



NEW OPTIONS FOR SURVIVORS OF TRAFFICKING AND DOMESTIC VIOLENCE

Vacatur and Criminal Defenses for Survivors of Trafficking and Intimate Partner or Sexual Violence

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I. Overview of the California Statutes that Protect Survivors of Trafficking, Intimate Partner Violence, or Sexual Violence in Criminal and Immigration Court

Across California and the nation, survivors of human trafficking and domestic or sexual violence are denied their livelihoods because of criminal records resulting from their exploitation.² For noncitizen survivors, any criminal conviction brings the additional risk of severe immigration consequences such as detention, deportation, and permanent separation from their families. California has enacted laws that provide a criminal defense to a current charge, and a way to vacate (eliminate) a past conviction, for survivors of human trafficking or of “intimate partner violence or sexual violence” who were coerced to commit an offense, as well as bases to mitigate the sentence.

California Penal Code § [236.23](#) (2017, amended 2022) and § [236.24](#) (2022) provide a complete defense to a criminal charge for defendants who were coerced into committing the offense as a result of being victims of human trafficking or of intimate partner or sexual violence, and who feared harm.

California Penal Code §§ [236.14](#) (2017) and [236.15](#) (2022) provide post-conviction relief vehicles, in the form of vacatur, for both groups of victims. These vacatur can help our non-citizen clients in immigration proceedings by eliminating convictions that cause adverse immigration consequences. Effective January 1, 2023, AB 2169 amends §§ 236.14 and 236.15 to articulate a ground of legal invalidity, which is that the victims lacked the necessary mental state to commit the offense. In cases before January 1, 2023 there has been the risk that immigration authorities would refuse to give effect to these vacatur on the grounds that the statutes does not require a legal error. See advice for pre-2023 cases in **Part III.C**, below.

California Penal Code §§ [1016.7 and 1170\(b\)\(6\)](#) (2022) can provide for mitigation of sentence where this kind of victimization was a “contributing factor” in the commission of the offense.

This advisory provides guidance to attorneys on how to use Penal Code §§ 236.23 and 236.24 to defend noncitizen clients facing criminal charges, §§ 1016.7 and 1170(b)(6) to mitigate sentences, and §§ 236.14 and 236.15 to vacate prior convictions in a way that is effective for immigration purposes.

²See Polaris, *The Importance of Criminal Records Relief for Human Trafficking Survivors*, (2019); <https://polarisproject.org/blog/2019/03/the-importance-of-criminal-record-relief-for-human-trafficking-survivors/>.

A. Overview of CA Penal Code §§ 236.23, 236.24 (Defense to a Criminal Charge) and §§ 236.14, 236.15 (Vacatur of a Conviction)

Defense to a criminal charge. Effective January 1, 2017, Penal Code § 236.23 provides an affirmative defense to a criminal charge if the defendant “was coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and had a reasonable fear of harm.”³ Experts note that this statute recognizes the dual victimization of human trafficking survivors and creates a defense for those who were “forced to commit crimes under threat from their traffickers.”⁴ As of January 1, 2022, the defense is available for a greater number of criminal charges than before, but it still cannot be used with a charge of committing a “violent felony” as defined at Penal Code § 667.5(c). See **Part II.B**, below.

Effective January 1, 2022, Penal Code § 236.24 provides an affirmative defense to a criminal charge for victims of “intimate partner violence or sexual violence,” under the same terms set out in § 236.23.⁵

Post-Conviction Relief. Effective January 1, 2017, Penal Code § 236.14 provides a post-conviction relief vehicle for survivors of human trafficking, which allows a court to vacate a prior arrest, conviction, or juvenile adjudication for “any nonviolent offense,” meaning any offense that is not a “violent felony” as defined at Penal Code § 667.5(c).⁶ Effective January 1, 2022, Penal Code 236.15 provides similar relief for some survivors of intimate partner or sexual violence. The court must find that the person committed the offense while they were a victim of human trafficking or intimate partner/sexual violence and as a direct result of the victimization, that the person is distancing themselves from the trafficking scheme or the perpetrator.

Effective January 1, 2023, the statutes require the petitioner to establish that the conviction was a direct result of the victimization, “which demonstrates that the person lacked the requisite intent to commit the offense. Upon this showing, the court shall find that the person lacked the requisite intent to commit the offense and shall therefore vacate the conviction as invalid due to legal defect at the time of the arrest or conviction.”⁷ By identifying the legal defect, this language further ensures that the vacatur will be given immigration effect. For cases handled before 2023, consider taking additional steps to make clear that the vacatur is based on legal defect. See **Part II.C**, below.

³ See [AB 1761](#) (California 2015-2016 session), creating Penal Code § 236.23.

⁴ See Isabella Blizard, *Chapter 636: Catching Those Who Fall, an Affirmative Defense for Human Trafficking Victims*, 48 U. Pac. L. Rev 631, 635 (2017).

⁵ See [AB 124](#) (California 2021-2022 session), creating Penal Code § 236.24.

⁶ “Human trafficking” and Penal Code §§ 236.14(t), 236.15(t).

⁷ See [AB 2169](#), (California 2021-2022 session), amending sections 236.14(a), 236.15(a).

B. Why These Statutes Are Important for our Noncitizen Clients

Strict immigration policies lead to increased trafficking because they push people to take illegal routes to migrate.⁸ These alternate courses intersect with human trafficking operations, as they force migrants to contact brokers or other third parties. For example, in one case of human trafficking in the United States, border smugglers coerced twenty-four Mexican women into sexual exploitation by using threats of violence.⁹ Similarly, many refugees from Central and South America are forced under threat of murder or torture to transport drugs across the U.S.-Mexico border.¹⁰

The affirmative defense and vacatur can assist our non-citizen clients who face draconian immigration consequences based on criminal convictions. For example, prostitution offenses can render a non-citizen inadmissible and barred from eligibility for some immigration relief, while any drug conviction is extremely serious and would render a non-citizen inadmissible, deportable, and barred from most types of immigration relief.¹¹ Minors trafficked by Central American gangs are often denied relief from deportation because of the negative stigma attached to gangs.¹² However, these youth often are victims of threats and coercion, and may qualify for a defense to a criminal charge or post-conviction relief because they are human trafficking victims.

It is essential that noncitizens who have survived human trafficking, intimate partner violence, or sexual violence be protected from deportation. These survivors already are suffering from severe trauma. Many have family and strong roots only in the United States and, if deported, will be left without social and support networks to rely on. This isolation will further expose them to trafficking and violence, creating a vicious cycle.

⁸ See Jennifer M. Chacon, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, U. OF PENN. L. REV. (2010).

⁹ See Heather Randall, *Human Smuggling, Trafficking, and Immigration Reform: Recommendations for Policy Makers*, HM. TRAFFICKING CTR. BLOG (March 27, 2014).

¹⁰ See *Drug mules: Swallowed by the illicit drug trade*, United Nations Office of Drug and Crime.

¹¹ See removal grounds at 8 USC §§ 1182(a)(2), 1227(a)(2) and see ILRC, § N.17 *Immigration Relief Toolkit* (August 2018) and §N.17A *Chart on Immigration Relief* (December 2021), both at <https://www.ilrc.org/chart>.

¹² See Anti-Trafficking Review, “*Ganged Up On: How the US immigration system penalizes and fails to protect Central American minors who are trafficked for criminal activity by gangs*”, No. 16 (2021), <https://www.antitraffickingreview.org/index.php/atrjournal>.

C. What Is a “Conviction” for Immigration Purposes?

Immigration law employs its own definition of when a conviction has occurred in state criminal court, and what is required to eliminate a conviction for immigration purposes. This definition applies regardless of what state law provides. For immigration purposes, a conviction occurs:

Where there is “a formal judgment of guilt of the [noncitizen] entered by a court” or, “if adjudication of guilt has been withheld, where ... a judge or jury has found the [noncitizen] guilty, or the [noncitizen] has entered a plea of guilty or nolo contendere, or has admitted sufficient facts to warrant a finding of guilt, and ... the judge has ordered some form of punishment, penalty, or restraint on the [noncitizen’s] liberty to be imposed.”¹³

The Board of Immigration Appeals (BIA) has held that a guilty plea or finding of guilt, plus any imposition of probation, fine, or jail will equal a conviction for immigration purposes.¹⁴ This means that if the person pled guilty, it is very likely that they have a conviction for immigration purposes. In limited cases, advocates have succeeded in arguing that the criminal court imposed absolutely no punishment, penalty, or restraint of liberty and therefore there was no conviction despite a guilty plea – but this is a difficult argument that will be hard-fought.¹⁵

In general, a conviction is not eliminated for immigration purposes by mere “rehabilitative relief” – meaning, where a state permits withdrawal of a plea or dismissal of charges because the defendant completed probation or for humanitarian reasons, rather than because of legal error in the original proceeding.¹⁶ The trafficking and domestic violence vacatur provisions were amended effective January 1, 2023 to clarify that the relief was based on error. See **Part III** below.

In addition, the following dispositions are not convictions for immigration purposes: a juvenile delinquency disposition, “pretrial” diversion (where the person pleads “not guilty” before being diverted), and (probably) a conviction on direct appeal of right on the merits. See practice advisories for further discussion of the immigration effect of California dispositions.¹⁷

¹³ INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

¹⁴ *Matter of Cabrera*, 24 I&N Dec. 459, 460–62 (BIA 2008), *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017).

¹⁵ *But see Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010) (California DEJ was not a conviction because an unconditionally suspended fine is not “punishment”; the court implicitly found that a requirement to attend drug education classes is not a punishment or penalty). *But see Matter of Mohamed*, *supra*.

¹⁶ See *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), *rev’d on other grounds*, *Pickering v. Gonzalez*, 465 F.3d 263 (6th Cir. 2006), *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001).

¹⁷ See, e.g., ILRC, *Overview: California Post-Conviction Relief for Immigrants* (July 2022), including discussion of California pre-trial diversion statutes, <https://www.ilrc.org/overview-california-post-conviction-relief-immigrants> and ILRC, *§N.2 Definition of Conviction* (2019), <https://www.ilrc.org/chart>.

D. Sentencing Relief: Penal Code §§ 1016.7, 1170(b)(6), 1172.1(a)(4)

Effective January 1, 2022, California law provides that certain factors, including some related to being a victim of trafficking or intimate partner violence, support mitigation of a sentence.¹⁸

- Under Penal Code § [1016.7](#), prosecutors in plea negotiations must consider certain factors as a basis for mitigation of sentence in the interests of justice;
- Under Penal Code § [1170\(b\)\(6\)](#), judges must impose the lower term of a felony sentence if certain factors are present unless this would not be in the interests of justice

Each provision applies “if any of the following were a *contributing factor* in the commission of the alleged offense” (emphasis added):

- (1) the person experienced specified types of trauma;
- (2) the person is or was a youth (under age 26) when they committed the offense: or
- “(3) Prior to the instant offense, or during the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.”

Practice Tip: Even if a defendant does not qualify for the complete defense to a charge under the “coercion” standard, they still may qualify for a sentence mitigation under the “contributing factor” standard at Penal Code §§ 1016.7 or 1170(b)(6). In addition, prosecutors should include these factors in their consideration of immigration consequences as part of a plea negotiation in the interests of justice under Penal Code §§ [1016.2](#), [1016.3\(b\)](#).

Finally, under Penal Code § [1172.1](#), a court at any time may recall and resentence a person convicted of a felony, or vacate the person’s conviction and impose judgment on a lesser offense, on the recommendation of parties such as jail or prison administration, prosecutors, or parole board, or the court may do this *sua sponte* within 120 days of sentencing. In making this decision, the court may consider a range of factors set out in section 1172.1(a)(4), which include that the person was a victim of intimate partner violence or human trafficking.

If, however, the goal is for the resentencing or vacatur to have effect in immigration proceedings, section 1172.1 may not be the best vehicle. Generally the court’s order must be based on a legal defect in the original proceeding in order to have immigration effect. See Part III, below, and consult with an expert. See also other California post-conviction relief options.¹⁹

¹⁸ See [AB 124](#) (California 2021-2022 session).

¹⁹ See, ILRC, *Overview: California Post-Conviction Relief for Immigrants* (July 2022), cited above.

II. Using the Coercion Defense for Noncitizens in Criminal Court

A. Required Elements for the Defense

The Judicial Council of California Jury Instruction (CALCRIM) No. 3414²⁰ sets forth the elements required to establish a defense pursuant to Penal Code §§236.23 and 236.24. The defendant must prove by a preponderance of the evidence that:

1. The defendant acted because of coercion;
2. The coercion was a direct result of being a victim of human trafficking, or intimate partner or sexual violence, at the time the defendant acted; and
3. When the defendant acted, they had a reasonable fear of harm.

To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. A victim of human trafficking is defined as a victim of an offense defined at Penal Code § [236.1\(a\)-\(c\)](#).

B. Criminal Charges Covered by the Defense

The coercion defense for these victims is available for a wide range of criminal charges, which was further expanded in 2022. From 2017 through 2021, the human trafficking victim defense, Penal Code § 236.23, was potentially available for any charge other than human trafficking offenses or “serious” or “violent” felonies. Effective January 1, 2022, the defense *is* available for charges of “serious” felonies (defined in Penal Code § 1192.7(c)) or human trafficking offenses, but still is not available for charges of “violent” felonies (as defined in Penal Code § 667.5(c)).²¹

Effective January 1, 2022, coercion was made a permissible defense for victims of intimate partner violence or sexual violence, under Penal Code § 236.24. Like the human trafficking victim defense, it is available for all charges other than “violent” felonies.

C. Using Experts to Assert the Defense

1. Mental Health Experts Can Obtain Client’s History and Conduct a Mental Health Evaluation

Many survivors of human trafficking or of intimate partner or sexual violence are not willing to share their full story of trauma with their attorneys. They may fear their abusers will harm them

²⁰ See CALCRIM No. 3114 for further instructions on the defense including of definitions of depriving or violating a person’s liberty, forced labor, duress, violence, menace, coercion.

²¹ See AB [124](#), part (1), Cal. 2021-2022 Regular Session, and see Penal Code §§ 236.23(a), 236.24(a).

or their family members if they “snitch” or share their stories, or they may want to avoid the pain of remembering the experiences.

For this reason, it may be important to hire a psychologist who has experience and training to work with survivors of domestic violence and/or trafficking survivors. The psychologist can earn the client’s trust to obtain their story, conduct a mental health evaluation for post-traumatic stress disorder, depression, anxiety, or low cognitive functioning. For survivors of intimate partner violence, hire an expert who can discuss battered women’s syndrome (BWS). BWS has been identified as a subcategory of post-traumatic stress disorder (PTSD). Although not all battered women meet all the DSM-IV-TR criteria for PTSD, a large number do. The evaluation is necessary to explain why the individual was coerced into committing the crime.

2. For Trafficking Survivors, Obtain Country Conditions Information and Find an Expert

For survivors of human trafficking, try to obtain evidence about the country of origin, the trip across the border, or wherever the victimization occurred. Country conditions information can be used to show support for your client’s narrative of what happened. For example, it can show that gangs or criminal enterprises have extensive power in the area, or that people are widely kidnapped and coerced as the client was. A Google search may reveal articles from that country or elsewhere describing what is happening. The U.S. Department of State *Country Reports on Human Rights Practices*, available online,²² may have useful information which may carry more weight for judges, because it comes from a government source.

An expert familiar with the country conditions of your client’s country of origin can be invaluable to make this proof. This expert can explain why and how someone is trafficked into the United States. University of California Hastings School of Law, Center for Refugee and Studies is a good starting point to find experts or information.²³ Immigration attorneys or nonprofits who handle applications for asylum or “T visas” (for human trafficking survivors) also may be sources of information about written materials and possible experts.

Even if you do not proceed to trial, with this information you will have the mitigating circumstances necessary to negotiate a favorable immigration neutral offense for your client that will not render them inadmissible or deportable.

²² Published annually and available at <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/>.

²³ See UC Hastings Center for Refugee and Studies at https://cgrs.uchastings.edu/sites/default/files/CGRS-CA_Country%20Conditions%20Pro%20Se%20Manual_June%202020.pdf

3. Seek Corroborating Evidence for Survivors of Intimate Partner or Sexual Violence

If possible, do not rely solely on the survivor's statement. As discussed in Part 1, above, a mental health evaluation is critical. In addition, § 236.24(c) provides that government documents of all kinds can be submitted to show this status, from police records to immigration documents pertaining to the victimization. Declarations from friends, family, employers, or clergy, or medical records also may be useful.

III. Vacating a Conviction for Immigration Purposes

A. Vacatur for Immigration Purposes Must Meet the *Pickering* Standard

In *Matter of Pickering*, the Board of Immigration Appeals (BIA) held that a “conviction vacated because of a procedural or substantive defect is not considered a conviction for immigration purposes and cannot serve as the basis for removability.”²⁴ In contrast, if a court vacates a noncitizen's conviction for reasons *solely* related to rehabilitation, humanitarian factors, or to avoid adverse immigration hardships, rather than based on a defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.²⁵

Therefore, for all vacatur that will be used in immigration proceedings, it is critical to make clear in moving papers and the judge's order that the vacatur is “based on the legal merits of the underlying proceedings” that resulted in the judgment of guilt.²⁶

B. Basic Requirements for Vacatur for Victims of Human Trafficking or of Intimate Partner or Sexual Violence

Under Penal Code § [236.14](#) (2017, amended 2022, 2023) and § [236.15](#) (2022, amended 2023), a court can vacate a qualifying conviction or arrest of a victim of human trafficking (section 236.14) or of intimate partner violence or sexual violence (section 236.15). A victim of human trafficking is a victim of an offense defined at Penal Code § [236.1\(a\)-\(c\)](#).²⁷

²⁴ *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), *rev'd on other grounds, Pickering v. Gonzalez*, 465 F.3d 263 (6th Cir. 2006) and see, e.g., *Nath v. Gonzalez*, 467 F.3d 1185, 1189 (9th Cir. 2006).

²⁵ *Matter of Pickering*, 23 I&N at 624.

²⁶ *Id.* at 625. See also discussion at ILRC, *Overview: California Post-Conviction Relief for Immigrants* (July 2022), cited above.

²⁷ See Penal Code § 236.14(t)(3).

These vacatur can help our noncitizen clients in immigration proceedings by eliminating erroneous convictions that cause adverse immigration consequences. As of January 1, 2023, sections 236.14(a) and 236.15(a) are amended to add a requirement of an explicit finding of a legal defect in the underlying proceeding. This should ensure that the vacatur are given effect in immigration proceedings. See discussion regarding the 2023 amendment and how to handle pre-2023 vacatur cases, in **Parts C, D**, below

The requirements discussed here in **Part B** apply to section 236.14 and 236.15 vacatur regardless of when they are obtained, i.e., whether before or after January 1, 2023.

1. Penal Code §§ 236.14 and 236.15

Section [236.14](#) provides a post-conviction relief vehicle that allows a court to vacate a prior arrest, conviction, or juvenile adjudication for “any nonviolent offense” if the crime was committed while the person was a victim of human trafficking and the person makes certain showings. Section [236.15](#) provides a vacatur under the same terms to victims of intimate partner or sexual violence. See **subpart 2**, below, regarding “nonviolent offense.”

Sections 236.14 and 236.15 permit a court to vacate a conviction if, after “considering the totality of the evidence presented,” the court finds that the petitioner established by clear and convincing evidence:

- 1) That the petitioner was a victim of [human trafficking or intimate partner/sexual violence] at the time the nonviolent crime was committed;
- 2) That the commission of the crime was a direct result of being a victim of [human trafficking or intimate partner/sexual violence];
- 3) That the victim is engaged in a good faith effort to distance themselves from the [human trafficking schemes or perpetrator of the harm]; and
- 4) That the vacatur is in the best interest of justice.

Effective January 1, 2023, sections 236.14(a) and 236.15(a) are amended to state:

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 which demonstrates that the person lacked the requisite intent to commit the offense. Upon this showing, the court shall find that the person lacked the requisite intent to commit the offense and shall therefore vacate the conviction as invalid due to legal defect at the time of the arrest or conviction.”

This statement makes clear that the vacatur is based on legal invalidity, which in turn makes clear that the vacatur has effect in immigration proceedings. See further discussion of the amendment at Part C, and see options for bringing these vacaturs before this language takes effect on January 1, 2023.

Sections 236.14 and 236.15 also set out rules regarding procedure, evidence, juvenile adjudications, notifications, and other matters.

2. California Offenses That Can Be Vacated

The vacatur is potentially available to eliminate convictions of a wide range of offenses, defined as any “nonviolent” offenses.

Here, “nonviolent” is a term of art that refers to any offense not listed as a “violent felony” in Penal Code § [667.5\(c\)](#). Section 667.5(c) lists very serious offenses including murder, rape, kidnapping, and armed robbery; convictions of these offenses cannot be vacated under sections 236.14, 236.15. But section 667.5(c) does not include all types of assault or other misdemeanors or felonies committed against a person, and these can be vacated. Seek expert advice if you are not sure whether your client’s offense is a “violent felony” under Penal Code § 667.5(c).

C. Effective January 1, 2023, these Vacatur Statutes Require a Finding of Error in the Underlying Proceeding and Should Have Immigration Effect

As we have discussed, to ensure that a vacatur will be given effect in immigration proceedings it is critical to make clear that the vacatur is “based on a defect in the conviction or in the proceedings underlying the conviction,” as opposed to rehabilitative or humanitarian factors.²⁸ Up until January 1, 2023, Penal Code §§ 236.14 and 236.15 have not explicitly identified or required a legal error. In some cases this has resulted in immigration judges or officials declining to give effect to the vacatur, on the grounds that it is merely humanitarian relief.

These statutes were amended to make it clear that the vacatur is based on legal defect. Effective January 1, 2023, subpart (a) of sections 236.14 and 236.15 provides in part that the petitioner shall establish that the arrest or conviction was the direct result of being a victim of human trafficking, or of intimate partner or sexual violence, “which demonstrates that the person lacked the requisite intent to commit the offense. Upon this showing, the court shall find

²⁸ *Matter of Pickering*, 23 I&N Dec. at 625. See also ILRC, *Overview: California Post-Conviction Relief for Immigrants* (July 2022), cited above.

that the person lacked the requisite intent to commit the offense and shall therefore vacate the conviction as invalid due to legal defect at the time of the arrest or conviction.”²⁹

The language in quotations, in effect as of 2023, establishes that the basis for the vacatur was that a substantive error in the original proceedings made the conviction legally invalid. Therefore, the vacatur should be given effect in immigration proceedings.

For cases handled before 2023, consider taking additional steps to make clear that the vacatur is based on legal defect. See **Part D**, below.

D. Options for Vacaturs from Before January 1, 2023

This section is for advocates who must bring vacaturs under these sections before the new statutory language identifying a legal error as the basis for the vacatur takes effect in 2023.³⁰

1. Pre-2023 Option: File a Penal Code § 1473.7 Motion

Before 2023, advocates using these vacaturs must take care to clearly identify a legal defect as the basis. Submit a carefully drafted motion and a proposed judge’s order describing the error in the underlying proceeding, to better ensure that the vacatur will be given immigration effect. Immigration courts must first look to the order itself to determine whether a vacatur was based on rehabilitative reasons versus error.³¹ If the original order explains the court’s reasons for vacating the conviction, the agency’s inquiry must end, but if does not, then the court may look to the record.³²

The discussion in the motion and language of the proposed order should identify the legal defect. Be clear in the order that the court has found that the petitioner was acting under coercion and therefore lacked the requisite intent to commit the offense.

Example: Margo is facing removal proceedings and must vacate her conviction before December 5, 2022. She is still on probation for her offense, and so cannot apply for a vacatur under Penal Code § 1473.7 (see next section). She can move to vacate the conviction under §§ 236.14 or 236.15. Along with alleging that she meets the requirements as stated in the statute, she should ask the judge to find that the conviction was legally invalid due to a Fifth or Sixth Amendment error.

²⁹ Language in quotation added by [AB 2169](#) (California 2021-2022 session), effective January 1, 2023.

³⁰ See discussion of AB 2169 amendments to PC §§ 236.14(a), 236.15(a), discussed in Part C.

³¹ *Id.* at 213.

³² See *id.* at 214-15.

For example, she could argue that due to the trauma she did not have the requisite intent to commit the offense, or that her plea was not made knowingly and intelligently because her attorney did not explain the immigration consequences of the plea, and/or she did not understand the consequences due to her undiagnosed trauma. If the judge's order is specific, this should work in immigration proceedings.

2. Pre-2023 Option: File a Penal Code § 1473.7 Motion

Consider bringing a vacatur based on two grounds: Penal Code §§ 236.14/.15 and Penal Code § [1473.7](#). Section 1473.7 is available if the person is no longer on probation or parole. If the person currently is on probation, consider moving to terminate probation early pursuant to Penal Code § 1203.3. Section 1473.7(a)(1) is a vacatur of a conviction or sentence that is legally invalid due to prejudicial error that affected the noncitizen defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of the conviction or sentence. Sections 1473.7(a)(2) and (3) provide alternative bases for vacatur, based on actual innocence or racial bias.³³

The § 1473.7 vacatur will protect against ICE arguments that a § 236.14/.15 vacatur is merely a rehabilitative statute and not valid for immigration purposes. Note that it is possible that DHS will argue (wrongly) that § 1473.7 does not qualify as a vacatur based on legal error. However, the effectiveness of § 1473.7 has been upheld by immigration judges (IJ) and by the BIA, in multiple unpublished opinions.³⁴

Clearly state the legal error, to give the client the best chance possible in immigration proceedings. Examples of legal error can be: 1) Innocence because the person lacked the required mental state since they suffered from PTSD and were acting under coercion; 2) The attorney failed to explain the possible defense and therefore, it was not a knowing and voluntary plea; or 3) The attorney failed to conduct a psychological report that revealed the person was acting under coercion.

³³ See ILRC's practice advisory, Overview of California Post-Conviction Relief Vehicles; https://www.ilrc.org/sites/default/files/resources/ca_pcr_july_2022.pdf

³⁴ See, ILRC, Case Chart – BIA Cases Citing to 1473.7 (2022), https://www.ilrc.org/sites/default/files/resources/bia_1473.7_case_chart_.pdf

IV. Last Step: Referral for Immigration Relief

If your client does not already have lawful immigration status, it is possible that they can obtain it because they were a survivor of human trafficking or violent crime – or on some other basis that you have not identified. Be sure to refer your client to an immigration nonprofit or pro bono attorney, to see what is possible. A finding that a criminal court determined that the person qualified for relief as a victim can support the immigration case -- just as a prior finding in immigration proceedings that the person is entitled to immigration benefits based on the victimization can help in criminal cases.

Basic information about different forms of immigration relief is available online,³⁵ but the main thing a criminal or post-conviction relief practitioner should know is that there may be possibilities and that the person should consult with an expert. As a few examples, the person might be eligible to apply for a T nonimmigrants status (“T” visa) as a victim of trafficking,³⁶ a U nonimmigrant status (“U” visa) as a victim of a violent crime,³⁷ or Violence Against Women Act (VAWA) relief as a victim of domestic abuse by a permanent resident or U.S. citizen spouse or parent, or parent, or U.S. citizen adult child.³⁸ The information also could contribute to an asylum or withholding claim. A noncitizen who was primarily the victim in a domestic relationship, but who was convicted of a deportable “crime of domestic violence,” may be able to apply for a discretionary waiver of the deportation ground and for a waiver that allows them to apply for non-LPR cancellation despite the conviction. See 8 USC §§ 1227(a)(7), 1229b(b)(5), to waive deportability under § 1227(a)(2)(E)(i).

³⁵ See, e.g., materials at <https://www.ilrc.org/u-visa-t-visa-vawa> and see discussion of each form of relief, and statutory and regulatory citations, in ILRC, *Immigration Relief Toolkit* (August 2018) at https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf and ILRC, *Immigration Relief Chart* (Nov. 2021) at https://www.ilrc.org/sites/default/files/resources/relief_chart_nov_2021_0.pdf

³⁶ The “T” visa can provide temporary and permanent lawful status to survivors of “a severe form of alien trafficking.” The person must be in the United States or at a port of entry because of the trafficking, and must show they would suffer “extreme hardship involving unusual and severe harm” if removed from the United States. The applicant can be recruited *after* entering the country; the trafficking need not be the reason they initially came to the United States. An applicant who is 18 years old or older must also show compliance with any reasonable law enforcement agency request for assistance in the investigation or prosecution of acts of trafficking. In some cases, close relatives can benefit as derivative beneficiaries. See 8 USC § 1101(a)(15)(T), and 8 CFR §§ 212.16, 214.11, and 245.23.

³⁷ The “U” visa can provide temporary and permanent lawful status to survivors of certain crimes who are or were willing to cooperate in investigation or prosecution of the offense. The “U” visa has a several-year waiting list, but in 2021 USCIS began a “bona fide determination” system that brings faster benefits to some applicants. In some cases, close relatives can benefit as derivative beneficiaries. See INA §§ 101(a)(15)(U), 245(m); 8 USC §§ 1101(a)(15)(U), 1255(m); 8 CFR §§ 212.17, 214.14, and 245.24.

³⁸ The person may be able to gain permanent lawful status as a VAWA self-petitioner (see 8 CFR 208.2) or through VAWA cancellation of removal (see 8 USC § 1229b(b)(2)). In some cases, close relatives can benefit as derivative beneficiaries. A broader definition of “marriage” applies in VAWA. Recall that in contrast to the T and U visa, for VAWA the perpetrator must be a United States citizen or lawful permanent resident.

Online resources can help you to find a nonprofit immigration agency for your client. The *Immigration Legal Services Directory* can direct you to nonprofits that serve clients from your county. Go to <https://www.immigrationadvocates.org/nonprofit/legaldirectory/search?state=CA> for California agencies. Scroll to “Refine Search” at the bottom of the page, where you can select “Counties Served.” You also can select filters such as “Areas of Immigration Legal Assistance” that can narrow the search to agencies who specialize in certain types of cases, e.g., T or U visas, asylum, or VAWA. Remember that as a traumatized person, your client may need a “warm” handoff to the agency. If someone at your office can call to arrange an appointment, with the name of a particular person, it may help your client make it to the meeting.

V. Conclusion

Nationwide, noncitizen survivors of human trafficking and intimate partner and sexual violence are coerced into committing criminal offenses that have devastating immigration consequences. Attorneys must utilize these relatively newly enacted statutes as additional tools to defend their noncitizen clients facing criminal charges and deportation.



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC’s mission is to protect and defend the fundamental rights of immigrant families and communities.