

Beyond the Bench 24 Conference

I'm a Human Trafficking Victim!

**The New Affirmative Defense and Post-
Conviction Relief for Victim-Defendants**

**San Diego, CA
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Learning Objectives

- Discuss the legal requirements to assert an affirmative defense under PC 236.23
- Discuss the legal requirements to assert a vacatur motion under PC 236.14
- Recognize the different contexts in which a trafficking victim could be coerced to commit crimes

Learning Objectives

- Apply PC 236.23 and PC 236.14 to hypothetical situations
- Identify and address potential issues under the new statutes

**UNDERSTANDING COERCION IN
HUMAN TRAFFICKING CRIMES
UNDER PENAL CODE § 236.1**

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**CA Trafficking Victim Protection Act
(AB 22, 2005)**

- PC § 236.1
- Prohibits human trafficking for
 - certain sex offenses
 - forced labor or services
- Prioritized victim protection along with prosecution

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CA Statute: PC §236.1

(adopts federal definition of human trafficking)

Deprive or violate personal liberty of victim

AND

Intent to:

- | | | |
|---|----|--|
| <ul style="list-style-type: none"> ❖ obtain forced labor or services from victim | OR | <ul style="list-style-type: none"> ❖ effect or maintain a violation of PC §§266, 266(h), 266(i), 266(j), 267, 311.1, 311.2, 311.3, 311.4, 311.5, 311.6, or 518. |
|---|----|--|

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PC §236.1: Trafficked Adults and Labor Trafficked Minors

Process

Means

End

Deprive
or
Violate
the
personal
liberty of
another



Through:

- Force
- Fear
- Fraud
- Deceit
- Coercion
- Violence
- Duress
- Menace, **OR**
- Threat of Unlawful Injury



With intent to:

- 266: Entice a female under 18 for prostitution
- 266h: pimping
- 266i: Pandering
- 267: Abduction of minor for purposes of prostitution
- 311: Employ minor to distribute/produce pornography, or
- 518: Extortion
- **Labor or Services**

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236.1(h)(3) Deprivation or Violation of Personal Liberty

Deprivation or
violation of
personal liberty



**Substantial
or sustained
restriction**

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Prop. 35 Deprivation or violation of the personal liberty of another

- Substantial and sustained restriction of another's liberty;
- Accomplished through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person,
- Under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out.

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236.1(h)(4) Duress Includes

- Knowingly:
 - destroying
 - concealing
 - removing
 - confiscating
 - possessing
- Any actual or purported passport or immigration document of the victim



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What is Coercion?

PC 236.1(h)(1) / 22 U.S.C. § 7102

Threat of serious harm to or physical restraint against a person

Any scheme, plan, or pattern intended to cause a person to believe that failure to act would result in serious harm or physical restraint

Abuse or threatened abuse of legal process

Catch-All

Prop 35 added: "or providing and facilitating the possession of any controlled substance to a person with the intent to impair the person's judgment."

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Serious Harm Defined

PC 236.1(H)(8) & (I)

- Any harm (Physical, Psychological, Financial or Reputational)
- Sufficiently serious **under all surrounding circumstances*** to compel a reasonable person of the **same background and same circumstances** to perform labor or commercial sex act to avoid harm.

18 USC § 1589 Forced Labor, 18 USC § 1591, Sex Trafficking (TVPRRA 2008)

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Serious Harm Defined, cont.

PC 236.1(H)(8) & (I)

***CA Only** - The total circumstances, including the age of the victim, the relationship between the victim and the trafficker or agents of the trafficker, and any handicap or disability of the victim, shall be factors to consider in determining the presence of deprivation or violation of the personal liberty of another, duress, and coercion as described in this section.

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Abuse of Legal Process (TVPRA 2008)

Use or threatened use of a law or legal process

- Administrative
- Civil
- Criminal



In any manner or for any purpose for which the law was not designed



To exert pressure on another person to cause/Refrain them to take action

Not defined in PC 236.1; See 22 USC § 7102(1), 18 USC § 1589 Forced Labor, 18 USC § 1591, Sex Trafficking

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Minor Victim of Sex Trafficking PC 236.1(c)

- No need to prove force, fraud or coercion
- Must prove the defendant **caused, induced, or persuaded** a minor to engage in a commercial sex act (PC §236.1(c))

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Minors: PC 236.1(d-f)

- Shall consider totality of the circumstances
PC 236.1(d)
 - e.g. victim's age, handicap or disability,
relationship to trafficker or agents of trafficker
- NOT A DEFENSE:
 - Consent PC 236.1(e)
 - Mistake of fact as to minor victim's age
PC 236.1 (f)

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PC 236.1(g)

The Legislature finds that the definition of human trafficking in this section is equivalent to the federal definition of a severe form of trafficking found in Section 7102(8) of Title 22 of the United States Code.

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Human Trafficking Victim Defined (No comparable CA definition)

22 U.S.C. 7109(9)

The term "severe form of trafficking in persons" means:

(A) **sex trafficking** in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to **involuntary servitude, peonage, debt bondage, or slavery**.

(Victims of Trafficking and Violence Prevention Act of 2000)

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True or False

A person can consent to human trafficking.

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Trafficked Adults & Labor Trafficked Minors:

Means

By
Force
OR
Fraud
OR
Coercion



Reality:

➤ Initial consent prior to force, fraud, or coercion is irrelevant, nor is payment

Myth:

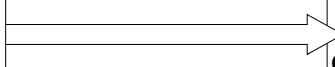
People informed about the work or initial conditions cannot be trafficked because it is not against their will or they “knew better”

Fact: You can't consent to an illegal act.

Sex Trafficked Minors:

PROCESS

Inducing Minor
(under 18 yo)



END

For the purposes of
Commercial Sex Act

➤ Consent is irrelevant!

What Would You Do?

You have been trafficked for sex since age 12. Your trafficker tells you to recruit other girls for him. He says you won't have to see as many clients if you help him and you know that he will beat you up if you refuse.

Would you do this?

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What Would You Do?

Your spouse has been physically and psychologically abusive for years. He wants you to help smuggle guns and drugs across the U.S.-Mexico border by being his cover – just sitting in the passenger seat – as he drives across the border. He is part of a violent gang and there are consequences if you refused.

Would you do this?

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What Would You Do?

Your employer has taken your passport and other identification documents. She asks you to drive a client to weekly medical appointments, but you have no driver's license. You believe your employer would deport you if you refused. You also have a \$20K placement debt to repay or the creditors will go after (meaning harm or even kill) your family back home if you miss any payments.

Would you do this?

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Question

Once someone has been identified as a victim of trafficking would you order diversion court as a means of getting a victim services?

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Human Trafficking for Forced Criminality...

- Prostitution
- Gangs
- Scams; Stolen Checks
- Identify Theft
- Theft – Property, Auto
- Benefits fraud
- Smuggle, Sell, cultivate, use drugs
- Loitering for sales
- Truancy

... Can be a form of forced labor or services!

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Forced Criminality of Victims



- Stigmatized
- Criminalized for behaviors - not seen as victims

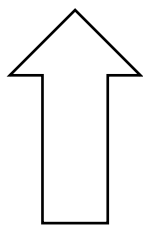
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Impact of Trafficking on Victim Identification

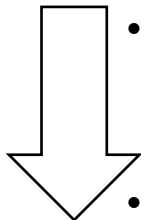
- Victims may not self-identify
- Victims may lie or not tell full story
- Victims may change their story overtime
- Victim may cover for the trafficker
- Victim may recant

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Responses to Forced Criminality of Victims



- Safe Harbor Laws (only minors, only prostitution)
- Diversion Courts (drug/ alcohol, prostitution, CSEC)



- Child Welfare/ Runaway & Homeless Youth Services (Referral/ response/ specialized services for all child trafficking victims, sex & labor)
- Adults (Specialized voluntary service programs for victims of human trafficking)

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Cartel Kids

<http://www.cnn.com/2015/08/12/us/inside-the-life-of-a-drug-trafficking-teen/index.html>