

# Workable Solutions for Criminal Record Relief: Recommendations for Prosecutors Serving Victims of Human Trafficking

## *A Report by the Survivor Reentry Project*

American Bar Association

Commission on Domestic & Sexual Violence



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*WHEREAS, victims of trafficking may be forced to engage in a variety of illegal acts beyond prostitution, and*

*WHEREAS, trafficked persons have not always been recognized as victims by the police and prosecutors and plead guilty or do not understand the consequences of criminal charges, and*

*WHEREAS, all persons with criminal records reflecting their involvement in the sex industry may face barriers to employment and other life opportunities long after they escape from their trafficking situations, and*

*WHEREAS, there is a genuine need for a **workable solution** to alleviate the impact of the collateral consequences of conviction for victims of human trafficking . . .*<sup>1</sup>

## INTRODUCTION

When the Trafficking Victims Protection Act became law in 2000, it specifically provided that “[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.”<sup>2</sup> In reality, however, trafficking survivors are regularly arrested and prosecuted for crimes resulting from their trafficking. In a 2016 survey conducted by the National Survivor Network, more than 90 percent of trafficking survivors reported having been arrested at least once, with more than 50 percent reporting that every arrest on their record was trafficking-related.<sup>3</sup> Trafficking survivors further report that criminal records regularly prevent them from obtaining employment, educational and professional opportunities, secure housing, and financial freedom.<sup>4</sup> As a result, survivors remain marginalized and vulnerable to further exploitation.

In 2010, New York became the first state to allow trafficking survivors to clear certain criminal charges from their records.<sup>5</sup> Criminal record relief laws allow survivors the ability to vacate, expunge, or seal arrests and convictions from their records where the conduct was the result of victimization. In the years since New York passed its law, almost every state has enacted some form of criminal record relief for trafficking survivors.<sup>6</sup> Across the country, hundreds of survivors have filed petitions seeking relief on trafficking-related arrests and convictions.

With the support of the U.S. Department of Justice Office for Victims of Crime, the American Bar Association Commission on Domestic & Sexual Violence launched the Survivor Reentry Project (“SRP”) in 2016. SRP provides national training and technical assistance for attorneys working with survivors of human trafficking seeking criminal record relief.

<sup>1</sup> H.R. 1325, 2013 Leg. (Fla. 2013), available at [https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=\\_h1325Ser.docx&DocumentType=Bill&BillNumber=1325&Session=2013](https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1325Ser.docx&DocumentType=Bill&BillNumber=1325&Session=2013).

<sup>2</sup> Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b)(19) (2015).

<sup>3</sup> NAT’L SURVIVOR NETWORK, NATIONAL SURVIVORS NETWORK MEMBER SURVEY: IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING 3, 5 (Aug. 2016), available at <https://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf>.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> Act of Aug. 13, 2010, ch. 332, 2010 N.Y. Sess. Laws 1083 (McKinney) (codified at N.Y. CRIM. PROC. LAW § 440.10(1)(i)).

<sup>6</sup> See A.B.A. COMM’N ON DOMESTIC & SEXUAL VIOLENCE, *Vacatur & Expungement for Trafficking Survivors*, [https://www.americanbar.org/content/dam/aba/administrative/domestic\\_violence1/SRP/Sept2018\\_vacatur\\_map.pdf](https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/SRP/Sept2018_vacatur_map.pdf) (last visited Aug. 2, 2019).

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In March 2019, SRP convened prosecutors with experience working with victims of human trafficking in the criminal legal system to share their knowledge and expertise over two days. The goals of the meeting were to discuss criminal record relief practices, such as vacatur and expungement, for victims of human trafficking, and develop a set of guiding principles for prosecutors on criminal record relief for victims to ensure consistency and reliability for survivors attempting to access criminal record relief.

The participants of the roundtable discussion included state and local prosecutors from across the country, expert stakeholders, and staff from the U.S. Department of Justice. While significant differences existed in terms of the criminal record relief available to survivors in the participants' jurisdictions, all of the participants had a strong understanding of human trafficking, and many had vast experience prosecuting human trafficking cases. In addition, most participants handled criminal record relief petitions in their jurisdiction. This report synthesizes the principles developed at the roundtable into specific recommendations that prosecutors across the country can implement to ensure that trafficking survivors are able to access criminal record relief that is trauma-informed, thereby minimizing the risk of revictimization. Finally, the convening addressed common challenges faced by prosecutors fielding requests for criminal record relief from trafficking survivors and attempted to work through some of the tension for prosecutors inherent in such requests.

During the first day of the roundtable, each participating prosecutor described the criminal record relief laws and procedures in their home state, which led to a discussion about best practices to achieve the goal described above. On the second day, participants began with a conversation about why criminal record relief was important to prosecutors and how it might fit into larger efforts to combat human trafficking. This allowed the development of the guiding principles that will be discussed in Part One of the report that follows. Part Two of this report explores common challenges that prosecutors encounter in situations where trafficking survivors seek criminal record relief. Part Three provides a non-exhaustive list of best practices that work to facilitate processes in line with the guiding principles while counteracting the challenges and building collaboration, while Part Four identifies promising areas for legislative and policy reform.

## PART ONE: GUIDING PRINCIPLES

- 1. Many trafficking victims need criminal record relief and prosecutors should not be a roadblock to criminal record remedies.**
- 2. Criminal record relief is the righting of a historical wrong and the law should prioritize the fullest remedies possible.**
- 3. Criminal record relief is key to reducing vulnerability and isolation for survivors.**
- 4. Criminal record relief has the capacity to shift victims' perception of law enforcement and the criminal legal system.**
- 5. Criminal record relief processes must be victim-centered and trauma-informed.**
- 6. Criminal record relief advocacy must be collaborative and interdisciplinary.**

The goal of the roundtable was to develop a set of guiding principles for prosecutors, advocates, and court staff to use when creating policies and procedures for criminal record relief for trafficking survivors. Roundtable participants recognized that while laws and court rules vary across state and even county lines, there are core ideals that can frame a prosecutor's work with survivors with criminal records.

### ***1. Many trafficking victims need criminal record relief and prosecutors should not be a roadblock to criminal record remedies.***

The first principle to emerge from the group was strong consensus that criminal record relief is crucial for survivors and that prosecutors should not be a roadblock to survivors seeking this relief. One prosecutor stated clearly, "We should not stand in the way; we should be a part of that healing process." Another prosecutor explained that she assisted survivors with criminal record relief simply "because it's the right thing to do." This is because, for trafficking survivors, the "long road to autonomy is impossible without beginning to take down barriers." Criminal record relief allows the court system and its stakeholders to recognize survivors' resilience, something that rarely happens in the criminal legal system.

### ***2. Criminal record relief is the righting of a historical wrong and the law should prioritize the fullest remedies possible.***

Rather than blindly defend the finality of prior arrests or convictions, prosecutors at the roundtable stressed that taking a second look at cases after the fact must be done with an understanding that it isn't about blaming prosecutors. Instead, post-conviction relief for survivors demonstrates the hope that, had the information available now been known to the parties at the time of arrest or prosecution, the case would have been resolved differently. Participants recognized that common opposition to criminal record relief centers on the notion of opening "flood gates," or the idea that granting relief to one person would cause many others to come forward and take advantage of the relief process. Generally, roundtable participants were unpersuaded and undaunted by the notion of flood gates. In fact, virtually every participant noted that not only had that not happened in their jurisdiction, but instead the opposite was true. As discussed below, the reality is that more outreach is required to alert the survivor community about criminal record clearing.

### ***3. Criminal record relief is key to reducing vulnerability and isolation for survivors.***

Roundtable participants stressed that criminal records make individuals more vulnerable. Not only do these records wrongly stigmatize survivors and serve as painful reminders of their experience, but also re-victimize

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them by preventing access to basic needs. For example, public housing agencies may consider convictions and arrests in determining eligibility for housing, and employers often ask about criminal records during the hiring process.

Given this, the group unanimously agreed that addressing a survivor's criminal record is key to reducing marginalization and the risk that survivors will be re-trafficked or further exploited. One prosecutor noted, "We all know that traffickers prey on vulnerability and that having a record is a form of vulnerability. Justice is not just convictions; it is doing the right thing. Reducing vulnerability is a prosecutorial/long-term objective." Participants viewed criminal record relief as important to survivors on an individual level, but also beneficial to communities and public safety more broadly.

#### ***4. Criminal record relief has the capacity to shift victims' perception of law enforcement and the criminal legal system.***

The group also articulated how criminal record relief benefits prosecutors and anti-trafficking efforts in general. Several prosecutors noted that criminal record relief can help shift survivors' view of law enforcement and the court system. Participants also discussed the many ways in which petitions for relief can educate judges by exposing them to a variety of different trafficking experiences. This can affect judges who preside over trafficking cases, as well as those who have been presiding over cases in which victims are before them as defendants, even unbeknownst to them. Several participants also discussed how criminal record relief can shift the public dialogue, for example through media or other coverage, and help to better inform the public about victim/trafficker dynamics. This also benefits prosecutors and investigations as it creates a more informed jury pool and members of the public who will be more aligned with practical and realistic anti-trafficking efforts.

#### ***5. Criminal record relief processes must be victim-centered and trauma-informed.***

When looking at the experience of survivors seeking relief, roundtable participants emphasized that all efforts must be victim-centered and trauma-informed. The group agreed that prosecutors have an obligation to minimize imposing requirements that could re-traumatize survivors and discourage them from seeking relief. Likewise, courts should recognize how trauma impacts memory and behavior, consider confidentiality and survivor privacy, and avoid the imposition of unnecessary or burdensome procedures.

#### ***6. Criminal record relief advocacy must be collaborative and interdisciplinary.***

Finally, the group agreed that in order to provide a pathway for criminal record relief, and achieve the desired impact, the process must be collaborative. One prosecutor who had handled several expungement petitions in her jurisdiction praised how the cases had given an "opportunity for prosecutors to be connected to different partners." This, she explained, allowed her office to "be more holistic and smart" about its use of resources.

Participants uniformly noted that collaboration builds trust and credibility among advocates and prosecutors and is imperative to the successful resolution of motions/petitions. One participant stated that "no single agency or group of people can or should own this; vacatur relief should be a partnership." Several prosecutors even indicated that their work investigating and analyzing applications for relief is much easier when they receive petitions from attorneys they regularly work with and trust.

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## PART TWO: COMMON CHALLENGES

- 1. Lack of Awareness of Remedies and Human Trafficking**
- 2. Survivors Involved in Open Cases or Investigations**
- 3. Survivors with Arrests and/or Open Warrants in Multiple Jurisdictions**
- 4. Level of Corroboration Required**
- 5. Survivor Cases Involving Other Victims**

A significant portion of the roundtable focused on the general challenges of obtaining criminal record relief for trafficking survivors, including the tension prosecutors confront when retroactively evaluating criminal convictions, and the shortage of resources necessary to allow the full promise of criminal record clearing for survivors to be realized. The discussion identified several additional challenges described below.

### **1. Lack of Awareness of Remedies and Human Trafficking**

Many of the participants indicated that even with criminal record relief laws having been on the books for several years in their states, many survivors and advocates remain unaware of the laws and the relief available. Several participants expressed concern that many legal services providers, public defenders, or legal practitioners more broadly did not know about the laws and were not screening clients for eligibility.

Similarly, roundtable participants described experiences with fellow prosecutors that indicated both unfamiliarity with criminal record relief for survivors and, even more troubling, a lack of understanding of the dynamics of human trafficking. For example, one participant reflected on a criminal record relief case where the survivor's convictions spanned different courts and, therefore, different prosecuting agencies. In speaking to the municipal level prosecutor, it became clear that the municipal office had no familiarity with human trafficking cases and common signs of trafficking. As a result, the municipal prosecutor failed to see the nexus between the survivor's previous arrests and the trafficking, although it was clear to the participant who specializes in trafficking cases.

Prosecutors work with victims in a variety of settings and capacities. Accordingly, prosecutors can be a key part of making survivors aware of relief and referring them to appropriate partners. Together with local bar associations, anti-trafficking task forces, and other entities, prosecutors can be key partners in helping to raise awareness of criminal record remedies.

### **2. Survivors Involved in Open Cases or Investigations**

One of the primary tensions identified was the extent to which the fact that a survivor has successfully cleared a criminal record may come up in a pending investigation or case where the survivor is a witness and will be providing testimony. Several participants raised concerns about whether the fact that a survivor has been granted criminal record relief could potentially undermine the survivor's credibility as a witness. Roundtable participants contemplated a trial scenario in which a survivor witness was cross-examined about the "benefit" of having had a criminal conviction vacated or expunged with the prosecutor's consent. This is similar to cases in which an immigrant victim is eligible for law enforcement certification of cooperation for immigration relief.

Ultimately, roundtable participants concluded that concerns about potential cross-examination should not prevent prosecutors from informing victims about criminal record relief or supporting applications while

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criminal charges against the trafficker are still pending. One prosecutor mentioned a case in which a victim was asked at trial about having convictions vacated and noted that it seemed as though that testimony added to her credibility as a witness with the jury. Roundtable participants argued that prosecutors could “own” the fact of criminal record relief, and emphasized that this was an opportunity to “embrace the policies of why [these laws] exist and use it to corroborate what the victim is saying. Use it to build up the case.” Even where that isn’t possible, the consensus remained that prosecutors should continue to advocate for criminal record relief and not withhold support during active investigations, or ask survivors to wait until a prosecution has concluded to seek relief.

### **3. Survivors with Arrests and/or Open Warrants in Multiple Jurisdictions**

Given the frequency with which trafficking victims are trafficked across state lines, another challenge is how to best address cases where survivors working with their offices in investigations or prosecutions have arrest histories that span multiple jurisdictions. Many expressed candidly that they did not know where or how to connect these survivors to legal representation or advocacy.

Several participating prosecutors explained that their offices utilize victims’ services counselors for support and case management for human trafficking victims. These staff members also confront instances where survivors have criminal records in multiple places outside of the local jurisdiction. Prosecutors and the advocates they work with would benefit from a more formalized national network of agencies and organizations. SRP has worked to lay the foundation for such a network through its trainings over the last several years. Roundtable participants explained how they have reached out to SRP when these cases arise, but also recognize a need to extend the network. For example, some prosecutors have had trouble identifying legal resources in rural areas or in places where a designated human trafficking task force does not exist.

Similarly, many trafficking survivors who come into contact with community-based organizations or law enforcement agencies have open warrants for their arrest for failing to appear in court on criminal charges. Traffickers often manage movement such that victims miss court dates because they have been brought to another jurisdiction or are simply not aware of or allowed to make an appearance in court. Several prosecutors recounted instances in which they were working with victims who did not even realize that they still had open matters. As a result, warrants haunt survivors both during and after their trafficking.

Here, roundtable participants drew a distinction between open warrants and previous cases that had already been resolved and were therefore closed. Open warrants felt more problematic, and difficult to resolve, because often court appearances are required and the risk to the survivor is harder to determine. Often, returning to court on a warrant leads to incarceration. Prosecutors described a tension between wanting to advocate for, and assist, identified survivors while also deferring to another jurisdiction’s established procedures and interest in determining how to resolve its own cases. One prosecutor shared uncertainty around how much information to share about a survivor when contacting other prosecutors.

Unfortunately, open warrants prove more destabilizing for survivors than closed cases. Several prosecutors recalled instances where they were able to assist a survivor who lived outside of their jurisdiction resolve an open warrant without appearances by calling the local prosecutor and explaining the situation. Others expressed concerns about being able to do so and sought guidance on options for connecting survivors with assistance outside of their jurisdiction. Roundtable participants identified this as a constant challenge, one that was worthy of further consideration and response.

### **4. Level of Corroboration Required**

A significant amount of time at the roundtable was devoted to how prosecutors should analyze petitions for criminal record relief and what level of detail and corroboration survivors should be required to provide.

All recognized that the process of detailing a trafficking experience calls up very specific trauma for a survivor. There was broad agreement that the process should be as sensitive to that as possible and not

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require survivors to face past victimization in an unhealthy or unnecessary way. To the extent possible, the process should be empowering and part of a survivor's healing. Yet, roundtable participants also maintained that, as prosecutors, they could not simply approve petitions for relief without appropriate proof. Ultimately, many needed to justify a decision to consent to relief to their supervising or managing prosecutors. Others also argued that more detailed petitions that address many aspects of a survivor's life beyond the trafficking itself can be more persuasive to courts, and helpful in educating the judiciary about the dynamics of human trafficking and the experience of victims.

Therefore, a tension exists between wanting survivors to access relief easily and without having to go through significant past trauma and yet still requiring an appropriate level of proof and detail. The discussion here reflected a recognition of the potential value of less detailed petitions, but also the strength in the power of a fully developed narrative.

### **5. Survivor Cases Involving Other Victims**

Finally, prosecutors at the roundtable made clear that criminal record relief cases where the survivor was charged with an offense that involved another victim deserved slightly different consideration. In some cases, another victim of the same trafficker or operation was the victim-witness in a criminal case against a survivor. In other cases, a victim may have been unrelated to the trafficking situation, such as a purchaser of commercial sex or other person whose property was taken or damaged.

While the fact that a case involved a separate victim does not bar criminal record relief, roundtable participants indicated that it does factor into their analysis. Although there is no specific formula or algorithm for determining when criminal record relief should be granted, participants stressed that the views of the other victims are important and need to be considered. One prosecutor explained that this involves "balancing," and making sure that the other victims have an opportunity to be heard.

Roundtable participants felt strongly that when a survivor seeks to vacate, seal, or expunge a case that involved a separate victim, prosecutors should attempt to contact the separate victim and learn their perspective. Not all separate victims will oppose relief, and prosecutors should not assume that they will. Moreover, participants generally agreed that a separate victim's objection should not automatically bar relief. However, in some cases, the separate victim's perspective will give prosecutors pause. Conflicts arise in situations where a prosecutor is certain that the survivor seeking relief meets the criteria but the separate victim in the case voices opposition.



## PART THREE: BEST PRACTICES

- 1. Prosecutors' offices should designate specific points of contact on criminal record relief cases for trafficking survivors.**
- 2. Prosecutors should be receptive to discussing cases with advocates and attorneys in advance of a court filing to map out potential resolutions.**
- 3. Prosecutors should share information which would assist in establishing eligibility for relief with the survivor's advocacy team.**
- 4. Prosecutors should recognize that survivors will not always have a specific level of documentation to support their claim for relief.**
- 5. Prosecutors should not shy away from supporting victims' efforts to clear criminal records at any time because of fear of a negative impact on open prosecutions.**
- 6. Prosecutors should not require interviews with survivors as part of their regular evaluation of criminal record relief cases.**
- 7. Prosecutors should identify opportunities for training key stakeholders in the criminal legal system.**
- 8. Prosecutors should assist efforts to develop templates for petitions, affidavits, and orders that can be easily accessed and create uniformity in the criminal record relief process.**
- 9. Prosecutors should approach criminal record relief collaboratively and prioritize building strong partnerships with external organizations.**
- 10. Prosecutors should consistently reflect on and refine the criminal record relief process for survivors.**

With the guiding principles in place, the roundtable participants worked to develop best practices in order to address these challenges, with the goal of working toward uniformity and consistency across jurisdictions, and even within the same offices, as turnover impacts the staff that oversees these processes.

### ***1. Prosecutors' offices should designate specific points of contact on criminal record relief cases for trafficking survivors.***

Given the importance of having the criminal record relief process be trauma-informed, the points of contact in each office must be familiar with both the dynamics of trafficking and victim-centered practices. Several prosecutors recommended that this practice remain distinct from any general expungement and/or appeals practice, noting that those units are less likely to have the necessary understanding of human trafficking, and because criminal record relief petitions for survivors are often fundamentally different than other forms of post-conviction relief. One prosecutor noted, "We have spent a lot of time telling victim service providers that we are in the fight with them. We've built that trust and I don't want to undo that [with a prosecutor] who is perhaps not so trauma-informed."

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## ***2. Prosecutors should be receptive to discussing cases with advocates and attorneys in advance of a court filing to map out potential resolutions.***

Roundtable participants universally expressed that the criminal record relief process is much easier to navigate when cases are discussed and worked through prior to an official filing. Prosecutors described how they have built relationships with attorneys representing survivors that have helped reach successful resolution of petitions. Vetting cases in this way allows for investigation and negotiation. Since criminal record relief is relatively new, advanced conferencing reduces the uncertainty for survivors. Many of the prosecutors explained that it has become common practice in their jurisdictions for attorneys to provide copies of petitions to their office in advance of filing, giving the prosecutor an opportunity to ask questions and/or raise concerns. The petitioner can then provide additional information and address any concerns to ideally avoid a formal objection to the relief.

Additionally, if the parties come to an agreement regarding criminal record relief in advance of a court filing, survivors may not need to file as detailed a petition in court or go through an interview, both of which can cause fear and deter survivors from seeking relief. Prosecutors also want to avoid contentious litigation around criminal record relief for survivors. Roundtable participants expressed that they did not want to end up in a position where they had to question or cross-examine a survivor seeking relief at a hearing.

One prosecutor explained their process for handling cases brought to them in advance of filing. After reviewing information provided by the survivor's attorney and their own file, they write an internal memo for approval within their office. They keep all the information in their files, but once they agree to relief, what gets filed in court is "bare bones." This practice furthers critical goals identified at the roundtable—avoiding evidentiary hearings, court appearances, or the unnecessary or inadvertent disclosure of a survivor's confidential information. As the same prosecutor summarized, "My goal is no hearing."

## ***3. Prosecutors should share information which would assist in establishing eligibility for relief with the survivor's advocacy team.***

Prosecutors at the roundtable provided examples of specific cases where they had been approached by advocates in advance of a filing and were able to assist with the investigation of a survivor's criminal record relief case. Prosecutors have access to information that survivors do not, and should openly share that information, even if it leads to a determination that a survivor is not, in fact, eligible for criminal record relief. Examples of this information include, but are not limited to, arrests and convictions of the trafficker(s), case dispositions, and non-criminal matters, including driving records.

## ***4. Prosecutors should recognize that survivors will not always have a specific level of documentation to support their claim for relief.***

In most states, the primary evidence in support of a petition for criminal record relief is a survivor's sworn statement, which lays out the trafficking that the individual endured, and explains the connection between the trafficking to the arrests and convictions at issue. Participants unanimously agreed that it is imperative that reviewing entities understand that often the client's narrative will be the only evidence they can produce.

Several prosecutors mentioned that they regularly check in with their local task forces and other agents to get additional information about a particular petitioner and/or their trafficker. While this can be helpful in corroborating the survivor's petition, roundtable participants agreed that they should not deny survivors relief if they do not find such corroboration. Not all traffickers are identified by law enforcement, and prosecutors and courts must use their understanding of the complexity and nuances of trafficking dynamics to assess the veracity of a claim.

Another common theme throughout the two-day discussion was how different each case is. Every survivor's trafficking is different, as is their situation post-trafficking. Survivors should not be held to unreasonable or unattainable standards in the evaluation of their petitions. Roundtable participants made clear that they do not require that a person prove their own "rehabilitation," or that they have made any specific educational or

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job accomplishments, given that vacatur laws are not designed to be rehabilitative but rather the righting of a historical wrong. Prosecutors also made clear that there is no such thing as a “perfect” survivor in the context of criminal record relief. Survivors should not be denied relief because they have subsequent arrests or convictions. For survivors who were involved in the commercial sex industry, prosecutors should not impose a requirement that they no longer be participating in commercial sex.

**5. *Prosecutors should not shy away from supporting victims’ efforts to clear criminal records at any time because of fear of a negative impact on open prosecutions.***

As discussed above, prosecutors handling human trafficking cases must turn over, as part of discovery, certain information about the witnesses involved. This would necessarily include any petitions for criminal record relief in the prosecutor’s possession and any internal documents relating to criminal record relief. Prosecutors must disclose the position they took on a petition for relief. This may lead to questioning on the subject when a survivor testifies at trial, and an attack on the survivor’s credibility because, it can be argued, they are simply seeking criminal record relief.

While some prosecutors may see this as a reason to oppose motions for relief, or simply delay them until a prosecution has terminated, roundtable participants squarely disagreed.

Participants concluded that concerns about potential cross-examination should not prevent prosecutors from informing victims about criminal record relief or supporting applications while criminal charges against the trafficker are still pending. Prosecutors should disclose the fact of criminal record relief in discovery but not assume it will be a negative area for aggressive cross-examination. Instead, prosecutors should incorporate the fact that a survivor has been recognized as a trafficking victim and secured relief into a case strategy.

**6. *Prosecutors should not require interviews with survivors as part of their regular evaluation of criminal record relief cases.***

As discussed above, the client’s sworn statement is often the only evidence that can be provided in support of a petition for criminal record clearing. It can be tempting for prosecutors to want more corroboration, and even to require an interview with a petitioner to gauge credibility. Roundtable participants largely discouraged this practice, noting that interviews should never be required as a matter of course, particularly when the individual’s sworn statement and other documentation already make it clear that they are entitled to relief.

The prosecutors did agree, however, that interviewing individuals could be a good option before requiring a full hearing in court if credibility is a concern. In those instances, asking for an interview can be a good compromise instead of immediately objecting to a petition and requiring the case to go to a hearing. One prosecutor also suggested that where an interview is required, there should be cooperation among jurisdictions within the state to avoid a survivor having to be interviewed multiple times.

**7. *Prosecutors should identify opportunities for training key stakeholders in the criminal legal system.***

A consistent theme throughout the roundtable was the need for a larger network of trained stakeholders (judges, advocates, civil pro bono attorneys, prosecutors, public defenders, court staff, and legislators) to effectively guide survivors through the criminal record clearing process. Several participants discussed how court staff in their jurisdictions still do not know about their state’s criminal record relief laws or how to process petitions. And, as discussed above, many survivors also remain unaware that criminal record clearing relief is available to them, highlighting the need for outreach to public defenders and victim advocates.

Participants repeatedly articulated the need for training for these groups and agreed that trainings should include an overview of trafficking dynamics generally, and the availability of vacatur relief within that jurisdiction specifically, as well as resources like SRP for individuals with multi-state records. Prosecutors would be key to these trainings, given how much overlap there is between their work and the work of these

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stakeholders. Several participants also noted that trainings conducted by both prosecutors and victims' attorneys can go a long way in highlighting the need for cooperative and non-adversarial procedures.

**8. *Prosecutors should assist efforts to develop templates for petitions, affidavits, and orders that can be easily accessed and create uniformity in the criminal record relief process.***

Given how relatively new criminal record relief is for trafficking survivors, most jurisdictions still do not have uniform procedures, templates, and orders that can be used for these proceedings. This can lead to confusion and inconsistent results for survivors seeking criminal record clearing. The group discussed the importance of bringing key players to the table early in the process to develop trauma-informed practices and procedures.

This naturally led to a discussion about the need for jurisdictions to develop forms, templates, and practice guides so that survivors have consistent and minimally-burdensome access to vacatur relief. At least one state has already developed court forms to help with the petition and others agreed to take that suggestion back to their states. One participant discussed how her office worked with civil attorneys and the presiding judge in her county, resulting in an agreement that all petitions in that county would be heard by the presiding judge, to allow for consistency. Other participants noted that having the court clerk involved in the process of developing the proposed order can make the process significantly easier down the road.

**9. *Prosecutors should approach criminal record relief collaboratively and prioritize building strong partnerships with external organizations.***

All of the roundtable participants emphasized the importance of approaching criminal record clearing for trafficking survivors collaboratively, recognizing that effective communication between prosecutors, the judiciary, and attorneys representing petitioners is key to ensuring a victim-centered, trauma-informed process. As one participant noted, "No single agency or group of people can/should own this. Vacatur relief should be a partnership."

In particular, participants agreed unanimously that collaboration with the attorneys representing petitioners is critical. Additionally, the prosecutors recognized that they are often in a better position to work with court personnel to ensure proper handling of vacatur petitions, and can step in to address questions about court processes and procedures.

As one prosecutor noted, "We usually only engage with the four corners of our system, but justice goes beyond our part of the courthouse. We should be looking for these moments to build relationships and work on projects together."

**10. *Prosecutors should consistently reflect on and refine the criminal record relief process for survivors.***

All of the roundtable participants expressed their sincere appreciation for being able to learn about the practices of prosecutors from other jurisdictions, hoping to bring what they learned back to their offices. The group agreed that prosecutors' offices should be amenable to feedback from victim-advocates about how their procedures can be more responsive to survivor needs, and make adjustments where possible.

Finally, there was a robust discussion about how best to include survivor voices in the development and assessment of laws and procedures around criminal record clearing. Participants agreed that regular reflection should involve asking survivors about their experiences, and making adjustments as necessary. Using more general feedback from local and national survivor-led organizations, such as the National Survivor Network and the Survivor Leadership Institute, can also be helpful in understanding trauma-informed best practices.

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## PART FOUR: LEGISLATION & POLICY

The roundtable discussion offered participants the opportunity to compare various state criminal record relief laws for human trafficking survivors and identify what model legislation should look like from a prosecutor's perspective. The recent report by Polaris and SRP, *State Report Cards: Grading Criminal Record Relief Laws for Survivors of Human Trafficking*,<sup>7</sup> framed the discussion. The report graded every state on its criminal record relief for trafficking survivors and identified the following criteria as ideal:

- Range of relief: Full vacatur of convictions on the merits rather than sealing or expungement.
- Offenses covered: All types and levels of offenses should be eligible for relief.
- Judicial discretion: Statutes should allow the court to grant relief in spite of a prosecutor's objection as long as the prosecutor had notice.
- Nexus to trafficking/burden of proof: Survivors must prove by preponderance of the evidence that the crimes were committed "as a result" of the trafficking.
- Time limitations and wait times: Statutes should not restrict an individual's ability to file by including a time limit or wait time.
- Hearing requirement: A survivor should not be required to appear in person at a hearing related to the vacatur petition.
- Official documentation: Official documentation recognizing the individual as a survivor of trafficking should create a rebuttable presumption of eligibility.
- Confidentiality: Statutes should include a provision to protect the confidentiality of information, such as allowing for the petitions to be filed under seal.

Against this backdrop, roundtable participants discussed what an ideal criminal record relief law should and should not include. Participants unanimously agreed that relief laws should recognize that trafficking survivors need to clear a wide range of offenses from their records, beyond just prostitution-related offenses. In fact, participants talked about their frustration with laws that limit eligible offenses, as those laws tie prosecutors' hands when they are otherwise inclined to consent to clearing of additional offenses. Moreover, the participants recognized that relief must be available to victims of labor trafficking, who will have convictions for non-prostitution offenses and therefore precluded from relief by laws that are limited to prostitution-related offenses.

However, there was apprehension about whether broad relief should include all offenses, or if some, particularly certain violent offenses, should be ineligible for clearing. Some participants worked in jurisdictions that allow survivors to vacate a broad variety of offenses. One prosecutor noted that their office's initial concerns about a "slippery slope" were not actualized.

Participants endeavored to identify appropriate parameters for offense eligibility but did not come to a clear consensus or conclusion. Instead, the discussion reinforced how complicated some criminal record cases may be. One prosecutor described an experience evaluating a petition for relief on a prior robbery conviction that ultimately was deemed appropriate to vacate. The investigation involved looking over the prosecutor's original file on the case, weighing it in light of the new information provided by the survivor, and using the prosecutor's own experience in human trafficking cases as a guide. This example, like many others raised at the roundtable, highlighted the need for criminal record relief cases to be handled by prosecutors with sufficient subject matter expertise. Furthermore, this example demonstrates that cases can and should

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<sup>7</sup> POLARIS, STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAWS FOR SURVIVORS OF HUMAN TRAFFICKING (2019), available at <https://polarisproject.org/sites/default/files/Grading%20Criminal%20Record%20Relief%20Laws%20for%20Survivors%20of%20Human%20Trafficking.pdf>. Note that this report was not funded by the U.S. Department of Justice Office for Victims of Crime.

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be considered on a case-by-case basis, rather than limited by narrow legislation that precludes relief in the appropriate circumstances.

Separately, but relatedly, roundtable participants soundly rejected the inference gaining traction in some jurisdictions that affirmative defense provisions for trafficking survivors obviate the need for criminal record relief. These provisions are not mutually exclusive. Affirmative defenses, while an important step toward preventing the criminalization of trafficking survivors, are not always practical or feasible for survivors facing criminal charges. As one prosecutor remarked, there are “a lot of reasons” why survivors would not assert the defense at the time of prosecution. Given that, it is crucial that criminal record relief continue to be available to all survivors.

Prosecutors at the roundtable identified several additional considerations for statutes and policies governing criminal record relief for trafficking survivors. To begin with, criminal record relief laws must apply to adult records. When discussing states that limit relief to cases where the survivor was a juvenile, participants questioned the thinking that survivors who were minors at the time of their trafficking were more deserving of relief than those who were adults. As one prosecutor explained, “People are willing to forgive children,” but the group denied the “logic” of this “mindset.”

Additionally, roundtable participants affirmed that criminal record relief laws should prioritize the confidentiality of survivor information. This can be statutory in the form of explicit confidentiality provisions in state law or by local court rule or policy. In whatever form, prosecutors agreed that there were numerous reasons why information contained in petitions should not be publicly available or disclosed. One prosecutor noted that in her state, several county prosecutors’ offices have given blanket consent to the filing of vacatur petitions under seal, removing one more barrier for advocates seeking to keep survivors’ information confidential.

Another recommendation pertained to making the criminal record relief process easier for survivors. First, when survivors struggle with arrests or convictions from multiple jurisdictions within the same state, prosecutors at the roundtable supported mechanisms that would consolidate and streamline the filing and adjudication process. Furthermore, roundtable participants agreed that criminal record relief laws should not have mandatory waiting periods or restrictive statutes of limitations and should establish clear deadlines for each part of the process, including the prosecutor’s response to a petition and the court decision.

Finally, the roundtable discussion explored whether a criminal conviction cleared for a survivor because it resulted from trafficking should be considered a “wrongful conviction.” While all participants agreed that the criminal record relief process was ultimately about righting or correcting a wrong, the characterizing language is important. Participants resisted the notion that criminal record relief should be interpreted as a conclusion that the prosecutor or police did anything wrong.

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## CONCLUSION: NEXT STEPS & OPPORTUNITIES

This roundtable brought prosecutors and other stakeholders from across the country together with the common goal of facilitating criminal record relief for survivors of human trafficking. Despite differences in the laws and procedures of their respective jurisdictions, every participant in the roundtable recognized that criminal record clearing is of vital importance to survivors, and prosecutors are key in making that relief a reality. Moreover, participants understood that they have significant power in determining whether the process of criminal record clearing would be one of empowerment and validation, or one that further shamed and re-traumatized survivors. The conversation that took place over the course of the two days allowed for the development of the guiding principles and best practices outlined above, paving the way for prosecutors nationwide to ensure that trafficking survivors are treated with victim-centered, trauma-informed care as they pursue criminal record relief.

By implementing the best practices and legislative reforms outlined above, other jurisdictions can begin or continue the work of ensuring that trafficking survivors are finally recognized and treated as the crime victims that they were all along, and have access to the independence and stability that criminal records preclude.

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