



**MODEL CPL § 440 MOTION TO VACATE JUDGEMENT
USING THE REBUTTABLE PRESUMPTIONS IN § 440.10(1)(j)**

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case. It is not intended as, nor does it constitute, legal advice. **DO NOT TREAT THIS MODEL MOTION AS LEGAL ADVICE.** If you are filing this motion in criminal court, you must also perform your own legal research to ensure that this motion is appropriate.

This motion is applicable to:

Cases in which a non-citizen was sentenced before April 12, 2019 to any New York State A misdemeanor or unclassified misdemeanor that has immigration consequences. In any 440 motion, counsel must fully investigate whether any other errors can be raised, because the subsequent motion bar at CPL § 440.10[3] may preclude a subsequent motion from being considered.

This sample motion is intended for filing with the New York criminal court that entered the judgment.

<court type> OF THE STATE OF NEW YORK
<county>: PART __

| | | |
|-------------------------------------|---|------------------|
| -----X | | |
| THE PEOPLE OF THE STATE OF NEW YORK | : | |
| | : | |
| -against- | : | NOTICE OF MOTION |
| | : | |
| <defendant name>, | : | Docket No. _____ |
| Defendant-Petitioner. | : | |
| -----X | | |

PLEASE TAKE NOTICE that, upon the annexed affirmation of <attorney>, Esq., the exhibits thereto, and all the prior proceedings had herein, the undersigned will move this Court, at the Courthouse and at a time and date set by the Court, for an order pursuant to C.P.L. § 440.10(1)(j), vacating <defendant>'s judgment of conviction under the above-referenced docket number, and for such other and further relief as this Court deems just and proper.

DATED: _____
<city>, NEW YORK

RESPECTFULLY SUBMITTED,

<attorney contact info>

TO: MOTIONS CLERK
<court address>

HON. <District Attorney>
District Attorney, <county>
<address>
Attn: ADA _____

<court type> OF THE STATE OF NEW YORK
<county>: PART __

-----X
THE PEOPLE OF THE STATE OF NEW YORK :
 :
 -against- : NOTICE OF MOTION
 :
<defendant name>, : Docket No. _____
 Defendant-Petitioner. :
-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF <county>)

<attorney>, an attorney admitted to practice in the Courts of this State, affirms under the penalties of perjury that the following statements are true, except those expressly attributed to others or made on information and belief, which s/he believes to be true:

1. I represent <defendant> on a motion to vacate the judgment of the <court type>, <county> rendered <date of sentence>, convicting her/him, upon guilty plea, of one count of <offense name> (Penal Law § <penal law section>, a class A misdemeanor), and sentencing her/him to <sentence imposed> (<presiding judge>, J., at plea and sentence).

2. I submit this affirmation in support of <defendant>'s motion, pursuant to C.P.L. § 440.10(1)(j), to vacate this judgment of conviction, as it was obtained by an unknowing and involuntary guilty plea and in violation of <defendant>'s right to due process under the United States Constitution and the Constitution of the State of New York. See C.P.L. § 440.10(1)(j); U.S. Const. amend. XIV; N.Y. Const. art. I, § 6.

3. As set forth herein, <defendant>'s guilty plea presumptively was not knowing, voluntary or intelligent because <defendant>, a non-U.S. citizen, faces ongoing negative immigration consequences as a result of her/his conviction. See C.P.L. § 440.10(1)(j).

Personal History

4. <defendant> was born in <birthplace> on <date>. See Exhibit A, Affidavit of <defendant>, at ¶ [#]. On <date>, s/he came to the United States <manner of entry>. See Exhibit B, <evidence of entry or affidavit if EWI>. S/he has built her/his entire adult life in the New York City area. Now <age> years old, s/he lives in the Bronx with her/his U.S.-born children _____ and _____. Id. at ¶ [#]. S/he remains on close terms with her/his mother, who lives a few blocks away from them. Id. at ¶ [#]. S/he has worked hard to provide for her/his family, working in a number of different factories over the years. Id. at ¶ [#]. And s/he has dutifully paid her/his incomes taxes. Id. at ¶ [#]. Since her/his conviction in this case, now a decade old, <defendant> has led a law-abiding and productive life dedicated to her/his family.

The Instant Case

5. On or about <date>, <defendant> was arrested and, on <date>, arraigned in criminal court and charged with <original charges>. See Exhibit [], Complaint, Dkt. No. _____. S/he was assigned counsel by the Court and, on that same day, pled guilty to <statute of conviction> and was sentenced to <sentence>. See Exhibit [], Certificate of Disposition; Exhibit [], Criminal Court Arraignment Sheet; **[add Plea Minutes at discretion only if not harmful]**.

Because <defendant>'s Guilty Plea Was Not Knowing, Voluntary, or Intelligent, Her/His Conviction And Sentence Are Unconstitutional Under Federal and State Law

6. Almost a decade has passed since <defendant>'s criminal conviction in <year>, and s/he has now resided in the United States for almost <number> years. S/he has been working steadily to support her/himself and provide a stable upbringing for her/his two children. Yet because of her/his conviction in this case, s/he is subject to the risk of mandatory deportation

and forced separation from her/his children, to be sent alone to a country s/he has not known since s/he was a teenager.

7. Newly enacted C.P.L. § 440.10(1)(j) provides that the Court may vacate a judgment of conviction for a class A or unclassified misdemeanor entered prior the law's effective date on April 12, 2019 that satisfies the ground prescribed in C.P.L. § 440.10(1)(h). C.P.L. § 440.10(1)(j). For such offenses, "there shall be a rebuttable presumption that a conviction by plea to such an offense was not knowing, voluntary and intelligent, based on ongoing collateral consequences, including potential or actual immigration consequences." *Id.*

8. <defendant>'s judgment of conviction is for a class A misdemeanor entered on <date>, before the April 12, 2019 effective date of this new law. See Exhibit [], Certificate of Disposition. Her/his conviction by plea must be presumed not to have been a knowing, voluntary, or intelligent plea because <defendant> faces ongoing negative immigration consequences as a result of her/his conviction.

9. Specifically, **[add discussion of all ongoing relevant potential immigration consequences, supported by case citations or evidence, including but not limited to an immigration court Notice to Appear I-864. See IDP's "One Day to Protect New Yorkers" Practice Advisory, located at <https://www.immigrantdefenseproject.org/wp-content/uploads/One-Day-to-Protect-New-Yorkers-.pdf>, for a discussion of many common immigration consequences]**

10. <defendant>'s conviction constitutes a "crime involving moral turpitude" (CIMT) under the immigration laws. See *Matter of* <case>, ___ I&N Dec. ___ (BIA <year>) (holding P.L. § <cite> is a CIMT). Moreover, at the time of her/his guilty plea, as a class A misdemeanor the offense of assault in the third degree was punishable by a sentence of up to one year.

<Defendant> is therefore mandatorily barred from seeking cancellation of removal for certain non-lawful permanent residents, a critical defense against deportation were s/he to be placed in removal proceedings. See 8 U.S.C. § 1229b(b)(1)(C); *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010) (cancellation of removal for nonpermanent residents barred by conviction of CIMT punishable by a year).¹ As <defendant> attests, permanent separation from her/his children would be devastating not only for <defendant> but also her/his children, who rely on her/him as their only parent and provider. See Exhibit A at ¶ [#]; Exhibits [] – [], Letters of Support and Photos). Her/his son, who has been diagnosed with learning disabilities and requires special education and significant extra care by <defendant> would suffer most. Exhibit A at ¶ [#].

11. Newly added subsection (9) of C.P.L. § 440.10 provides for a remedy specific to vacatur under rebuttable presumption in C.P.L. 440.10(1)(j):

Upon granting of a motion pursuant to paragraph (j) of subdivision one of this section, the court may either:

- (a) With the consent of the people, vacate the judgment or modify the judgment by reducing it to one of conviction for a lesser offense; or
- (b) Vacate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant in accordance with the amendatory provisions of subdivision one-a of section 70.15 of the penal law.

¹ Although New York's One Day to Protect New Yorkers Act, enacted April 12, 2019, automatically and retroactively reduces the maximum sentence for class A and unclassified misdemeanors to 364 days from one year, P.L. § 70.15[1-a][b]. The Board of Immigration Appeals has refused to give effect to the retroactive application of State laws that reduce the maximum potential sentence of an offense. See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (2018) (BIA's refusal to give effect to the retroactive application of California Penal Code § 18.5(a), which provides that the maximum potential sentence for a California misdemeanor is 364 days rather than one year).

WHEREFORE, FOR THE REASONS STATED ABOVE, IT IS RESPECTFULLY REQUESTED THAT THIS COURT VACATE <defendant>'S CONVICTION AND RETURN THE CASE TO PRE-PLEADING STATUS TO PERMIT ONE OF THE REMEDIES IDENTIFIED IN C.P.L. § 440.10(9). IN THE ALTERNATIVE, A HEARING SHOULD BE ORDERED.

Dated: <city>, New York
<date>

<attorney>