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September 20, 2016

Honorable Shirley N. Weber
Room 3123, State Capitol

HUMAN TRAFFICKING: AFFIRMATIVE DEFENSE: ASSEMBLY BILL NO. 1761 - #1618544

Dear Ms. Weber:

Assembly Bill No. 1761 (2015-2016 Reg. Sess.) (hereafter AB 1761) proposes to add Penal Code section 236.23¹ to establish an affirmative defense for certain criminal defendants who are human trafficking victims. AB 1761 was introduced on February 2, 2016, and was amended on March 28, 2016, and April 14, 2016.

You asked two questions relating to the affirmative defense for human trafficking victims proposed by AB 1761. We address each question separately below.

1. How does the April 14 version of proposed section 236.23, subdivision (a) differ from the introduced version of that subdivision?

Section 236.1 defines the crime of human trafficking. Proposed section 236.23 would enable certain criminal defendants who are human trafficking victims to assert an affirmative defense to the crimes with which they are charged. The introduced version of proposed section 236.23, subdivision (a) reads as follows:

“236.23. (a) (1) It is a defense to a charge of a nonviolent crime that the defendant or minor committed the offense as a direct result of being a human trafficking victim.

“(2) It is a defense to a charge of any crime not punishable by death that the defendant committed the offense as a direct result of duress created by a person who has deprived or violated the personal liberty of the defendant within the meaning of subdivision (a) or (b) of Section 236.1.”

¹ All further part, title, chapter, and section references are to the Penal Code, unless otherwise indicated.

Thus, in order for a criminal defendant to invoke the affirmative defense in the introduced version of proposed section 236.23, subdivision (a), the offense with which he or she is charged must be a nonviolent crime and must have been committed as a direct result of being a human trafficking victim.

The version of AB 1761 that was amended on March 28, 2016, deleted paragraph (2) of the introduced version of proposed section 236.23, subdivision (a), but made no further changes to that subdivision other than deleting the paragraph number. The April 14 version of proposed section 236.23, subdivision (a) reads as follows:²

*“236.23. (a) ~~It~~ In addition to any other affirmative defense, it is a defense to a charge of a ~~nonviolent~~ crime that the ~~defendant or minor committed person was~~ coerced to commit the offense as a direct result of being a human trafficking victim. ~~victim~~ *victim at the time of the offense and had a reasonable fear of harm. This defense does not apply to a serious felony, as defined in subdivision (c) of Section 1192.7, or a violent felony, as defined in subdivision (c) of Section 667.5, or a violation of Section 236.1.*”*

With respect to the differences between the introduced version and the April 14 version of proposed section 236.23, subdivision (a), the requirement contained in the introduced version that the offense must be a nonviolent crime differs in the April 14 version, which instead prohibits applying the affirmative defense if the defendant is charged with a serious felony, a violent felony, or the crime of human trafficking. Further, the April 14 version of proposed section 236.23, subdivision (a) contains additional elements that a defendant must prove in order to use the affirmative defense. In addition to requiring that the offense be committed as a direct result of being a human trafficking victim, the April 14 version of that subdivision imposes the following requirements: (1) the defendant must have been a human trafficking victim at the time of the offense, (2) the defendant must have been coerced to commit the offense, and (3) the defendant must have had a reasonable fear of harm.

Accordingly, it is our opinion that the April 14 version of proposed section 236.23, subdivision (a) differs from the introduced version of that subdivision by changing the description of the offenses for which the affirmative defense for human trafficking victims may not be used, and by adding additional elements that a defendant must prove in order to use the affirmative defense, as described above.

² Changes from the March 28, 2016, version of proposed section 236.23, subdivision (a) are shown in strikeout and italics.

2. **With respect to the affirmative defense authorized by the April 14 version of proposed section 236.23, subdivision (a), how would the elements relating to coercion and reasonable fear of harm be interpreted by a court?**

As indicated above, in order for a person to invoke the affirmative defense in the April 14 version of proposed section 236.23, subdivision (a) (hereafter proposed section 236.23(a)), the defendant must have been coerced to commit the offense as a direct result of being a human trafficking victim, and must have had a reasonable fear of harm, among other requirements. To interpret these provisions, we apply established rules of construction used by courts in construing statutory language. In that regard, the proper goal of statutory construction is to ascertain and effectuate legislative intent. (*In re Lucas* (2012) 53 Cal.4th 839, 849.) If there is no ambiguity in statutory language, the plain meaning controls. (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265; hereafter *Cornett*.) However, if the language of a statute is ambiguous, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. (*Ibid.*)

2.1 Reasonable fear of harm

In order to construe the phrase “reasonable fear of harm,” we first address the type of harm to which the phrase refers and then turn to the meaning of “reasonable” in this context. With respect to the type of harm, we think it is evident that the word “harm” includes, at a minimum, physical forms of harm. However, it may also be construed to include nonphysical forms of harm, such as emotional, psychological, or financial harm. Although the word “harm” is not defined for purposes of proposed section 236.23(a), that section and subdivision would be added to part 1, title 8, chapter 8 (§ 236 et seq.) (hereafter chapter 8), which also includes a definition of “serious harm” that applies to the entire chapter. That definition reads as follows:

“‘Serious harm’ includes any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor, services, or commercial sexual acts in order to avoid incurring that harm.” (§ 236.1, subd. (h)(8).)

As indicated above, the term “serious harm” includes nonphysical harm. In our view, the inclusion of the word “serious” in the phrase “serious harm” relates to the severity of the harm rather than the type of harm. Thus, we think that the word “harm,” as used in the statutory scheme relating to human trafficking, generally includes nonphysical as well as physical forms of harm. Nothing in proposed section 236.23(a) suggests a different legislative intent with respect to the use of the word “harm.” Thus, it is our view that the phrase “reasonable fear of harm” includes a reasonable fear of both physical and nonphysical harm.

In order to determine how a court would construe the phrase “reasonable fear of harm,” we must also address whether that phrase contains a requirement regarding the

severity of the harm which a person must fear in order to use the proposed affirmative defense. As indicated above, the phrase “serious harm” is defined to mean harm “that is sufficiently serious ... to compel a reasonable person” to take certain actions to avoid incurring the harm. (§ 236.1, subd. (h)(8).) If the harm referred to in proposed section 236.23(a) must be sufficiently serious to compel the defendant to commit the offense, then it would be similar to “serious harm.” However, the phrase “reasonable fear of harm” may also be construed to require a defendant to prove a fear of any harm, as long as the harm was significant enough for the fear to be reasonable.

A court could conclude that the language of proposed section 236.23(a) is unambiguous, and that the plain meaning indicates that the form of harm required by that subdivision need not be as severe as the serious harm referenced in the definition of the word “coercion.” In that regard, the phrase “a reasonable fear of harm” is preceded by the phrase “and had.” The verb “had” connects the phrase to the subject of the sentence, “the person,” and thus is not tied to the phrase “as a direct result of.” Therefore, a court relying on the grammar and syntax of the sentence could conclude that, under the plain meaning, a defendant invoking the affirmative defense must have been “coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense,” and as a separate element, the defendant must have “had a reasonable fear of harm.” The fact that, under this reading, the defendant need not have committed the offense as a “direct result of” a reasonable fear of harm indicates that harm may be less severe than serious harm. Further, it is a rule of statutory construction that where a statute with reference to one subject contains a given provision, the omission of that provision from a similar statute concerning a related subject is significant to show a different intention existed. (*People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1277.) Thus, the omission of the word “serious” indicates an intent to distinguish the harm required by the affirmative defense and the serious harm referenced in the definition of coercion.

However, a court could conclude that the use of the word “coerced” in proposed section 236.23(a) indicates an intent that the harm be similar to “serious harm.” In this regard, it is helpful to consider the definition of the word “coercion” for purposes of chapter 8. Under that definition, “coercion” includes various actions, including “any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm.” (§ 236.1, subd. (h)(1).) Although coercion may also involve other actions that do not involve serious harm, the reference to both coercion and a reasonable fear of harm in proposed section 236.23(a) could reflect a legislative intent to allow the use of the affirmative defense only where the defendant can show a level of harm that coerced the offense with which he or she is charged.

In addition, because the statutory scheme defines the phrase “serious harm” but not the word “harm,” a court could consider proposed section 236.23(a) to be ambiguous with respect to the severity of the harm required to invoke the affirmative defense. As discussed above, a court may resolve an ambiguity in statutory language by examining, among other things, the legislative history of the statute. (*Cornett, supra*, 53 Cal.4th at p. 1265.) In that regard, the analysis of AB 1761 prepared by the Senate Committee on Public Safety

states that “the person will be required to show by a preponderance of the evidence, that he or she was coerced to commit the crime as a direct result of being a victim of trafficking at the time of the crime, and of reasonable fear of harm.” (Sen. Com. on Public Safety, Analysis of AB 1761, as amended Apr. 14, 2016, p. 5.) By using the word “of” before the phrase “a reasonable fear of harm,” the committee analysis connects that phrase to the earlier phrase “as a direct result of,” thereby indicating an understanding that the defendant must have committed the offense as a direct result of a reasonable fear of harm. If the offense must be committed as a direct result of a reasonable fear of harm, it must, as with “serious harm,” be “sufficiently serious ... to compel a reasonable person” to commit the offense. Thus, the legislative history indicates that the word “harm” as used in proposed section 236.23(a) should be construed in a manner similar to “serious harm.”

In our view, a court would have a reasonable basis for reaching either conclusion regarding the severity of harm required by proposed section 236.23(a). On balance, however, based on the literal language of the subdivision, we think a court is more likely to conclude that the harm required to invoke the affirmative defense provided by that subdivision must be severe enough to create a reasonable fear, but need not be equivalent to “serious harm,” as defined in chapter 8.

With respect to the requirement in proposed section 236.23(a) that the fear of harm must be “reasonable,” that requirement, in our view, indicates an intent to preclude a defendant from relying on a fear that would not have been held by a reasonable person in similar circumstances. In that respect, the affirmative defense would be similar to the existing affirmative defense for perfect self-defense. To assert “‘perfect self-defense as an affirmative defense, one must actually and reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury.’ [Citation.]” (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305; emphasis omitted.) Reasonableness is determined in light of the particular circumstances facing the defendant. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.)³

Conclusion regarding reasonable fear of harm

Accordingly, it is our opinion that, with respect to the affirmative defense in proposed section 236.23(a), a court would likely interpret the phrase “reasonable fear of harm” to mean a fear of physical or nonphysical harm that would be objectively reasonable for a person in the defendant’s circumstance. While there is a reasonable basis for a court to conclude that the harm feared must have been severe enough to compel a reasonable person to commit the offense, this element of the affirmative defense would likely be satisfied if the harm were severe enough to create a reasonable fear.

³ By contrast, under imperfect self-defense, a defendant who had an actual but objectively unreasonable belief in the need to defend may be deemed to have acted without malice, but cannot be exonerated on that basis. (*People v. Hardin* (2000) 85 Cal.App.4th 625, 629.)

2.2 Coercion

As indicated above, a person must have been “coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense” in order to use the affirmative defense in proposed section 236.23(a). The term “coercion” is defined for purposes of chapter 8 as follows:

“Coercion’ includes any 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 any controlled substance to a person with the intent to impair the person’s judgment.” (§ 236.1, subd. (h)(1).)

Because proposed section 236.23(a) would be added to chapter 8, we think that a court would rely on the definition above in construing the word “coerced” in that subdivision. Under that definition, coercion includes not only actions that cause a person to fear serious harm, but also actions involving abuse of the legal process, debt bondage, and impairment of a person’s judgment by providing a controlled substance.

The scope of the word “coerced,” as used in proposed section 236.23(a), would be limited not only by this definition, but also by a court’s construction of the word “harm” in that subdivision. As discussed above, if the harm referred to in that subdivision is equivalent to “serious harm,” then proving a form of coercion listed in the definition above that does not involve serious harm would not suffice to establish coercion for purposes of invoking the affirmative defense. Rather, the affirmative defense could be based only on proof of a form of coercion involving a fear of serious harm. However, if the harm referenced in proposed section 236.23(a) need not constitute serious harm, then the affirmative defense could be based on any of the forms of coercion listed above, as long as the defendant also had a reasonable fear of harm.

In addition, the requirement of “coercion” in proposed section 236.23(a) limits the victims of human trafficking who may assert the affirmative defense. A person is guilty of human trafficking if he or she “deprives or violates the personal liberty of another” with the intent to obtain forced labor or maintain a violation of specified provisions of law. (§ 236.1, subds. (a) & (b).)⁴ The phrase “deprivation or violation of the personal liberty of another” is defined to include “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.” (§ 236.1, subd. (h)(3).) Thus, coercion is only one means of perpetrating the crime of human trafficking. Although in many cases the use of force, violence, and duress will also constitute coercion, circumstances could arise in which

⁴ A different standard applies if the victim of human trafficking is a minor. (See § 236.1, subd. (c).)

some of the means listed, such as fraud or deceit, would not fall within the statutory definition of coercion.

A court is not at liberty to insert into a statute a term that the Legislature chose to omit; its absence cannot be assumed to be without meaning. (*Azusa Land Partners v. Department of Indus. Relations* (2010) 191 Cal.App.4th 1, 19-20.) Thus, a court will likely assume that the inclusion of coercion and the omission of the other ways in which a person may perpetrate the crime of human trafficking was intentional and purposeful. It is our view, therefore, that under proposed section 236.23(a), only an individual who was coerced to commit an offense as a direct result of being a human trafficking victim at the time of the offense may raise the affirmative defense.

Conclusion regarding coercion

Accordingly, it is our opinion that the word “coerced” as used in proposed section 236.23(a) would be construed in accordance with the definition of “coercion” in section 236.1, subdivision (h)(1). However, depending on the construction of the word “harm,” the term “coerced” could be construed to include all of the forms of coercion listed in that definition or, alternatively, only a form of coercion involving a fear of serious harm. Further, the use of the term “coerced” in proposed section 236.23(a) would make the affirmative defense available only to persons who became human trafficking victims by a form of coercion defined by section 236.1, subdivision (h)(1), and not to persons who became human trafficking victims through other means.

Very truly yours,

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