

May 10, 2018

Eve Herschocopf
Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688
Via E-mail: eve.hershocopf@jud.ca.gov

RE: Petition to Vacate Arrest or Conviction (Human Trafficking Victim) (Form CR-407) and Order to Vacate Arrest or Conviction (Human Trafficking Victim) (Form CR-408)

Dear Ms. Herschocopf:

I am writing to submit the Coalition to Abolish Slavery and Trafficking's (CAST's) comments on the Judicial Council's Request for Comment on Criminal Procedure: Petition and Order to Vacate Arrest or Conviction (Human Trafficking Victims) Form CR-407 and Form CR-408.

Background

Founded in 1998 in Los Angeles, California, CAST was one of the first organizations in the United States to provide comprehensive social and legal services for survivors of human trafficking. CAST also opened the first shelter in the country exclusively dedicated to providing physically and psychologically safe housing for survivors. In 2014, CAST received the first Department of Justice grant to provide technical assistance and training nationally to other lawyers working with trafficking victims. CAST serves male, female, and child victims of trafficking. Its clients come from almost every region of the world including Asia, Latin America, Eastern Europe, Africa and the United States. To date, CAST has provided services to over 1500 survivors and their family members, as well as thousands of hours of technical consultation and assistance to organizations working on this issue across the country and internationally. CAST provides legal and social services to survivors on a daily basis.

In addition, CAST was involved in drafting SB 823, the bill that became Penal Code 236.14. Since it came into effect in January 2017, CAST has actively pursued relief for its clients under this section, successfully obtaining petitions for relief from arrest and conviction records for human trafficking victims. This experience gives CAST critical information about the real-life experiences of trafficking victims and how the revisions to the forms implementing PC 236.14 will impact survivors of human trafficking.

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From its experience working with trafficking victims, CAST is also well aware of the disproportionately large number of crimes for which individuals are arrested or convicted solely as a result of their trafficking status. In a survey of its membership, the National Survivor Network, a CAST-hosted project, reports that **40% of the respondents were arrested and/ or convicted of crimes 9 times or more while they were being trafficked.**¹ In New York, the state with the oldest vacatur law addressing human trafficking survivors, the Urban Institute documented that since the law was enacted in 2010, the state had vacated 1,598 convictions. Those convictions were imposed on the records of only **94 survivors.** Survivors had an average of 21 convictions on their records, the fewest had one, while one client had 147.²

CAST's own data from a survey of arrest and conviction records of its 65 clients found that human trafficking victims are arrested seven times more frequently for activity directly related to their trafficking than for non-trafficking activity. Victims are often detained by well-intentioned officers seeking to remove them from the streets and from the control of their traffickers.³ Sadly, the records show that some victims had been arrested 30 or 40 times in only a few years under the control of their trafficker.

The frequency of arrest and conviction of trafficking survivors means that the process of clearing arrest records and vacating convictions is a complex and time-consuming process for both survivors and their advocates. It is thus essential that the Judicial Council present clear information and guidance for undertaking the process in the rules and forms it proposes for implementing PC 236.14. The concrete suggestions CAST offers below are provided with firsthand knowledge of the complexities of arrests and/or criminal convictions in the human trafficking context. CAST hopes that the Judicial Council will recognize our extensive experience in the area and adopt our suggestions.

Confidentiality Process

CAST is appreciative of the Council's determination that relief under PC 236.14 is sufficiently complex and different from PC 1203.49 to warrant development of new forms. We fully concur with this assessment. In addition, consistent with legislative intent and the need to maintain a victim-centered approach, CAST agrees with the Council's proposal to ensure the confidentiality of all PC 236.14 filings. Making the forms confidential so that they are always placed in the confidential portion of the court's file will allow CAST and other advocates to assure their

¹ See National Survivor Network Members Survey: Impact of Criminal Arrest and Detention on Survivors of Human Trafficking (August 2016) available at: <https://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf>

² Consequences of Policing Prostitution: An Analysis of Individuals Arrested and Prosecuted for Commercial Sex in New York City (April 5, 2017). Available at: www.urban.org/research/publication/consequences-policing-prostitution.

³ Arrest is not the Answer (2016) Available at: <http://www.castla.org/resources>.

clients that this process is confidential from the very beginning, easing the practical and emotional burdens on survivors when they choose to file under PC 236.14.

Process For Consolidating Petitions From Multiple Jurisdictions

CAST is most concerned about the process proposed by the Council for consolidating petitions for relief. The proposed forms direct the petitioner to file a separate petition for each arrest or conviction for which the petitioner is seeking relief, even when the arrests and convictions occurred in the same county. This would not only require the filing of separate petitions for each court case in a particular county, but also the filing of separate petitions in every superior court of a county in which the petitioner has an arrest or conviction. This directive is contrary to the legislative intent and express language of PC 236.14.

The legislature directed the courts to allow petitioners under PC 236.14 to include multiple arrests and convictions in one petition. This is due to the specific nature of human trafficking crimes and the fact that individual victims often have multiple arrests and convictions across the state.

The current approach proposed by the Judicial Council only allows courts to consolidate the hearings on separate petitions into one hearing. The option of consolidating the hearing, but not the filing of the petition, defeats the purpose and intent of PC 236.14. In CAST's experience, all petitions to date have been granted without a hearing. The Judicial Council's proposal does not relieve the burden on petitioner to make separate filings for each arrest and/or conviction. Under PC236.14, petitioners are already responsible for serving petitions on the state and/or local prosecuting agency that was responsible for the conviction or had jurisdiction over the arrest. This notice process and certification from the petitioner should be sufficient to apprise the relevant agencies of the filing of the petitions. The statutory language in PC 236.14 specifically requires that:

“The petition for relief and supporting documentation shall be served on the state or local prosecutorial agency that obtained the conviction for which vacatur is sought or with jurisdiction over charging decisions with regard to the arrest. The state or local prosecutorial agency shall have 45 days from the date of receipt of service to respond to the petition for relief.”

Filing separate petitions in each court is thus unnecessary and overly burdensome, and should not be required.

CAST urges the Council to take a different approach. We recommend updating the Judicial Council forms to allow for filing of one petition for all arrests and/or convictions with clearer instructions to the applicant concerning serving the involved parties, certifying this service, and clarifying the date on which the court can deem the petition unopposed. CAST further suggests that the Council provide a sample stipulation that can be provided by the petitioner to

prosecution and law enforcement agencies at the same time as service of the petition to further simply the process of consolidating the court process. A draft sample stipulation is attached to these comments as Attachment A. If additional outreach is needed by the courts to secure court acceptance of the responsibility, then the court should bear the burden of this outreach, not the petitioner, a human trafficking survivor and/or his or her likely pro bono or non-profit legal service provider. At a minimum Judicial Council should explore and propose an e-filing process that is consistent across the state if it continues to require the filing of separate petitions.

Finally, because many trafficking survivors have both juvenile and adult arrest and conviction records, CAST requests the Judicial Council to further examine how the process can be better coordinated and streamlined with the juvenile system. For example, clarifying that juvenile arrests can be cleared through the adult petition process, and do not have to be done through the juvenile court process, and further proposing a system that enables the adult court to coordinate sealing juvenile convictions at the same time as adult petitions, would be two very useful procedures.

Given the complexity of this issue CAST suggests that the Judicial Council host a round table event where further input can be provided by practitioners and the Courts into the matters discussed above.

Suggested Change in Language on the Form:

Instructions –read carefully

- Serve the petition **and stipulation form** on the state or local prosecuting agency that was responsible for the conviction or that had jurisdiction over the arrest. **Certify the date that petition was served as the court can deem the petition unopposed and grant the motion without a hearing after 45 days if no opposition is filed.**

~~6. I request that the court consolidate the hearing on this petition with the hearings on the following petitions (list court cases numbers, and county~~

6. The petition for relief and supporting documentation must be served on the state or local prosecutorial agency that obtained the conviction for which vacatur is sought or with jurisdiction over charging decisions with regard to the arrest. I certify that on _____ (Insert DATE) I have served these petitions on the following entities:

Arrest/Conviction Number	Name of Agency(ies)	Date of Service

X Response Continued on Additional Page

7. I request the court consolidate the petitions listed in this form.

8. I certify that on _____ (Insert DATE) will be 45 days from the receipt of service and the court may deem the petition unopposed on that date.

Requirement of Petitioner Information on Form

Although this form is confidential, it still requires the petitioner's mailing address and telephone number. In CAST's experience, human trafficking survivors remain afraid for their safety years after the event, particularly if they think their trafficker may locate them. Accordingly, CAST is concerned that requiring this information will have a chilling effect on petitioners' willingness to seek vacatur. CAST suggests the form make clear that provision of this information is optional. If an attorney is involved in preparing the petition, the firm's business address and contact number could be safely used.

Suggested Language

Petitioner (the person who is filing this petition)
 Name: Date of Birth:

Provision of the following information is OPTIONAL

Street Address **or Confidential Safe Mailing Address**
 Mailing address (if different)
 Telephone Number **–or Safe Telephone Number where you can be reached if you are not represented by Counsel**

Requirement on Form Listing Arrests/ Convictions

The forms requiring information about the petitioner's arrest and/or conviction under 1 (a)-(e) and 2(a-c) could be improved by tacitly recognizing that most trafficking survivors have been arrested and convicted multiple times. To best meet the needs of the survivors, more space should be provided for these responses on the form. Using a chart format to obtain this information and explicitly stating that the response can be continued on an added page, would also significantly help the process.

Suggested re-formatting for form:

(1) Please include the following information in the chart below for each arrest for a non-violent offense (any offense not listed in Pen. Code 667.5(c)). If more space is needed, add an extra page and check the box that your response is “continued on an added page.” Please use the same format as below if you need to continue your response on an added page.

Date of Arrest(s)	Location of arrest (s) City and County	Law Enforcement Agencies that Made Arrests*	Arrest report number(s) or police report numbers if available	Other information**

*If it was a police department include the city name, if it was a county sheriff, list the county.

** Include any other information about the arrest(s) that is available from the prosecutor or the court, including the case number that the prosecutor used to review the arrest or used to file a case.

(2) This petition concerns the conviction(s) of a non-violent offense (any offense not listed in Pen. Code 667.5(c)). If more space is needed, add an extra page and check the box

that your response is “continued on an added page.” Please use the same format as below if you need to continue your response on an added page.

Date(s) of Conviction (s)	Location of Conviction(s) including city and county	Court Case Numbers(s) for the Conviction(s)

X Response Continued on Additional Page

Description of Supporting Facts/Official Documentation

Question 4 of the Judicial Council proposed form includes language that requests the supporting facts for the petition. CAST makes the following suggestions to strengthen this language: (1) remove the introductory phrase that states “tell your story briefly” and (2) provide additional guidance to petitioner on what information should be included to meet the standard under PC 236.14. In CAST’s experience, cases like this are highly complex so it would be better to use the alternative language proposed below to provide clearer guidance to petitioners.

Suggested Language:

1. Supporting Facts:

~~Tell your story briefly.~~ Describe **your human trafficking history. Please include**

- **1. Facts that show** evidence of your being a victim of human trafficking, and
- **2. Facts that show** evidence that the commission of the crime was the direct result of you being a human trafficking victim.

If necessary, attach additional pages. You may use Attachment to Judicial Council Form (form MC-025) for any additional pages. If available, ~~attach~~ declarations, relevant records, transcripts, or other documents **should be used** to supporting your claim.

The statutory language of PC 236.14(m) is clear that “Official documentation shall not be required for the issuance of an order described in subdivision (a).” In Question 5 of the Judicial Council proposed form, CAST proposes the following change in language to better reflect the statute's mandate.

Suggested Language:

5. **No official documentation is required to support a petition for relief under PC 236.14. However, to support my claim,** I have attached the following official documentation of my status as a victim of human trafficking issued by federal, state or local agency. (Describe)

Request for Additional Action Court May Take

Although included in the Judicial Council form as question 11 and in the Judicial Council Proposed Order for PC 236.14, the numerical ordering of the proposed form should be changed so that directly after the request that a specific arrest be sealed or a conviction vacated, petitioner can ask that the court grant “additional relief to carry out the purposes of this section.”

The intent of the legislature and the clear statutory language of PC 236.14 (r) allows a Court granting relief pursuant to this section to take additional action as appropriate. CAST proposes the following clarifying language to ensure a better understanding by petitioners that additional relief may be requested.

Suggested Language

Delete Question 11: ~~I request the court grant the following additional relief (specify):~~

Change question 6 to Question 7 and Insert as Question 6 the following:

(6) The Court is allowed to take additional action as appropriate to carry out the purposes of this relief. Are you asking for any additional relief from this court?

Yes

No

If Yes, describe this request and provide supporting documentation as needed. If necessary, attach additional pages. You may use Attachment to Judicial Council Form (form MC-025) for any additional pages.

Request to Not Have to Appear Personally or Have Counsel Appear

Under PC 236.14, it is optional for the court to hold a hearing on a PC 236.14 petition. See 236.14 (d). If opposition to the petition is not filled by the applicable state or local prosecutorial agency, the court shall deem the petition unopposed and may grant the petition. Under PC 236.14 (f), it is only “if the petition is opposed or if the court otherwise deems it necessary” that the court must schedule a hearing on the petition. The proposed Judicial Council form is unclear whether the petition for relief can be granted without a hearing. Additional clarifying language should be added as suggested below to inform petitioners of this fact.

Suggested Language:

7. Waiver of Appearance. I understand that a petition for relief may be granted without a hearing. If a hearing is necessary I will appear personally in court.

Yes

No

If No, I am prepared to appear in court for a hearing telephonically, via video conference or by other electronic means and I request that the court hold the hearing on this petition without my personal presence or the presence of counsel for the following compelling (good) reasons:

Judicial Council could also choose to adopt the Waiver of Appearance language used in the proposed form by Judicial Council for Juveniles in JV-748 that also clearly explains this process to petitioners and could be helpful clarifying language in the adult forms as well.

Request to Return Fines and Fees

Under PC 236.14, petitioners are allowed to apply for relief even if they have not completed the terms of probation or paid outstanding fines or fees associated with the conviction. Many trafficking victims have spent years trying to pay the fines and fees associated with their wrongful conviction. If the conviction is vacated, petitioners should be able to explicitly request a return of these fines and fees by the court unless, as provided in Section 236.14(i) it "is financial restitution ordered that benefited the victim of a nonviolent crime." A question on the Judicial Council proposed form should clarify to the court if the petitioner is (1) requesting the return of any fines or fees paid to the court and (2) the amount paid, if known.

Suggested Language:

Add after question 10 on proposed form:

(11) I am requesting the court return fines and fees paid as a term of my conviction.

Yes

No

I request the return in the amount _____(Insert if Known)

Request for Interpreter

In CAST's experience many human trafficking survivors are foreign nationals and do not speak English as their primary language. CAST currently serves clients who speak 69 different languages, many of which are not ones that the court commonly encounters. For this reason CAST suggests that the form the Judicial Council adopts for PC 236.14 petitions include a specific place where an applicant can request an interpreter. The suggested language tracks that proposed by the Judicial Council in its draft forms for Juvenile petitioners.

Suggested Language:

Insert as question 12 :(12). Request for an Interpreter. If there is a hearing, I will need a (Language) _____interpreter.

Proposed Order CR-408

As discussed above, PC 236.14 (d) is clear that a petition can be granted without a hearing. See 236.14(d). Paragraph 1 of the proposed order should thus be updated to include reference to the fact that the order to vacate arrest or conviction can be granted without a hearing if it is uncontested and the court makes the decision not to hold a hearing.

Suggested Language

- (1) The petitioner and/or counsel were personally present at the hearing on the matter, or appeared telephonically, via videoconference, or by other electronic means **OR**

The court determined the matter without a hearing as allowed under 236.14(d).

Many trafficking victims may still be on probation when the order for vacatur is granted. To ensure that probation is efficiently terminated the order should expressly state that the appropriate probation program should be notified and probation terminated.

Suggested Language

Insert the following language at 6(c): Any and all terms of probation are hereby terminated for the convictions listed in the petition and the appropriate probation programs are to be notified that probation should be terminated as of _____(INSERT DATE)

The court should specifically order the return of all fines and fees associated with the convictions in the petition.

Suggested Language

Change Question 10 to 11 and Insert as question 10: The Court orders the return of fines and fees for the convictions listed in the petition in the amount of _____(INSERT AMOUNT)

Conclusion

Thank you for considering these comments in preparing and revising the forms to implement PC 236.14. CAST, and particularly the survivors we serve, greatly appreciate this effort by the Judicial Council to provide additional clarification and support in filing PC 236.14 petitions that afford critical new protections for survivors of modern slavery in California. If you have further questions please contact Stephanie Richard, Policy & Legal Services Director at stephanie@castla.org or 213-365-1906 x 115.

Sincerely,



Kay Buck, Executive Director, CAST