



**NEW YORK
CITY BAR**

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**REPORT BY THE CRIMINAL COURTS COMMITTEE
AND THE SEX AND LAW COMMITTEE**

**RECOMMENDATIONS TO ENHANCE CRIMINAL PROCEDURE LAW § 440.10(1)(i),
REGARDING THE VACATUR OF PROSTITUTION AND TRAFFICKING-RELATED
CONVICTIONS FOR VICTIMS OF SEX TRAFFICKING**

OVERVIEW

The Criminal Courts Committee and the Sex and Law Committee (“Committees”) of the New York City Bar Association respectfully submit this report to provide information and recommendations on the topic of motions brought under Criminal Procedure Law (C.P.L.) § 440.10(1)(i), which allows for the vacatur of prostitution and trafficking-related convictions for victims of sex trafficking.

The first section of this report provides an overview of the legislation and its purpose, data regarding its implementation and court-related outcomes, and a glance at some of the outreach that has taken place in an effort to inform individuals who could potentially benefit under the law. The second section contains recommendations for the effectuation of further relief under the law. Specifically, the Committees recommend that: (1) courts continue to streamline the procedures for these motions, and maintain stricter deadlines for responses and decisions; (2) outreach be continued through a wide range of channels, including the publicizing of the remedy through New York State licensing agencies; and (3) the Legislature amend C.P.L. § 440.10(1)(i) to include a provision allowing for the assignment of counsel for the purpose of preparing such motions for indigent petitioners.

ABOUT THE COMMITTEES

The Criminal Courts Committee is composed of prosecutors, defense attorneys, and law professors with a range of perspectives who together seek to improve the operations of the New York City Criminal Court and the Criminal Term of the New York State Supreme Court. The Sex and Law Committee addresses issues pertaining to gender and the law in a variety of areas, such as violence against women, reproductive rights, gender discrimination, poverty, matrimonial and family law, employment law, and same-sex marriage.

CURRENT STATUS OF THE LAW AND ITS IMPLEMENTATION

In 2010, New York became the first state to pass legislation allowing survivors of sex trafficking the opportunity to have their criminal histories cleared of convictions they sustained as a

result of being trafficked into the sex industry.¹ The bill recognized the fact that victims of sex trafficking continue to face discrimination and stigmatization over their criminal histories long after their escape from trafficking. In essence, the law is intended to provide victims an avenue to obtain the “clean slate they need and deserve to secure living wage jobs, housing and other beneficial opportunities to rebuild their lives.”²

The law is codified under section 440.10 of the Criminal Procedure Law (“Motion to vacate judgment”) and allows for vacatur: (1) “where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or 230.00 (prostitution) of the penal law,” and (2) “the defendant’s participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law or trafficking in persons under the Trafficking Victims Protection Act . . .” C.P.L. § 440.10(1)(i).

The law encompasses judgments where the *arresting charge* was for loitering for the purpose of engaging in prostitution (Penal Law (P.L.) § 240.37) or prostitution (P.L. § 230.00). Drafters of the law intentionally drafted the legislation to look to the arresting charge to determine eligibility for relief because the majority of those arrested for prostitution ultimately take pleas to lesser charges. Relatedly, C.P.L. § 440.10 was amended to provide that, where a motion under this provision is granted, the court may take “such additional action as is appropriate in the circumstances,”³ so as to grant courts the power needed to give survivors the clean slate intended by the law.

The law requires movants to show that they are victims of sex trafficking, as that term is defined under section 230.34 of the Penal Law, or under the federal Trafficking Victims Protection Act.⁴ Although it is not required for relief under the law, official documentation verifying the individual’s status as a victim of sex trafficking from a federal, state or local government agency creates a presumption that such person’s participation in the qualifying offense was a result of having been a victim of sex trafficking.⁵

¹ S. 4429, 223d Leg. 223rd Sess. (N.Y. 2010); Assemb. 7670, 223d Leg., 223rd Sess. (N.Y. 2010); presented cited as N.Y. Crim. Proc. L. § 440.10(1)(i) (McKinney’s 2010).

² N.Y. Bill Jacket, 2010 A.B. 7670, Ch. 332, 233rd Leg. (2010 Reg. Sess.) (Letter from Sen. Thomas Duane to Gov. Paterson).

³ C.P.L. § 440.10(6).

⁴ 22 U.S.C.A. § 7102(9) (defining the term “sex trafficking” as the recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act).

⁵ C.P.L. § 440.10(i)(ii). This provision recognizes that federal and some state laws on human trafficking have created a regulatory framework by which someone can be “certified” as a victim of human trafficking, for the purpose of accessing public benefits or immigrant visas, e.g., a letter from the Department of Health and Human Services or the New York State Office of Temporary and Disability Assistance.

The Reach of the Law in Practice: Outreach & Implementation

To gain an understanding of how the law has worked in practice since its enactment, the Committees drafted a questionnaire and disseminated it to legal providers who have brought motions on behalf of individuals seeking relief from the criminal histories they sustained as a result of being trafficked into prostitution. The Committees received responses from two providers: The Legal Aid Society and the Sex Workers Project. In addition, to gain some perspective from the prosecutorial standpoint, a separate questionnaire was provided to Assistant District Attorney John Temple (New York County), head of the Human Trafficking Program, who responds to all motions filed under the law.

Organizational Resources Utilized

Legal Aid, an office comprised of approximately 1000 attorneys, reported that two lawyers from its organization had filed motions under the newly enacted vacatur law, with the assistance of one paralegal for document gathering and records requests, a social worker for client services and letters of support, and law students/interns for support with records requests, research and drafting. The Sex Workers Project is an organization of three attorneys, one of whom is devoted primarily to the oversight, drafting and filing of these motions. Support staff is more limited, consisting primarily of interns who assist with information-gathering and some drafting.

Both offices have collaborated with private law firms for pro bono assistance. Thirty-four lawyers from Cleary Gottlieb Steen & Hamilton were trained by Legal Aid, and a total of four motions have been filed to date as a result of that partnership. Nine lawyers from Duane Morris (reported as three teams of three) and two lawyers from Weil Gotshal & Manges have been trained to assist the Sex Workers Project; as of the date of this report, no motions had yet been filed by the firms, although two motions are expected to be filed imminently. While the assistance of private law firms has been welcomed by both reporting organizations, the organizations also noted the time-consuming training that it has entailed. Survivors of trafficking endure hardships and face psychological trauma requiring lawyers to have a specialized understanding of the industry. Moreover, the filing of C.P.L. § 440.10 motions in New York Criminal Court is a complex and time-intensive process with which these law firms are typically not familiar.

Questionnaire Answers and Findings

Between the two organizations, a total of 31 motions have been filed on behalf of 21 clients. On average, Legal Aid filed approximately one motion per client, and the Sex Workers Project filed approximately two motions per client. Per county, the number of filed motions breaks down as follows: Queens County (11), New York County (8), Bronx County (6), and Kings County (5). Legal Aid also filed one motion in Schenectady Criminal Court and one motion in Westchester County.

The attempts to clear the criminal histories of those who have been trafficked are complicated by the fact that many individuals seeking relief have incurred a large number of convictions before having the opportunity to escape the trafficking cycle. This difficulty is reflected in the large number of convictions garnered by the relatively small group of clients analyzed for purposes of this report. The 14 clients represented by Legal Aid Society had a total of 61 prostitution-related convictions. The seven clients represented by the Sex Workers Project sustained a total of 62 prostitution-related

convictions (although 39 of those convictions were for one client). Further, for each motion filed, Legal Aid challenged approximately three prostitution-related convictions and the Sex Workers Project challenged approximately five, and in some instances both offices had to file a motion(s) in more than one borough to clear the history for one client.

In addition, these organizations had to contend with challenging convictions that were not, by their legal definition, “prostitution-related” offenses, but nevertheless arose out of the client having been trafficked. For example, two of the 18 motions filed by Legal Aid included convictions were not prostitution-related. One of those motions challenged a conviction for Criminal Possession of a Controlled Substance in the 7th Degree and the other motion challenged six non-prostitution-related offenses, including four convictions for Attempted Jostling, one conviction for Attempted Assault in the 3rd Degree and one conviction for Petit Larceny. Similarly, five of the 13 motions filed by the Sex Workers Project included ten such convictions, including six for Possession of a Controlled Substance, two Trespass convictions, one conviction of Criminal Possession of a Weapon in the 4th Degree, and one conviction for resisting arrest.

Both organizations have experienced significant success in bringing these motions. Of the 61 prostitution-related convictions Legal Aid sought to challenge, 39 were vacated; the motions relating to 22 convictions are pending. The Sex Workers Project moved to vacate 23 convictions on behalf of six clients, and 17 have been vacated. An additional Sex Workers Project client had 42 convictions; a motion to vacate 41 of those convictions (originating in Bronx County) has been granted, and a motion to vacate the other conviction (Queens County) is pending.

Securing the support of the prosecution has been a critical component of this success so far. The People’s consent was obtained in every motion that has been granted except one.

Client Base and Current Outreach by Providers

Of the 21 movants examined for this report, 14 were referred from partner organizations, and seven were previously represented by the reporting organizations (five by Legal Aid, two by the Sex Workers Project).

Both reporting organizations state that they are conducting outreach by communicating with partner organizations. For example, the Sex Workers Project reports that they are part of the New York Anti-Trafficking Network and Providers Offering Resources and Services to Sex Workers. They publicize to these networks and others, such as the Legal Action Center, as well as public defense offices. Outreach so far has been effective. More than half of Legal Aid’s current clients and all of SWP clients were referred by partner organizations. The Sex Workers Project further notes that many of its former and current clients are also eligible for this remedy. As reported by the Sex Workers Project, there is no shortage of potential clients, just a lack of resources to aid them. Likewise, Legal Aid reports that it has a waitlist of approximately six individuals whose cases are inactive for reasons related to “staffing and resources.”

ADA Temple reported that, for the government’s part, all new prostitution-related arrests are screened for signs of sex trafficking and connections to sex trafficking organizations. The office has dedicated an assistant district attorney to Midtown Community Court who has training and experience in prosecuting trafficking cases, and this assistant is responsible for referring suspected,

newly-arrested trafficking victims to appropriate providers and fashioning alternatives for such victims accordingly.

RECOMMENDATIONS FOR ADVANCING FURTHER RELIEF UNDER THE LAW

Outreach

Despite building waitlists, both organizations agree that more should be done to publicize the remedy. Legal Aid suggested utilizing channels of mass media, such as newspapers, magazines, social networks and websites, to gain a wider audience. Based on their understanding of the sex-trafficking industry, both organizations estimate that thousands of individuals could stand to benefit from the law were they aware of it.

According to the Sex Workers Project, most clients who are impeded from attaining professional licenses as a result of their convictions are seeking positions in security or home health care. Because home health aides in New York must be licensed by the New York State Department of Health, they suggest that publicizing this remedy to that agency could lead to expanded relief.

The Committees conducted their own outreach in an effort to learn more about the effective channels for communicating this remedy. The Committees contacted the New York State Department of Health, which confirmed that individuals with a criminal past, including misdemeanors, may not be licensed as home health care attendants. The Committees requested that information about vacating prostitution and prostitution-related convictions under C.P.L. § 440.10(1)(i) be included on the Department's website, but as of the date of this report, the Department has yet to approve the request.

The Committees also contacted New York's Department of State Division of Licensing Services. The Division of Licensing Services (DLS) oversees the licensure, registration and regulation of 29 occupations throughout the state, including cosmetology, esthetics, nail specialty and hairstyling. The Committees made contact with an investigator at DLS who stated that misdemeanors or violations for offenses such as prostitution or loitering for the purpose of engaging in prostitution do not necessarily disqualify an applicant from obtaining a license, so long as the applicant discloses the history in his or her application. The Committees also reached out to DLS's Legal Division and the Commissioner's office to urge the agency to list information about the vacatur law on its website. As of the date of this report, DLS had not responded to those requests.

Cosmetology schools throughout the state were also contacted, although only two senior administrators had knowledge of students having difficulty obtaining licenses due to criminal histories. Moreover, these two administrators stated that, in the rare circumstance where a student's licensing is delayed due to a previous conviction, it is almost always drug related. According to all of the senior administrators contacted, there has never been an issue, known to the school, with a student being denied licensing based on a previous prostitution-related conviction. Even when schools encountered issues for a drug-related conviction, it was a matter of delay instead of outright denial of licensing.

Procedural Improvements

Both providers and the District Attorney's Office were asked to provide suggestions for procedural (systemic) improvements to expedite and streamline motions brought under C.P.L. § 440.10(1)(i).

In accordance with their responses, the Committees recommend that the courts consider instituting uniform filing rules, particularly with regard to filing under seal, filing anonymously, and preventing the disclosure of identifying information.

In addition, the Committees urge the courts to hold both parties to a strict time line for any responses and/or replies after the initial filing. Such deadlines would expedite the negotiation process which, in its current form, is too open-ended. Although the Committees encourage resolution through negotiation whenever possible, the specter of a looming deadline would protect against extensive delays, which cause anxiety and uncertainty, especially for individuals seeking an answer for purposes of employment or immigration issues. Relatedly, where the district attorney's office plans to consent, the Committees recommend that the court grant the motion verbally, even it plans to issue a written decision, so that relief is not unnecessarily delayed.⁶

Amending the Law to Provide for the Assignment of Counsel

For two main reasons, the Committees further recommend that the Legislature amend the law to provide for the assignment of counsel to indigent petitioners to assist in the preparation of the motion.⁷ First, as noted by the organizations who contributed to this report, there is an existing backlog of individuals awaiting the opportunity to apply for relief under the law. As reported by the Sex Workers Project, most survivors of trafficking are living in poverty and cannot afford to hire private attorneys.⁸ Further, as noted above, while pro bono assistance from private law firms has been welcomed by both organizations, it does not provide an efficacious or long-term solution for handling large numbers of motions due the time-intensive training and oversight that these attorneys must receive before filing such motions. In addition, as reflected by the information provided above, movants typically have numerous trafficking-related convictions, often spanning more than one

⁶ The district attorney's office also suggests that the moving party request an informal meeting before filing; however, the defense organizations were resistant to this idea. ADA Temple noted that, in most cases, the prosecution will want to speak with the potential survivor in an effort to independently corroborate his or her story, as the People might have access to information unavailable to a defense attorney. In addition, ADA Temple noted that such meetings can lead to investigations that might secure additional justice for the victim in the form of a prosecution of the sex trafficker. On the other hand, such meetings are problematic for many movants, as victims of sex trafficking often have concerns about meeting with law enforcement to discuss their experience. Further, such meetings would result in unnecessary delay, as the moving papers typically contain all the corroboration and information that the moving party has to offer.

⁷ Such provision could be added as C.P.L. § 440.10(1)(i)(iii), and incorporate necessary county law provisions, e.g.: "subdivision one of section seven hundred seventeen and the related provisions of article eighteen-A of such law, shall apply to the preparation of and proceedings on motions pursuant to this section, including any appeals."

⁸ Vacating Criminal Convictions for Trafficked Persons: A Legal Memorandum for Advocates and Legislators (April 2012), available at <http://www.sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf> (last visited May 21, 2013).

jurisdiction, making it extremely difficult for victims to combat their trafficking-related criminal history on their own. The New York County District Attorney's Office was not aware of any pro se applications for relief under the law.

In terms of advancing the policy behind the law, such an amendment would make sense. The bill was intended to have broad remedial scope, in acknowledgment of the fact that victims of sex trafficking who become saddled with a criminal record are "blocked from decent jobs and other prospects for rebuilding their lives," essentially becoming life-long victims. In accordance with its purpose, C.P.L. § 440.10(1)(i) provides victims with the legal mechanism for accessing the "desperately needed second chance they deserve," but without a provision allowing for the assignment of counsel to prepare the motion, it fails to provide the component necessary for securing relief for large numbers of eligible individuals.

CONCLUSION

Two organizations have already reported significant success in bringing motions to vacate convictions that were sustained by individuals forced into prostitution and related offenses. To advance further relief under the law, the Committees recommend:

- Greater uniformity amongst the courts, both in terms of filing rules and holding parties to deadlines; such uniformity would lead to a more efficient administration of justice and greater numbers of victims having the opportunity to be heard;
- An amendment providing for the assistance of counsel to indigent movants in preparing the motion, so as to address the backlog of cases awaiting attention. Given the purpose of the vacatur law and the broad legislative support for the passage of it, the Committees believe that such an amendment would be a worthwhile and feasible addition to C.P.L. § 440.10(i).

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