

Leveraging CPL 440 Post- Conviction Litigation in DVSJA Initial Sentencing Cases

**A guidebook for
post-conviction
defense teams**

**PREPARED FOR AND DISTRIBUTED BY
THE DVSJA STATEWIDE DEFENDER
TASK FORCE**

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I. Purpose and Development of this Manual¹

This manual is intended to provide guidance to defense team members assisting domestic violence (DV) survivors who received ineffective assistance of counsel (IAC) for errors related to their initial sentencing under the Domestic Violence Survivors Justice Act (DVSJA), pursuant to Penal Law § 60.12. In other words, this manual does not discuss DVSJA claims for *resentencing* under CPL 440.47, or IAC claims arising from CPL 440.47 representation.

To understand this distinction, it is important to clarify the eligibility criteria for DVSJA relief at initial sentencing versus resentencing. For survivors whose offenses occurred on or after August 12, 2019, the only opportunity to pursue DVSJA sentencing is at the initial sentencing. They cannot pursue resentencing pursuant to CPL 440.47. However, many eligible candidates for DVSJA sentencing are given inaccurate advice or given no information about DVSJA sentencing. Others may not have had their claims adequately investigated or received effective representation related to DVSJA sentencing.

In April 2026, the Court of Appeals gave clear guidance on the importance of a DVSJA hearing at initial sentencing upon request. The Court held that the right to a DVSJA hearing is not waivable as part of a plea deal because it is “too valuable, both to the [survivor-defendant] and the community, to be sacrificed in plea bargaining” (*People v N.H.*, 2026 NY Slip Op 02437, 2026 WL 1096314, at *1, *6 [April 23, 2026]).

The *N.H.* Court also emphasized that “it remains a [survivor-defendant’s] choice whether to request a section 60.12 hearing” (*id.* at *7). Recognizing the importance of a survivor’s agency, the Court noted that many “domestic violence survivors struggle with the effects of abusive relationships,” and therefore a “survivor may not be ready or willing to discuss their experiences in court.” Because many clients may be reluctant to share their experiences of abuse or may not even realize they are survivors of domestic violence, it is incumbent on trial defense teams to make every client aware of the DVSJA and to investigate every client’s eligibility so that clients can make informed decisions about whether to request a DVSJA hearing (see *id.* [“Therapy, family support, and counsel’s legal assistance may all be part of the healing process, which takes time”]). However, if counsel misadvises a client regarding DVSJA eligibility, or does not even recognize that the client has a claim, the survivor never has the opportunity to make that choice. Post-conviction counsel must be on the lookout for IAC claims arising from these situations.

¹ This guidebook was prepared by members of the DVSJA Statewide Defender Task Force, including Kimberly Duguay, Tammy Feman, Alexandra Harrington, Elizabeth Langston Isaacs, Mandy Jaramillo, Felice Milani, Kate Mogulescu, Filaree Moore, Brigid Riedy, and April Winecke. Primary authors are Mandy Jaramillo, Tammy Feman, Alexandra Harrington, and Kate Mogulescu.

has the opportunity to make that choice. Post-conviction counsel must be on the lookout for IAC claims arising from these situations.

Post-conviction defense teams may decide to pursue 440 litigation to argue that because prior counsel was ineffective, the judgment or sentence should be vacated. This manual will help defense teams:

- Understand the basic principles of the DVSJA, the law on ineffectiveness of counsel at sentencing, and post-conviction litigation;
- Identify the warning signs that indicate that 440 litigation may be needed;
- Counsel clients on the considerations and risks of pursuing 440 litigation;
- Determine whether to raise ineffectiveness issues related to the DVJSA on direct appeal or in post-conviction litigation;
- Understand the process of investigating, drafting, filing, and litigating 440 motions;
- Understand how to litigate 440 hearings and, if successful, DVSJA sentencing hearings; and
- File a leave application for permission to appeal the denial of a 440 motion.

II. Domestic Violence Survivors Justice Act

The Domestic Violence Survivors Justice Act (DVSJA) authorizes alternative and considerably reduced sentences for individuals who are survivors of domestic violence for whom the abuse was a significant contributing factor to the offense. The DVJSA has a retroactive component, codified in CPL 440.47, that applies to people whose offense dates were on or before August 12, 2019. The law also has a prospective component, Penal Law § 60.12, which applies to people whose offense dates were on or after May 14, 2019.

To qualify for alternative sentencing, a DVSJA applicant must prove that:

- (1) At the time of the offense, they were a victim of domestic violence subjected to substantial physical, sexual, or psychological abuse inflicted by an intimate partner, family member, or member of the same household, as defined in CPL 530.11;
- (2) The abuse was a significant contributing factor to their participation in the crime; and
- (3) Considering the “nature and circumstances” of the offense, and the applicant’s “history, character and condition,” a sentence under the standard sentencing range would be unduly harsh.

Because clients whose offenses occurred on or after August 12, 2019 can only obtain an alternative sentence under the DVSJA at their initial sentencing, trial defenders must investigate potential DVSJA claims and, when appropriate, seek a DVSJA hearing at

sentencing in the first instance. As will be discussed in depth in this manual, failure to do so may constitute ineffective assistance of counsel.

How does the DVSJA work at initial sentencing?

Who? A trial court must grant a DVSJA evidentiary hearing at sentencing upon request so long as the applicant meets the initial requirements related to the crime of conviction and the predicate status (see Penal Law § 60.12 [1]).²

When? DVSJA advocacy can and should be pursued at the earliest stages of the case. Talking to clients about the DVSJA early on, conducting investigation, and gathering mitigating evidence can materially affect plea negotiations, potential trial strategy, and the strength of the evidence at the DVSJA sentencing hearing. While the statute is unclear about exactly when a DVSJA hearing can take place, it is most common for it to occur post-plea or trial, prior to sentencing.

How? In some cases, the link between a client's domestic violence history and their offense may be clear. In others, particularly in cases where the abuser is not the complainant or decedent or where the predominant form of abuse was psychological, it can be more difficult to identify eligible clients. Some clients may not identify as DV victims or may not feel comfortable talking about their abuse. Working with a social worker, mitigation specialist, or investigator is helpful in identifying whether a client is eligible and in developing the claim. Defenders should also request DVSJA-related mitigating evidence as part of their discovery demands, pursuant to CPL 245.20 (1) (k) (vii).

III. What to Consider in Investigating and Litigating IAC 440 Motions for DV Survivors

CPL 440 motions seek post-judgment relief in NY trial courts by challenging the legality of the conviction or the sentence. CPL 440.10 is a request to vacate the conviction. When successful, applicants are generally placed back into pre-trial posture—with the conviction

² The main exclusions under the DVSJA are convictions for murder in the first degree pursuant to Penal Law § 125.27, aggravated murder pursuant to Penal Law § 125.26, murder in the second degree pursuant to Penal Law § 125.25 (killing of a child under 14 years old by a person over 18 years of age during a sexual act), any terrorism offense pursuant to Article 490, and any offense that requires someone to register as a sex offender under SORA, as well as attempt or conspiracy to commit any of the offenses described above. Second violent felony offenders pursuant to Penal Law § 70.04, persistent felony offenders pursuant to Penal Law § 70.10, and persistent violent felony offenders pursuant to Penal Law § 70.08 are also ineligible.

vacated and all pre-trial charges reinstated.³ CPL 440.20 is a request to set aside the sentence if it is “unauthorized, illegally imposed or otherwise invalid as a matter of law.” When successful, applicants are granted new sentencing proceedings. While CPL 440.20 motions are most often used to challenge the legality of the sentence itself, they can also be used to allege that the sentence is invalid because the client did not have effective assistance of counsel at sentencing, under the Sixth Amendment and Article I, § 6 of the New York State Constitution.

Practice Tip: Providers assigned to direct appeals or to post-conviction motions should also investigate and explore whether there are any other potential outside-the-record grounds that could be raised pursuant to CPL 440 and include all claims in a single motion. While there is no prescribed limit to the number of 440 motions that may be made, subsequent 440 motions are disfavored by courts unless the applicant has a strong reason for not having included a particular issue in the initial motion. Furthermore, the court may deny a 440.10 motion, including a motion raising ineffective assistance of counsel, where the applicant previously filed a 440.10 motion and could have “raise[d] the ground or issue underlying the present motion but did not do so” (CPL 440.10 [3] [c]; see also CPL 440.30 [1] [a]).

When should defense providers investigate 440 IAC claims in DV survivor cases?

Providers working on post-conviction cases should investigate whether DV survivors received effective assistance of counsel by considering the following scenarios.

Flags Indicating that IAC Investigation Is Warranted:

- **Client was eligible and DVJSA not discussed/hearing not requested:** Client was eligible for DVSJA sentencing hearing, pursuant to Penal Law § 60.12; client’s case file (trial file, appellate record, interviews with client and loved ones, etc.) indicates that client is a survivor of DV; and your interviews with client and/or trial counsel reveal that counsel did not discuss the DVSJA with client and/or did not request a 60.12 hearing.

³ If the court grants the motion, it must vacate the judgment and either dismiss the indictment or order a new trial, or “take such other action as is appropriate in the circumstances” (CPL 440.10 [4]). Where the court grants a new trial after vacating the conviction and does not dismiss the indictment, the criminal action is generally restored to its pretrial status, and the indictment is deemed to contain all the counts it originally contained (with certain specified exceptions) (CPL 440.10 [7], [8]). If the motion was granted on the ground of newly discovered evidence and would have resulted in a conviction for a lesser offense, the court may either order a new trial, or with the consent of the prosecution, modify the conviction to the lesser offense and resentence the applicant (CPL 440.10 [5]).

- **Client was eligible and counsel misadvised client on the DVSJA:** Client was eligible for DVSJA sentencing hearing, pursuant to Penal Law § 60.12; client's case file indicates that client is a survivor of DV; and your interviews with client and/or trial counsel reveal that counsel gave inaccurate information or misadvised client about the DVSJA due to a lack of familiarity with the facts or the law.
 - For example: Counsel told client, who had an offense date of September 8, 2023, that they could seek DVSJA resentencing on appeal or in post-conviction proceedings and did not need to request a 60.12 hearing.
 - For example: Counsel told client they would fare poorly in a DVSJA sentencing hearing because the ongoing psychological abuse they were suffering at the time of the offense did not count as DV under the statute.

- **Counsel was ineffective in pursuing DVSJA sentencing:** Client was eligible for DVSJA sentencing hearing, pursuant to Penal Law § 60.12; DVSJA sentencing hearing was discussed, requested, and/or conducted; and counsel made prejudicial error(s), such as:
 - Counsel failed to properly investigate the facts of the case.
 - Including, but not limited to: failure to gather records, read and analyze records, interview witnesses, consult an expert when advisable, and/or interview client.
 - Counsel failed to present critical and accessible evidence (from the client, other witnesses, or through documents) at the hearing.
 - Counsel failed to consult with an expert or present expert testimony or an expert report when it would have been beneficial under all the circumstances.
 - Counsel failed to make an effective argument or bring out the best evidence to prove the nexus between the history of abuse and the crime of conviction.⁴
 - Counsel failed to effectively cross-examine prosecution witnesses and/or experts, failed to object to the prosecution's improper questioning of witnesses

⁴ Where necessary, counsel must investigate the facts of the particular case and determine the best evidence and argument around the temporal nexus requirement (see, e.g., *People v Williams*, 198 AD3d 466 [1st Dept 2021] [adopting the prosecution's argument that to be a victim of domestic violence "at the time of the offense," the DVSJA applicant must demonstrate that "the abuse or abusive relationship [was] ongoing" when the offense occurred]; *People v Rivera*, 230 AD3d 517, 519 [2d Dept 2024] [adopting *Williams* approach]; *People v Fisher*, 221 AD3d 1195 [3d Dept 2023] [adopting the First Department's statutory interpretation of the temporal nexus required]). For tips on litigating temporal nexus in DVSJA cases, review the DVJSA Statewide Defender Task Force's [Intake & Case Assessment Guide for DVSJA Resentencing: A Guidebook for Defense Teams](#) (July 2024), at 34-39.

and/or characterization of their client, or failed to object to the admission of irrelevant or inflammatory evidence at the hearing.⁵

- Counsel only raised the client's status as a survivor of DV during plea negotiations and in closed-door conversations and failed to place the client's mitigating information or eligibility for DVSJA sentencing on the record.
 - Counsel failed to request and/or properly review discovery (see CPL 245.20 [1] [k] [vii] [prosecution has an obligation to turn over material favorable to mitigation argument]).
- **Counsel advised client to waive DVSJA sentencing in exchange for plea:** Client was eligible for DVSJA sentencing hearing, pursuant to Penal Law § 60.12, and defense counsel improperly advised client to waive their right to DVSJA sentencing as part of a negotiated plea bargain (see *People v N.H.*, 2026 NY Slip Op 02437 [holding that a DVSJA hearing is not a waivable right as part of a plea deal]).

What should defense providers consider before litigating 440 IAC claims in DV survivor cases?

In cases where DV survivor clients have valid post-conviction claims on the grounds of ineffective assistance of counsel, defense providers must determine the best path forward—whether it is filing a 440.10 motion, a 440.20 motion, or first filing the direct appeal without prior collateral litigation.

CPL 440 motions generally are used to present facts outside of the record. In most instances, IAC claims must be brought by way of 440 motion, rather than on direct appeal, because the applicant has the ultimate burden of showing the absence of trial counsel's strategic or legitimate reasons for their decisions—requiring evidence that is most often not contained in the record itself.⁶

⁵ See, e.g., *People v T.P.*, 45 NY3d 48, 50, 51 (2025) (holding that trial counsel was ineffective “for failing to object to remarks that the prosecutor made during summation which misrepresented critical evidence and repeatedly denigrated” T.P., including claiming that T.P. “had lied on the stand, using the word ‘lie’ or ‘lies’ fourteen times in total”).

⁶ See *People v Lopez-Mendoza*, 33 NY3d 565, 572-573 (2019) (finding the record insufficient to make the showing of “the absence of strategic or other legitimate explanations for counsel's challenged actions” without CPL 440 litigation); see also *People v Maffei*, 35 NY3d 264, 270 (2020) (“[I]n 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”) [quoting *People v Brown*, 45 NY2d 852, 853-854 (1978)]; *People v Jaquan C.*, 2026 NY Slip Op 02582 (4th Dept 2026) (rejecting IAC claim on direct appeal regarding counsel's failure to request 60.12 hearing because the “record [was not] sufficiently developed to permit resolution” of the claim”); but see *People v Nesbitt*, 20 NY3d 1080, 1082 (2013)

Thus, where counsel was ineffective during the *sentencing* proceeding, 440.20 is generally the best tool to capture outside-the-record information, including counsel's communication with the client (or lack thereof) and indicators of failing to properly investigate, advise on, request, or litigate alternative sentencing under the DVSJA.

However, in negotiated guilty plea cases, it may be more challenging to determine whether to file under 440.20 or 440.10, especially if the ineffectiveness went to the heart of the plea negotiations, rendering the plea involuntary and requiring vacatur of the conviction, pursuant to CPL 440.10.

Risks

Providers should consider and discuss with their clients the differences between CPL 440.10 and 440.20, as pursuing relief under each statute comes with unique benefits and risks.

Because 440.20 entails undoing the sentence, not the conviction, the risk of a greater punishment is, generally speaking, less than it would be for a 440.10 claim that vacates the conviction. However, in cases where the court grants the 440.20 motion and orders a DVSJA sentencing hearing, but ultimately denies alternative DVSJA sentencing, there may be some risk in resentencing. The risks vary depending on whether the sentence was imposed after trial or as part of a negotiated plea.⁷

Risks of resentencing after trial conviction: 440.20

For a case where the sentence was vacated after trial, a resentencing judge who imposes a greater sentence than that originally imposed must affirmatively state the reasons for doing so based on objective information about the client's conduct since the time of sentencing in order to overcome a presumption of vindictiveness (*North Carolina v Pearce*, 395 US 711,

(reversing and finding IAC on the record because in "this case, where the lawyer explained his thinking in plain language on the record, [there] is an exception: The record permits us to decide the claim on direct appeal").

⁷ A risk that applies to a resentencing both after plea and after trial is in cases where the original sentence was illegal because it was lower than the available legal sentences on resentencing. In these cases, the defense team should be wary of disturbing the sentence where the resentencing court will be obligated to sentence the applicant to a legal sentence, which may be higher than the original illegal sentence.

725-26 [1969]).⁸ This is also true under New York’s Constitution: there is a presumption of vindictiveness attached to an increased sentence after resentencing, even where a different judge conducts the resentencing, absent “some event becoming known or available only after the first sentence and justifying the more severe sentence” (*People v Van Pelt*, 76 NY2d 156, 161 [1990]).

In other words, absent some new information that emerges between the time of the original sentencing and resentencing to support a more severe sentence, a new sentence in a case where the original sentence was imposed after trial should be the same or lesser than the original sentence. Evidence of domestic violence, the DVSJA’s reduced sentencing guidelines, and the client’s positive growth and rehabilitation since the time of original sentencing should be marshalled in support of a lesser sentence. However, defense teams should be mindful of clients’ potentially problematic incarceration records (e.g., numerous disciplinary reports, fights, substance use in jail or prison, convictions while incarcerated, and/or recordings of calls that could be used to allege malingering, manipulation of the process, or a lack of remorse) that could potentially be used as evidence to support a harsher sentence.

Risks of resentencing after plea: 440.20

In negotiated plea cases, the risks for a resentencing applicant are greater. If the court vacates the sentence, the prosecution may be able to withdraw consent to the plea (*People v Farrar*, 52 NY2d 302, 307-08 [NY 1982]) [“Where the record shows that the prosecutor’s consent to a plea is premised on a negotiated sentence and a lesser sentence is later deemed more appropriate, the People should be given their opportunity to withdraw their consent”]; *People v N.H.*, 2026 NY Slip Op 02437, *16 [2026] [Cannataro, J., dissenting] [opining that the prosecution had a right under *Farrar* to withdraw consent to the plea bargain if DVSJA sentencing was granted on remand]]. There is a real risk that, where the 440.20 applicant did not plead to the top count and took a negotiated plea, prosecutors will try to withdraw the plea following a successful 440.20 application, leaving the applicant in a position more akin to the 440.10 process.

⁸ In *Alabama v Smith* (490 US 794, 799-802 [1989]), the Supreme Court of the United States (SCOTUS) clarified that *Pearce*’s presumption of vindictiveness does not apply in circumstances where the underlying policy would not warrant it, including where the accused seeks a de novo review of their conviction in another court, where a new jury imposes a greater sentence than a previous jury, or where a greater sentence is imposed after trial than was originally imposed after a guilty plea. And, in *Texas v McCullough* (475 US 134, 140 [1986]), SCOTUS held that *Pearce*’s presumption did not apply where there were two different sentencers as long as the second sentencer provided a “logical, nonvindictive reason for the sentence.”

However, there are a few considerations that can mitigate this risk:

(1) Prosecution request for plea withdrawal is not automatic; requires prejudice analysis.

Court of Appeals precedent clarifies that it is the *granting* of relief that is different than what was promised under the plea agreement—not the prospect of a hearing on eligibility—that could trigger the prosecution’s ability to withdraw its plea (see *Farrar*, 52 NY2d at 305 [giving prosecution “opportunity to withdraw consent to the plea in the event a lesser sentence is to be *imposed*”] [emphasis added]; *People v Dickerson*, 85 NY2d 870, 872 [1995] [acknowledging prosecution’s right to seek plea vacatur following determination that Dickerson was illegally sentenced as a persistent felony offender where the plea deal was “predicated” on a PFO finding]).

Further, *Farrar* emphasizes that the court maintains its discretion in determining the appropriate sentence, and the prosecution’s request to withdraw the plea should “not be granted in all cases,” particularly where there is prejudice to the applicant (*Farrar*, 52 NY2d at 308). This aspect of *Farrar* was reaffirmed by the Court of Appeals in *People v Sabb* (2026 NY Slip Op 01590, *5 [2026], *affirming People v Sabb*, 238 AD3d 1212, 1214-1215 [3d Dept 2025] [noting that a prosecution request to withdraw consent to plea based on subsequent sentence reduction “is not automatically granted, but rather triggers an evaluation of whether” plea vacatur would prejudice the defense, and declining to remit for prosecution to seek plea withdrawal where such relief was not requested on appeal]). Thus, the DVSJA applicant could argue that plea withdrawal after a successful 440.20 would prejudice them and/or would be improperly punitive and should not be allowed.

(2) Prosecution must affirmatively bargain for right to withdraw consent to plea.

Additionally, *People v Rudolph* (21 NY3d 497, 509-510 [2013]) provides a helpful comparison. The Court explained that “where a prosecutor is unwilling to take the chance that a judge will disagree with his or her recommendation, that prosecutor may bargain for the right to withdraw consent to the plea agreement if youthful offender treatment is granted” (*id.* at 502). Thus, the successful 440.20 applicant could argue that the prosecutor cannot withdraw consent to the plea agreement if the prosecutor did not affirmatively reserve the right to withdraw consent to the agreement *before the plea was entered* (not just before a DVSJA hearing is held).

(3) The risk may be negligible if DVSJA relief is granted.

Moreover, depending on the indictment and assuming that the client is ultimately granted alternative sentencing under the DVSJA, then the new sentence—even to a re-plea to the top count—may not expose them to more time. For example, in a case where the client is charged with second-degree murder but originally pleaded to first-degree manslaughter in exchange for a determinate term of 20 years of incarceration, the DVSJA sentencing range

for second-degree murder is a determinate term of between five and 15 years of incarceration, still lower than the original sentence.

Risks of a 440.10 IAC motion

In comparison to 440.20 litigation, the inherent risks in obtaining vacatur of a conviction after a guilty plea, pursuant to CPL 440.10, are greater. Because vacating the conviction reinstates the indictment against the client, a potential risk if the motion is granted is a subsequent worse criminal resolution *and* a harsher sentence. Thus, there is a real risk that a 440.10 applicant who pleaded guilty could end up in a worse position than where they started.

Moreover, time is a consideration: a client who is successful in vacating the conviction through a 440.10 motion will face the lengthy process of essentially starting their criminal proceeding anew. Because the client is now pre-plea, the client will have to re-engage in negotiation if appropriate, re-litigate any pre-trial motions, and re-litigate their case. Further, the client would likely be placed back in pre-trial detention, which may be less desirable to the client and could interrupt programming and services they were receiving in a state facility. Another potential downside may be a delay in obtaining relief on appeal, especially if there are strong and winnable direct appeal issues that could be raised from the first trial and if the 440.10 is filed before that appeal is final.

Finally, there may be significant risks to your client if your client is not a United States citizen. For non-US citizen 440 cases, counsel should always seek assistance from an immigration attorney.⁹

Timing

CPL 440.10 and 440.20 provide that a motion can be brought "at any time after the entry of judgment." While this language provides a generous time frame for practitioners to make an application on behalf of clients, courts may become increasingly skeptical of a claim as time passes.

Post-conviction counsel must conduct a deep dive into the facts or evidence that may or may not appear on the record before determining whether to begin with the 440 motion or

⁹ [Regional Immigration Assistance Centers](#) throughout New York State work with defense counsel to fulfill their obligation under *Padilla v Kentucky* (599 US 386 [2010] [holding that the Sixth Amendment requires criminal defense counsel to advise non-citizen clients about the immigration consequences that could arise from the decision to plead guilty or go to trial]).

the direct appeal. “In the rare case, it might be possible from the trial record alone to reject all legitimate explanations for counsel’s failure to pursue a colorable...issue” (*People v Rivera*, 71 NY2d 705, 710 [1988]). In other words, if it appears that the IAC claim might be viewed by the appellate court as strictly record-based, then the better choice could be to start with the appeal.

Separately, it may be strategically advantageous to start with a client’s direct appeal if the client has a strong separate appellate issue that could secure their release more quickly. For example, if the client is incarcerated and has a meritorious CPL 30.30 claim on direct appeal, it could make more sense to file the direct appeal first, rather than potentially delaying relief. Moreover, because pursuing DVSJA sentencing means that the client must admit guilt, if there is a meritorious argument on direct appeal that would require reversal, such as a suppression argument that would leave the prosecution with legally insufficient evidence, then counsel should weigh whether it would put the client in a worse position to bring the DVSJA 440 motion first. An admission of guilt could undermine future plea negotiations or chances at dismissal.

And finally, time constraints imposed by appellate courts may require starting with the direct appeal. Not all appellate departments will permit long-term enlargements to file the direct appeal, and 440 investigation can take months or even years. It is important to make sure that the direct appeal remains in good standing while the 440 motion is pending. Providers must stay on top of extension requests and/or motions to enlarge the time to perfect the direct appeal while 440 motions are pending.

However, in most cases, it is best to litigate a 440 motion before the direct appeal is perfected. First, if the 440 motion is denied, the applicant can seek leave in the Appellate Division to appeal the denial of the motion and to consolidate the 440 claims with the direct appeal or to calendar the cases so that they are heard together (*People v Evans*, 16 NY3d 571, 574-575 [2011] [encouraging appellate courts to consolidate 440.10 motions with the direct appeal]). Because of this judicial economy, appellate courts may be more likely to grant leave where the court can determine the 440 issues along with the direct appeal issues in one proceeding.¹⁰

¹⁰ However, keep in mind that the new joint rules of the Appellate Divisions do not allow for motions to consolidate “absent an order of the court,” and as such, not all appellate departments will consolidate the 440 and direct appeal (see 22 NYCRR Joint Rules of the Appellate Divisions, Part 1250.9 [4] [“Absent an order of the court, appeals from orders or judgments in separate actions or proceedings cannot be consolidated but may, upon written request of a party, be scheduled by the court to be heard together on the same day”]). In the Second Department, for example, the 440 appeal and the direct appeal will generally not be consolidated but may be placed on the same calendar day for review. The appellate panel should still have the full picture of what happened below if the cases are calendared together.

This approach may be particularly advantageous in raising IAC claims in the context of a DVSJA case because it provides the appellate court with a complete picture of what happened below and allows an examination of challenged decisions or omissions. It also allows the defense team to more fully tell their client's compelling story and get facts on the record that may impact the appellate court's overall view of the case.

Furthermore, in cases where counsel's strategic decisions are not apparent from the record for the direct appeal, a 440 motion should be filed prior to the direct appeal. An example of this could be where the prevalence of domestic abuse was apparent in outside-the-record materials, and the trial attorney failed to make an application under the DVSJA and failed to appreciate the significant potential sentence reduction (see *Rivera*, 71 NY2d at 709 [noting that appellate courts are reluctant to consider ineffective assistance claims on direct appeal where counsel's strategic decision making is not apparent from the record; see also *People v Jaquan C.*, 2026 NY Slip Op 02582 [4th Dept 2026] [holding that the direct appeal record was insufficient to establish that counsel was ineffective for failing to request 60.12 DVSJA hearing]; *People v Linda R.M.*, 236 AD3d 1488 [4th Dept 2025] [holding that counsel was not ineffective for failing to request 60.12 DVSJA hearing and finding that parts of the ineffectiveness claim contained information outside of the record that would need to be raised in a 440 motion]). Further, even where the IAC claim involves a mix of record-based and non-record-based claims and could arguably be raised on direct appeal, it should first be brought in a 440 proceeding (*Massaro v United States*, 538 US 500, 504-505 [2003]; *People v Evans*, 16 NY3d 571, 574-575 [2011]).

Additionally, bringing the 440 motion before the appeal may prevent the 440 trial court and the prosecutor from giving the case a summary review. If the conviction has not been affirmed on appeal, the 440 court and the prosecutor are more likely to fully review the case. A 440 motion brought after a survivor has had their conviction affirmed might send a message that there is nothing more that needs to be done on the matter (*but see People v Pendergraph*, 170 AD3d 1630, 1630-1631 [4th Dept 2019] [ineffective assistance claim was first denied on direct appeal, then denied by 440 court, and a hearing was granted on the appeal of the 440]).

Further, there is a risk that in starting with the direct appeal the appellate court might conduct a full merits analysis on counsel's effectiveness (even with incomplete information) that would make bringing a subsequent 440 motion more challenging (see *People v Robinson*, 168 AD3d 605 [1st Dept 2019] [finding record insufficient to determine if counsel was ineffective for failing to request lesser included offense charge but holding in the alternative that no reasonable view of the evidence supported the claim]). But even where an IAC claim is denied on direct appeal, an attorney can and likely should still bring a subsequent 440 motion where there are facts to support it (see *Pendergraph*, 170 AD3d at 1630-1631).

IV. The Law on IAC at Sentencing

What is the law generally on ineffective assistance of counsel?

Both the United States and New York Constitutions guarantee every person accused of a crime the right to the effective assistance of counsel (see US Const, Amends VI, XIV; NY Const art I, § 6; *Strickland v Washington*, 466 US 668, 686 [1984]; *People v Benevento*, 91 NY2d 708, 711 [1988]; *People v Baldi*, 54 NY2d 137, 146 [1981]). The Sixth Amendment right to counsel requires an attorney “who has taken the time to...prepare” and is familiar with the existing law and facts “relevant to the defense” (*People v Droz*, 39 NY2d 457, 462 [1976]). Counsel must “conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow [] enough time for reflection and preparation for trial” (*People v Bennett*, 29 NY2d 462, 466 [1972]).

Under the federal standard, accused people must show that (1) the “identified” attorney error(s) fell below an “objective standard of reasonableness,” and (2) the error(s) prejudiced the case so as to “undermine confidence in the outcome,” meaning “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” (*Strickland*, 466 US at 688, 694). Thus, to prevail, the person “must identify the acts or omissions of counsel” that are alleged to be objectively unreasonable, and the “court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance” (*id.* at 680; see *Kimmelman v Morrison*, 477 US 365, 386 [1986] [finding that conduct beyond the “identified acts or omissions” is only relevant where it sheds light on whether the identified errors were reasonable]).

For guilty pleas, “the long-standing test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action” (*Hill v Lockhart*, 474 US 52, 59 [1985]). Thus, “[t]he second prong, also known as the prejudice prong, ‘focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process’” (*People v McDonald*, 1 NY3d 109, 114 [2003], citing *Hill*, 474 US at 59). “[T]o satisfy this prong, a ‘defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial’” (*id.*).

While New York’s deficient-performance test tracks the federal standard (see *People v Turner*, 5 NY3d 476, 480 [2005]), the state’s prejudice standard—which focuses on meaningful representation—“is more protective than the federal standard because even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial” (*People v Debellis*, 40 NY3d 431, 436 [2023] [internal quotation marks omitted]). The burden rests on the defense

to show the absence of defense counsel's strategic rationale (see *People v Lopez-Mendoza*, 33 NY3d 565, 572 [2019]).

And, where counsel's singular error or multiple errors constitute prejudicial deficient performance, it is constitutionally irrelevant whether counsel may have performed competently during other stages of the proceeding. "[A]s our cases demonstrate, a single, sufficiently egregious and prejudicial error *will* constitute ineffective assistance of counsel, *despite* an otherwise competent performance" (*People v Hayward*, 42 NY3d 753, 757 [2024] [finding that reliance on "general competency" to excuse an otherwise prejudicial error "would produce an absurd result inconsistent with New York constitutional jurisprudence and the mandates of *Strickland*"]) [quoting *Rosario v Ercole*, 601 F3d 118, 126 [2d Cir 2010]; see ILS Appellate Defender Council (Matthew Bova, author) "[Practice Advisory: Responding to an Overall-Performance Theory When Litigating Ineffective Assistance of Counsel](#)"). Moreover, "where counsel's errors individually may not constitute ineffective assistance, the cumulative effect...can deprive defendant of meaningful representation" (*People v Wright*, 25 NY3d 769, 779 [2015] [internal marks and citations omitted]).¹¹

How does ineffectiveness extend to sentencing?

Every person accused of a crime is entitled to due process at sentencing, "a crucial stage in criminal proceedings" (*People v Minemier*, 29 NY3d 414, 422 [2017]; see also *People v Perry*, 36 NY2d 114, 119 [1975] ["That the sentencing process is a crucial stage of the criminal process which rises to constitutional dimension is beyond dispute"]). Due process at sentencing demands a "determination of an appropriate sentence," based on "the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of the penal sanction" (*Farrar*, 52 NY2d at 305 [citations omitted]).

The right to effective assistance of counsel, under both the federal and state constitutions, extends to the sentencing stage (see *Glover v United States*, 531 US 198, 203 [2001]; see also *People v Jones*, 181 AD3d 714, 715 [2d Dept 2020] [counsel ineffective where no substantive arguments were made at sentencing and record showed counsel had "no meaningful knowledge of the case or of the defendant's background"]; *People v Hunter*, 173 AD3d 1249 [3d Dept 2019] [counsel ineffective for failing to challenge enhanced sentence]; *People v Fagan*, 116 AD3d 451, 452 [1st Dept 2014] [counsel's failure to challenge the predicate was "the product of a lack of investigation," and thus constituted ineffective assistance of counsel at sentencing]; *People v Edmond*, 84 AD2d 938, 938 [4th Dept 1981]

¹¹ For other resources on investigating and litigating ineffective assistance of counsel claims, explore the ILS [Resource Guide for Ineffective Assistance of Counsel Trial Errors](#).

[counsel ineffective at sentencing where he relied on the probation report, then admitted he had not read it]).¹²

Effective assistance at sentencing requires that counsel be “sufficiently familiar with the case and the defendant’s background to make an effective presentation on the question of sentence” (*People v Wiggan*, 242 AD2d 549, 550 [2d Dept 1997] [internal citations omitted]; see also *Wiggins v Smith*, 539 US 510 [2003] [though some mitigation presented, counsel ineffective for failure to conduct additional mitigation investigation]; *Williams v Taylor*, 529 US 362, 370, 396 [2000] [by ignoring evidence of childhood abuse and cognitive challenges, defense counsel “did not fulfill their obligation to conduct a thorough investigation of the defendant’s background”]).

Thus, counsel must perform “a reasonable investigation into the relevant facts and law to determine whether matters of defense can be developed” and to pursue potential dispositions and lesser punishment (*People v Graham*, 129 AD3d 860, 862 [2d Dept 2015]; see also *People v Jones*, 181 AD3d 714, 715 [2d Dept 2020] [counsel ineffective where no substantive arguments were made at sentencing and record shows counsel had “no meaningful knowledge of the case or of the defendant’s background”]; *People v Walker*, 101 AD3d 1350 [3d Dept 2012] [counsel ineffective for failing to challenge enhanced sentence, leaving client to argue the issue for himself]; *People v Washington*, 96 AD2d 996, 997-998 [3d Dept 1983] [vacating sentence and remitting for a new sentencing hearing as a persistent felony offender where “counsel had neither investigated nor consulted with defendant in advance of the hearing on the possible existence of any mitigating factors, nor did he advise defendant either before or during the hearing of his right to present such factors to the court” causing the hearing to be “a sham” due to counsel’s “inadequate and ineffective legal representation”]; *Edmond*, 84 AD2d at 938 [Fourth Department finding ineffectiveness where counsel relied on probation report even though he had not read it]).¹³

¹² See also *People v Rivera*, Ind. 6256-09 (Crim Ct NY Co, July 5, 2019) (Carro, J.) (unpublished) (counsel ineffective at sentencing when he failed to investigate or obtain mitigating evidence illustrating the extent of client’s traumatic upbringing and mental illness). Please reach out to ILS’s Statewide Appellate Support Center at SASC@ils.ny.gov for a copy of this decision.

¹³ Other jurisdictions have also held that counsel was ineffective for failing to investigate and present mitigating information at sentence (see *Chambers v Lilly*, 735 FSupp3d 196, 205 [EDNY 2024] [granting habeas petition alleging ineffective assistance of trial counsel for failure to present mitigating evidence at sentencing regarding client’s difficult upbringing and remorse]; *United States v Sepling*, 944 F3d 138 [3d Cir 2019] [counsel ineffective at sentencing for failure to investigate nature of drugs that dictated client’s sentence under federal guidelines]; *State v Hess*, 207 NJ 123 [2011] [reversing denial of post-conviction motion for ineffective assistance of counsel at sentencing where counsel failed to present mitigating evidence of the domestic violence the complainant had perpetrated against the client]).

In *People v Butts* (Ind. Nos. 2585-06 & 3121-06 [Sup Ct, NY Co., Oct. 31, 2024] [Badamo, J.] [unpublished]),¹⁴ the court granted Mr. Butts' 440.20 motion, finding counsel ineffective for failing to investigate mitigating evidence for sentencing. The court confirmed that an attorney's obligation to argue for leniency is not limited to identifying documentary evidence of mitigation; rather, counsel should make the court aware of anecdotal "details of defendant's childhood and lifetime of abuse" in order to contextualize the client's criminal behavior. In this case, Mr. Butts had been sentenced to 35 years in prison for a string of robberies committed when he was 20 years old. While his attorney "recommended a sentence in the range of 13 years, asking that the court consider the People's plea offer, defendant 'relative youth' and lack of felony convictions," he failed to "make any inquiry of defendant, his mother or his siblings regarding defendant's background," which would have revealed years of abuse and substance use (*id.* at 8-9). Because counsel was "not sufficiently familiar with defendant's background," his "statements regarding defendant's relative youth and the potential influence of his older codefendants were just assertions calling for speculation by the court" (*id.* at 11).

Furthermore, "any amount of actual jail time has Sixth Amendment significance" for purposes of showing prejudice (*Glover*, 531 US at 203). And, because New York's sentencing scheme gives judges broad discretion in sentencing, this places an even greater obligation on defense counsel to investigate and present mitigating evidence to the court (see *People v Notey*, 72 AD2d 279, 283 [2d Dept 1980] ["[T]he personal status of the defendant" is "the most significant factor in...[a] sentencing process" that gives judges discretion to choose among sentence options that can differ by decades in prison]). In *Butts*, the court found that prejudice was established because "had counsel exerted even minimal effort, he would have obtained a trove of mitigation from which to argue cogently for leniency" (*Butts*, at 12).

How can IAC precedent be applied in DVSJA cases?

Professional standards make clear that "[e]arly in the representation, and throughout the pendency of the case," defense counsel "should consider potential issues that might affect sentencing," "become familiar with the client's background, applicable sentencing laws and rules, and what options might be available," and "consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate" to become "fully informed regarding available sentencing alternatives" (see [ABA Criminal Justice Standards for the Defense Function](#), § 4-8.3 [Sentencing]). It is counsel's duty to "present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused" (*id.*; see also [Performance Guidelines for](#)

¹⁴ Please reach out to ILS's Statewide Appellate Support Center at SASC@ils.ny.gov for a copy of this decision.

[Criminal Defense Representation](#), NLADA [Guideline 8.1 Obligations of Counsel in Sentencing] [counsel should “ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court”]).

Thus, in post-conviction cases where DV survivors are accused of crimes, it is of the utmost importance to determine whether defense counsel investigated the client’s background, gathered mitigating evidence, and considered sentencing issues early on in the representation; whether counsel then appropriately investigated these issues, including consulting an expert where necessary; explored any “available sentencing alternatives,” including requesting sentencing under the DVSJA; and presented all available arguments and evidence at sentencing to “assist the court...in reaching a sentencing disposition favorable to the accused” (see *id.*, ABA and NLADA Standards and Guidelines). Post-conviction counsel should rely on federal and New York state precedent (cited above) to argue that there was ineffective assistance of counsel in DVSJA cases where counsel’s performance was deficient for any of these reasons.

Currently, there is little precedent directly on point to guide practitioners in determining whether counsel was ineffective in cases where counsel failed to request or thoroughly investigate and/or litigate alternative sentencing under the DVSJA. And, thus far, there have not been any cases finding counsel ineffective on this ground.

However, because the Court of Appeals recently held in *N.H.* (2026 NY Slip Op 02437) that DVSJA hearings, like youthful offender (YO) determinations, are not waivable, more appeals and post-conviction motions are likely to feature challenges highlighting invalid waivers of DVSJA consideration. Some of these challenges will certainly include arguments that counsel was ineffective due to misadvising clients to waive a 60.12 hearing, failing to adequately investigate the viability of a DVSJA claim, and/or failing to request a post-plea DVSJA hearing. Furthermore, there are a number of appellate and post-conviction DVSJA-related IAC claims currently being litigated.

In *People v Riley* (221 AD3d 1162 [3d Dept 2023]), Ms. Riley, who had been convicted of second-degree assault for injuring her three-year-old son, appealed from a Washington County Court order denying her CPL 440.20 motion in which she had argued that trial counsel was ineffective for failing to seek a lesser sentence under the DVSJA, pursuant to Penal Law § 60.12. The Third Department found that it was “undisputed that [Ms. Riley] was previously subjected to substantial physical abuse by the victim’s father prior to this arrest and subsequent incarceration, roughly 16 months prior to [her] criminal conduct,” but that even if she “had thereafter been subjected to ongoing substantial psychological abuse by the victim’s father through written and telephone communication,” “she failed to demonstrate that the abuse was a significant contributing factor to her underlying criminal behavior against the victim” (221 AD3d at 1163, citing *Williams*, 198 AD3d at 466-467). Here, the

Third Department implicitly took the view that there was a temporal nexus problem in this case and held that because the survivor “failed to demonstrate that any prior or ongoing abuse was a significant contributing factor to her assault upon the victim,” counsel was not ineffective for failing to seek a sentence pursuant to Penal Law § 60.12 (*Riley*, 221 AD3d at 1163-1164).

In *People v Krista M.G.* (228 AD3d 1300 [4th Dept 2024]), the survivor, who had been convicted of first-degree manslaughter (but acquitted by the jury of second-degree murder) for stabbing her boyfriend, appealed from a Jefferson County order denying her CPL 440.47 resentencing application after a hearing. At trial, the survivor raised a justification defense. On the appeal of her resentencing denial, she argued in part that counsel was ineffective for “failing to elicit testimony from [her] at the [440.47] hearing with respect to her ‘perspective on her domestic violence survivorship’ and ‘to further develop the statements she made in her written submissions’” (*id.* at 1302). The Fourth Department affirmed the denial of the motion and held that counsel was not ineffective in this regard because his client “set forth in detail her self-described history of domestic abuse,” there was no indication in the appellate record “what additional testimony [she] would have offered at the hearing if defense counsel had engaged in further examination,” and she did not demonstrate the absence of a legitimate explanation for counsel’s conduct (*id.*). The court further opined that counsel may have believed that “eliciting additional testimony from [her] would have exposed her to damaging cross-examination, and that it was a better strategy to rely on [her] affirmation” (*id.* at 1302-1303).

In *Linda R.M.* (236 AD3d at 1488-1489), in a negotiated plea to first-degree manslaughter, the Fourth Department found on direct appeal that defense counsel’s failure to request a hearing to determine eligibility for an alternative sentence under the DVSJA at initial sentencing, was not ineffective assistance. The record reflected that, as part of the plea agreement, the parties agreed to a sentence commensurate with what appellant could have received under the DVSJA (*see id.* at 1489). The court noted that, to the extent that appellant was alleging IAC regarding the plea negotiation, that claim contained information outside of the record and would need to be raised in a 440 motion (*see id.*).

In *Jaquan C.* (2026 NY Slip Op 02582), Jaquan C. pleaded guilty to first-degree manslaughter and was sentenced to 15 years of incarceration after killing the decedent by stabbing him once in the chest during an argument, and then staying at the scene, calling 911, and calling the decedent’s family. The Fourth Department’s majority held that the direct appeal record was insufficient to establish that counsel was ineffective for failing to request a DVSJA hearing under Penal Law § 60.12 as it was “silent with respect to, among other things, whether defense counsel discussed the possibility of an alternative DVSJA sentence with defendant or raised the issue during plea negotiations with the prosecution,” and thus, that any IAC claim would have to be brought via CPL 440 motion. However, two dissenting

judges would have vacated the sentence and remitted for a DVSJA sentencing hearing on the grounds that counsel was ineffective for failing to request it. The dissenters found that the record (through the pre-sentence report) established that Jaquan C. and the decedent were in an intimate relationship with a history of domestic violence where several police reports reflected incidents in which the decedent had been the aggressor. Further, Jaquan C. had not disputed his culpability and indicated “repeatedly” that he believed the 15-year plea deal was “harsh,” suggesting he would have wanted to pursue a reduced sentence under the DVSJA. In the dissent’s view, there was “no legitimate strategy” justifying counsel’s omission, which was likely due to “an erroneous belief that [the DVSJA] did not apply because defendant and the victim were both men.”

As can be gathered from this limited precedent, in order to meet the “prejudice” prong of ineffective assistance of counsel, the 440 motion must demonstrate that the DV survivor would likely have been successful in a DVSJA sentencing hearing (*see Riley*, 221 AD3d at 1162-1164). In other words, you should argue and present evidence in the motion that the client meets each prong of the DVSJA: (1) that, at the time of the offense, they were a DV victim subjected to substantial physical, sexual, or psychological abuse inflicted by an intimate partner or family member, as defined in CPL 530.11; (2) that the abuse was a significant contributing factor to their participation in the crime; and (3) that considering all the circumstances of the case, the applicant’s background, and their prospects for rehabilitation, a sentence under current law would be unduly harsh. Furthermore, it is important to discuss the difference between the client’s current sentence and the alternative sentencing ranges that the client would be eligible for under the DVSJA.

V. Process for Investigating IAC 440 Motions in DV Survivor Cases

Investigating an ineffective assistance of counsel claim for failure to properly pursue DVSJA sentencing will require investigating both trial counsel’s representation, as well as the underlying DVSJA claim. That means that you will need to gather documentation and speak to witnesses both about the course of legal representation *and* about the client’s abuse and its connection to the underlying crime. The manuals, [DVSJA Investigations Best Practices Manual](#) and [Intake & Case Assessment for DVSJA Resentencing](#), provided by the DVSJA Statewide Defender Task Force, provide more in-depth guidance about DVSJA investigations. The [Interviewing for Mitigation](#) guide from ILS provides practical guidance on trauma-informed interviewing for defense teams. The ILS Statewide Appellate Support Center also provides [model materials and instructions regarding CPL 440.10 ineffective assistance of counsel \(IAC\) claims](#). This section will repeat some of the advice contained within those manuals, but we encourage you to review those materials for more detailed guidance.

How should defense providers begin IAC DVSJA investigations?

Gathering Information from Your Client

Your client will often be the main source of information about both the abuse they experienced and the role it played in the underlying offense, as well as about their experience with trial counsel. Interviewing and listening to your client are the most important parts of your investigation into IAC and the DVSJA. Gathering the story from your client will likely take multiple conversations over many weeks and months. Your client may not be prepared to tell you everything in your first meeting or call, and they may need multiple meetings to be comfortable sharing their DV history with you. Additionally, your client will benefit from the skills of interdisciplinary defense team members, such as social workers and mitigation specialists,¹⁵ who have experience and expertise in adhering to trauma-informed principles while building a relationship with and gathering information from the client.

You should consider scheduling an introductory in-person meeting to discuss with your client the goals of your work together. You will want to explain what a 440 motion is and what the DVSJA is. You should review what is involved in investigating a 440.10 and/or 440.20 claim for failure to pursue DVSJA sentencing (i.e., that you will be asking the client about their experiences with their attorney, about the underlying abuse they suffered, and about the instant offense). You should explain that you will be asking questions that span their lives leading up to the crime and through their current incarceration, and that these conversations will likely occur over multiple meetings. You should acknowledge that such conversations can be difficult and emotionally draining. It can help to address with the client the anticipated timeline for filing a 440 motion and how that will intersect with any pending direct appeal. You can also create space for the client to ask any questions they might have about the process and about what it will look like to work together. For clients serving sentences in state prison, you can direct them to the law library in their facility where they can draw on the expertise of law librarians who are often well-versed in 440 litigation.

As you move forward with client calls and/or meetings, think about the environment for the conversation. Where possible, request a private interview room in the correctional facility, and position the client so that they are not facing the window or the officer on duty to minimize distractions.¹⁶ Share your agenda and goals for the meeting with the client at the outset. This helps provide opportunities for the client to express agency and take some control over the

¹⁵ For more information on the defense team's duty to provide effective representation by working with interdisciplinary defense team members, explore the [ILS Standards for the Investigation Function of Interdisciplinary Defense Teams](#), Standard A-1 (Interdisciplinary Defense Team).

¹⁶ See [DOCCS Directive 4404 \(IV\) \(K\)](#): "The Superintendent shall designate an area for legal visits. Such area should ensure the confidentiality of all communications during the visit."

conversation. Save space at the beginning and the end of the meeting to check in with your client about how they are doing. Try not to end the conversation with a heavy topic but rather leave time to debrief with your client. This can include checking in with them about what they are looking forward to later that day, what they might do to take care of themselves, and whether there is something that has helped them in the past when they need to decompress after a difficult conversation. It can also include leaving space for some lighter chit-chat and conversation about a non-case-related topic so the client can compose themselves before they have to return to the general prison environment.

Some tips for asking trauma-informed questions during a client interview:

- Ask permission before asking questions about any subject that may be sensitive or difficult to discuss.
- Use open-ended non-judgmental questions (e.g., Ask: *Can you tell me about your relationship with your parents growing up?* Rather than: *Were you abused as a kid?*).
- Avoid questions that assume something about the client's identity, culture, or beliefs. These can have the effect of silencing the client (e.g., a question about a woman's first boyfriend, which assumes she identifies as heterosexual, might leave her uncomfortable telling you that she is gay).
- Explain why you are asking the questions you are asking. How do these questions relate to the goals of your work together and to the 440 motion?
- Respond with compassion, but do not react with emotion. Signaling your own distress to the client about the traumatic history they are sharing may cause the client to shut down.
- Building trust takes time. Do not push if the client is not comfortable sharing sensitive information. If it is important to your investigation, you can revisit the question at a later meeting. You can also validate that you know it can be difficult to talk about sensitive and/or traumatic memories.

Remember that, in the IAC context especially, the client's experiences with previous attorneys may not have been ideal. You may be working to overcome distrust built up through a prior attorney-client relationship, whether because of limited communication, a sense that the attorney was not willing to listen to the client, or a sense that the attorney did not believe the client or did not want to credit the client's expressed desire to pursue DVSJA sentencing. It will likely take time to build a relationship of trust by showing the client that you want to listen to them, that you are following through on the things that you said you would do, and that you are crediting their experiences of abuse, even if the prior attorney, prosecutor, or judge did not.

As you interview your client, you will want to ask them about their communication with counsel (i.e., how often, in what form, what was the substance). You will also want to understand whether and how the DVSJA was raised in the course of representation. In some

cases, the client may have asked their attorney about the DVSJA; in others, the attorney may have mentioned the DVSJA in passing; in other instances, the attorney may have discussed the DVSJA with the client but advised that they should not or could not pursue it; and in some circumstances, the client may not have heard of the DVSJA until after they were sentenced. If there was disagreement between the client and the attorney about pursuing the DVSJA, you will want to discuss that with your client. You will also want to learn about any investigation that the client asked the attorney to pursue and whether the defense team followed those leads or not. Your client can also tell you about any family members or friends who may have interacted with prior counsel and defense team members or observed the course of their representation.¹⁷

It is crucial that you explain the next steps of the investigation process to your client, and that you obtain your client's consent for proceeding with the investigation (e.g., talking with prior counsel, talking with friends and family, obtaining the client's records, etc.).

Gathering Information from Trial Counsel

Trial Counsel's File

You should make every effort to obtain trial counsel's file. You will want to ask your client to sign a release authorizing prior counsel to release the entire contents of their file to you. This release can be provided to trial counsel along with a request for the entire file. You will want to make sure that you request and obtain all documents in the file, including correspondence to and from the client; notes of any meetings with the client; correspondence with the prosecution; pleadings, motions, and responsive papers; any orders from the court; the indictment; any discovery obtained from the prosecution; any documents (e.g., police reports, witness statements, etc.) obtained through investigation; any notes on investigation; any notes, correspondence, retainers, reports, or other documents relating to use of an expert in the case; as well as any other documents in the file.

You will need to review the file closely to make sure you have everything that ought to be there based on your conversations with your client and trial counsel. You may need to submit a follow-up request if any records were omitted from the first response (i.e., sometimes electronic correspondence is not captured in the file or electronic discovery is saved in a separate location from the rest of the file, and sometimes counsel does not initially realize that the client is entitled to the attorney's notes on the case, with very limited exceptions [see

¹⁷ The DVSJA Statewide Defender Task Force's [Intake & Case Assessment for DVSJA Resentencing](#) guidebook has sample questions and outlines that can be used for interviewing clients about their histories of abuse. The [Interviewing for Mitigation](#) guide has additional guidance for incorporating trauma-informed practice into your client interviews. This is especially important when asking clients about sensitive subjects, like domestic violence.

Sage Realty v Proskauer, 91 NY2d 30, 37 (1997) (holding that a former client was presumptively entitled to both “end-product” documents and “work product materials”)).

Speaking with Trial Counsel and Obtaining an Affirmation

After you have reviewed trial counsel’s file and all of the other documents that you have gathered in the case, you will need to make efforts to speak with counsel about their representation. It is best practice to interview trial counsel with another member of the defense team. Interviewing counsel alone risks you as the attorney becoming a witness if prior counsel denies saying certain things during their conversations with you at a later hearing.

One of the most important components of an IAC claim is an explanation by counsel of the decisions made in the underlying proceeding. In a DVSJA-related claim, you will want to investigate everything that happened, including events or impressions that may not be captured in the record: whether the attorney knew about the DVSJA or not; whether they did any DVSJA investigation and if so, what; whether they engaged in discussions with the prosecution about DVSJA sentencing; and, whether they sought a DVSJA sentencing hearing, and whether it was done on the record. If they did seek DVSJA sentencing, you will want to understand what DVSJA investigation they did and what evidence they presented.

When speaking with counsel, expect that the conversation may feel difficult or awkward. Counsel may perceive a 440 claim as a personal attack. They may be defensive about what they did or did not do. They may have a negative perception of your client. Or they may be completely willing to assist with the 440 investigation. You should be prepared for any scenario. You should embark on conversations with trial counsel with a sense from your conversations with your client and your review of the records of what you think may have happened or what mistakes may have been made, but you should be open to revising this theory based on counsel’s recollection of the case. You should avoid judgment in your questions and ask open-ended questions specific to the attorney’s representation in your client’s case. Further, the interview should include questions about trial counsel’s decisions throughout the case and not necessarily just concentrate on sentencing and/or a lack of mitigation. If the attorney does not remember your client’s case or specific aspects of the case, you should consider sending them case materials or their own notes to refresh their recollection. You may also want to ask about the attorney’s general practices.

You should try to get an affirmation from trial counsel that explains their decisions, and if applicable, acknowledges the steps that they did not take. If counsel is not willing to provide a signed affirmation, then you should document the conversations with counsel and include any relevant facts in your own attorney affirmation. If you proceed with this latter route, you should explain in your affirmation that trial counsel refused to submit an affirmation in support

of the motion. Similarly, if you are unable to locate or to speak with trial counsel, you should include in your affirmation all of the attempts that you made to speak with trial counsel.¹⁸ However, you should make every attempt to obtain an affirmation because New York case law on IAC requires that the petitioner demonstrate the absence of strategic or legitimate reasons for counsel's decisions.

It may be helpful to remind trial counsel of their ethical obligations. Trial counsel has an ethical and legal obligation to provide a client a copy of their file upon request (see *Sage Realty v Proskauer*, 91 NY2d at 37 [affirming general right of client to the contents of the attorney's file upon termination of the attorney-client relationship]).¹⁹ Trial counsel also has a continuing duty of loyalty to clients that extends into the post-conviction phase of a case, even in circumstances where a client is making a claim of IAC (see ABA Criminal Justice Standards for the Defense Function, Standard 4.1.3; see also New York Rules of Professional Conduct [NYRPC], Rules 1.6, 1.9, 1.16 [e]). This includes a duty not to use confidential information to the disadvantage of the former client (NYRPC, Rule 1.09). Moreover, any waiver of attorney-client privilege must be narrowly related to the specific challenged conduct, not the entire case.

¹⁸ See *People v Wright*, 27 NY3d 516, 522 [2016] [finding that where a 440 applicant is unable to obtain an affirmation from prior counsel because prior counsel is "uncooperative," the applicant may bring a subsequent 440 motion with this information to defeat a prior "summary denial" of a 440 motion based on the lack of prior counsel's affirmation]; see also *People v Mower*, 242 AD3d 1377, 1380 [3d Dept 2025] [finding that where the "affirmation from motion counsel and the affidavit from defendant's investigator reflect meaningful efforts to obtain an affirmation from trial counsel in support of defendant's motion," the "failure to support his motion with an affirmation from trial counsel can be excused"]; *People v McCray*, 187 AD3d 679, 679-680 [1st Dept 2020] [reversing 440 denial and remanding for a hearing because the motion court erred by failing to grant a 440 hearing where the applicant's motion was supported by post-conviction counsel's "affirmation detailing his conversation with trial counsel, which raised serious questions about counsel's performance as to several matters," and post-conviction counsel "averred that trial counsel ultimately refused to submit an affirmation in support of the motion"]; *People v Bennett*, 139 AD3d 1350, 1351-1352 [4th Dept 2016] [finding that, in 440 litigation, "[w]here, as here, defendant's 'application is adverse and hostile to his trial attorney,' it 'is wasteful and unnecessary' to require the defendant to secure an affidavit from counsel, or to explain his failure to do so"]; *People v Pinto*, 133 AD3d 787 [2d Dept 2015] [holding that an applicant "seeking to vacate a judgment of conviction on the ground of ineffective assistance of counsel need not submit an affidavit or affirmation from his or her former attorney attesting to counsel's ineffectiveness"]).

¹⁹ See also NYSBA, Comm on Prof'l Ethics, Opn 766 (2003); NYSBA Rules of Prof'l Conduct, Opn 970 (2012); New York Rules of Professional Conduct, Rule 1.15(c)(4), 1.16(e); ILS Appellate Standard 25 (Case File) ("Counsel's case file belongs to the client, with minor exceptions").

Gathering Other Records

Records Relevant to the DVSJA Claim and Your Client's Representation

You should also obtain other records that relate to both your client's legal representation and to the underlying DVSJA claim, and ideally, these records should be gathered prior to speaking with trial counsel. The [DVSJA Investigations Best Practices Manual](#) has more detailed information on what records you might want to obtain and how to retrieve them (including sample releases). These other records will include the court file, the Presentence Investigation Report, transcripts of any plea, sentencing, relevant appearances, hearings, and trial. You will also want to obtain any competency reports, other mental health evaluations, mitigation reports, and examination notes where relevant. Where there has been a direct appeal, you should obtain appellate counsel's file and notes, the appellate briefs and post-conviction motions, the appellate decisions, and any federal habeas filings and decisions.

You should obtain all law enforcement records relevant to your client and for any other relevant parties, including the abuser. This may mean requesting records across jurisdictions (e.g., both Buffalo Police Department and the Erie County Sheriff's Office), including potentially from other states or countries. You should also obtain any orders of protection, separate charges against an abuser or criminal history of the abuser, and any relevant Family Court documents.

You should request and obtain any other records that might be relevant to documenting the abuse your client experienced or the context of their life at the time of the crime. Depending on your client's situation, there may be medical or mental health records. If the local child welfare agency was involved in the client's home, there may be relevant foster care and child welfare records. Keep in mind that such records may exist even if your client does not believe there was any CPS contact. If your client was ever represented in a family case, the prior attorney may also have relevant records. Depending on the client's age at the time of the abuse, school records may also offer helpful insight. If your client sought resources from a local domestic violence organization and shelter, you should request those records. For clients who have been incarcerated, you will also want to request their DOCCS records and local jail records, including disciplinary, programmatic, and medical documentation. You should also submit a separate request for mental health records from the Office of Mental Health (OMH). Even if your client has never received OMH services, every person incarcerated in New York State undergoes an OMH screening upon intake, which can be a useful record.

Information from Client's Family, Friends, and Other Witnesses

You should interview people who knew your client after getting your client's consent to speak with each individual. You will want to interview witnesses both about their observations of the client's legal representation (i.e., sometimes families are involved in hiring the attorney and in strategic decisions about the client's case) and about the abuse the client experienced. You will want to determine if any of the client's family, friends, neighbors, or other community members directly witnessed abuse. However, indirect corroboration can also be useful. For example, a friend may have observed changes in the client's behavior after they started dating the abuser; the client may have become more withdrawn, isolated, and/or nervous to do anything without the abuser's consent. This can be helpful corroboration of abuse. You should consider obtaining affidavits and/or affirmations from relevant witnesses to submit with your 440 motion. These statements could show that witnesses were accessible, willing to testify or provide evidence, and/or that trial counsel never contacted them. They are also helpful in demonstrating that, had trial counsel properly pursued DVSJA sentencing, a request for alternative sentencing under the DVSJA would have been successful.

VI. Drafting, Filing, and Litigating the IAC 440 Motion

What should the 440 motion contain?

A 440 motion must include several parts, as well as sufficient supporting documentation. CPL 440.30 (1) requires that the motion "raise every such ground upon which [the applicant] intends to challenge the judgment or sentence" and that the filings "contain sworn allegations" based upon "personal knowledge of the affiant or upon information and belief." Further, "documentary evidence or information supporting or tending to support the allegations of the moving papers" may also be submitted (*id.*). A 440 motion should contain the following components:

- Notice of Motion
 - The notice of motion tells the court and the prosecution the relief sought, the return date, and the time for service of answering papers.
- Affirmation in Support of Motion²⁰

²⁰ CPLR 2106, updated in January 2024 and again in November 2025, now permits anyone to use affirmations, rather than affidavits (reducing the notarization burdens). However, it also requires that an affirmation of truth statement strictly conform to the following language: "I affirm this ____ day of ____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, except as to matters alleged on information and belief and as to those matters I believe it to be true, and I understand that this document may be filed in an action or proceeding in a court of law."

- The affirmation in support of motion is signed by 440 counsel and affirms that the factual information contained within the affirmation and the exhibits that are annexed to and made a part of the motion are true—based upon “personal knowledge” or “information and belief.” Much of the information that is alleged in the affirmation is outside-the-record information that cannot otherwise be found in the record on appeal, the transcripts of the proceedings, or the court file. This is the outside-the-record information that requires that the claim be brought via 440 motion rather than on direct appeal.
- The affirmation is akin to a Statement of Facts section in a direct appeal brief. It is the portion of the motion that tells the story of your case. The structure of the affirmation can differ, depending on what you determine to be the most compelling way to convey your client’s narrative. You might start with the abuse they experienced. You also might start with conversations with counsel in which they received misadvice about DVSJA eligibility. Whatever structure you choose, keep in mind that wherever possible, factual assertions should be supported by a citation to an exhibit.
- Legal Argument
 - This is often and most appropriately formatted as a memorandum of law. However, some practitioners add the legal argument as its own section within the affirmation in support of the motion. The memorandum of law or legal argument section within the affirmation should include the legal arguments for all of the 440 claims that are raised.
 - In your argument that counsel was ineffective for mistakes related to the DVSJA, you will need to show both deficient performance and prejudice (that the deficient performance harmed your client and/or did not provide your client with meaningful representation). This generally means that you will need to show that your client meets each prong of the DVSJA and would be likely to succeed in a DVSJA sentencing hearing (*see Riley*, 221 AD3d at 1162-1164).
 - You should first cite to authority that is binding in your jurisdiction. Begin with NY Court of Appeals or SCOTUS precedent and then use the appropriate intermediate appellate court precedent. You may also wish to cite to case law from NY trial courts or other jurisdictions as persuasive authority.
- Affirmation from Prior Counsel²¹
 - If you are unable to obtain an affirmation from prior counsel, you will need to allege in your own affirmation in support the efforts that were made to obtain

²¹ Any affirmations from prior counsel, witnesses, experts, and clients must also conform to the requirements of CPLR 2106 (*see supra* footnote 20).

an affirmation from prior counsel and prior counsel's refusal to sign an affirmation.²² You may also want to include information that prior counsel shared with you as to any facts regarding their prior representation or their reasons for doing or failing to do the acts or omissions that you are alleging amounted to ineffectiveness.

- Affidavits or Affirmations from Witnesses (if relevant and helpful)
- Affidavits or Affirmations from Experts (if relevant and helpful)
- Affidavit or Affirmation from Client (if relevant and helpful)
- Other Supporting Documentation (if relevant and helpful)
- Affirmation of Service

What should be considered before filing?

Once you have drafted the 440 motion, meet with your client and review it to get their approval. Confirm with them that the facts of their prior representation are accurate and make sure that the way that you have described and corroborated their DV experience feels comfortable to them. These motions will inevitably include descriptions of the abuse and harm that your client experienced, and it is important that they make the final determination as to what is included and how. If you feel that a particular fact or document is critical, but your client does not want it included, explain your reasoning. Ultimately, clients must have control over the extent of information they provide a court about their victimization or trauma history.²³

Prior to filing your 440 motion, you may consider approaching the county's District Attorney's Office, especially if the DA's Office has worked cooperatively with defense teams in the past on DVSJA cases. You may wish to present a written summary of the case, including the legal issues and mitigating information regarding DV, or you may want to share a draft of the 440

²² See *supra* footnote 18 (providing case law in every appellate division department explaining that where prior counsel refuses to sign an affirmation, post-conviction counsel can affirm to this in the 440 affirmation).

²³ Additionally, prior to mailing a draft of the motion to an incarcerated client, ask your client whether they want to receive the motion via legal mail prior to the visit, or whether they would prefer not to have a hard copy of it. Some clients may not want this type of personal information in their possession within a facility. Further, some clients may not want to read the motion alone and may prefer to have a member of the defense team walk them through it.

motion. If the DA agrees with your arguments, the DA may join or not oppose your 440 motion when you file. This may also be an opportunity to engage in negotiation with the DA to reach a negotiated disposition other than the DVSJA, a resolution that your client may want to consider. You should also consider sending a copy of the 440 motion with a letter to prior counsel since it is possible, if not likely, that the DA will send a copy of the motion to them.

Where should the motion be filed?

The motion must be filed in the court where the judgment was entered. Once the motion is filed, it will generally be assigned to the judge who presided over the proceedings below, unless that judge is no longer on the bench.

What happens next?

The prosecution may respond but is not required to (CPL 440.30 [1] [a]). However, in most instances, the prosecution will almost certainly respond and, assuming there have been no prior discussions about the merits of the arguments, will generally oppose relief. While not required, you should generally file a reply, which could include additional information within an affirmation of support (rebutting information supplied by the prosecution or offering new information since the time of the original filing) as well as reply arguments, or could only include reply arguments (often formatted as a reply memorandum of law).

Because the defense files the initial 440 motion, the defense technically directs the timeframe in which the motion, including response and reply papers, should be heard. However, in practicality, the parties often work out the timing of the subsequent papers on consent and by keeping the court informed. Even where you choose not to consent to further adjournments, the court may still grant the prosecution additional time to respond. It is important to prepare your client for the possibility of a lengthy delay during motion practice.

What are the possible outcomes?

Once the court has received all papers, the court will decide the motion. The court must grant the motion without conducting a hearing if the motion alleges a valid legal basis and establishes sufficient facts that are supported by sworn allegations that the prosecution either concedes to be true or that are conclusively substantiated by unquestionable documentary proof (CPL 440.30 [3]). Although winning a 440 motion on the papers and without a hearing is quite rare, the best practice is to craft your legal argument to attempt to attain this outcome; and to request, in the alternative, a hearing on the motion.

The court may deny the motion without a hearing if the facts and allegations are not supported by sworn statements (affidavits and/or affirmations) or other evidence, or if an essential fact is shown to be false (CPL 440.30 [4]).

Finally, the court may order an evidentiary hearing to develop and resolve any factual disputes.²⁴ At the hearing, the applicant, who has a right to be present, has the burden of proving by a preponderance of the evidence every fact essential to support the motion (CPL 440.30 [5], [6]). After a 440 hearing, the court must set forth on the record findings of fact, conclusions of law, and the reasons for its determination (CPL 440.30 [7]).

What is the difference between a 440 hearing and a DVSJA hearing?

A hearing pursuant to CPL 440 is a post-conviction hearing based on evidence outside the record. A DVSJA sentencing hearing pursuant to Penal Law § 60.12 is conducted prior to sentencing if evidence indicates that the individual might be eligible for DVSJA sentencing relief.

The defense burden of proof at a CPL 440 hearing on most grounds, including ineffective assistance of counsel, is by “a preponderance of the evidence,” while the burden of proof at a DVSJA hearing may not be entirely settled (*but see People v Addimando*, 197 AD3d 106, 112 [2d Dept 2021] [applying the preponderance of the evidence standard to the review and analysis of a DVSJA hearing while acknowledging that the “statute does not expressly set forth the standard of proof or the appropriate evidentiary burden that must be borne by the defendant, as the movant”]).

A party who has the burden of proof by a preponderance of the evidence must prove their contention by the greater weight of the evidence. The preponderance of the evidence standard requires enough evidence to produce a reasonable belief in the facts asserted.

At a 60.12 hearing, whether relief is granted is ultimately in the hearing court’s discretion after considering any relevant evidence. The litigant must convince the court that the nature and circumstances of the crime and the history, character, and condition of the person being sentenced render a traditional (non-DVSJA) sentence unduly harsh (*see Matter of Maria S. v Tully*, 214 AD3d 988 [2d Dept 2023]; *Addimando*, 197 AD3d at 117-118).

Nothing in Penal Law § 60.12 requires the sentencing court to conduct a DVSJA hearing for every eligible person. The burden of requesting such a hearing is on the defense. Therefore, to establish that trial counsel was ineffective for failing to request sentencing under the

²⁴ The hearing court may issue a written decision setting forth its decision to grant a hearing, the scope of the hearing, and the contested issues to be resolved. If the court does not do so, consider requesting a conference to get a sense of the disputed facts that the hearing will resolve.

DVSJA, you must prove that the failure was not strategic, and that the applicant would have been likely to succeed on the merits. It will also be important to establish the sentencing ramifications by comparing the normal sentencing range to the reduced sentencing range under the DVSJA.

VII. Leave To Appeal the Denial of CPL 440 Motions

If the 440 motion is denied, counsel should seek permission to appeal from such denial²⁵ and, if leave is granted, represent the client on appeal.²⁶ Counsel is required to notify their client in writing that they have the right to apply for a certificate granting permission for leave to appeal (see 22 NYCRR § 606.5 [b]).

There is no automatic right to an appeal by the defense from an order denying a 440 motion (see *People v Farrell*, 85 NY2d 60 [1995]).²⁷ Instead, the applicant must make an application for a certificate granting permission for leave to appeal (CPL 450.15) and must do so within 30 days after service upon the applicant of the order denying the 440 motion (CPL 460.10 [4] [a]; *People v Walker*, 237 AD2d 726 [3d Dept 1997]). If a certificate granting leave to appeal is granted, it must be filed in the lower court, along with the notice of appeal, within 15 days after it is issued (CPL 460.10 [4] [b]).

VIII. Available Assistance on IAC 440 Motions in DV Survivor Cases

The DVSJA Statewide Defender Task Force works with the ILS Statewide Appellate Support Center and NYSDA to provide resources, training, and case consultations to help defense teams identify, investigate, and litigate DVSJA claims in trial court, on appeal, and in post-conviction proceedings. Fill out the [ILS SASC Intake Form](#), email SASC at SASC@ils.ny.gov, or email the NYSDA DVSJA Attorney Support Project by emailing SJBatcheller@nysda.org to request a case consultation or other support.

²⁵ “An application for such a certificate must be made in a manner determined by the rules of the appellate division of the department in which such intermediate appellate court is located” (CPL 460.15 [2]).

²⁶ Counsel should also continue to represent their client where the 440 motion is successful, but the prosecutor appeals.

²⁷ The prosecution, however, may appeal *as of right* 440 motion grants (CPL 450.20 [5], [6]).