

NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Legislative Memo

Dated: June 2, 2009

Bill Nos.: A05170 and S04667: Permits the court to grant post-conviction motions to vacate a judgment when the issue raised upon such motion is ineffective assistance of counsel in certain cases in which the court would otherwise be required to deny the motion.

The NYSACDL SUPPORTS passage of this bill in its entirety.

This proposed legislation would remedy a procedural "catch-22" defendants who claim ineffective assistance of trial counsel face when seeking post-conviction review of that claim. The legislation would amend criminal procedure law § 440.10, paragraphs (b) and (c) of subdivision 2 to exempt from those sections issues of ineffective assistance of counsel.

Policy Issues

Defendants who seek post-conviction review of their conviction have two procedural avenues available, a direct appeal to the intermediate appellate court, or a post-conviction motion in the trial court pursuant to criminal procedure law § 440.10. On a direct appeal to the intermediate appellate court, a defendant is limited to issues that appear in the appellate "record" (generally the transcribed proceedings, motion papers, court decisions, etc.) and cannot refer to matters or facts that exist "outside" the record on appeal.

Defendants who have a claim of ineffective assistance of trial counsel often rely upon facts that are apparent on the appellate record, but also have additional factual support for their ineffectiveness claim "outside" the appellate record. Not surprisingly, a large percentage of ineffective assistance of counsel claims involve allegations of what was not done by defense counsel (and would have been done by competent counsel), and thus would not appear on the appellate record. These claims necessarily rely upon facts that exist outside the record of appeal. These "mixed" ineffectiveness claims – involving issues that appear both in the appellate record, and outside the appellate record – present defendants with a difficult dilemma.

Should a defendant with a "mixed" ineffectiveness claim choose to bring the claim in the trial court pursuant to criminal procedure law § 440.10, the existing statute allows the trial court to deny the claim by holding that sufficient facts appear on the appellate record to allow the claim to be considered by the appellate court. (CPL § 440.10 [2][b].) Conversely, the appellate court may dismiss the appeal as the claim relies upon facts outside the record on appeal. If the defendant raises his claim in both the trial court, and on direct appeal, both forums might dismiss the claim by determining it is properly brought in the other forum.

The proposed legislation will remedy this untenable situation. It would allow defendants who raise an ineffective assistance of counsel claim to have their claim heard in the forum best suited to determine such claims – the trial court. It is the trial court that is in the best position to

"develop[] the facts necessary to determine[e] the adequacy of representation during an entire trial". (*Massaro v. United States*, 123 S.Ct. 1690, 1694 [2003]). Indeed, as the New York Court of Appeals has recognized, "[g]enerally, the ineffectiveness of counsel is not demonstrable on the main record . . . [c]onsequently, in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or postconviction proceeding brought under CPL 440.10." (*People v. Brown*, 45 NY2d 852, 854 [1978].)

As the Final Report of the New York State Bar Association's Task Force on Wrongful Convictions noted, ineffective assistance of trial counsel was a significant factor in wrongful conviction cases. As such, effective appellate review of ineffective assistance of counsel claims is essential to ensure that those defendants who have been convicted received the competent representation mandated by the State and federal constitutions. The proposed legislation will remove the procedural barrier to those claims outlined above, and would allow defendants to fairly litigate those claims post-conviction.

Conclusion

The **New York State Association of Criminal Defense Lawyers** SUPPORTS this proposed legislation for the reasons stated above and urges the New York State legislature to pass it, and the Governor to sign it.