



RE: Writ of Vacatur for Victims of Commercial Sex Trafficking and Division of Prostitution Statute

Dear Virginia State Crime Commission Members:

Thank you for hearing and prioritizing policy discussions on criminal record relief for survivors of human trafficking. The Virginia Coalition Against Human Trafficking (VCAHT) is an alliance of service providers, attorneys, survivor-advocates, and community members on a mission towards removing barriers preventing survivors of human trafficking from achieving a full and self-reliant life through public awareness campaigns, policy reform, and enacting survivor-centered human trafficking legislation.

We strongly commend the Commission for dedicating their time, energy, and resources to researching and considering strengthening access to justice for human trafficking survivors. The Commission's recommendation for the creation of a Writ of Actual Innocence for Victims of Commercial Sex Trafficking emphasizes the Commission's understanding that trafficking victims should not be held criminally liable for crimes they were forced to commit as a result of their victimization. This vital relief will serve to remove significant barriers to survivors in accessing services and empower them forward in their healing journeys. Specifically, VCAHT supports the following provisions in the draft legislation endorsed by the Commission:

- **§ 19.2-327.18 (C)** provides for the evidentiary standard of a preponderance of the evidence to obtain the relief requested which is appropriate and equitable for the relief sought. Moreover, it removes the “manifest injustice” standard that is presently codified in the expungement and writ of actual innocence statutes.
- **§ 19.2-327.19 (E)** provides for a statutory procedure wherein the survivor will be able to be refunded of all fines, costs, forfeitures, and penalties paid in relation to the qualifying offense which was vacated which is both equitable and constitutionally required under *Nelson v. Colorado*, 137 S. Ct. 1249, 197 L.Ed.2d 611 (2017).
- **§ 19.2-327.15**, defining the eligible offenses to include prostitution and bawdy house offenses, VA Code §§ 18.2-346 and 18.2-347, respectively, will provide relief to *some* trafficking survivors and will be a help if these charges are the total of their prior convictions.
- **§ 19.2-327.19 (C)** addresses anticipated Commonwealth Attorney objections that expunging the record and the criminal penalties associated with trying to use those



records after sealing would limit the Commonwealth's ability to prosecute traffickers in the future. As written, it appears that the Commonwealth could petition to access the records if they made the showing that disclosure best serves the interest of justice, thus balancing the interests of the victim and the Commonwealth's interests of justice.

- The draft legislation includes a remedy for juvenile adjudications of delinquency which is needed but not included in HB1033 that was presented to the Crime Commission for study.
- § 19.2-327.16 clearly gives the authority to the Court to take action and grant relief to the survivor which was missing in HB1033 and sets forth the authority that is found elsewhere in the Code and Rules of the Supreme Court to provide the precedent for doing so in this case. This addresses concerns about whether this has been done before and/or capable of being done.

At a minimum, in developing recommendations for the legislature, post-conviction relief should be accessible, comprehensive, and survivor-centered. While the draft legislation endorsed by the Commission will provide critical relief to some survivors, VCAHT has the following objections and recommendations for how to improve the legislation to be more meaningful and informed by the experiences of criminalized trafficking survivors:

- § 19.2-327.15 is too limited in that it does not provide for relief for misdemeanors and nonviolent felonies which survivors are frequently forced to commit as part of their victimization.
 - This is a problem because in a national survey of trafficking survivors, 60 percent of the survivors had felony offenses.¹
 - While it always includes the exchange of sex for something of value with a sex buyer, sex trafficking is deeply intertwined with forced criminality where other crimes are committed. Forced criminality can include any crime, but in the sex trafficking context, it commonly encompasses shoplifting, theft, robbing sex buying customers, recruiting and trafficking other victims, transporting or dealing illegal drugs, and selling of stolen items.²
 - The logic behind allowing prostitution related offenses to be qualifying should apply to any offenses that a victim was forced to commit as a direct result of their

¹ Beth Jacob and Stephanie Richard, Survey, Impact of Criminal Arrest and Detention on Survivors of Human Trafficking, National Survivor Network (2016).

² Dominique Roe-Sepowitz, Elynne Greene, James Walters, James Gallagher, Trick Roll Study: Forced Criminality in Sex Trafficking Situations, ASU Office of Sex Trafficking Intervention Research 1,2 (2020).



trafficking victimization. It is inconsistent logic to limit it to these offenses if the underlying premise is the same for other offenses. Vacating only one misdemeanor prostitution related offense when a victim might have failure to appear, contempt, misdemeanor drug offenses or petty theft offenses as well is limiting in terms of reducing barriers to employment and housing.

- Failure to provide this relief will ensure that these survivors' lives remain unstable, cut off from services and avenues for improvement, and assuring their continued vulnerability to be trafficked or commercially sexually exploited.
- By limiting § 19.2-327.15 to these eligible offenses, it results in juveniles being denied relief for these other misdemeanor and felony crimes for which they are far more likely to be arrested than prostitution.
- § 19.2-327.15 does not cover other sex trafficking statutes that survivors would be forced to commit including recruitment under VA Code § 18.2-357.1 or the new solicitation statute for which the Commission specifically discussed and voted should be included.
 - The phrase “bottom” is used to refer to a victim of human trafficking who is forced by the trafficker to control and coerce other victims. Often bottoms have been trafficked for many years, beginning when they were teenagers and are indeed victims themselves. However, they are often charged with trafficking offenses like those enumerated in VA Code § 18.2-357.1. Failure to include these offenses will inevitably result in victims being ineligible for the very relief intended for them.
- § 19.2-327.15 fails to use the Federal definition for human trafficking which is used elsewhere in the Code concerning this issue, including within the definition of child abuse, thereby creating unnecessary definitional inconsistencies in the Code.
- § 19.2-327.15 fails to provide for labor trafficking victims by unnecessarily limiting this to sex trafficking survivors.
- The endorsed legislation, as written, provides for no certification of human trafficking survivor status by a state, local or government agency and the rebuttable presumption language from HB1033 is eliminated.
 - This language would not only make the process more efficient for the courts, but would help minimize the amount of retraumatization the survivor would be subjected to in pursuing relief.
 - Commission staff had said the certification language would be included however the draft does not contain it.



- The Department of Social Services has been tasked with identifying at risk juveniles, and developing training materials. Moreover, the Department of Criminal Justice Services training manual provides model guidelines for investigating human trafficking crimes, including victim identification. As such, these agencies and others should be capable of providing such certification.
- **§19.2-327.17 (A) 3** should be stricken because it has the potential to unfairly prejudice a petitioner should a previous court improperly or incorrectly rule against the petitioner for a number of reasons, including access to certain evidence or assistance of counsel.
- Penalty of perjury language in **§ 19.2-327.17(B)** is unnecessary and adds an intimidation factor that will only increase the trauma and anxiety that survivors have as a result of the abuse to which they have been subjected to has left them with mental issues such as complex PTSD, depression, acute anxiety disorder.
- There is no ability for sealing the records and/or providing for a closed hearing in order to provide for the safety of the survivor and/or their loved ones. Given the requirements of **§ 19.2327.17A(1)** , there should be an accompanying provision allowing a petitioner to file the petition under seal, and for the court to allow all subsequent filings and hearings to be conducted under seal, as provided in Section M of §19.2-392.2:1 of the HB1033 draft legislation: *“At the request of the petitioner or attorney for the Commonwealth, the court may place any record or part of a proceeding related to a petition filed under this section under seal while the petition is pending. The court may also keep any record or part of a proceeding related to a petition filed under this section under seal if the petition is denied.”*
 - While the survivor may be free from their trafficker, that does not mean that the survivor and/or her loved ones does not still face a significant threat from the trafficker.
 - The failure to seal the record and have a closed hearing deviates from the present expungement statute, at least as it concerns being able to move to seal the record.
- **§19.2-327.17(B)** as currently written suggests that the Court may dismiss a petition that was previously dismissed if it is for the same qualifying offense. However, given that many survivors are not sophisticated defendants and may not have representation, or all the documents and evidence they need the first time the petition is filed and/or heard, VCAHT recommends that this provision be amended to include language that a subsequent petition may be dismissed if it it has previously been adjudicated on the



merits, after a hearing, and the new petition does not present any new qualifying offenses or evidence to support the subsequent petition

- **§19.2-327.18 (B)** requires that the Court “shall” conduct a hearing if the Commonwealth fails to respond. If the Commonwealth is properly notified and fails to respond, there should be a default judgment, or at the very least the Court *may* have a hearing. Additionally, consistent with the recommendation above, we recommend amending the final sentence of 19.2-327.18 (B) as follows: "**The Circuit Court shall not be required to conduct a hearing if it has previously dismissed a petition for vacatur from the same petitioner for the same qualifying offense, *provided that the previous petition was dismissed on the merits after a hearing and the new petition does not provide any new or additional evidence.***"
- **§ 19.2-327.18 (B)** contains unnecessary language wherein a prior victim would have to be notified regarding the hearing. This language is unnecessary if no additional offenses are going to be eligible, as there are no victims to be notified. If the draft is amended to provide for additional eligible offense, there would need to be a showing by the Commonwealth that such notification is necessary to allow the victim to be able to speak to the relief being granted. It should also provide the survivor the ability to object to the trafficker being notified where the trafficker was able to manipulate the system to have the survivor convicted of a charge against the trafficker, such as in a domestic violence situation.

Regarding the Commission’s recommendation to divide Virginia's current prostitution statute, VA Code § 18.2-346, into two separate Code sections to better distinguish between prostitution and solicitation of prostitution offenses, VCAHT would be in favor of this amendment if the Writ of Actual Innocence for Victims of Commercial Sex Trafficking statute includes this new code section as an eligible offense under § 19.2-327.15. Otherwise, we anticipate the distinction to bring about an additional way in which a survivor could be charged and victimized in the future. If we understood the discussion correctly, particularly regarding the concerns raised to this possibility by Chief Boone, the draft legislation was to provide for survivor relief under the new code section.

We would welcome any questions or feedback regarding the above and look forward to working with you in finalizing this legislation.

Sincerely,



Virginia Coalition Against Human Trafficking

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