

Post-*Padilla* Post-Conviction Relief in New York State Courts

The following guide explains the process of filing a motion for post-conviction relief in New York State courts for clients who pleaded guilty to crimes (or violations) and received deficient advice/performance as to the immigration consequences of their guilty pleas. This guide first provides a basic overview of the “440 motion,” which is the New York State vehicle for collaterally attacking a criminal conviction, and explains how to make such a motion. It then describes the steps that an attorney filing a 440 motion should take, identifies some issues that must be considered when crafting such a motion, and provides a list of the essential and advisable documents to include with the 440 motion.

I. Basics of Making a 440 Motion

Legal Authority

A motion seeking post-conviction relief in New York State courts may be brought under Article 440 of the N.Y. Criminal Procedure Law, which sets forth the basis and procedures for challenging the legality of a conviction or sentence. If the Article 440 motion succeeds, the court will vacate the conviction; the defendant is placed back in the position he found himself immediately prior to the plea, which typically means that all charges that existed prior to the plea are reinstated. Subsequently, a defendant may re-plead to a resolution that is better for immigration purposes, proceed to trial, or seek dismissal of the charges.

A 440 motion is not a substitute for a direct appeal. Unlike a direct appeal, it allows you to present facts outside of the trial record; facts presented for the first time on appeal cannot be considered by an appellate court. Article 440 is a separate legal vehicle from state habeas corpus (*see* N.Y. Crim. Proc. Law § 70).

There are nine grounds for making a 440 motion; the relevant ground for post-*Padilla* motions is the ground that authorizes vacatur of convictions obtained in violation of either state or federal constitutional rights.¹ The motion discussed in this guide is based on this ground—N.Y. Crim. Proc. Law § 440.10(1)(h)—for violation of the Sixth Amendment right to effective assistance of counsel articulated by the U.S. Supreme Court in *Padilla v. Kentucky*, which recognized defense counsel’s duty to provide affirmative, accurate advice to their clients about the immigration consequences of criminal convictions.² To win a 440 motion under *Padilla*, you must establish that 1) the advice, or lack thereof, regarding immigration consequences was deficient in comparison to the prevailing professional norms, and 2) the client suffered prejudice as a result of #1. Prejudice is the more difficult hurdle; establishing prejudice requires proving that, if correctly advised regarding the immigration consequences, the client would have rationally rejected the plea agreement. The client needs to demonstrate prejudice in every way possible,

¹ N.Y. Crim. Proc. Law § 440.10(1)(a)-(i).

² 559 U.S. 356 (2010).

which means demonstrating a chance of success at trial, and/or a chance at a resolution that minimized or eliminated the immigration consequences, and/or that avoiding deportation was so important that he would have risked a more serious conviction after trial to avoid the immigration consequence.

Immigrations and Customs Enforcement (ICE) will not credit the vacatur of a conviction that is done merely to avoid the immigration consequences so although you will likely emphasize the unjust nature of the deportation consequence as an equity that favors granting the 440 motion, the judge must find a procedural or constitutional violation as a basis for vacating the conviction.

If the immigration consequence is caused solely by the length of the sentence, for instance, a sentence of one year (as opposed to 364 days) that renders an assault conviction an aggravated felony, you can bring a motion to reduce the sentence under N.Y. Crim. Proc. Law § 440.20. These are roughly similar to a motion under N.Y. Crim. Proc. Law § 440.10. The one notable difference is that the judge does not need to find a procedural or constitutional violation to justify reducing or vacating the sentence; ICE will credit a sentence reduction even if it is done “in the interest of justice.” Also, a 440.20 motion may be based on other grounds, such as an Eighth Amendment claim that the sentence constitutes “cruel and unusual punishment,” as well as a Sixth Amendment ineffective assistance of counsel claim.

Practicalities

The basics of a 440 motion and practice are set forth in the statute itself.³ To put together a 440 motion, you will need to do a thorough investigation of the facts surrounding the conviction that you are seeking to vacate. In addition to finding out exactly what happened between your client and his previous defense attorney, you will need to familiarize yourself with the defenses that could have been raised and the evidence against your client at the time of the plea. You may need to reconstruct the factual investigation of the charge(s) that would have been done if the client had not pleaded guilty. You will also need to understand your client’s immigration status at the time of the plea and the immigration consequences resulting from your client’s charge(s) in order to establish that the previous attorney’s representation was inadequate.⁴ The requirements for such a motion, discussed below, are set forth in detail at N.Y. Crim. Proc. Law § 440.30.⁵

³ N.Y. Crim. Proc. Law §§ 440.10; 440.30.

⁴ To understand the immigration consequences of a criminal charge, it is helpful to speak with an immigration attorney with experience in the matter. This expertise will be important to demonstrate the harm that accrued to your client and the options he had at the time of the plea to avoid negative immigration consequences. It can also help in negotiations with the district attorney for a new plea that is immigration-neutral or has less severe immigration consequences, such as a plea that would leave your client eligible for relief in immigration court. See sources cited *infra* at note 15.

⁵ N.Y. Crim. Proc. Law § 440.30(1) provides, in especially pertinent part:

Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information

There is no statute of limitations for making a 440 motion.⁶ The motion, including the notice of motion, the memorandum of law, and supporting documents, must be filed in the trial court where the conviction occurred. You must also serve a copy on the district attorney of the county in which the conviction occurred.

Once your case is filed, it will be assigned to the judge who presided over the plea, or another judge if that judge is no longer on the bench,⁷ who will review it and either rule on the papers or order a hearing.⁸ The judge must grant it without conducting a hearing if the motion alleges a valid legal basis, and establishes sufficient facts (supported by sworn allegations) that the DA concedes to be true or are conclusively substantiated by unquestionable documentary proof.⁹ This rarely happens but you should attempt to construct the motion to accomplish this. The judge may deny your motion without a hearing if facts and allegations are not supported by sworn statements (affidavits) or other evidence, or if a necessary fact is clearly shown to be false.¹⁰ The judge may also order an evidentiary hearing in which the defendant, who has a right to be present, bears the burden of proving his claims by a preponderance of the evidence.¹¹ Hearsay is arguably inadmissible but often comes in with no objection. If the judge grants your motion, the judge will vacate the judgment and order a new trial; all charges dismissed as part of the vacated plea agreement will typically be reinstated.¹² Although a subsequent 440 motion is not absolutely barred, it is heavily disfavored unless the defendant has a very good reason why the legal issue was not raised in the first 440 motion, so you must consider non-*Padilla* 440 grounds

and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, if any, an answer denying or admitting any or all of the allegations of the motion papers, and may further submit documentary evidence or information refuting or tending to refute such allegations. After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

⁶ See *People v. Corso*, 40 N.Y.2d 578, 580 (1976) (holding that there is no statute of limitations for 440 motions).

⁷ If the judge who presided over the plea is no longer on the bench, the 440 motion will be assigned to a different judge, usually on a rotating basis. It may be possible to ascertain ahead of time which judge will handle the motion. It is also possible to search the Immigrant Defense Project's (IDP) database to find 440 decisions issued by the judge on your case; contact IDP for assistance at 212-725-6422. If you are unfamiliar with the judge, it is advisable to speak with a local criminal defense attorney to determine how to best approach the judge. Also, once the motion is filed, it is best practice to contact the ADA assigned to the case, and the judge's law clerk, to seek an informal conference to try to negotiate a mutually agreeable disposition. In some instances, especially if the conviction is not for something egregious, the judge's law clerk, or even the judge, may be convinced to suggest to the ADA that it makes sense to resolve the motion.

⁸ N.Y. Crim. Proc. Law § 440.30(3).

⁹ *Id.*

¹⁰ N.Y. Crim. Proc. Law § 440.30(4).

¹¹ N.Y. Crim. Proc. Law § 440.30(5)-(6).

¹² N.Y. Crim. Proc. Law § 440.10(4).

such as a conflict of interest, or other types of ineffectiveness such as failure to investigate suppression issues, failure to correctly advise regarding sentencing exposure, etc.¹³

Timing

A 440 case, from start to completion, will generally take at least four or five months even with diligent contact with the DA and the court in an effort to push the case forward. Immigration cases are parallel proceedings that may run on a faster timeline (particularly in the case of detained clients) and, in many cases, immigration judges will not halt or delay immigration proceedings to allow a person to seek post-conviction relief in criminal court. Therefore, it is essential that you coordinate with your client's immigration attorney. If your client does not have immigration counsel, it is advisable to speak with someone with experience in immigration court who can advise you and your client on the best way to ensure that your client is not removed before the completion of the post-conviction relief case.

The timing of the filing is a strategic decision, and if your client is not currently in immigration proceedings there may be reasons to delay filing. Sometimes a DA is more willing to resolve a case if the defendant has completed the sentence, or if the defendant has established a significant period of pro-social behavior in the community. The decision as to the timing must be made with regard to the particulars of the case.

II. Preliminary Steps

Order Records from Conviction: You will need to get your client's RAP sheet, order the full record of the conviction, and obtain the minutes of the plea and sentencing proceedings. (Note that, in many cases, the plea and sentencing proceedings are one and the same, so there will only be one set of minutes.) These records can take weeks or even months to receive, so this should be done as soon as possible. You should check with the client to make sure he has no convictions from other jurisdictions; if there is any question, you need to obtain the client's criminal record from that jurisdiction. The method of obtaining the court file and minutes varies between courts; if unfamiliar, you should call the court to ascertain the applicable procedure.

Interview Your Client: You will also need to interview your client as soon as possible. You will want to find out everything you can about the criminal case and his or her immigration status—then and now. Discussion should include:

- All communications with the previous defense attorney
- Your client's view of his case at the time of the plea and any defenses that s/he might have raised
- If there is anyone who would know what the client was told by the defense attorney at the time of the plea and if there is anyone who could corroborate the fact that he would not have

¹³ Check the annotations to C.P.L. 440.10 for case law regarding other grounds for vacatur of a conviction.

agreed to the plea if he had known of the immigration consequences. If your client is not detained, he may be able to connect you with these people. If your client is detained, you should get the contact information for these people.

- Your client's other criminal convictions, if he has any. In particular, you will want to understand why he pled to any other offenses that might have resulted in immigration consequences.
- Your client's immigration status and any pending or contemplated applications at the time of the plea
- Subsequent immigration consequences that your client has experienced as a result of the plea

Gather Supporting Affidavits: One of the most important things that you can do to bolster your client's case is to get affidavits from others that support your client's statements. These people must be speaking from personal knowledge of the defendant's circumstances. You or your client should reach out to these people as early as possible to get statements from them. You should draft them in affidavit form, using to the extent possible the exact words of the affiant, and submit them with your 440 motion.

Contact Former Defense Attorney: You must try to get an affidavit from the former defense attorney that explains the advice given to the defendant. This requires locating and contacting the former attorney, which can be a difficult phone call. If done thoughtfully and sensitively, this could be a very productive conversation; the defense attorney's affidavit is typically the most important document in the 440 motion. It is helpful to have developed a working theory as to "what went wrong" before you call the defense attorney, while remaining open to revising that theory in light of the defense attorney's recollection of the case. The approach to this call is very case-specific, but in general you want to avoid a judgmental tone, and ask questions in a manner that will make it easier for the defense attorney to give you the information you need. With older cases, it is common for the attorney to have no specific recollection, even after perusing the file. In that instance, it can be helpful to ask about the attorney's general practice during the relevant time period regarding incorporating immigration consequences into the representation, general knowledge of crim-imm law at the relevant time, whether the attorney would have made a notation in the file to reflect that she gave advice about immigration consequences, etc.

If you are not able to find the attorney, you must document your efforts to track her down and then explain this to the court by detailing those efforts in your own affidavit. You should do this as early as possible so that you give the former attorney time to respond to you and to locate her files related to your client's case. Obtaining a copy of the former attorney's file is essential.¹⁴ If the defense attorney refuses to provide an affidavit, which is not uncommon, but is willing to speak with you, you can include any helpful statements in your affidavit.

¹⁴ The file belongs to the client, and the defense attorney has an obligation to provide it promptly upon request. See *Sage Realty v Proskauer*, 91 N.Y.2d 30 (1997).

III. Making the Motion

Before making this motion, you must have a clear idea of why the former defense attorney's advice or representation was inadequate, whether it was because she did not provide any advice or because her advice was incomplete—or simply incorrect. You will need to know the exact immigration consequences of your client's plea and you will need to be able to point to the specific statutes or provisions of law that describe these consequences so that you can show the court exactly what reasonable research and investigation the defense attorney failed to perform.¹⁵ You will also want to discuss with your client the risks of the 440 motion, which may include a worse criminal resolution (more serious conviction(s), longer sentence) followed by the same or worse immigration consequence. If you are not acquainted with the practice of the local DA's office in plea negotiations and the handling of 440 motions, it is imperative that you consult with local counsel to educate yourself about the potential risks and benefits of this particular 440 motion in that jurisdiction, so that your client can make an informed decision whether to file it. You can also approach the DA once you are ready to file the motion and attempt to negotiate a resolution pre-filing; if your client's case presents strong equities and the resolution of the 440 motion does not require much of a concession from the DA, this is a great way to obtain a good result for your client while minimizing the risk. Prepare a mitigation packet; this allows you to present evidence in letter format as opposed to the affidavits typically required in a formal motion; it also allows you to supplement the defendant's equities at the time of the plea with equities developed subsequently. If the DA agrees, he can join you in a motion to the court to vacate your client's conviction ("on consent") and let your client re-plead. In many situations, however, the DA will not consider resolution until you have filed the 440 motion. Sometimes, to convince the DA to consent to the 440 motion, the client will need to accept a plea to a more serious charge (a felony as opposed to a misdemeanor), or agree to a more onerous sentence. Before approaching the DA, you should ascertain what the client is willing to offer as a concession to avoid the immigration consequence.

You should try to identify a charge to which your client could have pled that would not have subjected him to negative immigration consequences, or would have ameliorated the immigration consequences. For example, if your client was charged with Assault, 3rd degree (N.Y. Penal Law § 120.00(1)), typically charged by ICE as a crime involving moral turpitude, and Trespass, 2nd degree (N.Y. Penal Law § 140.15), both class A misdemeanors, and pled to Assault, you can argue that your client could have pled to Trespass, which carries no immigration consequences. Or, if your client pled to Criminal Possession of a Controlled

¹⁵ For assistance with this, we recommend contacting an immigration attorney or one of the wealth of immigration practice guides available to defenders and suggest consulting criminal-immigration experts in your geographic area. See, e.g., Immigrant Defense Project, <http://www.immigrantdefenseproject.org/>; Manny Vargas, REPRESENTING IMMIGRANT DEFENDANTS IN NEW YORK (5th ed. 2011); see also NORTON TOOBY, TOOBY'S GUIDE TO CRIMINAL AND IMMIGRATION LAW, Appendix B at 195, Appendix C at 196, available at no charge at <http://www.criminalandimmigrationlaw.com/public/Free%20eBooks/ToobysGuide.pdf> (updated regularly); NORTON TOOBY, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005).

Substance in the Third Degree pursuant to N.Y. Penal Law § 220.16 (1) (intent to sell), which is typically charged as an aggravated felony,¹⁶ you might argue that your client could have pled to N.Y. Penal Law § 220.16 (8-13) (simple possession) instead. This alternate plea is not an aggravated felony and so your client may have been left eligible for forms of relief from removal. Understanding what alternate pleas might have been available will be useful in your motion because you will be able to show that your client lost the opportunity to plead to a charge that carried no, or less severe, immigration consequences. It is extremely advantageous to have ready some alternate pleas that fit the facts of the case, might not seem like a bad deal to the prosecution (i.e. the charges are of roughly equivalent weight), and will eliminate or mitigate the immigration consequences to your client.

It is also helpful to try to bring the client and defense attorney affidavits in line with each other, and use both to support your argument. If the court can accept the defense attorney affidavit as true, and still find ineffective assistance of counsel, that may be a stronger way to frame the issue than requiring the court to disbelieve the defense attorney affidavit. This is an important strategic decision, and requires you to discuss the defense attorney affidavit with your client to ascertain where areas of agreement exist. Squarely controverting the defense counsel affidavit presents a risk that the court will credit the defense attorney's affidavit over your client's affidavit, so it is helpful to consider other ways to frame the ineffectiveness claim.

It is also advisable to identify the weaknesses in your case and to consider addressing these in the 440 motion; this is your chance to convince the judge of the solidity of your case before the DA files an opposition, and has the opportunity to portray these weaknesses in a very unsympathetic light. For instance, if the court made a statement about possible deportation during the plea colloquy, include in your client's affidavit an explanation as to why he pleaded guilty despite the statement. If the client never asked trial counsel about whether he could face deportation as a result of the guilty plea, or did not tell trial counsel that he was a non-citizen, these issues should also be addressed in the client's affidavit. These are common factual issues which a judge may emphasize in denying the 440 motion. It is helpful, as with any motion, to anticipate the problems and to consider addressing them in the first instance, instead of filing a defensive reply to the DA's opposition.

The motion itself should contain the following documents, many of which are provided as part of this set of model materials.

¹⁶ Aggravated felonies are defined in 8 U.S.C. § 1101(a)(43). An aggravated felony conviction renders a defendant subject to virtually mandatory removal because it carries a conclusive presumption of deportability. See 8 U.S.C. § 1228(c). An aggravated felony conviction also presents a bar to cancellation of removal, asylum, and virtually any other form of relief from deportation with the possible exception of withholding of removal and relief based on the Convention Against Torture (these last two are similar to an asylum claim but require the defendant to meet a more onerous evidentiary burden; the typical defendant would not be able to access these forms of relief.) See 8 U.S.C. § 1229b(a)(3) (cancellation of removal barred by aggravated felony conviction); 8 U.S.C. § 1158(b)(2)(A)(iii) & (b)(2)(B)(i) (asylum claim barred by aggravated felony conviction); 8 U.S.C. § 1231(b)(3)(B)(ii) (withholding of removal claim barred by conviction of “particularly serious crime”).

1. **Notice of Motion to Vacate Conviction** (required, see Model Document 1)
2. **Attorney Affirmation in Support of Motion** (required, see Model Document 2)
3. **Memorandum of Law** (required, see Model Document 3)
4. **Defendant Affidavit** (required, see Model Document 4)
5. **Affirmation from Prior Defense Attorney** (or explanation as to why you cannot provide this) (required, see Model Document 5)
6. **Affidavits from Family Members or Friends** (see Model Document 6)
 - a. Attesting to the fact that your client was not informed of immigration consequences and/or that he was worried about immigration consequences
 - b. Attesting to all of the positive ties to the U.S., such as family, job, etc., and any other information that shows that he would not have pled guilty if he knew that it would result in negative immigration consequences
 - c. Attesting to the client's lack of ties to the country of origin
7. **Immigration Documents:** (only if relevant and helpful)
 - a. Copy of charging document from ICE. (In most cases, this will be the "Notice to Appear.")
 - b. Copy of order of deportation from the immigration court, or decision from the Board of Immigration Appeals.
 - c. If your client was denied some benefit or status sought through an affirmative application, you may want to attach a copy of the document indicating that your client was denied a benefit because of the conviction at issue.
8. **Documents from Record of Conviction** (possibly, if helpful)
9. **Copy of Plea and/or Sentencing Minutes**
10. **Certificate of Service** (required, not attached)