

# Legal Relief

## For Human Trafficking Survivors

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1

## Learning Objectives

- At the end of this workshop, participants will be able to:
  - **Identify** legal protections for/rights of human trafficking survivors in a criminal prosecution
  - **Describe** how being a survivor of human trafficking can be a defense to a new criminal charge;
  - **Explain** how being a survivor of human trafficking can be a factor in reducing a criminal sentence
  - **Demonstrate** how survivors of human trafficking can clear their arrest and conviction records;
  - **Collaborate** with more local Human Trafficking Stakeholders

2

## There *is* relief at both entry points to California's Criminal Justice System

- For HT Survivors who enter as crime victims and/or witnesses
- For HT Survivors who enter because they were arrested, charged with or convicted of a crime

3

## Relief for HT Survivors who are Crime Victims and Witnesses

*Confidentiality, protective orders, courtroom support/Marsy's Law, restitution, compensation for lost income*

4

## California's Sex & Labor Trafficking Law

Pen. Code 236.1(a) and 236.1(b)

- Depriving a person of or violating their personal liberty
- With the intent to:
  - Start or continue one or more of the listed sex crimes (sex trafficking)
  - To obtain forced labor or services (labor trafficking)

5

## California's Commercial Sexual Exploitation of Children (CSEC) Law

Pen. Code 236.1(c)

- Causing, inducing, persuading or attempting to cause, induce or persuade a minor to engage in commercial sex
- With the intent to:
  - Start or continue one or more of the listed sex crimes (Pimping, pandering, procuring, producing/distributing child pornography, etc.)
- Liberty deprivation not required but adds a substantial penalty enhancement if it is "involved"

6

## Criminal charges are filed and maintained only if supported by evidence

- DA can't file criminal charges or permit such charges to remain pending in the absence of sufficient admissible evidence *to support a conviction*.
  - CA Bus. & Prof. Code Sec. 6068(c); American Bar Assoc. Criminal Justice Standards, Standard 3-3.9(a).
- Filing can be reconsidered during the statute of limitations
- Victims don't "press" or "drop" charges
- Witness attendance is court-ordered (subpoena)

7

## If CA criminal charges are filed - Know your Client's Rights

### **Marsy's Law (CA Const. Ar. 1, Sec. 28)**

- "Victim" – CA Const. Ar. 28(e)
  - Person who suffers direct or threatened harm as a result of crime
- Enforcement - CA Const. Ar. 28(c)
  - By victim directly
  - By DA if victim asks us to
  - By victim's private attorney
- Court must act promptly on any victim request for enforcement of Marsy's law rights
- DA's take these seriously and so do our Victim-Witness Advocates!!!
- CA Attorney General Website: [https://oag.ca.gov/victimservices/marsys\\_law](https://oag.ca.gov/victimservices/marsys_law)

8



## HT Victim Rights: Caseworker Communications Are Protected by Privilege

- Trafficking victims have a privilege to refuse to disclose and prevent others from disclosing confidential communications with their human trafficking caseworkers without a court order
  - CA Evid. Code Sec. 1038-1038.2
- Can be *waived* by disclosure or consent

9

## HT Victims Rights: Confidentiality

- ON REQUEST, names, images and addresses can be withheld from public records (police report) until completion of investigation and any subsequent prosecution
  - Pen. Code Sec. 293(e); Gov. Code Sections 6254(f)(2)(b), 6254(f)(3), 7923.615(c)
- ON REQUEST, Court can order identity of victim in all records and during all proceedings to be John Doe/Jane Doe
  - Pen. Code Sec. 293.5

10

## HT Victim Protection: From the Courts

- Protective Orders
  - DV EPO (CA Pen. Code Sec. 646.91)
  - Civil TRO / Order after Hearing (CA Civ. Code Sec. 527.6)
  - CPO (Pen. Code Sec. 136.2)
    - Prosecution Order
    - Post-Conviction Order up to 10 years
- Violation is a crime: Contempt of Court
  - Arrest, charging & conviction
- Firearms are Prohibited
  - Prohibited person possessing a gun or ammunition is guilty of a felony (CA Pen. Code Sec. 29825)

11

## HT Victim Protection: As Witnesses

- Court must protect all witnesses from undue harassment or embarrassment
  - Pen. Code Sec. 765(a)
- Witnesses under 14 get “special care” in court to protect from undue harassment or embarrassment
  - Pen. Code Sec. 765(b):
- Nonthreatening Court environment for witnesses under age 16
  - Pen. Code Sec. 868.6
- Two support persons of victim’s own choosing
  - Pen. Code Sec. 868.5

12

## HT Victims Protections: As Witnesses

Evid. Code Sec. 1108

- Defendant's character can be used to support the victim's testimony – proof that defendant is the kind of person who would commit this crime
  - In cases charging sex crimes
  - Defendant's commission of other relevant HT and/or sex crimes is admissible evidence
  - To show their propensity to commit the charged offense

13

## HT Victim Protections: As Witnesses

Evid. Code Sec. 1107.5

- No victim blaming or shaming allowed!
  - Expert witnesses can explain the effects of trafficking on victims
    - Nature and effect of physical, emotional and mental abuse
    - On a victim's beliefs, perceptions and behaviors
- Applies to both defense and prosecution

14

## HT Victims Protections: As Witnesses

### Evid. Code Sec. 1161(b)

- No victim blaming or shaming allowed!
  - Can't use evidence of a victim's sexual history or history of engaging in commercial sex acts to attack credibility/character
  - Court says "History" means any time before the trial
    - *People v. Calhoun* (2019) 38 Cal.App.5th 275
  - Applies to both defense and prosecution

15

## HT Victim Rights After Conviction: Restitution

- Defendant is court-ordered to pay full restitution for all economic losses suffered as result of crime
  - Lost wages
  - Moving / security expenses
  - Counseling
  - Medical treatment
  - Stolen, damaged property
  - Victim Rights Attorney Costs
- Victim Rights Attorney Can Co-Conduct / Otherwise assist at restitution hearing with the prosecutor

16



## HT Victims Rights: Compensation for Lost Income

- Trafficking victims can apply to CA Victim Compensation Board (VCB) for lost income during the time they were trafficked
  - Up to 40 hours / week using CA minimum wage laws to calculate value of victim's labor
  - As much as \$10,000 per year, for up to two years.
  - VCB holds the funds of minor victims until they are 18
    - <https://victims.ca.gov/victims/issues/humantrafficking/>
    - Gov. Code Sec. 13957, 13957.2, 13957.5

17

## Relief for HT Survivors who are Arrested, Charged or Convicted

*HT as a criminal defense, a sentencing factor, and/or the basis for wiping arrests/convictions off a survivor's record*

18

## HT can be a complete criminal defense

“Coercion” Defense - Pen. Code Sec. 236.23(f)

- If the survivor can prove they were
  - “Coerced” to commit a non-violent offense
    - Pen. Code 667.5(c) defines “violent” offenses
    - As a direct result of being a human trafficking victim at the time of the offense; and
    - Had a reasonable fear of harm
- Survivor is *not guilty*
- CCCDA already considers this in decisions to file criminal charges

19

## Ineligible crimes under 236.23

- **No violent felonies –**
  - Robbery
  - Carjacking
  - Kidnapping
  - “Hot prowl” residential burglary
  - Any crime with a 12022.53 enhancement
  - Witness dissuasion if would violate 186.22
  - Extortion
  - Any crime in which GBI is personally inflicted
  - Any crime with arming enhancements – 12022.3, 12022.5, 12022.55

20

## Affirmative defense

Defendant carries the burden of proof:  
Preponderance



21

## CACLRIM 3414 (Coercion)

1. Defendant was coerced;
2. Coercion was a direct result of being a victim of HT at the time the defendant acted;

AND

3. When defendant acted, he/she/they had a reasonable fear of harm.

22

# 1. Coercion

- a scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;
  - the abuse or threatened abuse of the legal process;
  - debt bondage; OR
  - providing and facilitating the possession of a controlled substance to a person with the intent to impair the person's judgment.
- Penal Code § 236.1(h)(1)

23

## Trafficker does NOT need to directly coerce client's conduct

*In re D.C.* (2021) 60 Cal.App.5th 915

Not required that trafficker directly order/coerce the criminal conduct.

Trafficker does not even need to know that the victim is planning to or has committed the crime

24



## CACLRIM 3414 (Coercion)

1. Defendant was coerced;
2. Coercion was a direct result of being a victim of HT at the time the defendant acted;

AND

3. When defendant acted, he/she/they had a reasonable fear of harm.

25

## 2. HT victim

- Deprivation/violation of personal liberty
- With the intent to
  - Obtain forced labor or services; OR
  - Maintain a violation of Penal Code sections:
    - 266 (enticing a minor into a house of ill-repute)
    - 266h-j (pimping and pandering, transporting minor)
    - 267 (taking a minor from parents/guardian to prostitute)
    - 311.1-6 (child pornography)
    - 518 (extortion)
- Pen. Code §§ 236.1(a), (b)

26

## Liberty deprivation/violation

- Substantial and sustained restriction of liberty;
  - By force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury;
  - Reasonable belief that it is likely that the threat would be carried out.
- Penal Code §236.1(h)(3)

27

## Minor victims of sex trafficking

- Attempt to or actually cause/induce/persuade a minor to engage in a commercial sex act with the intent to commit various other crimes.
- Commercial sex act: sexual conduct in exchange for money or anything of value. (Penal Code § 236.1(h)(2).)
- No liberty deprivation element.

• Penal Code § 236.1(c)

28

## 2. At the time of the crime

- Must establish client was HT victim at the time of the crime.
- Historical abuse is relevant, but not enough.



29

## Proving Status as HT Survivor

- Client's testimony
- Trafficker
- Family/friends/community
- Other HT victims of same trafficker(s)
- Police officers who have contacted:
  - Your client
  - Your client's trafficker
  - Other victims of your client's trafficker
- Police reports and priors – client's, trafficker's
- Expert, e.g., academic, advocate, counselor, social worker

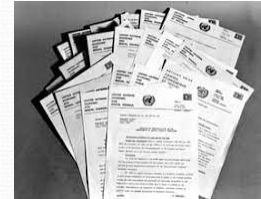


30

## Proving Status as HT Survivor

### Penal Code §236.23(c)

May use certified records from almost any governmental agency, including immigration, which document client's status as a victim of human trafficking at the time of the offense



Penal Code § 236.2 – requires officers to identify HT victims; can use even if no ID made

31

## CACLRIM 3414 (Coercion)

1. Defendant was coerced;
2. Coercion was a **direct result** of being a victim of HT at the time the defendant acted;

AND

3. When defendant acted, he/she/they had a reasonable fear of harm.

32



## Direct Result



- Not defined in statute
- Not defined in CALCRIM 3414
- No case law...yet
- Causation = Substantial factor? (See CACI 430)
- Bottom line: must show the nexus between the HT dynamic and your client's conduct

33

## CALCRIM 3414 (Coercion)

1. Defendant was coerced;
2. Coercion was a direct result of being a victim of HT at the time the defendant acted;

AND

3. When defendant acted, he/she/they had a reasonable fear of harm.

34

## Related defenses

What if you cannot prove your client was a victim of HT at the time of the incident? **Don't give up.**

### Pen. Code § 236.24

- Intimate partner violence; or
- Sexual violence

35

## If you win...

- Case records must be sealed (Pen. Code § 851.86)
  - LE may still use to investigate others, but not client
- Charge deemed not to have occurred
- May say never arrested, charged, or convicted
- May not be denied benefits (housing, employment, welfare, etc.)
- May not be charged/convicted of perjury if deny arrest/charge



• Penal Code § 236.23(e)

36

## HT as mitigation in plea negotiations

Pen. Code Sec. 1016.7

- In all plea negotiations, prosecutor now required to consider among other factors if defendant
  - Experienced psychological, physical or childhood trauma including but limited to abuse, neglect, exploitation or sexual violence
  - Is a youth (25 or under) or was at time of offense
  - Was a victim of **intimate partner violence or human trafficking** prior to or during commission of the offense
- *Marsy's Law* – victims still have right to attend and object

37

## HT can reduce criminal sentences

Pen. Code Sec. 1016.7

Significantly looser standard than affirmative defense under PC 236.23

- Contributing factor vs. direct result
- Prior to or during commission of the offense vs. at the time of the offense

38

## HT at sentencing

Pen. Code Sec. 1170(b)(6)(C)



- Sentencing judge now required to consider HT and IPV factors as mitigation if:

- Contributing factor
- Prior to or during the commission of a charged offense

**Court MUST sentence to low term**

- UNLESS aggravating circumstances outweigh mitigators
- *Marsy's Law* – victims still have right to attend and object

39

## Leaving HT can clear a Survivor's Criminal Record

Pen. Code Sec. 236.14

- If survivor arrested or convicted of a nonviolent offense
- Files a Petition for Vacatur in court and serves it on DA's Office (in CCC – the HT Unit)
- And the Petition shows:
  - Clear and convincing evidence
  - Offense/conviction was **direct result** of being a victim of HT and
  - Victim is making good faith **effort** to get out of HT scheme

40



## Leaving HT can clear a Survivor's Criminal Record

Pen. Code Sec. 236.14

- Prosecution has 45 days to file opposition or court may grant
  - CCCDA's Office will not oppose valid petitions
- Court can allow Petitioner to appear through counsel or by telephone/electronic means if there is a compelling reason
- Court can't refuse to hear a Petition on grounds that the survivor still has outstanding fines/fees or has failed probation.

41

## Leaving HT can clear a Survivor's Criminal Record

Pen. Code Sec. 236.14

- If Petition denied – may be “without prejudice” with reasons stated, so survivor can try again
- If the Petition is granted:
  - Court orders any verdict of guilty set aside, dismisses the charges, orders that records be sealed/destroyed
  - Arrest, adjudication/conviction is deemed not to have occurred
  - Survivor may legally deny or refuse to acknowledge
  - Records shall not be distributed to state licensing boards

42

## Local HT Resources

*Collaboration is Key!*

43

## See Something? Say Something:

- Survivors can call 24/7:
  - Community Violence Solutions
    - Crisis Line: 800-670-7273
  - CSEC / CFS:
    - Contra Costa: 800-388-2900
    - Alameda: 510-259-1800
  - National HT Hotline: 888-373-7888 / text BeFree (233-733)

44

## See Something? Say Something:

- Community can report: Non-Emergency / Anonymous
  - Contra Costa DA Tip Line: 925-957-8658
  - Alameda H.E.A.T. Watch Tip Line: 510-208-4050
- Stakeholders can nominate: HT MDT Teams
  - State law authorizes: See Pen. Code Sec. 13753
  - Contra Costa County: Natalie Oleas, J.D. 925 521-6366 or [natalie@cocofamilyjustice.org](mailto:natalie@cocofamilyjustice.org) for nomination form

45

## Engage local direct service providers:

- Community Violence Solutions [www.cvsolutions.org](http://www.cvsolutions.org)
- Bay Area Legal Aid <https://baylegal.org/>
- International Rescue Committee [www.help.rescue.org](http://www.help.rescue.org)
- Justice at Last <https://www.justiceatlast.org>
- Love Never Fails <https://www.loveneverfailsus.com>
- MISSEY <https://missey.org>
- STAND! <https://www.standffov.org>
- Family Justice Centers
  - Contra Costa <https://www.cocofamilyjustice.org>
  - Alameda: <https://www.acfjc.org>
- Victim-Witness Assistance Programs
  - Contra Costa <https://www.contracosta.ca.gov/972/Victim-Witness-Assistance-Program>
  - Alameda [https://www.alcoda.org/victim\\_witness/](https://www.alcoda.org/victim_witness/)

46

## More local resources:

- Contra Costa DA Webpage:
  - <https://www.contracosta.ca.gov/7690/Human-Trafficking-Unit>
- Alameda County H.E.A.T. Watch Webpage:
  - <https://www.heatwatch.org>

47

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48