

Date of Hearing: March 22, 2022

Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 2169 (Gipson) – As Amended March 17, 2022

SUMMARY: Clarifies that vacatur relief for offenses committed while the petitioner was a victim of human trafficking, intimate partner violence, or sexual violence demonstrates that the petitioner lacked the requisite intent to commit the offense, and that the conviction is invalid due to legal defect. Specifically, **this bill:**

- 1) States that a court may vacate the conviction and arrest and if it finds that the arrest or conviction was a direct result of being a victim of human trafficking, intimate partner violence or sexual violence.
- 2) Removes the requirement that a court must find that the victim was engaged in a good faith effort to distance themselves from the human trafficking scheme or the perpetrator of the harm and that the vacatur relief be in the best interest of the petitioner.
- 3) Requires an order of vacatur to set forth a finding that the petitioner lacked the requisite intent to commit the offense and to set aside the arrest and finding of guilt as invalid due to a legal defect at the time of the arrest or conviction.

EXISTING LAW:

- 1) Authorizes a person who was arrested for or convicted of any nonviolent offense, as specified, committed while they were a victim of human trafficking, to petition the court for vacatur relief of their convictions and arrests. (Pen. Code, § 236.14, subd. (a).)
- 2) Authorizes a person who was arrested for or convicted of any nonviolent offense, as specified, committed while they were a victim of intimate partner violence or sexual violence, to petition the court for vacatur relief of their convictions and arrests. (Pen. Code, § 236.15, subd. (a).)
- 3) Provides that the petitioner shall establish, by clear and convincing evidence, that the arrest or conviction was the direct result of being a victim of human trafficking, intimate partner violence, or sexual violence. (Pen. Code, §§ 236.14, subd. (a); 236.15, subd. (a).)
- 4) States that the petition for relief shall be submitted under penalty of perjury and shall describe all of the available grounds and evidence that the petitioner was a victim of human trafficking, intimate partner violence, or sexual violence and the arrest or conviction of a nonviolent offense was the direct result of being a victim of human trafficking, intimate partner violence, or sexual violence. (Pen. Code, §§ 236.14, subd. (b); 236.15, subd. (b).)

- 5) Provides that, after considering the totality of the evidence presented, the court may vacate the conviction and the arrest and issue an order if it finds all of the following:
 - a) That the petitioner was a victim of human trafficking, intimate partner violence, or sexual violence at the time the nonviolent crime was committed;
 - b) The commission of the crime was a direct result of being a victim of human trafficking, intimate partner violence, or sexual violence;
 - c) The victim is engaged in a good faith effort to distance themselves from the human trafficking scheme or the perpetrator of the harm; and,
 - d) It is in the best interest of the petitioner and in the interests of justice. (Pen. Code, §§ 236.14, subd. (g); 236.15, subd. (g).)
- 6) Requires the court, in issuing an order of vacatur, to do the following:
 - a) Set forth a finding that the petitioner was a victim of human trafficking, intimate partner violence or sexual violence when they committed the offense;
 - b) Set aside the verdict of guilty or the adjudication and dismiss the accusation or information against the petitioner; and,
 - c) Notify the Department of Justice that the petitioner was a victim of human trafficking, intimate partner violence or sexual violence when they committed the crime and of the relief that has been ordered. (Pen. Code, §§ 236.14, subd. (h); 236.15, subd. (h).)
- 7) Provides that, a petitioner who has obtained vacatur relief may lawfully deny or refuse to acknowledge the arrest, conviction, or adjudication that is set aside pursuant to the order. (Pen. Code, §§ 236.14, subd. (o); 236.15, subd. (o).)
- 8) Defines “Vacate” to mean that the arrest and any adjudications or convictions suffered by the petitioner which are deemed not to have occurred and that all records in the case are sealed and destroyed. (Pen. Code, §§ 236.14, subd. (t)(2), 236.15, subd. (t)(2).)

EXISTING FEDERAL LAW: States circumstances that allow non-citizens to be deported, which include having been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country including, among others, crimes of moral turpitude and aggravated felonies. (8 U.S.C.S. § 1227, subd. (a)(2).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, “In our state, vulnerable Californians, particularly women and children, suffer disproportionately from human trafficking. When non-citizens (undocumented) are trafficked, their unique vulnerabilities are can be leveraged by their traffickers; a lack of immigration status, language barriers, cultural norms, being, and lack of familiarity with U.S. protections can all add to further exploitation. Traffickers

may use legal mechanisms to enforce their control over non-citizen victims, threatening them with arrest or deportation should they consider seeking help or reaching out to law enforcement. Traffickers may even threaten to kill or harm victims or their family members to maintain control. Vacatur laws are intended to correct the record when a victim of trafficking, intimate partner violence, or sexual violence is wrongly arrested or convicted as a direct result of their victimization. This specialized vacatur relief should not inadvertently create a two-tiered system of unequal relief for non-citizen and citizen survivors of human trafficking and interpersonal violence. By clarifying the intent to vacate based on a substantive defect, this bill will ensure equal access to vacatur for non-citizen survivors. This effort will help undo the harm that non-citizens (undocumented), who are an integral piece to the American puzzle, have faced as victims of exploitation and then criminalized as a result of their abuse.”

- 2) **Need for the Bill:** Penal Code section 236.14 provides post-conviction relief to human trafficking victims by vacating nonviolent arrests, charges and convictions that were a direct result of human trafficking. Penal Code section 236.15 extends the same form of post-conviction relief to intimate partner violence and/or sexual violence victims by vacating nonviolent arrests, charges and convictions that were a direct result of the intimate partner or sexual violence. Unlike an expungement, getting a conviction vacated effectively means that the conviction never occurred. “Vacate” means that the arrest and any adjudications or convictions suffered by the petitioner are deemed not to have occurred and that all records in the case are sealed and destroyed. (Pen. Code, §§ 236.14, subd. (t)(2), 236.15, subd. (t)(2).) The purpose of these laws is to provide relief for individuals who have criminal records as a result of their exploitation, by vacating nonviolent criminal offenses that were committed by human trafficking victims at the behest of their traffickers. (See, Assembly Public Safety Analysis for SB 823 (Block), Chapter 650, Statutes of 2016.)

Under federal law, a vacated conviction remains valid for purposes of federal immigration laws where there is no legal defect in the conviction. (*Matter of Roldan* (1999) 22 I. & N. Dec. 512.) “No effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.” (*Ibid.*) A state order setting aside a conviction is invalid for immigration purposes where it is “not based on any showing of innocence or on any suggestion that the conviction had been improperly obtained.” (*United States v. Campbell* (1999) 167 F.3d 94, 98.) Thus, if a court vacates a non-citizen’s conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes and can still form the basis for adverse immigration consequences. (See *Matter of Pickering* (2003) 23 I & N Dec. 621.) Otherwise stated, if a court vacates a conviction based on a defect in the underlying criminal proceedings, the individual no longer has a “conviction” under federal law; if, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the conviction remains for immigration purposes. (*In re Conde* (2008) 27 I. & N. Dec. 251, 252.)

Vacatur under sections 236.14 and 236.15, is based on a substantive defect: because the arrest or conviction was a direct result of human trafficking, intimate partner violence, and/or sexual violence, the defendant had a lack of criminal intent, a necessary element of the crime, and the arrest or conviction should never have occurred given the defendant’s status as the

victim. However, the current statutory language fails to explicitly specify that the vacatur relief is based on a substantive defect that legally invalidates the conviction. Accordingly, under federal immigration law, the conviction remains for immigration purposes, despite the fact that it has been erased under state law. As such, the current statutory language inadvertently creates a two-tiered system whereby citizens who obtain a vacatur under these statutes are entitled to complete relief from the collateral consequences of their convictions, while non-citizen victims continue to face collateral immigration consequences of their convictions.

AB 2169 clarifies that vacatur relief under sections 236.14 and 236.15 is based on a substantive defect in the underlying arrest or conviction—that petitioner lacked the requisite mens rea (i.e., intent) to commit the offense, which is a necessary element of all criminal offenses. (Pen. Code, § 20.) This bill would also clarify that the vacatur is based on a finding that the conviction or arrest is invalid due to a legal defect.

- 3) **Argument in Support:** According to *California Public Defender Association*, “AB 2169 would provide that if an individual’s arrest or conviction is vacated because the individual was the victim of human trafficking or domestic or sexual violence, the court has found that the arrest or conviction was legally invalid. In other words, the evidence presented to the court that qualify a victim of trafficking, intimate partner violence, or sexual violence for relief from the consequences of arrest or convictions caused by their victimization show that they lacked the requisite intent to commit the offense of which they were arrested or convicted, and that the lack of intent rendered the arrest or conviction legally defective at the time of the arrest or conviction.

“Under existing law, a victim of human trafficking, intimate partner violence, or sexual violence who was arrested or convicted of a crime, including prostitution, as a direct result of their victimization may be granted relief including the sealing of their arrest and conviction records, and vacatur of their conviction.

“Under federal law, deportation proceedings can still be based on a vacated conviction unless the vacatur is based on a legal defect in the underlying arrest or conviction. With the recently enacted vacatur, relief is predicated on the court finding that the evidence is legally insufficient for a conviction. This relief is inadequate for federal immigration relief. Federal immigration law requires that the court pronounce that the conviction is invalid due to a legal defect at the time of the arrest or conviction, or that the arrested or convicted person lacked the requisite intent to commit the offense. Without these explicit statements in the statutes that authorize vacatur and court orders under them, AB 262 and AB 124 vacatur, under Penal Code sections 236.14 and 236.15, have been denied effect in immigration proceedings. “ICE has successfully argued that a vacatur should not be given effect because it is not based on a legal error or defect in the underlying proceeding. Most individuals facing deportation cannot afford counsel, and do not have a right to the appointment of counsel. Without the assistance of counsel, the immigrant stands little chance of rebutting the ICE lawyer’s attack on their California vacatur.

“AB 2169 would prevent victims of human trafficking and domestic violence from being deported. It would protect the validity of a vacatur in immigration proceedings by eliminating the vagueness in existing law. It would do so by making explicit the legal underpinnings of the post-conviction relief provided for by recent legislation. Thereby, it would ensure that all

victims, regardless of immigration status, would avoid adverse consequences based on legally defective convictions.”

- 4) **Related Legislation:** AB 2195 (Jones-Sawyer), would allow a defendant to be convicted of and sentenced for maintaining or committing a public nuisance based on a plea agreement that includes the dismissal of one or more specified drug charges, in order to avoid immigration consequences of the conviction. AB 2195 is pending in this Committee.

5) **Prior Legislation:**

- a) AB 262 (Patterson), Chapter 193, Statutes of 2021, clarified that a victim can petition the court for vacatur relief at any point in time.
- b) AB 2867 (Gonzalez), Chapter 825, Statutes of 2018, provides that an individual need not establish a finding of ineffective assistance of counsel to vacate a conviction.
- c) SB 823 (Block), Chapter 650, Statutes of 2016, allows a person arrested or convicted of a nonviolent crime while he or she was a human trafficking victim to apply to the court to vacate the conviction and seal and destroy records of arrest.
- d) AB 813 (Gonzalez), Chapter 739, Statutes of 2016, created an avenue of post-conviction relief for a person to vacate a conviction or sentence based on error damaging the petitioner’s ability to meaningfully understand, defend against, or knowingly accept the immigration consequences of the conviction.
- e) AB 1762 (Campos) of the 2015-2016 Legislative Session, would have allowed a person convicted of a nonviolent crime while he or she was human trafficking victim to apply to the court to vacate the conviction upon a showing of clear and convincing evidence. AB 1762 was vetoed.
- f) AB 1585 (Alejo), Chapter 708, Statutes of 2014, provides that a defendant who has been convicted of solicitation or prostitution may petition the court to set aside the conviction if the defendant can establish by clear and convincing evidence that the conviction was the result of his or her status as a victim of human trafficking.

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice
California Public Defenders Association
Loyola Law School, the Sunita Jain Anti-trafficking Initiative

Opposition

None

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