

## Memorandum Urging Approval

### COMMITTEE ON MANDATED REPRESENTATION

October 15, 2021

S. 1217  
A. 2653

By: Senator Benjamin  
By: M. of A. Lavine  
Senate: Passed unanimously  
Assembly: Passed unanimously  
Effective Date: Immediately

**AN ACT** to amend the criminal procedure law, in relation to claims of ineffective assistance of counsel in post-conviction motions.

**LAW AND SECTIONS REFERRED TO:** Section 440.10 of the criminal procedure law.

### **THE COMMITTEE ON MANDATED REPRESENTATION** **SUPPORTS THIS LEGISLATION**

The Committee on Mandated Representation strongly supports S1217/A2653, which unanimously passed the Legislature on June 7, 2021. The bill is a simple fix to CPL 440.10(2)(b). The bill incorporates language that has been before the Legislature for at least the last 10 years but had yet to pass. The language is the insertion of the phrase, “unless the issue raised in such a motion is ineffective assistance of counsel.”

Currently, claims of ineffective assistance of counsel (IAC) are clearly raisable on a motion pursuant to CPL 440.10. However, sub-section (2)(b) bars all claims (including IAC) from being raised in a 440.10 motion if the claim could be raised on direct appeal. The procedural bar makes sense, but not for IAC claims. IAC claims are typically raised where trial defense counsel makes serious errors during a trial that truly impacted on the result. A typical claim would be that counsel failed to raise a particular defense at trial. However, on direct appeal one can raise only claims based upon the existing record—off the record facts cannot be included in the appeal. Even assuming the IAC claim could conceivably be based on record material—e.g. there is no rational reason why the defense was not raised—, it is always better to allow trial defense counsel to explain the strategic reasons for proceeding the way they did—e.g., why the defense was not raised. This allows the 440 court to make a better assessment of the validity of the IAC claim. Additionally, most IAC claims are based on a number of alleged errors by counsel—some off the record and some on the record. The bill’s language would enhance judicial efficiency by allowing the IAC claims to be raised holistically, in one proceeding.

For the above reasons, the Committee on Mandated Representation **SUPPORTS** this legislation and urges it be signed into law.