A Jailhouse Lawyer's Manual

Chapter 20:

Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence

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CHAPTER 20

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

A. Introduction

If you have been convicted in a New York state court, it may be possible to have your conviction overturned. Under certain circumstances (such as the discovery of new evidence or when important evidence wasn't included at your trial) you may ask the trial court to either vacate (cancel) the judgment or set aside your sentence. You can make this request in a motion[1] brought under Article 440 of the New York Criminal Procedure Law.[2] Part B of this Chapter explains what Article 440 motions are, the grounds upon which you may make an Article 440 motion, and the circumstances under which a court will consider your Article 440 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 kinds of favorable decisions possible through an Article 440 motion. Part F explains how to appeal a court's denial of your Article 440 motion. Part G summarizes important things to think about when making an Article 440 motion. Finally, Appendix B to this Chapter contains forms for filing Article 440 motions.

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

B. When to Use Article 440

1. What Is an Article 440 Motion?

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

(1) The complaint and the indictment;

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

2. The laws pertaining to Article 440 motions can be found in §§ 440.10–440.60 of the New York Criminal Procedure Law.

3. Other ways of attacking your conviction include filing a state or federal writ of habeas corpus. Please see Chapter 13, "Federal Habeas Corpus," and Chapter 21, "State Habeas Corpus," of the *JLM*, which describe the federal writ of habeas corpus and the state writ of habeas corpus, respectively. Both of these writs can be used to obtain post-conviction relief for state and federal constitutional violations.

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

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

(2) The minutes of any hearing to suppress evidence (a hearing to exclude evidence resulting from an illegal search or seizure) and other hearings; and
(3) The report of the formal proceedings in the trial court. This includes:
    (a) the pleadings and motions made by both sides;
    (b) the minutes of a guilty plea if you made one;
    (c) the minutes of the trial court, including objections made by both sides and court rulings;
    (d) the charges to the jury, if it was a jury trial;
    (e) the minutes of the arraignment and the sentencing;
    (f) the minutes of any adjournment; and
    (g) any trial testimony and evidence such as documents, photographs, reports, etc.

An Article 440 motion allows you to inform the trial court of facts that cannot be raised on appeal because they were not in the trial record,[6] since facts presented for the first time on appeal cannot be considered by an appellate court.[7] There are two types of Article 440 motions: a "motion to vacate judgment" and a "motion to set aside sentence."

A motion to vacate, or cancel, a judgment is provided for in Section 440.10 of the New York Criminal Procedure Law. This motion challenges the fairness and/or legality of your *conviction*. It allows you to attack your conviction by stating that the trial court acted improperly when it found you guilty. If this motion is granted, you receive a new trial or appeal.

The second kind of motion, a motion to set aside your sentence, is based on Section 440.20 of the New York Criminal Procedure Law. This motion enables you to attack your *sentence*. In this motion you cannot challenge your guilt; rather, you argue that the punishment is too harsh for the crime. For example, you can challenge your sentence if it exceeds the maximum sentence allowed by the law.

Article 440 was created to partially replace the remedy of *coram nobis*, although some courts may still refer to an Article 440 motion as a writ of *coram nobis*. [8] Though a writ of *coram nobis* is not available in situations covered by Article 440,[9] it may still be brought in situations in which 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.[10]

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6. *See* People v. Bell, 161 A.D.2d 772, 772–73, 556 N.Y.S.2d 118, 119 (2d Dept. 1990) (holding that direct appeal cannot be had for matters based 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. However, in a death penalty case, an Article 440 motion is heard directly by the Court of Appeals (New York's highest court). N.Y. Ct. App. R. 510.4.

8. *See* People v. Crimmins, 38 N.Y.2d 407, 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 CPL 440.10 represents the codification of common law postjudgment coram nobis proceedings); People v. Lyon, 143 Misc. 2d 690, 692, 541 N.Y.S.2d 702, 704 (Suffolk County Ct. 1989) (referring to CPL 440.10 as a postjudgment writ of coram nobis).

9. *See* People v. Perez, 162 Misc. 2d 750, 763, 616 N.Y.S.2d 928, 937 (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) (stating that a claim of ineffective assistance of appellate counsel is covered by a writ of coram nobis and not an Article 440 motion). If you file a coram nobis motion on the basis that you received ineffective assistance of appellate counsel or that you were wrongfully deprived of counsel on appeal, and the Appellate Division denies your 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.

Article 440 was also created to replace the remedy of state habeas corpus, which challenges the government's right to keep you in prison by inquiring into the legality of your confinement. State habeas corpus is still available for New York state prisoners in some situations, but courts generally require you to make an Article 440 motion instead (most frequently, state habeas can still be used to challenge parole and bail decisions). The remedy for a habeas corpus violation is immediate release from custody. Under an Article 440 motion, the relief granted is not immediate release but rather a new trial, appeal, or sentence.[11]

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

(a) Motion to Vacate Judgment

Article 440.10 lists eight wrongs that you may complain about in a motion to vacate judgment.[12] These eight wrongs are as follows.

(1) The trial court lacked "jurisdiction" to decide your case.[13]

(2) The judge or prosecutor (or a person representing one of them) used fraud, false statements ("misrepresentation"), or physical or undue psychological pressure ("duress") to secure your conviction.[14] You cannot simply *claim*, however, that the judge or district attorney used fraud or misrepresentation.[15] As with every Article 440 motion, you must support your claim with specific facts in the form of an affidavit and, if possible, witnesses.[16]

(3) At trial, the prosecutor introduced (or the judge allowed in) important ("material") evidence the prosecutor (or judge) knew was false at the time of trial.[17] Again, you cannot just state the judge or district attorney knew certain facts were false; you must *show* they knew the facts to be false.[18]

(4) The prosecutor introduced important ("material") evidence that was obtained in violation of your rights under the U.S. or New York State Constitutions.[19]

(5) You could not understand or participate in the trial because you suffered from a mental disability of some kind.[20] For instance, in one case, a prisoner claimed in his Article 440 motion that he did not remember or understand his plea or the sentencing proceedings. In support of his motion, the prisoner noted that he had been diagnosed after the judgment as suffering from psychosis associated with brain

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11. *See JLM* Chapter 21, "State Habeas Corpus."

12. N.Y. Crim. Proc. Law §§ 440.10(1)(a)–(h) (McKinney 2005).

13. N.Y. Crim. Proc. Law § 440.10(1)(a) (McKinney 2005). For an explanation of jurisdiction, *see* Chapter 2 of the *JLM*, "Introduction to Legal Research."

14. N.Y. Crim. Proc. Law § 440.10(1)(b) (McKinney 2005).

15. *See* People v. Gates, 168 A.D.2d 995, 996, 564 N.Y.S.2d 938, 938 (4th Dept. 1990) (finding that unsupported claim of fraud is not enough to overturn a conviction).

16. *See* People v. Session, 34 N.Y.2d 254, 255, 313 N.E.2d 728, 729, 357 N.Y.S.2d 409, 410 (1974) (finding that affidavits from co-defendants stating that assistant district attorney had threatened them with increased charges if they testified on behalf of defendant were insufficient to require hearing on Article 440 motion since affidavits did not contain nature of any testimony co-defendants could offer).

17. N.Y. Crim. Proc. Law § 440.10(1)(c) (McKinney 2005).

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

19. N.Y. Crim. Proc. Law § 440.10(1)(d) (McKinney 2005). For more information on such violations, *see JLM* Chapter 13, "Federal Habeas Corpus", which lists possible violations of the U.S. Constitution, and Chapter 21, "State Habeas Corpus," 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* Part B(3) of this Part of this Chapter.

20. N.Y. Crim. Proc. Law § 440.10(1)(e) (McKinney 2005).

trauma. In light of this fact, the court held that there should be a hearing on the prisoner's motion to vacate the conviction for manslaughter.[21]

(6) The record of your case failed to include improper ("prejudicial") conduct that occurred at your trial and that would have led an appellate court to reverse the judgment against you if the appellate court could have learned of the conduct from the record.[22] Such conduct includes the prosecutor's failure to supply you with *Brady* material, which is any evidence in the prosecutor's possession or knowledge that is favorable to the defense and material to guilt or punishment.[23] This material is often referred to as "exculpatory" evidence. To have a conviction overturned based upon the failure to produce *Brady* material there must be a reasonable *probability* that the evidence would have affected the ultimate outcome of the trial. However, if your defense counsel made a specific request for the evidence in question, there need only be a reasonable *possibility* that disclosure would have changed the outcome.[24] The reasonable probability test is harder to satisfy than the reasonable possibility test. Under the reasonable probability test, the undisclosed evidence receives no more weight than it would have been given had it been introduced at trial. Thus, the trial court reviewing an Article 440 motion must determine how the evidence would have affected the jury's deliberations. On the other hand, the reasonable possibility test focuses on the evidence withheld, and the court must determine whether the failure to disclose it may have contributed to the verdict. Additionally, the evidence in both cases must be admissible in court. For example, polygraph (lie detector) test results suggesting that a witness lied are of no use since they are inadmissible as evidence.[25] *Brady* material may also include evidence in the possession of other law enforcement agencies involved in your prosecution (for example, FBI Crime Lab notes). However, if an out-of-state agency refuses to turn over materials, the prosecution cannot be held responsible for failure to disclose.[26]

(7) You have uncovered new evidence since your trial you could not have discovered before or during your trial. To succeed on this ground, you must show that the evidence (a) will probably change the result in your case if a new trial is granted; (b) was discovered since the trial; (c) could not have been discovered before the trial by the exercise of due diligence; (d) is "material" to the issue of your guilt; and (e) does

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21. People v. Fixter, 79 A.D.2d 861, 861, 434 N.Y.S.2d 484, 485 (4th Dept. 1980).

22. N.Y. Crim. Proc. Law § 440.10(1)(f) (McKinney 2005); *see* People v. Cleveland, 132 A.D.2d 921, 921, 518 N.Y.S.2d 477, 478 (4th Dept. 1987) (finding that defendant's claim that 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 conduct claimed to be improper and prejudicial did not appear in record).

23. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963) (holding that the suppression of evidence by the prosecution denied petitioner due process); *see also* People v. Vilardi 76 N.Y.2d 67, 77–78, 555 N.E.2d 915, 920–21, 556 N.Y.S.2d 518, 523–24 (1990) (ordering retrial on arson charges, because prosecution withheld material and exculpatory evidence from defense; showing "reasonable possibility" that failure to disclose favorable evidence contributed to verdict is the appropriate standard under New York State constitutional law).

24. *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 reasonable possibility existed that result would have been different if prosecutor had disclosed, in response to a specific *Brady* request, key witness's denial of having seen shooting).

25. *See* People v. Scott, 88 N.Y.2d 888, 891, 667 N.E.2d 923, 924, 644 N.Y.S.2d 913, 915 (1996) (finding failure to produce scratch sheet alluding to polygraph examination of witness not grounds for vacating conviction in part because polygraph results would have been inadmissible as evidence).

26. *See* People v. Santorelli, 95 N.Y.2d 412, 421–22, 741 N.E.2d 493, 497–98, 718 N.Y.S.2d 696, 700–01 (2000) (refusing to vacate conviction based upon prosecutor's failure to provide reports from a parallel FBI investigation where the FBI was unwilling to turn over the reports to the prosecutor).

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 must make the motion within a reasonable time after you find the new evidence. But you can only make an Article 440 motion on the basis of newly discovered evidence if you were found guilty after a full trial; if you pled guilty, you cannot make an Article 440 motion on the basis of newly discovered evidence.[28]

(8) Your conviction was obtained in violation of your constitutional rights.[29] Chapter 13, "Federal Habeas Corpus," of the *JLM* provides a long list of possible violations of your rights under the U.S. Constitution. You may raise any of these violations in your Article 440 motion as long as they are applicable to your case and your motion satisfies the conditions described in Section 3 of this Part.[30] For example, if you fail to present your constitutional attack in your direct appeal of your conviction, you will later be foreclosed from making an Article 440 motion based on that constitutional claim, unless your claim falls into one of the exceptions described in Section 3 of this Part of this Chapter.[31]

In addition to federal constitutional violations, you may also raise violations of your rights under New York State's Constitution in an Article 440 motion. These rights are generally very similar to your federal constitutional rights. For example, the law under both constitutions forbids attorneys from purposefully discriminating against people by race or gender in selecting a jury.[32] This claim could therefore be raised as a violation of your rights under the New York State Constitution, as well under the U.S. Constitution.

You should be aware that some of your rights under the New York State Constitution are broader than the same rights under the U.S. Constitution. For example, the New York State Constitution provides you with greater protection against unreasonable police searches than the U.S. Constitution.[33] The New York State Constitution also provides you with greater protection against a court imposing a longer sentence upon you after a successful appeal.[34] In addition, the New York State Constitution requires a prosecutor to supply you with a wider

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27. N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 2005); *see* People v. Latella, 112 A.D.2d 321, 322, 491 N.Y.S.2d 771, 772–73 (2d Dept. 1985) (setting standards for newly discovered evidence); People v. Sherman, 83 Misc. 2d 563, 565, 372 N.Y.S.2d 546, 548–49 (Sup. Ct. N.Y. County 1975) (holding indictment of police officer who testified at trial and investigation of judge who signed search warrant not enough to grant Article 440 motion).

28. *See* People v. Latella, 112 A.D.2d 321, 322, 491 N.Y.S.2d 771, 772–73 (2d Dept. 1985) (holding that guilty plea forecloses Article 440 motion); People v. Sherman, 83 Misc. 2d 563, 565, 372 N.Y.S.2d 546, 548 (Sup. Ct. N.Y. County1975) ("There was no verdict after trial here. The defendant pleaded guilty before trial. Thus, on its face, defendant's pleading requires a denial of this motion.").

29. N.Y. Crim. Proc. Law § 440.10(1)(h) (McKinney 2005).

30. As noted in *JLM* Chapter 13, "Federal Habeas Corpus," raising a federal constitutional violation in an Article 440 motion is often necessary to satisfy exhaustion, required to raise the violation in a petition for federal habeas corpus.

31. *See* People v. Skinner, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934–35 (1st Dept. 1990) (holding that failure to raise an issue on appeal when defendant had knowledge to do so forecloses an Article 440 motion).

32. *See generally* People v. Kern, 75 N.Y.2d 638, 649–53, 554 N.E.2d 1235, 1241–43, 555 N.Y.S.2d 647, 653–55 (1990) (discussing the New York State Constitution ban on racial discrimination in jury selection). *See also* Batson v. Kentucky, 476 U.S. 79, 84–98, 106 S. Ct. 1712, 1716–1724, 90 L. Ed. 2d 69, 79–89 (1986) (discussing the Federal Constitutional ban on racial discrimination in juries).

33. *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 "canine sniff" outside defendant's apartment is a search under New York Constitution).

34. *See* People v. Van Pelt, 76 N.Y.2d 156, 161–62, 556 N.E.2d 423, 425–26, 556 N.Y.S.2d 984, 986–87 (1990) (finding that a sentence following retrial that was for a longer period than the sentence from the first trial was presumed to be vindictive and must be set aside, even if the second trial judge was different from the first trial judge).

category of evidence than the U.S. Constitution requires.[35] Finally, your right to a lawyer is broader under the New York State Constitution than the U.S. Constitution.[36]

Because you may have greater rights under the New York Constitution than the U.S. Constitution, be sure to include claims of state constitutional violations in your Article 440 motion. Indeed, it is a good idea when claiming a violation of a specific federal constitutional provision (for example, the Fourth Amendment's prohibition against unreasonable searches and seizures) to cite the equivalent state constitutional provision (which, in this example, would be Article I, Section 12 of New York's Constitution).

Another example of state and federal constitutional violations that can be raised in an Article 440 motion is ineffective assistance of counsel; in other words, you had a lawyer, but he or she did not represent you effectively at trial. You should be aware though, that it is firmly established in New York that a claim of ineffective assistance of counsel may not be based solely upon your lawyer's unsuccessful use of a certain trial strategy even if that strategy was offensive, outrageous,[37] daring, or innovative.[38] In addition, it is not enough to simply claim that your lawyer was ineffective. You must identify the specific acts or omissions of counsel that you believe were so ineffective that you were in essence deprived of your right to counsel. Then, you must also show that this deficiency of counsel prejudiced your defense to such an extent that the trial result is unreliable.[39] For example, an error by

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35. *See* People v. Vilardi, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 920, 556 N.Y.S.2d 518, 523 (1990) (holding where the prosecutor was made aware by a specific discovery request that defendant considered exculpatory material important to the defense, standard of materiality is "reasonable possibility" that failure to disclose the material contributed to the verdict). *But see* People v. Lesiuk, 161 A.D.2d 21, 25, 560 N.Y.S.2d 711, 713 (3d Dept. 1990) (stating that standard is "reasonable probability" where the prosecution has tried hard to produce a missing exculpatory police informant), *aff'd* 81 N.Y.2d 485, 617 N.E.2d 1047, 600 N.Y.S.2d 931 (1993). A reasonable probability test is harder to satisfy than the reasonable possibility test. The difference between the tests is under the reasonable probability test, the undisclosed evidence receives no more weight than it would have been given had it been introduced at trial. Thus, the trial court reviewing an Article 440 motion must determine how that evidence would have affected the jury's deliberations. On the other hand, the reasonable possibility test focuses on the evidence withheld and the court must determine whether the failure to disclose it possibly contributed to the verdict. *See* People v. Vilardi, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 920, 556 N.Y.S.2d 518, 523 (1990); People v. Lesiuk, 161 A.D.2d 21, 25, 560 N.Y.S.2d 711, 713 (3d Dept. 1990).

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."); People v. Hobson, 39 N.Y.2d 479, 483–84, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976) (detailing New York case law that extended protections for the defendant under the State Constitution beyond those guaranteed by the Federal Constitution).

37. *See* People v. Sullivan, 153 A.D.2d 223, 226–27, 550 N.Y.S.2d 358, 359–60 (2d Dept. 1990) (holding that defense attorney's reference to victims as "skells," "pimps," or "junkies" was not ineffective counsel because it must, in the absence of any proof to the contrary, be presumed to have been devised as part of a trial strategy).

38. *See* People v. Baldi, 54 N.Y.2d 137, 151–52, 429 N.E.2d 400, 407–08, 444 N.Y.S.2d 893, 900–01 (1981) (holding that defense attorney's strategy of testifying at his client's trial in an attempt to present an insanity defense was not ineffective assistance even though the attorney did not pursue a claim of innocence).

39. *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (stating you must first specify the error made by counsel and then show that the error prejudiced your defense to such an extent that it affected the result of the trial). However, New York has retained the *Baldi* standard in preference to the federal *Strickland* standard in evaluating claims of ineffective assistance of trial counsel. People v. Stultz, 2 N.Y.3d 277, 282, 810 N.E.2d 883, 886, 778 N.Y.S.2d 431, 434 (2004) (stating that the appropriate standard for effective assistance of counsel is the same meaningful representation standard as *People v. Baldi*). In New York, you are entitled to "meaningful representation." People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981) ("So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful

counsel, even if professionally unreasonable, does not warrant setting aside the judgment if the error had no effect on the judgment. 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, prejudice will be presumed by the courts.[40] 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.[41]

(b) Motion to Set Aside Sentence

Unlike the Article 440.10 motion to challenge your *conviction* (discussed above), an Article 440.20 motion allows you to attack your *sentence* if it is unauthorized, illegally imposed, or in some other way invalid.[42] A sentence is unauthorized if the sentence exceeds the maximum length of time allowed by law.[43] For example, third degree burglary, a Class D felony,[44] carries a maximum sentence of seven years if you are a first or second felony offender.[45] Thus, you could make an Article 440 motion to attack a sentence of seven years and one day for third degree burglary if you are a first or second felony offender. However, you could not attack a sentence of seven years. Although this sentence may seem long or excessive in comparison to sentences that other defendants have received for the same crime, the Penal Law authorizes a seven-year sentence.[46] You cannot raise a claim that your sentence was too harsh or excessive under this motion as long as the sentence was authorized.[47]

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representation, the constitutional requirement will have been met."). However, "meaningful representation" does not mean perfect representation. People v. Ford, 86 N.Y.2d 397, 404, 657 N.E.2d 265, 268, 633 N.Y.S.2d 270, 273 (1995) (quoting People v. Modica, 64 N.Y.2d 828, 829, 476 N.E.2d 330, 331, 486 N.Y.S.2d 931, 932 (1985)) (stating meaningful representation does not mean perfect representation).

40. *See* Cuyler v. Sullivan, 446 U.S. 335, 349—50, 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); *see also* Winkler v. Keane, 812 F. Supp 426, 431 (S.D.N.Y. 1993) (finding that existence of a contingency fee arrangement between defendant and his attorney does not amount to a *per se* claim of ineffective assistance of counsel); People v. Wandell, 75 N.Y.2d 951, 952, 554 N.E.2d 1274, 1275, 555 N.Y.S.2d 686, 687 (1990) (stating that attorney must inform client and trial court of conflicting interests so that court may conduct a record inquiry to determine whether client understands the implications of the conflict); People v. Gomberg, 38 N.Y.2d 307, 314–16, 342 N.E.2d 550, 555, 379 N.Y.S. 2d 769, 776–77 (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 obligation to protect defendants' rights).

41. *See JLM* Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

42. N.Y. Crim. Proc. Law § 440.20(1) (McKinney 2005).

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

44. N.Y. Penal Law § 140.20 (McKinney 1999). The N.Y. Penal Law describes and classifies every felony. In order to determine whether your sentence was authorized by law, 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 § 140.20 through § 140.35 of the Penal Law. Then, consult § 70.00 of the Penal Law, which specifies the maximum and minimum terms of sentence which can be imposed for the various classes of felonies.

45. N.Y. Penal Law § 70.00 (McKinney 2004).

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

47. N.Y. Crim. Proc. Law § 440.20 and Practice Commentary (McKinney 2005). *See* Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for more information on appeals.

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

(1) Due process errors in the sentencing procedures; [48]
(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;[49]
(3) The sentencing court disregarded your right to be present at sentencing;[50]
(4) The court violated your First Amendment right of free association by, for example, considering at sentencing your membership in a racist organization where this membership was not relevant to any of the issues at your trial;[51]
(5) The court sentenced you as a second- or third-time offender, but the prior conviction was obtained in violation of your constitutional rights or was in some other way invalid.[52] For example, you may challenge the constitutional validity of the prior

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48. *See* People v. Bellamy, 160 A.D.2d 886, 887–88, 554 N.Y.S.2d 320, 321 (2d Dept. 1990) (vacating the sentence and finding that, while judge had authority to vacate a previously-imposed minimum permissible sentence, defendant's right to due process was violated when judge thereafter imposed maximum permissible sentence, without offering any justification for doing so).

49. N.Y. Crim. Proc. Law § 380.50(1) (McKinney 2005) 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, 119–20 (2d Dept. 1979) (defendant at sentencing indicated possibility that his intoxication at time of robbery had negated his criminal intent, and if this were so, issue of whether he had knowingly waived this potential defense to the crime must be examined by the court); People *ex rel*. Boddingham v. LaVallee, 50 A.D.2d 692, 692, 375 N.Y.S.2d 477, 478 (3d Dept. 1975) (holding that defendant who was denied right of allocution is entitled only to resentencing and not release from incarceration).

50. N.Y. Crim. Proc. Law § 380.40 (McKinney 2005) 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) (defendant's absence at resentencing denied his statutory right). 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). To succeed on an Article 440 motion based on a denial of this right, you must show that had you been present, you would have said something that would have obligated 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. *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 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 defendant waived his right to be present at his predicate 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 frustrate the sentencing process, your right to be present may have been forfeited by your actions. *See* People v. Corley, 67 N.Y.2d 105, 110, 491 N.E.2d 1090, 1092, 500 N.Y.S.2d 633, 635 (1986) (affirming sentence imposed in defendant's absence where "defendant willfully absented himself from the court for the purpose of frustrating the sentencing process").

51. *See* Dawson v. Delaware, 503 U.S. 159, 160, 112 S. Ct. 1093, 1095, 117 L. Ed. 2d 309, 314 (1992) (holding that admitting evidence at the capital sentencing proceeding of defendant's membership in racist gang was error where that evidence was not relevant to any issue in the punishment phase).

52. *See* People v. Simmons, 143 A.D.2d 153, 154, 531 N.Y.S.2d 928, 928–29 (2d Dept. 1988) (finding that defendant's prior conviction for buying, receiving, and concealing stolen property under Alabama statute that did not specify monetary value for stolen property did not qualify as a predicate felony for purposes of second felony offender status as the New York statute required proof that the value of the stolen property exceeded $250). If no objection was at the time the prosecution identified to you the prior felony to be used for sentencing enhancement, an appeals court will not review this

convictions or the decision to count them as predicates (prior convictions). Perhaps the most common error in this area 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 under New York law. The crime must be a felony, punishable by more than one year imprisonment in both states.[53] For example, if you were convicted of promoting prostitution by soliciting persons to patronize a prostitute in New Jersey, where it is a felony, your conviction 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;[54]

(6) The court erroneously imposed consecutive sentences (one sentence running after another) when you should have been sentenced to concurrent sentences (two sentences running at the same time).[55] In general, consecutive sentences cannot be imposed where (1) a single act constitutes two or more offenses, or (2) a single act constitutes one offense and is a material element of another.[56] 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.

(7) Remember, a motion under Section 440.20 deals solely 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.[57]

(c) Request for DNA Testing

In a relatively new section of Article 440, a defendant may request in his or her 440 motion that a forensic DNA test be done on evidence introduced at trial.[58] The court will order that a test be done if it determines that the following requirements are met

(1) Your 440 motion requests the performance of a forensic test on *specific* evidence, which is clearly identified;

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sentencing issue. *See* People v. Sullivan, 153 A.D.2d 223, 232–33, 550 N.Y.S.2d 358, 364 (2d Dept. 1990) ("When the defendant fails to raise an objection, and when, as a result, the legality of the sentence cannot be determined by this court upon the information contained in the appellate record, review as a matter of law should be denied."). If no objection was made due to mutual mistake, the appellate court can still reverse if the use of the predicate (or prior) felony was clear error (meaning that it was apparent on the record). *See* People v. Eason, 168 Misc. 2d 44, 46-47, 641 N.Y.S.2d 1018, 1020 (Sup. Ct. Queens County 1996) (setting aside sentence where error regarding existence of predicate felony constituted mutual mistake as to effect of certain dates, and was clear on the record; prior felony had not yet been sentenced so was not available as a predicate); *see also* N.Y. Crim. Proc. Law §§ 400.15(7)(b), 400.16, 400.20(6), & 400.21(7)(b) (McKinney 2005).

53. N.Y. Penal Law § 70.06(1)(b)(i) (McKinney 2004 & Supp. 2007) ("The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state …").

54. People v. Johnson, 127 A.D.2d 1003, 1003, 513 N.Y.S.2d 60, 60 (4th Dept. 1987) (holding New Jersey felony conviction for promoting prostitution did not constitute felony for New York sentencing purposes because crime would have been misdemeanor in New York).

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

56. *See* N.Y. Penal Law § 70.25(2) (McKinney 2004 & Supp. 2007); People v. Jeanty, 268 A.D.2d 675, 679–81, 702 N.Y.S.2d 194, 200–01 (3d Dept. 2000) (holding that the lower court erred in making sentence for robbery in the first degree and burglary in the first degree consecutive to felony murder sentence because the conduct constituting the robbery and burglary offense could have been a material element of the felony murder; however, the court also held that aggregate sentence of 75 years to life was proper).

57. N.Y. Crim. Proc. Law § 440.20(4) and Practice Commentary (McKinney 2005).

58. N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005).

(2) The evidence upon which you are requesting a DNA test was obtained in connection with the trial which resulted in your conviction; and
(3) There is a "reasonable probability" that if the results of a DNA test had been admitted at the trial, the verdict would have been more favorable to you.[59]

The third requirement is probably the most important one. The court will not order a DNA test if it believes there is no "reasonable probability" the verdict would have been different even if you are right about whatever you are trying to prove with the DNA test.[60] For more information on DNA testing see Chapter 11 of the *JLM*, "Using Post-Conviction DNA Testing To Attack Your Conviction or Sentence."

3. When You Can Get Relief Under Article 440

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

a. When You Are Not Entitled to Move to Vacate a Judgment Under Section 440.10

There are four circumstances in which the court *must deny* your motion to vacate your judgment under Section 440.10.[61] These four circumstances are as follows.

i. You cannot make a Section 440.10 motion if your claim was raised on appeal and the court denied your complaint on the merits (in other words, when the appellate court found that your legal arguments could not overcome your guilty conviction).[62] There is an exception to this rule that applies when the law has changed after your appeal was decided and the courts have agreed to apply the new law "retroactively" (in other words, when courts apply a new law to cases which have been tried, decided, or appealed before the change in the law).[63] The Court of Appeals will only grant "full retroactivity" to new laws whose purpose is to preserve the fact-finding process from unreliably obtained information relating directly and substantially to a defendant's guilt or innocence. Full retroactivity means you can raise the new law in a post-conviction proceeding, such as an Article 440 motion, in order to attack a conviction that was handed down and appealed before the new law came into effect. However, full retroactivity has been applied very rarely in New York.[64] The courts decide

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59. N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005). *See* n. 35 of this Chapter for an explanation of "reasonable probability."

60. N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005); *see also* People v. Tookes, 167 Misc. 2d 601, 605–06, 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* n. 35 of this Chapter for an explanation of "reasonable probability."

61. N.Y. Crim. Proc. Law §§ 440.10(2)(a)–(d) (McKinney 2005).

62. N.Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 2005); *see*, *e.g.*, People v. Skinner, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934 (1st Dept. 1990) (arguments raised and rejected on the merits on direct appeal may not be raised in an Article 440 motion).

63. N.Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 2005).

64. *See* People v. Laffman, 161 A.D.2d 111, 112–13, 554 N.Y.S.2d 840, 841 (1st Dept. 1990) (vacating the judgment and remanding for a new trial where the defendant was shown to the victim handcuffed and alone with one other suspect in the police station for identification. The station house identification procedures were found to be improper in a subsequent case which applied retroactively to these cases). *But see* People v. Pepper, 53 N.Y.2d 213, 222, 423 N.E.2d 366, 370, 440 N.Y.S.2d 889, 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 cannot waive his constitutional right

whether a new rule should apply retroactively after considering the following three factors:

(a) the new rule's purpose;

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

(c) the effect on the administration of justice in applying the new rule retroactively (in other words, if the reliance on the old rule has been very great, applying the new rule retroactively would result in so many overrulings and retrials that it would over-burden the criminal courts). In such a situation, the courts are unwilling to apply the new rule retroactively.[65]

(2) You cannot make a Section 440.10 motion on the basis of an error that you may still raise in an appeal of your conviction or that you have raised in an appeal that is pending (in other words, the appeals court has not yet handed down a decision).[66] Remember, Article 440 is not a substitute for an appeal. However, you may complain in a Section 440.10 motion about an error without first appealing the error, if the record of your trial does not contain sufficient facts to allow an appeals court to review the error.[67] For example, if you have found new evidence that was not available at the time of the trial, and therefore was not included in the record, you may bring a Section 440.10 motion directly.[68] But be very careful about deciding to appeal a decision on an Article 440 motion without first bringing a direct appeal. The sufficiency of the record will be decided by the reviewing court. If the court finds that the record was sufficient for direct appeal, the 440 motion will be dismissed and if

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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 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, 235, 613 N.Y.S.2d 543, 544–45 (Sup. Ct. Queens County 1994) (limiting retroactivity to only direct appeals and not to post-conviction hearings of a decision, holding that defendants generally had the right to be present during *Sandoval* hearings to determine whether the prosecution should be permitted to raise prior convictions and bad acts on cross-examination of the defendant applies retroactively, but only to direct appeals and not to post-conviction motions); People v. Alvarez, 151 Misc. 2d 697, 701, 573 N.Y.S.2d 592, 594–95 (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).

65. *See* People v. Mitchell, 80 N.Y.2d 519, 528–29, 606 N.E.2d 1381, 1386, 591 N.Y.S.2d 990, 995 (1992) (applying a new state statutory right prospectively and not retroactively because it violated this three-pronged test: (1) the court held that the new rule's purpose would not be hindered by prospective application, (2) the courts had substantially relied on the old rule, and (3) and retroactive application would substantially burden the justice system); People v. Perez, 162 Misc. 2d 750, 762–63, 616 N.Y.S.2d 928, 936 (Sup. Ct. Kings County 1994) (observing as dicta that a certain new rule would not apply retroactively, even though retroactive application would further the new rule's purpose, 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).

66. N.Y. Crim. Proc. Law § 440.10(2)(b) (McKinney 2005); *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 record is sufficient for review of the issue on direct appeal, the issue cannot be collaterally 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 pertinent, new evidence not in the record). *See generally* Part B of this Chapter for a definition of the "record."

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

68. N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 2005).

you did not file or pursue a direct appeal, it may be too late to do so.[69] Sometimes there may be doubt as to whether there are sufficient facts in the record from which an appeals court must decide. In such a case, you should be careful to perfect and file a timely direct appeal and not to rely only on an Article 440 motion.

(3) If you failed to raise an error on appeal, either because you did not include the error in your appeal or because you simply did not appeal your conviction at all, you cannot raise that error in an Article 440 motion *unless you have a good excuse* for not raising the issue on appeal.[70] One example of a good excuse would be where the error was overlooked due to ineffective assistance of counsel. (But if you believe your lawyer was ineffective because your lawyer did not tell you of your right to appeal, you must make a motion instead under N.Y. Crim. Proc. Law Section 460.30.) Another good excuse is where an appeal seemed useless due to the state of the law at the time, but the law changed later and courts applied the new law retroactively, and because of those changes, if your trial had occurred today, it would be considered fundamentally unfair.[71]

(4) The judge must deny your Section 440.10 motion if it is based on an issue that involves only the validity of your sentence, rather than your conviction.[72] You must complain about your sentence in a motion to set aside your sentence under N.Y. Crim. Proc. Law Section 440.20, not Section 440.10.

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

While a judge must deny your Section 440.10 motion in the four circumstances listed above, there are other circumstances in which a judge may deny, but is not required to deny, your Section 440.10 motion.[73] These circumstances are as follows.

i. You did not preserve the issue for review on appeal. An issue is not preserved for review on appeal if you failed to object to errors that occurred during trial, or failed to request a particular instruction or ruling on an issue, or failed to make facts that would support your claim, which would have been discovered through due diligence appear in the record, or in some way failed to make sure that an issue would appear in the trial record.[74] The following are examples of some of the issues you may raise

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69. *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 the raised issue on direct appeal, the judge must dismiss the Article 440 motion); N.Y. Crim. Proc. Law § 440.10 and Practice Commentaries (McKinney 2005).

70. N.Y. Crim. Proc. Law § 440.10(2)(c) (McKinney 2005); *see*, *e.g.*, People v. Skinner, 154 A.D.2d 216, 221, 552 N.Y.S.2d 932, 934–35 (1st Dept. 1990) (holding that the defendant's failure to present his constitutional attack in his direct appeal foreclosed any consideration of it in an Article 440 motion); People v. Cunningham, 104 Misc. 2d 298, 304, 428 N.Y.S.2d 183, 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).

71. N.Y. Crim. Proc. Law §§ 440.10(2)(a), (3)(b), and Practice Commentaries (McKinney 2005).

72. N.Y. Crim. Proc. Law § 440.10(2)(d) (McKinney 2005).

73. N.Y. Crim. Proc. Law §§ 440.10 (3)(a)–(c) (McKinney 2005). Although the court may deny the motion under any of the circumstances specified, in the interest of justice and for good cause shown, it can use its discretion to grant the motion and vacate the judgment.

74. N.Y. Crim. Proc. Law § 440.10(3)(a) (McKinney 2005); *see* People v. Green, 177 A.D.2d 856, 857, 576 N.Y.S.2d 625, 626 (3d Dept. 1991) (holding that court properly denied § 440.10 motion where defendant could have challenged the prosecutor's use of peremptory challenges to eliminate black jurors at trial, but did not, [440.10 issue was unrelated to separate appeal based on police information issue]); 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

in an Article 440 motion even though the issues were not preserved for review on appeal.

(a) You may complain that you received ineffective assistance of counsel at trial. The New York Court of Appeals believes that an Article 440 motion is usually better suited than an appeal for an ineffective assistance of counsel claim because details of your lawyer's performance at trial are not usually obvious from the trial record.[75] However, if the trial record does contain facts that would allow an appellate court to review a claim of ineffective assistance of counsel, you must raise the claim on direct appeal.[76]

(b) A court may also grant a hearing on 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 relevant facts.[77] For example, in one Article 440 motion, a defendant complained that the prosecutor had not revealed an agreement to recommend a more lenient sentence for a prosecution witness in exchange for the witness' testimony against the defendant. The trial court denied the motion on the ground that the defendant could have raised this issue at trial and the intermediate appellate court affirmed 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.[78]

(c) If you did not alert the trial court to prejudicial or harmful newspaper publicity about your case 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.

(2) A trial court has discretion to either entertain or reject a second motion to vacate the judgment as long as (1) the issue was not decided on direct appeal and (2) it was included in your first Article 440 motion.[79] Again, there is an exception to this rule if the law has changed since your earlier motion and the change has been ruled to apply retroactively.[80]

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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, 443–44, 487 N.Y.S.2d 345, 352–53 (2d Dept. 1985) (holding that because the defendant did not claim at trial that his confession was obtained in violation of his right to counsel, the defendant could not raise this issue for the first time in a § 440.10 motion). As explained in Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," you or your lawyer must protest errors that occur at trial when they happen in order to ensure that these errors will be reviewed on appeal.

75. *See* People v. Brown, 45 N.Y.2d 852, 853–54, 382 N.E.2d 1149, 1149–50, 410 N.Y.S.2d 287, 287 (1978) (observing that often the record does not provide enough information for appeal on effectiveness of counsel, so Article 440 motion is usually a better method for ineffectiveness of counsel claims); *see also* N.Y. Crim. Proc. Law § 440.10(3)(a) (McKinney 2005).

76. *See* People v. Gonzalez, 158 A.D.2d 615, 615, 551 N.Y.S.2d 586, 587 (2d Dept. 1990) (denying Article 440 motion because ineffectiveness of counsel claims were based on matters in the record, so they should have been raised on direct appeal rather than in an Article 440 motion).

77. *See* People v. Qualls, 70 N.Y.2d 863, 865–66, 517 N.E.2d 1346, 1347, 523 N.Y.S.2d 460, 461–62 (1987) (finding defendant could not have discovered with due diligence evidence of prosecutorial misconduct based on the prosecutor's misrepresentation of the substance of its cooperation agreement with a witness and its knowing use of perjured testimony, and thus was entitled to a hearing on his Article 440 motion).

78. *See* People v. Qualls, 70 N.Y.2d 863, 865–66, 517 N.E.2d 1346, 1347, 523 N.Y.S.2d 460, 461–62 (1987).

79. N.Y. Crim. Proc. Law § 440.10(3)(b) and Practice Commentary (McKinney 2005).

80. N.Y. Crim. Proc. Law § 440.10(3)(b) and Practice Commentary (McKinney 2005).

(3) The third situation where a trial court has discretion to grant or reject your motion is when you could have raised this issue in a previous Section 440.10 motion, but failed to do so. Unless you can demonstrate good cause for failing to include the issue in your prior motion, the court will deny your second motion.[81] It is important, therefore, that you include all possible grounds for complaint when drawing up your Section 440.10 motion since you may not be able to raise any claims you leave out in another Article 440 motion.

(c) Alleging Omission of *Rosario* Materials

Rosario material is any recorded statement of a prosecution witness (including police officers) possessed by the police or prosecution that relates to the subject matter of the witness' trial testimony. By law, the prosecutor must provide you with statements that relate to the witness' testimony at your trial.[82] If the prosecutor neglects to do so, and a court finds that there is a reasonable possibility that the failure to disclose materially contributed to a verdict against you, the court will reverse your conviction on appeal.[83] Likewise, if you raise the issue of omitted *Rosario* materials in an Article 440 motion, the court will reverse your conviction only if you can prove the omission was not "harmless error" (in other words, that the omission prejudiced your defense).[84] If you raise this claim for the first time in an Article 440 motion, you must demonstrate there was a reasonable possibility that the failure to disclose these statements contributed to the verdict against you.[85]

Furthermore, it is unlikely that a court will reverse your conviction on this ground if the material withheld by the prosecution duplicates material in the record,[86] or if the prosecution

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81. N.Y. Crim. Proc. Law § 440.10(3)(c) and Practice Commentary (McKinney 2005).

82. N.Y. Crim. Proc. Law § 240.45(1)(a) (McKinney 2005). *See* People v. Rosario, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883–84, 213 N.Y.S.2d 448, 450–51 (1961) (finding that trial court should have turned over to defense counsel, on their request, statements given before trial by prosecution witnesses relating to their trial testimony, so that defense counsel could have used statements on cross-examination).

83. *See* N.Y. Crim. Proc. Law § 240.75 (McKinney 2005) (abrogating previous rule that failure to turn over *Rosario* material was *per se* (nearly automatic) reversible error); People v. Sorbello, 285 A.D.2d 88, 95–96, 729 N.Y.S.2d 747, 753 (2d Dept. 2001) (holding that § 240.75, which replaced the old *per se* reversible error rule that applied when a *Rosario* violation was found with a standard of harmless error, must apply retroactively to all cases that were being prosecuted or appealed as of its February 1, 2001 effective date).

84. *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 direct appeal has been completed will only be successful if defendant can prove both improper conduct by prosecutor and prejudice to the defense); People v. Machado, 90 N.Y.2d 187, 192, 681 N.E.2d 409, 412, 659 N.Y.S.2d 242, 245 (1997) (holding that in an Article 440 motion, defendant/movant must prove that the failure to turn over *Rosario* material prejudiced the outcome of the defendant's case, even if an appeal is pending at the time the Article 440 motion is filed).

85. *See* People v. Nikollaj, 155 Misc. 2d 642, 649, 589 N.Y.S.2d 1013, 1018 (Sup. Ct. Queens County 1992) (granting defendant new trial because prosecution's withholding of *Rosario* materials prejudiced defendant's case, and a reasonable probability existed that the violations contributed to the verdict); People v. Machado, 90 N.Y.2d 187, 192, 681 N.E.2d 409, 412, 659 N.Y.S.2d 242, 245 (1997) (stating that defendant/movant must prove the omission prejudiced his case and contributed to the verdict against him; conviction will not be automatically reversed regardless of whether defendant's direct appeal is still pending or completed); People v. Vilardi, 76 N.Y.2d 67, 77–78, 555 N.E.2d 915, 920–21, 556 N.Y.S.2d 518, 523–24 (1990) (explaining that the standard for determining whether an omission of *Rosario* material was prejudicial is whether there was a "reasonable possibility" that prejudice resulted).

86. *See* People v. Cortez, 184 A.D.2d 571, 573, 584 N.Y.S.2d 609, 611 (2d Dept. 1992) (finding that conviction need not be reversed if material withheld by prosecution is duplicative of other evidence contained in the record); People v. Ray, 140 A.D.2d 380, 382–83, 527 N.Y.S.2d 864, 866 (2d Dept. 1988)

merely delayed in producing the material.[87] However, courts construe "duplication" very narrowly. Unless the excluded material appears in the record in nearly identical form, the court will probably not reject your claim on the grounds that the *Rosario* material that was not disclosed was duplicative.[88]

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

Like a motion to vacate a judgment under Section 440.10, you do not have to wait until you have appealed your conviction to make a motion to vacate your sentence under Section 440.20. You can make this motion any time after your sentencing.[89] 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.[90] There is an exception to this rule that applies if the law has changed since your appeal and the new law is made retroactive.[91] In addition, the judge may deny your motion if the issue was decided in a previous Section 440.20 motion or a similar non-appeal proceeding, such as a habeas corpus motion. The court may grant a motion, however, if it is in the interest of justice and good cause is shown.[92]

C. How to File an Article 440 Motion

a. Preparing Your Motion Documents

Appendix B of this Chapter contains forms to help you prepare an Article 440 motion. Whether you are making a motion to vacate a judgment or set aside your sentence, you will need at least two documents. The first document is a "Notice of Motion." It informs the court that you are challenging your conviction and/or sentence and also states the basis for your challenge. The notes following the sample Notice of Motion in Appendix B tell you how to fill out a Notice of Motion.

The second document is an "affidavit." This is a statement of facts made by someone with firsthand knowledge of the facts. You, a witness at your trial, or someone else who knows facts that will convince the court your conviction or sentence was improper 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.[93]

To write an effective 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

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(stating that prosecution must prove that the undisclosed statements are indeed duplicative).

87. *See* People v. Blagrove, 183 A.D.2d 837, 837, 584 N.Y.S.2d 86, 87 (2d Dept. 1992) (stating that prosecution's delay in turning over material relating to a prosecution witness' testimony will only result in a reversal if the defense was "substantially prejudiced" by the delay; and finding no delay where prosecution turned over *Rosario* material to the defense prior to the testimony of the witness to which the material pertained).

88. *See* People v. Young, 79 N.Y.2d 365, 370–71, 591 N.E.2d 1163, 1166–67, 582 N.Y.S.2d 977, 980–81 (1992) (finding that two documents cannot be duplicative if there are variations or inconsistencies between them, including omissions; exception to automatic reversal rule for duplicate material should be read very narrowly to apply when material is in fact a duplication of material in the record).

89. N.Y. Crim. Proc. Law § 440.20(1) and Practice Commentary (McKinney 2005 & Supp. 2007).

90. N.Y. Crim. Proc. Law § 440.20(2) (McKinney 2005 & Supp. 2007); *see*, *e.g.*, People v. Chapman, 115 A.D.2d 911, 911, 496 N.Y.S.2d 588, 588 (3d Dept. 1985) (finding that appeal to set aside sentence bars the Article 440 motion).

91. N.Y. Crim. Proc. Law § 440.20(3) (McKinney 2005 & Supp. 2007). 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.

92. N.Y. Crim Proc. Law § 440.20(3) (McKinney 2005 & Supp. 2007).

93. 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.

arrest me." If either of these claims is the basis for your motion, you must detail the specific circumstances under which you were denied counsel or state in a clear and detailed manner what led to your arrest. For example, if you requested 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 or she 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 (or representative) make the statement.

If a judge thinks that there is no reasonable possibility that the facts stated in your affidavit are true, he or she will deny your motion.[94] 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 grounds or issues on which you could bring an Article 440 motion.[95] If you leave one out, a court will probably not allow you to raise the ground in a later motion.[96]

You must swear in the presence of a notary that the facts stated in your affidavit are true.[97] If the prison officials refuse to provide you with a notary, you should sign in your own name at the bottom of the form. You should also ask a friend to watch (witness) you sign the affidavit and have the friend sign his or her own name under the line that reads "sworn to before me" at the end of the affidavit. Finally, you should write an explanation under the signature of the friend who witnessed your signature regarding the fact that the prison officials refused to provide a notary. Appendix A of *JLM* Chapter 17 contains a "sample verification" (A-2) that can be filled out by a friend.

2. When and Where to File

(a) When to File

While there is no statute of limitations (time limit) for making an Article 440 motion,[98] a court may not grant your motion if you wait too long after your sentencing to make your motion.[99] For example, one court denied a Section 440.10 motion that was made three years after the defendant's conviction because the defendant could not explain why he could not have discovered the facts underlying his claim earlier.[100] Furthermore, Article 440 itself requires you to make a motion based on the ground of newly discovered evidence within a reasonable time after you discover the new evidence.[101]

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94. *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).

95. N.Y. Crim. Proc. Law § 440.30(1) (McKinney 2005 & Supp. 2007).

96. N.Y. Crim. Proc. Law § 440.10(3)(c) (McKinney 2005 & Supp. 2007).

97. N.Y. Crim. Proc. Law § 440.30(1) (McKinney 2005 & Supp. 2007).

98. *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 there is no time limit on § 440.10 claims).

99. *See* People v. Wilson, 81 Misc. 2d 739, 740, 365 N.Y.S.2d 961, 962–63 (Sup. Ct. Nassau County 1975) (denying motion to vacate judgment, and finding that fact that defendant waited almost five years to complain of his conviction was a "significant factor"); People v. Byrdsong, 161 Misc. 2d 232, 236, 613 N.Y.S.2d 543, 545 (Sup. Ct. Queens County 1994) (declaring that a post-conviction motion filed nine years after trial and seven years after appeals was, in the interest of finality, a time period too great to continue further litigation).

100. *See* People v. Friedgood, 58 N.Y.2d 467, 470–71, 448 N.E.2d 1317, 1319, 462 N.Y.S.2d 406, 408 (1983).

101. N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 2005 & Supp. 2007).

(b) Where to File

An Article 440 motion must be brought in the trial court where you were convicted. It cannot be brought in the court of another county where you happen to be imprisoned. To file your motion, mail your Notice of Motion, your affidavit(s), and all supporting documents to the clerk of the court in which you were convicted.[102] See Appendix II of the *JLM* for the addresses of the supreme courts for each county in New York State. You must also send a copy of your papers to the district attorney of the county in which you were convicted. See Appendix III in the back of the *JLM* for a list of the addresses of the district attorneys' offices for each county in New York.

3. How to Get Help From a Lawyer

You do not have a right to a lawyer to help you prepare your Article 440 motion. But, if the court decides to hold a hearing based on your motion and affidavits and you request a lawyer, the court may assign one.[103] You should request a lawyer because he or she can usually help present a better case.

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

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

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

Once you have filed your motion, the district attorney will ordinarily file an 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.[104] The answer will usually deny some or all of the allegations in your motion and supporting papers.

After reviewing the facts and arguments set forth in your motion and supporting affidavits, and in the district attorney's answer, the judge may grant or deny your motion, or hold a hearing. If your papers state a legal ground for vacating the judgment or setting aside your sentence, and the facts in support of that ground are not disputed, the judge will grant your motion.[105] If your papers do not state a legal ground for vacating the judgment or

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102. 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, 375–76 (Sup. Ct. Suffolk County 1978) (holding the appropriate venue for a hearing in the nature of *coram nobis* would be in the county of the indictment, rather than the county to which the case was transferred for the purpose of trial).

103. *See* N.Y. County Law § 722(4) (McKinney 2004 & Supp. 2007); People *ex rel*. Anderson v. Warden, 68 Misc. 2d 463, 470, 325 N.Y.S.2d 829, 837 (Sup. Ct. Bronx County 1971) ("Assignment of counsel other than for an evidentiary hearing is discretionary in both habeas corpus and Article 440 proceedings.").

104. N.Y. Crim. Proc. Law § 440.30(1) (McKinney 2005).

105. N.Y. Crim. Proc. Law § 440.30(3) (McKinney 2005).

setting aside your sentence, or lack facts to support a legal ground, the judge will deny your motion.[106] The judge will also deny your motion without a hearing if:

(1) The facts you use to support your motion are not supported by sworn statements (affidavits);
(2) A fact necessary to support your motion is clearly shown to be false by documentary proof; or
(3) A fact necessary to support your motion is contradicted by the record from your trial or is made solely by you and unsupported by other evidence, and there is no reasonable possibility the allegations are true.[107]

Otherwise, the judge must grant a hearing on your motion.[108] 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.[109]

If the judge decides to hold a hearing, you have the right to attend this hearing, although you may waive (decide not to use) this right.[110] Since at your hearing you will bear the burden of proof, meaning you will have the responsibility of proving that your claims are true,[111] it is not recommended that you waive the right to appear. To meet your burden of proof, you must persuade the judge that the facts of your story are true by a "preponderance of the evidence," which means that the facts are more likely than not to be true.[112] To state your responsibility more simply, 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 that you use must also persuade the judge that your conviction or sentence was unfair.[113] Part B of this Chapter explains what kinds of acts by the judge or prosecutor may make a trial unfair for the purposes of Article 440.

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106. N.Y. Crim. Proc. Law § 440.30(4) (McKinney 2005); *see*, *e.g.*, People v. Risalek, 172 A.D.2d 870, 870, 568 N.Y.S.2d 172, 174 (3d Dept. 1991) (denying motion where defendant's allegations of fraud and coercion were contradicted by transcripts and 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 without merit); People v. Batts, 96 A.D.2d 842, 842–43, 465 N.Y.S.2d 600, 601 (2d Dept. 1983) (denying motion for failure to set forth sufficient grounds to justify hearing).

107. N.Y. Crim. Proc. Law § 440.30(4) (McKinney 2005).

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

109. N.Y. Crim. Proc. Law § 440.30(7) (McKinney 2005).

110. N.Y. Crim. Proc. Law § 440.30(5) (McKinney 2005).

111. N.Y. Crim. Proc. Law § 440.30(6) (McKinney 2005). In contrast, at your trial the prosecutor bore the burden of proof; he or she had to prove you guilty beyond a reasonable doubt.

112. N.Y. Crim. Proc. Law § 440.30(6) (McKinney 2005); *see*, *e.g.*, People v. Richard, 156 A.D.2d 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).

113. *See*, *e.g.*, People v. Lehrman, 155 A.D.2d 693, 693, 548 N.Y.S.2d 260, 261 (2d Dept. 1989) (finding defendant failed to demonstrate that jury misconduct impaired his right to trial); People v. Rhodes, 92 A.D.2d 744, 745, 461 N.Y.S.2d 81, 83 (4th Dept. 1983) (stating to prevail on Article 440 motion based on claim of juror misconduct, defendant must not only prove misconduct by a preponderance of the evidence, but also show that the misconduct created a substantial risk of prejudice); 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).

E. What Relief the Court Can Provide Under Article 440

1. Motion to Vacate Judgment

In deciding on an Article 440.10 motion, the court has several choices:

(1) As noted above, even if the court finds that the facts you have stated are true, the court may deny your motion if the court does not find that your conviction was unfair;[114]
(2) The court may grant your Article 440.10 motion to vacate judgment and dismiss the indictment or charge against you, entitling you to be released from prison, or to be more likely to receive a new trial;[115] or
(3) If your motion raises new evidence, the judge may vacate the judgment and order a new trial,[116] or she may reduce your conviction to one for a lesser included offense, provided the district attorney agrees.[117]

2. Motion to Set Aside Sentence

If the judge decides to grant your motion to set aside your sentence under Section 440.20, he or she will not change your underlying conviction. The court must resentence you in accordance with the New York Penal Code's guidelines and limits for sentences.

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

You do not have the automatic right to appeal a denial of your Article 440 motion to an intermediate appellate court (in New York, this is the Appellate Division).[118] To appeal, therefore, you must request leave (permission) from a judge of the intermediate appellate court to which you want to appeal.[119] You must request permission within thirty days after you receive a copy of the court's order denying your Article 440 motion.[120] If the judge of the appellate court grants you permission to appeal, you will receive a certificate indicating that you may appeal.[121] In order to apply for a certificate, you must also check the appropriate appellate division rules for the department where the intermediate appellate court you are

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114. *See*, *e.g.*, People v. Lehrman, 155 A.D.2d 693, 693, 548 N.Y.S.2d 260, 261 (2d Dept. 1989) (finding defendant failed to demonstrate that jury misconduct impaired his right to trial); People v. Rhodes, 92 A.D.2d 744, 745, 461 N.Y.S.2d 81, 83 (4th Dept. 1983) (stating to prevail on Article 440 motion based on claim of juror misconduct, defendant must not only prove misconduct by a preponderance of the evidence, but also show that the misconduct created a substantial risk of prejudice); 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).

115. N.Y. Crim. Proc. Law § 440.10(4) (McKinney 2005).

116. N.Y. Crim. Proc. Law § 440.10(5)(a) (McKinney 2005).

117. N.Y. Crim. Proc. Law § 440.10(5)(b) (McKinney 2005); *see* People v. Reyes, 92 A.D.2d 776, 777, 459 N.Y.S.2d 614, 614 (1st Dept. 1983) (reducing defendant's sentence of robbery in first degree to robbery in second degree after evidence showed gun was a toy pistol). See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for a detailed explanation and example of lesser included offense.

118. N.Y. Crim. Proc. Law § 450.15 (McKinney 2005); *see* People v. Farrell, 85 N.Y.2d 60, 70, 647 N.E.2d 762, 768, 623 N.Y.S.2d 550, 556 (1995). However, you do have the right to appeal an order that sets aside your sentence after the district attorney makes an Article 440 motion under § 440.40 for the purpose of seeking a longer sentence against you. N.Y. Crim. Proc. Law § 450.10(4) (McKinney 2005).

119. N.Y. Crim. Proc. Law § 460.15 (McKinney 2005). Assuming you were convicted in a New York supreme court and, thus, made 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. [*See* n. 122 for a listing of the counties included in each department.]

120. N.Y. Crim. Proc. Law § 460.10(4)(a) (McKinney 2005).

121. N.Y. Crim. Proc. Law § 460.15 (McKinney 2005).

appealing to is located.[122] 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.[123] You must also serve the certificate and notice of appeal upon the district attorney of the county where your trial court is located.[124] Once you have completed these steps, you have "taken" your appeal.[125]

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

If a judge of the intermediate court denies you permission to appeal, the appeals process ends at that stage and cannot be pursued further.[126] (Note, however, that you may still be able to raise your claim in a federal habeas corpus petition as described in Chapter 13, "Federal Habeas Corpus", of the *JLM*.) If you do receive permission to appeal and the appellate court then denies your appeal, you may appeal the denial to the New York Court of Appeals, the state's highest court.[127] To do so, you must request permission to appeal from a judge of the Court of Appeals.[128] You must make your request within thirty days after the intermediate appellate court hands down the denial you are trying to appeal.[129] Again, if you are granted permission to appeal, you will be issued a certificate indicating you have permission to appeal. Upon issuance of the certificate, your appeal is "taken."[130]

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

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. However, if your appeal is still pending, you can make an Article 440 motion. You can then make a motion to consolidate (combine) the appeal and the 440 motion in the interests of judicial economy. If you consolidate, the range of factual matter the court may examine will be expanded in the

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122. N.Y. Crim. Proc. Law § 460.15(2) (McKinney 2005). 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 1st Department includes the counties of the Bronx and New York. The 2nd Department includes the counties of Dutchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester. The 3rd 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, Schuler, 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.

123. N.Y. Crim. Proc. Law § 460.10(4)(b) (McKinney 2005). See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for a definition of a notice of appeal and a description of the appeals process, generally, and also for a sample notice of appeal from a denial of an Article 440 motion.

124. N.Y. Crim. Proc. Law § 460.10(4)(b) (McKinney 2005).

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

126. N.Y. Crim. Proc. Law § 460.15 (McKinney 2005).

127. N.Y. Crim. Proc. Law § 460.10(5) (McKinney 2005).

128. 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."

129. N.Y. Crim. Proc. Law §§ 460.10(5)(a), 460.20 (McKinney 2005).

130. N.Y. Crim. Proc. Law § 460.10(5)(b) (McKinney 2005). Again, however, you must still perfect your appeal. *See* Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence."

appeal, and all of the errors presented together may more convincingly persuade the court that your trial was unfair.

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

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

APPENDIX A

STATE POST-CONVICTION RELIEF STATUTES

Alabama	ALA. CODE § 15-21-1 *et seq*.
Alaska	ALASKA STAT. § 12.75.010 *et seq*.
Arizona	ARIZ. R. CRIM. P. 32; ARIZ. REV. STAT. § 13-4121 *et seq*.
Arkansas	ARK. R. CRIM. P. 37; ARK. CODE ANN. § 16-112-101 *et seq*.
California	CAL. PENAL CODE § 1473 *et seq*.
Colorado	COLO. R. CRIM. P. 35; COLO. REV. STAT. § 13-45-101 *et seq*.
Connecticut	CONN. GEN. STAT. ANN. § 52-466 *et seq*.
Delaware	DEL. SUP. CT. CRIM. R. 35; DEL. CODE ANN. tit. 10, § 6901 *et seq*.
D.C.	D.C. CODE § 23-110; D.C. CODE § 16-1901 *et seq*.
Florida	FLA. R. CRIM. P. 3.850
Georgia	GA. CODE ANN. § 9-14-1 *et seq.*
Hawaii	HAW. REV. STAT. § 660-3 *et seq*.
Idaho	IDAHO CODE ANN. § 19-4901 *et seq*.
Illinois	725 ILL. COMP. STAT. 5/122-1 *et seq*.
Indiana	IND. CODE ANN. § 34-25.5-1-1 *et seq.;* IND. R. P. FOR POST-CONVICTION REMEDIES R. PC 1.
Iowa	IOWA CODE ANN. § 663A.1 *et seq*.
Kansas	KAN. STAT. ANN. § 60-1501 *et seq*.
Kentucky	KY. R. CRIM. P. 11.42; KY. REV. STAT. ANN. § 419.020 *et seq*.
Louisiana	LA. CODE CRIM. PROC. ANN. art. 924 *et seq*.
Maine	ME. REV. STAT. ANN. tit. 15, § 2121 *et seq*.
	ME. REV. STAT. ANN. tit. 14, § 5501 *et seq*.
Maryland	MD. CODE ANN., CRIM. PROC. §7-101 *et seq*.
	MD. CODE ANN. CTS. & JUD. PROC. § 3-701 *et seq*.
Massachusetts	MASS. R. CRIM. P. 30; MASS. GEN. LAWS ch. 276, § 19
Michigan	MICH. COMP. LAWS ANN. § 600.4301 *et seq*.
Minnesota	MINN. STAT. ANN. § 590.01 *et seq*.
Mississippi	MISS. CODE ANN. § 99-39-1 *et seq*.
Missouri	MO. S. CT. R. CRIM. P. 29.12-15; MO. ANN. STAT. § 548.101.
Montana	MONT. CODE ANN. § 46-21-101 *et seq*.; MONT. CODE ANN. § 46-22-101.
	MONT. CODE ANN. § 46-22-101 *et seq*.
Nebraska	NEB. REV. STAT. § 29-3001 *et seq*.
Nevada	NEV. REV. STAT. § 34-350 *et seq*.
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. CRIM. P. CODE ANN. art. 11.01 *et seq*.
Utah	UTAH CODE ANN. § 78-35A-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 tells you how to use poor person's papers to obtain a lawyer in an Article 440 proceeding. Sample poor person's papers may be found in Chapter 9 of the *JLM*.

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

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

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

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

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

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

1. _____
2. _____

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

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

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

Dated:_____

_____, , ____[xiii]

_____[xiv]

_____[xv]

Defendant, *pro se*.[xvi]

To:

District Attorney of

_____County,

_____, New York[xvii]

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

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

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

State of New York)
County of _____[xxi]) ss.:
_____,[xxii] being duly sworn, deposes and says:

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

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

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

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

_____
_____
_____
_____.[xxxii]

5. _____ _____.[xxxiii]

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

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

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

[xxxviii]

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

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

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

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

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

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

_____*reasons*], [l]

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

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

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

Dated:_____

_____ [lii]

_____ [liii]

Defendant, *pro se*.

To: .

District Attorney of

_____County,

_____, New York [liv]

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

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

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

State of New York)
County of _____ [lviii]) ss.:
_____, [lix] being duly sworn, deposes and says:

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

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

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

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

5. _____. [lxxiv]

6. _____. [lxxv]

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

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

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

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

---

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

xliii. Fill in your name.

xliv. Since you should submit an affidavit with your motion, your name should be filled in here. Also, if you are submitting affidavits of other people who took part in the case, their names should be filled in, and the word "affidavit" changed to "affidavits."

xlv. Fill in the date you signed your affidavit.

xlvi. Enter the number of the court part, if you know it.

xlvii. Enter the address and city of the court hearing your motion.

xlviii. Enter the date and time of your hearing.

xlix. Enter the day, month, and year on which you were sentenced.

l. Give the reasons your sentence should be set aside. *See* Section B(2) of this Chapter. The three grounds are (a) sentence unauthorized; (b) sentence illegally imposed; or (c) sentence invalid otherwise, as a matter of law. If you can raise more than one ground, you should include all that apply.

li. Fill in the amount of notice you feel is necessary, considering the length of time you will need to develop arguments to answer their affidavit.

lii. Enter the city and state, and the date on which you are signing this notice.

liii. Sign your name and print your complete mailing address underneath.

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

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

lvi. Fill in your indictment number.

lvii. Fill in your name.

lviii. Fill in the name of the county in which you are signing this affidavit.

lix. Your name, in capital letters.

lx. List briefly the reasons why you think the court should vacate the sentence against you. *See* Section B(2) of this Chapter for a list of possible reasons.

lxi. Fill in the name of the offense for which you were indicted.

lxii. Fill in the amount of bail you posted.

lxiii. Fill in the trial judge's name.

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

lxv. If you pled guilty, leave out this first sentence in paragraph 3. Instead, write: "I entered a plea of guilty to (give the name of the crime), a Class (give the class of the felony: A, B, C, etc.) felony."

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

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

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

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

lxx. Fill in the date, including the day, month, and year of your sentencing.

lxxi. Fill in the name of the judge who sentenced you.

lxxii. Enter the county and part number of the court that sentenced you.

lxxiii. Enter the terms of the sentence that you received and the name and address of the facility in which you are to serve your sentence.

lxxiv. Indicate whether or not an appeal has been taken in your case. If so, give the name of the court, the date and the name of the judge who heard your appeal.

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

lxxvi. If you have previously raised the issues on which you are basing this motion, you should change this paragraph to reflect the previous court proceedings. If the law has changed since you previously litigated the issues, you should state this.

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

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