CHAPTER 20

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

A. Introduction

If you were convicted in New York, it may be possible for you to challenge and overturn your conviction by filing a motion under Article 440 of the New York Criminal Procedure Law.[1] If you were convicted in a different state, you cannot use Article 440. **Appendix A** at the end of this Chapter has a list of similar post-conviction relief statutes from other states. If you were convicted in Florida, you should read *JLM,* Chapter 21, "State Habeas Corpus: Florida, New York, and Michigan," which discusses Florida's post-conviction motion in more detail.

This Chapter is divided into six parts. **Part B** explains what Article 440 motions are, what kinds of claims you can raise, 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. Finally, **Part G** summarizes important things to think about when making an Article 440 motion. If you decide you want to file an Article 440 motion, **Appendix B** at the end of this Chapter contains forms for filing Article 440 motions.

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.[2] If your Article 440 motion succeeds, you will receive a new trial or a new sentence. An Article 440 motion is not an "appeal"[3] and is not a substitute for an appeal or second appeal.[4] In an appeal, you request a higher court (i.e., the Appellate Division or the Court of Appeals) to review errors during your trial. 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:[5]

(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:

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[1] 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").

[2] 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 *JLM*, Chapter 9, "Appealing Your Conviction or Sentence." For information about federal and state writs of habeas corpus, please see *JLM*, Chapter 13, "Federal Habeas Corpus Petitions," and *JLM*, Chapter 21, "State Habeas Corpus: Florida, New York, and Michigan."

[3] For more on how to appeal your conviction, see *JLM*, Chapter 9, "Appealing Your Conviction or Sentence."

[4] *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").

[5] However, if you are raising an ineffective assistance of counsel claim, you can argue that the court needs to look at information both inside and outside of the record in order to assess the totality of counsel's performance. *See* People v. Maxwell, 89 A.D.3d 1108, 1109, 933 N.Y.S.2d 386, 388 (2d Dept. 2011).

(a) The pleadings and motions made by both sides,
(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 introduced at trial, 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 direct appeals are limited to the trial record.[7]

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* 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 use an Article 440 motion for a claim of ineffective assistance of trial counsel (as opposed to 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]

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[6] *See* People v. Bell, 161 A.D.2d 772, 723, 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 & Bronx Surface Transit Operating Auth., 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, 413–414, 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 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 County 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 County 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 2023); N.Y. CRIM. PROC. LAW § 450.90 practice cmnt. at 273 (McKinney 2023). See Subsection B(2)(a) of this Chapter for a discussion of the standard under which a court will examine ineffective assistance of trial counsel.

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

Article 440 generally 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 successful state habeas corpus claim is immediate release from custody.[12] Under an Article 440 motion, the relief granted is not immediate release but rather a new trial, appeal, or sentence.[13]

2. What You Can Argue in an Article 440 Motion

There are two main types of Article 440 motions: a "motion to vacate judgment" and a "motion to set aside sentence." The first type, a motion to vacate judgment, attacks your conviction. The second type, a motion to set aside sentence, attacks your sentence. Which type of Article 440 motion you should bring depends on what you want to argue. This Section will discuss what arguments you can make in each of the two main types of Article 440 motions. It will also discuss a third type of Article 440 motion that you can use to request DNA testing.

(a) Motion to Vacate Judgment

A motion to vacate judgment challenges the fairness and/or legality of your conviction by arguing that that the trial court acted improperly when it found you guilty. These motions are described in Section 440.10 of the New York Criminal Procedure Law. If your motion to vacate judgment is granted (successful), you receive a new trial or appeal. There are eleven possible grounds (arguments you can make) for a successful motion.[14] Each is described below.

(i) *Trial Court Lacked Jurisdiction*

You can argue that the trial court lacked "jurisdiction" to decide your case.[15] For an explanation of jurisdiction, see *JLM,* Chapter 2, "Introduction to Legal Research." This is not a very common argument

(ii) *Your Conviction Was Secured Through Fraud, Misrepresentation, or Duress*

You can argue that 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.[16] If you make this argument, you cannot simply claim that the judge or district attorney used fraud or misrepresentation.[17] You must support your Article 440 motion with specific facts in the form of an "affidavit" and, if possible, witnesses.[18]

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

[13] *See* People *ex rel.* Kaplan v. Cmm'r of Corr., 93 A.D.2d 768, 769, 461 N.Y.S.2d 336, 337 (1st Dept. 1983) (noting that even if appellant is successful in a hearing held pursuant to N.Y. CRIM. PROC. LAW § 440.10, the only remedy available would be a new trial or new appeal, not immediate release), *aff'd*, 60 N.Y.2d 648, 454 N.E.2d 1309, 467 N.Y.S.2d 566 (1983); *see also* N.Y. CRIM. PROC. LAW § 440.20(4) (McKinney 2023) (providing that, after granting a motion to vacate a sentence, "the court must resentence the defendant in accordance with the law").

[14] N.Y. CRIM. PROC. LAW § 440.10(1)(a)–(k) (McKinney 2023).

[15] N.Y. CRIM. PROC. LAW § 440.10(1)(a) (McKinney 2023). For an explanation of jurisdiction, see *JLM*, Chapter 2, "Introduction to Legal Research."

[16] N.Y. CRIM. PROC. LAW § 440.10(1)(b) (McKinney 2023).

[17] *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, 995–996, 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).

[18] *See* People v. Saunders, 301 A.D. 2d 869, 872, 753 N.YS.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).

(iii) *Trial Included Material Evidence That the Prosecutor or Judge Knew Was False*

You can argue that the prosecutor introduced (or the judge allowed in) "material evidence" at your trial that the prosecutor (or judge) knew was false at the time.[19] Material evidence means key evidence that significantly impacted the trial and led to your conviction. This could include things like false testimony from a key witness or a forged document that was important to prove your guilt.

Again, in your motion, you cannot simply state that the judge or district attorney knew the evidence was false. You must explain facts that show that the prosecutor (or the judge) knew the evidence to be false.[20]

(iv) *You Could Not Understand or Participate at Trial Due to Mental Disability*

You can argue that you could not understand or participate in your 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]

(v) *Record Failed to Include Prejudicial Conduct*

You can argue that the record of your case failed to include "prejudicial" conduct that occurred during your trial *if* an appellate court would have reversed the judgment against you if the conduct had been included in the record.[23] Prejudicial conduct is conduct that harmed or unfairly disadvantaged you.

One example of such conduct is juror misconduct, which occurs when a member of the jury acts in a way that suggests they have actual or implied bias in favor of the prosecution.[24] Bias may be established by proving, for example, that a prospective juror behaved dishonestly during *voir dire* (jury selection)[25] when both the prosecution and the defense have the chance to ask potential jurors questions about possible bias. You can also prove misconduct more generally by showing that a juror's

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[19] N.Y. CRIM. PROC. LAW § 440.10(1)(c) (McKinney 2023).

[20] *See* People v. Brown, 56 N.Y.2d 242, 246–247, 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).

[21] N.Y. CRIM. PROC. LAW § 440.10(1)(e) (McKinney 2023).

[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 2023); *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] *See* People v. McGregor, 179 A.D.3d 26, 30, 113 N.Y.S.3d 675, 678 (1st Dept. 2019) ("Juror misconduct includes both 'actual bias' and 'implied bias.'").

[25] *See* People v. Southall, 156 A.D.3d 111, 119, 65 N.Y.S.3d 508, 515 (1st Dept. 2017) (granting defendant's 440 motion "[d]ue to the juror's concealment of material information regarding her job application [to work at the District Attorney's office], which also demonstrated a predisposition in favor of the prosecution"), *leave to appeal denied by* 30 N.Y.3d 1120, 101 N.E.3d 986, 77 N.Y.S.3d 345 (2018); People v. Estella, 68 A.D.3d 1155, 1156, 889 N.Y.S.2d 759, 760 (3d Dept. 2009) (finding that a juror "engaged in misconduct by failing to disclose, during voir dire, his prejudice and preexisting personal opinion of defendant's guilt based upon race"); People v. Howard, 66 A.D.2d 670, 671, 411 N.Y.S.2d 15, 16 (1st Dept. 1978) (ordering a new trial because a juror failed to disclose his experience as a police informant during *voir dire*).

behavior was consistent with bias against you.[26] Another example of prejudicial conduct is the prosecutor's failure to supply you with "*Rosario* materials" (recorded statements of prosecution witnesses). For more information about *Rosario* materials, see Subsection B(3)(c) of this Chapter.

(vi) *Newly Discovered Evidence*

You can argue that, 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 meets **all** of the following conditions:

1. The evidence would probably change the result in your case if a new trial is granted,
2. The evidence was discovered after the trial,
3. The evidence could not have been discovered before or during the trial through the exercise of "due diligence" (care in research that a reasonable person would use),
4. The evidence is material (important) to the issue of your guilt, and
5. The evidence does not simply duplicate or contradict other evidence.[27]

Furthermore, if you would like to make an Article 440 motion on the grounds of newly discovered evidence, you should make the motion within a reasonable time after you find the new evidence. While there is no set deadline for when your Article 440 motion must be filed, **you should file as soon as possible after discovering the new evidence**. Some courts have dismissed motions because the defendant waited too long to file after discovering the new evidence.[28]

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 you have demonstrated a substantial probability of innocence.[29] 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.[30] The procedure for obtaining a DNA test is explained in Subsection B(2)(c) of this Chapter.

(vii) *Evidence or Conviction Violated Your Constitutional Rights*

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[26] For example, the Court of Appeals of New York has held that a juror's personal or professional relationship with the government's attorney is grounds for disqualifying that juror. *See* People v. Branch, 46 N.Y.2d 645, 649, 389 N.E.2d 467, 468 (1979). Similarly, a juror's insertion of evidence that was not admitted in the record during deliberations has been held to be grounds for a finding of juror misconduct. *See* People v. Maragh, 94 N.Y.2d 569, 576, 729 N.E.2d 701, 706 (2000).

[27] N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2023); *see also* People v. Watson, 43 Misc. 3d 1234(A), 1234A, 993 N.Y.S.2d 645, 645, 2014 N.Y. Misc. LEXIS 2627, at *36–40 (Sup. Ct. Bronx County 2014) (*unpublished*) (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).

[28] *See* N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2023) ("[A] motion based upon [newly discovered evidence] must be made with due diligence after the discovery of such alleged new evidence . . . ."); *see also* People v. Jenkins, 175 A.D.3d 1177, 1178, 109 N.Y.S.3d 279, 280 (1st Dept. 2019) (denying defendant's motion to vacate his conviction based on newly discovered evidence in part because he filed the motion 6 years "after the discovery of the alleged new evidence without any valid excuse for the delay"); People v. Stuart, 123 A.D.2d 46, 54, 509 N.Y.S.2d 824, 829 (2d Dept. 1986) (holding that it was not error to deny a motion to vacate a conviction based on newly discovered evidence where the motion was made more than 1 year after the discovery of the new evidence and, therefore, not made with due diligence); People v. Friedgood, 58 N.Y.2d 467, 470–471, 448 N.E.2d 1317, 1319, 462 N.Y.S.2d 406, 408 (1983) (finding that the defendant's 3-year delay in bringing newly discovered evidence to the court's attention without an explanation did not satisfy due diligence requirement of § 440.10).

[29] N.Y. CRIM. PROC. LAW § 440.10(1)(g-1)(1) (McKinney 2023).

[30] N.Y. CRIM. PROC. LAW § 440.10(1)(g-1)(2) (McKinney 2023).

You can argue that the prosecutor introduced material evidence that was obtained in violation of your constitutional rights.[31] You can also argue that your conviction was obtained in violation of your state or federal constitutional rights.[32] Constitutional claims are especially common, so this will be explained in more detail than the other grounds.

Your constitutional rights include both your rights under the U.S. Constitution and the New York State constitution. The rights in the New York State constitution 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 when selecting a jury.[33] This claim could be raised as a violation of your rights under both the New York State constitution and the U.S. Constitution. However, 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.[34] The New York State constitution also provides you with greater protection against a court imposing a longer sentence upon you after a successful appeal.[35] In addition, your right to a lawyer is broader under the New York State constitution than the U.S. Constitution.[36]

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).

A common example of a state and federal constitutional violation that can be raised in an Article 440 motion is ineffective assistance of counsel at trial. Under the federal standard (the "*Strickland* standard"), you must show: (1) "deficient performance" (that your lawyer did not comply with professional standards while representing you) and (2) "prejudice" (that there is a reasonable probability the outcome of your trial would have been different if not for the lawyer's "deficient performance").[37] Under the New York standard (the "*Baldi* standard"), you must show that you did

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[31] N.Y. CRIM. PROC. LAW § 440.10(1)(d) (McKinney 2023). For more information on such violations, see Appendix C of *JLM*, Chapter 13, "Federal Habeas Corpus Petitions," which lists possible violations of the federal Constitution, and Section C(2) of Chapter 21, "State Habeas Corpus: Florida, New York, and Michigan," which lists possible violations of New York State's Constitution. Be aware you may not be able to raise these constitutional violations if you raised them unsuccessfully on appeal. *See* Section B(3) of this Chapter.

[32] N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2023).

[33] *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); 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).

[34] *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 even though it is not a search under federal law).

[35] *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 under the state constitution, 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, and even though the same presumption may not apply when there is a different judge as a matter of federal constitutional law).

[36] *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." (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).

[37] *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). For more information on the *Strickland* standard, see Section C(1) of *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

not receive "meaningful representation.[38] You should be aware that in New York, you may not generally 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,[39] daring, or innovative.[40] In addition, you cannot simply claim that your lawyer was ineffective. You must identify your lawyer's specific acts or omissions (failures to act) that you believe were so ineffective that you were deprived of meaningful representation. Then, you must show that your lawyer's errors affected your defense so much that the trial was not a fair trial.[41] 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.[42] 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.[43] For a list of common types of ineffective assistance of counsel claims, see Part D of *JLM,* Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

Another example of a common constitutional violation that you may raise is the prosecution's failure to provide you with "*Brady* material." *Brady* material is any evidence that the prosecutor has that is favorable to the defense and material to guilt or punishment.[44] This material is often referred to as "exculpatory evidence" (evidence that is favorable to the defendant). For a conviction to be overturned based on the prosecution's failure to turn over *Brady* material, there must be a "reasonable

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[38] 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."). 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)).

[39] *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).

[40] *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 to present an insanity defense was not ineffective assistance even though his being on the stand left his client without representation).

[41] Under the *Baldi* "meaningful representation" standard, it is important to show prejudice (a reasonable probability that counsel's errors affected the outcome), even though it is technically not required, because it is highly relevant to showing that the trial was unfair. People v. Stultz, 2 N.Y.3d 277, 283–284, 810 N.E.2d 883, 887, 778 N.Y.S.2d 431, 435 (2004) ("We would . . . be skeptical of an ineffective assistance of counsel claim absent any showing of prejudice. But under our *Baldi* jurisprudence, a defendant need not fully satisfy the prejudice test of *Strickland*. We continue to regard a defendant's showing of prejudice as a significant but not indispensable element in assessing meaningful representation. Our focus is on the fairness of the proceedings as a whole.").

[42] *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 automatically lead to 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 if they have any conflicting interests so that the court may conduct a record inquiry and make sure 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).

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

[44] 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 favorable, material evidence by the prosecution violates due process).

probability" that the evidence would have affected the ultimate outcome of the trial.[45] However, under New York state law, if 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.[46] 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 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.[47] 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.[48] Courts are more likely to grant your motion if the withheld *Brady* material would have been admissible at trial.[49] If the evidence is clearly not admissible, you can still argue it would have led to admissible evidence or been useful for cross-examination.[50] *Brady* material also includes evidence in the

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[45] *See* People v. McCray, 23 N.Y.3d 193, 198, 12 N.E. 3d 1079, 1081, 989 N.Y.S.2d 649, 651–652 (2014) (finding that "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" (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 United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481, 492 (1985))).

[46] *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).

[47] *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").

[48] *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 the witness's credibility was "already blemished" during cross-examination).

[49] *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).

[50] *See* People v. McCray, 23 N.Y.3d 193, 199–200, 12 N.E.3d 1079, 1082, 989 N.Y.S.2d 649, 653 ("Inadmissible evidence can be material under *Brady* if it will be useful to the defense, perhaps as a lead to admissible evidence or a 'tool in disciplining witnesses during cross-examination.'" (quoting United States v Gil, 297 F.3d 93, 104 (2d Cir. 2002))). *But 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,

possession of other law enforcement agencies involved in your prosecution.[51] However, if a federal or state agency (including an out-of-state agency) refuses to turn over materials, the prosecution cannot be held responsible for failure to disclose.[52]

There are many other types of constitutional issues you can raise. We just covered the two most common types: ineffective assistance of counsel and the prosecution's withholding of exculpatory evidence (evidence that tends to help the defendant). Appendix C of *JLM,* Chapter 13, "Federal Habeas Corpus Petitions," provides a long list of other possible constitutional rights violations. 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 Section B(3) of this Chapter.[53] For example, if you do not include your constitutional attack in your direct appeal of your conviction but could have done so, 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 Section B(3) of this Chapter.[54]

(viii) *Your Involvement in the Crime Was Because You Were a Victim of Trafficking*

You can argue that your involvement in the crime for which you were convicted was a result of you being a victim of sex trafficking, labor trafficking, aggravated labor trafficking, compelling prostitution, or trafficking in persons.[55]

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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).

[51] *See* Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L.Ed.2d 490, 508 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

[52] *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 on 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); People v. Flynn, 79 N.Y.2d 879, 881, 589 N.E.2d 383, 385, 581 N.Y.S.2d 160, 162 (1992) ("We have consistently held that the People's *Rosario* obligation to produce the pretrial statements of prosecution witnesses is limited to material which is within their possession or control. Material in the possession of a State administrative agency . . . is not within the control of a local prosecutor; thus the court properly denied defendant's request." (citations omitted)); People v. Kelly, 88 N.Y.2d 248, 252–253, 666 N.E.2d 1348, 1350, 644 N.Y.S.2d 475, 477 (1996) (finding that records of the Division of Parole, which is a "member[] of the State Executive Branch family," should not generally be considered to be in the control of local prosecutors for purposes of disclosure obligations); *cf.* People v. Rutter, 202 A.D.2d 123, 131 (1st Dept. 1994) (finding that where the prosecutor was "afforded unfettered access" to documents generated by out-of-state police investigation, he was obligated to turn over such *Rosario/Brady* material to the defense), *leave to appeal dismissed*, 85 N.Y.2d 866, 648 N.E.2d 805, 624 N.Y.S.2d 385 (1995).

[53] As noted in *JLM*, Chapter 13, "Federal Habeas Corpus Petitions," "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 it appears that the applicant has exhausted the remedies available in the courts of the State'" or the state does not have corrective processes (quoting 28 U.S.C. § 2254(b))). 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.*, United States *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).

[54] *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).

[55] N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2023). For the elements of each of those crimes, see N.Y. PENAL LAW §§ 230.34 (sex trafficking), 230.34-a (sex trafficking of a child), 135.35 (labor trafficking), 135.37 (aggravated labor trafficking), and 230.33 (compelling prostitution), and the Trafficking Victims Protection Act, 22 U.S.C. §§ 7101–7114 (trafficking in persons).

After a 2021 amendment, there is no longer a "due diligence" requirement, meaning you no longer are required to bring your Article 440 on these grounds motion within any particular time period.[56] 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.[57]

(ix) *Your Class A or Unclassified Misdemeanor Conviction Before August 28, 2019 Violated Your Constitutional Rights*

If you were convicted of a Class A or unclassified misdemeanor prior to August 28, 2019 and you want to argue that your conviction violated your constitutional rights, a special provision of Section 440.10 applies to you.[58] Be sure to review the discussion above in Subsection B(2)(vii) on constitutional rights to understand the type of arguments you can make.

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.

(x) *You Were Convicted of Certain Marijuana Offenses Before August 28, 2019*

Another special provision of Section 440.10 allows motions to be granted for certain marijuana offenses. This will apply to you if, before August 28, 2019, you were convicted of either (1) unlawful possession of marijuana in the second degree (which means you knowingly and unlawfully possessed marijuana) or (2) 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 than one ounce).[59]

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.

(b) Motion to Set Aside Sentence

The second kind of motion, a motion to set aside your sentence, is found in Section 440.20 of the New York Criminal Procedure Law. Unlike the motion to vacate judgment discussed above, this motion attacks your sentence (not your guilt) by arguing your sentence was unauthorized, illegally imposed, or in some other way invalid.[60] If this motion is granted, your sentence will be vacated (taken away) and you will be resentenced.

A sentence is unauthorized if it is longer than the law allows.[61] For example, third-degree burglary, a Class D felony,[62] carries a maximum sentence of seven years if you are a first or second-time felony offender.[63] Thus, you could make an Article 440 motion to attack a sentence of more than seven years

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[56] N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2023); 2021 N.Y. ALS 629, 2021 N.Y. Laws 629, 2021 N.Y. Ch. 629, 2021 N.Y. AB 459.

[57] N.Y. CRIM. PROC. LAW § 440.10(1)(i)(i) (McKinney 2023).

[58] N.Y. CRIM. PROC. LAW § 440.10(1)(j) (McKinney 2023).

[59] N.Y. CRIM. PROC. LAW § 440.10(1)(k) (McKinney 2023).

[60] N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 2023).

[61] *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).

[62] N.Y. PENAL LAW § 140.20 (McKinney 2022). 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.

[63] N.Y. PENAL LAW § 70.00(2)(d) (McKinney 2009).

for third degree burglary if you are a first or second felony offender. However, you could not attack a sentence of seven years or less. Even if this sentence is longer than sentences that other defendants received for the same crime, the law allows a seven-year sentence.[64] You cannot raise a claim that your sentence was too harsh or long under this motion if the sentence is allowed by law.[65]

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,[66]
(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,[67]
(3) The sentencing court ignored your right to be present at sentencing,[68]
(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,[69]

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

[65] N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 2023). If you want to raise a claim that your sentence was legal but "unduly harsh or severe," a court can consider it on direct appeal "in the interest of justice." N.Y. CRIM. PROC. LAW § 470.15(2)(c), (6)(b) (McKinney 2009). See *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," for more information on appeals.

[66] *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 the judge violated defendant's right to due process after he revised defendant's sentence to the maximum permissible sentence without offering any explanation for doing so).

[67] N.Y. CRIM. PROC. LAW § 380.50(1) (McKinney 2018) 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 the trial court was required to inquire further when a defendant raised the possibility of a defense that possibly negated his criminal intent at sentencing); 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).

[68] 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 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 court for the purpose of frustrating the sentencing process").

[69] *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 an error because that evidence was not relevant to any issue in the punishment phase).

(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.[70] 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.[71] For example, a felony conviction in New Jersey of promoting prostitution by soliciting persons to patronize a sex worker 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,[72]

(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).[73] 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.[74] 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.

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.[75]

(c) Request for DNA Testing

In another section of Article 440, a defendant may use an Article 440 motion to request forensic DNA test[76] on evidence introduced at trial.[77]

The court will order a test to 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

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[70] *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).

[71] N.Y. PENAL LAW § 70.06(1)(b)(i) (McKinney 2021).

[72] *See* People v. Johnson, 127 A.D.2d 1003, 1003, 513 N.Y.S.2d 60, 61 (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 more than one year was not authorized).

[73] *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).

[74] *See* N.Y. PENAL LAW § 70.25(2) (McKinney 2021); 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 a total sentence of 75 years to life was proper).

[75] N.Y. CRIM. PROC. LAW § 440.20(4) (McKinney 2023).

[76] For more information on DNA testing, see *JLM*, Chapter 11, "Using Post-Conviction DNA Testing to Attack Your Conviction or Sentence."

[77] N.Y. CRIM. PROC. LAW § 440.30(1-a)(a)(1) (McKinney 2023).

(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.[78]

The third requirement is probably the most important one. The court will not order a DNA test if it believes that there is no reasonable probability the verdict against you would have been different, even if you are right about the DNA test.[79]

There are also additional restrictions that may apply if you were convicted after entering a guilty plea. Specifically, these restrictions will apply to 440 motions for forensic DNA testing made by defendants who pleaded guilty to a homicide offense, any felony sex offense, a violent felony offense, or any other felony after being charged with one of the offenses previously listed.[80] If you fall into this category of individuals and you file a 440 motion for forensic DNA testing, the court may grant your motion if it concludes that: (1) the evidence with DNA was obtained in connection with the investigation that led to your prosecution, and (2) there is a substantial probability that, if a DNA test had been conducted before you entered your guilty plea, the results would have shown that you were actually innocent.[81] However, even if the court finds that both of the above requirements are true in your case, it may still deny your motion if it finds that you had the chance to request DNA testing before pleading guilty and failed to do so[82] or if you filed your motion more than five years after your conviction, with limited exceptions.[83]

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) Requirements For a Motion to Vacate Judgment (440.10)

There are four circumstances in which the court **must** deny your motion to vacate a judgment and three circumstances where the court **can** (but does not have to) deny your motion to vacate judgment.[84] These seven circumstances are described below. As long as your circumstances do not fit into the first four categories, you can file your Article 440 motion to vacate judgment. Keep in mind that, if your circumstances fall into the last three categories, it still may be denied.

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[78] N.Y. CRIM. PROC. LAW § 440.30(1-a)(a)(1) (McKinney 2023). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

[79] N.Y. CRIM. PROC. LAW § 440.30(1-a)(a)(1) (McKinney 2023); *see also* People v. Tookes, 167 Misc. 2d 601, 605–606, 639 N.Y.S.2d 913, 916 (Sup. Ct. N.Y. County 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 footnotes 54 and 79 of this Chapter for further explanation of the meaning of "reasonable probability."

[80] N.Y. CRIM. PROC. LAW § 440.30(1-a)(a)(2).

[81] N.Y. CRIM. PROC. LAW § 440.30(1-a)(a)(2); *see also Substantially Probable (Substantial Probability)*, BOUVIER LAW DICTIONARY (Desk ed. 2012) (defining "substantial probability" as "very likely").

[82] N.Y. CRIM. PROC. LAW § 440.30(1-a)(a)(2)(i).

[83] N.Y. CRIM. PROC. LAW § 440.30(1-a)(a)(2)(ii). If you failed to file your Article 440 motion within the 5-year time limit, the court may still hear your motion if you can show: (a) you have been diligent in pursuing your rights (e.g., actively trying to gather evidence or pursue other legal options for relief) but some "extraordinary circumstance" prevented you from filing your motion on time; (b) you (and your lawyer, if you are represented by an attorney) did not know about the facts that your current motion is based on, and even with your best efforts, you could not have discovered them before the 5-year time limit expired; or (c) in light of all the circumstances, including the evidence of your guilt, your efforts to obtain relief, the integrity of the justice system, and public safety, granting you an exception for the 5-year time limit would be in the "interests of justice." N.Y. CRIM. PROC. LAW § 440.30(1-a)(a)(2)(ii).

[84] N.Y. CRIM. PROC. LAW § 440.10(2)(a)–(d) (McKinney 2023) (when a court must deny a motion to vacate judgment); N.Y. CRIM. PROC. LAW § 440.10(3)(a)–(c) (McKinney 2023) (when a court may deny a motion to vacate judgment, but may grant the motion in the interest of justice and for good cause shown).

(i) *Claim Was Raised and Denied in an Appeal*

The court **must** deny your motion if your claim was raised on appeal and the court denied your complaint on the merits.[85] In other words, your motion will be denied when the claims you make in it were already considered during your appeal by the appellate court and the appellate court decided that your claims were not sufficient to overcome your guilty conviction.

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).[86] The Court of Appeals will only give full retroactivity to new laws that aim to protect the fact-finding process from unreliably obtained information that relates directly and substantially to guilt or innocence (in other words, to prevent a defendant from being found guilty on unreliably obtained information).[87] "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.[88] The courts decide whether a new rule should apply retroactively based on three factors:

1. 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 that relates directly to guilt or innocence),
2. 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
3. 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).[89]

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[85] N.Y. CRIM. PROC. LAW § 440.10(2)(a) (McKinney 2023); *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).

[86] N.Y. CRIM. PROC. LAW § 440.10(2)(a) (McKinney 2023).

[87] *See* People v. Laffman, 161 A.D.2d 111, 112–113, 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.").

[88] *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 station house 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 County 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 County 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).

[89] *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

(ii) *Claim Can Still Be Raised in an Appeal*

Remember, Article 440 is not a substitute for an appeal. So, the court **must** deny your motion if it is based on an error that you can still raise in an appeal of your conviction (or an error that you have already raised in an appeal that is pending).[90]

However, you may complain in a Section 440.10 motion about an error that you did not appeal if your trial record does not contain sufficient facts to allow an appeals court to review the error.[91] 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, you may bring a Section 440.10 motion directly.[92] However, 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.[93] 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 rely solely on an Article 440 motion in case the motion is denied.[94]

If you are raising an issue of ineffective assistance of counsel, you are not required to raise that issue on appeal first.[95] Also, you may complain in a Section 440.10 motion without first appealing if you are relying on New York Criminal Procedure Law Section 440.10(1)(i) (for victims of sex trafficking and related offenses).[96] In order to qualify for this exception, your participation in the offense for which you were convicted must have been a result of having been a victim of sex trafficking or another offense listed in the statute.[97]

(iii) *Claim Could Have Been Raised in an Appeal*

The court **must** deny your motion if it is based on an error that could have been raised during an appeal. Specifically, you cannot raise an error in your Article 440 motion to vacate judgment if there were sufficient facts on the record such that the error could have been addressed on appeal but you

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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 County 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).

[90] N.Y. CRIM. PROC. LAW § 440.10(2)(b) (McKinney 2023); *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 on appeal to the Appellate Division and defendant failed to demonstrate the existence of relevant new evidence not in the record). Section B(1) of this Chapter contains a list of information found in your trial record.

[91] N.Y. CRIM. PROC. LAW § 440.10(2)(b) (McKinney 2023). See *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," for a full discussion of how to appeal your sentence and/or conviction.

[92] N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2023).

[93] *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, even as defendant failed to preserve the issue for review).

[94] *See* N.Y. CRIM. PROC. LAW § 440.10(2)(b), (c) (McKinney 2023).

[95] N.Y. CRIM. PROC. LAW § 440.10(2)(b) (McKinney 2023).

[96] N.Y. CRIM. PROC. LAW § 440.10(1)(i), (2)(b) (McKinney 2023).

[97] *See* N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2023).

failed to raise it on appeal when you could have, unless 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 (and there were sufficient facts on the record to have done so), then you may not bring up the error in your Article 440 motion.[98] However, if you are raising an issue of ineffective assistance of counsel, you do not need to have raised it on appeal.[99]

Remember, this can be excused if you have a good excuse for not raising the error during your appeal. One example of a good excuse would be where the error was overlooked due to the incompetence of appellate counsel.[100] (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 New York Criminal Procedure Law Section 460.30.) Another good excuse is where an appeal was clearly useless due to the state of the law at the time, but the law has changed since and courts apply the new law retroactively. Because of those changes, you can argue that your conviction is fundamentally unfair.[101]

(iv) *Claim is Based Only on Your Sentence's Validity*

The court **must** deny your motion if it is based on an issue that involves only the validity of your sentence rather than your conviction.[102] Instead, you must complain about your sentence in a motion to set aside your sentence under New York Criminal Procedure Law Section 440.20, not Section 440.10.

(v) *You Did Not "Preserve" Your Claim for Review*

The court **can** (but does not have to) deny your motion if you did not "preserve the issue for review on appeal." This means that you did one or more of the following things: (a) you did not object at the trial to errors that happened during the trial, (b) you did not ask the court to give a particular instruction to the jury, (c) you did not ask the court to make a ruling on an issue, (d) you did not present facts that would have supported your claim and that you should have found through due diligence (proper research and investigation), or (e) in some way you did not make sure that an issue would be in the trial record.[103]

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[98] N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 2023); *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 County 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).

[99] N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 2023).

[100] *See, e.g.*, People v. Syville, 15 N.Y.3d 391, 400 n.3, 938 N.E.2d 910, 916 n.3, 912 N.Y.S.2d 477, 483 n.3 (2010) ("If a defendant was prevented from pursuing his direct appeal solely due to his attorney's noncompliance with a request to file a notice of appeal, the failure to raise the issue in question on direct appeal would be justifiable." (citation omitted)).

[101] N.Y. CRIM. PROC. LAW § 440.10(2)(a) (McKinney 2023); *see, e.g.*, People v. Hernandez, 167 A.D.3d 936, 939–940, 90 N.Y.S.3d 235, 238–239 (2d Dept. 2018) (holding that the defendant's failure to challenge the sufficiency of the evidence on appeal was justified under N.Y. CRIM. PROC. LAW § 440.10(2)(c) because the cases he relied on in his Article 440 had not yet been decided at the time that he perfected his direct appeal).

[102] N.Y. CRIM. PROC. LAW § 440.10(2)(d) (McKinney 2023).

[103] N.Y. CRIM. PROC. LAW § 440.10(3)(a) (McKinney 2023); *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 *JLM*, Chapter 9, "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.

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.

(1) You may complain that you received ineffective (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.[104] In 2021, the New York Criminal Procure Law was amended to allow individuals to raise ineffective assistance of counsel claims in a Section 440.10 motion before bringing them on direct appeal, even if the trial record contains enough facts that would allow an appellate court to review your claim.[105]

(2) 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.[106] 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 the 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.[107]

(3) 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, as a result, 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.[108]

(4) You may claim that your involvement in the crime for which you were convicted was a result of you being a victim of sex trafficking, labor trafficking, aggravated labor trafficking, compelling prostitution, or trafficking in persons.[109]

(vi) *Claim Was Already Decided in a Proceeding Other Than an Appeal*

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[104] *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 2023) (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.").

[105] *See* N.Y. CRIM. PROC. LAW § 440.10(2)(b)–(c) (McKinney 2023) (stating that the court must deny a motion to vacate a judgment where "sufficient facts appear on the record" to permit appellate review and the judgement is "appealable or pending on appeal" or the defendant failed to appeal the judgment or raise the claim on appeal "*unless the issue raised upon such motion is ineffective assistance of counsel*") (emphasis added). These amendments permitting ineffective assistance of counsel claims to be raised on post-conviction review (rather than on direct appeal) were made to keep New York law aligned with the federal system, as well as the majority of other states, and to avoid imposing unnecessary burdens on defendants and the legal system. *See* N.Y. Assembly Mem. in Support, Bill Jacket, A.B. 2653, ch. 501, 2021 Leg., 244th Sess. (N.Y. 2021).

[106] *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 granting defendant a hearing on his Article 440 motion).

[107] 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).

[108] *See* People v. Pitts, 24 Misc. 3d 869, 876, 879 N.Y.S.2d 313, 318 (Sup. Ct. Rensselaer County 2009) (quoting the practice commentary to N.Y CRIM. PROC. LAW § 440.10, which gave the example of an Article 440.10 motion based on allegedly prejudicial newspaper publicity before and during the trial).

[109] N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2023).

The court **can** (but does not have to) deny your motion if it is based on an issue that was already decided in another New York or federal court proceeding that is *not* a direct appeal.[110] The claim must have been determined "on the merits," which means the other court must have actually considered your issue and not just denied it for some technical reason (like missing a filing deadline). This rule does not apply if the law has changed since your earlier motion and the change has been held to apply retroactively (applying to a past event).[111]

(vii) *Claim Could Have Been Raised in a Past Motion to Vacate Judgment*

If you have already filed an Article 440 motion to vacate judgment in the past, the court **can** (but does not have to) deny your motion if you could have raised this issue in that previous 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.[112] 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.

(b) Requirements for a Motion to Set Aside a Sentence (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.[113] 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.[114] 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).[115] 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.[116] The court may grant your motion, however, if it is in the interest of justice and a good reason is shown.[117]

(c) Alleging Omission of *Rosario* Materials

You may file an Article 440 motion if the government did not give you any recorded statement made by any person who has evidence or information relevant to your case, including all police reports, notes of police officers and other investigators, and law enforcement agency reports.[118] Previously, the

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[110] N.Y. CRIM. PROC. LAW § 440.10(3)(b) (McKinney 2023); N.Y. CRIM. PROC. LAW § 440.10 practice cmt. (McKinney 2023).

[111] N.Y. CRIM. PROC. LAW § 440.10(3)(b) (McKinney 2023); N.Y. CRIM. PROC. LAW § 440.10 practice cmt. (McKinney 2023).

[112] N.Y. CRIM. PROC. LAW § 440.10(3)(c) (McKinney 2023); N.Y. CRIM. PROC. LAW § 440.10 practice cmt. (McKinney 2023).

[113] N.Y. CRIM. PROC. LAW § 440.20(1) (McKinney 2023).

[114] N.Y. CRIM. PROC. LAW § 440.20(2) (McKinney 2023); *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).

[115] 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 2023) ("[T]he court must 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.").

[116] N.Y. CRIM PROC. LAW § 440.20(3) (McKinney 2023).

[117] N.Y. CRIM PROC. LAW § 440.20(3) (McKinney 2023). 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 (Crim. Ct. N.Y. County 1981) (reading the "interest of justice" and "good cause" grounds narrowly for the discretion that a judge holds in this context).

[118] N.Y. CRIM. PROC. LAW § 245.20(1)(e) (McKinney 2023).

prosecutor was required to turn over any recorded statement of a potential witness that related to the subject matter *of the witness's testimony*.[119] But under New York's amended discovery rules, which went into effect in January 2020, the prosecutor now must disclose all statements that broadly relate to the subject matter *of the case*.[120] However, it is important to note that even if the prosecutor failed to give you the witness statements, that does not mean your conviction will automatically be overturned. Instead, the court must find a "reasonable possibility" that the failure to give you such statements "materially contributed" to the verdict against you.[121] Only then will the court reverse your conviction on appeal because the statements were not given to you.[122] Likewise, if you raise the issue of omitted witness statements 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).[123] 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.[124]

Furthermore, it is unlikely that a court will reverse your conviction for this reason if the material kept by the prosecution duplicates material in the record[125] or if the prosecution was merely delayed

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[119] People v. Rosario, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 450 (1961); N.Y. CRIM. PROC. LAW § 240.45(1)(a), *superseded by* N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2023).

[120] N.Y. CRIM. PROC. LAW § 245.20(1)(e) (McKinney 2023); *see also* People v. Faison, 73 Misc. 3d 900, 908–909, 156 N.Y.S.3d 658, 664–665 (Crim. Ct. Kings County 2021) (holding that New York's discovery reforms, codified in N.Y. Crim. Proc. Law § 245, require broader disclosure than the *Rosario* doctrine because "*Rosario* material relates 'to the subject matter of the *witness' testimony*' . . . , in contrast to the more encompassing requirement of CPL 245.20 to disclose all material related to the subject matter *of the case*"); People v. Godfred, 77 Misc. 3d 1119, 1124, 180 N.Y.S.3d 511, 516 (Crim. Ct. Bronx County 2022) ("The purpose of and justification for article 245 was specifically to eliminate 'trial by ambush' and to remedy [informational] inequities by mandating earlier and broader discovery obligations by the prosecution . . . .").

[121] N.Y. CRIM. PROC. LAW § 245.80(3) (McKinney 2023).

[122] *See* N.Y. CRIM. PROC. LAW § 240.75(3) (replacing the previous rule, established in 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, with the "reasonable possibility" standard), *superseded by* N.Y. CRIM. PROC. LAW § 245.80(3) (McKinney 2023) (maintaining the "reasonable possibility" standard). Because the new discovery laws retain the rule that a defendant raising a *Rosario* claim in an Article 440 motion must show that there was a reasonable possibility that the non-disclosure contributed to his guilty verdict, cases decided before the new law went into effect analyzing whether a defendant made this showing are still good law. *See* People v. Rosas, 297 A.D.2d 390, 390–391, 746 N.Y.S.2d 610, 611 (2d Dept. 2002) (finding that the failure to disclose certain statements relating 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's trial testimony materially contributed to the verdict); *see also* 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 non-disclosure of grand jury minutes contributed to the verdict).

[123] *See* 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 must prove that the failure to turn over *Rosario* material prejudiced the outcome of the defendant's case, even if an appeal is pending at the time the Article 440 motion is filed).

[124] *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 a defendant making an Article 440 motion—either before or after exhausting his direct appeal—must prove that non-disclosure of the materials prejudiced his case and contributed to the verdict against him in order for his sentence or conviction to be vacated); *see also* 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 *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).

[125] *See* People v. Cortez, 184 A.D.2d 571, 573, 584 N.Y.S.2d 609, 611 (2d Dept. 1992) (finding that conviction

in producing the material.[126] However, courts interpret "duplication" very narrowly. Unless 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 material was duplicative.[127]

C. How to File an Article 440 Motion

1. Preparing Your Motion Documents

Appendix B of this Chapter 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. 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.

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 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 will deny your motion.[128] 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.[129] If you leave one out, a court will probably not allow you to raise the ground in a later motion.[130]

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need not be reversed if material withheld by prosecution is duplicative of other evidence in the record); *see also* 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).

[126] *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's 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 and other physical evidence").

[127] *See* People v. Young, 79 N.Y.2d 365, 370, 591 N.E.2d 1163, 1166, 582 N.Y.S.2d 977, 980 (1992) (finding that two documents cannot be duplicative if "there are variations or inconsistencies between them" and that a statement that is consistent with other disclosed material but omits facts or details is not duplicative).

[128] *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).

[129] N.Y. CRIM. PROC. LAW § 440.30(1) (McKinney 2023).

[130] N.Y. CRIM. PROC. LAW § 440.10(3)(c) (McKinney 2023).

You must swear in the presence of a notary that the facts stated in your affidavit are true.[131] If prison officials refuse to provide you with a notary, you can verify your affidavit through a witness. 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 Chapter 17 of the *JLM* 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.[132] But, if you wait too long after your sentencing, a court may decide to deny your motion.[133] 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.[134] Furthermore, Article 440 requires you to make a motion based on newly discovered evidence *within a reasonable time* after you discover the new evidence.[135]

(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 statements, affidavits, and all supporting documents to the clerk of the court where you were convicted.[136] 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

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[131] N.Y. CRIM. PROC. LAW § 440.30(1) (McKinney 2023).

[132] *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).

[133] *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 §440.10 motion nine years after trial and seven years after all appeals had been exhausted); *see also* 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).

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

[135] *See* N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2023) (requiring a motion based on newly discovered evidence to "be made with due diligence after the discovery of such alleged new evidence"). The statute does not specify a particular time frame, and New York State case law is not entirely clear as to how much time between discovery of the evidence and filing of the motion is too much time to satisfy the "due diligence" requirement. *See, e.g.*, People v. Jenkins, 175 A.D.3d 1177, 1178, 109 N.Y.S.3d 279, 280 (1st Dept. 2019) (denying defendant's motion to vacate his conviction based on newly discovered evidence in part because he filed the motion 6 years "after the discovery of the alleged new evidence without any valid excuse"); People v. Burton, 9 Misc. 3d 577, 584, 802 N.Y.S.2d 858, 865 (Sup. Ct. Queens County 2005) (finding that the defendant failed to use due diligence when filed his motion almost 3 ½ years after the discovery of new evidence); People v. Stuart, 123 A.D.2d 46, 54, 509 N.Y.S.2d 824, 829 (2d Dept. 1986) (affirming denial of a motion filed more than 1 year after discovery of the new evidence because the delay reflected a lack of due diligence); People v. Turner, 79 Misc. 3d 473, 493, 190 N.Y.S.3d 830, 846 (Sup. Ct. Richmond County 2023) (granting a defendant's motion filed about 10 months after co-defendant made an affidavit exculpating defendant, and finding that he "raised this issue with due diligence"); People v. Sterling, 6 Misc. 3d 712, 721, 787 N.Y.S.2d 846, 852 (Sup. Ct. Monroe County 2004) (finding that recent developments surrounding the use and reliability of DNA testing were sufficient to excuse defendant's 13-year delay in filing his motion). Given this lack of clarity as to how long you can wait to file your Section 440.10 motion after discovering new evidence, you should file your motion as soon possible.

[136] 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).

convicted. See Appendix III 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.[137] 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 (referred to as "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 court clerk 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*." *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," describes poor person's papers in more detail and also contains sample documents. 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 where 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.[138] 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.[139] The judge will also deny your motion without a hearing if:

(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

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[137] *See* N.Y. COUNTY LAW § 722(4) (McKinney 2017); People *ex rel.* Anderson v. Warden, N.Y.C. Corr. Inst. for Men, 68 Misc. 2d 463, 470, 325 N.Y.S.2d 829, 837 (1st Dept. 1971) ("Assignment of counsel other than for an evidentiary hearing is discretionary in both habeas corpus and Article 440 proceedings.").

[138] N.Y. CRIM. PROC. LAW § 440.30(1)(a) (McKinney 2023).

[139] N.Y. CRIM. PROC. LAW § 440.30(4)(a) (McKinney 2023)*; 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 prosecutorial misconduct were not preserved or were 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).

(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.[140]

Otherwise, the judge must grant a hearing on your motion.[141] 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.[142]

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.[143] It is recommended that you go to the hearing, and that you do not waive the right to appear. At the hearing, you will be responsible for proving that your claims are true (this responsibility is called a "burden of proof").[144] To meet your burden of proof, you must persuade the judge that the essential facts of your story are true by a "preponderance" of the evidence, which means that the facts are more likely to be true than not true.[145] 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.[146] 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;[147]

(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;[148] or

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[140] N.Y. CRIM. PROC. LAW § 440.30(4)(b)–(d) (McKinney 2023).

[141] N.Y. CRIM. PROC. LAW § 440.30(5) (McKinney 2023); *see also* 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).

[142] N.Y. CRIM. PROC. LAW § 440.30(7) (McKinney 2023).

[143] N.Y. CRIM. PROC. LAW § 440.30(5) (McKinney 2023).

[144] N.Y. CRIM. PROC. LAW § 440.30(6) (McKinney 2023). In contrast, the prosecutor had to prove you guilty beyond a reasonable doubt at your trial.

[145] N.Y. CRIM. PROC. LAW § 440.30(6) (McKinney 2023); *see also* 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).

[146] *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).

[147] *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).

[148] N.Y. CRIM. PROC. LAW § 440.10(4) (McKinney 2023).

(3) If your motion raises new evidence, the judge may vacate the judgment and order a new trial.[149]

Alternatively, the judge may reduce your conviction to a lesser offense if the district attorney agrees.[150]

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, they 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[151] (in New York, the intermediate appellate court is called the Appellate Division). To appeal, you must request "leave" (permission) from a judge of the intermediate appellate court to which you want to appeal.[152] You must request leave to appeal within thirty days after you receive a copy of the court's order denying your Article 440 motion.[153] When you request leave, you must apply for a "certificate granting leave to appeal."[154] 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.[155] If the judge of the appellate court grants you permission to appeal, you will receive the certificate indicating that you may appeal.[156] 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.[157] You must also "serve" (give) the certificate and notice of appeal upon the district attorney

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[149] N.Y. CRIM. PROC. LAW § 440.10(5)(a) (McKinney 2023). The new evidence must be substantial enough that it probably would have changed the outcome of the original trial if it had been admitted in time.

[150] N.Y. CRIM. PROC. LAW § 440.10(5)(b) (McKinney 2023); 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 *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," for a detailed explanation and example of lesser included offense.

[151] N.Y. CRIM. PROC. LAW § 450.15 (McKinney 2023); *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 2023).

[152] N.Y. CRIM. PROC. LAW § 460.15 (McKinney 2023). 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 143 below.

[153] N.Y. CRIM. PROC. LAW § 460.10(4)(a) (McKinney 2023).

[154] N.Y. CRIM. PROC. LAW § 460.10(4)(a) (McKinney 2023).

[155] N.Y. CRIM. PROC. LAW § 460.15(2) (McKinney 2023). 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.

[156] N.Y. CRIM. PROC. LAW § 460.15(1) (McKinney 2023).

[157] N.Y. CRIM. PROC. LAW § 460.10(4)(b) (McKinney 2023). See *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," for a definition of a notice of appeal, a general description of the appeals process, and a sample notice of appeal from a denial of an Article 440 motion.

of the county where your trial court is located.[158] Once you have completed these steps, you have "taken" your appeal.[159]

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 *JLM*, Chapter 13, "Federal Habeas Corpus Petitions," 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.[160] (Note, however, that you may still be able to raise your claim in a federal habeas corpus petition as described in *JLM,* Chapter 13, "Federal Habeas Corpus Petitions.") 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.[161] To do so, you must request permission to appeal from a judge of the Court of Appeals.[162] You must make your request within thirty days after the intermediate appellate court hands down the denial you are trying to appeal.[163] Again, if you are granted permission to appeal, you will be issued a certificate indicating you have permission to appeal.[164] Upon issuance of the certificate, your appeal is "taken."[165]

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 and 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 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.

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158 N.Y. CRIM. PROC. LAW § 460.10(3)(b), (4) (McKinney 2023).

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

160 N.Y. CRIM. PROC. LAW § 450.15 (McKinney 2023).

161 N.Y. CRIM. PROC. LAW § 460.10(5) (McKinney 2023).

162 N.Y. CRIM. PROC. LAW § 460.10(5) (McKinney 2023). 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.

163 N.Y. CRIM. PROC. LAW §§ 460.10(5)(a), 460.20 (McKinney 2023).

164 N.Y. CRIM. PROC. LAW § 460.10(5)(b) (McKinney 2023).

165 N.Y. CRIM. PROC. LAW § 460.10(5)(b) (McKinney 2023). 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

If you were convicted in a state other than New York, the Article 440 procedures described in this Chapter do not apply to you. This table tells you what statute in your state is similar to New York's Article 440. **If you were convicted in Florida,** you should read *JLM,* Chapter 21, "State Habeas Corpus: Florida, New York, and Michigan," for a discussion on Rule 3.850 motions.

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. Section C(3) of this Chapter ("How to Get Help From a Lawyer") tells you how to use "poor person's papers" to obtain a lawyer in an Article 440 proceeding. There are "poor person's papers" in Appendix B of *JLM*, Chapter 9, "Appealing Your Conviction or Sentence."

Appendix II 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 _____[166]

The People of the State of New York,	:	
	:	
Plaintiffs,	:	NOTICE OF MOTION
	:	TO VACATE JUDGMENT
— against —	:	
	:	Indictment No. _____[167]
_____,[168]	:	
	:	
Defendant.	:	

PLEASE TAKE NOTICE that upon the annexed affidavit of _____,[169] duly sworn to the __ day of _____, _____,[170] (and documents attached thereto) and upon the accusatory instrument and_____,[171] and all proceedings previously heretofore held herein, defendant will move this Court at Criminal Term, Part _____[172] thereof, at the Courthouse located at _____,[173] on the _____ day of _____, _____ at ____ a.m.,[174] or as soon thereafter as counsel may be heard, for:

An order pursuant to Criminal Procedure Law § 440.10(__)[175] vacating the judgment entered against the above-named defendant on the ___ day of _____, _____,[176] on the following grounds:

1. _____
2. _____[177]

[*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: _____

_____

166 Fill in the name of the county in which the court hearing your motion is located.

167 Fill in your indictment number.

168 Fill in your name.

169 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."

170 Fill in the date or dates on which you or others signed your affidavits: day, month, year.

171 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.

172 Fill in the "Part" number of the court, if you know it.

173 Fill in the address of the court.

174 Fill in the date on which the hearing will be held.

175 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.

176 Fill in the day, month, and year on which the judgment of conviction was entered against you.

177 List the reasons why you think the court should vacate the judgment against you. See Section B(2) of this Chapter for more information.

_____, _____[178]
_____[179]
_____[180]
Defendant, *pro se*.[181]
To:
District Attorney of
_____ County,
_____, New York[182]

[178] Fill in date on which you signed this notice, and the city and state in which you signed it.

[179] Sign your name here.

[180] Fill in your complete mailing address here.

[181] *Pro se* means that you are acting as your own legal representative (without a lawyer).

[182] Fill in the name of the district attorney, and the county and town in which they are located.

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

Supreme Court of the State of New York
County of _____[183]

----------x

The People of the State of New York,	:	
	:	
Plaintiffs,	:	AFFIDAVIT
	:	
— against —	:	Indictment No. _____[184]
	:	
_____,[185]	:	
	:	
Defendant.	:	

----------x

State of New York)
County of _____)[186] s.s.:

_____,[187] 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 _____,[188] to vacate the judgment of conviction herein, upon the ground that _____.[189]

2. I was indicted for _____.[190] At the arraignment I entered a plea of "not guilty" and posted bail in the amount of $_____.[191] I was tried in this court before Hon. Judge_____ _____[192] on_____, _____.[193] The case was submitted to a jury, which rendered a verdict of guilty.[194]

3. On _____, _____,[195] I was sentenced to _____.[196]

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

_____
_____
_____.[197]

---

[183] Fill in the name of the county in which the court hearing your motion is located.

[184] Fill in your indictment number.

[185] Fill in your name.

[186] Fill in the name of the county in which you are signing this affidavit.

[187] Fill in your name, in capital letters.

[188] 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.

[189] 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.

[190] Fill in the name of the offense for which you were indicted.

[191] Fill in the amount of bail you posted.

[192] Fill in the trial judge's name.

[193] Fill in the date or dates including the day, month, and year on which your trial took place.

[194] If you did not have a jury trial, simply indicate that the judge found you guilty.

[195] Fill in the day, month, and year on which judgment was given in your case.

[196] Fill in the sentence ordered in your case.

[197] Summarize the evidence that the prosecution relied upon and that the jury was allowed to consider.

5. _____.[198]

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 _____, _____.[199]

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.[200]

WHEREFORE, I respectfully request that my conviction be vacated on the ground that_____ _____,[201] 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 _____.[202]

_____[203]

_____[204]

Sworn to before me this:

day of _____, 20____

_____[205]

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198 Summarize the facts which support the reasons you set out in numbers 1 through 8, above, for challenging your conviction.

199 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.

200 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.

201 Briefly state the reasons for your motion.

202 Fill in the evidence upon which you want DNA testing performed.

203 Sign your name, ***in the presence of a notary public***. This is where The notary public will then "notarize" the affidavit by signing it and fixing his or her official seal to it. The prison librarian may be a notary public or may be able to direct you to the person who provides that service within the prison.

If you still have difficulty obtaining the services of a notary public after speaking with the prison librarian, you should have another incarcerated person witness your signature. (*Use this alternative only as a last resort.*) If another incarcerated person is your witness, you should add at the bottom of the affidavit:

> I declare that I have not been able to have this [affidavit] notarized according to law because [explain your efforts to get the affidavit notarized]. I therefore declare under penalty of perjury that all of the statements made in this [affidavit] are true to my own knowledge, and I pray leave of the Court to allow this [affidavit] to be filed without notarization.
>
> [Your signature]

204 Print your complete mailing address below your signature.

205 The notary will sign and fill in the date here after seeing you sign the document.

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

Supreme Court of the State of New York
County of _____[206]

The People of the State of New York,	:	
	:	
Plaintiffs,	:	NOTICE OF MOTION TO SET ASIDE SENTENCE
	:	
— against —	:	
	:	Indictment No. _____[207]
_____,[208]	:	
	:	
Defendant.	:	

PLEASE TAKE NOTICE that upon the annexed affidavit of _____,[209] duly sworn to the _____ day of ____, 20___,[210] (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 _____[211] thereof, at the Courthouse located at _____,[212] on the _____ day of _____, 20____, at ____ a.m.,[213] 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 _____, _____,[214] or, in the alternative, ordering a hearing to determine whether such sentence should be set aside on the ground(s) that:

_____[*reasons*],[215]

(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 __[216] days prior to the return of this motion.

Dated:_____

---

[206] Fill in the name of the county in which the court hearing your motion is located.

[207] Fill in your indictment number.

[208] Fill in your name.

[209] 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."

[210] Fill in the date you signed your affidavit.

[211] Enter the number of the court part, if you know it.

[212] Enter the address and city of the court hearing your motion.

[213] Enter the date and time of your hearing.

[214] Enter the day, month, and year on which you were sentenced.

[215] 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.

[216] 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.

_____[217]
_____[218]
Defendant, *pro se*.
To:
District Attorney of
_____ County,
_____, New York [219]

[217] Fill in date on which you signed this notice, and the city and state in which you signed it.

[218] Sign your name and print your complete mailing address underneath.

[219] Enter the name of the district attorney, followed by his or her county and address.

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

Supreme Court of the State of New York
County of _____[220]

----------x

The People of the State of New York,	:	
	:	
Plaintiffs,	:	AFFIDAVIT
	:	
— against —	:	Indictment No. _____[221]
	:	
_____,[222]	:	
	:	
Defendant.	:	

----------x

State of New York)
County of _____)[223] s.s.:

_____,[224] 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 _____ _____.[225]

2. I was indicted for _____.[226] At the arraignment I entered a plea of "not guilty" and posted bail in the amount of $_____.[227] I was tried in this court before Hon. Judge _____ _____[228] on _____, _____.[229]

3. After a trial[230] held on _____ _____, _____,[231] I was found guilty of count(s) _____[232] of the indictment charging _____ in the _____ degree, a Class _____ felony.[233] Bail was revoked and I was held in the _____, located at _____, _____ _____,[234] New York, until the sentencing for my conviction held on _____, _____[235]

---

[220] Fill in the name of the county in which the court hearing your motion is located.

[221] Fill in your indictment number.

[222] Fill in your name.

[223] Fill in the name of the county in which you are signing this affidavit.

[224] Fill in your name, in capital letters.

[225] 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.

[226] Fill in the name of the offense for which you were indicted.

[227] Fill in the amount of bail you posted.

[228] Fill in the trial judge's name.

[229] Fill in the date or dates, including day, month, and year on which your trial took place.

[230] 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."

[231] If you had a trial, fill in the date or dates, including the day, month, and year of the trial.

[232] If you had a trial, fill in the numbers of the counts of the indictment of which you were convicted.

[233] If you had a trial, fill in the names, degrees (if any), and classes of the offenses of which you were convicted.

[234] Give the name and address of the facility where you were held while you were waiting to be sentenced.

[235] Fill in the date, including the day, month, and year of your sentencing.

before Hon. Judge _____[236] in Criminal Term Part _____ of the _____ _____[237] County Supreme Court.

4. I was sentenced to a _____ term of imprisonment at _____Correction Facility, _____,[238] New York.

5. _____.[239]

6. _____.[240]

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.[241]

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.

_____

_____[242]

Sworn to before me this:

day of _____, 20____

_____[243]

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[236] Fill in the name of the judge who sentenced you.

[237] Enter the county and part number of the court that sentenced you.

[238] 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.

[239] 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.

[240] Give the reasons why you think your sentence is illegal. See Section B(2) of this Chapter for a list of possible reasons.

[241] 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.

[242] Sign your name, ***in the presence of a notary public***, and print your complete mailing address below your signature.

[243] The notary will sign and fill in the date here after seeing you sign the document.