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**by Alexander Esseesse**

Stetson University College of Law J.D. Candidate, 2015

and

**Emily Tocci**

Juris Doctoral Candidate, 2015;  
Trainer, International Association of  
Human Trafficking Investigators

# **Human Trafficking Specific Jury Instructions: Tools to Increase Prosecutions and Convictions**

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Juris Doctoral Candidate, 2015

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**and Emily Tocci**

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Trainer, International Association of Human Trafficking Investigators

## **The Problem of Human Trafficking**

Human trafficking is a modern form of slavery.<sup>1</sup> Victims of human trafficking are faced with numerous and complex issues ranging from bodily injury caused by physical harm to post-traumatic stress disorder (PTSD) generated by repeated abuse, intimidation, and fear. While varying forms of human exploitation have been in existence for millennia, over the past two decades countries have taken a more serious approach to addressing the problem of human trafficking by enacting legislation, improving resources to victims, and encouraging more education of law enforcement officials. Despite the increase in the awareness of human trafficking, “most convictions still take place in only a few countries.”<sup>2</sup> Between 2007 and 2008, 40% of the more than 150 countries studied in the United Nations Office on Drugs and Crime (UNODC) Global TIP Report had not secured a single human trafficking conviction.<sup>3</sup> By the end of 2008, around two-thirds of the countries in the Global TIP Report had some form of law criminalizing the sexual exploitation or labor exploitation of men, women, and children.<sup>4</sup> In early 2009, ninety-one countries from the Global TIP Report had prosecuted a human trafficking case with seventy-three of these countries securing convictions.<sup>5</sup> The desire for countries to develop and implement human trafficking laws is on the rise, but simply enacting human trafficking laws does not mean that successful prosecutions and convictions will necessarily follow.<sup>6</sup>

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<sup>1</sup>UNODC. Global Report on Trafficking in Persons. 6. February 2009.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 8.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at 39.

For prosecutors to bring charges under new human trafficking laws, they must feel comfortable with the law’s language and structure, and confident that the jury will be able to correctly apply the law to the facts of the case. While pattern jury instructions are “typically written by committees of judges and attorneys . . . [with] legal expertise, . . . [the] legal accuracy and vetting by multiple legal constituencies do no[t] guarantee that the instructions will be comprehensible to laypersons.”<sup>7</sup> In order to avoid such issues, legislators should strive to develop straightforward laws so that committees tasked with writing pattern jury instructions do not misapply the law. Without the necessary legal guidance “juries may reach decisions that are inconsistent with the law they are ostensibly being asked to apply.”<sup>8</sup>

### **Comprehension of Jury Instructions**

While effective anti-trafficking laws are key for prosecutors to successfully bring charges against an alleged trafficker, actually securing a conviction requires the jury be able to correctly apply the law to the facts and evidence presented in court. While the common assumption is that jurors fully comprehend the law outlined in jury instructions, “social science casts doubt on the ability of jurors to understand and properly apply [these] instructions.”<sup>9</sup> The idea that jurors actually understand jury instructions has no historical or statistical support “and, given the legalistic wording of most jury instructions, common sense would suggest that the presumption ought to be that laypersons would have great difficulty in understanding them.”<sup>10</sup> The judicial system in the United States relies heavily on the jury’s ability to understand the law, and “questioning the validity of the presumption [that jurors carefully follow instructions] poses a threat to the survival of our system of justice . . .”<sup>11</sup> Ultimately, jury instructions need to “advise the jury on the proper legal standards to be applied in determining issues of facts as to the case before them.”<sup>12</sup>

Jury instructions are used to “provide the jury with specific information on the law necessary to decide the factual issues of the case presented to the jury . . .

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<sup>7</sup>Diamond, S., Murphy, B., & Rose, M. “The ‘Kettleful of Law’ in Real Jury Deliberations: Successes, Failures, and Next Steps.” *Northwestern University Law Review*. 106:1537, 1543-44. 2012.

<sup>8</sup>*Id.* at 1546.

<sup>9</sup>Thompson, Sandra G. “Criminal Law: Judicial Gatekeeping of Police-Generated Witness Testimony.” *102 J. Crim. L. & Criminology* 329, 362. Spring 2012.

<sup>10</sup>Ritter, Judith. “Your Lips are Moving . . . but the Words aren’t Clear: Dissecting the Presumption that Jurors Understand Instructions.” *69 Missouri Law Review* 163, 164. Winter 2004.

<sup>11</sup>*Id.* at 163.

<sup>12</sup>Harrington v. U.S., 504 F. 2d 1306, 1317 (1st Cir. 1974).

[and] provide proper guidance and assistance to the jury so that it may reach a verdict.”<sup>13</sup> Additionally, because there is an inherent risk that juror predispositions can influence a verdict in one way or another, “carefully constructed instructions can thwart the potential for bias by jury members.”<sup>14</sup> The most effective jury instructions are those that are “correct in law, adapted to the issues developed at trial by counsel, and adequate for guidance of the jury.”<sup>15</sup> The current human trafficking laws require prosecutors to prove many complicated elements beyond a reasonable doubt. Due to the complex language of the statutes the resulting jury instructions need to avoid “overuse of legal jargon, unfamiliar use of grammar, and [unorganized] sentence [structure].”<sup>16</sup>

### **Challenges for State Prosecutions of Human Trafficking**

Despite an influx of human trafficking legislation in virtually every state, state prosecutions of human trafficking offenses are lagging far behind.<sup>17</sup> In general, state courts lack the basic infrastructure and processes to take on human trafficking cases.<sup>18</sup> Additionally, prosecutors lack experience using human trafficking laws and governmental support in terms of training and education of the issues is virtually nonexistent.<sup>19</sup> Proportionate to the actual occurrence of human trafficking offenses state prosecutions are very low, with only 69% of human trafficking cases moving forward with any charges at all.<sup>20</sup> Although cases disproportionately reflected the statutory element for sex trafficking, prosecutions were actually more common in the smaller number of labor trafficking cases.<sup>21</sup> Prosecutors prefer charging the familiar lesser-included offenses such as sexual battery, kidnapping, procuring, and false imprisonment because they are better known not only to the lawyer, but also to the court and the jurors. As a result of this lack of training and human trafficking case law precedent, prosecutors are reluctant

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<sup>13</sup>3-22 Moore's Manual--Federal Practice and Procedure § 22.68, 1.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>Ritter at 201.

<sup>17</sup>Polaris Project, 2012.

<sup>18</sup>Lederach, A., Martin, J., Price, D., Weller, S., & Yoder, J. “Addressing Human Trafficking in State Systems” at 17 (2013).

<sup>19</sup>*Id.*

<sup>20</sup>Farrell, A., McDevitt, J. Pfeffer, R., Fahy, S., Owens, C., Dank, M., & Adams, W. “Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases.” 4. April 2012.

<sup>21</sup>*Id.*

to charge human trafficking rather than the more comfortable and reliable offenses.<sup>22</sup>

Contributing to prosecutorial challenges are the complexities of human trafficking as a crime and the associated needs of its victims.<sup>23</sup> Their symptoms from trauma can vary, overlap, and recur depending on the levels and stages of identification, recovery, and rebuilding.<sup>24</sup> Further complicating the situation for prosecutors is the important evidence provided by the victim who is typically left with gaps in services and viable options to be free from exploitation. When victims do not see a realistic alternative to their current situation, they are less likely to cooperate with an investigation or prosecution.<sup>25</sup> Without the victim testimony, case outcomes typically result in lesser charges or unsuccessful convictions, which can lead to continued exploitation. In order to avoid failed prosecutions and the potential for recurring abuse, specialized training in human trafficking should be undertaken by law enforcement and prosecutors since more effective interviewing and investigating skills have proven to result in stronger cases and a greater likelihood of conviction.<sup>26</sup>

In addition to an unwillingness of victims to cooperate with the prosecution of their case, the lack of interagency cooperation with victim service providers and non-governmental organizations (NGOs) to address the needs of victims can often compound the dilemma. While it is not required by statute, prosecutors usually prefer for there to be multiple cooperating victims to help assist with the prosecution.<sup>27</sup> Without such a valuable asset prosecutors may seek lesser criminal charges or may not even file charges at all.<sup>28</sup> Prosecutors should not discount moving forward with a single-victim case where efforts have been exhausted to determine whether additional victims exist and are available to testify. The need for prosecutors to find innovative ways of applying current human trafficking laws is essential to building a foundation of case law and encouraging legislators to adjust laws so that they are most effective. For example, a string of recent federal human trafficking cases highlight the prosecutions' ability to adapt the laws to their

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<sup>22</sup>*Id.*

<sup>23</sup>Problems with identification and cooperation; lack of stable or safe housing; lack of proper therapeutic, mental health care, and sufficient trauma counseling; lack of proper medical care; problems with identity documents; custody issues; arrests or convictions due to offenses committed under the coercion of the trafficker; education or job skills; employment issues.

<sup>24</sup>Lack of ability to self-identify; general fear of trafficker and extreme reluctance to testify; fear of retaliation by trafficker; trauma bonds, Stockholm Syndrome, or conflicting loyalties; distrust; denial; helplessness; shame; guilt; self-blame; humiliation; shock; Post-Traumatic Stress Disorder; phobias; panic attacks; anxiety; depression.

<sup>25</sup>Farrell, et al. at 4.

<sup>26</sup>*Id.* at 7.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

specific fact patterns, specifically focusing on the use of coercion to exploit single victims in domestic servitude.<sup>29</sup> These cases can be instructive in providing a framework for proving coercion and the subjective belief standard of the victim in sex trafficking cases.

### **Victim-Witness Reliability**

Another important element that human trafficking jury instructions must address is the role of victim-witness testimony. In human trafficking cases, victim testimony is a crucial part of the government's case against the suspected trafficker. However, there are some issues that a prosecutor must work through in order to ensure the witness is both reliable and truthful. Human trafficking victims typically suffer from mental health issues that prevent them from candidly revealing their experiences to the court, especially in front of their alleged trafficker. As a result, it is typical for "witnesses [to] stumble, perspire, twitch, sneer, lose their tempers, or otherwise [be unable to] deliver a smooth presentation [to the jury causing the testimony to be] forgotten or not believed."<sup>30</sup> A court's ability to totally eliminate bias is unrealistic, but jury instructions can be used to at least minimize such attitudes.

Victims of human trafficking typically suffer from "psychological effects [that] can be devastating and, if left unaddressed, can undermine victims' recovery and potentially contribute . . . to re-victimization."<sup>31</sup> The physical and/or psychological abuse victims endure forces them to become dependent on their trafficker to survive, which many times leads the victims to participate in criminal behavior. Due to their role in such criminal acts, victims are weary of fully explaining their situation to law enforcement officers because they face the risk of being charged with those crimes.<sup>32</sup> As a result, it is important to enlist the help of mental health experts and social workers to provide some insight into the problems that human trafficking victims experience, including post-traumatic stress disorder, depression, and anxiety.<sup>33</sup>

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<sup>29</sup>See *United States v. Calimlim*, 538 F.3d 706 (7th Cir. 2008); *United States v. Udeozor*, 515 F.3d 260 (4th Cir. 2008); and, *United States v. Djoumessi*, 538 F.3d 547 (4th Cir. 2008).

<sup>30</sup>McErlan, W., Stolle, D., & Smith, M. "The Evolution of Witness Preparation." *Litigation* Fall 2010 Vol. 37 No. 1: 21.

<sup>31</sup>U.S. Department of State Office to Monitor and Combat Trafficking in Persons. "Addressing the Internal Wounds: The Psychological Aftermath of Human Trafficking." June 2012.

<sup>32</sup>U.S. Department of Health and Human Services: Administration for Children & Families. "National Human Trafficking Resource Center: Identifying Victims of Human Trafficking Fact Sheet." [http://www.acf.hhs.gov/sites/default/files/orr/fact\\_sheet\\_identifying\\_victims\\_of\\_human\\_trafficking.pdf](http://www.acf.hhs.gov/sites/default/files/orr/fact_sheet_identifying_victims_of_human_trafficking.pdf).

<sup>33</sup>U.S. Department of State Office to Monitor and Combat Trafficking in Persons. "Addressing the Internal Wounds."

The negative effects of human trafficking do not end once a victim is out of the trafficking situation, and educating juries about the seriousness of the trauma is essential to putting victim-witness testimony into perspective. Trauma is defined as an “external threat” that “overwhelms the victim’s psychological and biological coping mechanisms.”<sup>34</sup> The trauma experienced during human trafficking situations is usually complex and has profound negative effects on the victim, including depression, anxiety, and aggression.<sup>35</sup> In order to adequately educate jurors on the traumatic effects caused by human trafficking, expert witness testimony should be integrated into the jury instructions, such as explanations for possible inconsistencies when gauging the reliability of victim-witness testimony and clinical definitions of terms like trauma. First, expert witness testimony from mental health professionals or trained and experienced social workers is helpful to the jurors because it explains the wide range of trauma that victims of human trafficking endure and what types of consequences the abuse might have on the victim’s testimony or demeanor in court. Second, by incorporating the definition of trauma into the jury instructions, the jurors will be better able to determine how much weight should be assigned to victim-witness testimony, especially if there are inconsistencies.

### **Expert Testimony on Effects of Human Trafficking**

Providing comprehensive, thorough, and easy to understand jury instructions to the jurors is crucial, and a good framework to apply to human trafficking cases can be found in domestic violence cases. Domestic violence cases utilize expert witness testimony to “assist the jury in evaluating a victim’s testimony or conduct.”<sup>36</sup> By applying this methodology to human trafficking cases, jurors will have a greater understanding of the psychological impacts human trafficking can cause to victims when analyzing the reliability of the victim’s testimony. While human trafficking affects men, women, and children, the battered-woman syndrome theory can be used to highlight some relevant connections with trafficking and how incorporating expert witness testimony should be handled in court. Battered-woman syndrome can be likened to the psychological impacts of

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<sup>34</sup>UNODC. Global Initiative to Fight Human Trafficking. “Anti-Human Trafficking Manual for Criminal Justice Practitioners, Module 3: Psychological Reactions of Victims of Trafficking in Persons.” 2009. p. 2 (quoting Saporta, J. and B.A. van der Kolk, *Psychobiological Consequences of Trauma, in Torture and its Consequences: Current Treatment Approaches*, M. Basoglu, Editor. 1992, Cambridge University Press: Cambridge).

<sup>35</sup>UNODC. Global Initiative to Fight Human Trafficking. 2-3.

<sup>36</sup>*Id.*

human trafficking because victims “are abused both physically and emotionally by [dominant figures] in their lives over a prolonged period of time.”<sup>37</sup>

The consequences of such abusive behavior is that the victim suffers from “decrease in self-esteem, an emotional dependence upon the dominant [individual], and a type of ‘learned helplessness’ arising out of an inability to predict or control the violence directed against them.”<sup>38</sup> As a result, victims of domestic violence suffer from “learned helplessness” and are afraid to report the abuse to the police out of fear that they will not be protected.<sup>39</sup> Foreign victims fear they will be deported if they are in this country illegally; families of both foreign and domestic victims alike are often threatened with harm or death by the trafficker/trafficking network; victims can often be charged with crimes associated with, or as a consequence of, the trafficking scheme. Also, elements of trauma-bonding of victims to their traffickers, similar to Stockholm syndrome of victims to their captors, often exist and require explanation to the jury.<sup>40</sup>

Prosecutors may have a difficult time bringing successful charges against an alleged perpetrator of domestic violence because victims may refuse to testify, suffer from memory loss, or recant their testimony.<sup>41</sup> In order to overcome these issues, the Rules of Evidence need to be more accepting of expert testimony in human trafficking cases and trial judges need to be better educated on the benefits of having an expert’s testimony, especially in terms of “explain[ing] potentially puzzling behavior or testimony” from the victim.<sup>42</sup> Federal Rule of Evidence 702 can be used in federal court to permit expert testimony “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>43</sup> Expert witness testimony on the topic of battered-woman syndrome, which is comparable to the experience of human trafficking victims, has been permitted in a number of courts so long as the expert’s “knowledge, skill, experience, training, or education” allows for such testimony.<sup>44</sup> Additionally, utilizing the testimony of social workers that have experience and training with victims of human trafficking can be helpful to further educate the jury on the effects of human trafficking on the demeanor and behavior of victims. The prosecution must remain aware that without credentials or qualifications to

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<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>“Human Sex Trafficking”; Amanda Walker-Rodriguez and Rodney Hill. Federal Bureau of Investigations; March 2011.

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

diagnose the victim the defense's experts can counter such testimony. Therefore, testimony from these sources should be used to supplement and corroborate claims made by expert witnesses.<sup>45</sup> When the victim's credibility is called into question due to inconsistencies, expert testimony is permitted to provide the jury with possible explanations.

A recent federal human trafficking case, U.S. v. Campbell, No. CR 12-40039 2012 WL 6050585 (D.S.D. Oct. 23, 2012), out of the United States District Court for the District of South Dakota, provides a good example of how jury instructions should be written and illustrates what improvements can be made at the state level to simplify the complexities of human trafficking crimes. In Campbell, the jury instructions included a section entitled "Impeachment Instruction" that focused on the credibility of witnesses, including alleged victims. Two particular subsections instructed the jury to take into account that the "witnesses testimony may have been influenced by their desire to please the government or to strike a good bargain with the government about their own situation" and that a witness received a payment and "whether or not [a victim-witness] information or testimony may have been influenced by receiving such benefits."<sup>46</sup>

It is expected for defense counsel to challenge the statements made by any and all witnesses, and the "Impeachment Instruction" section accomplishes this goal. However, without explaining that victims are hesitant to reveal every detail during the initial investigation in the jury instructions, the ability for jurors to appreciate the victim-witness's testimony will be limited. The Sixth Amendment to the United States Constitution ensures that the defendant is able to confront any accuser. However, due to the very nature of the alleged human trafficking offense, victims may not be able to testify. Therefore, human trafficking jury instructions need to find a middle ground when addressing victim-witnesses to provide the victim with some level of protection on the stand while still preserving the defendant's right to a fair trial.

### **Guidance from Federal and Parallel Cases**

Federal human trafficking jury instructions are useful resources for states to develop their own legal framework, particularly for educating jurors about the coercive methods used by traffickers to control victims. This element is difficult for juries to understand especially when the defense claims that the victim had opportunities to run away or call law enforcement. The state of Florida has recognized that even when violence or lock-and-key situations are not present in

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<sup>45</sup>*Id.*

<sup>46</sup>Jury Instructions from U.S. v. Campbell, No. CR 12-40039 2012 WL 6050585 (D.S.D. Oct. 23, 2012).

human trafficking cases, less obvious methods of controlling victims may be used to keep them compliant and hidden.<sup>47</sup> For this reason, it is essential that coercion is defined in states' jury instructions and that examples are provided to juries, such as in the Eleventh Circuit human trafficking jury instructions.<sup>48</sup> One of the most important elements to include as directives for the jury's consideration is that they each consider the victim's background and circumstances as to whether they think his/her actions or lack of action was reasonable or not.

“‘Serious harm’ means 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 commercial sexual activity in order to avoid incurring that harm.”<sup>49</sup>

This will be addressed in the recommendations section on the use of expert testimony to help support these directives as well as combat defense attempts at discrediting the witness due to the victim's emotional or psychological behaviors. In United States v. Farrell, 563 F.3d 364 (8th Cir. 2009), the court held that even when a victim is physically absent from a trafficker, this fact does not negate coercion when “reasonable belief” would lead a person to act or fail to act because they would suffer harm if they did not comply with the exploitation.<sup>50</sup> This emphasizes the need to communicate the difference to the jury that freedom of movement does not necessarily equal freedom of choice. The Farrell decision, which was upheld by the United States Court of Appeals for the Eighth Circuit, established that mere statements of physical force without the action of physical force were coercive enough to prove the traffickers maintained control over their victims even when the victims left the country and subsequently returned to the work required by the traffickers in the United States. The voluntary nature of the employment is not determined by the perceived freedom of movement.<sup>51</sup> The threats regarding the United States legal system were also considered by the court to qualify as threats of physical force, designed to maintain compliance of the victims.<sup>52</sup>

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<sup>47</sup>Fla. Stat. § 787.06(1)(c). (2013).

<sup>48</sup>18 U.S.C § 1591(a)(1). Sex Trafficking of Children or by Force, Fraud, or Coercion.

<sup>49</sup>*Id.* (emphasis added).

<sup>50</sup>United States v. Farrell, 563 F.3d 364 (8th Cir. 2009).

<sup>51</sup>See United States v. Veerapol, 312 F.3d 1128, 1131-32 (9th Cir.2002).

<sup>52</sup>Farrell at 364.

It is crucial to convey to the jury the methods of control and violence used by traffickers in order to address questions or misunderstandings they may have regarding victim experience and testimony. A victim may return to her pimp even if he has not physically restrained her, because he has threatened her with what could happen if she left and did not return. A victim may not enjoy having to engage in sex acts with multiple men per night or weekend, but because she has seen the pimp beat another victim for not making enough money she will continue to engage in commercial sex. Similarly, a trafficker can use the threat of arrest for offenses like prostitution, drugs, or theft in order to force the victim to continue to work. It is also important to note that threats towards a person or persons other than the victim, such as family or a child, also serve as coercion.

The recent conviction in United States v. Fields, 2013 WL 5278499 (M.D. Fla. Sept. 18, 2013), serves as precedent for the use of drugs and the exploitation of an addict's drug habit as qualifying conditions for coercion in human trafficking.<sup>53</sup> The Fields case exemplifies several critical elements which go to the jury's fact-finding and decision-making duty. Some of the victims came and went from the defendant's trailer home, but the actual freedom of the victims was severely constricted by the threat of harm. Fields, the trafficker, used threats of allowing the victims to become "pill sick," or suffer from the violent withdrawal symptoms of addiction, to coerce the victims into engaging in commercial sex and, thus, furthering the addiction. Additionally, Fields enforced debt bondage of money owed for the pills he would provide the victims even if they expressed wishes to enter a rehabilitation program. Victims were only able to pay down this "debt" by carrying out commercial sex acts for which Fields controlled the arrangement, transportation, and payment.<sup>54</sup>

In determining whether "physical or legal coercion or threats thereof could plausibly have compelled the victim" to engage in the work or acts at issue, the jury is entitled to consider "evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities."<sup>55</sup> This again goes to the need for prosecutors to demonstrate the objective requirements and definitions within the human trafficking law, as well as explanations of the subjective elements of individual victims' situation or circumstances. Special vulnerabilities in the Fields case included victims who recreationally used drugs and were vulnerable to becoming addicted; victims who were working in the strip club industry or already engaging in prostitution; and, victims who had few options for employment, housing, transportation, and financial means of supporting

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<sup>53</sup>Department of Justice Office of Public Affairs. "Lutz, Fla., Man Convicted on Drug Distribution and Sex Trafficking Charges." <http://www.justice.gov/opa/pr/2013/November/13-crt-1189.html>. Nov. 6, 2013.

<sup>54</sup>*Id.*

<sup>55</sup>United States v. Kozminski, 487 U.S. 931, 952-53 (1988).

themselves. These are frequently occurring vulnerabilities that traffickers look for to target and recruit individuals for commercial sexual exploitation.

The U.S. v. Calimlim, 538 F.3d 706 (7th Cir. 2008), case is instructive on conveying the subjective element of coercion to the jury. This case further defines “special vulnerabilities” in that once a trafficker identifies that aspect for a particular victim, he/she is able to zero in on that factor as a means of control without needing to resort to violence or physical restraint. The traffickers knew that, to this particular victim, being prohibited from sending money home to her family constituted “serious harm.”<sup>56</sup> When coupled with the threats of the legal system (in her case, deportation), this inability to act served to keep the victim enslaved without any physical force or threat of violence.

In conjunction with illustrating coercive elements to the jury, the prosecutor must establish that there is no affirmative duty to escape on the part of the victim, even despite potential opportunities for escape.<sup>57</sup> Once coercion is proven beyond a reasonable doubt, the prosecutor should then establish that the fear of harm to the victim prevents them from leaving or severing ties with the trafficker, regardless of whether there was an opportunity to escape.<sup>58</sup> Even making the assumption that there are realistic points of escaping the trafficker’s control, the Farrell and Fields cases affirm that a rational jury could conclude that a victim’s employment was “involuntary for at least some portion of [the time]. And that involuntary portion would suffice to sustain the conviction.”<sup>59</sup>

### **State Cases and Pandering Charges**

State prosecutors have frequently charged pandering on cases that have the elements to be charged under human trafficking. Therefore, it is useful to look to court interpretations and jury instructions from pandering or similarly-charged cases and apply them in order to prosecute a human trafficking charge. There are parallels to human trafficking cases in the nature of pandering as a crime, as well as the level of proof for commercial sex acts from the human trafficking standpoint.

A California case, People v. Tillis, 2011 WL 5117721 (Cal.App. 4 Dist.), provides a good example of bringing both human trafficking and pandering charges when the facts of the case and the state’s laws align. In this case, while an initial act of violence served to deprive the victim of personal liberty and recruit her for

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<sup>56</sup>Calimlim at 711.

<sup>57</sup>See United States v. Bibbs, 564 F.2d 1165, 1168 (5th Cir.1977).

<sup>58</sup>*Id.*

<sup>59</sup>United States v. Djoumessi, 538 F.3d at 552-53.

purposes of sex trafficking, there was no subsequent physical force or violence but only coercive threat.<sup>60</sup> Despite the victim not actually completing commercial sex acts while under the traffickers' control and not being forced to turn over any financial proceeds the human trafficking conviction was affirmed.<sup>61</sup> The fact that the victim had initially entered the street environment with the intent of being a willing prostitute served to establish her own vulnerability for coercion under the definition of human trafficking in addition to satisfying the "encouraging" element of the pandering statute.<sup>62</sup>

California criminalizes pandering as any conduct that "by promises, threats, violence, or any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute."<sup>63</sup> It acknowledges the same types of behaviors traffickers employ for control. The California human trafficking statute reads: "Any person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, is guilty of human trafficking."<sup>64</sup> The convictions were upheld on both the pandering charge and human trafficking charge as completed crimes, and not just attempts, despite the lack of financial gain on the part of the trafficker. Similarly, in addition to someone who does benefit financially from forced labor or services, Florida criminalizes the specific intent to engage in human trafficking whether the exploitative act was actually completed or not.<sup>65</sup>

### **Applying Federal Law When State Law Fails**

While the federal government has a relatively effective legal framework to handle federal human trafficking cases, it will be greatly beneficial for states to create anti-trafficking laws as an added method of prosecuting trafficking crimes and to encourage politicians and the general population to become more aware of human trafficking. For example, while Campbell, No. CR 12-40039 2012 WL 6050585 (D.S.D. Oct. 23, 2012), was prosecuted under federal law and took place in federal court in South Dakota, the state itself received a Tier-Four designation from Polaris Project due to a lack of effective state anti-trafficking laws, insufficient human trafficking training for law enforcement officers, and

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<sup>60</sup>People v. Tillis, 2011 WL 5117721 (Cal.App. 4 Dist.).

<sup>61</sup>*Id.* at 3.

<sup>62</sup>Pen.Code § 266i, subd. (a)(2).

<sup>63</sup>*Id.*

<sup>64</sup>Pen.Code § 236.1, subd. (a).

<sup>65</sup> Fla. Stat. § 787.06(3)(a): "any person who knowingly engages or *attempts to engage* in human trafficking with the intent or knowledge that the trafficked person *will be* subjected to forced labor or services." (emphasis added).

inadequate assistance programs for trafficking victims.<sup>66</sup> This disconnect shows how ill-equipped some states are in their efforts to combat human trafficking.

South Dakota's human trafficking laws, S.D. Codified Laws § 22-49-1, 22-49-2, and 22-49-3 (2013), are troubling in their insufficiency. Specifically, S.D. Codified Law § 22-49-2 states that if a human trafficking act involves "committing or attempting to commit kidnapping" or supports "prostitution or procurement for prostitution" it is considered a first-degree human trafficking offense, which is only a Class 2 felony. A Class 2 felony carries a maximum twenty-five year sentence and possible fine of \$50,000.<sup>67</sup> However, under South Dakota's kidnapping statute, S.D. Codified Law § 22-19-1, kidnapping is defined as a Class C felony. Such an offense carries a maximum of life imprisonment and a potential fine of \$50,000.<sup>68</sup> Despite a kidnapping offense being included in the human trafficking law, the latter holds a lesser penalty, encouraging prosecutors to charge under the kidnapping statute rather than the trafficking laws because of its relative simplicity and harsher punishment.

Furthermore, the trafficking statutes themselves contradict one another in terms of punishing similar acts. In S.D. Codified Law § 22-49-3 the "recruit[ment], harbor[ing], and transport[ation] . . . of another person knowing that force, fraud, or coercion will be used to cause the [victim] to engage in prostitution" is a Class 4 felony, which carries a ten-year prison sentence and a possible fine of \$20,000.<sup>69</sup> Conversely, when prostitution is the result of a trafficking offense under S.D. Codified Law § 22-49-1 it is considered a Class 2 felony. If the laws are confusing from the start, the jurors cannot be asked to decipher such complex nuances, especially in a high-pressure situation no less.

In Campbell, the defendant was charged and convicted in federal court of one count of sex trafficking by force, fraud, or coercion; two counts of sex trafficking a child; one count of interstate transportation for prostitution; and, one count for obstruction of sex trafficking enforcement.<sup>70</sup> For these crimes, the defendant received three life sentences for each trafficking charge and twenty years for each of the obstruction and transportation charges.<sup>71</sup> The ability for the prosecutor to obtain such a verdict is due to the favorability of the federal law and,

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<sup>66</sup>Polaris Project, South Dakota State Report: State Ratings (2013). [http://www.polarisproject.org/storage/documents/South\\_Dakota\\_State\\_Report\\_2013\\_08\\_01\\_17\\_29\\_41\\_033.pdf](http://www.polarisproject.org/storage/documents/South_Dakota_State_Report_2013_08_01_17_29_41_033.pdf)

<sup>67</sup>S.D. Codified Law § 22-6-1(5) (2013).

<sup>68</sup>S.D. Codified Law § 22-6-1(3) (2013).

<sup>69</sup>S.D. Codified Laws § 22-6-1(7) (2013).

<sup>70</sup>U.S. Department of Justice: U.S. Attorney's Office for the District of South Dakota. "Illinois Man Found Guilty of Sex Trafficking." 11 Feb. 2013. <http://www.justice.gov/usao/sd/pressreleases/SF-2013-02-11-Campbell.html>.

<sup>71</sup>U.S. Department of Homeland Security: ICE. "South Dakota man sentenced to three life terms in prison for sex trafficking." 30 May 2013. <http://www.ice.gov/news/releases/1305/130530siouxfalls.htm>.

thus, the comprehensibility of the jury instructions. While the federal human trafficking law was useful in securing a conviction for offenses against a minor, South Dakota's laws would have fallen short because of the State's age designation for a "minor" as someone under sixteen years of age.

According to federal law, 18 U.S.C. § 2256, a minor is "any person under the age of eighteen." Applying this definition of "minor" to the federal human trafficking law, 18 U.S.C. § 1591, allows federal prosecutors to bypass having to satisfy the elements of force, fraud, or coercion when dealing with someone under the age of eighteen. On the other hand, S.D. Codified Law § 22-49-2 states that a first-degree human trafficking offense is committed when the victim is under the age of sixteen. This age difference makes it easier for human trafficking cases involving minors to be brought in federal court than in South Dakota state courts where state prosecutors have to take into account the more restrictive definition of a minor created by the state legislature. Interestingly, the South Dakota legislature defines a minor as being "natural male persons and natural female persons under eighteen years of age," which again shows the inconsistencies between the human trafficking laws and other criminal statutes.<sup>72</sup>

In order for human trafficking jury instructions to be practical, legislators at the state and federal levels need to pass comprehensive laws that courts will apply without hesitation. Such an example of the broad reaching effect of a trafficking law is seen in *U.S. v. Jungers*, 702 F. 3d 1066 (8th Cir. 2013).<sup>73</sup> In *Jungers*, the Eighth Circuit Court of Appeals upheld the sentences of two individuals who were convicted under 18 U.S.C. § 1591 for soliciting sex with minors. While the lower court granted the defendants' motions to acquit on the grounds that "customers" were not the focus of the statute, the Eighth Circuit stated that "the ambiguous text of 18 U.S.C. § 1591 makes no distinction between suppliers and purchasers of commercial sex acts with children, and [the] defendant[s] have failed to persuade [the Court that] Congress intended a supplier-only limitation or a purchaser exception in § 1591 that Congress never stated."<sup>74</sup> Due to the broad language of the statute the prosecutor was able to provide the jury with straightforward instructions and secured two significant convictions.<sup>75</sup> Federal law and developing precedent provide an excellent model for prosecutors to get creative with statutory language

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<sup>72</sup>S.D. Codified Law § 26-1-1 (2013).

<sup>73</sup>Johnson, Brendan. *U.S. Attorney's Office District of South Dakota Annual Report: 2012*. p. 31. [http://www.justice.gov/usao/sd/docs/Annual\\_Report\\_2012.pdf](http://www.justice.gov/usao/sd/docs/Annual_Report_2012.pdf).

<sup>74</sup>*Jungers*, 702 F.3d 1066, 1075.

<sup>75</sup>The jury instructions used in *Jungers*, 702 F. 3d 1066 (8th Cir. 2013): "(1) Defendant knowingly recruited, enticed, or obtained a person whom the defendant knew would be caused to engage in a commercial sex act; (2) that the defendant believed that the person had not attained the age of eighteen years; (3) that the offense was in or affecting interstate commerce; (4) that the defendant intended to commit sex trafficking of a child and voluntarily and intentionally carried out some act which was a substantial step toward the crime."

and utilize laws in as many ways possible. For example, United States v. Bagley et al. was the first case to convict customers when the victim was an adult. In addition to the primary trafficker and his conspiring wife, four customers were sentenced to significant convictions and restitution requirements.<sup>76</sup>

## Conclusion

Human trafficking laws are enacted to protect vulnerable members of society from being exploited, punish the perpetrators of human trafficking when they are caught, and prevent any further harm from being caused once a trafficking network is identified. Unfortunately, the existing human trafficking laws do little to simplify the complex nature of the crime. While proper education of prosecutors and training for law enforcement officials are both essential to accomplishing these goals, the ultimate responsibility in rendering a verdict lies with the jurors. In order to ensure jurors are informed, the prosecution should make it a point of utilizing expert witnesses to explain the psychological effects human trafficking has on its victims. Additionally, when it comes time for the jurors to evaluate the victim-witness testimony, the jury instructions should explicitly state, preferably in a section entitled “Impeachment Instruction,” that re-emphasizes the potential psychological effects that can explain discrepancies in the victim’s statements. The jury needs to be made aware of the nuances of human trafficking if they are expected to render a fair verdict, and the most effective way of accomplishing this goal is by providing the jurors with clear and thorough jury instructions.

## Recommendations

The State Justice Institute has provided funding to form a Human Trafficking and State Courts Collaborative resulting in identification of four priorities necessary to address human trafficking in state court systems: 1) increase awareness and understanding of cases, victim issues, their families, and traffickers, 2) develop a method for assessing and testing the impact of human trafficking victims and defendants, 3) improve court services for human trafficking-related case processing demands, and 4) build effective national, state, and local partnerships for addressing human trafficking cases.<sup>77</sup>

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<sup>76</sup> United States Attorney’s Office Western District of Missouri; United States v. Cook, 2013 WL 3039296, W.D.Mo., June 17, 2013 (NO. 10-00244-02-CR-W-DW). <http://www.koamtv.com/Global/story.asp?S=13132902>. United States v. Stokes, 2011 WL 1585601, W.D.Mo., April 25, 2011 (NO. 10-00244-04-CR-W-DW). Stokes plea agreement, Department of Justice: [http://www.justice.gov/usao/mow/news2012/stokes\\_plea.pdf](http://www.justice.gov/usao/mow/news2012/stokes_plea.pdf). James Noel and Dennis Henry were the other two customers sentenced.

<sup>77</sup>Lederach, et al. at 20.

### **Priority 1: Ongoing Training**

As previously discussed, training has a direct link to prosecutions. Specialized education on human trafficking and how to conduct these cases is needed for prosecutors. Many states, including Florida, have included the requirement of mandated training programs for law enforcement and prosecutors but have yet to enforce these mandates. To overcome their own bias and in order to properly explain exploitation to jurors, prosecutors must be trained on and sensitive to the victim experience and mindset. Prosecutors and law enforcement need to be able to share best practices, guidelines, and lessons learned that are specific to human trafficking cases. The International Association of Human Trafficking Investigators is currently the only worldwide organization made up of law enforcement and prosecutors who have worked human trafficking cases of all types and train other law enforcement and prosecutors on human trafficking. State leaders, such as Attorneys General, Governors, and State Attorney Offices should coordinate trainings through this organization and encourage attendance at their annual conference.

### **Priority 2: Assessment and Data-Collecting**

Advise states to look to other assessment tools from national leaders in human trafficking such as Polaris Project, Shared Hope, and state leaders to model their own local, district, or statewide system after existing models. As part of a training program that is developed and enforced for prosecutors and law enforcement, the outcomes could be tested through guidelines for cases and reported back to a central database. For example, Florida Department of Juvenile Justice is using the assessment tool developed by Shared Hope International to determine potential human trafficking victims coming through the juvenile detention and dependent system. Also in Florida, the Metropolitan Bureau of Investigations has started an initiative for collecting both quantitative and qualitative data from multiple agencies on victims/survivors, perpetrators, and “johns”. Their first data summary, although small, serves as the preliminary baseline for the beginning of Central Florida’s Data Gathering Mission.

### **Priority 3: Human Trafficking-Specific Units; Human Trafficking-Specific Courts**

What has been expressed by law enforcement and prosecutors alike is that if an officer or prosecutor does not dedicate the appropriate level of time and effort

that such complex cases require victims will fall through the cracks and, ultimately, cases will not be successful. Individuals or units who seek training and look for cases need to be assigned to human trafficking units or as a representative to the local human trafficking task force with agency funding dedicated to only human trafficking investigations for that specific area. For example, Pinellas County Sheriff Office has recently decided to dedicate a unit to domestic minor sex trafficking investigations; Clearwater Police Department since 2006 has dedicated at least one full time investigator to the Clearwater/Tampa Bay Area Human Trafficking Task Force; the Tampa office of Homeland Security Investigations has a full-time investigator dedicated to human trafficking investigations as well as collaboration with the Task Force. A similar structure exists in Central Florida with Orange County Sheriff Office, Metropolitan Bureau of Investigations, and the Greater Orlando Area Task Force on Human Trafficking. When resources, training, and collaboration are focused specifically on victim-centered human trafficking investigations, the outcomes are more successful. Furthermore, the “New York Model,” which utilizes specific courts to handle human trafficking cases, as well as prostitution and pandering-type offenses, is another option states can use to best address their human trafficking concerns. This model is focused on identification and recovery of human trafficking victims, ensuring that criminal charges they gained while under the coercion of the trafficker are dropped or vacated, and also offering services and avenues out of prostitution for those who choose to take it.

Whatever structure is selected by a state, guidelines and preparations for qualified expert testimony should also be implemented. Experts are often an essential part of explaining to juries the world of human trafficking—one that is completely foreign to the world the average citizen is accustomed. As discussed in detail above and throughout cases, such as in the Tillis case, experts can be useful in connecting the slang, rules, and behavior of trafficking with the statutory elements such as coercion, which is more difficult for jurors to grasp than violence or physical restraint. For example, victims being on “automatic”, “autopilot”, or “auto” means that they continue to abide by the rules of the trafficker even when he is not physically present. This classic example of the power of coercion connects to the prior discussion that freedom of movement does not always equal freedom of choice, and can only be effectively explained by victim testimony and corroboration such as by an expert. On the cutting edge of this aspect is the first survivor-created and survivor-informed model for training and certifying human trafficking survivors to serve as expert witnesses and reinforce the victim testimony when the survivor expert’s own experience in exploitation has parallels to the case at issue.

Other developments for this priority include the need for judicial training and implementing bench cards for quick and easily accessible information when a

victim may be identified or assisted in court. General community training on human trafficking issues and the ways in which this crime affects victims is also helpful, considering any citizen at any time could be called to be a juror on a human trafficking case.

#### **Priority 4: Web-based Network to Build Effective Partnerships**

A web-based prosecutorial network to share information, get advice, and collaborate with other prosecutors and human trafficking experts has been an explicitly requested need by state prosecutors, as previously noted. Currently, this exists through membership and private database with the International Association of Human Trafficking Investigators ([www.iahti.org](http://www.iahti.org)), and it is the only one available to connect law enforcement and prosecutors nationally and internationally to share case information, criminal intelligence, investigative and prosecutorial tactics, and lessons learned.

#### **Sample Human Trafficking Jury Instructions for Florida**

It is a felony crime in the state of Florida to [transport], [solicit], [recruit], [harbor], [provide], [entice], [maintain], or [obtain] a person by any means of [force], [fraud], or [coercion] for the purpose of [sexual exploitation] or [forced labor].

To prove the defendant is guilty of human trafficking, the State must prove beyond a reasonable doubt that:

< Element 1 - Action/Process >

< Alternative A) Transport. The defendant transported < victim >;

< Alternative B) Solicit. The defendant solicited < victim >;

< Alternative C) Recruit. The defendant recruited < victim >;

< Alternative D) Harbor. The defendant harbored < victim >;

< Alternative E) Provide. The defendant provided < victim >;

< Alternative F) Entice. The defendant enticed < victim >;

< Alternative G) Maintain. The defendant maintained < victim >;

< Alternative H) Obtain. The defendant obtained < victim >;

< Element 2 - Means >

< Alternative A) Force. The defendant used force against < victim >;

< Alternative B) Fraud. The defendant used fraud against < victim >;

< Alternative C) Coercion. The defendant used coercion against < victim >;

< Alternative D) Minor. If < victim > had not yet attained the age of 18 at the time of the offense. If the person subject to human trafficking is a minor, then the State need not prove force, fraud, or coercion.

< Element 3 - Purpose >

< Alternative A) Commercial sexual activity: any violation of Chapter 796 or an attempt to commit any such offense, including sexually explicit performances and the production of pornography;

< Alternative B) Forced labor, including any work of economic or financial value, or services.

< Element 4 - Knowledge >

< Alternative A) Knowledge. The defendant knowingly engaged in, or attempted to engage in, participation in a venture that subjected < victim > to human trafficking.

< Alternative B) Reckless Disregard of the Facts. The defendant, in reckless disregard of the facts, engaged in or attempted to engage in, participation in a venture that subjected < victim > to human trafficking.

< Alternative C) Financial Benefit. The defendant benefited financially by receiving anything of value from participation in a venture that has subjected < victim > to human trafficking.

< Alternative D) Minor Status: If the defendant had reasonable opportunity to observe < victim > who was subject to human trafficking, then the State need not prove the defendant knew that < victim > had not attained the age of 18 years.

< Impeachment Instruction >

< It is the responsibility of you, the jury, to weigh the truthfulness and credibility of a witness.

< A witness's testimony can be discredited or refuted based on the evidence, or lack of evidence, presented at trial. It is up to you to assign whatever weight you think each witness's testimony deserves.

< Witnesses may have admitted to being involved in criminal activity. It is up to you to determine if that witness participated in such crimes based on their own free will and judgment, or if they suffered from any psychological effects caused by human trafficking during the commission of said crimes. It is up to you to decide if the witness testified in an attempt to gain favorable treatment from the prosecution and/or with the hope of avoiding punishment.

< Evidence has been presented that a victim-witness received government assistance before and during this trial. It is your responsibility to determine if the victim-witness's testimony was manipulated or influenced based on such assistance. Federal law requires that alleged victims of human trafficking receive support and it is the responsibility of the investigators and prosecution to ensure this assistance does not taint any evidence.

***Plain meaning definitions, and statutory definitions of elements***

“Transport”: to carry (someone or something) from one place to another; to transfer or convey from one place to another.

“Solicit”: to make petition to; entreat; to approach with a request or plea; to urge (as one's cause) strongly; to entice or lure especially into evil; to try to obtain by usually urgent requests or pleas.

“Recruit”: to find suitable people and get them to join a company, group, or an organization; to form or build (a group, team, army, etc.) by getting people to join;

to persuade (someone) to join you in some activity or to help you; to secure the services of.

“Harbor”: to hold or contain.

“Provide”: to make (someone/something) available; to supply (someone/something that is wanted or needed); to give someone/something wanted or needed to (someone or something); to supply; to say that something will or should happen; to make it certain or possible that something will happen or be done.

“Entice”: to attract (someone) especially by offering or showing something that is appealing, interesting, etc.; to attract artfully or adroitly or by arousing hope or desire.

“Maintain”: to cause (something) to exist or continue without changing; to continue having or doing (something); to keep in an existing state.

“Obtain”: to gain or get (something) usually by effort; to continue to be accepted or in use; to gain or attain usually by planned action or effort

“Force” includes:

- confinement;
- physical restraint;
- beating, slapping, punching, grabbing, pushing, or strangling;
- sexual assault, rape and/or gang rape;
- beatings or rapes with objects (bats, tools, chains, belts, hangers, canes, cords, etc.);
- burning with cigarettes or other items.

“Fraud” includes:

- false promises;
- deceit;
- lies or misrepresentations about working conditions;
- lies or misrepresentations about a “better life” or promising a “dream”;
- trickery;

- duress;
- debt bondage.

“Coercion” includes:

- threat of physical force against any person;
- use of physical force against any person;
- restraining, isolating, or confining; threatening to restrain, isolate, or confine any person without lawful authority and against her or his will;
- using lending or other credit methods to establish a debt by any person when labor or services are pledged as a security for the debt, if the value of the labor or services as reasonably assessed is not applied toward the liquidation of the debt, the length and nature of the labor or services are not respectively limited and defined;
- destroying, concealing, removing, confiscating, withholding, or possessing any actual or purported passport, visa, or other immigration document, or any other actual or purported government identification document, of any person;
- causing or threatening to cause financial harm to any person;
- enticing or luring any person by fraud or deceit;
- providing a controlled substance as outlined in Schedule I or II of s. 893.03 to any person for the purpose of exploitation of that person.

“Sexually explicit performances”: act or show, whether public or private, that is live, photographed, recorded, or videotaped, and intended to arouse or satisfy the sexual desires or appeal to the prurient interest.

“Services”: any act committed at the behest of, under the supervision of, or for the benefit of another. The term includes, but is not limited to, forced marriage, servitude, or the removal of organs.