

THE 2027 GUIDE TO
CPL 440 Motions

*Vacating Convictions and Setting Aside Sentences
in New York State*

CRIMINAL APPEALS ATTORNEYS

Post-Conviction Relief and Appellate Advocacy

2027 Edition

About This Guide

This guide states the law governing post-conviction motions under Article 440 of the New York Criminal Procedure Law as of its 2027 edition. It is written for people living with a criminal conviction, for the families who stand behind them, and for advocates and counsel who need a working command of the statute and the cases that control it. Citations to controlling authority appear throughout so that every proposition can be verified and carried directly into a brief.

This guide is information, not legal advice. Article 440 practice turns on strict procedural rules, and a single missed deadline or an omitted ground can permanently foreclose relief. No publication can substitute for counsel who has reviewed the record of a specific case. Anyone considering a motion should consult a qualified New York post-conviction attorney before filing.

Contents

1. The Case Is Not Always Over
 2. CPL 440 Motion Versus Direct Appeal
 3. The Architecture of Article 440
 4. Grounds to Vacate a Conviction (CPL 440.10)
 5. Setting Aside a Sentence (CPL 440.20)
 6. Ineffective Assistance of Counsel
 7. Prosecutorial Misconduct and Brady Violations
 8. Newly Discovered Evidence
 9. Actual Innocence Claims
 10. DNA Testing Motions (CPL 440.30)
 11. Resentencing Provisions
 12. Recent Developments
 13. Filing a CPL 440 Motion, Step by Step
 14. After You File
 15. If the Motion Is Denied
 16. If the Motion Is Granted
 17. Alternatives to a CPL 440 Motion
 18. Frequently Asked Questions
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1. The Case Is Not Always Over

A conviction feels final. The trial ends, the appeal is argued and lost, and the system treats the judgment as settled. For a great many people, that finality is an illusion. New York law provides a distinct and powerful remedy that operates after the direct appeal is exhausted, reaches the evidence the jury never saw, and gives the trial court the authority to undo its own judgment. That remedy is the motion under Article 440 of the Criminal Procedure Law.

Article 440 authorizes two core motions: a motion to vacate the conviction itself under CPL 440.10, and a motion to set aside the sentence under CPL 440.20. What makes these motions different from a direct appeal, and often more potent, is that they are not confined to the trial record. **The most serious failures in a criminal case rarely appear in the transcript.** An attorney who never investigated an alibi, a prosecutor who buried favorable evidence, a plea taken without a warning the law required, forensic testimony that science has since discredited: none of these leave a mark on the record an appellate court reviews. The 440 motion is frequently the only vehicle that can put them before a judge.

Article 440 also carries specialized resentencing provisions enacted over the past two decades, reflecting a legislative judgment that some sentences handed down long ago no longer reflect current law or current values. These reach people sentenced under the old Rockefeller drug laws, people carrying marijuana convictions for conduct New York has since legalized, and survivors of domestic violence whose abuse drove the conduct that put them in prison.

This guide walks through every operative provision of Article 440 in practical terms, section by section, with the controlling authority named inline. The law here is unforgiving of procedural error and rewards precision. Knowing how it works is the first step toward using it.

2. CPL 440 Motion Versus Direct Appeal

The difference between a direct appeal and a 440 motion is the difference between what the record shows and what the record hides. Understanding it determines where a claim belongs and whether it survives.

The Direct Appeal: Confined to the Record

A defendant convicted in New York has the right to a direct appeal, taken to the Appellate Division. The appeal asks a panel of judges to review the existing record, meaning the transcripts, exhibits, and written rulings, and to decide whether legal error affected the outcome. The recurring claims are improper evidentiary rulings, erroneous jury charges, legally insufficient evidence, and constitutional violations visible on the face of the record. The defining limit is that the appellate court sees only what is already there.

The 440 Motion: Reaching Beyond the Record

A motion under CPL 440.10 is filed back in the trial court, and it permits the defendant to introduce new material through sworn affidavits, exhibits, and documentary proof that was never part of the trial record. If trial counsel never interviewed a decisive alibi witness, that omission appears nowhere in the transcript. A 440 motion, supported by affidavits from the witness and the defendant, is ordinarily the only way to bring it before a court.

Which Remedy Fits the Claim

The allocation is clean in principle:

- **Record-based error** belongs on direct appeal.
- **Error that depends on facts outside the record** belongs in a 440 motion.

Some claims straddle the line. Ineffective assistance of counsel is the classic example, and New York courts have long recognized that these claims frequently require a 440 proceeding because the full picture cannot be assembled from the transcript alone. See *People v. Love*, 57 N.Y.2d 998 (1982). As Section 6 explains, a 2021 reform removed the procedural trap that once forced record-based ineffectiveness claims onto direct appeal, so counsel now has far greater freedom to litigate the full claim in a single 440 proceeding.

Procedural Bars and the Leave Requirement

Two mandatory bars govern the interaction between the appeal and the motion. Under CPL 440.10(2)(b), a court must deny a 440 motion where the judgment is still appealable or an appeal is pending and the record is adequate to review the issue. Under CPL 440.10(2)(c), the court must deny the motion where the claim could have been raised on direct appeal but the defendant unjustifiably failed to do so. **Both bars apply only when the record contains enough to permit appellate review.** Where the claim depends on facts outside the record, neither bar reaches it.

Deadline that ends cases: A 440 denial is not automatically appealable. The defendant must apply to the Appellate Division for leave to appeal under CPL 460.15 within 30 days of service of the order. Miss that window and appellate review of the denial is gone. A motion to reargue does not stop the clock.

3. The Architecture of Article 440

Article 440 is a set of related provisions, each with a distinct function. The ones that carry the practice are these:

- **CPL 440.10 (Vacating a Judgment).** The central provision. Grounds range from lack of jurisdiction and fraud through false evidence, constitutional violations, newly discovered evidence, DNA evidence of innocence, and ineffective assistance. Treated in Section 4.
- **CPL 440.20 (Setting Aside a Sentence).** Targets the sentence rather than the conviction, available where the sentence was unauthorized, illegally imposed, or otherwise invalid as a matter of law. Treated in Section 5.
- **CPL 440.30 (Procedure and DNA Testing).** Governs how 440 motions are decided and authorizes post-conviction forensic DNA testing. Treated in Section 10.
- **CPL 440.46 (Drug Offense Resentencing).** Resentencing for people sentenced under the old Rockefeller drug laws. Treated in Section 11.
- **CPL 440.46-a (Marijuana Resentencing under the MRTA).** Vacatur or resentencing for marijuana convictions following legalization. Treated in Section 11.
- **CPL 440.47 (DVSJA Resentencing).** Resentencing for domestic violence survivors whose abuse contributed to the offense. Treated in Section 11.

Further provisions include CPL 440.40 (the People's motion to set aside a sentence), CPL 440.50 (notice to crime victims of disposition), CPL 440.55 (notice to the Education Department on felony conviction of a licensed professional), and CPL 440.65 (notice to a child protective agency on conviction of certain crimes against a child).

4. Grounds to Vacate a Conviction (CPL 440.10)

CPL 440.10 is the most heavily litigated section of Article 440. Subdivision 1 enumerates the grounds on which a court may vacate a judgment of conviction, lettered (a) through (k).

(a) Lack of Jurisdiction

A conviction may be vacated where the court lacked jurisdiction over the action or the person. Jurisdictional challenges are uncommon, but when they land they are absolute: a court without jurisdiction had no power to enter a valid judgment in the first place.

(b) Fraud, Duress, or Misrepresentation

A conviction procured by duress, misrepresentation, or fraud on the part of the court or the prosecutor may be vacated. The ground reaches conduct attributable to the government that rendered the proceeding fundamentally unfair, such as a prosecutor making false representations to secure a plea.

(c) False Evidence Known to the Prosecution

Vacatur is available where material trial evidence was false and the prosecutor or the court knew it was false before judgment. A witness who lied about receiving a cooperation deal, where the prosecutor knew of the deal, is the paradigm case.

(d) Evidence Obtained in Violation of Constitutional Rights

A conviction may be vacated where material trial evidence was obtained unconstitutionally, through an illegal search, a coerced confession, or a denial of counsel, in circumstances where the violation was not litigated at trial and cannot be reviewed on the existing record.

(e) Incapacity Due to Mental Disease or Defect

Where the defendant was mentally incapable of understanding or participating in the proceedings, the conviction may be vacated. These motions require supporting psychiatric or psychological proof of incapacity at the relevant time.

(f) Improper and Prejudicial Conduct Not in the Record

This broad provision captures misconduct and error that occurred at trial but left no trace in the transcript. Its most frequent use is for Brady violations, addressed in Section 7, where the prosecution fails to disclose favorable evidence. It also reaches improper ex parte communications and jury tampering.

(g) Newly Discovered Evidence

A conviction may be vacated on significant new evidence surfacing after judgment. Under *People v. Salemi*, 309 N.Y. 208 (1955), the evidence must (1) probably change the result at a new trial; (2) have been discovered since trial; (3) have been undiscoverable earlier with due diligence; (4) be material; (5) be non-cumulative; and (6) not merely impeach record evidence. Treated at length in Section 8.

(g-1) DNA Evidence Demonstrating Innocence

This provision addresses post-conviction DNA evidence, permitting vacatur where forensic testing after judgment establishes a substantial probability of actual innocence in a guilty plea case, or a reasonable probability of a more favorable verdict in a trial case. See Section 10.

(h) Conviction Obtained in Violation of Constitutional Rights

The broadest ground, reaching any constitutional violation that affected the judgment. Its most common use is ineffective assistance of counsel, measured under the federal standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and New York's broader standard under *People v. Baldi*, 54 N.Y.2d 137 (1981). These claims encompass failures to investigate, to file motions, to advise on immigration consequences under *Padilla v. Kentucky*, 559 U.S. 356 (2010), and to communicate plea offers. See Section 6.

The Appellate Division, Second Department, recognized in *People v. Hamilton*, 115 A.D.3d 12 (2014), that a freestanding claim of actual innocence is cognizable under this subdivision. The Court of Appeals in *People v. Tiger*, 32 N.Y.3d 91 (2018), held that the freestanding claim is unavailable to defendants who pleaded guilty. See Section 9.

(i) Conviction Resulting from Trafficking Victimization

Vacatur is available where the defendant's participation in the offense resulted from being a victim of sex trafficking, labor trafficking, or trafficking in persons. Originally confined to prostitution-related offenses, the provision was expanded in 2021 to reach any offense resulting from trafficking victimization. Where granted, the court vacates the judgment and dismisses the charges.

(j) and (k) Immigration and Marijuana Grounds

Subdivision (j) permits vacatur of certain pre-enactment class A or unclassified misdemeanor convictions carrying severe collateral consequences, including immigration consequences, with rebuttable presumptions that the plea was not knowing, voluntary, and intelligent. Subdivision (k) permits vacatur of marijuana-related offenses predating the 2021 reforms, again with presumptions favoring the defendant.

Where the Motions Actually Live

In practice, the overwhelming majority of CPL 440.10 motions rest on four grounds: ineffective assistance under (h), newly discovered evidence under (g), Brady violations and off-record misconduct under (f), and trafficking victim status under (i), with immigration challenges running through (h), (j), and (k).

5. Setting Aside a Sentence (CPL 440.20)

Where CPL 440.10 attacks the conviction, CPL 440.20 attacks the sentence. A successful 440.20 motion leaves the conviction standing; the defendant remains convicted but is resentenced lawfully.

The Standard

CPL 440.20(1) authorizes the court to set aside a sentence that was unauthorized, illegally imposed, or otherwise invalid as a matter of law.

- **Unauthorized sentence.** A sentence beyond what the law permits, such as a term exceeding the statutory maximum or a period of post-release supervision longer than the statute allows.

- **Illegally imposed sentence.** A sentence imposed through a procedure that violated the defendant's rights even if it falls within the lawful range, such as a failure to order a required pre-sentence investigation or a denial of allocution.
- **Otherwise invalid as a matter of law.** A catch-all reaching sentences based on materially inaccurate information or rendered invalid by a retroactive change in law.

Procedural Bars

Under CPL 440.20(2), the court must deny the motion where the issue was previously determined on the merits on appeal, unless there has been a retroactively effective change in the law. Under CPL 440.20(3), the court may deny where the issue was decided on a prior motion, but retains discretion to grant in the interest of justice and for good cause shown. These bars are looser than those governing 440.10, reflecting the principle that an illegal sentence should not survive on a procedural technicality.

Check the resentencing statutes first: CPL 440.20 is not the only route to a sentence challenge. The specialized provisions (440.46 for drug offenses, 440.46-a for marijuana, 440.47 for domestic violence survivors) carry their own, often more favorable, standards. Where a defendant may qualify under one of those statutes, pursue it alongside or instead of a general 440.20 motion. See Section 11.

6. Ineffective Assistance of Counsel

The Sixth Amendment guarantees effective representation, and in New York, ineffective assistance is among the most frequently litigated grounds under CPL 440.10. It is often the only way to challenge what went wrong inside the attorney-client relationship, where the failures by their nature never reached the record.

New York's Standard: Meaningful Representation

New York applies its own constitutional standard, established in *People v. Baldi*, 54 N.Y.2d 137 (1981). The question is whether the defendant received meaningful representation, assessed by examining the evidence, the law, and the circumstances in their totality and as of the time of the representation. A single tactical misstep does not establish ineffectiveness; the focus is the overall quality of the defense rather than isolated decisions that look wrong only in hindsight.

How New York Diverges from Strickland

The federal standard under *Strickland v. Washington*, 466 U.S. 668 (1984), requires both deficient performance and prejudice, meaning a reasonable probability of a different outcome. New York's standard is broader. As the Court of Appeals explained in *People v. Benevento*, 91 N.Y.2d 708 (1998), whether the defendant would have been acquitted but for counsel's errors is relevant but not dispositive under the state guarantee. Reversal remains available where the defendant was denied a fair process, even without a clear showing that the verdict would have changed. Claims that fail the federal two-prong test can succeed in New York state court.

Recurring Failures

- **Failure to investigate.** Not interviewing witnesses, not reviewing forensic evidence, not developing available defenses.

- **Failure to call witnesses.** Declining, without explanation, to present witnesses with direct knowledge of the facts.
- **Defective plea advice.** Inaccurate advice on sentencing exposure, immigration consequences, or registration, or failure to convey a favorable offer.
- **Failure to file motions.** Not moving to suppress evidence obtained through an arguably unconstitutional search.
- **Failure to object.** Standing silent while inadmissible evidence or improper argument reaches the jury.

The 2021 Reform: Record-Based Claims

Before 2021, New York law set a trap. A claim whose basis appeared on the record generally had to be raised on direct appeal, not in a 440 motion, yet the appellate court would often find the record inadequate to evaluate counsel's strategy. The Legislature amended CPL 440.10(2)(b) and (2)(c) to remove the bar, so a defendant may now bring an ineffective assistance claim in a 440 motion regardless of whether the supporting facts appear on the record. The change aligned New York with the federal system and the majority of states and is one of the most consequential expansions of post-conviction rights in a generation.

Building the Claim

Assemble everything bearing on what counsel did and failed to do: file notes, correspondence, and the recollections of family members. Affidavits from witnesses who were never contacted carry real weight. Expert opinion showing what a competent investigation would have uncovered strengthens the claim further. Under *Baldi*, the defendant need not prove a different outcome was probable, but must show that the representation was not meaningful in the context of the case.

7. Prosecutorial Misconduct and Brady Violations

The prosecutor's power carries a constitutional obligation to play fair. When prosecutors suppress favorable evidence, present testimony they know to be false, or otherwise abuse that power, the conviction is open to challenge under CPL 440.10.

Brady v. Maryland: The Duty to Disclose

Brady v. Maryland, 373 U.S. 83 (1963), holds that suppression of evidence favorable to the accused violates due process where the evidence is material to guilt or punishment. A Brady violation has three elements: (1) the evidence is favorable, whether exculpatory or useful for impeachment; (2) the prosecution suppressed it, willfully or inadvertently; and (3) the suppression was material, meaning a reasonable probability of a different outcome.

How These Violations Surface

Brady violations are concealed at trial by definition. They emerge later through Freedom of Information Law requests, post-conviction investigation by new counsel or innocence organizations, revelations about prosecution witnesses such as undisclosed cooperation agreements, and disciplinary proceedings involving the same office.

The New York Vehicle

A Brady claim is raised under CPL 440.10(1)(f) for improper conduct not appearing in the record, under (1)(b) for fraud or misrepresentation, or under (1)(h) as a constitutional violation. The 440 motion is the proper vehicle precisely because the evidence of the violation was never part of the trial record. New York applies a materiality threshold that eases somewhat where the defense made a specific request for the evidence that was ignored.

Misconduct Beyond Brady

Other grounds include the knowing use of false testimony under CPL 440.10(1)(c), improper argument to the jury in extreme cases, and coercion of witnesses. These are among the most powerful bases for a 440 motion, and among the most investigation-intensive. They are rarely won without experienced post-conviction counsel and a developed factual record.

8. Newly Discovered Evidence

Sometimes the evidence that would have changed the verdict does not surface until after conviction. CPL 440.10(1)(g) provides the mechanism to seek a new trial when genuinely new evidence comes to light.

The Six-Factor Test

New York applies a rigorous six-factor test rooted in *People v. Salemi*, 309 N.Y. 208 (1955), and reaffirmed in *People v. Hartle*, 2023 NY Slip Op 02029 (2023). The defendant must establish all six by a preponderance of the evidence:

- The evidence will probably change the result at a new trial.
- It was discovered since trial.
- It could not have been discovered before trial with due diligence.
- It is material to the issue.
- It is not cumulative of the former evidence.
- It does not merely impeach or contradict the former evidence, though courts recognize exceptions for powerful impeachment going to the core of the case.

The Due Diligence Requirement

The third factor is where these claims most often turn. In *Hartle*, the Court of Appeals held that evidence the defendant knew about, helped create, and deliberately destroyed before trial could not qualify as newly discovered, whatever technology later recovered it. The evidence must be genuinely new, not merely newly obtained.

What Qualifies

Successful claims most often involve recanting witnesses, treated with caution because recantation is notoriously unreliable, new forensic evidence produced by scientific advances, previously unknown witnesses, and evidence of third-party guilt. Where the new evidence is so overwhelming that no reasonable jury could convict, the court may dismiss the charges rather than order a new trial.

9. Actual Innocence Claims

An actual innocence claim asserts not merely that the trial was unfair, but that the person convicted is not guilty.

The Framework

In *People v. Hamilton*, 115 A.D.3d 12 (2014), the Appellate Division, Second Department, recognized a freestanding claim of actual innocence under CPL 440.10(1)(h), holding that the conviction or continued incarceration of a guiltless person violates the Due Process Clause of the New York Constitution.

The Standard

The defendant must present clear and convincing evidence of actual innocence. Where the court, after weighing all reliable evidence, determines that no reasonable juror would find guilt beyond a reasonable doubt, dismissal is appropriate, because retrial of a demonstrably innocent person serves no legitimate purpose.

The Guilty Plea Limitation

In *People v. Tiger*, 32 N.Y.3d 91 (2018), the Court of Appeals held that the freestanding actual innocence claim is unavailable to a defendant convicted on a guilty plea, reasoning that the plea waived the right to trial. Innocence advocates have criticized the holding, noting that innocent people do plead guilty, often under pressure or inadequate advice or in the shadow of a far harsher sentence after trial. It remains good law. Critically, *Tiger* does not bar a defendant who pleaded guilty from seeking DNA testing under CPL 440.30. See Section 10.

Supporting Evidence

These claims are typically built on DNA excluding the defendant, identification evidence showing misidentification, a confession or admission by the actual perpetrator, and expert testimony rebutting the forensic evidence used at trial. They frequently overlap with other grounds, and defendants ordinarily raise several grounds in the same motion.

10. DNA Testing Motions (CPL 440.30)

DNA evidence has reshaped the criminal justice system. CPL 440.30(1-a) provides a specific procedure for a convicted person to request forensic DNA testing of evidence not tested at trial or now susceptible to more advanced methods.

Who May File and When

Any convicted person may move for DNA testing in the court that entered the judgment. For a defendant convicted by guilty plea, the motion generally must be filed within five years of entry of judgment. Three exceptions can extend that deadline: diligence combined with extraordinary circumstances that prevented timely filing; a factual basis unknown to the defendant and not discoverable through due diligence; and the interests of justice on the totality of the circumstances.

What the Movant Must Show

For a defendant convicted at trial, the movant must show that evidence containing DNA was secured in connection with the trial and that, had testing been conducted and admitted, there is a reasonable probability the verdict would have been more favorable. For a defendant convicted by guilty plea, the standard is higher: a substantial probability that the defendant was actually innocent.

When Results Are Favorable

Favorable DNA results can support a motion to vacate under CPL 440.10 as actual innocence evidence, as newly discovered evidence, or as proof of a constitutional violation. Because DNA testing under CPL 440.30 is available even to defendants who pleaded guilty, it is a critical pathway for people convicted by plea who may have biological evidence establishing innocence.

11. Resentencing Provisions

Several provisions within Article 440 allow a reduced sentence based on a change in the law. For people serving long terms under regimes since reformed, these mechanisms can be transformative.

Drug Offense Resentencing (CPL 440.46)

The Rockefeller Drug Laws of 1973 imposed some of the harshest drug sentences in the country, including mandatory minimums of fifteen years to life for relatively small quantities. The Drug Law Reform Act of 2009, codified in part at CPL 440.46, allows people sentenced under the old laws to apply for resentencing.

To qualify, a person must be in DOCCS custody, whether incarcerated or on parole; have been convicted of a class B felony drug offense under Penal Law Article 220; have committed the offense before January 13, 2005; and be serving an indeterminate sentence with a maximum exceeding three years. People convicted of exclusion offenses under Correction Law 803 are ineligible. Where the criteria are met, the court must resentence to a determinate term under the reformed provisions unless substantial justice dictates denial, weighing factors including institutional record and programming.

Marijuana Resentencing (CPL 440.46-a)

The Marijuana Regulation and Taxation Act of 2021 legalized adult-use cannabis and addressed the legacy of prohibition.

- **Automatic relief.** For many people, relief is automatic. The Office of Court Administration was directed to vacate, dismiss, and expunge convictions for conduct no longer criminal under Penal Law Article 222, a process that continued through implementation.
- **Resentencing motions.** Where the conduct would still be an offense under Article 222 but carry a lesser penalty, the defendant may move for resentencing, and the court may vacate, substitute a lesser offense, or reduce the sentence.

DVSJA Resentencing (CPL 440.47)

The Domestic Violence Survivors Justice Act of 2019 recognizes that many incarcerated people committed their offenses while suffering domestic violence that was a significant contributing factor.

Eligibility requires that the applicant be currently incarcerated and serving a sentence of at least eight years; have committed the offense before August 12, 2019; not have been sentenced as a second violent felony, persistent felony, or persistent violent felony offender; and not have been convicted of certain excluded offenses, including first-degree murder, aggravated murder, terrorism offenses, and offenses requiring sex offender registration.

At least two pieces of evidence must corroborate the abuse, with at least one drawn from a specified list that includes court records, pre-sentence reports, social services and hospital records, sworn witness statements, law enforcement records, orders of protection, and domestic incident reports. The process runs in three steps: the applicant files a request establishing threshold eligibility and seeking assigned counsel; on a finding of preliminary eligibility, counsel is appointed and the full motion prepared; the court holds a hearing where the applicant must prove by a preponderance that the abuse was substantial, that it significantly contributed to the offense, and that a standard sentence would be unduly harsh. If granted, the court may impose a substantially shorter sentence under Penal Law 60.12.

12. Recent Developments

Post-conviction relief in New York continues to expand. Several developments have widened the options or stand poised to.

The Clean Slate Act

New York's Clean Slate Act, signed in November 2023 and effective November 16, 2024, provides for automatic sealing of eligible convictions after fixed waiting periods, with no application required. Full implementation is proceeding toward November 16, 2027. Misdemeanors become eligible three years after sentencing or release, whichever is later; felonies after eight years. Excluded convictions include sex offenses and non-drug class A felonies, while drug-related convictions, even class A felonies, are eligible. Sealed records remain accessible to law enforcement in defined circumstances but drop off standard background checks. See Section 17.

The Second Look Act

This measure would allow a person who has served ten years or half the sentence, whichever is less, to petition the sentencing court for a reduction, with the court weighing age, maturity, rehabilitation, and the impact of continued incarceration. It has been carried forward in successive legislative sessions and remains a priority for sentencing-reform advocates, alongside a limited merit-time expansion already enacted.

Elder Parole

The Elder Parole bill would require the Board of Parole to interview any incarcerated person aged 55 or older who has served at least 15 years. It is distinct from the broader Fair and Timely Parole proposal and, like the Second Look Act, remains under active consideration rather than enacted.

Decriminalization-Based Vacatur

A proposal to amend Article 440 would create a new ground to vacate where the underlying conduct has been decriminalized or a change in law warrants retroactive application, providing a streamlined mechanism beyond the automatic expungement provisions of the MRTA and the Clean Slate Act.

The Direction of Travel

The trajectory is unmistakable. The 2021 opening of CPL 440.10 to record-based ineffectiveness claims, the DVSJA's retroactive resentencing, the Clean Slate Act, and the pending proposals all reflect a growing recognition that justice does not end with the original verdict or sentence. For anyone holding a viable claim, the climate for post-conviction relief is more favorable than it has been in decades.

13. Filing a CPL 440 Motion, Step by Step

Where to File

A CPL 440 motion is filed in the trial court that entered the judgment, typically a County Court or Supreme Court. It is not filed in the Appellate Division.

A Written Motion with Sworn Allegations

The motion must be in writing. Where it rests on facts, it must contain sworn allegations made under oath by the defendant or another person with knowledge. Allegations may rest on personal knowledge or on information and belief, but in the latter case the affiant must identify the sources and the grounds for the belief. A motion lacking sworn allegations of essential facts can be denied without a hearing under CPL 440.30(4)(b).

Supporting Documents

A well-built motion includes affidavits that are sworn and notarized, exhibits such as forensic reports and newly discovered records and expert analyses, and a legal memorandum citing the controlling subdivision and the governing cases.

Service and Timing

A complete copy must be served on the District Attorney with proof of service filed with the court. There is no fixed statute of limitations, but unexplained delay weighs against the motion, and filing sooner is almost always better.

Successive Motions

There is no absolute bar on filing more than one 440 motion, but successive motions are heavily restricted under CPL 440.10(3). The principal exception is newly discovered evidence that was unavailable despite due diligence. The first motion is the best opportunity, so every available ground should be raised in it.

Why the first motion matters so much: CPL 440.10(3)(c) lets a court deny a later motion raising a ground that could have been raised earlier. A hasty first filing that leaves out viable grounds can forfeit them permanently. This is the single strongest reason to have experienced counsel assemble the motion before it goes in.

Pro Se or Counsel

A defendant may file pro se, and there is no filing fee. Courts extend some formatting leniency to pro se motions, but the substantive requirements are identical. Experienced post-conviction counsel identifies the

strongest grounds, avoids the procedural traps, and presents the motion in the form most likely to earn a hearing.

14. After You File

The People's Response

After filing and service, the District Attorney may answer with affidavits, exhibits, and legal argument. The court then reviews the papers and decides how to proceed.

Three Outcomes

- **Summary denial without a hearing.** Under CPL 440.30, the court may deny on the papers where the allegations state no legal basis, lack sworn support, are conclusively refuted by documentary proof, or rest solely on the defendant's uncorroborated say-so with no reasonable possibility of truth. This last standard is why corroborating affidavits matter so much.
- **Evidentiary hearing.** Where the motion raises factual questions that cannot be resolved on the papers, the court must hold a hearing under CPL 440.30(5). The defendant presents witnesses and evidence, the People cross-examine and present their own, and the judge decides without a jury. The defendant bears the burden by a preponderance.
- **Grant without a hearing.** Where the papers allege a legally sufficient ground on sworn facts that are undisputed or unrefuted, the court must grant the motion. This is uncommon but does happen, particularly where the prosecution concedes.

Timeline

There is no fixed timeline. Some courts decide within months; others take more than a year. An evidentiary hearing functions as a mini-trial, and the court may call for post-hearing briefs before ruling.

15. If the Motion Is Denied

Procedural Bars

Mandatory denial under CPL 440.10(2) applies where the issue appears on the record and was or could have been raised on direct appeal, though ineffective assistance claims are expressly excluded from this bar after the 2021 amendment. Discretionary denial under CPL 440.10(3) applies where the issue was previously decided on a prior motion or could have been raised in one.

The Interest-of-Justice Exception

Where a discretionary bar applies, the court retains authority to grant in the interest of justice and for good cause shown. In *People v. Phelps*, 2025 NY Slip Op 01680 (3d Dep't 2025), the Appellate Division invoked that exception where irregularities marked a prior denial order and new witness affidavits about counsel's misadvice on parole eligibility supported the claim. Procedural bars are significant hurdles, not always insurmountable ones.

Appealing a Denial

There is no automatic right to appeal a denial. The defendant must apply for leave to appeal from the Appellate Division under CPL 460.15 within 30 days of service of the order. The deadline is strict, and a motion to reargue does not pause it. If the Appellate Division denies leave, further leave may be sought from the Court of Appeals.

Federal Habeas Corpus

After exhausting state remedies, a defendant may file a federal habeas petition under 28 U.S.C. 2254. State remedies must be exhausted first. The petition must be filed within one year of when the conviction became final under AEDPA, though that clock is tolled while a properly filed 440 motion is pending. Federal courts apply strict deference, granting relief only where the state adjudication was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.

16. If the Motion Is Granted

Outcomes

- **New trial ordered.** The conviction is vacated and the case returns to its pre-trial posture. The defendant is again presumed innocent, and the People must prove guilt beyond a reasonable doubt.
- **Conviction vacated and charges dismissed.** Where retrial would be inappropriate or the People concede they can no longer prove the case.
- **Resentencing.** Where the court grants a CPL 440.20 motion, the conviction stands and a new sentencing proceeding is held.
- **Reduction to a lesser offense.** With the prosecution's consent, the court may reduce the conviction to a lesser included offense.

What Follows

When a conviction is vacated, the District Attorney may retry the case, offer a plea, or dismiss. An incarcerated defendant may be released pending retrial, though the court may set bail. The next steps should be planned with counsel immediately, because the posture of the case changes quickly once relief is granted.

17. Alternatives to a CPL 440 Motion

Record Sealing Under CPL 160.59

A person may apply to seal a record with no more than two convictions, no more than one of them a felony, where at least ten years have passed since the most recent sentence or release and no charges are pending. Sex offenses, violent felonies, and class A felonies are ineligible. Sealing makes the conviction non-public but does not vacate it.

The Clean Slate Act

Effective November 16, 2024, the Clean Slate Act automatically seals eligible convictions without an application, with full implementation proceeding toward November 16, 2027. Misdemeanors become eligible three years after sentencing or release, felonies after eight years, with sex offenses, non-drug class A felonies,

and certain serious offenses excluded. The Act does not vacate convictions or correct legal error, but for a person who has vacated a conviction and been resentenced or had charges dismissed, it can accelerate the practical benefit by keeping sealed records from generating continuing collateral consequences.

Executive Clemency

The Governor may grant a pardon, relieving the consequences of a conviction, or a commutation, reducing a sentence. Applications go to the Executive Clemency Bureau within DOCCS, and commutation applicants generally must have served at least half the minimum term. Large numbers of clemency applications remain pending at any given time, and the process is discretionary.

Other Remedies

A writ of error coram nobis challenges ineffective assistance of appellate counsel and is filed directly with the Appellate Division. An Article 78 proceeding challenges administrative decisions by government agencies, such as parole determinations, but cannot be used to attack a conviction or sentence.

18. Frequently Asked Questions

What does it cost to file a CPL 440 motion?

There is no filing fee for criminal motions in New York. A pro se filing costs only photocopying, postage, and notarization. Legal aid organizations and law school clinics may assist at no cost.

Can I file if I pleaded guilty?

Yes. Common grounds include ineffective assistance, especially failure to advise on immigration or other collateral consequences, newly discovered evidence, coercion, and prosecutorial fraud. A freestanding actual innocence claim unrelated to new DNA evidence is generally unavailable after a voluntary plea. See Section 9.

Is there a deadline?

There is no fixed statute of limitations for a 440 motion, but delay works against the motion as evidence deteriorates and courts view unexplained delay skeptically. If federal habeas relief may follow, note that the one-year AEDPA clock runs from when the conviction becomes final. See Section 15.

Do I need a lawyer?

No, but experienced post-conviction counsel materially improves the odds by identifying the strongest grounds and avoiding the procedural traps that sink pro se motions. See Section 13.

Can I file more than one motion?

Yes, but successive motions face procedural restrictions, and the court may deny grounds that were or could have been raised earlier. Newly discovered evidence is the principal exception. See Section 13.

How long does it take?

There is no standard timeline. Resolution ranges from a few months to well over a year, longer where a hearing is held or a denial is appealed. See Section 14.

Will I be released if the motion is granted?

Not necessarily. If the conviction is vacated and a new trial ordered, release or bail is possible. If charges are dismissed, release should follow. If only the sentence is set aside, resentencing follows. See Section 16.

Can I file while my direct appeal is pending?

Yes, and it is sometimes strategically advisable where the claims depend on facts outside the record. The court may hold the motion in abeyance pending the appeal. An issue raised and decided on appeal cannot be relitigated in a 440 motion. See Section 2.

CRIMINAL APPEALS ATTORNEYS

Post-Conviction Relief and Appellate Advocacy

A criminal appeal is not a second trial, and a post-conviction motion is not a form to fill out. Both are won on the quality of the record a lawyer builds and the precision of the argument drawn from it. The reversal of a New York conviction is rare, and it goes to the advocate who finds the error others missed and frames it in the exact terms the law requires.

The firm's practice is confined to appeals and post-conviction litigation. That focus is the point. Every matter begins with a rigorous case review, an honest assessment of whether a viable ground exists and what it would take to prevail, because the worst outcome is a premature or incomplete filing that forecloses a claim that proper preparation could have won.

This guide is educational and does not constitute legal advice. Reading it creates no attorney-client relationship.

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