
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 1726 **Hearing Date:** July 11, 2023
Author: Kalra
Version: July 3, 2023
Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Crimes: sentences*

HISTORY

Source: Decrim Sex Work Coalition

Prior Legislation: SB 357 (Wiener), Chapter 86, Statutes of 2022
SB 239 (Wiener), Chapter 537, Statutes of 2017

Support: ACLU California Action; California Attorneys for Criminal Justice; California Public Defenders Association; Center for HIV Law and Policy; Drug Policy Alliance; Ella Baker Center for Human Rights; Equality California; Free Speech Coalition; GLIDE; Initiate Justice; Los Angeles LGBT Center; National Association of Social Workers, California Chapter; Sex Worker Outreach Project Behind Bars; The Gubbio Project; Together in Service; Woodhull Freedom Foundation

Opposition: None known

Assembly Floor Vote: 45 - 17

PURPOSE

The purpose of this bill is to declare that prior convictions for specified prostitution related-offenses that have since been repealed are presumed legally invalid because the conviction was sought, obtained, or imposed for specified unlawful reasons.

Existing law establishes the California Racial Justice Act which prohibits the state from seeking or obtaining a criminal conviction or seeking, obtaining or imposing a sentence on the basis of race, ethnicity, or national origin. (Pen. Code, § 745.)

Existing law authorizes a person to file a motion to vacate a conviction or sentence because the conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel. (Pen. Code, § 1437.7.)

Existing law provides that a person currently serving a sentence for a conviction of violating former Section 653.22, whether by trial or by open or negotiated plea, may petition for a recall or

dismissal of sentence before the trial court that entered the judgment of conviction in the case to request resentencing or dismissal, and sealing, as applicable. (Pen. Code, § 653.29, subd. (a)(1).)

Existing law states that upon receiving a petition for recall and resentencing, the court shall presume the petitioner satisfies the criteria unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not. If the petitioner satisfies the criteria, the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid and shall seal the conviction as legally invalid. (Pen. Code, § 653.29, subd. (a)(2).)

Existing law states that a person who has completed their sentence for a conviction of violating Section 653.22, whether by trial or open or negotiated plea, may file an application before the trial court that entered the judgment of conviction in their case to have the conviction dismissed and sealed because the prior conviction is now legally invalid. (Pen. Code, § 653.29, subd. (b)(1).)

This bill additionally provides that all convictions of former Section 653.22 are presumed legally invalid because the conviction was sought, obtained, or imposed for any of the following reasons:

- On the basis of race, ethnicity, or national origin in violation of the Racial Justice Act;
- Because it was imposed on a defendant who was acting under duress;
- Due to prejudicial error moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.

Existing law provides that a conviction for a violation of Penal Code section 647f as it read on December 31, 2017, is invalid and vacated. (Pen. Code, § 1170.21.)

Existing law states that all charges alleging violation of Section 647f are dismissed and all arrests for violation of Section 647f are deemed to have never occurred. An individual who was arrested, charged, or convicted for a violation of Section 647f may indicate in response to any question concerning their prior arrest, charge, or conviction under Section 647f that they were not arrested, charged, or convicted for a violation of Section 647f. Notwithstanding any other law, information pertaining to an individual's arrest, charge, or conviction for violation of Section 647f shall not, without the individual's consent, be used in any way adverse to their interests, including, but not limited to, denial of any employment, benefit, license, or certificate. (Pen. Code, § 1170.21.)

Existing law authorizes a person who is serving a sentence as a result of a violation of Section 647f as it read on December 31, 2017, whether by trial or by open or negotiated plea, may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in their case. (Pen. Code, § 1170.22, subd. (a).)

Existing law provides that if the court's records show that the petitioner was convicted for a violation of Section 647f as it read on December 31, 2017, the court shall vacate the conviction and resentence the person for any remaining counts. (Pen. Code, § 1170.22, subd. (b).)

This bill additionally provides that all convictions of Section 647f as it read on December 31, 2017, are presumed legally invalid because the conviction was sought, obtained, or imposed for any of the following reasons:

- On the basis of race, ethnicity, or national origin in violation of the Racial Justice Act;
- Because it was imposed on a defendant who was acting under duress;
- Due to prejudicial error moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.

This bill contains the following legislative declarations and findings:

- Former Penal Code section 653.22 was enforced in an arbitrary and discriminatory manner.
- For example, in the city of Los Angeles, Black adults comprised 56.1% of the charges, despite making up only 8.9% of the city's population. Women accounted for 67.1% of all 653.22 charges.
- Likewise, vagueness of former Penal Code section 653.22 also led to a dismissal rate in Los Angeles County almost three times higher than other Penal Code sections that criminalize sex work. Nearly one in three section 653.22 cases referred to prosecutors by police were rejected for filing for lack of sufficient evidence.
- Former Penal Code section 647f, which created a felony crime that only applied to HIV-positive individuals, was also enforced in an arbitrary and discriminatory manner.
- For example, women made up 45% of those who came into contact with the criminal justice system under former section 647f, but women are only 12% of the HIV-positive population in California.
- Likewise, Black and Latino people comprised two-thirds (68%) of the people who came into contact with the criminal justice system under former section 647f, although just over half (56%) of people living with HIV in California are Black and Latino.
- White men were also significantly more likely to be released and not charged under former section 647f. White men who were arrested for violating former section 647f were not charged in 70% of cases, while all other racial/ethnic groups were not charged in 39% to 47% of solicitation incidents.
- Dedicated to the integrity of convictions free from racial bias, the Legislature passed the California Racial Justice Act of 2020 (Stats. 2020, ch. 317, § 1) to require that “[t]he state . . . not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.” (Pen. Code, § 745, subd. (a).)

COMMENTS

1. Need for This Bill

According to the author of this bill:

Under federal law, deportation proceedings can still be based on a vacated conviction unless the vacatur is due to a legal defect in the underlying arrest or conviction. In cases where state law does not explicitly specify as such, non-citizens are inadvertently subjected to a two-tiered system where they unfairly face additional consequences for convictions based on outdated laws and are denied the relief they are entitled to. AB 1726 corrects this statutory oversight and ensures equal access to vacatur under Penal Code Sections 653.29, 1170.21, and 1170.22 by explicitly stating that convictions for former Penal Code sections 653.22 and 647f were legally invalid due to specified defects that existed at the time of the convictions.

2. Former Penal Code Section 653.22

The crime of loitering with the intent to commit prostitution was enacted in 1995 by AB 1035 (Katz). At the time, soliciting or agreeing to engage in prostitution was already a crime, however according to the Senate Committee's analysis of the bill, the author and proponents of the bill expressed that the bill was needed because existing laws were ineffective at resulting in arrests of persons who were believed to be sex workers and the presence of such individuals add to crime and blight of their neighborhoods. According to the author's statement provided in the analysis:

Prostitutes and drug dealers blatantly work on the streets in defiance of law enforcement. Prostitution and drug dealing adversely affect the safety, welfare, and health of our neighborhoods while hurting small businesses and decreasing property values. While it is usually quite obvious that prostitutes and drug dealers are conducting business, existing law has been ineffective in securing their arrest.

In order to be arrested, prostitutes must either solicit, accept, or engage in a sexual act for money. Drug dealers must be caught exchanging controlled substances for money. These criminals have become skilled in their operations -- they are familiar with undercover officers and know exactly what they can and cannot say to avoid arrest. They blatantly work the streets in defiance of law enforcement -- and add to the rampant crime and blight in some of our neighborhoods.

(Sen. Comm. on Crim. Procedure, Analysis of Assem. Bill No. 1035 (1995-1996 Reg. Sess.) as amended Apr. 6, 1995, p. d.) The committee analysis cites concerns by opponents of the bill that enacting the proposed crime of loitering with the intent to commit prostitution may allow police officers to make arrests with substantially less than probable cause that a crime has been or will be committed by providing broad discretion on what circumstances may satisfy the intent to commit prostitution which may lead to subjective and arbitrary arrests. (*Id.* at pp. i-j.)

SB 357 (Wiener), Chapter 86, Statutes of 2022 repealed Penal Code section 653.22 and related provisions of law and declared them to be invalid. According to this committee's analysis of SB 357:

A study conducted in 2019 through the Los Angeles County Public Defender's office compiled data from all of the charges of violations of Penal Code section 653.22 reported from the Compton Branch of the Public Defender's office. During a one-week period of time, a total of 48 cases were reported. (Demeri, *Policing of People in the Sex Trades in Compton: Analysis of Section 653.22 Clients*, Law Offices of the Los Angeles County Public Defender (2019).)

The study found that the majority of arrests were made up of young Black women. 42.6 percent of arrests were for people aged 21-24 with the next highest rate being 23.4 percent for people aged 18-20. (*Id.* at p. 2.) As for race, 72.3 percent were Black with the next highest rate being 17 percent for Hispanic. (*Id.* at p. 4.)

The study shows that probable cause was most commonly established by the arrestee's presence in an area known for sex work, their clothing, and motioning in a flirtatious manner to vehicles. (*Id.* at p. 14.) Other stated reasons for establishing probable cause for the arrest include possession of a cellphone, possession of cash, reacting to presence of police, giving conflicting information about activities, among many other stated reasons. (*Ibid.*)

(Sen. Comm. on Pub. Safety, Analysis of Sen. Bill No. 357 (2021-2022 Reg. Sess.) as amended Apr. 13, 2021, p. 5.)

This bill specifies that a prior conviction for former Penal Code section 653.22 is presumed legally invalid because the conviction was sought, obtained, or imposed for specified unlawful reasons.

3. Former Penal Code Section 647f

In the 1980's several laws were passed in California that criminalized behaviors of people living with HIV or added penalties to existing crimes for those with HIV. These laws were based on fear and the limited medical science of the time. In 1988, when most of these laws were passed, there were no effective treatments for HIV and discrimination towards people living with HIV was extremely high. One of these laws, former Penal Code section 647f, punished the crime of prostitution or solicitation as a felony if the person was previously convicted of the same offense and was tested for HIV/AIDS with a positive result and the person knew of the result.

SB 239 (Wiener), Chapter 537, Statutes of 2017, reformed four HIV-specific criminal offenses including the repeal Penal Code section 647f, which was the most commonly enforced of the HIV-related laws. According to this Committee's analysis of SB 239:

A 2015 report conducted by the Williams Institute of the University of California, Los Angeles, reviewed data on all law enforcement contacts for these HIV-related offenses and the general statute that criminalizes willful exposure to any communicable disease if it could be determined that the arrest was HIV related,

from 1988 to 2014 in California. Of these crimes, the prostitution or solicitation offense was by far the most common reason for law enforcement contact making up about 94% of all of the contacts, or 1,113 people. The next most common offense was committing specified sex crimes which made up about 2% of all of the contacts, or 35 people. (Hasenbush, et al, *HIV Criminalization in California*, Williams Institute, UCLA School of Law (Dec. 2015) at 15.)

The report also looked at the demographics of the individuals who came in contact with the criminal justice system and found patterns that indicate that certain groups have been disproportionately affected by these laws. Black women, while only making up 4% of the population of people diagnosed with HIV in California, made up 21% of the population of people who had contact with the criminal justice system related to their HIV status. White women, while only making up 3% of the population of people diagnosed with HIV in California, made up 15% of the population of people who had contact with the criminal justice system related to their HIV status. By comparison, white men make up 40% of the population of people in California diagnosed with HIV, but only 16% of those who had contact with the criminal justice system related to their HIV status. (*Id.* at 17.)

(Sen. Comm. on Pub. Safety, Analysis of Sen. Bill No. 239 (2017-2018 Reg. Sess.) as amended Mar. 27, 2017, p. 6.)

This bill specifies that a prior conviction for former Penal Code section 647f is presumed legally invalid because the conviction was sought, obtained, or imposed for specified unlawful reasons.

4. Impact on Immigration

A criminal conviction vacated for stated rehabilitative purposes or the stated purpose to avoid immigration consequences remains a conviction for immigration purposes. In contrast, a conviction vacated on some grounds as legally invalid is eliminated as a source of adverse immigration consequences. (See *Matter of Pickering* (BIA 2003) 23 I&N Dec. 621, 622-623, reversed on other grounds in *Pickering v. Gonzales* (6th Cir. 2006) 454 F.3d 525; see also *Pinho v. Gonzales* (3d Cir. 2005) 432 F.3d 193, 195; *Nath v. Gonzales* (9th Cir. 2006) 467 F.3d 1185, 1189.)

When SB 357 (Wiener) of 2022 repealed the crime of loitering with the intent to commit prostitution, it also added a statute providing a procedure to obtain post-conviction relief. (Pen. Code, § 653.29.) That provision already specified that former convictions for loitering with intent to commit prostitution were “legally invalid.” (See Pen. Code, § 653.29, subds. (a)(2) & (b)(1).)

Similarly, when SB 239 (Wiener) of 2017 repealed the crime of prostitution or solicitation with a prior by a person who is HIV/AIDS positive, it added a post-conviction relief statute declaring these convictions “invalid and vacated.” (See Pen. Code, § 1170.21.)

This bill amends the existing sections of law that allow post-conviction relief for persons whose sentence included a conviction for one of the repealed laws by declaring that the prior convictions are presumed legally invalid because the conviction was sought, obtained, or

imposed in violation of the Racial Justice Act; on a defendant who was acting under duress; or prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. The proponents of the bill state that this change is necessary because SB 239 and SB 357 did not include specific language needed to help persons whose prior convictions can be used against them for immigration purposes.

For immigration purposes, a vacated conviction must have been legally or procedurally defective at the time it was entered in order to no longer be used as a "conviction" against an individual. If the court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the criminal conviction remains for immigration purposes.

This bill specifies some of the reasons these prior convictions may be found legally invalid including statistics on arbitrary and discriminatory enforcement of these crimes as well as referencing the recent enactment of reforms to remove racial bias in the criminal justice system. The purpose of this language is to provide immigration practitioners with statutory authority, albeit not binding on federal immigration courts, that could be used to support an argument that there was a defect in the criminal proceedings that resulted in the underlying conviction for these crimes.

5. Argument in Support

According to Ella Baker Center for Human Rights:

AB 1726 is a technical fix to last year's SB 357 and 2017's SB 239 to ensure that the record clearing provisions enacted by SB 357 and SB 239 also work for purposes of immigration relief. AB 1726 ensures that vulnerable immigrant populations can benefit from the reforms that resulted from repealing Penal Code sections 647f and 653.22. Many sex workers, particularly in California, are subject to brutal immigration enforcement and deportation for even minor criminal infractions.

The broad subjective nature of section California Penal Code § 653.22 created opportunities for law enforcement to engage in discriminatory policing that targeted Black and Brown women and members of the transgender community. Penal Code Section 647f was based on fear and limited medical science at the time and penalized sex workers who were living with HIV. SB 357 and SB 239 were attempts to solve these problems and created a process to clear the records for persons convicted of violating these penal code sections. However, the prior bills did not include the specific language needed to help persons who need to have a prior conviction cleared for immigration purposes despite the intention of both bills to provide relief for immigrants. For immigration purposes, a conviction must have been legally or procedurally defective at the time it was entered. AB 1726 simply adds language that would clarify that convictions for Penal Code sections 653.22 and 647f and were invalid from the beginning, thereby ensuring SB 357 and SB 239 protect all the Californians they were meant to protect.