could have rightfully used those statements on cross-examination). Note that in this case the error was found to be harmless due to its specific circumstances.

103. *See* N.Y. CRIM. PROC. LAW § 240.75 (McKinney 2009) (removing the previous rule from People v. Ranghelle, 69 N.Y.2d 56, 63, 503 N.E.2d 1011, 1016, 511 N.Y.S.2d 580, 585 (1986) that failure to turn over Rosario material was per se (automatic) reversible error, replacing the Ranghelle rule with the "reasonable possibility" standard); People v. Sorbello, 285 A.D.2d 88, 95–96, 729 N.Y.S.2d 747, 752–753 (2d Dept. 2001) (holding that § 240.75, which replaced the old Ranghelle rule, applies retroactively to all cases that are being prosecuted or appealed as of February 1, 2001); *see also* People v. Rosas, 297 A.D.2d 390, 390–391, 746 N.Y.S.2d 610, 611 (2d Dept. 2002) (finding that failure to disclose certain statements that related to the identification of the defendant by the victim's son could reasonably have affected the verdict); People v. Potter, 283 A.D.2d 1011, 1011–1012, 725 N.Y.S.2d 778, 779–780 (4th Dept. 2001) (granting new trial because of the reasonable possibility that failure to disclose tapes and statement relating to the witness' trial testimony materially contributed to the verdict). *But see* People v. Delosanto, 307 A.D.2d 298, 299, 763 N.Y.S.2d 629, 631 (2d Dept. 2003) (denying reversal despite finding that a Rosario violation was committed because there was no reasonable possibility that disclosure of grand jury minutes would have contributed to the trial).

104. People v. Jackson, 78 N.Y.2d 638, 641, 585 N.E.2d 795, 797, 578 N.Y.S.2d 483, 485 (1991) (stating that motion for post-conviction relief brought after a completed direct appeal will only be successful if defendant can prove both improper conduct by prosecutor and prejudice to the defense); *see also* People v. Machado, 90 N.Y.2d 187, 192, 681 N.E.2d 409, 412, 659 N.Y.S.2d 242, 245 (1997) (holding that in an Article 440 motion, defendant/movant must prove that the failure to turn over Rosario material prejudiced the outcome of the defendant/movant's case, even if an appeal is pending at the time the Article 440 motion is filed).

105. *See* People v. Machado, 90 N.Y.2d 187, 192, 681 N.E.2d 409, 412, 659 N.Y.S.2d 242, 245 (1997) (stating that defendant/movant must prove the omission of materials prejudiced his case and contributed to the verdict against him, conviction will not be automatically reversed regardless of whether defendant's direct appeal is still pending or completed); People v. Vilardi, 76 N.Y.2d 67, 77–78, 555 N.E.2d 915, 920–921, 556 N.Y.S.2d 518, 523–524 (1990) (explaining that the standard for determining whether an omission of Rosario material was prejudicial is whether there was a reasonable possibility that the defendant would not have been convicted had the Rosario material been provided at trial); People v. Nikollaj, 155 Misc. 2d 642, 648–649, 589 N.Y.S.2d 1013, 1017–1018 (Sup. Ct., Bronx County 1992) (granting defendant new trial because prosecution's withholding of a lot of Rosario materials, including a 16-minute recorded interview of the main eyewitness, prejudiced defendant's case, and there was a reasonable possibility that the violations contributed to the verdict).

106. *See* People v. Cortez, 184 A.D.2d 571, 573, 584 N.Y.S.2d 609, 611 (2d Dept. 1992) (finding that conviction need not be reversed if material withheld by prosecution is duplicative of other evidence in the record); People v. Ray, 140 A.D.2d 380, 382–383, 527 N.Y.S.2d 864, 866 (2d Dept. 1988) (stating that the prosecution must prove the undisclosed statements are indeed duplicative).

107. *See* People v. Blagrove, 183 A.D.2d 837, 837–838, 584 N.Y.S.2d 86, 87 (2d Dept, 1992) (stating that the prosecution's delay in turning over material relating to a prosecution witness' testimony will only result in a reversal if the defense was substantially prejudiced by the delay, and finding no delay where "[t]he defendant received the notes prior to the doctor's testimony, and had a full opportunity to cross-examine him based upon the notes . . . [and] the defendant was generally apprised of the fact that the notes were based on the autopsy report

the excluded material appears in the record in identical or almost identical form, the court will probably not reject your claim on the grounds that the undisclosed *Rosario* material was duplicative.[108]

(d) When You May File a Motion to Set Aside a Sentence under Section 440.20

Just like in a motion to vacate a judgment under Section 440.10, in a motion to vacate your sentence under Section 440.20, you do not have to wait until you have appealed your conviction to make the motion. You can make this motion at any time after your sentencing.[109] But, if you challenged your sentence when you appealed your conviction and lost, you cannot challenge your sentence again through a Section 440.20 motion.[110] There is an exception to this rule that applies if (1) the law has changed in the time since your appeal, and (2) the new law is made retroactive (meaning that the new law can apply to your case even though that law was passed after you were convicted and sentenced).[111] In addition, the judge may deny your motion if the issue was already decided in a previous Section 440.20 motion or a similar non-appeal proceeding, such as a habeas corpus motion.[112] The court may grant your motion, however, if it is in the interest of justice and a good reason is shown.[113]

C. How to File an Article 440 Motion

1. Preparing Your Motion Documents

Appendix B of this Chapter (beginning on page 627) contains forms to help you prepare an Article 440 motion. For any motion you make using Article 440, you will need at least two documents. The first document is a Notice of Motion. It tells the court that you are challenging your conviction and/or sentence. It also states the reason for your challenge. The notes after the sample Notice of Motion in Appendix B tell you how to fill out this document.

The second document is an "affidavit." This is a sworn statement of facts made by someone with firsthand knowledge of the facts. Either you, a witness at your trial, or someone else who knows facts that will convince the court your conviction or sentence was wrong can prepare and swear to an affidavit. Appendix B of this Chapter provides a sample affidavit written as though you (the defendant) made the affidavit.[114]

To write a good affidavit, you must do more than make general claims such as "I was deprived of my constitutional right to counsel" or "the officer had no probable cause to arrest me." If you make these claims in your motion, you must give details of the specific circumstances under which you were

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and other physical evidence.").

108. *See* People v. Young, 79 N.Y.2d 365, 370–371, 591 N.E.2d 1163, 1166–1167, 582 N.Y.S.2d 977, 980–981 (1992) (finding that two documents cannot be duplicative if "there are variations or inconsistencies between them[,]" including omissions, that the exception to an automatic reversal rule for duplicate material is "simply not consistent with the principles underlying our case law[,]" and should be read very narrowly to apply when material is in fact a duplication of material in the record).

109. N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 2009).

110. N.Y. CRIM. PROC. LAW § 440.20(2) (McKinney 2009). *See, e.g.*, People v. Chapman, 115 A.D.2d 911, 911, 496 N.Y.S.2d 588, 588 (3d Dept. 1985) (finding that a court must deny an Article 440 motion when the sentencing issue was previously determined on the merits as part of a direct appeal).

111. A court will review a claim that you raised in a previous Article 440 motion if the law has changed since your appeal, and the new law applies to cases decided before the change. N.Y. Crim. Proc. Law § 440.20(2) (McKinney 2005 & Supp. 2011) ("[T]he court may deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.").

112. N.Y. CRIM PROC. LAW § 440.20(3) (McKinney 2009).

113. N.Y. CRIM PROC. LAW § 440.20(3) (McKinney 2009). Note, however, that it is rare for the court to grant a 440.20 motion on these grounds. *See, e.g.*, People v. Baraka, 109 Misc. 2d 271, 274, 439 N.Y.S.2d 827, 830 (N.Y. Crim. Ct., New York County 1981) (reading the "interest of justice" and "good cause" grounds narrowly for the discretion that a judge holds in this context).

114. A witness affidavit would look almost the same as the defendant's affidavit, except that the witness must identify himself and explain why he is aware of the facts to which he is swearing.

denied counsel or state in a clear and detailed way what led to your arrest. For example, if you asked for a lawyer at trial and the judge told you that you were not entitled to a lawyer, you should include in your affidavit the name of the judge, the exact words he used (if you can remember them), the date (or approximate date) that the statement was made, and the names of any witnesses who heard the judge make the statement.

If a judge thinks that there is no reasonable possibility that the facts stated in your affidavit are true, he or she will deny your motion.[115] Therefore, you should be as detailed and precise about the facts of your story as possible. In addition, if any witnesses are available, you should have them write affidavits that support your story.

You should also be careful to include all of the possible reasons or issues on which you could bring an Article 440 motion.[116] If you leave one out, a court will probably not allow you to raise the ground in a later motion.[117]

You must swear in the presence of a notary that the facts stated in your affidavit are true.[118] If prison officials refuse to provide you with a notary, you can verify your affidavit through a witness. In order to verify your affidavit, you should sign your own name at the bottom of the form. You should also ask a friend to witness (watch) as you sign the affidavit and have the friend sign his own name under the line that reads "sworn to before me" at the end of the affidavit. Finally, you should write an explanation under the signature of the friend who witnessed your signature regarding the fact that the prison officials refused to provide a notary. Appendix A of *JLM*, Chapter 17, contains a "Sample Verification" (A-2) that can be filled out by a friend.

2. When and Where to File

(a) When to File

There is no "statute of limitations" (time limit) for making an Article 440 motion.[119] But, if you wait too long after your sentencing, a court may decide to deny your motion.[120] For example, one court denied a Section 440.10 motion that a defendant made three years after his conviction because he could not explain the delay. The court believed he could have discovered the facts underlying his claim earlier.[121] Furthermore, Article 440 requires you to make a motion based on newly discovered evidence *within a reasonable time* after you discover the new evidence.[122]

(b) Where to File

You must bring an Article 440 motion in the trial court where you were convicted. You cannot bring it in the court of another county where you happen to be imprisoned. To file your motion, mail your Notice of Motion, your sworn statement(s) (affidavit(s)), and all supporting documents to the clerk

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115. *See* People v. Selikoff, 35 N.Y.2d 227, 244, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 638 (1974) (denying motion based on incredible and unsubstantiated claim that trial judge, deceased at time of motion, had made an off-the-record sentencing promise to defendant). *But see* People v. Seminara, 58 A.D.2d 841, 843, 396 N.Y.S.2d 472, 475 (2d Dept. 1977) (granting motion for hearing where defendant claimed that judge's law secretary made probation promise to defendant and claim was supported by affidavit from his trial attorney).

116. N.Y. CRIM. PROC. LAW § 440.30(1) (McKinney 2009).

117. N.Y. CRIM. PROC. LAW § 440.10(3)(c) (McKinney 2009).

118. N.Y. CRIM. PROC. LAW § 440.30(1) (McKinney 2009).

119. *See* People v. Corso, 40 N.Y.2d 578, 580, 357 N.E.2d 357, 359, 388 N.Y.S.2d 886, 889 (1976) (holding that a § 440.10 claim may be filed at any time).

120. *See* People v. Byrdsong, 161 Misc. 2d 232, 236, 613 N.Y.S.2d 543, 545 (Sup. Ct. Queens County 1994) (denying relief to an incarcerated person who filed a §440 motion nine years after trial and seven years after all appeals had been exhausted); People v. Wilson, 81 Misc. 2d 739, 740, 365 N.Y.S.2d 961, 962–963 (Dist. Ct. Nassau County 1975) (denying motion to vacate judgment and finding it to be a "significant factor" that defendant waited almost five years to complain of his conviction).

121. *See* People v. Friedgood, 58 N.Y.2d 467, 470–471, 448 N.E.2d 1317, 1319, 462 N.Y.S.2d 406, 408 (1983).

122. N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005).

of the court where you were convicted.[123] See Appendix II of the *JLM* for the addresses of the trial courts for each county in New York State. In New York State, the trial courts are called the supreme courts. You must also send a copy of your papers to the district attorney of the county where you were convicted. See Appendix III in the back of the *JLM* for a list of the addresses of the district attorneys' offices for each county in New York.

3. How to Get Help from a Lawyer

You do not have a right to a lawyer to help you prepare your Article 440 motion. But the court may decide to assign you a lawyer under certain circumstances. First, the court must decide to hold a hearing based on your motion and affidavits, and then you must request a lawyer.[124] You should request a lawyer because he can usually help you present a better case.

To request a lawyer, you need to file certain documents ("poor person's papers"). "Poor person's papers" state that you would like a lawyer, but are unable to pay for one. These papers also allow you to request that the clerk of the court serve the district attorney with all of your papers, so you do not have to serve the papers yourself. "Poor person's papers" are also known as a request to proceed "*in forma pauperis*." Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," describes poor person's papers in more detail and also contains sample poor person's papers. You may make and use a copy of the papers in Appendix B of Chapter 9 of the *JLM* (but do not tear them out of the book), as long as you:

(1) Replace all references to "Appeal" with either "Motion to Vacate Judgment" or "Motion to Set Aside Sentence," whichever is applicable,
(2) Delete all references to "Appellate Division" and "Judicial Department" (make sure that "Supreme Court" still appears), and
(3) Make sure that the county in which you were convicted is included wherever there is a reference to the Supreme Court.

D. What to Expect After You Have Filed Your Article 440 Motion

Once you have filed your motion, the district attorney will ordinarily file a response ("answer") to your motion with the judge who received your motion. The district attorney must also send you or your lawyer a copy of the answer.[125] The answer will usually deny some or all of the allegations in your motion and supporting papers.

The judge will then review the facts and arguments set forth in the district attorney's answer and in your motion and supporting affidavits. Next, the judge will grant your motion, deny your motion, or hold a hearing. The judge will grant your motion if your papers state a legal ground for "vacating" (canceling) the judgment or setting aside your sentence. The judge will deny your motion without a hearing if your papers do not state a legal ground for vacating the judgment or setting aside your sentence. Additionally, the judge will deny your motion without a hearing if your papers lack facts to support a legal ground.[126] The judge will also deny your motion without a hearing if:

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123. If your trial was moved to a different county (for example, to avoid pretrial publicity), you should send your motion to the court in the county where you were indicted. *See* People v. Klein, 96 Misc. 2d 564, 566, 409 N.Y.S.2d 374, 375–376 (Sup. Ct. Suffolk County 1978) (holding the appropriate venue for a hearing in the nature of a fundamental error ("*coram nobis*") would be in the county of the indictment, rather than the county where the case was moved for the purpose of trial).

124. *See* N.Y. COUNTY LAW § 722(4) (McKinney 2017); People *ex rel.* Anderson v. Warden, 68 Misc. 2d 463, 470, 325 N.Y.S.2d 829, 837 (Sup. Ct. Bronx County 1971) ("Assignment of counsel other than for an evidentiary hearing is discretionary in both habeas corpus and Article 440 proceedings.").

125. N.Y. CRIM. PROC. LAW § 440.30(1)(a) (McKinney 2005).

126. N.Y. CRIM. PROC. LAW § 440.30(4)(a) (McKinney 2005). *See, e.g.*, People v. Risalek, 172 A.D.2d 870, 870–871, 568 N.Y.S.2d 172, 173–174 (3d Dept. 1991) (denying motion where defendant's allegations of fraud and coercion were contradicted by transcripts, other allegations in motion were not supported by affidavits or other evidence, and defendant failed to preserve the objection to the plea he knowingly entered into); People v. Portalatin, 132 A.D.2d 581, 582, 517 N.Y.S.2d 301, 302 (2d Dept. 1987) (denying hearing because allegations of

(1) Affidavits do not support the facts you use to support your motion;
(2) Documentary proof shows that a fact necessary to support your motion is clearly false;
(3) The record from your trial contradicts a fact necessary to support your motion; or
(4) A fact necessary to support your motion is either contradicted by an official court document or supported only by your own testimony, and there is no reasonable possibility the claim is true.[127]

Otherwise, the judge must grant a hearing on your motion.[128] Whether the court grants you a hearing or not, the court must state for the official record what facts it found to be true, how it viewed the law, and why it decided the way it did.[129]

If the judge decides to hold a hearing, you have the right to attend this hearing. You may decide to "waive" (not use) this right in writing.[130] It is recommended that you go to the hearing, and you do not waive the right to appear. At the hearing, you will bear the responsibility of proving that your claims are true (this responsibility is called a "burden of proof").[131] To meet your burden of proof, you must persuade the judge that the essential facts of your story are true by a "preponderance" (majority) of the evidence, which means that the facts are more likely to be true than not true.[132] In other words, you must convince the judge that the evidence supporting your claim outweighs the evidence against your claim.

Even if the hearing convinces the court that the facts stated in your motion and affidavit are true, the court will not automatically grant your motion. The facts stated in your motion must also persuade the judge that your conviction or sentence was unfair.[133] Part B of this Chapter explains what kinds of acts by the trial judge or prosecutor may make a conviction or sentence unfair under Article 440.

E. What Relief the Court Can Provide Under Article 440

1. Motion to Vacate Judgment (440.10)

In deciding on a Section 440.10 motion, the court has several choices:

(1) Even if the court finds that the facts you have stated are true, the court may deny your motion if the court finds that your conviction was fair;[134]

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prosecutorial misconduct were not preserved or without merit); People v. Batts, 96 A.D.2d 842, 842–843, 465 N.Y.S.2d 600, 601 (2d Dept. 1983) (denying motion for failure to set forth sufficient grounds to justify a hearing).

127. N.Y. CRIM. PROC. LAW § 440.30(4)(b)–(d) (McKinney 2005).

128. N.Y. CRIM. PROC. LAW § 440.30(5) (McKinney 2005). *See, e.g.*, People v. Ferreras, 70 N.Y.2d 630, 631, 512 N.E.2d 301, 302, 518 N.Y.S.2d 780, 781 (1987) (finding that defendant who submitted personal affidavit supporting claim of ineffective counsel due to conflict of interest was entitled to hearing on motion).

129. N.Y. CRIM. PROC. LAW § 440.30(7) (McKinney 2005).

130. N.Y. CRIM. PROC. LAW § 440.30(5) (McKinney 2005).

131. N.Y. CRIM. PROC. LAW § 440.30(6) (McKinney 2005). In contrast, the prosecutor had to prove you guilty beyond a reasonable doubt at your trial.

132. N.Y. CRIM. PROC. LAW § 440.30(6) (McKinney 2005). *See, e.g.*, People v. Richard, 156 A.D.2d 270, 270, 548 N.Y.S.2d 659, 660 (1st Dept. 1989) (denying defendant's Article 440 motion because claims were not supported by the required preponderance of evidence).

133. *See, e.g.*, People v. Lehrman, 155 A.D.2d 693, 694, 548 N.Y.S.2d 260, 260–61 (2d Dept. 1989) (finding defendant failed to demonstrate that jury misconduct impaired his right to trial); People v. Dean, 125 A.D.2d 948, 949, 510 N.Y.S.2d 41, 41 (4th Dept. 1986) (denying Article 440 motion because defendant could have raised issue on appeal and defendant failed to show denial of due process); People v. Rhodes, 92 A.D.2d 744, 745, 461 N.Y.S.2d 81, 83 (4th Dept. 1983) (stating that to prevail on Article 440 motion based on claim of juror misconduct, defendant must prove misconduct by a preponderance of the evidence and show that the misconduct created a substantial risk of prejudice; mere speculation of prejudice is insufficient).

134. *See, e.g.*, People v. Machado, 90 N.Y.2d 187, 188–89, 681 N.E.2d 409, 410, 659 N.Y.S.2d 242, 243 (1997) (holding that the defendant must demonstrate prejudice in Article 440 motions made after a direct appeal has concluded, even though reversal is required upon a direct appeal when prosecution fails to turn over a pretrial witness statement); People v. Dean, 125 A.D.2d 948, 949, 510 N.Y.S.2d 41, 41 (4th Dept. 1986) (denying Article 440 motion because defendant could have raised issue on appeal and defendant failed to show denial of due process).

(2) The court may grant your Section 440.10 motion to vacate the judgment and dismiss the indictment or charge against you. If the court grants your Section 440.10 motion, you will either be released from prison or (more likely) receive a new trial;[135] or

(3) If your motion raises new evidence, the judge may vacate the judgment and order a new trial.[136]

Alternatively, the judge may reduce your conviction to a lesser offense, if the district attorney agrees.[137]

2. Motion to Set Aside Sentence (440.20)

Even if the judge decides to grant your motion to set aside your sentence under Section 440.20, he will not change your underlying conviction. The court must resentence you by following the New York Penal Code's guidelines and limits for sentences.

F. How to Appeal if Your Article 440 Motion is Denied

You do not have the automatic right to appeal a denial of your Article 440 motion to an intermediate appellate court (in New York, the intermediate appellate court is called the Appellate Division).[138] To appeal, you must request "leave" (permission) from a judge of the intermediate appellate court to which you want to appeal.[139] You must request leave to appeal within thirty days after you receive a copy of the court's order denying your Article 440 motion.[140] When you request leave, you must apply for a "certificate granting leave to appeal."[141] In order to apply for a certificate, you must check the appropriate appellate division rules. The appellate court you appeal to will be located in one of four departments. Use the rules for the department where the intermediate appellate court you appeal to is located.[142] If the judge of the appellate court grants you permission to appeal, you will receive the certificate indicating that you may appeal.[143] Within fifteen days after you receive this certificate, you must file the certificate and a notice of appeal in the court that denied your Article 440 motion.[144] You must also "serve" (give) the certificate and notice of appeal upon the district

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135. N.Y. CRIM. PROC. LAW § 440.10(4) (McKinney 2009).

136. N.Y. CRIM. PROC. LAW § 440.10(5)(a) (McKinney 2009). The new evidence must be substantial enough to create a probability that it would have changed the outcome of the original trial had it been admitted in time.

137. N.Y. CRIM. PROC. LAW § 440.10(5)(b) (McKinney 2009); s*ee also* People v. Reyes, 92 A.D.2d 776, 777, 459 N.Y.S.2d 614, 614 (1st Dept. 1983) (reducing defendant's conviction for robbery in the first degree to robbery in the second degree after evidence showed gun was a toy pistol). See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for a detailed explanation and example of lesser included offense.

138. N.Y. CRIM. PROC. LAW § 450.15 (McKinney 200); *see also* People v. Farrell, 85 N.Y.2d 60, 70, 647 N.E.2d 762, 768, 623 N.Y.S.2d 550, 556 (1995) (holding that the New York constitution does not prevent the legislature from limiting a defendant's right to appeal a denial of a non-final post-judgment collateral motion). However, you do have the right to appeal an order that sets aside your sentence if the district attorney makes an Article 440 motion under § 440.40 to seek a longer sentence against you. N.Y. Crim. Proc. Law § 450.10(4) (McKinney 2009).

139. N.Y. CRIM. PROC. LAW § 460.15 (McKinney 2009). Assuming you were convicted in a New York supreme court and filed your Article 440 motion there, you would appeal from a denial of your Article 440 motion to the appellate division of the department in which you were convicted. For a listing of the counties included in each department, see note 134 below.

140. N.Y. CRIM. PROC. LAW § 460.10(4)(a) (McKinney 2009).

141. N.Y. CRIM. PROC. LAW § 460.10(4)(a) (McKinney 2009).

142. N.Y. CRIM. PROC. LAW § 460.15(2) (McKinney 2009). These rules are located in N.Y. COMP. CODES R. & REGS. tit. 22, § 600.8(d) (for the 1st Dept.), § 670.6(b) (for the 2d Dept.), § 800.3 (for the 3d Dept.), and 1000.13(o) (for the 4th Dept.). The First Department includes the counties of the Bronx and New York. The 2nd Department includes the counties of Duchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester. The Third Department includes the counties of Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren, and Washington. The 4th Department includes the counties of Allegany, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca, Steuben, Wayne, Wyoming, and Yates.

143. N.Y. CRIM. PROC. LAW § 460.15(1) (McKinney 2009).

144. N.Y. CRIM. PROC. LAW § 460.10(4)(b) (McKinney 2009). See Chapter 9 of the *JLM*, "Appealing Your

attorney of the county where your trial court is located.[145] Once you have completed these steps, you have "taken" your appeal.[146]

You should be aware that judges rarely grant permission to appeal from denials of Article 440 motions. Nonetheless, it is essential that you seek leave to appeal from a denial of your Article 440 motion. As noted in Chapter 13 of the *JLM*, "Federal Habeas Corpus," you must seek leave to appeal to satisfy the exhaustion requirements for raising a claim in a federal habeas corpus petition.

If a judge of the intermediate court denies you leave to appeal, the state appeals process ends at that stage and cannot be pursued further.[147] (Note, however, that you may still be able to raise your claim in a federal habeas corpus petition as described in Chapter 13, "Federal Habeas Corpus," of the *JLM.*) If you do receive permission to appeal and the appellate court then denies your appeal, you may appeal the denial to the New York Court of Appeals, the state's highest court.[148] To do so, you must request permission to appeal from a judge of the Court of Appeals.[149] You must make your request within thirty days after the intermediate appellate court hands down the denial you are trying to appeal.[150] Again, if you are granted permission to appeal, you will be issued a certificate indicating you have permission to appeal.[151] Upon issuance of the certificate, your appeal is "taken."[152]

In addition, the district attorney has the right to appeal an Article 440 motion that sets aside either your conviction or your sentence.

G. Conclusion

With an Article 440 motion, you can challenge your conviction (Section 440.10) or your sentence (Section 440.20). Remember that if you have already appealed your case and lost, you cannot raise any issue already decided by the appellate court in the course of your appeal. But if a court has not decided on your appeal yet, you can still make an Article 440 motion. You can then make a motion to "consolidate" (combine) the appeal and the 440 motion for the sake of "judicial economy" (efficiency). If you consolidate, the range of factual matters the court may examine will be expanded in the appeal. Also, all of the errors presented together may better persuade the court that your trial was unfair.

You must prove that the facts stated in your motion and affidavit are true. You must also prove that the facts state a legal ground that is serious enough to require a court to grant your motion. If you claim that the court made a mistake during your trial, you must show that the mistake affected your chance of being not guilty or that the mistake was so serious that you must be protected from it. If you could have raised a claim in an earlier Article 440 motion, a court will probably deny your present motion. A court will also probably deny your present motion if you have already made an Article 440 motion on the same ground(s) and lost.

If you plead guilty at your trial, you will have a harder time succeeding on a motion to vacate judgment.

Conviction or Sentence," for a definition of a notice of appeal and a description of the appeals process, generally, and also for a sample notice of appeal from a denial of an Article 440 motion.

145. N.Y. CRIM. PROC. LAW §§ 460.10(3)(b), 460.10(4) (McKinney 2009).

146. See Chapter 9 of the JLM, "Appealing Your Conviction or Sentence," to see what steps may still be necessary to legally perfect your appeal.

147. N.Y. CRIM. PROC. LAW § 450.15 (McKinney 2009).

148. N.Y. CRIM. PROC. LAW § 460.10(5) (McKinney 2009).

149. N.Y. CRIM. PROC. LAW § 460.10(5) (McKinney 2009). You may also seek permission from an appellate division judge if the appellate division denied your motion. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence" for more information.

150. N.Y. CRIM. PROC. LAW §§ 460.10(5)(a), 460.20 (McKinney 2009).

151. N.Y. CRIM. PROC. LAW § 460.10(5)(b) (McKinney 2009).

152. N.Y. CRIM. PROC. LAW § 460.10(5)(b) (McKinney 2009). Again, however, you must still perfect your appeal. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence."

APPENDIX A

STATE POST-CONVICTION RELIEF STATUTES

Alabama	ALA. CODE § 15-21-1 *et seq.*
Alaska	ALASKA STAT. § 12.75.010 *et seq.*
Arizona	ARIZ. R. CRIM. P. 32, ARIZ. REV. STAT. § 13-4121 *et seq.*
Arkansas	ARK. R. CRIM. P. 37, ARK. CODE ANN. § 16-112-101 *et seq.*
California	CAL. PENAL CODE § 1473 *et seq.*
Colorado	COLO. R. CRIM. P. 35, COLO. REV. STAT. § 13-45-101 *et seq.*
Connecticut	CONN. GEN. STAT. ANN. § 52-466 *et seq.*
Delaware	DEL. SUP. CT. CRIM. R. 35, DEL. CODE ANN. tit. 10, § 6901 *et seq.*
D.C.	D.C. CODE § 23-110, D.C. CODE § 16-1901 *et seq.*
Florida	FLA. R. CRIM. P. 3.850
Georgia	GA. CODE ANN. § 9-14-1 *et seq.*
Hawaii	HAW. REV. STAT. § 660-3 *et seq.*
Idaho	IDAHO CODE ANN. § 19-4901 *et seq.*
Illinois	725 ILL. COMP. STAT. 5/122-1 *et seq.*
Indiana	IND. CODE ANN. § 34-25.5-1-1 *et seq.*, IND. R. P. FOR POST-CONVICTION REMEDIES R. PC 1.
Iowa	IOWA CODE ANN. § 663A.1 *et seq.*
Kansas	KAN. STAT. ANN. § 60-1501 *et seq.*
Kentucky	KY. R. CRIM. P. 11.42, KY. REV. STAT. ANN. § 419.020 *et seq.*
Louisiana	LA. CODE CRIM. PROC. ANN. art. 924 *et seq.*
Maine	ME. REV. STAT. ANN. tit. 15, § 2121 *et seq.*, ME. REV. STAT. ANN. tit. 14, § 5501 *et seq.*
Maryland	MD. CODE ANN., CRIM. PROC. §7-101 *et seq.*, MD. CODE ANN., CTS. & JUD. PROC. § 3-701 *et seq.*
Massachusetts	MASS. R. CRIM. P. 30, MASS. GEN. LAWS ch. 276, § 19
Michigan	MICH. COMP. LAWS ANN. § 600.4301 *et seq.*
Minnesota	MINN. STAT. ANN. § 590.01 *et seq.*
Mississippi	MISS. CODE ANN. § 99-39-1 *et seq.*
Missouri	MO. S. CT. R. CRIM. P. 91.01, MO. ANN. STAT. § 532.010
Montana	MONT. CODE ANN. § 46-21-101 *et seq.*
Nebraska	NEB. REV. STAT. § 29-3001 *et seq.*
Nevada	NEV. REV. STAT. §§ 34.720, 176.515.
New Hampshire	N.H. REV. STAT. ANN. § 534:1 *et seq.*
New Jersey	N.J. STAT. ANN. § 2A:67-1 *et seq.*
New Mexico	N.M. STAT. ANN. § 31-11-6
North Carolina	N.C. GEN. STAT. 15A-1411 *et seq.*, N.C. GEN. STAT. 17-1 *et seq.*
North Dakota	N.D. CENT. CODE § 32-22-01 *et seq.*
Ohio	OHIO REV. CODE ANN. § 2953.21 *et seq.*
Oklahoma	OKLA. STAT. ANN. tit. 22, § 1080 *et seq.*
Oregon	OR. REV. STAT. § 138.510 *et seq.*
Pennsylvania	42 PA. CONS. STAT. ANN. § 6501 *et seq.*
Rhode Island	R.I. GEN. LAWS § 10-9.1-1 *et seq.*, R.I. GEN. LAWS § 10-9-3 *et seq.*
South Carolina	S.C. CODE ANN. § 17-27-10 *et seq.*
South Dakota	S.D. CODIFIED LAWS § 21-27-1 *et seq.*
Tennessee	TENN. CODE ANN. § 40-9-119 *et seq.*
Texas	TEX. CODE CRIM. PROC. ANN. art. 11.01 *et seq.*
Utah	UTAH CODE ANN. § 78B-9-101 *et seq.*
Vermont	VT. STAT. ANN. tit. 13, § 7131 *et seq.*
Virginia	VA. CODE ANN. § 8.01-654 *et seq.*
Washington	WASH. REV. CODE ANN. § 7.36.010 *et seq.*
West Virginia	W. VA. CODE § 53-4A-1 *et seq.*
Wisconsin	WIS. STAT. ANN. § 974.06 *et seq.*
Wyoming	WYO. STAT. ANN. § 7-14-101 *et seq.*, WYO. STAT. ANN. § 1-27-101 *et seq.*

APPENDIX B

SAMPLE ARTICLE 440 MOTIONS AND SUPPORTING PAPERS

This Appendix contains the following materials:

B-1. Sample Notice of Motion by Defendant to Vacate Judgment
B-2. Sample Defendant's Affidavit in Support of Motion to Vacate Judgment
B-3. Sample Notice of Motion by Defendant to Set Aside Sentence
B-4. Sample Defendant's Affidavit in Support of Motion to Set Aside Sentence

DO NOT TEAR THESE FORMS OUT OF THE *JLM*. Copy them on your own paper and fill them out according to the facts of your particular case. The endnotes following the sample documents tell you how to fill in the necessary information. Remember, your affidavit is a sworn statement, you can be punished if you intentionally include any statements that you know are false. Change the wording of the forms, if necessary, so that all the statements apply to your case. You must sign your affidavit in the presence of a notary public.

No poor person's papers (*in forma pauperis*) have been included in these forms. Part C(3) of this Chapter tells you how to use poor person's papers to obtain a lawyer in an Article 440 proceeding. Sample poor person's papers may be found in Chapter 9 of the *JLM*.

Appendix II at the end of the *JLM* lists the addresses and jurisdictions of the New York state courts to which these papers should be addressed.

B-1. Sample Notice of Motion by Defendant to Vacate Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____ [i]

The People of the State of New York	:	
Plaintiffs,	:	NOTICE OF MOTION TO VACATE JUDGMENT
- against -	:	Indictment No._____ [ii]
_____,[iii]	:	
Defendant.	:	

PLEASE TAKE NOTICE that upon the annexed affidavit of _____,[iv] duly sworn to the ____ day of _____, _____, [v] (and documents attached thereto) and upon the accusatory instrument and_____, [vi] and all proceedings previously heretofore held herein, defendant will move this Court at Criminal Term, Part _____[vii] thereof, at the Courthouse located at_ _____,[viii] on the _____ day of _____, _____ at ____ a.m.,[ix] or as soon thereafter as counsel may be heard, for:

An order pursuant to Criminal Procedure Law § 440.10(__)[x] vacating the judgment entered against the above-named defendant on the ____ day of _____, _____,[xi] on the following grounds:

1. _____
2. _____[xii]

[*if applicable, include*:] An order pursuant to N.Y. Crim. Proc. Law § 440.30(1-a), directing that forensic Deoxyribonucleic Acid (DNA) testing be performed on evidence specified in the annexed affidavit,

An order, pursuant to N.Y. Crim. Proc. Law § 440.30(5), to produce the defendant at any hearing to be conducted for the purpose of determining this motion, and

Such other and further relief as the Court may deem just and proper.

Dated: _____

_____, _____[xiii]
_____[xiv]
_____[xv]
Defendant, *pro se*.[xvi]

To:
District Attorney of
_____ County,
_____, New York[xvii]

B-2. Sample Defendant's Affidavit in Support of Motion to Vacate Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____[xviii]

The People of the State of New York	:	
Plaintiffs,	:	AFFIDAVIT
- against -	:	Indictment No._____[xix]
_____,[xx]	:	
Defendant.	:	

State of New York)
County of _____[xxi] ss.:)

_____,[xxii] being duly sworn, deposes and says:

1. I am the defendant in the above-entitled proceeding. I make this affidavit in support of a motion, pursuant to section 440.10, subdivision _____,[xxiii] to vacate the judgment of conviction herein, upon the ground that _____.[xxiv]

2. I was indicted for _____.[xxv] At the arraignment I entered a plea of "not guilty" and posted bail in the amount of $_____.[xxvi] I was tried in this court before Hon. Judge_____ _____[xxvii] on_____, _____.[xxviii] The case was submitted to a jury, which rendered a verdict of guilty.[xxix]

3. On _____, _____,[xxx] I was sentenced to _____.[xxxi]

4. The evidence adduced at my trial may be summarized as follows:

_____
_____
_____.[xxxii]

5. _____.[xxxiii]

6. [*If applicable, include*:] Among the evidence gathered by the State in its investigation of the crime and admitted at my trial [*or*] but not admitted at my trial was _____, which contains Deoxyribonucleic Acid (DNA). DNA testing of _____ is relevant to proof of guilt in that _____ _____. My conviction occurred prior to January 1, 1996, to wit, on _____, _____.[xxxiv]

7. The ground(s) for relief raised upon this motion has (have) not previously been determined on the merits upon a prior motion or proceeding in a court of this state, or upon an appeal from the judgment, or upon a prior motion or proceeding in a federal court.[xxxv]

WHEREFORE, I respectfully request that my conviction be vacated on the ground that_____ _____,[xxxvi] and that this Court grant such other and further relief as it may deem just and proper [*or if applicable*:] WHEREFORE, I respectfully request an Order of this Court pursuant to N.Y. Crim. Proc. Law § 440.30(1-a), directing that forensic Deoxyribonucleic Acid (DNA) testing be conducted upon _____ _____.[xxxvii]

_____[xxxviii]

_____[xxxix]_____

Sworn to before me this:
day of _____, 20____

_____[xl]
NOTARY PUBLIC

B-3. Sample Notice of Motion by Defendant to Set Aside Sentence

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____[xli]

The People of the State of New York	:	
Plaintiffs,	:	NOTICE OF MOTION TO SET ASIDE SENTENCE
- against -	:	Indictment No._____[xlii]
_____,[xliii]	:	
Defendant.	:	

PLEASE TAKE NOTICE that upon the annexed affidavit of _____,[xliv] duly sworn to the _____ day of ____, 20___, [xlv] (and documents attached thereto) and upon the accusatory instrument and all other papers filed and proceedings heretofore had herein, defendant will move this Court, Part _____[xlvi] thereof, at the Courthouse located at _____,[xlvii] on the ____ day of _____, 20____, at ____ a.m.,[xlviii] or as soon thereafter as counsel may be heard, for:

(1) an order, pursuant to Criminal Procedure Law, section 440.20, setting aside the sentence heretofore imposed upon the above-named defendant on the __ day of _____, _____, [xlix] or, in the alternative, ordering a hearing to determine whether such sentence should be set aside on the ground(s) that:

_____[*reasons*],[l]

(2) An order, pursuant to Crim. Proc. Law § 440.30(5), to produce the defendant at any hearing conducted to determine this motion, and

(3) Such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are to be served upon the undersigned at least __[li] days prior to the return of this motion.

Dated:_____

_____[lii]

_____[liii]

Defendant, *pro se*.

To:

District Attorney of

_____ County,

_____, New York [liv]

B-4. Sample Defendant's Affidavit in Support of Motion to Set Aside Sentence

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____ [lv]

The People of the State of New York Plaintiffs, - against - _____,[lvii] Defendant.	AFFIDAVIT Indictment No._____[lvi]

State of New York)
County of _____[lviii] ss.:)

_____,[lix] being duly sworn, deposes and says:

1. I am the defendant in the above-entitled proceeding. I make this affidavit in support of a motion, pursuant to section 440.20 to set aside the sentence herein, upon the ground that _____ _____.[lx]

2. I was indicted for _____.[lxi] At the arraignment I entered a plea of "not guilty" and posted bail in the amount of $_____.[lxii] I was tried in this court before Hon. Judge _____ _____[lxiii] on _____, _____.[lxiv]

3. After a trial[lxv] held on _____ _____, _____,[lxvi] I was found guilty of count(s) _____[lxvii] of the indictment charging _____ in the _____ degree, a Class _____ felony.[lxviii] Bail was revoked and I was held in the _____, located at _____, _____ _____,[lxix] New York, until the sentencing for my conviction held on _____, _____[lxx] before Hon. Judge _____[lxxi] in Criminal Term Part _____ of the _____ _____[lxxii] County Supreme Court.

4. I was sentenced to a _____ term of imprisonment at _____Correction Facility, _____,[lxxiii] New York.

5. _____.[lxxiv]

6. _____.[lxxv]

7. The ground(s) for relief described by this affidavit has (have) not previously been determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a prior motion or proceeding in a federal court.[lxxvi]

WHEREFORE, I respectfully request that this Court enter an order, pursuant to section 440.20 of the Criminal Procedure Law, setting aside the sentence imposed upon me and resentencing me in accordance with law, and granting such other and further relief as the Court may deem just and proper.

_____
_____[lxxvii]
Sworn to before me this:
day of _____, 20____
_____[lxxviii]
NOTARY PUBLIC

Fill in the blanks indicated in the sample documents as follows:

i. Fill in the name of the county in which the court hearing your motion is located.
ii. Fill in your indictment number.
iii. Fill in your name.
iv. Since you should submit an affidavit with your motion, you should fill your name in here. Also, if you are submitting affidavits of other people who have taken part in your case, their names should be filled in, and the word "affidavit" changed to "affidavits."
v. Fill in the date or dates on which you or others signed your affidavits: day, month, year.
vi. Describe briefly other documents, if any, that you are attaching because they will help you make your case to the court. For example, you can mention a transcript of your trial.
vii. Fill in the "Part" number of the court, if you know it.
viii. Fill in the address of the court.
ix. Fill in the date on which the hearing will be held.
x. Fill in the subsection of § 440.10 that corresponds to the ground upon which you are making your motion. See Section B(2) of this Chapter for information on these subsections.
xi. Fill in the day, month, and year on which the judgment of conviction was entered against you.
xii. List the reasons why you think the court should vacate the judgment against you. See Section B(2) of this Chapter for more information.
xiii. Fill in date on which you signed this notice, and the city and state in which you signed it.
xiv. Sign your name here.
xv. Fill in your complete mailing address here.
xvi. *Pro se* means that you are acting as your own legal representative (without a lawyer).
xvii. Fill in the name of the district attorney, and the county and town in which he or she is located.
xviii. Fill in the name of the county in which the court hearing your motion is located.
xix. Fill in your indictment number.
xx. Fill in your name.
xxi. Fill in the name of the county in which you are signing this affidavit.
xxii. Your name, in capital letters.
xxiii. Fill in the subsection of § 440.10 that corresponds to the ground upon which you are making your motion. See Section B(2) of this Chapter.
xxiv. List briefly the ground that corresponds to the subsection of N.Y. Crim. Proc. Law § 440.10 provided above. See Section B(2) of this Chapter for a list of grounds.
xxv. Fill in the name of the offense for which you were indicted.
xxvi. Fill in the amount of bail you posted.
xxvii. Fill in the trial judge's name.
xxviii. Fill in the date or dates including the day, month, and year on which your trial took place.
xxix. If you did not have a jury trial, simply indicate that the judge found you guilty.
xxx. Fill in the day, month, and year on which judgment was given in your case.
xxxi. Fill in the sentence ordered in your case.
xxxii. Summarize the evidence that the prosecution relied upon and that the jury was allowed to consider.
xxxiii. Summarize the facts which support the reasons you set out in numbers 1 through 8, above, for challenging your conviction.
xxxiv. Fill in the evidence, if any, containing DNA samples, how that evidence proves your innocence, and the date, prior to January 1, 1996, that your conviction occurred, if applicable.
xxxv. If you have previously raised the issues on which you are basing this motion, you should change this paragraph to reflect that fact. If the law has changed since you previously litigated the issues, you should state this.
xxxvi. Briefly state the reasons for your motion.
xxxvii. Fill in the evidence upon which you want DNA testing performed.
xxxviii. Sign your name, ***in the presence of a notary public***. If your prison will not give you access to a notary, see Appendix A, Endnote 102 to Chapter 16 of the *JLM*.
xxxix. Print your complete mailing address below your signature.
xl. The notary will sign and fill in the date here after seeing you sign the document.
xli. Fill in the name of the county in which the court hearing your motion is located.
xlii. Fill in your indictment number.
xliii. Fill in your name.
xliv. Since you should submit an affidavit with your motion, your name should be filled in here. Also, if you are submitting affidavits of other people who took part in the case, their names should be filled in, and the word "affidavit" changed to "affidavits."
xlv. Fill in the date you signed your affidavit.

xlvi. Enter the number of the court part, if you know it.
xlvii. Enter the address and city of the court hearing your motion.
xlviii. Enter the date and time of your hearing.
xlix. Enter the day, month, and year on which you were sentenced.
l. Give the reasons your sentence should be set aside. See Section B(2) of this Chapter. The three grounds are (a) sentence unauthorized, (b) sentence illegally imposed, or (c) sentence invalid otherwise, as a matter of law. If you can raise more than one ground, you should include all that apply.
li. Fill in the amount of notice you feel is necessary, considering the length of time you will need to develop arguments to answer their affidavit.
lii. Fill in date on which you signed this notice, and the city and state in which you signed it.
liii. Sign your name and print your complete mailing address underneath.
liv. Enter the name of the district attorney, followed by his or her county and address.
lv. Fill in the name of the county in which the court hearing your motion is located.
lvi. Fill in your indictment number.
lvii. Fill in your name.
lviii. Fill in the name of the county in which you are signing this affidavit.
lix. Your name, in capital letters.
lx. List briefly the reasons why you think the court should vacate the sentence against you. See Section B(2) of this Chapter for a list of possible reasons.
lxi. Fill in the name of the offense for which you were indicted.
lxii. Fill in the amount of bail you posted.
lxiii. Fill in the trial judge's name.
lxiv. Fill in the date or dates, including day, month, and year on which your trial took place.
lxv. If you pled guilty, leave out this first sentence in paragraph 3. Instead, write: "I entered a plea of guilty to (give the name of the crime), a Class (give the class of the felony: A, B, C, etc.) felony."
lxvi. If you had a trial, fill in the date or dates, including the day, month, and year of the trial.
lxvii. If you had a trial, fill in the numbers of the counts of the indictment of which you were convicted.
lxviii. If you had a trial, fill in the names, degrees (if any), and classes of the offenses of which you were convicted.
lxix. Give the name and address of the facility where you were held while you were waiting to be sentenced.
lxx. Fill in the date, including the day, month, and year of your sentencing.
lxxi. Fill in the name of the judge who sentenced you.
lxxii. Enter the county and part number of the court that sentenced you.
lxxiii. Enter the terms of the sentence that you received and the name and address of the facility in which you are to serve your sentence.
lxxiv. Indicate whether or not an appeal has been taken in your case. If so, give the name of the court, the date it was heard/decided, and the name of the judge who heard your appeal.
lxxv. Give the reasons why you think your sentence is illegal. See Section B(2) of this Chapter for a list of possible reasons.
lxxvi. If you have previously raised the issues on which you are basing this motion, you should change this paragraph to reflect the previous court proceedings. If the law has changed since you previously litigated the issues, you should state this.
lxxvii. Sign your name, ***in the presence of a notary public***, and print your complete mailing address below your signature.
lxxviii. The notary will sign and fill in the date here after seeing you sign the document.