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## HUMAN TRAFFICKING: VICTIMS, DEFENDANTS AND THOSE WHO ARE BOTH

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### INTRODUCTION

It used to be that those who worked the streets – mostly women – were often regarded as insignificant, “nuisance” criminals/drug addicts who traded sex with weekend (or weeknight) warriors who wandered in from the suburbs for a “walk on the wild side.”

If arrested by an undercover “john,” the defendant would be hailed into the local or City Court, where they might, depending on their record, plead down to a Disorderly Conduct or a Loitering violation and be sentenced to “time served” or up to 15 days in jail. In almost no time, they’d be back on the streets, still addicted and in need of money to survive. Not surprisingly, sooner or later, they would also be back in court facing similar charges and looking at up to 90 days in jail for Prostitution.

For their part, the patrons, if they were arrested, might be granted an Adjournment in Contemplation of Dismissal (ACD), on the condition that they attend and complete “John” School. That way, they could avoid a criminal record and hopefully fly under the radar of media scrutiny, (let alone the wrath of a heartbroken and humiliated spouse).

Not all that much attention was paid to persons who engage in prostitution (or other forms of forced labor) to understand why and how they would become involved (let alone remain) in such a seemingly self-destructive and dangerous way of life. Not until this century, with the passage of Trafficking Victims Protections Act (TVPA) 18 USC 7102 in 2000, and the introduction of new state laws in 2007 (Sex Trafficking/PL 230.34 and Labor Trafficking/PL 135.35) aimed at proscribing and punishing those who enlist and coerce others into acts of prostitution for profit.

Police, prosecutors and courts became aware that lurking in the shadows of many street-level offenders (whether local or foreign-born), were cunning and coercive criminals who had lured the offenders into a life of sexual servitude by preying upon their vulnerabilities and controlling every aspect of their lives by means of threats, violence or manipulation. Law enforcement gradually began to see the offenders, in a different light, as victims who were in much greater need of assistance than punishment.

This was especially so in cases where the alleged offender was a teenager and sometimes younger. Their presence and activities (e.g., loitering for prostitution, drug use), raised serious questions not only about their immediate safety but about the circumstances and stability (or lack thereof) of their overall living situation and potential to lead a law-abiding life.

Consequently, over time, the State passed laws such as the Safe Harbor Act for Exploited Children (in 2008) which not only defined a sexually exploited child (under 18) with reference to the Penal Law (PL 230 [Prostitution], 230.34, 230.34-a [Sex Trafficking of a Child], 230.33 [Compelling Prostitution] and 263 [Sexual Performance by a Child], but provided safe haven and specialized services to help the victims take the first steps toward a safer and (hopefully) better life.

## CPL 440.10 RELIEF

The Legislature recognized the injustice of prosecuting those whose prostitution-related conduct resulted from being victimized by sex-traffickers and realized that such convictions can create often insurmountable obstacles to self-advancement via education, employment or otherwise. To this end, in 2010, the Legislature amended CPL 440.10 to add section 1(i) which provides an avenue to obtaining vacatur and dismissal of certain convictions if a person who was ARRESTED for loitering (for the purpose of engaging in prostitution (PL 240.37), or prostitution (PL 230.00) or prostitution in a school zone (PL 230.03), can show by a preponderance of the evidence that, at the time of the arrest, she/he:

1. WAS A VICTIM of SEX TRAFFICKING (PL 230.34 or 230.34-a [child]), COMPELLING PROSTITUTION (PL 230.33), LABOR TRAFFICKING (PL 135.35) or TRAFFICKING IN PERSONS under TVPA [22 USC 78]); and

2. THE DEFENDANT'S PARTICIPATION IN THE OFFENSE WAS THE RESULT OF HAVING BEEN A VICTIM AS DEFINED ABOVE.

Though the state statute does not define "victim," it references PL 230.34 (which describes persons who are "trafficked" into prostitution by different stratagems including: providing drugs, making false statements, withholding passports and immigration documents, requiring prostitution to pay off a debt, use of force or schemes involving threats of injury, damage to property, unlawful imprisonment, blackmail, testifying or providing information (withholding same), with respect to another's legal claim or defense, using or abusing one's position as a public servant (or failing to perform an official duty), in a manner that affects another adversely or performing an act calculated to harm the person's health, safety or immigration status); and

The statute expressly incorporates the TVPA which defines a victim as someone who is induced to engage in COMMERCIAL SEX ACTS through FORCE, FRAUD OR COERCION, OR WHERE THE INDUCED VICTIM IS UNDER AGE 18 (22 USC 7102[9][A]). The federal statute also includes other severe forms of trafficking including: RECRUITMENT, HARBORING, TRANSPORTATION, OBTAINING A PERSON FOR LABOR OR SERVICES BY WAY OF FORCE, FRAUD OR COERCION FOR THE PURPOSE OF INVOLUNTARY SERVITUDE. (22 USC 7102 [9][B]).

In 2018, the Legislature enacted PL 230.34-a (SEX TRAFFICKING OF A CHILD) which makes it a CLASS B VIOLENT FELONY for a person, age 21 or more, to intentionally ADVANCE (i.e. intentionally engage in conduct that facilitates prostitution) (subd. 2[a]) or PROFIT FROM (i.e. accepting money or property pursuant to an agreement/understanding with another to

participate in the proceeds of prostitution activity (subd. 2[b]), PROSTITUTION OF ANOTHER PERSON WHO IS A CHILD UNDER AGE 18 YEARS OLD.

Knowledge of the child's age by the defendant is NOT an element, NOR is it a defense that the defendant DID NOT KNOW the age of the child or believed that the child was over 18 years old. NOTABLY, this statute DOES NOT REQUIRE any showing of force, fraud or coercion on the part of the defendant-trafficker in relation to the child involved in prostitution activity.

A motion to vacate per CPL 440.10 must be brought with DUE DILIGENCE after the defendant has CEASED TO BE A VICTIM of such trafficking or compelled prostitution SUBJECT TO REASONABLE CONCERNS FOR THE SAFETY OF THE DEFENDANT, HER/HIS FAMILY MEMBERS, OR OTHER VICTIMS OF SUCH TRAFFICKING/COMPELLED PROSTITUTION WHO MAY BE JEOPARDIZED BY THE BRINGING OF SUCH MOTION (or for other reasons consistent with the purposes of this statute.)

#### PURPOSE OF THE STATUTE

The purpose of the statute (described as an ameliorative one), is to provide a second chance to those who have been forced into prostitution, convicted of such offenses and then burdened by a criminal record which can prevent them from rebuilding their lives even after they have freed themselves (often with the help of social service agencies), from the millstone of sex trafficking victimization. (see People v DV 64 Misc 3d 344 [Crim Ct. City of NY, Queens County 2019], People v LG 41 Misc 428 [Crim Ct City of NY 2013], People v GM 32 Misc 3d 274 [Sup Ct Queens County 2011]).

Under CPL 440.10 (1)(ii), official documentation (from a state or federal agency), of the defendant's status as a victim of sex (or labor) trafficking, or compelled prostitution (under state or federal statutes) creates a PRESUMPTION that the defendant's participation in the offense was a result of having been a VICTIM of trafficking or compelled prostitution but is NOT REQUIRED for a motion pursuant to this section to be granted.

And, in view of the sensitive and personal nature of the information involved, a motion pursuant to this statute (and all relevant papers) are treated as CONFIDENTIAL and may not be made available to any person or public/private entity without the express written authorization of the court. (see People v DV supra). Multiple motions may also be consolidated into one proceeding upon consent of the defendant/petitioner and the prosecutors in each matter.

Upon granting a motion, per CPL 440.10(1)(i), the court, in addition to VACATING AND DISMISSING the charges (and sealing the records thereof per CPL 160.50), is also authorized to take whatever additional action is warranted under the circumstances. (CPL 440.10 [6]).

## SOME 440 CASES:

In *People v Doe* 34 Misc 3d 237 (Sup. Ct. Bronx County 2011), the court, without opposition from the People, granted the defendant's motion to vacate three convictions for Loitering for Prostitution (PL 240.37) committed on three occasions over the course of one month in 2006, when the defendant was 17 years old.

The defendant reportedly became involved in prostitution after running away from home at age 13. After a series of abusive relationships with street pimps, she met up with an individual, "DB" who used ridicule and coercion to compel her to engage in prostitution, (telling customers that she was 19). DB also made her tattoo his name on her arm so that everyone would know to whom she belonged.

In 2008, the defendant escaped from DB and moved to another state where she worked in food service for several months and began training to become a medical assistant. In 2010, she provided information about DB to prosecutors which eventually led to his conviction on federal charges in the southern district of Florida.

Noting the evolution of state and federal laws to address the growing phenomenon of sex trafficking of minors and addressing the defendant's subjugation at the hands of DB, the court had no difficulty finding that she was a victim of sex trafficking at the time of her arrests. In the court's view, the remedial purpose of the statute was well served by relieving this defendant of the stigma and negative consequences of her convictions.

Similarly, in *People v GM supra*, the court granted the defendant's motion to vacate convictions for two violations and four class B misdemeanors stemming from six arrests (for prostitution, criminal trespass and criminal possession of a controlled substance) committed over a four month period from September 1997 through January 1998.

The defendant came to the US from the Dominican Republic (DR) on a tourist visa back in 1989, whereupon she met and eventually married a man who turned out to be a possessive and manipulative crack addict who controlled her life (and followed her back to the DR where he persuaded her to return to New York). In addition to raping and unlawfully imprisoning her, the husband forced the defendant into prostitution under threat of killing her if she did not comply. He also took her earnings and let her subsist on what he gave her.

The defendant managed to leave the defendant and return home to the DR a second time only to be "persuaded" to return to New York where the violence and prostitution picked up where they had left off. In 2005, the defendant managed to escape from her husband and obtain help from social service agencies. Four years later, she obtained a T-Visa and got a job as a Home Health Care Aide which was later put in jeopardy by her convictions.

The defendant's original motion was based on a claim of ineffective assistance of counsel (allegedly resulting in involuntary guilty pleas), but it was amended after CPL 440.10 1(i) went into effect to allege that her crimes were the result of sex trafficking victimization at the hands of her abusive and controlling husband.

The court observed that the defendant had already been formally identified by federal authorities as a victim of sex trafficking (thereby creating a presumption of such status for purposes of the defendant's motion), and found (with no opposition from the prosecution), that

the defendant's arrests were the product of years of physical, psychological and sexual abuse by the husband all of which made her a victim of sex trafficking.

Left unaddressed by the court, in view of the People's consent to the relief sought, was the issue of whether a non-prostitution offense (e.g., trespass, controlled substance possession) fell within the realm of relief provided by the statute.

That question was answered in the affirmative in *People v LG* 41 Misc. 3d 428 (Crim. Ct. City of NY, Queens County 2013). In that case, the defendant moved to vacate her guilty pleas/convictions for Disorderly Conduct (reduced from Prostitution) in 2000 and Criminal Possession of a Weapon 4th degree (a pocket-knife that she carried for safety, at her pimp's direction, while "working" for him) in 2003. For the latter offense, she was initially sentenced to three years of probation followed by a re-sentence in 2006 to 10 days in jail upon a Violation of Probation (VOP).

The defendant's foray into a life of prostitution under the coercive control of a succession of sleazy sex traffickers began in 1998 when she was 12 years old following several stays in foster care after living with her grandmother and a sexually abusive uncle.

The first trafficker lured her into living in a house where six other underage girls resided. "It's better than living in a foster home," was the pitch. She was eventually introduced to different men at the racetrack where she engaged in sex for a fee. She later worked for others of the same ilk whom she paid for room and engaged in sex for pay on the continuing threat of harm if she did not comply.

In 2000, the defendant went to DC, then to Florida after which she returned to foster life in New York. She became associated with yet another trafficker who beat and raped her before sending her out to work on the street. When she was arrested in that year, she gave a false name and date of birth (as directed by her pimp). At the time of the 2003 arrest, the defendant was now 17 and explained that she carried a pocket-knife at her pimp's direction because it was not at all uncommon for her to be roughed up or threatened by the clientele.

After the pimp was arrested in 2004, the defendant left and returned to foster care where she told her life's story for the first time. She was connected with the "GEMS" program and eventually obtained a degree in Home Health Care in 2007 after which she obtained steady employment in her chosen field...until the State Health Department stopped her on account of her convictions.

In 2008, the defendant got word from her erstwhile pimp that he was going to leave her alone but she continued to remain in fear since a relative was recently murdered by her trafficker and the defendant couldn't be sure that her former "employer" was telling the truth.

In 2010, the defendant obtained her GED and eventually enrolled in college from which she expected to graduate with degrees in Social Work and Public Administration in 2014. In her motion papers in support of her application to vacate her convictions, the defendant averred that she wanted to get on with her life and career without being held back by her past.

While satisfied that the defendant qualified as a victim of sex trafficking at the hands of several successive abusers, (at the time of her arrests), the court wondered whether she could obtain relief (i.e. vacatur and dismissal) for the weapons count of which she was convicted but which is not a prostitution offense (PL 240.37, 230.00 or 230.03).

Noting that the legislature framed the language of CPL 440.10 (1)(i) around the ARRESTING CHARGE (i.e. “the judgment is a conviction where the arresting charge was under PL 240.37, 230.00 or 230.03”...), the court concluded that while PL 265.01 is NOT a prostitution offense in its own right, it RESULTED FROM the defendant’s forced involvement in sex trafficking activity by her pimp when he compelled her to engage in such activity.

The court took note of the practical reality that human trafficking victims are often arrested on a variety of charges (besides loitering and prostitution), and it is not uncommon for them to plead guilty to related but not necessarily prostitution offenses (e.g., disorderly conduct or, as in this case, possessing a pocketknife to deal with occupational hazards).

As the court saw it, inasmuch as the Legislature anticipated that a sex trafficking victim who is arrested on prostitution (and other) charges may ultimately plead guilty to an alternate count, it necessarily follows that where (as here), one of the charges (loitering), is prostitution-related, a guilty plea to a non-prostitution charge (arising from the same arrest), must be regarded as having RESULTED from the defendant’s status as a victim of such trafficking.

Consequently, the defendant was entitled to have the weapons charge (as well as the Disorderly Conduct which the court deemed null and void due to the defendant’s age), vacated and dismissed.

The court rejected the People’s argument that the defendant’s motion (filed in September 2011), was not brought with due diligence given that the defendant remained in fear of her last pimp at least until 2008, and the statute was only recently amended so as to permit such relief in 2010.

In *People v DV*, 64 Misc. 3d 344 (Crim. Ct. Queens County 2019), the court, while vacating seven of the defendant’s convictions (for prostitution, loitering and/or disorderly conduct), from 2005-2013, four of which (between 2007 and 2013), the People did not oppose, the court DENIED the defendant’s motion with respect to a 2008 arrest for Assault 3d degree and Harassment 2d degree because the language of CPL 440.10 (1)(i) LIMITS such relief to those who arrested for LOITERING OR PROSTITUTION.

This was so even though the record established that the defendant was under the control (and in fear of) of her violent pimp who was across the street watching to make sure she was out there making money, when she attacked a competitor who tried to interrupt her access to a potential customer.

Acknowledging the apparent unfairness that relief was not available to someone who was clearly a trafficking victim who struck out on account of her fear of the consequences of coming up short, the court noted that according to the express language of the statute limiting the charges of arrest, the defendant was not entitled to vacatur of this conviction. (citing *People v Williams* 19 NY3d 100 [2012]).

Such was not the case however with respect to the remainder of the defendant’s other convictions, including those from 2005 to 2006 where the People, after interviewing the defendant for several hours, concluded and argued that the defendant had not yet become a sex trafficking victim (even though she was living with several other transgender females who were required to engage in sex seven days a week under the roof and control of a pimp who required them to work 12 hour shifts, hand over all their earnings (from which they were pieced off with a pittance), and threatened them with violence or denial of their transitional hormone

medicine and/or threats to blow them in to Immigration Services if they did not do as they were told.

It appears that the defendant, having been abused and ostracized since childhood for her gender orientation, and having been subjected to more overt acts of violence by subsequent traffickers by whom she was indentured, downplayed her relationship with the one in question as a “rental arrangement” (even though a good chunk of her earnings were taken, and she was not allowed to have “non-paying” visitors). The People also argued that the defendant never expressly mentioned being “victimized” despite having a strong motivation to do so in light of the relief that she was seeking in her motion.

After defense counsel became better informed about the effects of long-term trauma on a trafficking victim’s recognition of abuse (as something other than normalized exploitation), and ability to recount it in a way that not only makes sense but underscores its damaging effects on one’s psyche, the defense was able to present a compelling case at the hearing to persuade the court that she was indeed a victim within the meaning of CPL 440.10 (1)(i) who was entitled to relief under the statute. (see Lawyer’s Manual on Human Trafficking, edited by Jill Laurie-Goodman and Dorchen A. Leidholdt, Supreme Court of the State of New York, Appellate Division First Department, New York State Judicial Committee on Women in the Courts).

Unlike motions to seal criminal records under CPL 160.59 (2)(a) (limited to two eligible offenses including one felony conviction/ ten years after the imposition of sentence on the latest one or latest release from incarceration [CPL 150.59 [5]), there is no restriction on the number of convictions that may be vacated that meet the criteria of CPL 440.10 (1)(i).

In *People v Gonzalez* 32 Misc. 3d 831 (Crim. Ct. City of NY 2011), the court granted the defendant’s motion to vacate 87 CONVICTIONS amassed by the defendant stemming from prostitution arrests over the course of three years.

The evidence at the hearing established that the defendant, who came from Brazil, entered this country in 1986 on a tourist visa. She resided with her mother in the Bronx until 1992, having overstayed her visa.

An individual named Marisol offered to help the defendant (who did not speak English), obtain a green card and persuaded her to hand over her passport and other immigration documents. He then withheld the documents and coerced her into engaging in commercial sex lest he take steps to see that she was deported.

Over the next few years, the defendant was arrested numerous times for loitering and prostitution, sometimes intentionally, in the hope that she could extricate herself from her predicament. In 1995, she somehow managed to get back her documents, leave her trafficker and move in with a relative.

The court concluded that the defendant qualified as a victim of sex trafficking and that her involvement in prostitution was a direct result of that status. In the court’s analysis (which also referenced the Lawyer’s Manual on Human Trafficking), the defendant’s life story fell within the accepted norm of sex trafficking victims who are often too wary of law enforcement or too traumatized by their experience to report their victimization and seek the help they may need.

With respect to one of the cases (for Resisting Arrest), the defendant withdrew her motion to vacate since the charge did not fall under the protective umbrella of CPL 440.10 (1)(i).

## FEDERAL AND STATE SEX TRAFFICKING PROSECUTIONS

While many sex trafficking victims are foreign-born (or foreign language speaking), many others are US citizens and local residents who happen to be vulnerable to being inveigled into the sex trafficking trade (whether via the internet or in-person), because of addiction, isolation, abuse or neglect at home and/or no meaningful source of income.

From 2014 to 2016, for example, nine different female victims were recruited by one Valentino Shine, a Buffalo resident, who capitalized on their addictions and plied them with illegal drugs. According to 9/13/19 article by Maki Becker appearing in the Buffalo News, Shine met one of his victims at a Narcotics Anonymous meeting after which he supplied her with crack cocaine and advertised her services on a "Back Page" website which led to commercial sexual encounters in motels and other locations from Batavia to Grand Island.

Shine was convicted on September 26, 2019 in federal court (WDNY) of five counts of sex trafficking and was sentenced to 30 years in prison.

In February 2015, a similar sentence was imposed in federal district court (WDNY) upon one Thomas Cramer who was convicted of four counts of sex trafficking of minors by luring young girls from apparently broken homes via the internet by promising them, among other things, a "family life." That life, as it turned out, consisted of paid sexual encounters (\$200 an hour) with strangers in hotels in Rochester and Buffalo.

The first such conviction of this type in Western New York, according to 1/17/13 press release from the US Attorney's Office, involved a defendant, one Kenneth Graham of Amherst NY, who reportedly recruited, promoted and profited from the prostitution activities of two minors who advertised via Back Page ("sweet, sexy and petite companions"), and were paid up to \$200 a session. The defendant was reported to have threatened and assaulted the girls to keep them in line.

And, according to a June 4, 2020 US Attorney's Office (WDNY) press release, one Michael McDonald a/k/a George Jackson was indicted for sex trafficking stemming from an alleged scheme whereby he was reported to have recruited women on Face Book to "dance and strip" in Florida, and otherwise used fraudulent or coercive tactics to compel them into commercial sex activities.

More recently, on March 12, 2021, the New York State Attorney's Office publicly reported on the indictment of one Paul Alexander who was arrested in late December 2020 for allegedly trafficking minor females (12-to-16-year-olds), by sexually abusing them and then coercing them to engage in commercial sex. According to the AG's press release, the defendant accepted \$300 from an undercover officer whom he encouraged to use alcohol and marijuana to loosen the girls up.

## INCREASED VICTIM REFERRALS

In addition to increasing criminal indictments and convictions, the number of reported victims, and referrals according to State Office of Temporary and Disability Assistance (NYSOTDA) and Division for Criminal Justice Services (DCJS), (both of which oversee the trafficking victim referral process), has increased by 70% from 2019 to 2020 (from January 2020 to June 2020 alone, the number was 177), and from 2007 to 2019, the number of reported victims was listed as 1541 (1158 of whom were from sex trafficking and the remainder from labor trafficking).

## EPSTEIN AND MAXWELL

Perhaps no case has shined a brighter light on the dark and smarmy world of sex trafficking than that of Jeffrey Epstein a wealthy hedge fund manager (and friend to the rich, royal and powerful), who was initially convicted in Palm Beach Florida in 2008 of Procuring a Child for Prostitution. Pursuant to an agreement with a prosecutor (who would later become Secretary of Labor under a president who described Epstein in 2002 to New York Magazine as a “terrific guy, a lot of fun to be with”), Epstein wound up serving 13 out of 18 months in prison, most of which was spent in “work release” in his office.

In July 2019, after stepping off a plane from France at a New Jersey airport, Epstein was arrested on a federal indictment charging him with sex trafficking of minor females whom he allegedly recruited and had “groomed” by his longtime business manager/girlfriend Ghislaine Maxwell so that he could receive sexual services at his mansions in Florida, New York and Arizona.

One month after his arrest, Epstein was found dead in his cell in New York City, reportedly the victim of suicide. For her part, Maxwell remains in custody in a federal detention facility in Brooklyn since July 2020, on an indictment charging her with conspiracy to entice minors to travel for the purpose of engaging in illegal sex acts and, more recently, sex trafficking of a minor (age 14) between 1994 and 1997.

Maxwell has been unsuccessful so far in: seeking to get bail (she reportedly offered to post bond in excess of \$200 million), persuading the court to dismiss the indictment on 6th Amendment grounds (failure to draw a grand jury consisting of a fair cross section of the community [i.e. more minorities] by presenting the case in the mostly white community of White Plains NY, and upon the grounds that she was included within the “no federal prosecution,” agreement allegedly struck by Epstein with federal prosecutors when he pled guilty to state charges in Florida back in 2008.

It is not likely that Maxwell, a wealthy British socialite who, (along with Epstein), hobnobbed with princes, presidents, politicians, scientists, celebrities and high-profile attorneys, will cut quite as sympathetic a figure as some of the less well-heeled victims described in the above mentioned cases.

Nevertheless, unless she has valuable (and prosecutable) information to trade for some type of plea deal, it would be interesting to see whether she will claim that instead of acting as Epstein’s accomplice/enabler, she was somehow a victim of some type of Svengali-like influence that he imposed upon her.

## EVEN SEX TRAFFICKERS CAN GET 440 RELIEF (BUT FOR DIFFERENT REASONS):

In *People v Brown* 2020 NY Slip Op. 4849 (2d Dep't 9/12/20), the defendant initially appealed from the summary denial of his CPL 440 motion to vacate his convictions (upon a jury verdict) for Kidnapping, Sex Trafficking Promoting Prostitution and Unlawful Imprisonment (for victimizing a 19-year-old homeless woman), on the grounds of ineffective assistance of counsel for failing to advise him that if he rejected the People's plea offer (with a proposed sentence of four and one-half to nine years), he could face a sentence, upon conviction as charged, to life in prison as a persistent felony offender (PFO.)

The defendant was convicted after trial in 2010. He subsequently moved to vacate the conviction but the trial court summarily denied the motion in 2014. The Appellate Division remitted the matter (to a different judge) for a hearing on the defendant's CPL 440 motion (143 AD3d 622).

After the hearing in 2017, the lower court found that the defendant did receive ineffective assistance of counsel (resulting in the defendant's rejection of the plea and sentence offer), but then directed the People to re-convey the offer. The court advised the defendant that if he accepted the deal, the court would then decide whether to vacate the convictions.

The People indicated that they would re-offer the plea bargain and the defendant indicated that he would accept it. However, the court rejected it and left the convictions and sentence in place, effectively denying the defendant's motion.

The Appellate Division (AD) REVERSED, holding that upon finding that a defendant's CPL 440 motion has merit, the court MUST VACATE the judgment and either DISMISS THE ACCUSATORY INSTRUMENT, ORDER A NEW TRIAL OR TAKE SUCH ACTION AS IS APPROPRIATE UNDER THE CIRCUMSTANCES. (citing, *inter alia*, *People v Brett W.* 144 AD3d 1314 [3d Dep't 2016]).

Having found that the defendant received ineffective assistance of counsel, the court, in the AD's view, should have GRANTED the motion and then directed the People to re-tender the offer.

The lower court was also found to have erred in leaving the judgments of conviction (and sentence) intact upon its rejection of the plea deal because that is not an authorized remedy under CPL 440.10. Instead, the court was, as noted above, required to vacate the convictions and either dismiss the indictment, order a new trial or take other appropriate action (e.g., recommend a different plea offer and sentence commitment).

Accordingly, the AD vacated the convictions and sentence and remitted the case to the lower court for further proceedings under the indictment.

## DEFENDANTS/ VICTIMS

Unlike victims of sex trafficking who may obtain CPL 440.10 relief from their convictions BECAUSE of their victimization, the defendant in *Brown*, a convicted sex trafficker, was deemed entitled to such relief (IN SPITE OF HIS STATUS), only because the lower court

misapprehended its options under CPL 440 after concluding that the defendant had received ineffective assistance of counsel in the context of plea negotiations.

In the latter case, the remedy is purely a matter of law while for defendants who are also victims of sex trafficking, the legal remedy reflects an increased awareness of and empathy for those who find themselves, often through no fault of their own, in unsavory and untenable situations that have spiraled well beyond their individual control.

#### HUMAN TRAFFICKING COURT:

Evidence of institutional recognition of the existence of the commercial sex industry that ensnares vulnerable victims from near and far away and turns them into sex workers many of whom eventually become criminal defendants, can be found in the Human Trafficking Courts (HTC) which were introduced in 2013 as part of a state-wide initiative to intervene in the lives of trafficking victims and help them get away from their abusers and into a safer, more productive environment.

Defendants whose cases are referred to HTC are screened by trained professionals for evidence of victimization (and other conditions), and may be referred to appropriate agencies for treatment, counseling or other needed services (e.g., housing, addiction treatment, education, job training etc.)

The cases are overseen by the HTC judge from arraignment through disposition and prosecutors and defense attorneys assigned to this part are generally expected, whenever possible and warranted, to work toward resolutions that are more rehabilitative than punitive in nature. The idea, as stated by Hon. Jonathan Lippmann, former Chief Judge of the Court of Appeals, in 2013, is to “create a compassionate resolution to cases...through meaningful intervention that links (the defendants) to resources aimed at (helping them) break the cycle of exploitation.”

Obviously, if the defendant is charged with a violent crime (e.g., Homicide, Assault, Robbery), it may not be possible to resolve a particular case with an ACD with counseling, a violation with a conditional discharge or a low-level crime with probation. However, being able to recognize the signs of victimization in such cases and understand the trauma-based communication of the accused, can help counsel fashion an appropriate defense (e.g., Justification) or, in the event of a conviction, make a strong case for mitigation.