

ASSISTING HUMAN TRAFFICKING VICTIMS WITH RETURN OF PROPERTY AND RESTITUTION

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INTRODUCTION

Victims of human trafficking face numerous obstacles to justice, among them the re-victimization they may experience when participating in the criminal justice process. Human trafficking laws have provided victims with some protections, but there are still hurdles for many victims looking to rebuild their lives. Investigating and prosecuting cases of human trafficking and violence against sexually exploited women is rife with challenges, including balancing victims' property interests with the need to hold traffickers and exploiters accountable. Criminal justice professionals can meet these challenges by pursuing the return of victims' property and seeking restitution where appropriate. States across the country prescribe comprehensive restitution generally and often specifically for victims of human trafficking.

This *STRATEGIES in Brief* will identify issues that often arise when trying to return property to victims in human trafficking cases and will provide collaborative strategies for prosecutors and allied criminal justice professionals seeking to balance victim and criminal justice interests. It will also present a brief overview of restitution as another means of relief for victims of human trafficking to be considered by prosecutors.

RETURN OF PROPERTY

Victims often ask law enforcement, advocates, civil attorneys, or prosecutors about when and how seized property will be returned to them. This issue may arise at a number of different stages during the pendency of the criminal case, including immediately upon seizure of property, pretrial, during trial, and post-trial. Determining whether property can be returned to trafficking victims depends on a number of considerations; for example, the property's evidentiary value, the type of property, ownership, and the victim's interest in the property. Reaching the appropriate answer requires knowledge of your jurisdiction's laws, a collaborative relationship with law enforcement, anticipation of the property's relevance to the prosecution of a case, and an understanding of the dynamics of exploitation.

Is the property evidence?

One of the first questions criminal justice and allied professionals will have to ask themselves when determining whether it is appropriate or possible to return seized property is whether it is evidence. Presumably, everything law enforcement seizes has *some* evidentiary value, but that must be balanced against the individual's strong interest as the owner of the property. In anticipation of such concerns, prosecutors and law enforcement should proactively communicate with victim advocates and civil attorneys to provide guidelines regarding property evidence and necessary seizure. Thus, when issues arise, advocates and civil attorneys will be better positioned to understand when certain items cannot be returned to victims due to their relevance to a criminal case.²

Certain evidence may be copied, photographed, preserved for the record, or documented in some way so that the original property can be returned to a victim. Common types of evidence seized include identification documents, phones, GPS devices, computers, money, credit and debit cards, jewelry, and clothing. The prosecutorial value of such evidence is

in both its physical use in the commission of the crime as well as the additional corroborating evidence it provides. For example, a trafficker's finger prints, DNA, hairs, etc. on documents, passports, identification (particularly bearing date of birth where the victim's age or the trafficker's knowledge of the victim's age is an issue) can be very significant evidence. This is especially true because document confiscation is a mechanism of control and often an explicit element of trafficking offenses.³ In addition, many jurisdictions often test money for chemical traces of narcotics or gunpowder residue to prove a nexus to other aspects of the case and to corroborate victim testimony. There may also be certain chemicals associated with certain types of labor that could justify chemical testing. Another example can be found in electronic devices (*e.g.*, phones, computers, iPods, GPS devices, etc.), which contain valuable evidence in the form of electronic data. Forensic examination can sometimes be done quickly by the investigating agency or the evidence may have to be sent to a lab for more extensive examination. While testing may create a delay in property return, this process offers a wealth of evidence that is critical to holding offenders accountable.

There is more information in phones and computers than one may think, beyond just tracing phone numbers called. Properly examining the phones and computers of victims and traffickers is often what results in convictions. Juries may question the credibility of trafficking victims due to their involvement in the forced sex trade, collateral criminal behavior, piecemeal reporting, inconsistent statements, or cultural issues⁴ and immigration.⁵ When the victim's testimony, however, is supported by forensic evidence found in the seized phone's memory, it can satisfy the juror's desire for independent corroborating evidence. This evidence can turn a difficult case that relies solely on victim testimony into one where the victim's account is thoroughly corroborated by independent evidence; this strengthens the case and makes a guilty verdict or plea more likely. Where law enforcement is able to make a complete copy of all data on a seized computer, phone, or other electronic device, it may be possible to return the original device to the victim. Depending on the amount of data, and the complexity of the device, some jurisdictions have the capability of forensically copying the devices themselves.⁶ Other devices, however, have to be sent to outside labs with superior technological capacity and will take more time. Ask your law enforcement agency to explore these options, which will be discussed in greater detail below.

It is important for law enforcement to seize all of the money of the *trafficker* or the criminal enterprise immediately so that it is not used for bail, to hire a lawyer, to flee, and to prevent partners partners or family from hiding the money. In doing so, the money can be securely retained until sentencing when a judge can order restitution for the victim⁷ from the seized funds. If restitution is not awarded or if the amount of the restitution does not make the victim whole, the victim might want to consider filing for civil remedies.⁸ When money and jewelry are seized, determining ownership can be problematic.⁹ With money, in particular, it is critical to distinguish between court-ordered *restitution*, and a law enforcement officer giving money seized during the investigation to the victim. At the time money is seized, there has not been a determination in court of entitlement to restitution, and the police have no legal authority to give victims any of the defendant's money. A fundamental premise of a human trafficking case is that the trafficker takes all the profits from the forced labor of the victims, so the unfortunate truth is that the money earned through illegal activity are proceeds of the crime and none of it is "the victims' money," even though they likely are the ones who earned it. Proceeds of illegal activity would usually be seized for forfeiture.¹⁰ Therefore, there would rarely be a case where there is any money to released to a victim.¹¹ However, prosecutors should work toward ordering the seized money to be paid to the victim to satisfy restitution (at the conclusion of the case), before it is tapped into for forfeiture.

Procedure for initiating return of property

As soon as possible, victims' advocates or attorneys should provide law enforcement and the prosecution with a complete list of their client's belongings. The list should prioritize what items are most important to the victim and detailed explanations of why. Communicating this information to law enforcement and prosecutors will enable them to properly evaluate the evidence and submit a request to the court for release of property. While it might not be possible for them to agree to

a release of everything on the list, a victim's most urgent needs can be addressed and a compromise reached. Consider a compromise where evidence can be released if it is completely and accurately documented and the defense has had an opportunity to inspect the original. Be aware of relevant rules of criminal procedure that apply to the return of property.¹² Additional considerations for returning victims' property may arise where a warrant was issued for the seizure because state law might require that any return of property be done through a court order.¹³ Before requesting the return of any property, law enforcement and prosecutors should ensure that the victim legitimately owns the property.

Some practice tips for documenting evidence in order to be able to return the original to the rightful owner can be found in the box below.

PRACTICE TIPS

- Documentation of seized evidence is an opportunity to think outside the box; consider recording evidence by video to capture the complete view of a piece of evidence.
- Documenting a passport might be satisfied by taking quality photos or color scans of every page of the passport including the covers.
- Documenting a cellphone/computer/electronic device would require photographing the condition of the device (including readable photos of any markings externally and internally), and also making a complete copy of all data on the device by a forensic expert. (There may be deleted data still stored on the device that an expert can retrieve even where law enforcement or the prosecutor do not have access).
- Other items may be easier or more difficult to reproduce and the key is whether the copy still maintains all the evidentiary value and admissibility of the original.

Note: Copies may not suffice for items that are central to the case or where there is no compelling need to release the item pre-trial.

In most cases, prosecutors, law enforcement, advocates, and victims' attorneys should avoid *telling* other professionals *what to do*; instead, they should work together to share perspectives and find some common ground. The key to finding solutions is a *balancing of competing needs*. Prosecutors should review each case to determine if the facts and circumstances of each piece of evidence allow for its release. For each individual piece of evidence, prosecutors should first weigh the importance of the evidence – to holding the trafficker accountable in court – against how critical and irreplaceable the property is to the victim. Something that is absolutely critical to the prosecution will rarely be released, but some items may be dispensable to the prosecution, which weighs in favor of release to the victim. For example, if the trafficker kept the victim's prosthetic leg locked in a closet to keep her from running away – and law enforcement recovered it locked in that closet – that is key evidence. Prosecutors should, however, communicate with victims and their advocates about the significance of certain irreplaceable items in evidence and make a concerted effort to persuade the judge to release that evidence to him or her. Such items might include family jewelry, eyeglasses, automobiles, passports, government benefit cards, driver's licenses, and more.

RESTITUTION

As mentioned above, not all property seized from a victim can be returned. Additionally, the physical, emotional, and economic damages incurred by trafficking victims are unparalleled. As a result, legislatures have enacted statutes—including restitution laws that attempt to counter the devastating effects of these crimes. Some jurisdictions permit restitution under general laws, while others have drafted restitution statutes specific to trafficking victims. Whether victims' property was returned or not, prosecutors *should also* seek to restore victims through an award of restitution.¹⁴

Restitution can be ordered by the judge following a conviction but prosecutors should begin considering restitution issues from the beginning of a case when they are making charging decisions. While restitution may be available only for specific offenses, all states have passed either a general or trafficking-specific statute providing for relief. Restitution is a valuable tool for prosecutors and is grounded in several rationales including punishment, deterrence, rehabilitation, and compensation.¹⁵ Restitution awards can include but are not limited to compensation for medical treatment, psychological treatment, community services, gross income/value of services, attorney's fees, return of property or full value, and relocation expenses.

In contemplation of pursuing restitution upon conviction, prosecutors should be familiar with their jurisdiction's laws so that they can support their sentencing arguments with ample evidence, statutory language, and constitutional provisions related to victims' rights to restitution.¹⁶ Restitution can and should also factor into plea-bargaining. The sentencing hearing, following trial or a plea, is an opportunity for the prosecutor to act as an advocate for the victim(s). *Make sure to account for all victims and their losses.* Be familiar with how to calculate restitution awards and in cases involving children, and consider contacting the National Center for Missing and Exploited Children (NCMEC), which has experience with those specific calculations and can provide technical assistance.¹⁷ When making calculations, note that restitution can be a factor in sentencing guidelines and may be mandatory unless the defense can present a compelling reason against the order.

To obtain a restitution order at a sentencing hearing, prosecutors must prove, by a preponderance of the evidence, that the trafficker's or exploiter's criminal actions were at least a proximate cause of the victim's injury.¹⁸ After the trafficker's criminal acts are established as the cause of the injury, the amount of the damage has to be proven before a restitution order can be made.¹⁹ This can be done by presenting documentary evidence of the injury or loss through medical and other bills, receipts, victim testimony, expert testimony, affidavits, and more, pursuant to your jurisdiction's procedural rules governing sentencing.²⁰ The judge can order that the convicted trafficker pay restitution as a lump sum or in payments. It will be important for victims to keep probation or parole officers apprised of where to send their restitution payments as they are paid by the offender over time.

CONCLUSION

Protecting victims' rights while balancing criminal justice needs is not always a simple task. It requires compromise, an understanding of each agency's role in the response to human trafficking, and an appreciation for the interests involved. Law enforcement, prosecutors, and judges must strike the difficult balance between the necessity to collect and preserve evidence for trial with the rights afforded to victims of human trafficking. Each case will be heavily dependent on its unique facts and circumstances, as well as the collaboration amongst police, prosecutors, and allied professionals.

ENDNOTES

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- 2 Due process still generally requires the prosecutor to give the defense a reasonable opportunity to inspect original evidence, in possession of law enforcement, before it is released.
- 3 For more information on specific requirements for human trafficking offenses, see AEquitas' Statutory Compilation of Human Trafficking Offenses, *available upon request at* www.aequitasresource.org/library.cfm.
- 4 In this context, the term culture encompasses the divide between between sexually exploited persons and members of the mainstream society in which they are marginalized.
- 5 Prosecutors and allied professionals with experience in violence against women crimes and expertise in criminal prosecutions with complex investigative tactics or legal issues and with the civil legal and advocacy needs of these victims should collaborate to enhance the identification of victims and traffickers. Jennifer Gentile Long, *Enhancing Prosecutions of Human Trafficking and Related Violence Against Sexually Exploited Women*, 6 STRATEGIES 2 (May 2012), *available at* <http://www.aequitasresource.org/library.cfm>. You may want to seek the permission of the court and put the defense on notice. Defense counsel could argue a due process violation if their experts are not permitted to examine the original evidence.
- 7 Victims may also have the ability to pursue civil restitution. In some states the funding source from restitution can be pulled from forfeited assets. See Charlene Whitman, *Hitting Them Where it Hurts: Strategies for Seizing Assets in Human Trafficking Cases*, 20 STRATEGIES IN BRIEF (Sept. 2013), *available at* www.aequitasresource.org/library.cfm.
- 8 *Id.* Prosecutors should work toward court ordered restitution. At the close of the criminal case, it might be helpful for the civil attorney to send any statement of the case to the prosecutor for review to ensure it does not contain any factual inaccuracies when pursuing a separate civil remedy.
- 9 Ownership can also be a complex issue with items such as phones. Is "her phone" a phone the trafficker bought for her to use as a work phone? Is such a phone his or hers? This is less of an issue if you can establish that he or she had this phone before he or she met the trafficker.
- 10 See AEquitas' Restitution and Civil Asset Forfeiture: A Focus on Human Trafficking Statutory Compilation, *available upon request at* www.aequitasresource.org/library.cfm; see also WHITMAN, *infra* note 7.
- 11 There are exceptions to every rule; for example, you could have a victim who is still being groomed, and the trafficker has not yet taken the cash that the victim had when they met. You could have a victim who has just cashed a social security check or other government benefits check where the prosecution still has the issue of proving that these are the funds from that source and not proceeds of the crime.
- 12 Property seized as evidence will likely require authorization from the court before it can be released, and may require giving the defense an opportunity to inspect the evidence first.
- 13 A search warrant orders the police to seize property. The judge's order is required to then release that same property.
- 14 See FULBRIGHT & JAWORSKI L.L.P., POLARIS PROJECT, MAXIMIZING RESTITUTION AWARDS FOR LABOR AND SEX TRAFFICKING VICTIMS: A GUIDE FOR FEDERAL PROSECUTORS AND PRO BONO ATTORNEYS (2013).
- 15 NAT'L CRIME VICTIM LAW INSTITUTE, VICTIM LAW BULLETIN, FUNDAMENTALS OF VICTIMS' RIGHTS: A VICTIM'S RIGHT TO RESTITUTION (Nov. 2011), *available at* <http://graduate.lclark.edu/live/files/11821-fundamentals-of-victims-rights-a-victims-right-to>.
- 16 *Id.*
- 17 NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, <http://www.missingkids.com/home> (last visited Dec. 18, 2013).
- 18 See, e.g., 18 U.S.C.A. § 2259 (2013); see also, e.g., United States v. Lewis, 791 F.Supp.2d 81 (2011) (ordering defendant to pay for restitution to numerous victims of child sex trafficking, such as costs of psychological treatment including medications, tutoring expenses, and value of services).
- 19 Prosecutors should try to have seized money or property applied toward restitution to the victim – before attorneys' fees and other expenses – to avoid the Restitution Order becoming an unexecutable civil judgment against an offender with no visible or liquid assets who is serving a prison sentence.
- 20 See, e.g., 720 ILL. COMP. STAT. ANN. 5/10-9 (allowing restitution to be proven by any of the real market value of the labor/services rendered, actual income earned by the trafficker, or even hours worked times minimum wage where all else fails).

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