

CONFIDENTIAL

FOR COMMISSION MEMBERS AND STAFF ONLY

November 1965

TITLE X

PROCEEDINGS AFTER JUDGMENT

ARTICLE X

POST JUDGMENT MOTIONS

*Note: this matter
is superseded by
new § 305.00 (P130)*

§ Motion to vacate judgment

1. At any time after the entry of a judgment of conviction, the court in which the judgment was entered may, upon motion of the defendant, vacate such judgment upon any of the following grounds:

(a) Any ground which would support a motion formerly known as a motion to vacate a judgment of conviction in the nature of a writ of error coram nobis;

(b) That the judgment was obtained in violation of a provision of the constitution of this state or of the constitution of the United States; or that the court did not possess jurisdiction of the action, or any ground relating to the validity of the judgment which, if advanced in an appropriate court of this state upon a petition for a writ of habeas corpus brought pursuant to article seventy of the civil practice law and rules, or if advanced in an appropriate federal court upon a petition for a writ of habeas corpus, would require such court to sustain such writ and vacate the judgment;

(c) Any ground which, if cognizable or reviewable upon an appeal from judgment of conviction, would require a reversal of the judgment by an appellate court;

(d) That new evidence has been discovered since the entry of a judgment of conviction based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part, ^{and} which is of such character as to create a substantial possibility that had such

evidence been received at the trial the verdict would have been more favorable to the defendant.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment of conviction when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment of conviction; or

(b) The judgment of conviction is, at the time of the motion, appealable, and the record contains or discloses sufficient facts, evidence or information with respect to the ground or issue raised upon the motion to permit adequate review thereof upon an appeal from the judgment of conviction; or

(c) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment of conviction when:

(a) Although the record of the proceedings underlying the judgment of conviction contained or disclosed sufficient facts, evidence or information to permit upon appeal therefrom adequate review of the ground or issue raised upon the motion, no such appellate review or determination ensued owing to the defendant's failure to take or perfect an appeal or to his failure to raise such ground or issue upon an appeal actually taken by him; or

(b) Although facts, evidence or information in support of the ground or issue raised upon the motion were known to the defendant before entry of the judgment of conviction and could with due diligence on his part have readily been made to appear on the record

in a manner providing adequate basis for review thereof upon an appeal from such judgment, the defendant did not adduce such matter prior to judgment and the ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon alleged deprivation of the right to counsel or upon failure of the court to advise the defendant of such right; or

(c) The ground or issue raised upon the motion was previously determined on the merits upon (i) a prior motion made pursuant to this section, or (ii) a prior motion formerly known as a motion to vacate a judgment in the nature of a writ of error coram nobis, or (iii) a prior motion or proceeding in another court of this state, other than ^{an} appeal from the judgment of conviction or (iv) a prior motion or proceeding in a federal court.

Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it be otherwise meritorious and vacate the judgment notwithstanding such circumstances.

4. If the court grants the motion and vacates the judgment, it must dismiss the indictment or information, or order a new trial, or take such other action as is appropriate under the circumstances.

§ Motion to set aside sentence

1. At any time after the entry of a judgment of conviction, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.

2. Notwithstanding the provisions of subdivision one,

The court must deny a motion to set aside a sentence when the ground or issue raised upon the motion was previously determined on the merits upon an appeal from judgment of conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to set aside a sentence when the ground or issue raised was previously determined on the merits upon (a) a prior motion made pursuant to this section, or (b) a prior motion formerly known as a motion for resentencing, or (c) a prior motion formerly known as a motion to vacate a judgment of conviction in the nature of a writ of error coram nobis, or (d) a prior motion or proceeding in another court of this state, other than an appeal from the judgment of conviction; or (e) a prior motion or proceeding in federal court. Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it be otherwise meritorious and set aside the sentence notwithstanding such circumstances.

4. An order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence the defendant in accordance with the law.

§ Motion to vacate judgment and to set aside sentence;
mechanics and procedure

1. A motion to vacate a judgment or to set aside a sentence must be made in writing and upon notice to the people. If the motion is expressly or impliedly based upon the existence or occurrence of certain facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons, fully supporting the ground of the motion. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief,

provided that in the latter event the affiant must further state the sources of such information and the grounds of such such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers.

2. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel if any, an answer denying or admitting any or all of the allegations of the moving papers, and may further submit documentary evidence or information refuting or tending to refute such allegations.

3. After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of determining whether the motion can and should be determined without a further proceeding to resolve questions of fact.

4. If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by conclusive documentary evidence or information, that there are circumstances apart from the merits of the motion which require denial thereof pursuant to subdivision two of section x or subdivision two of section y, the court must deny the motion without considering the merits thereof. If it so appears that there are circumstances apart from the merits authorizing, though not requiring, denial thereof pursuant to subdivision three of section x or subdivision three of section y, the court may in its discretion either (a) deny the motion without considering the merits thereof, or (b) proceed to consider the merits thereof.

5. Upon considering the merits of the motion, the court must grant it and vacate the judgment or set aside the sentence if:

(a) The moving papers allege a ground constituting

legal basis for the motion pursuant to subdivision one of section x or subdivision one of section y, and also contain, where essential, sworn allegations of fact fully supporting such ground; and

(b) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by documentary evidence or information.

6. Upon considering the merits of the motion, the court deny it if:

(a) The moving papers do not allege any ground constituting legal basis for the motion pursuant to subdivision one of section x or subdivision one of section y; or

(b) The motion is expressly or impliedly based upon the existence or occurrence of certain facts, and the motion papers do not contain sworn allegations substantiating or tending to substantiate such facts, as required by subdivision one; or

(c) A factual allegation essential to support the motion is conclusively refuted by documentary evidence or information.

7. If the court does not determine the motion pursuant to subdivision four, five or six, it must conduct a proceeding for the purpose of making findings of fact essential to the determination thereof. The defendant has a right to be present in person at such proceeding but may waive such right. If the defendant does not waive such right and if he is confined in a prison or another institution of this state, the court must cause him to be produced at such proceeding.

8. Every witness called in such proceeding must testify under oath and may be cross-examined, and the rules of evidence applicable to a criminal trial are applicable to such

a proceeding. The order in which evidence is heard and the procedure generally are within the discretion of the court.

9. In such a proceeding, the defendant has the burden of establishing by a preponderance of the evidence every ground alleged upon the motion.