MOTIONS TO VACATE JUDGMENTS OF CONVICTIONS AND SENTENCES:

CPL 440.10 and 440.20

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More often than not, defendants who seek to challenge a judgment of conviction or a sentence imposed thereon do so by way of direct appeal to an intermediate appellate court (e.g. Appellate Division from County or Supreme Court or County Court from the local criminal courts).

Another avenue of relief is a motion to set aside the judgment (CPL 440.10) and/or the sentence (CPL 440.20), which, while NOT a substitute for a direct appeal, can provide a basis for post-judgment relief via collateral attack if the statutory criteria have been satisfied. It is worth keeping in mind, however, that CPL 440 motions are often denied for failure to raise an issue on appeal that was supportable by facts in the record or because of unjustifiable failure to bring or perfect an appeal, or to develop the record in support of the issue: see People v Cochrane 27 AD3d 659[2d dep't 2006]).

Unlike CPL 330.30 motions which must be brought before sentence is imposed, a CPL 440 motion can be brought pretty much any time after judgment is imposed, whether before, during or after the pendency of an appeal. However, courts may become less inclined to grant motions brought long after the fact (especially with claims based on newly discovered evidence which require due diligence on the defendant's part), because the case may now become unprovable due to the passage of time.

Where the motion is based on a claim of ACTUAL (i.e. factual) INNOCENCE, there is no such concern because the case will be dismissed (rather than a new trial ordered), if the motion is granted. This, of course, is at it should be because a person should not be subject to further prosecution much less be exposed to the prospect of spending any more time in jail for a crime that he/she did not commit. (People v Tankleff 49 AD3d 177 [2d dep't 2007]).

Motions under CPL 440 frequently challenge judgments of conviction derived from GUILTY VERDICTS (the only avenue if the claim is based on a claim of newly discovered evidence [CPL 440.10[1][g]), including challenges based on post-judgment DNA testing that creates a reasonable probability of a more favorable verdict (CPL 440.10 [1] [g-1][2]) and a claim of actual innocence (People v Hamilton 15 AD3d 12 [2d dep't 2014]): A post verdict claim of actual innocence pursuant to CPL 440.10 [1[[h] may be allowed despite procedural obstacles that might otherwise apply under CPL 440.10 [1][g], [see People v Salemi 309 NY 208 1955], but defendant, who no longer enjoys the presumption of innocence, must establish his innocence by clear and convincing evidence.

Collateral attacks can also be brought against convictions based on a GUILTY PLEA (e.g. for ineffective assistance of counsel in failing to inform client of immigration consequences of plea, and upon post-judgment DNA testing that creates a substantial probability of actual innocence (CPL 440.10[1][g-1][1], but does NOT include a claim of actual innocence (See People v Tiger 2018 NY Slip Op. 04377 [6/14/18] where the Court of Appeals held that CPL 440.10 [1][h] should not be extended to grant relief not intended by the Legislature because a voluntarily entered guilty plea should mark the end of the case rather than a gateway to further litigation. [Citing, inter alia, People v Hansen 95 NY2d 222 [2000]).

It should be noted that a defendant can not automatically appeal from an adverse determination of a CPL 440 motion. Rather, he/she must first obtain permission to appeal and must bring such request within 30 days of receipt of notice of entry of the judgment denying his/her motion. (See CPL 450.15, 460.15).

CPL 440.10

With respect to motions to set aside a judgment of conviction, CPL 440.10 provides that: 1. at any time after entry of judgment, the court where the judgment was entered may, upon motion of the defendant, vacate such judgment on (any of) the (following) grounds that: a. the court LACKED JURISDICTION over the action or the defendant; b. the judgment was obtained by DURESS, MISREPRESENTATION OR FRAUD by the court or the prosecutor or others acting on their behalf; c. MATERIAL TRIAL EVIDENCE resulting in the conviction was FALSE (and known by the prosecutor to be so), before entry of judgment; d. material trial evidence resulting in the conviction was OBTAINED IN VIOLATION of the defendant's CONSTITUTIONAL RIGHTS ; e. during the proceedings resulting in the judgment, the DEFENDANT COULD NOT UNDERSTAND or participate in them due to MENTAL DISEASE OR DEFECT f. improper and PREJUDICIAL CONDUCT NOT APPEARING IN THE RECORD occurred during the trial resulting in the conviction and would have required reversal of the judgment on appeal therefrom if it had appeared in the record; g. NEW EVIDENCE has been discovered since the entry

of judgment BASED ON A VERDICT AFTER TRIAL, which the defendant could not have produced at the trial (even with due diligence by him/her), and which is of SUCH CHARACTER as to create a PROBABILITY of a more favorable verdict for the defendant had it been received at the trial, (but this motion MUST be made with DUE DILIGENCE after discovery of such alleged new evidence); g-1. based on FORENSIC DNA TESTING performed since entry of the judgment, in the case of a GUILTY PLEA, the defendant has demonstrated a SUBSTANTIAL PROBABILITY that he is ACTUALLY INNOCENT of the offense of which he/she was convicted or, if convicted AFTER TRIAL, there is a REASONABLE PROBABILITY that the verdict would have been more favorable to the defendant.

See People v Simmons 2020 NY Slip Op. 931 (4th dep't 2/7/20): Motion seeking order for DNA testing of victim's body hair sought by defendant convicted after trial of Rape and Sex Abuse was properly denied because defendant failed to demonstrate a reasonable probability of a more favorable verdict, and the issue was previously raised and decided on the merits of an earlier motion seeking the same relief (63 AD3d 1605 [4th dep't 2009]). Defendant also failed to make out a prima facie showing of actual innocence. (People v Pottinger 156 AD3d 1379 [4th dep't 2017]).

As noted above, a free-standing claim of ACTUAL INNOCENCE in a case involving a guilty verdict is one basis to set aside a judgment of conviction (or at least obtain a hearing (CPL 440.3[5]), on the issue (People v Hamilton supra), under CPL 440.10(1)(h) which involves a claim that the judgment was obtained in violation of the defendant's state or federal constitutional rights (e.g. due process, fair trial, meaningful representation by counsel).

The defendant in Hamilton was convicted of Murder 2d degree based on a shooting that occurred in Brooklyn NY on January 4, 1991 when the defendant (who asserted an alibi defense) claimed that he was in New Haven Connecticut interviewing for a job at a talent agency. His trial attorney noticed two people (1 and 2) as alibi witnesses, both of whom did not testify on account of illness and fear (based on an alleged threat by a detective) respectively. The People's primary identification witness (the victim's girlfriend), later recanted her identification testimony.

At a CPL 330 hearing, the girlfriend testified that she lied because the police threatened her with prosecution and removal of her child. The prosecutor and detective offered contrary testimony, and the court rejected the recantation claim as unreliable, and denied the motion.

The defendant made the first of several CPL 440 motions in 1994 based on a new witness (who said the defendant didn't commit the crime), and he sought to include in a hearing two additional alibi witnesses (3 and 4), whom trial counsel had not named in the Notice of alibi. According to the defendant's moving papers, these two witness (a Connecticut cop and another person, neither of whom, he said, could be located for trial), were prepared to testify that the defendant was with them interviewing for a job at a talent agency in New Haven at the time of the shooting.

On April 12th, 1996, the trial court summarily denied the motion and refused the defendant's request to expand the proceedings to include the two additional witnesses because: 1. they were not on the original notice of alibi; 2. their testimony was not "newly discovered inasmuch as the defendant was aware of them at the time of the trial and failed to establish that they could not have been produced at trial and 3. their proposed testimony was not credible.

The defendant was granted leave to appeal the denial of this motion which was consolidated with his direct appeal. The Appellate Division held that trial counsel was not ineffective for failing to call the named alibi witnesses (1 and 2) (272 AD2d 553), and the defendant did not raise the issue of the court's denial of his motion to expand the 440 hearing.

From 2005 to 2009, the defendant brought more CPL 440 motions (and petitions for habeas corpus relief) based on claims of actual innocence. He claimed that his proposed alibi evidence (including an affidavit from yet another witness in New Haven), established that he was not the shooter. Defendant's new counsel challenged the court's 1996 summary rejection of "compelling evidence" of actual innocence (i.e. W'S 3 and 4), which, he asserted, constituted a denial of due process. (Citing In re Davis 557 US 952 [2009]).

Counsel further argued that the procedural bars raised by the People (e.g. the court's earlier finding that these witnesses did not meet the test of newly discovered evidence), should not apply where the defendant bases his claim on actual innocence. Moreover, the court, in counsel's view, should consider the claim of ineffective assistance of counsel for not including W'S 3 and 4 on the alibi notice notwithstanding the defendant's failure to assert this issue in previous motions. (Though opposing the motion, the People conceded that if the defendant established his actual innocence by clear and convincing evidence, his continued incarceration would be fundamentally unfair in violation of the State Constitution).

The defense urged that a free-standing actual innocence claim under CPL 440.10.1(h)exists separate and apart from any claim of newly discovered evidence, and need not meet the procedural requirements of CPL 440.10 1(g). Rather, it requires an examination of all the evidence, old and new, and should be decided by the PREPONDERANCE OF THE EVIDENCE standard applicable to all other 440 motions. (CPL 440.30[6]).

The People argued that since the defendant's claim falls under CPL 440.10(h), it was subject to the applicable procedural bars, and inasmuch as the defendant no longer enjoyed the presumption of innocence, the standard of proof should be clear and convincing evidence.

On January 11, 2011, the court denied the defendant's latest motion (citing prior decisions determining that W'S 3 and 4 were not newly discovered evidence and the defendant's failure to raise certain issues on his appeals from earlier denials of such motions). The court also rejected the actual innocence claim. The defendant appealed.

The defendant was released to parole supervision on December 7, 2011 and argued on appeal that he should have at least been granted a hearing to determine whether his proposed alibi evidence demonstrated his actual innocence. He also alleged that trial counsel was ineffective for failing to include W'S 3 and 4 in his notice of alibi. He also argued for the first time that two additional alibi witnesses constituted new evidence but the court found that as to this argument, the defendant failed to satisfy the requirements of People v Salemi 309 NY 208 [1955]: 1.the evidence would probably change the outcome; 2. it was discovered since the trial; 3. it could not be discovered with due diligence before the trial; 4. the evidence was material; 5. it was not cumulative and 6. it was not just impeachment evidence. The court noted that by failing to raise the "new evidence" argument in his CPL 440 motion, it was not properly before the court on appeal. (citing People v Jenkins 84 AD3d 1403 (2011).

The court also noted, however, that the defendant had not raised the actual innocence claim in his direct appeal and that the facts underlying his current claim were not part of the record. Therefore, the defendant's most recent motion was NOT subject to the mandatory bar of CPL 440.10 (2) (a) [issue previously determined on the merits of an appeal from the judgment of conviction]).

While a court MAY deny a CPL 440.10 motion where the defendant could have raised it earlier but didn't (People v Cochrane 27 AD3d 659 [2d dep't 2006]), the Hamilton court observed that it could, in its discretion, grant such motion if it was otherwise meritorious. The court noted that the defendant first raised his actual innocence claim in 2005, and such claim, though otherwise procedurally barred, stands on its own and can be decided if it appears credible. As such, it can serve as a gateway to review of another claim that might otherwise be procedurally foreclosed. (Citing Schlep v Delo 513 US 298 [1995] and McQuiggin v Perkins 569 US 383 [2013]).

Noting further that actual innocence equals factual innocence, the court held that it must be based on reliable evidence not presented at trial which establishes its merit by CLEAR AND CONVINCING evidence. Such evidence may be considered WHETHER OR NOT it satisfies the Salemi factors noted above. The court went on to explain that a person who has committed no crime has a due process right to be free from (unwarranted) punishment, and the incarceration of an innocent person (as well as subjecting him to conditions of parole) constitutes cruel and unusual punishment. (People v Broadie 37 NY2d 100 [1075]).

Consequently, in the court's analysis, a FREE-STANDING CLAIM OF INNOCENCE may be addressed under CPL 440.10 1 (h) based on a violation of the defendant's constitutional rights. (Citing, inter alia, People v Caraway 36 Misc 3d 1224[a][Sup Ct NY County 2012] and People v Cole 1 Misc 3d 541 [Sup Ct Kings County 2003]).

The court said that a prima facie showing of actual innocence is made out where there is a sufficient showing of possible merit to warrant a fuller exploration by the court at a hearing where all reliable evidence (including evidence that might otherwise be excluded on procedural grounds (e.g. failing to include W'S 3 and 4 on the alibi notice), should be admitted. And if the defendant establishes his innocence by clear and convincing evidence, there would be no need for a new trial where no reasonable jury could be expected to find guilt beyond a reasonable doubt.

Long story short, in view of the proposed alibi evidence (and indications of possible witness coercion by police), the judgment denying the defendant's motion was reversed and the matter was remitted to the trial court for a hearing on the defendant's free-standing claim of actual innocence.

A far less generous interpretation of CPL 440.10(1)(h) and conclusion were reached in People v Tiger supra where the defendant/nurse's judgment of conviction stemmed not from a verdict after trial, but from a guilty plea, in that case, to a felony charge of Endangering the Welfare of a Physically Disabled/Incompetent Person 1st degree (for scalding the legs of a severely handicapped, 10-year-old, in-home patient while bathing her in a tub with a hand-held shower device in late November 2011).

The defendant told the victim's parents that she noticed that the child's legs were red and peeling after she applied an antibiotic cream. (She had recently been prescribed Biaxin). The child's doctor initially concluded that the child had suffered an adverse reaction to the topical medication. The child was then taken to a medical center where it was thought that she might be suffering from either Toxic Epidermal Necrolysis (TEN) or Stevens-Johnson syndrome (SJS), a rare skin disorder.

Shortly thereafter, the director of the hospital burn unit determined that the child suffered 3rd degree burns from scalding water. She remained in the hospital for two months during which time she underwent multiple skin-graft surgeries.

Shortly thereafter, the defendant told investigators from the Child Abuse Task Force (CATF), that she burned the child with water that she tested and realized at the time was hot. She then noticed the redness and peeling as she was drying her off. She later apologized to the parents.

At the plea colloquy in July 2012, the court asked the defendant if she tested the water and made sure it was not too hot. She replied that she did and determined that the water was "not that hot." She then conferred privately with counsel (whom she later claimed in her 440 motion told her, "if you want the plea and to avoid a lengthy jail term, you have to admit that the water was too hot"), and then told the court that the water was "hotter than it should have been," that she erred in determining that the water temperature was suitable for the child, and ultimately acknowledged that she was reckless in the care that she provided to the child.

In September 2012, the defendant was sentenced to a split term of six months in jail and five years of probation. Not long thereafter, she and her employer were sued civilly by the victim's parents. In light of her guilty plea (which she never moved to withdraw), the defendant could not contest the issue of liability. Nevertheless, based, at least in part, on defense expert testimony, the jury found that the defendant's conduct was NOT the proximate cause of the child's injuries.

In April 2014, the defendant moved per CPL 440.10 1(h) to set aside the judgment of conviction on the grounds of actual innocence (due to lack of causation), and ineffective assistance of counsel (for failing to conduct a proper investigation, utilize the biopsy report which referenced other possible causes of the injuries and suggested further pathological correlations), and employ an expert (whom her lawyer reportedly told her would be too expensive, especially in view of her difficulty keeping up with her legal fee). Notwithstanding her previous admissions to investigators and those made during the plea proceedings, the defendant now claimed that she was not guilty. She did not, however make any claim of new evidence.

The trial court summarily denied the defendant's motion, ruling that even if an actual innocence claim can lie from a guilty plea, the defendant failed to provide clear and convincing evidence to warrant such relief (or a hearing). The court also rejected the defendant's ineffective assistance claim.

The Appellate Division (2d Department), reversed and remitted the matter to the lower court for a hearing on both issues. The People appealed from that part of the ruling that granted a hearing on actual innocence, arguing that no such basis can be found in CPL 440.10 except for subdivision g-1 pertaining to DNA evidence obtained post plea and sentence that creates a substantial probability of actual innocence. Moreover, in their view, CPL 440.10 1(h) should not be interpreted to permit a free-standing claim of innocence after the defendant has formally admitted her guilt under oath in court proceedings.

The Court of Appeals reversed the Appellate Division, determining that expanding CPL 440.10 1 (h) to include an actual innocence claim post guilty plea would exceed the legislative intent of CPL 440.10 which provides several specific and well-defined grounds to pursue post-judgment collateral relief, and would frustrate the policy favoring judicial efficiency and finality of judgments, especially those entered upon an admission of guilt in open court. (Citing People v Keizer 100 NY2d 174 [2003]).

The Court noted that by limiting actual innocence claims to those based on new DNA evidence (which is highly reliable in identifying or excluding perpetrators), the Legislature did not contemplate a separate constitutional claim to vacate a guilty plea based on new evidence as to guilt or innocence. (Citing Matter of Chen Specialities MGR. Assoc. v Jorling 85 NY2d 382 [1995]: "that which was not included was intended to be excluded."). The Court also noted that claims based on new (non-DNA) evidence are limited to evidence that could not be produced AT TRIAL with due diligence.

The Court did NOT overrule Hamilton supra, but went to great lengths to distinguish between convictions obtained after trial and those based upon guilty pleas. In the former, the defendant has maintained his/her innocence, and in the latter, he/she has voluntarily relinquished it (usually in consideration of some benefit, whether by pleading to a lesser charge or receiving a more favorable sentence). In the case of a verdict, the defendant still can maintain that some external factor (e.g. presentation of false evidence or improper conduct outside the court's presence) adversely affected the outcome of the case.

With respect to a guilty plea, however, the court observed that where the defendant has "solemnly admitted... that he is in fact guilty of the offense ...charged, he may not thereafter raise independent claims relating to the deprivation of his constitutional rights that occurred prior to the entry of the plea because the conviction rests directly on the sufficiency of the plea." (Tollett v Henderson 411 US 258 [1973]).

Consequently, for all intents and purposes, a valid, voluntary guilty plea which is inconsistent with factual innocence generally relinquishes any claim that would contradict the admissions made therein. (Citing People v Taylor 65 NY2d 1 [1985] and Class v US 138 S Ct 798 [2017]).

The Court held that the defendant was, therefore, not entitled to bring a free-standing actual innocence claim which was belied in any event not only by her guilty plea but by her admissions made to CATF investigators. Also, the fact that she never moved to withdraw her guilty plea did not augur in her favor.

With respective to the defendant's claim of ineffective assistance of counsel for failing to advance the biopsy results and to retain an expert in support of her claim of innocence), the Court observed that any inconsistencies in the biopsy report (which also referenced scald burns), and potential expert testimony might only raise some doubt (via battle of the experts), but did not necessarily establish factual innocence to warrant undoing a validly entered guilty plea based on a claim of ineffective assistance of counsel. (The concurring justice was clearly unmoved by the defendant's after-the-fact protestations of innocence).

Bottom line in Tiger: "a guilty plea entered in proceedings where the record demonstrates that the conviction was constitutionally obtained will presumptively foreclose an independent actual innocence claim."

Tiger should not be read to mean that a valid ineffective assistance of counsel claim cannot provide a basis to undo a guilty plea that was entered, upon the erroneous advice (or other demonstrated ineffectiveness) of counsel, for example, with respect to the direct consequences of a plea. (See, for example, People v Olecski 2017 NY Slip Op. 27281 [Crim Ct of City of NY 9/5/17]: D's 440.10 1[h] motion to set aside conviction upon guilty plea to DWAI granted and case restored to pre-pleading status because counsel's incorrect advice with respect to her ability to obtain a conditional license constituted ineffective assistance of counsel).

As it turned out, the defendant in Olecski was ineligible for a conditional license based on the DMV'S "look-back" rule and was also subject to automatic revocation for five years under 15 NYCRR 136.5(3)(ii). Defense counsel conceded that he was unaware of these rules when he advised his client to take the plea which he said would be the "only way" for her to obtain a conditional license. The court held that since counsel gave the defendant incorrect advice with respect to her conditional license eligibility, and she established that she would not have taken the plea but for that advice, she was entitled to relief based on ineffective assistance. (See People v Dunn 261 AD2d 940 [4th dep't 1999]).

The court rejected the defendant's claim with respect to the DMV revocation which it deemed to be a collateral consequence of which a defendant need not be informed (unless it involves immigration status): (citing People v Peque 22 NY3d 184[2013]).

See also People v Galan 2020 NY Slip Op 01636 (2d dep't 3/11/20): Error to summarily deny without a hearing defendant's CPL 440.10 motion based on claim of ineffective assistance of counsel for failing to negotiate a plea that would not have exposed him to the risk of mandatory deportation.

The federal standard for ineffective assistance of counsel requires a showing of deficient performance which prejudiced the defendant (Strickland v Washington 466 US 668 [1984], while the New York State constitutional approach focuses on whether, in view of the law, evidence and particular circumstances of the case, counsel provided meaningful representation, (viewed at that time rather than through the lens of 20-20 hindsight). (People v Baldi 54 NY2d 137 [1981]). Meaningful representation, which must be assessed in the context of each case, will be found lacking where there is no discernible strategy or legitimate explanation for counsel's conduct (People v Benevento 91 NY2d 708 [1998], People v Rivera 71 NY2d 705 [1988]. Ineffective assistance should not, however, be confused with losing tactics. Regardless of outcome, there should always be a plausible and articulable method to the madness.

In contrast, see People v Liggins 919 NY Supp 2d 612 (4th dep't 2011) where the court upheld the lower court's denial, (after a hearing conducted on remand), of his CPL 440.10 1 (h) motion to set aside his judgment of conviction for Murder 2d degree (as a Juvenile Offender at age 15), based on ineffective assistance of counsel. The court noted that the defendant (who shot at the victim six times into his vehicle before killing him over an unsatisfactory drug deal), received the minimum sentence of five years-life, and that counsel's failure to make motions did not constitute ineffectiveness in light of the People's plea offer (which was only available for two weeks after arraignment), and the record revealed an unlikelihood of acquittal (after counsel conducted an in-depth investigation of the facts and law of the case). Citing People v Ford 86 NY3d 397 (1995), the court observed that the defendant received an advantageous disposition, and the record did not cast doubt on counsel's effectiveness.

SOME OTHER 440 CASES WORTH NOTING:

People v Tomaski 44 Misc3d 492 (Sup Ct. Erie County 2012): In this case, the court granted the defendant's CPL 440.10 1 (h) motion and dismissed the charge of Manslaughter 1st degree (as a lesser included offense of Murder 2d degree, permitted upon the People's request over defense objection), based on ineffective assistance of counsel for unjustifiably failing to object to the charge-down request based on the Statute of Limitations. At a hearing on his motion, the defendant established (and the People did not adequately rebut) that he was not continuously outside of New York State to toll the five-year statute of limitations for felonies other than Murder (CPL 30.10 4[a]). As such, the Manslaughter charge stemming from a killing that occurred in 2002 would have been barred in light of the indictment being reported out in 2010.

People v Pace 2017 NY Slip Op 08137 (4th dep't 11/17/17): Here, the Fourth Department held that the lower court erred in summarily denying the defendant's CPL 440.10 1 (h) motion to set aside his felony sex offense convictions based on ineffective assistance of counsel for failing to raise a double jeopardy argument (CPL 40.20 2 [a] and [b]), after the People announced post indictment that they just learned that the defendant had already pled guilty in the local court to the misdemeanor counts arising from the same incident.

The People argued that that the defendant's claim was barred for unjustifiably failing to raise this issue on his direct appeal. (CPL 440.10 2[c]), nor did he demonstrate that the motion to dismiss on double jeopardy grounds would have been successful had it been made. (People v Peterson 19 AD3d 1015 [4th dep't 2005]; People v Cavan 5 NY3d 143 [2005]).

In remitting the case for a hearing, the Fourth Department held that in light of the absence of the local court accusatory documents from the record (the People reported they had been lost), the defendant could not have been expected to address much less successfully establish whether or not the acts underlying the misdemeanor offenses (to which the defendant pled guilty) were, in the main, clearly distinguishable from those establishing the felony offenses so as to avoid a double jeopardy bar under CPL 40.20 2 (a). (Such was not the case under CPL 40.20 2 (b) which could have been addressed on direct appeal because it only required an examination of the respective statutes and a consideration of the harm they seek to redress).

Accordingly, since the defendant was not deemed to have unjustifiably failed to raise the CPL 40.20 2 (a) issue on appeal, the lower court was wrong to deny his motion without a hearing. (See also People v Williams 2019 NY Slip Op, 06293 [4th dep't 8/22/19]: error to deny D'S motion without a hearing to determine whether defense counsel's failure to file an alibi notice or conduct a more thorough investigation or utilize potentially exculpatory witnesses constituted ineffective assistance of counsel where the arguments were based on matters OUTSIDE THE RECORD [citing People v Conway 18 AD3d 1290[4th dep't 2014]).

In contrast, in People v Jimenez 46 Misc 3d 1220 (Sup Ct Bronx County 2015). The court denied the defendant's CPL 440.10 motion (claiming actual innocence, newly discovered evidence, due process and Brady violations) where the defendant offered the affidavit of the People's identifying witness (who knew the defendant, identified him in a photo array and in court), saying that as a result of a chance meeting between his wife and the defendant's girlfriend several years later, he learned that the defendant was Puerto Rican when he believed (based on alleged comments by a detective), that the shooter was Dominican.

The court found that the defendant failed to make out a prima facie case of actual innocence, deeming this witness to be of dubious credibility based in part on demonstrable inconsistencies in his affidavit (e.g. that the shooter spoke in a Dominican accent which he never mentioned at trial and that the wanted poster said "Dominican," when, in fact, it said "Hispanic."). The court also rejected his claim that he was coerced by police. The court also rejected the defendant's other arguments finding, inter alia, that the affidavits of his new alibi witnesses would not preclude him as being the shooter and, unlike the alibi witnesses in Hamilton supra, they were available to the defendant at trial.

CPL 440.10 (cont'd):

Subdivision i of CPL 440.10(1) provides an avenue of relief where the judgment of conviction is based on arresting charge of Loitering for the Purpose of Engaging in a Prostitution Offense (PL 240.37), (provided that the defendant was not alleged to be loitering for the purpose of patronizing a person for prostitution, or promoting prostitution, or prostitution [including in a school zone]), and the defendant's participation was the result of having been a victim of sex trafficking under PL 240.34, 340.34-a (sex trafficking of a child), labor trafficking (PL 135.37), compelling prostitution (PL 230.33) or the Federal Trafficking Victims Protection Act.

In People v GM 32 Misc 3d 274 (Crim Ct City of NY 4/21/11) the court dismissed all the misdemeanor charges (including those not covered by the statute, with the People's consent) after the defendant, a Dominican immigrant, demonstrated that she was the victim of rape, unlawful imprisonment and other crimes at the hands of a sex trafficker. The court noted that the

purpose of the statute (enacted in 2010), is to protect those who are forced into prostitution and then saddled with criminal convictions that can have adverse effects on the rest of their lives.

Pursuant to subdivision i, the motion must be made with due diligence after the defendant has ceased being a victim of such trafficking or has sought services available for such victims, subject to reasonable concerns for the safety of the defendant, family members or other such victims who may be jeopardized by the bringing of such motion.

Official documentation of the defendant's victim status from a federal, state or local government agency creates a presumption that the defendant's participation was the result of having been a victim of sex trafficking.

Under subdivision j, where the motion is for a class A or unclassified misdemeanor (entered before the effective date of this section), and satisfies subdivision h, there is a REBUTTABLE PRESUMPTION that a conviction by plea to such offense was NOT KNOWING, VOLUNTARY and INTELLIGENT, based on ongoing collateral consequences, including POTENTIAL OR ACTUAL IMMIGRATION CONSEQUENCES, and there is a rebuttable presumption that a conviction by verdict constitutes cruel and unusual punishment under the State Constitution based on such consequences; or

k. The judgment pre-dated the effective date of this section and is for an offense defined in sub paragraphs i and ii of CPL 160.50(3) (k), (i.e. PL Art 220 or PL 240.36 violation), in which case the court shall presume that a conviction by plea was not knowing, voluntary and intelligent, if it has severe and ongoing consequences, including actual or potential immigration consequences; and if by trial verdict, it shall be presumed to be cruel and unusual punishment based on those consequences. (The People may rebut these presumptions).

CPL 440.10(2): MANDATORY DENIAL OF MOTION:

Under subsection 2,(a), the court MUST DENY a motion to vacate a judgment when: a. the ground or issue raised was PREVIOUSLY DETERMINED ON THE MERITS UPON AN APPEAL from the judgment, (unless there has since been a retroactive change in the controlling law with respect to such issue); or

b. The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to such ground/issue raised in the motion to permit adequate review thereof upon such appeal. (This section does not apply to a motion based on subdivision 1i above (conviction for PL 240.37); or

c. Despite there being sufficient facts in the record of the proceedings underlying the judgment to have permitted adequate review of the ground/issue on appeal, no such review occurred due to the defendant's UNJUSTIFIABLE FAILURE to either timely take or perfect an appeal, or to raise such ground/issue upon an appeal actually perfected by him/her, or

d. the ground/issue relates solely to the validity of the sentence and not of the conviction.

CPL 440.10(3): PERMISSIVE DENIAL OF MOTION:

The court MAY DENY a motion to vacate a judgment when: a. Although facts in support of the ground/issue raised in the motion could, with due diligence by the defendant, have readily been made to appear on the record so as to provide sufficient basis for review of such ground/issue on appeal from the judgment, the defendant UNJUSTIFIABLY FAILED TO ADDUCE SUCH MATTER prior to sentence, and the ground/issue in question was not subsequently determined on appeal. (This section does not apply to a motion based on deprivation of the right to counsel at the trial, or the court's failure to advise the defendant of such right, or to a motion under subdivision 1i above; or

b. The ground/issue raised on the motion was PREVIOUSLY DETERMINED on the merits upon a prior motion or proceeding in a NY State Court (other than on an appeal from the judgment), or upon a motion or proceeding in Federal Court ; unless there has since been a retroactive change in the law controlling such issue; or

c. Upon a previous motion made pursuant to this section, the defendant could have adequately raised the ground or issue underlying the present motion but did not do so.

Although the court may deny the motion under any of the circumstances set forth in this subdivision, it may, in its discretion, in the INTEREST OF JUSTICE AND FOR GOOD CAUSE SHOWN, GRANT THE MOTION if it is otherwise has merit and vacate the judgment.

4.If the court GRANTS the motion, it must, except as provided in subdivisions 5 or 6 of this section, VACATE the judgment and MUST DISMISS the accusatory instrument or, order a NEW TRIAL, or take such other action as is appropriate under the circumstances.

5. Upon granting the motion on the grounds of NEWLY DISCOVERED EVIDENCE after trial (CPL 440.1[g[), which would have resulted in a more favorable verdict (i.e. a lesser offense), the court may either: a. VACATE the judgment and order a new trial; or b. With the People's consent, MODIFY the judgment by reducing it to a conviction for such lesser offense. If so, the court must re-sentence the defendant accordingly.

6. If the court grants a motion made under CPL 440.10 (1) (k)(1))(PL220 or 240.36), it MUST VACATE THE JUDGMENT and DISMISS the accusatory instrument, and may take such additional action as is appropriate under the circumstances.

7. Upon a new trial resulting from a vacatur order under this section, the indictment is deemed to contain all the counts/offenses that it contained/charged when the previous trial commenced, (including any counts that were dismissed by the court during the trial), except: a. those for which the defendant was acquitted and b. those dismissed by the vacatur order and c. those previously dismissed by an appellate court upon appeal from the judgment, or by any court upon a previous post-judgment motion.

8. Upon a vacatur order based on a guilty plea to an accusatory instrument (or a part thereof), but which does not dismiss the entire accusatory instrument, the criminal action is (absent an express direction to the contrary), restored to its pre-pleasing status and the accusatory instrument is deemed to contain all the counts/charges which it contained at the time of the plea, except those subsequently dismissed per subsections b and c above.

Where the plea is entered pursuant to CPL220.30 (GP to part of an indictment or covering other indictments), in satisfaction of the accusatory instrument in question as well as other accusatory instruments pending in the same court, the vacatur order COMPLETELY RESTORES such other accusatory instruments (even though such order dismisses the main accusatory instrument underlying the judgment).

9. Upon granting a motion pursuant to CPL 440.10(1) (j) (Class A /Unclassified Misdemeanor), the court may either: a. Vacate or modify the judgment by reducing it to a lesser offense; or b. Order a new trial wherein the defendant enters a plea to the same offense in order to allow the court to re-sentence the defendant in accordance with the "amendatory provisions" of PL 70.15(1-a).

PROCEDURE FOR MOVING TO VACATE A JUDGMENT AND SETTING ASIDE A SENTENCE:

1.(a) These motions MUST BE IN WRITING and be made upon REASONABLE NOTICE to the People. To the extent that he/she is in a position to do so, the defendant should RAISE EVERY GROUND upon which he/she seeks to challenge the judgment/sentence.

If based on the existence/occurrence of facts, the moving papers MUST contain SWORN ALLEGATIONS thereof, whether by the defendant or another person, and may be based either on personal knowledge of the affiant or upon information and belief (stating the sources and grounds for such belief).

The defendant may submit DOCUMENTARY EVIDENCE or information (tending to) support the allegations.

The People may serve and file any answer admitting or denying any/all of the defendant's allegations, and may also submit documentary evidence (tending to) refute them.

After all the papers/documents have been submitted, the court MUST consider them to ascertain whether the motion can be determined WITHOUT A HEARING (to resolve questions of fact).

PROPERTY:

(b). Where the court orders a hearing, it may require the People to produce or make available for inspection any PROPERTY in their possession/custody/control that was secured in connection with the investigation/prosecution of the defendant upon CREDIBLE ALLEGATIONS by the defendant (and a court finding) that such property, if obtained, would be probative of the determination of the defendant's actual innocence, and the request is reasonable. (See text for limitations

on such request such as preserving the chain of custody and integrity of evidence collection process, possible harm to others [including informants] or undermining the functions of law enforcement).

The court SHALL DENY such request where: (i)(1): the defendant does not seek to demonstrate his/her actual innocence or (2): has not presented credible allegations and the court has not found that such property, if obtained, would be probative of the determination of the defendant's actual innocence and that such request is reasonable;

(ii): the defendant has made his/her motion AFTER FIVE YEARS from the date of the judgment of conviction. (This limitation is TOLLED if the defendant is IN CUSTODY in connection with the conviction that is the subject of the motion).

Notwithstanding the time limitations, the court MAY CONSIDER the motion if the defendant has shown: (A) that he/she has been pursuing his/her rights diligently and that some EXTRAORDINARY CIRCUMSTANCE prevented the timely filing of the motion for forensic DNA testing; (B) that the facts upon which the motion is based were unknown to the defendant (or attorney) and could not have been ascertained with due diligence before the expiration of the statute of limitations; or (C) considering all the circumstances including evidence of guilt, the impact of granting or denying such motion upon public confidence in the justice system, or upon the safety/welfare of the community, and the defendant's diligence in seeking such property/relief, the INTERESTS OF JUSTICE WOULD BE SERVED by considering the motion;

(iii): the defendant is challenging a judgment convicting him/her of an offense that is NOT A FELONY defined in PL Section 10.00; or (iv): upon a finding by the court that the property requested in this motion would be available through reasonable efforts by the defendant to obtain such property.

See text of 1-a(a)(1), 2 pertaining to requests for DNA testing

(b). The court may direct the People to provide the defendant with information in the People's possession concerning the current location of the specified evidence (and if it no longer exists, or the location is unknown, a statement to that effect and any documentary evidence concerning the last known location of such evidence). If the court finds that such evidence no longer exists or its location is unknown, it shall not permit an unfavorable inference against the People in deciding a motion under this section.

The court may, on motion of the defendant, issue a SUBPOENA DUCES TECUM directing a public/private hospital, lab or other entity to produce such specified evidence in its possession and/or information and c[documentary evidence concerning the location and status of such evidence.

(c). The court may, upon motion and notice to the parties and the entity directed to conduct a search, order an entity with access to CODIS or its successor system to COMPARE a DNA profile (obtained from probative biological material gathered in connection with the investigation/prosecution of the defendant against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon a court finding that: 1. Such profile complies with FBI or State requirements, and that the data meet State DNA Index System criteria and 2. If such results had been admitted at trial, there is a REASONABLE PROBABILITY that the verdict WOULD HAVE BEEN MORE FAVORABLE to the defendant, or in the case of a GUILTY PLEA, if the results had been available beforehand, there is a REASONABLE PROBABILITY that the CONVICTION WOULD NOT HAVE RESULTED.

2.If it is conceded, uncontradicted or established by unquestionable documentary proof that there are circumstances requiring denial pursuant to CPL 440.10(2) or 440.20(2), the Court must SUMMARILY DENY the motion.

If there are circumstances authorizing (but not requiring) denial thereof pursuant to CPL 440.10(3) or 440.20(3), the may either: (a) summarily deny the motion, or (b) consider the merits thereof.

3.Upon considering the motion, the court MUST GRANT it WITHOUT A HEARING and vacate the judgment (or set aside the sentence) if:(a) the moving papers allege a ground constituting a LEGAL BASIS for the motion; and (b) such ground (if based on the existence/occurrence of facts, is supported by SWORN ALLEGATIONS thereof; and (c) the sworn allegations of fact ESSENTIAL TO THE MOTION are either CONCEDED by the People or are CONCLUSIVELY SUBSTANTIATED by UNQUESTIONABLE DOCUMENTARY PROOF.

4. The court MAY DENY it without a hearing if: (a) the moving papers fail to provide a legal basis for the motion; or (b) the motion is based on facts unsupported by sworn allegations tending to substantiate all the essential facts; or (c) an essential fact is CONCLUSIVELY REFUTED by UNQUESTIONABLE DOCUMENTARY PROOF; or (d) an essential fact is CONTRADICTED by a court record or other official document, or is made solely by the defendant and is UNSUPPORTED by any other affidavit or evidence, and (ii) under all the circumstances],there is NO REASONABLE POSSIBILITY that such allegation is true.

5. if the court does not determine the motion as above, it must CONDUCT A HEARING and make FINDINGS OF FACT essential to the determination thereof.

The defendant has a RIGHT TO BE PRESENT at such hearing, but MAY WAIVE such right IN WRITING. If he/she does not so waive and if he/she is confined in prison, the court MUST CAUSE HIM/HER TO BE PRODUCED at such hearing.

6. At such hearing, the defendant has the BURDEN OF PROVING by a PREPONDERANCE of the evidence EVERY FACT ESSENTIAL to support the motion. (Note that per People v Hamilton supra, the defendant must establish a FREE-STANDING CLAIM OF ACTUAL INNOCENCE BY CLEAR AND CONVINCING EVIDENCE).

7.Hearing or not, the court must, upon determining the motion, set forth its FINDINGS OF FACT, CONCLUSIONS OF LAW AND REASONS FOR ITS DETERMINATION on the record.

CPL 440.20: DEFENSE MOTION TO SET ASIDE SENTENCE:

1. At any time after entry of judgment, the court (where judgment was entered) may, upon motion of the defendant, set aside the sentence on the ground that it was UNAUTHORIZED, ILLEGALLY IMPOSED OR OTHERWISE INVALID AS A MATTER OF LAW.

Examples might include sentencing a defendant as a predicate felony offender when he/she, in fact, was not, or not sentencing him/her as a predicate felony offender when, in fact, she was such an offender. In People v Jurgin 2015 NY Slip Op. 09311 (Court of Appeals12/17/15), the defendant pled guilty to Robbery 1st degree on the understanding that he would be sentenced (as a second violent felony offender based on a DC Attempted Robbery Conviction), to a determinate term of 11 years in prison plus five years of post-release supervision (PRS) if certain conditions were met.

During the plea colloquy, the court advised the defendant that he could challenge his prior conviction on the basis of either identity or constitutionality. At sentencing, the court determined that the defendant failed to meet the conditions of sentence and imposed a 25 year determinate term. At no time did defense counsel question whether the DC conviction qualified as an equivalent felony conviction in New York State. (As it turned out, it didn't because under the DC statute, as interpreted by the New York Court of Appeals, one of the ways a person can commit robbery is by snatching property by stealth [akin to pick-pocketing], while the New York statute requires some form of FORCIBLE COMPULSION).

The defendant brought a CPL 440.20 motion to set aside the sentence arguing that he was illegally sentenced as a predicate felony offender and he agreed to the plea on the erroneous belief that he did qualify as such. His motion was denied and he appealed to the Appellate Division (AD) which considered it together with his direct appeal. The AD ruled that the "non-equivalency" argument with respect to the DC conviction was not preserved, and was without merit in any event. (107 AD3d 595 [1st dep't 2013]). It also rejected the defendant's ineffective assistance of counsel claim but reduced the sentence (as unduly harsh and excessive) to 15 years plus PRS.

The Court of Appeals REVERSED, finding that the defendant did not waive his right to challenge the legality of his sentence on other grounds by remaining silent to the only challenge options presented by the court ("it wasn't me" or "the conviction was unconstitutionally obtained"). (Citing People v Dickinson 18 NY3d 835 [2011]). In the court's view, he did not knowingly and voluntarily give up his right to challenge whether the DC conviction provided a proper basis for sentencing him as a predicate felony offender. (People v Saunders 95 NY2d 52 [2000]).

The Court noted that CPL440.20 is the proper vehicle for challenging the legality of a sentence because it allows the parties to create a record for appellate review, and insofar as the defendant raised the issue of the out-of state conviction in his motion to set aside the sentence, it was properly preserved. And, upon comparing the elements of the New York and DC statutes, the Court, as noted above, determined that the defendant should not have been sentenced as a predicate felony offender.

WHAT'S IN A NAME?

In People v Francis 2020 NY Slip Op. 00996 (Court of Appeals 2/13/20), the Court found that the defendant (who, for years, had been using false names and obtaining better sentences than he deserved), could not challenge his sentence as being "unlawfully too lenient" (of all things), because he was not "adversely affected" by the court's order denying his motion to set it aside (CPL 470.15).

The defendant's end-game was to undo a sentence of 23-years-to-life as a persistent violent felony offender that was imposed in 1997 upon his conviction of Robbery 1st degree. Recognizing that the defendant was seeking first to vacate an earlier sentence (6/5 split) upon a 1988 Felony Weapons Possession conviction on the grounds that he should have been sentenced as a second felony offender (which the court missed because he used a fake name), as a prelude to then moving to vacate the conviction (on the grounds of involuntariness for taking a plea on the promise of an illegal sentence), the Court refused to grant his wish.

The defendant's chameleonic history included: a 1982 conviction for Criminal Possession of a Controlled Substance (CPCS) 5th degree as Lawrence Benjamin for which he was sentenced to 60 days in jail. Six years later in 1988, he was erroneously sentenced (as Gerald Francis) to the 6/5 split term because, as noted above, the court was unaware of the 1982 felony conviction which would have earned the defendant a mandatory minimum indeterminate sentence of two-to-four years in prison. (Pre-Sentence Reform Act).

In 1991, the defendant (this time as Burrell Gould), pled guilty to Attempted Robbery 1st degree and was sentenced to four-to-eight years as a second felony offender (based on the 1982 felony drug conviction) but not as a second violent felony offender (as he should have been), because the court was unaware of the 1988 conviction.

In 1997, the defendant (as Lawrence Benjamin revisited), was convicted after jury trial of Robbery 1st degree. Based on the 1988 Weapons conviction and the 1991 Attempted Robbery conviction, he received the aforementioned sentence of 23 years-to-life as a persistent violent felony offender.

In 2009, the defendant brought a CPL 440.20 motion to set aside the 1991 sentence as invalid as a matter of law since he was incorrectly adjudicated as a second felony offender instead of second violent. Supreme Court denied his motion but the Appellate Division reversed (131 AD3d 871 [1st dep't 2015]), and remitted the matter to Supreme Court which re-imposed the same 4-8 year sentence. (The conviction itself remained undisturbed).

In 2014, Supreme Court denied the defendant's motion to set aside his 1988 sentence, finding that while the sentence was illegal (because he did not get second felony offender treatment), he was not aggrieved by the error and, therefore, was not entitled to relief.

The Appellate Division denied leave to appeal, finding that the defendant not aggrieved by the error. (CPL 470.15). In fact, he was deemed to have actually benefitted from it.

The defendant was granted leave to appeal, and argued to the Court of Appeals that a CPL 440.20 challenge to a sentence is not limited by the procedural restrictions of CPL 470.15 (specifically that a lower court judgment must "adversely affect" the appellant in order to seek relief from it). The Court held that CPL 470.15 does NOT distinguish between direct appeals and those taken from an order denying CPL 440.20 relief, and even though 440.20 does not specifically mention "adverse effect," the requirement is the same for both. The Court also rejected the defendant's argument that mere denial of a motion constitutes an adverse effect (as compared to an actual adversity such as the imposition of a more severe punishment).

In the Court's view, the1988 sentence was hardly adverse to the defendant, and arguing that an adversity lies in the frustration of any subsequent attempts to challenge the earlier convictions (which depended, first, on undoing the illegal sentences), put the cart before the horse and exceeded the scope of the Court's review power which is limited to the specific error alleged to have been committed in the particular case that is before the Court. Consequently, the Appellate Division was deemed to have correctly determined, based on the plain language of CPL 470.15, that it lacked the authority to review the error raised by the defendant.

CPL 440.40: PEOPLE'S MOTION TO SET ASIDE SENTENCE:

1. The People may move any time NOT MORE THAN ONE YEAR after entry of judgment, to set aside the sentence on the ground that it was INVALID AS A MATTER OF LAW.

2. The court MUST SUMMARILY DENY the motion where the ground/issue raised was PREVIOUSLY DETERMINED on the MERITS upon an APPEAL from the judgment or sentence, (unless there has since been a retroactively effective change in the law controlling such issue.

3. The court may summarily deny the motion when the ground or issue raised therein was previously determined on the merits on a prior motion in a court of this State (other than an appeal from a judgment or sentence), unless there has since been a retroactively effective change in the law controlling such issue. Despite such circumstance, however, the court may, in the interest of justice and for good cause shown grant the motion in its discretion if it otherwise has merit.

4. The motion must be made upon reasonable notice to the defendant and to his/her counsel who appeared for him/her in the last proceeding which occurred in connection with the judgment or sentence, and the defendant must be given an opportunity to appear in opposition to the motion.

The defendant has the right to be present at such proceeding but may waive such right in writing. if he/she does not so waive, and if confined in prison or other state institution, the court must cause him/her to be produced at the proceeding upon the motion.

5. An order setting aside a sentence per this section DOES NOT affect the validity or status of the underlying conviction, and, after entering such order, the court MUST RE-SENTENCE the defendant in accordance with law.

6. Upon re-sentence per subdivision 5, the terms of which are MORE SEVERE than those of the original sentence, the defendant's time to take an appeal from the judgment is AUTOMATICALLY EXTENDED as per CPL 450.30(4).

SEE CPL 440.46 for Re-Sentencing of Drug Offenders; CPL 440.47 for Motions for Re-Sentencing of Defendants (per PL 60.12) who are Victims of Domestic Violence (discussed in a previous article), the the Notice of Re-Sentence Provisions of CPL 440.50 (Crime Victims); CPL 440.55 (Education Department where licensed professional is convicted of a felony); CPL 440.60 (Invalid Sentences of Probation), CPL 440.65 (Notice to Child Protective Agency for certain crimes against children); CPL 440.70 (Notice to Secretary of State when false financing statement is filed).

As is evident, there are many grounds upon which to pursue (and grant) a motion to set aside a judgment and almost as many grounds (some mandatory and others permissive) to deny it. Counsel is well-advised and clients are well-served when they understand the different avenues of available relief and steer clear of the perils and pitfalls that can get in the way of setting aside an unjust conviction or undoing an illegal sentence.