



**NEW YORK  
CITY BAR**

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**REPORT ON LEGISLATION BY THE  
COMMITTEE ON CRIMINAL JUSTICE OPERATIONS**

**A.1135  
S.1020**

**M. of A. Lavine  
Sen. Peralta**

**SUPPLEMENTAL MEMO IN SUPPORT  
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ON COLLATERAL REVIEW**

**SUMMARY**

The Criminal Justice Operations Committee of the New York City Bar is comprised of attorneys who practice in the area of criminal law, representing both defendants and the prosecution. Among other things, the Committee engages in policy analysis and legislative review in the area of criminal law and justice.

The Committee believes that the interests of justice and judicial economy would be better served by following the lead of the federal system and the majority of other states by permitting all Ineffective Assistance of Counsel (“IAC”) claims to be raised on collateral review: first, because some IAC claims are subject to reasonable disagreement as to whether they are reviewable on the record, defendants can be unfairly subjected to procedural bars if they choose the wrong forum; second, the trial court, which presided over the trial, is often in a better position to make the first assessment of trial counsel’s performance; and third, the current scheme requires piecemeal litigation of IAC claims that are, in part, record based and, in part, non-record based.

**DISCUSSION**

This bill promotes fundamental fairness for defendants without increasing the burden on the court system generally, or trial courts in particular. The Committee's conclusions are based on the following reasons:

1. Representing a criminal defendant involves a certain skill set and, almost always, some strategic choices. When defendants later claim that their lawyers were ineffective, reviewing courts must examine the performance of the lawyer and, frequently enough, the strategies employed. Courts are usually reluctant to second-guess trial counsel when it comes to strategy, even if, in hindsight, it is clear the strategy pursued was woefully misguided.

In New York State, the constitutional right to counsel is met if “the evidence, the law, and the circumstances of a particular case, viewed in totality, and as of the time of the representation, reveal that the attorney provided meaningful representation.” See People v. Baldi, 54 N.Y.2d 137, 147 (1981).

2. New York State defendants who believe they were not afforded effective assistance of counsel can raise claims of ineffectiveness on direct appeal or by collateral attack pursuant to Criminal Procedure Law §440.10. Only IAC claims that are totally record-based can be properly raised on direct appeal. Such claims are very rare.<sup>1</sup> The vast majority of IAC claims are totally outside of the record or involve at least some off-the-record information, such as, frequently enough, a statement by defense counsel as to strategy. These claims should be filed in the trial court pursuant to §440.10. It is of the utmost importance to identify whether the IAC claim is totally on the record or not because the appellate court can deny a claim that depends upon off-record information and, conversely, the 440 (trial) court can deny a claim that depended, in its opinion, solely on facts on the record. See §440.10(2) (c). While of utmost importance, it is not always easy to determine. Indeed, regarding IAC claims, reasonable minds can differ about whether trial counsel’s acts or omissions in a particular case could have resulted from conscious strategy (effective representation) or instead could only have resulted from ignorance of the law and/or facts (ineffective representation). In the former situation, a §440.10 motion is required to rule out strategy; in the latter situation, a direct appeal is currently required.
3. There are two main groups of ineffective assistance claimants: defendants *pro se* and institutional appellate providers for the indigent. (IAC claims are rarely filed by retained counsel.) The *pro se* claimants, by far the largest segment of claimants, almost exclusively file IAC claims by §440.10 and most of those motions are summarily denied pursuant to 440.30(4)(d), which allows the trial court to deny the motion “if an allegation of fact essential to support the motion . . . is made solely by the defendant and is unsupported by any other affidavit or evidence.” The institutional providers only rarely file IAC claims on direct appeal because, as noted in paragraph 2 above, the claim is rarely 100% record based and free from strategy debate. In addition, the Court of Appeals has sent a message that it encourages litigants to bring IAC claims by §440.10. See People v. Brown, 45 N.Y.2d 852 (1978) (“in the typical case, it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10”). Institutional providers typically file the IAC claim pursuant to §440.10. The present bill will not alter these

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<sup>1</sup> As just one example: in a gun possession case, a defendant could claim that his or her attorney had been ineffective in failing to move to suppress the gun when said motion would have been successful under prevailing law. The record shows that the motion was not made and there could be no strategic basis for failing to so move, which, the law dictates, would have resulted in dismissal.

filing preferences.<sup>2</sup> Most IAC claims will continue to be filed pursuant to §440.10 in the lower court and most will be summarily denied.

4. The bill will, however, redress a procedural black hole, which sometimes precludes all review of IAC claims in New York State and is fundamentally unfair. With the present procedural framework (see 2 above) in mind, posit the following example: D raises an IAC claim pursuant to §440.10. The trial court denies it summarily because it did not involve facts outside the record. D seeks leave to the appellate court (appeal from the denial of a §440.10 motion is not “of right”) and leave is denied. D then raises his IAC claim on direct appeal, but it is denied because in that court’s view, some part of the claim (perhaps trial counsel’s statement as to strategy) was not on the record. As such, no court ever reaches the merits of the IAC claim.

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While the example provided in paragraph 4 above is not common, it is not unheard of, either. Many members of the Committee are aware of such instances.<sup>3</sup> Further, only a rare few defendants have the know-how or wherewithal to renew their IAC claim in a federal habeas petition (28 U.S.C. §2254). Notably, in reviewing some of these petitions, federal courts have had occasion to bemoan instances where a New York state trial court unjustifiably invoked C.P.L. §440.10(2)(c) to procedurally bar review of the IAC claim. *See, e.g., Flores v. Demski*, 215 F.3d 293 (2d Cir. 2000); *Bonilla v. Portuondo*, 2004 WL 350694 at 10 (SDNY); *Quinnone v. Miller*, 2003 WL 21276429 at 13 (SDNY).

## CONCLUSION

The quality of trial counsel is critical to the fairness of the criminal justice system. Without competent representation, a defendant has little or no chance of fair resolution of his or her case. Indeed, wrongful conviction commissions invariably point to ineffective assistance of counsel as a significant factor to the conviction of innocent defendants. *See* 2009 Report of the New York State Bar Association’s Task Force on Wrongful Convictions. Thus, thorough review of the merits of IAC claims is essential to guaranteeing a fundamentally fair criminal justice system.

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<sup>2</sup> For those IAC claims that are, without question, based on the record, defendants would still have the option of raising the issue on direct appeal because the amendment would expand the scope of C.P.L. Article 440 without narrowing the relevant appellate jurisdiction. Moreover, a Westlaw search revealed that the four Appellate Divisions had found, in only 17 cases in 2008, that an IAC claim brought on direct appeal should have been brought as a 440 motion. Although this is a relatively small number - which demonstrates that the legislation will not cause a flood of motions at the trial level - for those defendants who never had their IAC claims heard on the merits (for the reasons stated herein), the consequences are very serious.

<sup>3</sup> We have been informed by the Office of Court Administration that it does not maintain statistics showing how often trial courts invoke the procedural bar under the existing statute. Moreover, when trial courts invoke the procedural bar and find that the IAC claim should be brought on direct appeal, such decisions are often unreported, and those decisions are not appealable as of right.

The bill would not only provide necessary review of IAC claims in all cases, but it would promote judicial efficiency. In this regard, the Committee stresses that the present bill would bring an end to piecemeal litigation of IAC claims. Defendants would no longer need to file IAC claims both before the trial court (pursuant to §440.10) and direct appeal, and only those very rare, obvious, on-the-record IAC claims would be filed by institutional providers on direct appeal. See N.Y.L.J., 3/3/08, Ineffective Assistance of Counsel, N.Y. Collateral Review, by Jonathan I. Edelstein (criticizing current statute for causing piecemeal litigation of IAC claims). Moreover, as the United States Supreme Court stated in a recent, unanimous opinion, trial courts are invariably better equipped to provide thorough and efficient review of IAC claims. Massaro v. United States, 538 U.S. 500, 505 (2003). That is why both the federal system and a growing majority of state courts follow the rule espoused in the instant proposed legislation.

For these reasons, the Committee supports enactment of A.1135/S.1020.

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