
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1761 **Hearing Date:** June 28, 2016
Author: Weber
Version: April 14, 2016
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Human Trafficking: Victims: Affirmative Defense*

HISTORY

Source: Coalition to Abolish Slavery and Trafficking
National Council of Jewish Women

Prior Legislation: AB 1585 (Alejo) – Chapter 708, Stats. 2014,
AB 694 (Bloom) – Chapter 126, Stats. 2013
SB 327 (Yee) failed Assembly Appropriations 2013
AB 785 (Eaves) – Chapter 812, Stats. 1991

Support: ACT for Women and Girls; American Academy of Pediatrics; American Association of University Women Long Beach; American Civil Liberties Union; California Council of Churches IMPACT; California Public Defenders Association; California Women’s Law Center; CAST Survivor Advisory Caucus; City of Los Angeles; Clergy and Laity for United for Economic Justice; Housing California; Junior Leagues of California; Junior League of San Diego; Legal Services for Prisoners with Children; The Los Angeles Alliance for a New Economy; Planned Parenthood Affiliates of California; Religious Action Center of Reform Judaism; San Diego Urban League for Young Professional

Opposition: California District Attorneys Association; California State Sheriffs’ Association; Los Angeles District Attorneys Association; Sacramento County District Attorney’s Office

Assembly Floor Vote: 69 - 3

PURPOSE

The purpose of this bill is to create a human trafficking affirmative defense applicable to non-violent, non-serious, non-trafficking crimes.

Existing law guarantees a defendant a meaningful opportunity to present a defense. (U.S. Const., VI Amend., Cal. Const. art. I, §. 15.)

Existing law provides that all persons are capable of committing crimes except those belonging to specified classes, including person who committed the act or made the omission charged

under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused. (Penal Code § 26.)

Existing law states that all relevant evidence is admissible unless it is made inadmissible by some statutory or constitutional provision. (Cal. Const., art. I, § 28(f)(2), Evidence Code, § 351.) 4)

Existing law provides that the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evidence Code, § 352.)

Existing law states that a person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient for the court to deem the person qualified on a subject about which he or she is asked to express an opinion. (Evidence Code, § 720.)

Existing law limits expert testimony to a subject that is sufficiently beyond common experience that the opinion of that expert would assist the trier of fact to understand the evidence or determine a fact in issue. (Evidence Code § 801 (a).)

Existing law authorizes expert testimony in criminal cases by either the prosecution or defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a defendant to prove the occurrence of the act or acts of abuse which form the basis of a criminal charge. (Evidence Code § 1107 (a).)

This bill states that, in addition to any other affirmative defense, it is a defense to a crime that the person was coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and of reasonable fear of harm.

This bill states that this affirmative defense does not apply to a serious felony, a violent felony, or the offense of human trafficking, as specified.

This bill establishes the standard of proof for the human trafficking affirmative defense as the preponderance of evidence standard.

This bill states that certifying records from federal, state, tribal, or local court or government certifying agencies for documents such as U or T visas, may be presented to establish the affirmative defense.

This bill provides that the human trafficking affirmative defense can be asserted at any time before entry of plea or before the end of a trial. The defense can also be determined at the preliminary hearing.

This bill entitles a person who successfully raises the human trafficking affirmative defense to the following relief: a) Sealing of all court records in the case; b) Release from all penalties and disabilities resulting from the charge, and all actions that led to the charge shall be deemed not to have occurred; and c) Permission to attest in all circumstances that he or she has never been arrested for, or charged with the subject crime, including in financial aid, housing, employment, and loan applications.

This bill states that, in any juvenile delinquency proceeding, if the court finds that the alleged offense was committed as a direct result of being a victim of human trafficking then it shall dismiss the case and automatically seal the case records.

This bill states that the person may not be thereafter charged with perjury or otherwise giving a false statement based on the above relief.

This bill states that in a juvenile delinquency proceeding, if the court finds that the offense charged in the proceedings was committed as a direct result of the minor being a victim of human trafficking, and the affirmative defense was established by a preponderance of the evidence, then the court shall dismiss the proceedings and order automatic record sealing.

This bill provides that in a criminal action expert testimony is admissible by either the prosecution or defense regarding the effects of human trafficking on its victims, including, but not limited to the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of human trafficking victims.

This bill states that the requisite foundation for the introduction of this expert testimony will be established if the proponent of the evidence shows its relevance and the proper qualifications of the expert witness.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

Human trafficking victims are often treated as criminals with respect to the crimes their traffickers force them to commit. Human Trafficking is a unique crime in that traffickers often benefit from having their victims commit illegal acts and may force both children and adults to commit a diverse range of crimes. Traffickers also reinforce their power and control over victims by instilling fear of law enforcement and the systems designed to protect them so that victims-both adults and children-often initially lie to law enforcement about the circumstances of their trafficking experience or proactively attempt to protect their traffickers.

Because of the unique nature of the trafficking crime, California must take proactive steps to protect these victims and create multiple pathways for them to be identified as the victims they are so that the real perpetrators can be prosecuted. We must also enact measures to ensure that the complexities of trafficking crimes can be appropriately described to judges and juries. AB 1761 helps ensure that human trafficking victims arrested for offenses directly related to their trafficking are not convicted of crimes their traffickers forced them to commit.

This provision is consistent with the actions of other states who have taken this step to better protect trafficking victims. At least 34 states have enacted laws making a person's status as a victim of human trafficking an affirmative defense to certain criminal charges. In addition, Alaska, New York and Virginia, three states without such a defense or immunity, currently have introduced bills in their respective state legislatures that would create an affirmative defense for trafficking victims. The 34 states that have established an affirmative defense are Alabama, Arizona, Arkansas,

Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington and Wisconsin. Finally, similar to the proposed provision The Uniform Act includes an affirmative defense for an “individual charged with [prostitution] or [other nonviolent offenses] committed as a direct result of being a victim” of human trafficking. See Prevention of and Remedies for Human Trafficking Section 16, available at: <http://www.uniformlaws.org/Act.aspx?title=Prevention>.

2. Affirmative Defense

A victim of trafficking who is charged with a crime may be able to raise the defense of duress. Duress is said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. ‘if there was a reasonable, legal alternative to violating the law, ‘a chance both to refuse to do the criminal act and also to avoid the threatened harm,’ the defenses will fail.’ (*People v. Heath* (1989) 207 Cal.App.3d 892, 899-900, citations omitted.) “Persons (unless the crime is punishable with death) who commits the act or made the omission charged under threats or menace suffices to show that they had reasonable cause to and did believe their lives would be endangered if they refused” are not guilty of the crime. (Pen. Code, § 26.) A court has a duty to give a duress instruction on its own motion if it is supported by substantial evidence and is not inconsistent with the defense theory. (*People v. Wilson* (2005) 36 Cal.4th 309, 331.)

The defendant acted under duress if, because of threat or menace, he or she believed that his or her or someone else's life would be in immediate danger if he or she refused a demand or request to commit the crime. The demand or request may have been expressed or implied. The defendant's belief must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed. CALCRIM 3402.

Duress applies if the defendant has been threatened with imminent great bodily harm. (See *People v. Otis* (1959) 174 Cal.App.2d 119, 124; *United States v. Bailey* (1980) 444 U.S. 394, 409.) Also, although this is not reflected in the instruction, duress probably applies if the instigator threatens harm to another person. (See *Heath*, supra, at p. 898, discussing *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 21-25 [a necessity defense due to threats to a third party].)

The sponsors of this bill believe the duress defense is inadequate for trafficking victims because a victim may not be able to show his or her life was in immediate danger. This bill creates a separate human trafficking affirmative defense.

Under the defense created by this bill, the person will be required to show by a preponderance of the evidence, that he or she was coerced to commit the crime as a direct result of being a victim of trafficking at the time of the crime, and of reasonable fear of harm. The coercion requirement will prevent a trafficking victim from raising the defense when he or she commits a crime for personal gain, as opposed to at the behest of his or her trafficker. In addition, the requirement

that the person be a victim of trafficking at the time of the offense, will preclude a trafficking survivor from using the defense years later to escape liability for criminal conduct because he or she was a victim in the past.

This new defense will not apply to all crimes. A trafficking victim cannot raise the defense when charged with a serious felony as described in Penal Code section 1192.7, subdivision (c), a violent felony listed in Penal Code section 667.5, subdivision (c), or with regard to a charge of human trafficking. The latter crime is excluded from application so that a victim of trafficking does not escape liability for becoming a recruiter for his or her trafficker.

3. Expert Testimony

Evidence Code section 1107 generally makes admissible in a criminal action expert testimony regarding "intimate partner battering and its effects, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence" As explained by the California Supreme Court: Battered women's syndrome "has been defined as 'a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives.' (*State v. Kelly* (1984) 97 N.J. 178, 193 [478 A.2d 364, 371]) This bill applies the same principles to expert testimony regarding the effects of human trafficking to its victims. It provides that testimony is admissible by either prosecution or defense regarding the effects of human trafficking victims including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of human trafficking victims.

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