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September 9, 2021

Hon. Kathy Hochul
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Re: Urging the Governor to sign A.2653 / S.1217 (relating to claims of ineffective assistance of counsel in post-conviction motions)

Dear Governor Hochul:

On behalf of the New York City Bar Association, I am writing to urge you to swiftly sign A.2653 (AM Lavine) / S.1217 (former Sen. Benjamin) into law when it is delivered to your office.[1] This is an Office of Court Administration bill that would remove a procedural bar to appellate review of claims of ineffective assistance of counsel. The bill would address New York's long-standing wrongful conviction problem by promoting fundamental fairness for people pursuing post-conviction review of criminal convictions. It passed both houses of the Legislature unanimously.

As is further outlined in the enclosed report, the City Bar believes that the interests of justice and judicial economy would be better served by following the lead of the federal system and the majority of other states by permitting all IAC claims to be raised on collateral review. This bill promotes fundamental fairness for defendants without increasing the burden on the court system generally or on trial courts in particular.

The City Bar respectfully urges the governor to sign this important legislation into law today.

Respectfully,

Elizabeth Kocienda

Encl.

[1] This was one of the bills identified in the City Bar's Aug. 26, 2021 letter from Bret Parker to Governor Hochul ("Introduction to the New York City Bar Association and Our Positions on Bills Pending Your Action").

About the Association
The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

NEW YORK CITY BAR

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

A.2653 **M. of A. Lavine**
S.1217 **Sen. Benjamin**

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

THIS BILL IS APPROVED

SUMMARY

The New York City Bar Association's (City Bar) Criminal Justice Operations Committee is comprised of attorneys who practice criminal law, representing both defendants and the prosecution, and engages in policy analysis and legislative review in the area of criminal law and justice. The City Bar's Criminal Courts Committee includes prosecutors and criminal defense attorneys who analyze laws and policies that affect the criminal courts in New York.

The proposed legislation would repeal the overly restrictive rule in New York that Ineffective Assistance of Counsel (IAC) claims depending solely on the record cannot be brought under Criminal Procedure Law Section 440.10.

The Committees believe that the interests of justice and judicial economy would be better served by following the lead of the federal system and the majority of other states by permitting all IAC claims to be raised on collateral review: first, because some IAC claims are subject to reasonable disagreement as to whether they are reviewable on the record, defendants can be unfairly subjected to procedural bars if they choose the wrong forum; second, the trial court, which presided over the trial, is often in a better position to make the first assessment of trial counsel's performance; and third, the current scheme requires piecemeal litigation of IAC claims that are, in part, record based and, in part, non-record based.[1]

[1] *See also* Report in Support of A.2442/S.42 (Reissued April 2013), *available at* http://www.nycbar.org/pdf/report/uploads/20071702-ReportinsupportofbillA5170InaffectiveAssistanceCounselinPost-ConvictionMotions.pdf.

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DISCUSSION

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

1. Representing a criminal defendant involves a certain skill set and, almost always, some strategic choices. When defendants later claim that their lawyers were ineffective, reviewing courts must examine the performance of the lawyer and, frequently enough, the strategies employed. Courts are usually reluctant to second-guess trial counsel when it comes to strategy, even if, in hindsight, it is clear the strategy pursued was woefully misguided. In New York State, the constitutional right to counsel is met if "the evidence, the law, and the circumstances of a particular case, viewed in totality, and as of the time of the representation, reveal that the attorney provided meaningful representation."[2]

2. New York State defendants who believe they were not afforded effective assistance of counsel can raise claims of ineffectiveness on direct appeal or by collateral attack pursuant to Criminal Procedure Law 440.10. Only IAC claims that are totally record-based can be properly raised on direct appeal. Such claims are very rare.[3] The vast majority of IAC claims are totally outside of the record or involve at least some off-the-record information, such as, frequently enough, a statement by defense counsel as to strategy. These claims should be filed in the trial court pursuant to 440.10. It is of the utmost importance to identify whether the IAC claim is totally on the record or not because the appellate court can deny a claim that depends upon off-record information and, conversely, the 440 (trial) court can deny a claim that depended, in its opinion, solely on facts on the record.[4] While of utmost importance, it is not always easy to determine. Indeed, regarding IAC claims, reasonable minds can differ about whether trial counsel's acts or omissions in a particular case could have resulted from conscious strategy (effective representation) or instead could only have resulted from ignorance of the law and/or facts (ineffective representation). In the former situation, a 440.10 motion is required to rule out strategy; in the latter situation, a direct appeal is currently required.

3. There are two main groups of ineffective assistance claimants: defendants *pro se* and institutional appellate providers for the indigent. (IAC claims are rarely filed by retained counsel.) The *pro se* claimants, by far the largest segment of claimants,

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[2] *See People v. Baldi*, 54 N.Y.2d 137, 147 (1981).

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

[4] *See* CPL 440.10(2) (c).

almost exclusively file IAC claims by 440.10 and most of those motions are summarily denied pursuant to 440.30(4)(d), which allows the trial court to deny the motion "if an allegation of fact essential to support the motion . . . is made solely by the defendant and is unsupported by any other affidavit or evidence." The institutional providers only rarely file IAC claims on direct appeal because, as noted in the second point above, the claim is rarely 100% record based and free from strategy debate. In addition, the Court of Appeals has sent a message that it encourages litigants to bring IAC claims by 440.10.[5] Institutional providers typically file the IAC claim pursuant to 440.10. The present bill will not alter these filing preferences.[6] Most IAC claims will continue to be filed pursuant to 440.10 in the lower court and most will be summarily denied.

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

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While the example provided in the fourth point above is not common, it is not unheard of, either. Many members of the Committees are aware of such instances. Further, only a rare few defendants have the know-how or wherewithal to renew their IAC claim in a federal habeas petition (28 U.S.C. § 2254). Notably, in reviewing some of these petitions, federal courts have had occasion to bemoan instances where a New York state trial court unjustifiably invoked C.P.L. 440.10(2)(c) to procedurally bar review of the IAC claim.[7]

CONCLUSION

The quality of trial counsel is critical to the fairness of the criminal justice system. Without competent representation, a defendant has little or no chance of fair resolution of his or her case. Indeed, wrongful conviction commissions invariably point to ineffective assistance of counsel as

[5] *See People v. Brown*, 45 N.Y.2d 852 (1978) ("in the typical case, it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10").

[6] For those IAC claims that are, without question, based on the record, defendants would still have the option of raising the issue on direct appeal because the amendment would expand the scope of CPL Article 440 without narrowing the relevant appellate jurisdiction.

[7] *See, e.g., Flores v. Demski*, 215 F.3d 293 (2d Cir. 2000); *Bonilla v. Portuondo*, 2004 WL 350694 at 10 (SDNY); *Quinnone v. Miller*, 2003 WL 21276429 at 13 (SDNY).

a significant factor to the conviction of innocent defendants.[8] Thus, thorough review of the merits of IAC claims is essential to guaranteeing a fundamentally fair criminal justice system.

The bill would not only provide necessary review of IAC claims in all cases, but it would promote judicial efficiency. In this regard, the Committees stress that the present bill would bring an end to piecemeal litigation of IAC claims. Defendants would no longer need to file IAC claims both before the trial court (pursuant to 440.10) and on direct appeal, and only those very rare, obvious, on-the-record IAC claims would be filed by institutional providers on direct appeal.[9] Moreover, as the United States Supreme Court stated in a unanimous opinion in Massaro v. United States, 538 U.S. 500, 505 (2003), trial courts are invariably better equipped to provide thorough and efficient review of IAC claims. That is why both the federal system and a growing majority of state courts follow the rule espoused in the instant proposed legislation.

For these reasons, the Committees support enactment of this legislation.

Criminal Justice Operations Committee
Tess M. Cohen, Chair

Criminal Courts Committee
Terri S. Rosenblatt, Chair

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[8] *See* 2009 Report of the New York State Bar Association's Task Force on Wrongful Convictions.

[9] *See* N.Y.L.J., 3/3/08, Ineffective Assistance of Counsel, N.Y. Collateral Review, by Jonathan I. Edelstein (criticizing current statute for causing piecemeal litigation of IAC claims).