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REPORT ON LEGISLATION BY THE COMMITTEE ON CRIMINAL JUSTICE OPERATIONS AND THE COMMITTEE ON CRIMINAL COURTS

A.2442 **M. of A. Lavine**
S.42 **Sen. Peralta**

AN ACT to amend the Criminal Procedure Law, in relation to claims of ineffective assistance of counsel in post-conviction motions

THIS BILL IS APPROVED

This report is respectfully submitted by the Criminal Justice Operations and Criminal Courts Committees of the New York City Bar Association. The Association is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The members of the Criminal Justice Operations Committee include prosecutors and criminal defense attorneys who analyze the legal, social and public policy aspects of criminal justice issues facing New Yorkers today. The members of the Criminal Courts Committee include prosecutors, and criminal defense attorneys who analyze laws and policies that affect the criminal courts in New York.

Based on its review of Criminal Procedure Law section 440.10 governing motions to vacate judgments, the Committees support A.2442/S.42, which recommends that C.P.L. §440.10 be amended to allow all ineffective assistance of trial counsel claims to be raised via 440.10 motions.

In New York, defendants can seek relief from a judgment of conviction in two ways. First, they can file, as of right, a direct appeal in the Appellate Division (for indicted offenses) or in the Appellate Term (for misdemeanors). On direct appeal, defendants can only raise issues that are based on facts already contained in the trial record.[1] Second, defendants can file a motion to vacate the judgment pursuant to C.P.L. §440.10. That motion is filed in the trial court in which the judgment was obtained and can rely on factual allegations not contained in the trial record. Defendants may not appeal the denial of such a motion as of right, but must seek permission to do so.

As a corollary to these forum rules, New York prohibits a defendant from raising, on collateral review, (1) any claim that the defendant can raise on appeal (C.P.L. §440.10[2][b]) and

[1] See, e.g., People v. Kinchen, 60 N.Y.2d 772 (1983).

(2) any claim that the defendant could have raised on appeal but failed to do so (C.P.L. §440.10[2][c]). In other words, record-based claims must be brought on direct appeal and claims that are nonrecord-based must be brought collaterally. These rules currently apply to ineffective assistance of counsel claims ("IAC" claims) – thus, on-the-record IAC claims must be brought on direct appeal and IAC claims that rely on off-the-record facts must be brought collaterally.[2]

We believe 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 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; third, the current scheme requires piecemeal litigation of IAC claims that are, in part, record based and, in part, non record based; and fourth, when trial counsel serves as counsel on appeal, a defendant effectively waives any IAC claims that are based on the record. Below we discuss more fully the reasons we support amending the current statute.

The general purpose of C.P.L. 440.10 2[b] and 2[c] is to prohibit a defendant from using CPL §440.10 as a substitute for direct appeal. But this procedural bar is ill-suited to IAC claims. Notably, the Supreme Court has exempted IAC claims from the analogous procedural bar contained in the federal rules.[3] As the Supreme Court explained in Massaro, "when [an ineffectiveness] claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record that is not developed precisely for the purpose of litigating or preserving the claim and thus often incomplete or inadequate for this purpose."[4] The trial court is, "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial."[5] It is "the judge who presided at trial, who should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial."[6]

As noted in Massaro, "a growing majority of state courts now follow the rule" adopted in Massaro.[7] As set forth in Grant, at least 27 states follow the rule adopted in Massaro, including a number of states - California, Florida, Pennsylvania, and Texas - with large metropolitan criminal justice systems.[8]

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[2] See People v. Allen, 285 A.D.2d 470 (2d Dept. 2001).

[3] Massaro v. United States, 538 U.S. 500, 504 (2003).

[4] Id. at 505.

[5] Id.

[6] Id.

[7] Id. at 508, citing Commowealth v. Grant, 572 Pa. 48, 67 n. 13, 813 A.2d 726, 738 n. 13 (2002) (cataloging other States' law adopting this position).

[8] 572 Pa. at 67 n. 13, 813 A.2d at 738 n. 13.

New York should joint the growing majority of jurisdictions on this issue. Barring a defendant from raising an IAC claim on collateral review that arguably falls within the small group of directly appealable ineffectiveness claims places defendants in a difficult situation. It is often impossible for a defendant to predict whether a court will decide that his ineffectiveness claim is reviewable on direct appeal. If the defendant picks what turns out to be the wrong forum, he risks losing on procedural grounds without ever getting a decision on the merits.

This problem is illustrated in Flores v. Demski, 215 F.3d 293 (2d Cir. 2000). In Flores, the defendant brought an IAC claim, by C.P.L. §440.10, based on trial counsel's failure to object to a Rosario violation. Although the 440.10 motion contained an affidavit from the attorney explaining that his failure was not the result of a strategic decision, the trial court denied the 440.10 motion on the procedural ground that the claim could be raised on appeal (C.P.L. §440.10(2)(b)). Leave to appeal from the 440.10 decision was denied and defendant attempted to raise the claim on direct appeal. In his ultimate state court direct appeal, the Court of Appeals rejected the defendant's claim on the ground that the lawyer's Rosario failure might have been the result of a strategic decision (because leave to appeal from the 440.10 was denied, the Court could not consider the trial counsel affidavit establishing the absence of strategy). Thus, through no fault of the defendant and after much waste of judicial resources and time, Flores's IAC claim was never reviewed on the merits in state court. The proposed Bill would free defendants from this unnecessary dilemma and the judicial inefficiencies and potential injustices that it creates.

Next, the current statutory scheme results in the piecemeal litigation of IAC claims that are more properly reviewed as a single comprehensive claim.[9] As noted in a New York Law Journal article on the subject:[10]

> To begin with, piecemeal litigation of ineffective assistance of counsel claims is inimical to the standards of review contemplated in [prevailing federal and state case law], which contemplate review of counsel's performance in light of the entire case.
>
> The artificial distinction between record-based and nonrecord-based claims effectively prevents this from happening in a majority of cases, because it ensures that no single court will ever review all the alleged defects in representation. Instead, the court hearing the direct appeal must review the claims derived from the record without having before it the nonrecord errors that might case light on whether the attorney's overall representation was "meaningful," while a subsequent post-conviction court will be able to review the off-the-record errors but not the record-based deficiencies that put them in context.

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[9] See People v. Baldi, 54 N.Y.2d 137, 147 (1981) (counsel renders effective assistance of counsel when, "the evidence, the law and the circumstances of a particular case, viewed in totality and as of the time of representation reveal that the attorney provided meaningful representation.")(emphasis added).

[10] N.Y.L.J., Mar. 3, 2008, Ineffective Assistance of Counsel, N.Y. Collateral Review, by Jonathan I. Edelstein.

Finally, another dilemma arises for defendants who are represented by the same lawyer at trial and on direct appeal. As the Second Circuit recognized in Billy-Eko v. United States, 8 F.3d 111 (2d Cir. 1993), a trial attorney who continues to represent a defendant on appeal is in no position to raise an IAC claim. "An attorney can hardly be expected to recognize and litigate his own ineffectiveness if he continues to represent his client on appeal."[11]

We believe that the proposed amendment would encourage IAC claims to be brought in the preferable forum, would prevent the judicial inefficiency of unnecessary appeals or unduly delayed appeals, would prevent piecemeal litigation, would avoid causing defendants who have the same lawyer at trial and on appeal to forfeit IAC claims, and would avoid forcing defendants to make unpalatable decisions that rest on hard-to predict court labeling. 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 proposed amendment would expand the scope of C.P.L. Article 440 without narrowing the relevant appellate jurisdiction.

For these reasons, the Committees support passage of A.2442/S.42.

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[11] Id.