
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1762 **Hearing Date:** June 28, 2016
Author: Campos
Version: May 31, 2016
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Human Trafficking: Victims: Vacating Convictions*

HISTORY

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

Prior Legislation: SB 823 (Block) in Assembly Public Safety 2016
AB 1585 (Alejo) – Ch.708, Stats. of 2014

Support: ACT for Women and Girls; American Academy of Pediatrics, California;
American Association of University Women, Long Beach; American Civil
Liberties Union; The American Medical Women’s Association; California Church
IMPACT; California Public Defenders Association; California Women’s Law
Center; City of Los Angeles; Clergy and Laity United for Economic Justice;
Coalition for Humane Immigrant Rights of Los Angeles; Conference of California
Bar Associations; County of Santa Cruz; Legal Services for Prisoners with
Children; The Jewish Public Affairs Committee of California; The Los Angeles
Alliance for a New Economy; National Association of Social Workers; National
Council of Jewish Women-California; Religious Action Center of Reform
Judaism

Opposition: Alameda County District Attorney; California District Attorneys Association;
Judicial Council of California; Los Angeles County District Attorney’s Office;
San Diego County District Attorney

Assembly Floor Vote: 53 - 19

PURPOSE

The purpose of this bill is to allow an individual convicted of a nonviolent crime while he or she was a human trafficking victim to apply to the court to vacate the conviction at any time after it was entered.

Existing law allows a court to set aside a conviction of a person who has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or who the court in its discretion and the interests of justice, determines that the person should be granted relief, provided that the person is not then serving a sentence

for any other offense, is not on probation for any other offense, and is not being charged with any other offense. (Penal Code § 1203.4 (a).)

Existing law provides that the relief pursuant to Penal Code Section 1203.4 does not relieve the petitioner of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission. The conviction can be alleged in any subsequent criminal prosecution. If the underlying conviction bars a person from possessing a firearm, the dismissal of the conviction does not eliminate that prohibition. (Penal Code § 1203.4 (a),(b).)

Existing law states that a person who was adjudicated a ward of the court for the commission of a violation of specified provisions prohibiting prostitution may petition a court to have his or her records sealed as these records pertain to the prostitution offenses without showing that he or she has not been subsequently convicted of a felony or misdemeanor involving moral turpitude, or that rehabilitation has been attained. This relief is not available to a person who paid money or any other valuable thing, or attempted to pay money or any other valuable thing, to any person for the purpose of prostitution as defined. (Penal Code § 1203.47.)

Existing law provides that a person who was under the age of 18 at the time of a commission of a misdemeanor and is eligible for, or has previously received expungement relief, may petition the court for an order sealing the record of conviction and other official records in the case, including records of arrests resulting in the criminal proceeding and records relating to other offenses charged in the accusatory pleading, whether the defendant was acquitted or charges were dismissed. Thereafter the conviction, arrest, or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence. (Penal Code § 1203.45.)

Existing law states that any person who was under the age of 18 when he or she was arrested for a misdemeanor may petition the court in which the proceedings occurred or, if there were no court proceedings, the court in whose jurisdiction the arrest occurred, for an order sealing the records in the case, including any records of arrest and detention, in certain circumstances. (Penal Code § 851.7.)

Existing law allows in certain cases, a person who has reached the age of 18 years to petition the juvenile court for sealing of his or her juvenile record. (Welf. & Inst. Code § 781.)

Existing law provides that any person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, is guilty of human trafficking and shall be punished by imprisonment in the state prison for 5, 8, or 12 years and a fine of not more than \$500,000. (Penal Code § 236.1(a).)

Existing law states that any person who deprives or violates the personal liberty of another with the intent to effect or maintain a violation of specified sex crimes is guilty of human trafficking and shall be punished by imprisonment in the state prison for 8, 14, or 20 years and a fine of not more than \$500,000. (Penal Code § 236.1 (b).)

Existing law provides that the Department of Justice (DOJ) shall maintain state summary criminal history information and authorizes DOJ to furnish state summary criminal history

information to statutorily authorized entities for specified purposes including employment and licensing. (Penal Code §11105.6.)

Existing law prohibits a public or private employer from asking an applicant for employment to disclose, information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or post-trial diversion program; nor shall any employer seek from any source, or utilize, as a factor in determining any condition or facet of employment, or any apprenticeship or other training program leading to employment, any record of arrest or detention that did not result in conviction, or any record regarding any pretrial or post-trial diversion program. Nothing in this section shall prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial. This provision does not apply to employment of peace officers. (Labor Code § 432.7(a) and (e).)

Existing law allows a court, upon making a finding that a defendant has been convicted of solicitation or prostitution as a result of his or her status as a victim of human trafficking, to issue an order that does all of the following:

- Sets forth a finding that the petitioner was a victim of human trafficking when he or she committed the crime;
- Orders expungement relief;
- Notifies the Department of Justice (DOJ) that the petitioner was a victim of human trafficking when he or she committed the crime and the relief that has been ordered by the court; and,
- Prohibits DOJ from disseminating the petitioner's record of conviction for specified licensing, employment and certification requirements. (Penal Code § 1203.49.)

This bill allows an individual adjudicated a ward of the juvenile court as the result of a nonviolent crime committed while he or she was a human trafficking victim to apply to have the petition dismissed.

This bill provides, if the application is granted, that the court shall have all records in the case sealed and mandates release of the defendant from all penalties and disabilities, as provided.

This bill defines "human trafficking victim" as a person who is a victim of labor trafficking, sex trafficking, or trafficking of a minor."

This bill defines "nonviolent crime" as "any crime or offense other than murder, attempted murder, voluntary manslaughter, mayhem, kidnaping, rape, robbery, arson, carjacking, or any other violent felony as defined."

This bill specifies a procedure for victims to apply to the court to have their convictions vacated. The procedure is specified as follows:

- Provides that any individual convicted of a nonviolent crime committed while that individual was a human trafficking victim may apply to the court in which the conviction was entered to vacate the conviction at any time after it is entered.
- Requires that the court grant the application on a finding that the applicant's participation in the offense on which the applicant was convicted was a direct result of the applicant being a human trafficking victim.

- Provides that the application shall identify the applicant, the offense for which vacatur is sought, and the court in which the conviction was entered. The applicant shall describe in the application all the available grounds and evidence for vacatur of the conviction known to the applicant.
- Allows the defendant applying for vacatur to submit evidence containing personal identify information under seal along with a statement under penalty of perjury confirming his or her identity.
- Provides that the state or local prosecutorial agency shall have 30 days for the date of receipt of service to oppose the application once the application and all relevant information has been served by the agency; provides that if opposition to the application is not filed, the court shall deem the application unopposed and shall grant the application; and specifies that if the application is opposed, the court shall hold a hearing on the application.
- Provides that if the court finds, by clear and convincing evidence, that the applicant's participation in the offense on which the conviction was based was a direct result of the applicant being a victim of human trafficking, the court shall grant the application and vacate the conviction, strike the adjudication of guilt, and order the specified relief and may also take additional action and grant additional relief as it deems appropriate under the circumstances.
- States that if the court denies the application because the evidence is insufficient to establish grounds for vacatur, the denial shall be without prejudice. The court shall state the reasons for its denial in writing and, if those reasons are based on curable deficiencies in the application, allow the applicant a reasonable time period to cure the deficiencies upon which the court based the denial.
- Specifies that in making a determination on an application the court may consider any evidence it deems of sufficient credibility and probative value, including the sworn statement of the applicant. The statement, alone, is sufficient evidence to support the vacating of a conviction, provided the court finds that the statement is credible. Evidence in support of granting an application may also include, but is not limited to, all of the following:
 - Certified records of a federal, state, tribal or local court or governmental agency documenting the person's status as a victim of human trafficking at the time of the offense, including identification of a victim of human trafficking by a peace officer and certified records of approval notices or enforcement certifications generated from federal immigration proceedings, create a rebuttable presumption that an offense was committed by the defendant as a direct result of being a human trafficking victim; and
 - A sworn statement from a trained professional staff member of a victim services organization, an attorney, a member of the clergy, or a medical or other professional from whom the defendant has sought assistance in addressing the trauma associated with being trafficked.
- Provides that the court shall grant an application if the conviction or adjudication was based on a crime constituting or arising from a commercial sex act, including solicitation for prostitution or loitering with intent to commit prostitution, upon a finding that the applicant was under the age of 18 years at the time of the offense on which the conviction is based.

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:

Besides the psychological damage and physical harm suffered by victims of trafficking, the often extensive criminal records trafficking victims frequently acquire are the most crippling legacy and long-term barrier to recovery. The record of convictions remains with the victim for years, and in many states for life. The victim's criminal record forecloses or hinders many opportunities for employment, education and housing that former victims would otherwise have and thereby makes a normal life much more difficult.

Recently, the federal government enacted incentives for states which have vacatur laws. Section 1002 of the Justice for Victims of Trafficking Act of 2015 authorizes preferential grant consideration to applicants in States that provide a process for human trafficking victims to move to vacate any arrest or conviction for non-violent offenses committed as a "direct result" of trafficking (a) that creates a rebuttable presumption that any arrest or conviction of an individual for an offense associated with human trafficking is the result of being a victim of human trafficking if the victim has documentation of trafficking issued by a federal, state or local agency, (b) that protects the identity of human trafficking victims in courts and other public records and (c) that does not require a victim of human trafficking to provide official documentation in order to receive protection under the vacatur law.

2. Duress and Necessity

Under current law, if a victim of human trafficking is forced to commit a crime by their trafficker then they have the defenses of duress and necessity made available to them. "All persons are capable of committing crimes except persons (unless the crime be punishable with death) 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.).

- Duress: The defendant is not guilty of a crime if he or she acted under duress. 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.
- Necessity: Although evidence may raise both necessity and duress defenses, there is an important distinction between the two concepts. With necessity, the threatened harm is in the immediate future, thereby permitting a defendant to balance alternative courses of conduct. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1009-1013.) Necessity does not negate any element of the crime, but rather represents a public policy decision not to

punish a defendant despite proof of the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901.) The duress defense, on the other hand, does negate an element of the crime. The defendant does not have the time to form the criminal intent because of the immediacy of the threatened harm. (*Ibid.*)

3. Expungement vs. Vacating a Conviction

Defendants who have successfully completed probation (including early discharge) can petition the court to set aside a guilty verdict or permit withdrawal of the guilty or nolo contendere plea and dismiss the complaint, accusation, or information. (Penal Code Section 1203.4.) Defendants who have successfully completed a conditional sentence also are eligible to petition the court for expungement relief under Penal Code Section 1203.4. (*People v. Bishop* (1992) 11 Cal.App.4th 1125, 1129.) Penal Code Section 1203.4 also provides that the court can, in the furtherance of justice, grant this relief if the defendant did not successfully complete probation. (Penal Code Section 1203.4; see *People v. McLernon* (2009) 174 Cal.App.4th 569, 577.)

Expungement relief is not available for convictions of certain offenses. These include most felony child molestation offenses, other specific sex offenses, and a few traffic offenses. (Penal Code Sections 1203.4 and 1203.4a.) It does not prevent the conviction from being pleaded and proved just like any other prior conviction in any subsequent prosecution. (See *People v. Diaz* (1996) 41 Cal.App.4th 1424.) Expungement relief pursuant to Penal Code Section 1203.4 does not relieve the petitioner of the obligation to disclose the conviction in response to any direct question in any questionnaire or application for public office or for licensure by any state or local agency.

Expungement relief pursuant to Penal Code Section 1203.4a, on the other hand, does not explicitly require the person to disclose the conviction in an application for a state license or public office. Penal Code Section 1203.4a is only available for defendants convicted of a misdemeanor and not granted probation.

By regulation, a private employer may not ask a job applicant about any misdemeanor conviction dismissed under Penal Code 1203.4. (2 Cal. Code of Regs. Section 7287.4(d).) Also, under Labor Code Section 432.7, a private or public employer may not ask an applicant for employment to disclose information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or posttrial diversion program. However, if the employer is an entity statutorily authorized to request criminal background checks on prospective employees, the background check would reveal the expunged conviction with an extra entry noting the dismissal on the record.

This bill proposes vacating convictions of human trafficking victims. By vacating the conviction, the remedy is actually more forceful than an expungement. Unlike an expungement, a vacatur effectively means that the conviction never occurred. Under current California law and criminal procedure, motions to vacate a conviction are generally done through the appellate process. This bill takes a novel approach of setting up a statutory framework for vacating convictions for a particular class of individuals. Essentially, this bill creates parity between human trafficking victims and those individuals who are found factually innocent of crimes they never committed.

4. Current Expungement Law Related to Prostitution

Under current California law a defendant who has been convicted of solicitation or prostitution may petition the court for, and the court may set aside the conviction if the defendant can show that the conviction was the result of his/her status as a victim of human trafficking. This provision of law is the result of the passage of AB 1585 (Alejo), Chapter 708, Statutes of 2014. The relief set forth in AB 1585 was limited to expungement of prostitution offenses. This bill broadly expands upon these remedies to include most non-violent crimes.

5. Support

The sponsor of this bill, the Coalition to Abolish Slavery and Trafficking, states:

Based on CAST experience as a service provider in California, trafficking victims who finally escape from their traffickers and seek to rebuild their lives then experience the substantial barriers that criminal convictions create on their pathway to recovery. These hurdles include barriers to employment, housing, public benefits, and other supportive systems. Former trafficking victims are also often stigmatized as criminals. As one survivor aptly puts it “even after I was freed I still feel the invisible bonds of criminal convictions.”

Trafficking victims in California have suffered enough. AB 1762 takes critical steps to fully eliminate the barriers that criminal convictions create for trafficking survivors. AB 1762 puts in place a comprehensive system to ensure that all trafficking survivors-both sex and labor, both adults and children - are able to fully clear their criminal records so that they can leave their trafficking experience behind them. **Because many survivors would be able to expunge their criminal records after a longer wait, CAST believes that this measure will not increase fiscal costs beyond what is already spent on expunging criminal convictions and might even create a more streamline system in the long run saving the state money.**

A survey by the National Survivor network showed that 90% of trafficking victims had criminal convictions, that 20% had been arrested more than 10 times and that 10% had been arrested more than 30 times. CAST’s records show that some victims have been arrested 30 or 40 times in a few years under the control of traffickers. CAST has worked with one trafficking victim who was arrested more than 200 times. Criminal convictions for trafficking victims sometimes create insurmountable barriers to the very support systems that survivors need to recover. The National Survivor Network Survey indicated that 80% of trafficking survivors surveyed had lost or not received employment because of their criminal convictions and 50% had suffered barriers to accessing housing .As NSN survey demonstrates, criminal convictions for trafficking victims create long-term barriers for recovery. They leave scars that follow victims into later life and affect them educationally, occupationally, financially, and psychologically.

Although in the past California has taken steps to remove convictions from prostitution from trafficking survivors’ records, many of the convictions trafficking survivors face are not prostitution related. Clearing only part of a criminal record is often like not clearing the criminal record at all. Additionally, past measures have required that trafficking survivors have to wait to clear their

records until the terms of their probation are complete and they have paid all fines and fees. Sine trafficking victims have not committed these crimes, these burdens create additional barriers to trafficking victims' recovery and should not have to be borne by trafficking survivors at all.

AB1762 enables human trafficking victims to vacate convictions for all non-violent crimes they committed as a direct result of human trafficking. It adjusts the standard of proof required under current law and creates presumptions for proving the trafficking experience so that trafficking victims are not re-traumatized by the process of clearing their criminal records. AB 1762 also fully clears criminal records, as it extends to trafficking victims the same standards of sealing arrest and court records that are currently provided for factually innocent persons wrongly convicted of crimes. AB 1762 also explicitly permits human trafficking victims to state that they have never been arrested for, charged with or convicted of the crime in question and it prohibits the denial of rights or benefits, including employment and housing benefits, based on the arrest, charge or conviction. Finally AB 1762 creates additional protections for minors as it establishes a conclusive presumption that commercial sex crime convictions for acts committed when the victim was under 18 years old were the direct result of human trafficking, requiring the resulting conviction to be vacated. [emphasis in original]

6. Opposition

The California District Attorneys Association opposes this bill stating:

This proposal would create a class of people who would be presumptively exempted from liability for the crimes they commit, as long as the offense “was a direct result of the applicant being a human trafficking victim.” Traditional defenses to criminal liability are fully adequate to address the issues that victims of trafficking may bring to excuse or justify their criminal conduct.

We believe that AB 1762 would promote criminal conduct by creating an incentive for traffickers to enlist their victims to commit crimes, knowing full well that the people they press into service will not be held responsible for their actions. This proposal would allow a defendant whose claim was heard and rejected at trial to return to court immediately after conviction to vacate his or her conviction, notwithstanding the fact that the trier of fact heard and rejected the defense.

In addition to being poor public policy, the bill fails to provide courts or counsel with any guidance as to how these claims are to be evaluated, and does not even include a burden of proof. Meanwhile, it amounts to a legislative attempt to strong-arm judges into granting these applications by requiring denials to be in writing. The applicants need not even show that they acted under duress to succeed in vacating their convictions.

This bill could create speedy exonerations for a wide variety of felony and misdemeanor offenses, including registerable sex offenses, residential burglary, weapons possession, every variety of theft, vehicular manslaughter, elder abuse, child abuse, and a great many crimes of violence not listed in Penal Code section 667.5(c).

Two years ago, AB 1585 (Chapter 708, Statutes of 2014) was enacted with near unanimous support, as a measured, fair-minded and reasonable path allowing trafficking victims to clean the slate without inflicting any harm on crime victims.

In addition to repealing the Penal Code section created by AB 1585, this bill, by contrast, has the potential to harm both public safety and crime victims

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