
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: AB 2169 **Hearing Date:** June 14, 2022
Author: Gipson
Version: March 17, 2022
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Criminal procedure*

HISTORY

Source: The Sunita Jain Anti-Trafficking Policy Initiative, Loyola Law School, Loyola Marymount University; Free to Thrive; Immigrant Legal Resource Center

Prior Legislation: SB 823 (Block) Chapter 650, Stats. 2016

Support: California Immigrant Policy Center; California Public Defenders Association; Coalition to Abolish Slavery & Trafficking (CAST); Journey Out; Los Angeles Center for Law and Justice; Peace Over Violence

Opposition: None known

Assembly Floor Vote: 76 - 0

PURPOSE

The purpose of this bill is to clarify 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.

Existing law 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. (Penal Code § 236.14 (a).)

Existing law 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. (Penal Code § 236.15 (a).)

Existing law 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. (Penal Code §§ 236.14 (a); 236.15(a).)

Existing law 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. (Penal Code §§ 236.14 (b); 236.15(b).)

This bill 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. (Penal Code §§ 236.14 (g); 236.15 (g).)

Existing law 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. (Penal Code §§ 236.14 (h); 236.15 (h).)

Existing law 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. (Penal Code §§ 236.14 (o); 236.15 (o).)

Existing law 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. (Penal Code §§ 236.14 (t)(2), 236.15 (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 (a)(2).)

This bill 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.

This bill 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.

This bill 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.

COMMENTS

1. Need for This Bill

According to the author:

This bill would clarify an ambiguity in the language of two statutes that, if left unaddressed, could expose noncitizen victims of human trafficking, intimate partner, and/or sexual violence to immigration consequences such as deportation as a result of their victimization and notwithstanding their eligibility for vacatur relief.

PC 236.14 provides post-conviction relief to survivors of human trafficking by vacating nonviolent arrests, charges and convictions that are a direct result of human trafficking. This law was intended to provide relief for survivors who are criminalized as a result of their exploitation. PC 236.15 extended the same form of post-conviction relief to survivors of intimate partner violence and/or sexual violence who are consequently criminalized. Because PC 236.15 was patterned on PC 236.14, these statutes are nearly identical – and they contain the same ambiguity for noncitizen survivors.

Immigration law requires a vacatur to be based on a substantive or procedural defect to be effective at eliminating the immigration consequences of a conviction. . See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Convictions vacated as a rehabilitative measure, rather than on the basis of a legal defect, are not eliminated for immigration purposes and can still form the basis for adverse immigration consequences.

Vacatur under current PC 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 an absolute defense and the arrest or conviction should never have occurred. However, the current statutory language fails to specify that the relief is based on this substantive defect rather than rehabilitation, and even includes some language that could be interpreted as rehabilitative.

This inadvertently withholds effective vacatur relief from non-citizen victims, creating a two-tiered system where citizens who obtain a vacatur under these statutes are entitled to complete relief while non-citizen victims may have their state vacaturs ignored and continue to face devastating immigration consequences.

The language in PC 236.14 and 236.15 must be updated to reflect that the basis for vacatur is a substantive defect in the underlying arrest or conviction due to the survivor's status as a victim and there lacked the requisite intent to commit the offense. This clarification will ensure that non-citizen survivors are afforded the same vacatur relief that citizen victims can obtain – a result that was always intended by the Legislature when the vacatur laws were passed.

2. Vacatur

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. 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.

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

The Los Angeles Center for Law and Justice supports this bill stating:

Assembly Bill 2169 seeks to help undo the harm that non-citizen survivors of trafficking, intimate partner and sexual violence experience when they are criminalized as a result of their abuse. AB 2169 will ensure that non-citizen survivors, like their citizen counterparts, are able to use vacatur remedies to eliminate the ongoing consequences of old, legally invalid convictions and arrests. Over the years, we have encountered many undocumented clients who have been adversely affected by the absence of such remedies. Laura is a non-citizen survivor of labor trafficking. For more than a year, Laura was forced to cook, clean, and perform home health aide services for her trafficker's family member under threat of homelessness, deportation, and separation from her children. She was also physically and sexually abused by her trafficker. She was convicted of welfare fraud after her trafficker called her benefits worker and stated that she had lied on her application for public benefits when it was actually her trafficker who forced her to stay in a county that was different from where she permanently resided. Nonetheless, Laura was still convicted of welfare fraud. She is currently in removal proceedings and she also remains at risk of having her T visa waiver denied. Due to this criminal issue that was a direct result of the labor trafficking she was forced to endure, she remains at risk of not obtaining T nonimmigrant status and possibly being removed from the United States and permanently separated from her children.

Over the past five years, California has taken great strides in its efforts to protect the rights of survivors of trafficking, intimate partner and sexual violence. California has passed two groundbreaking laws, Cal. Pen. C. § 236.14 (SB 823, Block) and Cal. Pen. C. § 236.15 (AB 124, Kamlager), that recognize victims are unable to form the requisite intent to complete crimes. The laws provide a way for survivors to clear their criminal histories based on the past injustice they experienced and get a truly fresh start.

Even though noncitizens are particularly vulnerable to trafficking, intimate partner and sexual violence, these laws may not—without amendments—be given full effect in immigration court and/or by the United States Citizenship and Immigration Services (USCIS). Immigration law requires a vacatur to be based on substantive or procedural defect to be given the full effect of eliminating the immigration consequences of a conviction. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Convictions vacated as rehabilitative, rather than on the basis of legal defect, are not eliminated for immigration purposes and can still form the basis for adverse immigration consequences. Though these laws were passed to cure legal defects, because of an oversight in drafting, citizen survivors are able to use the vacatur laws fully, but non-citizen survivors do not because it is unclear whether the vacaturs will be recognized by immigration officials.

This gap in the vacatur laws has created a functional problem where advocates advise non-citizen survivors to steer clear of vacatur protections for fear of unintended adverse immigration consequences, whereas citizen survivors can access relief. In effect, we have created a two-tiered system that perversely treats non-citizen survivors as less deserving of the vacatur remedy than their citizen counterparts, leaving survivors like Laura and Lisa, and many other undocumented and non-citizen survivors like them, still vulnerable to adverse immigration consequences and at risk.

We must act to ensure that vacatur protections are available for every survivor in the state, and that these protections are as robust for non-citizen survivors as they are for citizen survivors of human trafficking, intimate partner violence, and/or sexual violence. California must ensure that all survivors of these forms of exploitation and violence have access to services and opportunities to clear their records of old arrests and convictions that the courts and legislature have deemed legally defective. This includes ensuring current vacatur relief is clear in its intent to remedy legal defects so that it may apply fully to non-citizens, an equal and absolutely integral piece of the American puzzle.

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