

# Post-Conviction Relief for Human Trafficking Victims Convicted of Crimes Coerced By a Trafficker

Human trafficking victims may be coerced or pressured into the commission of a variety of crimes due to demands of a trafficker, as a result of the physical or psychological trauma associated with being a victim of human trafficking. Some of the more common crimes that a trafficking victim may be coerced into committing include the following:

- prostitution;
- drug use;
- drug sales;
- theft;
- illegal peddling;
- resisting arrest;
- using false identification;
- gang activity; and
- recruiting other victims for the trafficker.

Trafficking victims who are convicted of crimes coerced by a trafficker may face serious collateral consequences that greatly increase the effects of their victimization. As a result of these collateral consequences, having a conviction removed from the record of a human trafficking victim may be an important component of freeing the victim from the control of the trafficker.

## COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS

### Eligibility for Employment

Criminal convictions can have consequences for eligibility for a variety of types of employment and access to other privileges that may be a requirement for certain jobs, such as driving or possessing a firearm. Further, employers may take into account any criminal or juvenile conviction that reasonably relates to the fitness of an individual for a particular job.

The following are some of the crimes that can result in mandatory or discretionary denial of employment or ineligibility for a state license. The list includes both felonies and misdemeanors.

- crimes involving moral turpitude, as defined under state law;
- theft;
- crimes indicating dishonesty, fraud, or breach of trust;
- offenses involving a child victim or endangering the welfare of a child;
- any misdemeanor;

- drug trafficking;
- any crime related to a controlled substance; and
- human trafficking, such as recruiting new victims for a trafficker.

The following is a partial list of areas of employment that may be barred, depending on the laws of the particular state:

- occupations with likelihood of significant contact with children in the form of care, guidance, supervision, or training (e.g. social workers, clergy, hospital personnel, mental health professionals, counselors, librarians and doctors);
- health and behavioral services, including home health care, behavioral services, mental health services, residential or assisted living, batterer intervention programs;
- school employment, including teacher, administrator, counselor, school nurse, school social worker, school psychologist, assistant, aide, contractor, etc.;
- justice system employment, including law enforcement officer, court interpreter, municipal court judge, juvenile justice employee;
- state agency employee or contractor;
- professional licenses, including physician, optometrist, dentist, architect, attorney, pharmacist, chiropractor, speech pathologist;
- occupational licenses, including physical therapist, massage therapist, dental hygienist, medical imaging technician, emergency medical technician, social worker, midwife, private investigator, massage parlor employee;
- financial industry licenses, including insurance broker, securities broker/dealer, investment advisor, accountant, real estate broker;
- federal employment in a variety of jobs; or
- various other occupations, including staff working at airports, auctioneer, motor vehicle dealer or salesperson, security guard, electrician, HVAC technician, interior designer, plumber, hairstylist, barber, cosmetologist.

### Immigration Status and Eligibility for Immigration Relief

In addition, for victims who are immigrants a criminal conviction or juvenile delinquency disposition can affect the individual's immigration status and eligibility for many forms of immigration relief. While many of the types of crimes typically committed

by trafficking victims are misdemeanors and may appear as minor offenses, some of those misdemeanors can fall under the definition of aggravated felony or crime involving moral turpitude under federal immigration law. Conviction of those crimes may make the defendant deportable, and both adult convictions and juvenile delinquency dispositions may make the defendant inadmissible and thus ineligible for some forms of immigration relief. There is a more detailed discussion on immigration issues for human trafficking victims on a separate information card on [www.htcourts.org](http://www.htcourts.org).

## **POST-CONVICTION RELIEF TO NULLIFY A CRIMINAL CONVICTION DUE TO TRAFFICKING VICTIMIZATION**

At the criminal trial or plea hearing it may not be obvious to the judge or prosecutor that the defendant is a human trafficking victim. The possible presence of human trafficking may not have been raised or even recognized by the prosecution. Further, the victim may not self-identify as a victim and believe that, despite repeated abuse, the trafficker is a loving boyfriend, spouse, or parent. The trafficker may even push a victim to plead guilty, as a guilty plea will likely result in a suspended sentence that enables the victim to return to the trafficker. In addition, trafficking victims often appear uncooperative and hostile and thus do not make sympathetic defendants for prosecutors or judges.

Once a conviction has been entered, through a guilty plea or trial, the only recourse open to the victim will be to seek some form of post-conviction relief, assuming that the trial itself did not contain any appealable legal defects. The two main types of post-conviction relief that are available are vacatur and expungement.

### Vacating or Expunging a Conviction for Prostitution

As of May 2014, 15 states provided a means to vacate or expunge a judgment if it is later shown that the conviction was for an offense resulting from coercion by a trafficker, and another 9 states had such legislation pending. Vacating a conviction makes the conviction legally invalid. Expunging the conviction physically seals all official records pertaining to the case and treats the proceeding as not having occurred. Note that vacating a conviction for legal insufficiency also removes the conviction for immigration purposes, while expungement alone does not provide an immigrant defendant with relief from the immigration consequences of the original conviction.

The New York Vacatur statute is an example of trafficking victimization as a basis for vacating a conviction.

## **NEW YORK CRIMINAL PROCEDURE LAW S 440.10 MOTION TO VACATE JUDGMENT.**

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

- (i) The judgment is a conviction 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 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 (United States Code, title 22, chapter 78); provided that
- (i) a motion under this paragraph shall be made with due diligence, after the defendant has ceased to be a victim of such trafficking or has sought services for victims of such trafficking, subject to reasonable concerns for the safety of the defendant, family members of the defendant, or other victims of such trafficking that may be jeopardized by the bringing of such motion, or for other reasons consistent with the purpose of this paragraph; and
- (ii) official documentation of the defendant's status as a victim of sex trafficking or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking or trafficking in persons, but shall not be required for granting a motion under this paragraph.

6. If the court grants a motion under paragraph (i) of subdivision one of this section, it must vacate the judgment and dismiss the accusatory instrument, and may take such additional action as is appropriate in the circumstances.

The Ohio statute, Ohio Revised Code Title 29, Chapter 2953, Section 2953.38, is an example of trafficking victimization as a basis for expunging a conviction. The effect of expungement is specified in Section 2953.39(G).

## OHIO REVISED CODE SECTION 2953.38(G)

1. The court shall send notice of the order of expungement to each public office or agency that the court has reason to believe may have an official record pertaining to the case if the court, after complying with division (E) of this section, determines both of the following:

- (a) That the applicant has been convicted of a violation of section 2907.24, 2907.241, or 2907.25 of the Revised Code;
- (b) That the interests of the applicant in having the records pertaining to the applicant's conviction expunged are not outweighed by any legitimate needs of the government to maintain those records.

2. The proceedings in the case that is the subject of an order issued under division (F) of this section shall be considered not to have occurred and the conviction of the person who is the subject of the proceedings shall be expunged. The record of the conviction shall not be used for any purpose, including, but not limited to, a criminal records check under section 109.572 of the Revised Code. The applicant may, and the court shall, reply that no record exists with respect to the applicant upon any inquiry into the matter.

The Vermont statute provides for both vacating the conviction and expunging the record.

## VERMONT TITLE 13: CRIMES AND CRIMINAL PROCEDURE

### Chapter 060: Human Trafficking

§ 2658. Prostitution conviction; motion to vacate by victim of human trafficking

- (d)(1) The Court shall grant the motion if it finds by a preponderance of the evidence that: (A) the moving party was convicted of prostitution in violation of section 2632 of this title; and (B) the conviction was obtained as a result of the moving party's having been a victim of human trafficking. (2) If the motion is granted, the Court shall vacate the conviction, strike the adjudication of guilt, and expunge the record of the criminal proceedings. The Court shall issue an order to expunge, or redact the moving party's name from, all records and files related to the moving party's arrest, citation, investigation, charge, adjudication of guilt, criminal proceedings, and probation for the offense.

## Vacating or Expunging Crimes Other Than Prostitution Coerced by a Trafficker

All of the above statutes are specifically aimed at the crime of prostitution committed due to the coercion of a trafficker. The states differ as to the application of the statutory provisions for vacatur or expungement to crimes other than prostitution. Some states have statutes more broadly written to permit expungement of all crimes committed due to the coercion of a trafficker. For example, Florida provides:

### FLORIDA CRIMINAL PROCEDURE, SECTION 943.0583

3. A person who is a victim of human trafficking may petition for the expunction of a criminal history record resulting from the arrest or filing of charges for an offense committed or reported to have been committed while the person was a victim of human trafficking, which offense was committed or reported to have been committed as a part of the human trafficking scheme of which the person was a victim or at the direction of an operator of the scheme, including, but not limited to, violations under chapters 796 and 847, without regard to the disposition of the arrest or of any charges. However, this section does not apply to any offense listed in s. 775.084(1)(b)1. Determination of the petition under this section should be by a preponderance of the evidence. A conviction expunged under this section is deemed to have been vacated due to a substantive defect in the underlying criminal proceedings.

The one New York criminal court opinion interpreting the New York statute quoted above interpreted it broadly. The court noted that the bill was passed based on the recognition that trafficking victims who are arrested for prostitution are blocked from many jobs and are thus victimized for life even after they are no longer under the control of their trafficker. Further, the court vacated six convictions of the defendant, two for prostitution, two for criminal trespass, and two for drug possession, noting that while the section 440.10(1) applies only to prostitution, section 440.10(6) allows the court to take such additional action as is appropriate in the circumstances. See *New York v. G.M.*, 32 Misc. 3d 274 (Criminal Court of the City of New York, Queens County, Apr. 29, 2011).

## Other Issues in the Application of Vacatur and Expungement

In addition, the statutes in different states differ with regard to the burden of proof of victimization, including: (1) the evidence required and presumptions that may be made regarding proof of victimization; (2) the time limits after a conviction within

which a motion to vacate must be made; and (3) subsequent criminal convictions that may affect eligibility for a vacatur or expungement.

The ability to provide evidence of victimization by a trafficker may pose a significant hurdle to overcome for some victims. Evidence may be difficult or painful to procure. Some state laws, including the New York statute cited above, provide that documentation from a local, state, or federal agency as to the defendant's status as a trafficking victim creates a rebuttable presumption that the conviction was for a crime coerced by the trafficker.

With regard to timing, some states require that the motion to vacate a judgment be filed within a reasonable time, while other states allow the motion to be filed at any time. The determination of what is a reasonable time may take into account concerns for the victim's safety if the victim is still in danger from the trafficker.

The Washington statute, RCW 9.96.060, provides an example of limitations placed on a person seeking expungement of a conviction if the person is the subject of other criminal actions. The statute provides, in part:

#### WASHINGTON CRIMINAL CODE RCW 9.96.060

Misdemeanor or gross misdemeanor offenses, persons convicted of prostitution who committed the offense as a result of being a victim of trafficking, promoting prostitution in the first degree, promoting commercial sexual abuse of a minor, or trafficking in persons, or of violating a certain statute or rule regarding the regulation of fishing — Vacating records.

1. Every person convicted of a misdemeanor or gross misdemeanor offense who has completed all of the terms of the sentence for the misdemeanor or gross misdemeanor offense may apply to the sentencing court for a vacation of the applicant's record of conviction for the offense. If the court finds the applicant meets the tests prescribed in subsection (2) of this section, the court may in its discretion vacate the record of conviction by: (a)(i) Permitting the applicant to withdraw the applicant's plea of guilty and to enter a plea of not guilty; or (ii) if the applicant has been convicted after a plea of not guilty, the court setting aside the verdict of guilty; and (b) the court dismissing the information, indictment, complaint, or citation against the applicant and vacating the judgment and sentence.

2. An applicant may not have the record of conviction for a misdemeanor or gross misdemeanor offense vacated if any one of the following is present:

- (a) There are any criminal charges against the applicant pending in any court of this state or another state, or in any federal court; ...

As trafficking victims are often coerced into in a variety of criminal activities by a trafficker and may continue to engage in such activities if they remain under the control of the trafficker after the conviction for which expungement is being sought, this restriction may prove to be a significant burden.

## CONCLUSION

In another information card we discuss possible approaches available to the courts to avoid a conviction for an offense committed by a human trafficking victim for a crime coerced by a trafficker. (See the information card titled "Human Trafficking Victims as Criminal Defendants" on the web site [www.htcourts.org](http://www.htcourts.org).) Avoiding a conviction altogether is the best legal result for the victim. Once that opportunity has passed and a conviction has been entered, the options discussed in this card may still be available for undoing the some of the more important legal effects of the conviction on the victim's ability to move on to a life free of dependence on the trafficker.