



PROSECUTION AT ANY COST?

The Impact of Material Witness Warrants in Federal Human Trafficking Cases



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“Too often, victims of trafficking are treated as instruments of criminal investigations, rather than as rights holders with a legal entitlement to protection, support and remedies.”

Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy N. Ezeilo, ¶ 53, Human Rights Council, U.N. Doc. A/HRC/26/37 (Apr. 1, 2014).

Introduction

Human traffickers deprive their victims of freedom, agency, and self-determination. While the criminal justice system seeks to restore these rights, the realities of criminal prosecution sometimes undermine this goal. Human trafficking prosecutions often rely heavily on victim testimony. However, trafficking victims are often unwilling to cooperate with law enforcement or appear in court. When victims refuse to testify, prosecutors may face a difficult choice: they can drop the case, allowing a trafficker to go free. Or they can secure the conviction – at the expense of the victim’s freedom, agency, and self-determination.

Courts have enormous power to compel witness testimony. When a court anticipates that a witness’s testimony is material to a case, but determines that the witness is unlikely to appear willingly, the court may issue a *material witness warrant* for the witness’s arrest, without regard to whether the witness is also a victim.¹ It is not uncommon for courts to issue these warrants in human trafficking prosecutions, particularly in sex trafficking cases, where the material witnesses are sometimes the defendant’s victims. The

¹ See 18 U.S.C. § 3144.

result is that human trafficking victims – some in their early teens – are arrested and, in some cases, detained in jail pending their testimony so that the government can pursue a conviction against their traffickers.²

Federal authorities often tout the importance of a victim-centered approach to human trafficking prosecutions.³ Although the practice of arresting, jailing, and forcing trafficking victims to testify is inconsistent with a survivor-centered, trauma-informed approach, courts seem willing to accept that victims' wishes should take a back seat to efforts to convict.⁴ Indeed, courts frequently issue material witness warrants without *any* discussion of the negative impact arrest and detention will likely have on human trafficking victims.⁵ That impact can be significant, particularly for those who have only recently escaped their traffickers.

Eliminating this practice altogether would undoubtedly thwart some prosecutions, allowing traffickers to go free. But arresting and detaining victims as material witnesses – especially in the context of trafficking prosecutions – raises critical questions: When,

Arresting and detaining victims as material witnesses—especially in the context of trafficking prosecutions—raises a critical question: At what cost to trafficking victims should traffickers be brought to justice?

if ever, should prosecutors compel testimony of non-consenting victims in order to win a case? At what cost to trafficking victims should traffickers be brought to justice?

This report explores the implications of material witness warrants in federal trafficking

cases. It analyzes the circumstances under which trafficking victims have been arrested and detained, the reasons given for these arrests, and the cost imposed on victims in the

² See e.g. Government's Memorandum in Aid of Sentencing, *United States v. Curtis*, No. 1:03-cr-00533 (D.D.C. Feb. 16, 2006), Dkt # 102 at 2, 7 (noting that the victim was 12 years old when trafficked in 2002, and was detained to testify at trial in 2004); Application for Warrant and Order Detaining Material Witness, *United States v. Hunt*, 1:13-cr-00180 (E.D.Cal., August 2, 2013), Dkt. # 56 at 2 (noting that the victim was 15 at time of trial).

³ See generally Attorney General's Report to Congress on U.S. Government Efforts to Combat Trafficking in Persons FY 2017, <https://www.justice.gov/humantrafficking/page/file/1103081/download>.

⁴ See e.g. Jessica Emerson and Alison Aminzadeh, Left Behind: How the Absence of a Federal Vacatur Law Disadvantages Survivors of Human Trafficking, 16 U. Md. L.J. Race, Religion, Gender & Class (2017), <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1272&context=rrgc> at 245 (noting that a "focus on a criminal justice approach to trafficking often results in prioritizing the prosecution of traffickers over the protection of victims' rights").

⁵ The impact of arrest is not a statutory factor to be considered in issuing a material witness warrant. See 18 U.S.C. § 3144.

name of prosecution. Section I outlines the methodology the authors used to gather and organize information on material witness detention in human trafficking cases. Section II lays out the legal requirements for requesting and securing material witness warrants. This section also discusses particular cases, identifying circumstances and trends in trafficking cases with material witness orders. Section III discusses special issues arising in cases of undocumented or foreign-born material witnesses. Section IV lays out two false narratives that enable this practice to continue. The final section recommends practical steps that may reduce the harm suffered by trafficking victims identified as material witnesses in federal prosecutions.

THE MATERIAL WITNESS STATUTE:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title [relating to pretrial detention]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure. 18 U.S.C. § 3144.

I. Research Methodology

The Human Trafficking Legal Center maintains a database of federal criminal trafficking cases brought since 2009.⁶ The authors used this database to identify instances in which courts ordered victims to be detained as material witnesses in federal

⁶ At the time the research was conducted, the database included 1,668 cases brought under the federal trafficking statutes, Chapter 77 of U.S. Code Title 18, since 2009. Given the secrecy of grand jury proceedings, the database does not include investigations that ended without charges being filed.

criminal human trafficking prosecutions.⁷ The research uncovered 49 individual instances of trafficking victims detained as material witnesses in federal criminal cases against their alleged traffickers.⁸ All but three of these trafficking victims were held as material

The research uncovered 49 individual instances of trafficking victims detained as material witnesses in federal criminal cases against their alleged traffickers.

witnesses in sex trafficking cases. In another 15 instances, courts ordered victims to be designated as material witnesses, but the authors were unable to conclusively determine whether these victims had been detained. Finally,

the authors found 42 instances of people being designated as material witnesses, but could not determine whether they were victims.⁹

There is reason to believe that there are more – perhaps many more – trafficking victims who have been jailed on material witness holds than this research reveals. The search results were necessarily limited to public record references to the use of material witness warrants, and therefore exclude any cases in which 1) the court issued the material witness warrant under seal, or 2) the docketed documents and available transcripts do not discuss the material witness warrant. Furthermore, material witness warrants are also used during grand jury investigations, which are generally conducted in secret.¹⁰ In short, the report does not purport to address the scale of the issue. Instead, the report focuses on concrete examples, identifying circumstances common to these cases. The report seeks to spark debate about the significant costs and consequences of this practice.

⁷ Search terms included “material witness,” “material witness detention,” and “3144.”

⁸ Because victims are often identified by initials or in sealed documents, authors were sometimes forced to draw inferences to discern a detained material witness’s role in a case. For example, for purposes of this research, where a detained material witness had the same initials as a victim, the individual was assumed to be the same person.

⁹ Authors also found 23 non-victim material witnesses in federal human trafficking prosecutions, predominantly friends or associates of a defendant. See Appendix for full dataset.

¹⁰ Rule 6(e)(2)(B) of the Federal Rules of Criminal Procedure imposes secrecy requirements on grand jury investigations. See *United States v. Awadallah*, 349 F.3d 42, 51 (2d Cir. 2003) (finding that a grand jury investigation is a “criminal proceeding” under 18 U.S.C. § 3144).

II. Legal Procedure for Obtaining Material Witness Warrants¹¹

Under federal law, a court may order the arrest and detention of a potential witness in a criminal matter where a party has shown that there is probable cause to believe that the witness's testimony is *material* and that securing the witness's appearance by alternative means would be *impracticable*.¹² Neither case law nor the material witness warrant statute clearly define what "material" means for these purposes. The law gives courts significant latitude in issuing the warrants, allowing detention so long as it is "necessary to prevent a failure of justice."¹³ In the cases analyzed for this report,¹³ all but one request came from prosecutors. Courts granted every request.¹⁴

Lawyers for individuals arrested and held under material witness warrants have criticized the statute, arguing that it "confers incredible power on the government to obtain the arrest and detention of a witness" not charged with any crime.¹⁵ Most trafficking victims do not have counsel unless and until they are

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arrested on such a warrant, and even then are not guaranteed counsel. At that point, their counsel is likely a court-appointed criminal defense attorney who must start from scratch to establish trust with a traumatized client. This often means that the victim's attorney is

¹¹ When a material witness is already incarcerated, a Writ of Habeas Corpus Ad Testificandum will issue. 28 U.S.C. §§ 2241(c)(1), (c)(5); see e.g. *Barber v. Page*, 390 U.S. 719, 724 (1968) (noting that "federal courts [have] the power to issue writs of habeas corpus ad testificandum" in "case of a prospective witness currently in federal custody" where testimony is necessary). Trafficking cases in which a Writ of Habeas Corpus Ad Testificandum was issued include *United States v. Chatman*, 9:17-cr-80013 (S.D. Fla. Jan 24, 2017), and *United States v. Norris*, 1:05-cr-00479 (N.D. Ga. Oct 12, 2005).

¹² See 18 U.S.C. § 3144 (2006); *Bacon v. United States*, 449 F.2d 933, 942-43 (holding that probable cause is the appropriate standard for § 3144 material witness warrants).

¹³ *Id.* Where testimony can be secured by deposition, the witness may be able to opt out of testifying in open court. Release in that case is not guaranteed, but subject to the court's determination that "further detention is not necessary to prevent a failure of justice." *Id.*

¹⁴ In the one case in which the defendant made the request, the motion was also denied in part. See *generally* Motion Hearing, *United States v. Sou*, 1:09-cr-00345 (D. Haw. Aug 27, 2009) Dkt #172.

¹⁵ Preston Burton, Paige Ammons and Caroline Eisner, Coercive Process For Material Witnesses Needs Reform, Law360 (March 24, 2019), <https://www.law360.com/articles/1140264/coercive-process-for-material-witnesses-needs-reform>.



not in the best position to articulate for the court the myriad harms the victim has suffered and may continue to suffer if detained. These systemic failures suggest that the appointment of victim-witness counsel for trafficking victims earlier in the process could result in greater cooperation. Indeed, appointment of legal counsel for a traumatized victim could prevent the need for a material witness warrant entirely.

In their case in chief, federal prosecutors must prove several elements to convict a defendant of sex trafficking. Prosecutors must show that the defendant acted knowing or in reckless disregard of the fact that the victim was either a) under 18 years of age or b) was being compelled through force, fraud, or coercion to engage in commercial sex acts.¹⁶ Victims are generally in the best position to testify to the facts needed to convict their traffickers, making their testimony material, if not essential, to the prosecution.¹⁷ But, in the aftermath of trauma, trafficking victims may be unavailable or uncooperative. Under the current test for issuing material witness warrants, neither prosecutors nor courts have to consider whether a material witness is also a victim, let alone the effect of arrest and detention on a traumatized victim. The result is that trafficking victims are

¹⁶ See 18 U.S.C. § 1591.

¹⁷ See Evidence Considerations in Proving Sex Trafficking Cases without a Testifying Victim at 116, <https://www.justice.gov/usao/page/file/1008856/download>.

arrested, processed, and detained. And trafficking prosecutions move forward without regard to the toll they may take on the very victims they purportedly seek to protect.

A. Materiality

In order to secure a material witness warrant, a party to a criminal proceeding must file an affidavit showing that the testimony of the potential witness is material.¹⁸ Trafficking victims are necessarily privy to the details of their own exploitation; in some cases, they are the only people with direct knowledge of what defendants did and likely knew. Their testimony, in other words, is almost always material. The materiality standard is not, however, a necessity standard. In other words, notwithstanding the enormous impact that arrest and detention have on trafficking victims, the material witness statute gives no consideration to the necessity of the victim's testimony in light of the other evidence, what steps the government has taken (or could take) to secure other evidence, or the likely impact of arrest and detention in light of the victim's background and circumstances.¹⁹

The material witness statute gives no consideration to whether other evidence could be used instead of the material witness's testimony.

For example, in *United States v. Hunt*, the victim, S.G., met the defendant when she ran away from her grandmother's home at the age of 13.²⁰ The defendant then used threats of force and physical violence to traffic her into commercial sex.²¹ In the application for a warrant to detain S.G. as a material witness, prosecutors told the court that S.G. was "the primary — if not sole — witness on critical aspects of [the sex trafficking] count, including the defendant's use of force and coercion and the existence of fear that compelled her to prostitute herself for the defendant."²² The victim's testimony, prosecutors

¹⁸ See 18 U.S.C. § 3144.

¹⁹ In contrast, a prosecutor who seeks a court order authorizing a wiretap must establish far more than materiality. In light of the substantial invasion of privacy effected by a wiretap, a prosecutor must demonstrate that a wiretap is "necessary" by providing a "full and complete statement" of why other investigative processes are or will be futile. See 18 U.S.C. § 2518.

²⁰ See Government's Trial Brief at 2, *United States v. Hunt*, 1:13-cr-00189 (E.D. Cal., July 29, 2013), Dkt #53.

²¹ See *id.*

²² Application for Warrant and Order Detaining Material Witness at 4, *United States v. Hunt*, No. 1:13-cr-00189 (E.D. Cal. Aug. 2, 2013), Dkt # 56.

argued, went “to the heart of the government’s case.”²³ The court granted the warrant request, and S.G. was detained for two days and released only after she testified.²⁴

CASE STUDY: Minor Sex Trafficking Victim Detained

In *United States v. Hunt*, the victim, S.G., met the defendant when she ran away from her grandmother’s home at the age of 13. The defendant then used threats of force and physical violence to traffic her into commercial sex. In the application for a warrant to detain S.G. as a material witness, prosecutors told the court that S.G. was “the primary — if not sole — witness on critical aspects of [the sex trafficking] count, including the defendant’s use of force and coercion and the existence of fear that compelled her to prostitute herself for the defendant.” The victim’s testimony, prosecutors argued, went “to the heart of the government’s case.” The court granted the warrant request, and S.G. was detained for two days and released only after she testified.

B. Impracticability

In addition to showing that a witness’s testimony is material, prosecutors must also convince the court that it would “impracticable” to secure a witness’s testimony without a subpoena.²⁵ While the materiality of trafficking victims’ testimony is rarely in question, their reasons for not appearing to testify vary widely.

Trafficking victims held as material witnesses generally fall into one of two categories: (1) those who are difficult to reach, and (2) those who are actively opposed to testifying. Victims may be hard to reach because they are homeless, lack a permanent address, or are otherwise transient. Witnesses may be unwilling to testify because they want to avoid law enforcement, because they fear their traffickers, or because they feel loyal to their traffickers. Many simply do not want to relive the trauma.

²³ See *id.* at 2.

²⁴ See Order of Release, *United States v. Hunt*, No. 1:13-cr-00189 (E.D. Cal. Aug. 2, 2013), Dkt # 58; (E.D. Cal., August 6, 2013).

²⁵ See *United States v. Feingold*, 416 F. Supp. 627, 629 (1976) (holding that issuance of material witness warrant was proper where witness ignored several subpoenas).

These categories are not mutually exclusive. In their requests to arrest and detain victims under material witness warrants, prosecutors frequently cite both a victim's unresponsiveness and unwillingness to cooperate. A closer examination of the issues that make it impracticable to obtain the testimony of trafficking victims is helpful in assessing what alternatives may be available.

1. Inaccessible Victims

Many trafficking victims prove difficult or impossible to trace. In fact, the very same circumstances that made these individuals vulnerable to trafficking in the first place can make it hard for law enforcement to reach them in its aftermath. Aspects of the abuse itself may also create barriers between victims and law enforcement. Homelessness, loss of cellphones, and the simple passage of time may make contacting victim-witnesses difficult.

In one case, a victim, C.F., met her trafficker when she was 14 years old.²⁶ She had recently been kicked out of her mother's house. According to the government's sentencing memorandum, the defendant, Alexander Walls, forced C.F. to have sex with approximately four clients per day over a period of two months.²⁷ C.F. escaped with the help of a stranger, and reported her abuse to the police.²⁸

Years later, detectives reached out to C.F. to talk about Walls's case.²⁹ C.F., who was 19 at the time of the trial, testified that she had been forthcoming with the detectives, but had failed to keep in contact with them because her phone had been shut off.³⁰ When law enforcement was unable to reach C.F., they obtained a material witness warrant, and police arrested C.F. after running her name during a traffic stop.³¹

At trial, the defense attorney pressed C.F. on the question of why she was testifying. She admitted that she had no choice but to testify – following a night in jail immediately after her arrest, she was now on supervision, and faced additional jail time if she didn't appear in court. Either evincing her desire to avoid jail or her willingness to

²⁶ See Transcript of Trial (Day 1) at 20, *United States v. Walls*, No. 3:11-cr-05408 (W.D. Wash., March 21, 2013), Dkt #236.

²⁷ See Government's Restitution Memorandum, *United States v. Walls*, No. 3:11-cr-05408 (W.D. Wash., August 22, 2013), Dkt #284.

²⁸ See Transcript of Trial (Day 2) at 121, *United States v. Walls*, No. 3:11-cr-05408 (W.D. Wash., March 21, 2013), Dkt #236.

²⁹ See *id.* at 123.

³⁰ See *id.* at 124.

³¹ See *id.*

testify had the government been able to locate her, she testified at trial, “Nobody ever wants to come to court and testify, but it’s something I chose to do so I can finally end all this.”³² Walls was convicted of three counts of sex trafficking, sentenced to twenty three years in prison, and ordered to pay over \$200,000 in restitution to seven victims, including C.F.³³

CASE STUDY: Material Witness Warrants Issued Years After Escape

A child met her trafficker when she was 14 years old. Her trafficker forced her to have commercial sex with approximately four clients per day over a period of two months. She escaped with the help of a stranger and reported her abuse to the police.

Years later, detectives reached out to the victim, now 19 years old. When law enforcement was unable to reach her, they obtained a material witness warrant. Police arrested the victim after running her name during a traffic stop. She spent a night in jail immediately after her arrest, then remained on supervised release and faced additional jail time if she failed to appear in court. She testified at trial.

Addiction

Trafficking victims who suffer from drug or alcohol addiction are particularly vulnerable to arrest on material witness warrants. People struggling with addiction may be transient and may be particularly motivated to avoid contact with law enforcement. In some sex trafficking cases, traffickers control their victims by regulating their access to drugs.³⁴ In *United States v. Boston*, for example, the defendant exploited one of his victims by manipulating her drug addiction.³⁵ After the defendant’s arrest, the victim successfully

³² See *id.* at 149

³³ See Amended Judgment, *United States v. Walls*, 3:11-cr-05408 (W.D.Wash., June 17, 2014), Dkt #323.

³⁴ See e.g. Complaint, *United States v. Fields*, 8:13-cr-00198 (M.D.Fla., March 20, 2013).

³⁵ See Application for Material Witness Detention at 2-3, *United States v. Material Witness*, No: 3:18-mj-00309-DCK (W.D.N.C. Sept. 14, 2018), Dkt #3.

completed a drug rehabilitation program and moved in with her parents.³⁶ Two years later, however, when investigators attempted to reach the victim, they learned that she had left her parents' house.³⁷ Prosecutors secured a material witness warrant for her arrest, on grounds that she had been unresponsive to phone calls and her family suspected that she had resumed using drugs.³⁸

Similarly, in *United States v. Gillispie*, prosecutors sought a material witness warrant for the arrest of a victim who had been addicted to drugs and convicted of various crimes, including theft, prostitution, identity theft, and drug possession.³⁹ The affidavit requesting the material witness warrant described the victim's participation in three separate rehab programs, including one for human trafficking victims, and her recent disappearance and cessation of contact with victim specialists.⁴⁰

Homeless Victims

Many trafficking victims are minors who have run away from home.⁴¹ In *United States v. Hunt*, discussed above, the victim frequently ran away from home – a fact that prosecutors deemed was a “central component to [the] case.”⁴² S.G. fled her grandmother's home multiple times; eventually, her grandmother told law enforcement that “she was too old to care for the victim and keep her out of trouble.”⁴³ Even after Child Protective Services (CPS) took custody of her, S.G. continued running away. On two occasions, she disappeared immediately after being released from juvenile detention.⁴⁴

After the case against S.G.'s trafficker was set for trial, an FBI agent contacted S.G. She refused to meet with the agent because there was a warrant out for her arrest.⁴⁵ She was

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Affidavit of David R. Mullins, *United States v. Gillispie*, 1:16-cr-00077 (E.D.Tenn.) at 2.

⁴⁰ See *id.* at 8.

⁴¹ Though the term “runaway” is generally reserved for non-emancipated minors, adult survivors may face homelessness in the immediate aftermath of their victimization. See generally “Common Needs,” <https://aspe.hhs.gov/report/addressing-needs-victims-human-trafficking-challenges-barriers-and-promising-practices>.

⁴² Government's Trial Brief at 2, *United States v. Hunt*, 1:13-cr-00189 (E.D. Cal., July 29, 2013), Dkt #53.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

arrested two days later. While she was in juvenile detention, the agent came to see her.⁴⁶ S.G. indicated at that point that she would be willing to testify against her trafficker, but prosecutors noted that “once released from Juvenile Hall she would not be staying with her grandmother and did not provide information about where she would be staying.”⁴⁷

Prosecutors went on to argue that “[g]iven her prior history of being a juvenile runaway, difficulties the government has experienced in locating her in the past, her previously stated unwillingness to testify, it is unlikely she will appear to testify, even if subpoenaed.”⁴⁸ They then noted that “considering the facts underlying the charges – including

While some victims may find catharsis in testifying against their traffickers, others do not wish to do so. The reasons for their reluctance may vary.

allegations of violence by the defendant towards her – it is anticipated she will be fearful of testifying.”⁴⁹ The court issued a material witness warrant to detain S.G. when she was to be released from juvenile detention on August 4, 2013. S.G.

remained in federal custody until she testified against the defendant two days later.

2. Victims Unwilling to Testify

While some victims may find catharsis in testifying against their traffickers, others do not wish to do so.⁵⁰ The reasons for their reluctance vary: some fear retaliation by their traffickers; some distrust law enforcement; others simply hope to avoid reliving their trauma.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.* at 4.

⁴⁹ See *id.* at 4.

⁵⁰ See e.g. Hanna Love, Jeanette Hussemann, Lilly Yu, Evelyn McCoy, and Colleen Owens, *Justice in Their Own Words: Perceptions and Experiences of (In)Justice among Human Trafficking Survivors*, Urban Institute (March 2018), https://www.urban.org/sites/default/files/publication/97351/justice_in_their_own_words_0.pdf, p. 11 (noting that victims commonly distinguish “between justice for themselves and justice for their traffickers”).

Distrust of Law Enforcement

In the overwhelming majority of trafficking cases prosecuted by federal authorities, victims have been trafficked into the commercial sex industry, a criminalized sector.⁵¹ This automatically puts victims at odds with the law. Even minors trafficked into the sex industry can face arrest.⁵²

In *United States v. Folks*, a sex trafficking victim was detained as a material witness after law enforcement failed to reach her after several subpoena attempts. In their request to arrest her as a material witness, prosecutors described her as distraught and angry.⁵³ Specifically, prosecutors told the court that “she has been yelling to the marshals that they cannot protect her from [the defendant], that this is ‘all [their] fault,’ that they are making her lose custody of her child, and that she does not want to testify.”⁵⁴

The victim, released because the trial was rescheduled, voluntarily testified at trial a year later. She eventually decided to testify, she said, because she didn’t “want somebody doing this kind of stuff” to her daughter.⁵⁵ When pressed on inconsistencies between current testimony and her grand jury testimony two years earlier, she stated repeatedly that she lied to investigators and in court because she feared going to jail.⁵⁶

Trauma

Many victims seek to avoid testifying because they have moved on, or want to. A detained victim in *United States v. Muslim* stated that she “wanted to forget about everything that happened.”⁵⁷ S.E., a victim in *United States v. Walls*, stated that “I don’t like talking about this because it happened so long ago, and it is a past – things that happened in the past that

⁵¹ Roughly 95% of federal criminal trafficking prosecutions since 2009 have been for sex trafficking. (Data on file with authors.)

⁵² See *Protecting Victims from Wrongful Prosecution and Further Victimization*, Office to Monitor and Combat Trafficking in Persons, <https://www.state.gov/protecting-victims-from-wrongful-prosecution-and-further-victimization> (noting that “[l]aw enforcement authorities often fail to properly screen and identify victims of human trafficking when they detain or arrest criminal suspects. This can result in a second victimization when victims are punished for their engagement in the crimes their traffickers forced them to commit.”).

⁵³ See Supplemental Motion for Detention of Material Witness, *United States v. Folks et al*, No: 2:16-cr-00094 (D.Vt., April 25, 2018), Dkt #222 at 3.

⁵⁴ See *id.* at 3.

⁵⁵ Jury Trial Transcript, *United States v. Folks*, 2:16-cr-00094 (D.Vt., May 2, 2019), at 37-38.

⁵⁶ See *id.* at 73, 82, 83.

⁵⁷ Transcript of Trial Testimony, Volume 2, *United States v. Muslim*, 3:13-cr-307 (W.D.N.C., Aug. 6, 2014), Dkt #128 at 457.

I just want to forget about.”⁵⁸ Others cite general fear, like the victim in *United States v. Jackson*, who testified at trial that she didn’t show up after being called to testify because “I was afraid...that something bad was gonna go wrong. Something was gonna happen.”⁵⁹

The process of testifying is notoriously taxing, especially when it comes to issues around sexual violence.⁶⁰ And not only are trafficking victims forced to face down defense attorneys seeking to discredit them, but trafficking victims are sometimes forced to confront their traffickers themselves, when defendants proceed pro se. In *United States v. Hunt*, for example, the victim, who was held on a material witness warrant, was forced to face her trafficker as he cross-examined her about the abuse he had inflicted on her:

[Victim]: I got up. You came in the restroom.

[Defendant]: Okay. Then what happened?

[Victim]: You led me to [K]’s bedroom.

[Defendant]: Then what happened?

[Victim]: [K] was in the room and you raped me.⁶¹

...

[Defendant]: Isn’t it true, ..., that all of this stories that you are saying today about [me] raping you, forcing you, all of this accounts that you are giving in court today, is simply retaliation because [I] destroyed your reputation in the African American community that you had a STD and you were spreading it?

[Victim]: No.⁶²

The jury convicted the defendant, and the court sentenced him to 50 years in prison. The court did not order the defendant to pay any restitution to the victim.⁶³

⁵⁸ Transcript of Trial (Day 2), *United States v. Walls*, 3:11-cr-5408 (W.D.Wash., March 21, 2013), Dkt #237 at 132.

⁵⁹ Jury Trial – Volume II, *United States v. Jackson*, 1:13-cr-246 (W.D.Mich., Nov. 17, 2014), Dkt #96 at 257.

⁶⁰ See National Crime Victim Law Institute, “Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology,” *Violence Against Women Bulletin* (September 2011) at 1 (noting that giving courtroom testimony “can be particularly traumatic for rape victims”).

⁶¹ Reporter’s Transcript of Proceedings, 1:13-cr-189 (E.D.Cal., Aug. 6, 2013), Dkt #115 at 244-245.

⁶² See *id.* at 262.

⁶³ See Judgment, *United States v. Hunt*, 1:13-cr-189 (E.D.Cal., Nov. 1, 2013), Dkt #99. Restitution for federal sex trafficking offenses is mandatory under the law. See 18 U.S.C. § 1593.

Intimidation and Witness Tampering

In *United States v. Vianez*, the victim, N.S., was admitted to an emergency room with “the worst [injuries] that [a law enforcement officer who arrived at the scene] had ever seen in a domestic assault case.”⁶⁴ Vianez was charged with felony assault in state court, and the FBI immediately opened an investigation into possible trafficking.⁶⁵ Vianez had in fact been trafficking N.S. for more than four years, starting when she was 17.⁶⁶

Several months later, Vianez got out of jail on bail and urged N.S. to leave the area until his assault case was resolved.⁶⁷ She complied, and the assault case was dismissed because of her absence.⁶⁸ N.S. was then served with a federal grand jury subpoena, but the defendant warned her that there would be “repercussions” if she talked to the authorities about him. Heeding his threat, she failed to show up for her federal grand jury appearance.⁶⁹ A federal material witness warrant was then issued for her arrest.⁷⁰

N.S. was arrested, along with the defendant, several months later.⁷¹ When the defendant spotted N.S. at the local jail, “he yelled to her that she should do like ‘Mike Nel,’ which was an implication that she should not talk.”⁷² Nevertheless, N.S., detained on a material witness warrant, testified at Vianez’s trafficking trial.⁷³ Vianez was convicted and sentenced to 20 years in prison. The court awarded N.S. over \$1.3 million in mandatory restitution.⁷⁴

After the defendant threatened her, N.S., a trafficking victim, failed to appear for her federal grand jury appearance. A federal material witness was then issued for her arrest.

⁶⁴ Government’s Sentencing Memorandum at 7, *United States v. Vianez*, No. 3:09-cr-05065 (W.D. Wash., Sept. 13, 2010), Dkt #56.

⁶⁵ *See id.*

⁶⁶ *See id.* at 6.

⁶⁷ *See id.* at 7.

⁶⁸ *See id.* at 8.

⁶⁹ *See id.* at 9.

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.* at 9.

⁷³ *See id.* at 19-20.

⁷⁴ *See* Judgment, *United States v. Vianez*, 3:09-cr-05065 (W.D. Wash., Sept. 24, 2010), Dkt #66.

Trafficking cases sometimes include witness tampering. In *United States v. Pruitt*, for example, the defendant was convicted of tampering with a witness – namely, his trafficking victim, A.D. According to the government’s sentencing memorandum, Pruitt threatened to kill himself if A.D. cooperated with law enforcement or was otherwise disloyal to him. As a result of the defendant’s pressure, “A.D. changed her phone number, destroyed her phone, and stopped cooperating with law enforcement for a year.”⁷⁵ She “remained in custody [on a material witness warrant] for two weeks before she testified because Pruitt had improperly influenced her to stop cooperating.”⁷⁶ Pruitt was convicted and sentenced to 25 years in prison. The court failed to order the defendant to pay restitution to A.D.⁷⁷

Victims Who Have Become Bonded to their Traffickers

Trafficking cases often involve complex relationships between traffickers and victims. These relationships may also change over time. In *United States v. Walls*, discussed in the case study above, a second material witness was detained alongside C.F.. Like C.F., G.H. was a victim. Unlike C.F., however, she did not testify in court voluntarily. Instead, she initially refused to testify because she did not want the criminal prosecution to proceed.

It is not uncommon for trafficking victims to seek to protect the trafficker in cases such as this one. If arrested, some victims will even contact the trafficker to arrange bail and/or a legal defense. Many victims can become dependent on their trafficker for protection, even as their traffickers continue to abuse them. Experts have likened the emotional bonds in trafficking cases to those that form in domestic violence cases, where trauma bonding is well-recognized.⁷⁸

⁷⁵ Government’s Sentencing Memorandum, *United States v. Pruitt*, 2:16-cr-00285 (D. Nev. Mar. 15, 2019), Dkt #214 at 13.

⁷⁶ *See id.*

⁷⁷ Judgment, *United States v. Pruitt*, 2:16-cr-00285 (D. Nev., Mar 28, 2019).

⁷⁸ *See* Office for Victims of Crime Training and Technical Assistance Center, “Human Trafficking Task Force e-Guide,” <https://www.ovcttac.gov/taskforceguide/eguide/>.

III. Noncitizen Detained Material Witnesses

From 2002 to 2016, federal authorities made more than 75,000 material witness arrests.⁷⁹ The Congressional Research Service has reported that these warrants are used most often in the prosecution of immigration offenses involving material witnesses who are foreign nationals.⁸⁰ This claim is corroborated by data provided by the Bureau of Justice Statistics, presented in the table below.⁸¹

Material Witness Arrests				
FY	U.S. Citizens	Non-U.S. Citizens	Citizenship Status Unknown	Total
2016	112	5,233	249	5,594
2015	90	4,462	342	4,894
2014	96	4,512	411	5,019
2013	97	4,720	135	4,952
2012	119	3,622	160	3,901
2011	90	3,310	254	3,654
2010	104	3,369	798	4,271
2009	143	3,834	606	4,583
2008	129	5,146	547	5,822

A. Overview

Trafficking victims may end up in U.S. Immigration and Customs Enforcement (ICE) custody. Indeed, some victims are discovered in the course of immigration raids. As one

⁷⁹ See Preston Burton, Paige Ammons and Caroline Eisner, Coercive Process For Material Witnesses Needs Reform, Law360 (March 24, 2019), <https://www.law360.com/articles/1140264/coercive-process-for-material-witnesses-needs-reform>.

⁸⁰ See *Federal Material Witness Statute: A Legal Overview of 18 U.S.C. 3144*, Congressional Research Center (July 1, 2011), <https://www.everycrsreport.com/reports/R41903.html#fn13>.

⁸¹ BJS, Federal Justice Statistics Program website (<https://www.bjs.gov/fjsrc/>).

advocate noted, raids often require ICE officers to distinguish between victims, traffickers, and other individuals who have simply committed an immigration violation.⁸² Making this determination accurately requires time and expert resources. ICE's goal of removing immigration offenders as quickly as possible is, in such cases, at odds with identifying survivors of trafficking. In some cases, federal authorities may seek a material witness warrant to prevent potential victims from being deported – in effect, to buy time.⁸³ But there are other, more appropriate tools to protect trafficking victims from deportation.

Federal law provides various forms of temporary immigration relief for trafficking victims. In the time period immediately following identification of victims, the most important of these is Continued Presence. Continued Presence (CP) is a temporary non-immigrant designation that the government can provide to trafficking victims while their traffickers are being investigated.⁸⁴ The Department of Homeland Security has noted that Continued Presence “provides victims with a legal means to temporarily live and work in the U.S., providing them stability, a means of support, and protection from removal.”⁸⁵ Continued Presence, not detention under a material witness warrant, is a more appropriate method to permit a trafficking victim to remain in the United States. In addition, Continued Presence may be used to protect family members at risk in a witness's country of origin.⁸⁶

The use of material witness warrants can present additional hardships for undocumented trafficking victims. Compelled testimony by noncitizens may be especially risky, as witnesses' families in the country of origin may be threatened, and witnesses themselves can be placed in danger if they are subsequently deported. Courts appear entirely unprepared to deal with these issues. In one case in Texas, a detained material witness told the

⁸² Interview with anti-trafficking advocate, November 2019.

⁸³ Interview with former federal prosecutor, November 2019.

⁸⁴ See 22 U.S.C. § 7105(c)(3). Victims may also apply for a T Visa, which allows victims of trafficking to stay in the U.S. for up to four years. See U.S. Citizenship and Immigration Services, “Victims of Human Trafficking: T Nonimmigrant Status,” available at <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

⁸⁵ U.S. Citizenship and Immigration Services, “Continued Presence: Temporary Immigration Designation for Victims of Human Trafficking,” available at https://www.dhs.gov/sites/default/files/publications/blue-campaign/19_1028_bc-pamphlet-continued-presence.pdf. The government issues this status very rarely, with only 121 trafficking victims receiving Continued Presence in FY 2018. See Department of State, “Trafficking in Persons Report” (June 2019), available at <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>.

⁸⁶ Law enforcement may request that certain family members join the CP recipient in the United States including: the spouse, child, parent, or unmarried sibling (under 18) of a CP recipient under 21; the spouse or child of a CP recipient 21 or older; and parent(s) or sibling(s) in present danger due to the alien's escape from trafficking or cooperation with law enforcement. See DHS Continued Presence Pamphlet, https://www.dhs.gov/sites/default/files/publications/blue-campaign/19_1028_bc-pamphlet-continued-presence.pdf.

judge that “when one of the Defense attorneys went to interview us to ask our statements, he told me that if I testified against them, that they could go and kill my family.”⁸⁷ The court replied that “[t]hat is something you need to talk to about with the lawyer I’m going to appoint you.”⁸⁸

In that case, *United States v. Rojas*, traffickers lured Mexican women and girls to the United States with the promise of legitimate jobs in restaurants.⁸⁹ The defendants smuggled the victims into the United States and then forced the women and girls into commercial sex and forced labor with debt coercion, threats of force, and physical violence.⁹⁰ Following a three-year investigation, prosecutors indicted 10 individuals.⁹¹ The court also issued material witness warrants for, and detained, at least eight women from Mexico as material witnesses.⁹² It appears that both defense counsel and the prosecution sought to take statements from the witnesses before their likely deportation so that they would be available for use at trial.⁹³

On April 5, 2011, the material witnesses appeared before the court for an initial hearing after already having been detained for a month and a half. The women all identified as trafficking victims.⁹⁴ None had counsel, nor had they been assigned counsel during their detention.⁹⁵ At the hearing, the witnesses were told that the government and defense counsel would be taking their depositions and that then they would be returned to their home country. One of the eight women asked, “[h]ow much time are we talking about, because my family knows nothing about what – about where I am?”⁹⁶ Another

⁸⁷ Initial Appearance of Material Witnesses, *United States v. Rojas*, 4:11-cr-00116 (S.D.Tex., Apr. 5, 2011), Dkt #343 at 11.

⁸⁸ See *id.* Detained material witnesses do not always obtain counsel.

⁸⁹ Indictment at 7-8, *United States v. Rojas et al.*, No. 4:11-cr-000116 (S.D. Tex., Feb. 15, 2011), Dkt #1.

⁹⁰ See *id.*

⁹¹ See *Federal Bureau of Investigation, Human Trafficking Investigation Leads to Indictment and Arrest of 10 Individuals* (February 17, 2011), <https://archives.fbi.gov/archives/houston/press-releases/2011/ho021711.htm>.

⁹² Initial Appearance of Material Witnesses, *United States v. Rojas*, 4:11-cr-00116 (S.D.Tex., Apr. 5, 2011), Dkt. No. 343.

⁹³ See Motion for Reconsideration of Order of Detention Pending Trial, *United States v. Rojas*, 4:11-cr-00116 (S.D.Tex., June 1, 2011), Dkt #112 at 3. The government must take steps to preserve exculpatory evidence, including witness testimony that would be both material and favorable to the defense. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1981) (noting that a defendant must make a “plausible showing that the testimony of deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses” to establish a violation of the Sixth Amendment or the Due Process Clause of the Fifth Amendment).

⁹⁴ See *id.* 4-10.

⁹⁵ See *id.* at 2-4.

⁹⁶ See *id.* at 6.

woman asked if she would be home for her daughter's 15th birthday.⁹⁷ At the time of their detention, law enforcement had taken the witnesses' personal belongings, including phones. Notably, in this case, at least some of the women were willing to testify and cooperate with law enforcement.⁹⁸ Nevertheless, the women remained in detention for more than four months – first on material witness warrants, and then in ICE custody. The defendants pled guilty and were sentenced to between time served and 191 months in prison. The court did not order restitution.

B. Substantive Differences in Requests for Detention

When applying for a material witness warrant for the arrest of a trafficking victim who is a U.S. citizen, prosecutors routinely bring up the victim's drug use, intractability, history of escape, among other things, as proof that it would be impracticable to secure the witness's testimony through a subpoena. Often, these applications detail efforts to track down the witness in other ways.⁹⁹ But when a material witness is a foreign national, courts appear willing to accept the witness's noncitizen status as an independent reason to detain them, whether or not ICE has lodged a detainer. Courts rarely explore alternative – and less traumatic – means of securing testimony. Rather, courts seem to automatically consider a noncitizen trafficking victim as a flight risk.

In *United States v. Cedana*, a sex trafficking case in Texas, ICE agents arrested six women at various brothels in Texas believed to be owned by the defendant.¹⁰⁰ Law enforcement made these arrests as part of an investigation by the "Human Trafficking Rescue Alliance," which included agents from ICE, FBI, and local law enforcement.¹⁰¹ Through interviews, officers determined that each of the women was a noncitizen and "acting as [a] prostitute."¹⁰² The authorities placed the women in immigration detention.

In September 2010, federal prosecutors submitted a request to detain the six

⁹⁷ *See id.* at 7.

⁹⁸ *See id.* at 10.

⁹⁹ *See e.g.* Affidavit requesting material witness warrant, *United States v. Gillispie*, 1:16-cr-00077 (E.D. Tenn.) at 8 (discussing the witness's participation in rehab programs and cessation of contact with victim specialists).

¹⁰⁰ Government's Affidavit in Support of Detention of Material Witnesses at 2, *United States v. Cedana*, 4:10-cr-00693 (S.D.Tex.).

¹⁰¹ *See id.*

¹⁰² *See id.* at 3.



women as material witnesses. Without any elaboration, prosecutors simply announced that “there is a substantial likelihood that one or more of the [material witnesses] will flee once released by ICE, and thus be unavailable to testify at trial.”¹⁰³ The court granted the warrant, and the victims were detained.¹⁰⁴ At the government’s request, their detention was then extended by 30 days; at that time, they were to be released to ICE custody.¹⁰⁵ The defendant then pled guilty to an alien-harboring charge and to lying on a passport application, mooting the need for their testimony.¹⁰⁶ It does not appear that the women received Continued Presence, and it is impossible to determine whether the women were deported.

In another case, *United States v. Medeles-Arguello et al.*, prosecutors sought to detain more than 25 material witnesses. All were in ICE custody following a raid on a bar owned

¹⁰³ Government’s Motion to Detain and Depose Material Witnesses at 3, *United States v. Cedana*, 4:10-cr-00693 (S.D. Tex.).

¹⁰⁴ Order Extending Time for Detention of Material Witnesses, *United States v. Cedana*, 4:10-cr-00693 (Oct. 20, 2010).

¹⁰⁵ *See id.*

¹⁰⁶ *See* Judgment, *US v. Cedana*. 4:10-cr-00693 (Mar. 16, 2011).

by some of the defendants.¹⁰⁷ Pointing to “a substantial likelihood” that witnesses would flee if released by ICE or face deportation if placed in removal proceedings, prosecutors requested that they be designated as material witnesses.¹⁰⁸ As in *U.S. v. Cedana*, the government was able to secure the detention of noncitizens – including potential trafficking victims – without an individualized assessment of whether there might be alternative means of securing their testimony. As noted above, it appears that it failed to make use of Continued Presence, a tool designed to address this very situation.

IV. Human Trafficking Myths Used to Justify Material Witness Holds

The practice of arresting and detaining trafficking victims contradicts basic intuitions about justice and violates core assumptions about how the legal system should work. How, then, has it been allowed to persist? Two specific myths about trafficking and trafficking victims have given cover to this practice. First, some argue that arrest is beneficial to victims. A second myth is that the trauma of the material witness arrest is the inevitable consequence of the defendant’s criminal acts. Neither claim is true.

A. The Myth of the Arrest as Rescue

If a central purpose of the justice system is to protect victims, it is difficult, at first pass, to understand why material witness arrests do not generate more outrage. The answer may be the growing proliferation of a dangerous myth: that arresting someone can be a way of protecting them. This myth of the “helpful arrest” appears to be gaining traction and has been used as a justification for the arrest of (presumed) sex trafficking victims by law enforcement across the country. In a recent post on Twitter, the Deputy Chief of the Seattle Police Department described a policy of arresting “victims...forced into prostitution through violence, deception, and other factors not of their choosing” in order to “disrupt the cycle of violence and abuse.”¹⁰⁹ A law enforcement officer in California described a practice of arresting individuals believed to be victims, noting that “[s]ometimes

¹⁰⁷ Government’s Affidavit in Support of Detention of Material Witnesses, *United States v. Medeles-Arguello et al*, 4:13-cr-00628 (S.D.Tex.).

¹⁰⁸ *See id.* at 4.

¹⁰⁹ Seattle Police Dept. (SeattlePD). 2 October 2019, 9:04pm. Twitter.

it takes multiple arrests, sometimes only a couple” to build trust between law enforcement and trafficking victims.¹¹⁰ Similarly, a Texas Sheriff described a practice of arresting people believed to be victims, stating that in “virtually every case, these women are victims,” but that “[u]nfortunately, sometimes the only way to get them away from their abusers is by placing them under arrest.”¹¹¹

Arresting and detaining minor trafficking victims has likewise been rebranded as

“victim assistance” by law enforcement. In *United States v. Pruitt*, for example, the detective who detained the victim testified, “I placed her in handcuffs as [SIC] to ruse the other female so that it didn’t appear that she was

Arresting and detaining minor trafficking victims has been rebranded as “victim assistance” by law enforcement. But arrests are, by design, coercive.

cooperating with the police, just for her own safety, and then I transported her to Northwest Area Command where we conducted more of an interview.”¹¹² Despite the handcuffs allegedly being nothing more than a stage prop in a helpful ruse, the detective transported the victim to the station in handcuffs, handcuffed her to a table at the station, and arrested her. When asked, at trial, why he had arrested her, the detective testified that “she gave false information as to her identity and based on the fact that she was a juvenile and was missing – was reported missing from I believe the state of California, I had an obligation to keep her in custody for her own safety to make sure she got a safe return back to California.”¹¹³ The victim was sent to juvenile hall, apparently on charges of having provided false identification.

Arrests are, by design, coercive. They are accordingly limited by safeguards, such as Miranda requirements, that reflect the fact that the interests of the subject and those of the arresting officer are presumptively at odds. To pretend that arrests are anything other than a hostile encounter is to give police essentially unfettered authority to forcibly detain and extract information from anyone they claim to want to help.

¹¹⁰ Veronica Miracle, “3-day human-trafficking sting in California leads to 339 arrests,” ABC7 News (January 30, 2019) available at <https://abc7.com/human-trafficking-sting-in-ca-leads-to-339-arrests/5112123/>

¹¹¹ Hannah Dellinger, “37 arrested in sex trafficking bust in Houston suburb,” The Houston Chronicle (September 5, 2019), available at <https://www.chron.com/news/houston-texas/houston/article/37-arrested-in-sex-trafficking-bust-in-Houston-14416399.php>.

¹¹² Trial Transcript, *United States v. Pruitt* at 28.

¹¹³ See *id.* at 29.

B. Blaming Arrests on the Defendant

In *United States v. Curtis*, the victim met the defendant, Carlos Curtis, near a library in Brooklyn, New York. She was 12 years old.¹¹⁴ Like many traffickers, Curtis lured his victim by telling her she was pretty and offering her safety, clothes, and food. But soon after persuading her that he would take care of her, Curtis forced the victim, A.P., to engage in commercial sex acts.

Local police stopped a car transporting A.P. several days later and took her to the police station to be picked up by a family member.¹¹⁵ When no one showed up to retrieve her, “she was inadvertently sent to Oak Hill [juvenile detention facility], where she was raped by two inmates with a toothpaste tube.”¹¹⁶ After leaving the facility, she was returned home, but soon ran away again to be with the defendant, who once again trafficked her. A.P. was eventually rearrested. When it came time for her trafficker’s trial, prosecutors argued that “[b]ecause of her rearrest and lack of stability at home, she had to be held as a material witness so that the defendant could be prosecuted.”¹¹⁷

In the government’s sentencing memorandum, the prosecutors noted that “[p]rosecuting pimps is extremely difficult because the victims, are as in this case, minor children who are runaways or ‘throwaways kids’ who are difficult to keep available for trial.”¹¹⁸ The prosecutors went on to cite the victim’s detention, *which they had petitioned for and secured, as part of the harm visited on her by the defendant*:

“[A] child was not only victimized by being lured into prostitution; victimized by being raped by virtue of having been brought to the District of Columbia from New York and misplaced; *but also essentially, re-victimized because she had to be held so that she could be present to testify at the defendant’s trial.* Essentially, the defendant has robbed a child of her life.”¹¹⁹

The reality is far less tidy: whatever devastating impact the defendant’s crimes may have had on the victim, prosecutors and other legal officials made the choice to revictimize the victim by holding her as a material witness – and could have chosen differently.

¹¹⁴ Government’s Sentencing Memo at 2, *United States v. Curtis*, No. 1:03-cr-00533 (D.D.C. Feb. 16, 2006).

¹¹⁵ *See id.* At 4.

¹¹⁶ Government’s Sentencing Memo at 4, *United States v. Curtis*, No. 1:03-cr-00533 (D.D.C. Feb. 16, 2006).

¹¹⁷ *See id.* at 7.

¹¹⁸ *See id.* at 6-7.

¹¹⁹ *See id.* at 7 (emphasis added).

CASE STUDY: Child Material Witness Held After Rape in Detention

A defendant trafficked a 12-year-old girl, forcing her to engage in commercial sex acts after meeting her near a library. Local police stopped a car transporting the child several days later and took her to the police station to be picked up by a family member. When no one came to retrieve her, she was sent to a juvenile detention facility, where she was raped by two inmates. After leaving the facility, she returned home, but soon ran away again to be with the defendant, who once again trafficked her. She was eventually rearrested. When it came time for her trafficker's trial, prosecutors argued that "[b]ecause of her rearrest and lack of stability at home, she had to be held as a material witness so that the defendant could be prosecuted."

Conclusion

Detaining victims to compel them to testify at trial is at odds with a victim-centered approach to human trafficking. As critics of the material witness statute have pointed out:

Aside from the indignity of such a detention and being fingerprinted, photographed, shackled and clothed in jail garb, being detained in a correctional facility can impede the material witness' access to adequate legal representation, not only as to the material witness proceedings but also in preparing for the grand jury or trial testimony that the witness is poised to give. All of these factors create an extremely coercive environment for the witness.¹²⁰

Contrary to federal prosecutors' claims in *United States v. Curtis*, a victim's re-victimization by the justice system is not an inevitable extension of the defendant's actions. Prosecutors can choose differently. In the words of attorneys charged with representing material witnesses, "Th[e] process is deeply flawed and antithetical to the fundamentals

¹²⁰ Preston Burton, Paige Ammons and Caroline Eisner, *Coercive Process For Material Witnesses Needs Reform*, Law360 (March 24, 2019), <https://www.law360.com/articles/1140264/coercive-process-for-material-witnesses-needs-reform>.

of American criminal justice, and to the rights of individuals, particularly those not charged with any crime.”¹²¹

The justice system – to live up to its name – must identify better ways to accomplish the goal of successfully prosecuting human traffickers. As a first step, DOJ policy on seeking material witness warrants for identified trafficking victims should reflect the statutory rights of crime victims generally. Under the Crime Victims’ Rights Act (“CVRA”), any victim of a crime—adult or minor—has a set of substantive rights, including “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy.”¹²² The government is obliged to inform a crime victim that she may seek the advice of an attorney regarding any of her substantive rights under the CVRA.¹²³ Although that statute does not specifically address the application of material witness warrants to victims, the rights Congress conferred on crime victims under the CVRA should not be disregarded because a victim does not want to testify against her trafficker.

Despite the lofty promises of the CVRA, it is often difficult for victims to enforce their rights under the law.¹²⁴ The CVRA mandates that the court ensure that victims are afforded rights—holding prosecutors to a lesser “best efforts” standard—but the victim has a limited set of remedies if her rights are not enforced.¹²⁵ Courts can, however, use the CVRA to provide a powerful check on prosecutors acting against the best interests of the victim.¹²⁶ Additionally, 34 U.S.C. § 20141 mandates that a “responsible official”¹²⁷ provide crime victims with information about support services and assistance in contacting those services.¹²⁸ Although the government obligation to the victim falls short of a guaranteed right to counsel, DOJ can nevertheless apply the principles of the CVRA in its treatment of victims subject to material witness warrants by providing them with information and assistance in contacting support services.

¹²¹ See *id.*

¹²² 18 U.S.C. § 3771(a)(8).

¹²³ 18 U.S.C. § 3771(c)(1).

¹²⁴ See generally Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims’ Rights Act, and the Victim’s Right to Be Reasonably Protected from the Accused*, 78 TENN. L.R. 47 (2010).

¹²⁵ *Id.* at 70-71; see also 28 C.F.R. § 45.10(c)-(e) (creating a complaint process for victims to enforce their rights under the CVRA, but only providing the possibility of internal disciplinary procedures for a violation by a DOJ employee).

¹²⁶ See *United States v. Croxford*, 324 F.Supp. 2d 1230, 1251-52 (D. Utah 2004) (excusing the government’s failure to consult with the victim before requesting a sentencing delay but denying the motion for the delay because granting the motion would not be in line with the CVRA’s requirement that the victim be “treated with fairness”).

¹²⁷ The head of “each department and agency of the United States engaged in the detection, investigation, or prosecution of crime” is required to designate the people who are responsible for filling this position. 34 U.S.C. § 20141(a).

¹²⁸ See *Id.* § 20141(c)(1); see also *United States v. Sigillito*, 759 F.3d 913, 933 (8th Cir. 2014) (recognizing the government’s obligation to inform victims of the status of the investigation under a separate provision of this subsection).

In the case of minors, the law offers stronger protections for victims, witnesses, and even defendants that it does to minors detained on material witness warrants. In keeping with those laws, DOJ's policy on seeking material witness warrants for minors should also reflect the statutory protections afforded minors subject to arrest, and those afforded minor victims and witnesses generally.¹²⁹

Under 18 U.S.C. § 3509, a minor victim *or witness* is afforded a number of protections. In addition to giving the court power to close the courtroom or make other special arrangements for the minor's testimony,¹³⁰ the statute empowers (but does not require) the court to appoint a guardian *ad litem* for the minor.¹³¹ Although not required under the statute, the government may file a motion for the appointment of a guardian *ad litem*.¹³² Prosecutors may be reticent to inject a victim's advocate into a criminal proceeding, but appointing a guardian *ad litem* is arguably in the best interests of minor victims.¹³³ Section 3509 is silent as to whether material witness warrants should be sought against minor victims, but DOJ policy should require prosecutors to consider whether Section 3509's protections for minor victims counsel against seeking a material witness warrant to secure the testimony of a minor victim. If the determination is made that a material witness warrant should be issued for a minor victim, DOJ policy should require prosecutors to notify the court that the witness qualifies as a minor victim under Section 3509, and to seek appointment a guardian *ad litem* for any minor trafficking victim subject to a material witness warrant.

¹²⁹ Prosecutors are already given extensive instruction—both in DOJ guidance and in statute—as to the special care required when dealing with child victims. See 18 U.S.C. § 3509; DEPT OF JUSTICE, JUSTICE MANUAL 9-8.001 *et seq.* (2018). Additionally, the DOJ instructs its prosecutors to exercise a great deal of discretion in bringing charges against a minor victim, a discretion which should also be exercised in the context of material witness warrants. JUSTICE MANUAL 9-8.190.

¹³⁰ 18 U.S.C. § 3509(d)-(e).

¹³¹ *Id.* § 3509(h); *United States v. Goodwin*, 287 F. App'x 608, 609 (9th Cir. 2008); see also *United States v. Yazzie*, 743 F.3d 1278, 1292 (9th Cir. 2014) (holding that although the trial court was authorized to appoint a guardian *ad litem*, that decision had no impact on the court's authority to close the courtroom for testimony under Section 3509(e)).

¹³² See *United States v. Tipton*, No. 1:12-cr-25, 2012 WL 3262433, *1 (W.D.N.C. Aug. 9, 2012) (granting the government's motion to appoint a guardian *ad litem* pursuant to 18 U.S.C. § 3509(h)); see also United States' Motion and Memorandum in Support of Motion in Limine to Admit Hearsay Statements of Victim and for Televised Testimony by Victim at 7 n.1, *United States v. Croxford*, 324 F.Supp. 2d 1230 (D. Utah 2004) (noting that because the "United States' desire to have the minor victim testify at trial may become adverse to what is in the best interest of the minor victim," the government filed a contemporaneous motion to appoint a guardian *ad litem*).

¹³³ See *Croxford*, 324 F. Supp. 2d at 1251 (denying a request sentencing delay on motion from the victim's guardian *ad litem*, even though both the government and the defendant had stipulated to the continuance); *Tipton*, 2012 WL 3262433, at *1 (noting that the appointed guardian had experience serving in this capacity for minor victims in state court and that she had already advocated for the present victim in a related investigation).



Section 3509 also states that the court shall use a “multidisciplinary child abuse team . . . when it is feasible to do so” to provide evaluations, expert testimony, and training in handling child victims/witnesses.¹³⁴ There is no reason that such resources should not be used equally for child victims brought in on material witness warrants.

Congress clearly intended to give juveniles charged with crimes more protections than adults in similar circumstances.¹³⁵ The DOJ documented this intention in the Justice

¹³⁴ 18 U.S.C. § 3509(g). The purpose is primarily to aid the court in deciding whether to afford special protections to the minor victim/witness, not to provide direct assistance to the child. *See United States v. Moses*, 137 F.3d 894, 900 (6th Cir. 1998) (finding that a social worker’s testimony regarding the effect of testifying in court on a child victim was not expert testimony, because the “expertise related to trauma” contemplated in Section 3509(g) was psychological or psychiatric).

¹³⁵ *See* Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601 *et seq.* (1974) (providing state funding for ensuring “core requirements” for youth in the criminal justice system, including placing juveniles in separate facilities from adults in most circumstances and prohibiting detention or confinement of status offenders); *see also* Federal Juvenile Delinquency Act of 1938, 18 U.S.C. §§ 921–927 (1940) (allowing the DOJ to return juveniles charged with federal crimes to their home state’s juvenile authority); Federal Youth Corrections Act of 1950, 18 U.S.C. §§ 5005–5026 (1950) (allowing special rehabilitation for juveniles charged as adults).

Manual, which outlines particular restrictions on juvenile prosecution.¹³⁶ A juvenile arrested solely to be a witness should have – at a minimum – rights equal to those of a juvenile arrested on criminal charges.

In all trafficking cases, the least restrictive method possible should be used to obtain the testimony of witnesses. Ensuring that victim-witnesses in human trafficking cases remain accessible to law enforcement may call for the use of specialized shelters, or hotels, but should not involve jails. Providing services to trafficking victims, rather than arrest and incarceration, should be the norm. This is particularly the true in the case of minors.

Broadly, the goals of federal prosecutions, immigration enforcement, and victim protection are often not aligned. One advocate noted that prosecutors are rewarded for high numbers of convictions, without regard to specific circumstances that might counsel against prosecution.¹³⁷ Additionally, ICE's goal of deporting people as quickly as possible also thwarts prosecutions, preventing victims from being available to testify. For noncitizen victims, law enforcement's failure to obtain Continued Presence leads to unnecessary detention of trafficking victims prior to trial.

Finally, and perhaps most importantly, trafficking victims need lawyers. A material witness warrant should not be the only path for a trafficking victim to obtain counsel. As discussed above, legal provisions and DOJ guidance already lay the groundwork for providing counsel (and/or a guardian *ad litem* for minors) to trafficking victims. The force of these laws can be strengthened, both through amending current legislation and through further DOJ guidance requiring prosecutors to seek appointment of victim's counsel in trafficking cases.

¹³⁶ See U.S. DEPT OF JUSTICE, JUSTICE MANUAL 9-8.001 et seq. (2018); see also *id.*, Criminal Resource Manual §§ 43–44 (outlining limitations on juvenile arrest) and § 45 (outlining limitations on juvenile detention), <https://www.justice.gov/jm/jm-9-8000-juveniles>.

¹³⁷ Interview with anti-trafficking advocate, November 2019.

Appendix: Table of Cases and Witnesses

	Case Name	Docket	Material Witness Status
1	US v. Alvarado McTague (Maria) et al*	5:14-cr-00055 (W.D. Va.)	Non-victims (2)
2	US v. Andrade (Michael) et al	1:13-cr-00430 (E.D. Cal.)	Victim (1)
3	US v. Andry (Christian) et al	4:14-cr-00957 (D.Az.)	Victim (1)
4	US v. Barrett (Bobby)	4:14-cr-00336 (S.D. Tex.)	Victim (1), cannot determine (2)
5	US v. Blake (Dontavious) et al	9:13-cr-80054 (S.D.F-la.)	Non-victim (1)
6	US v. Boston (Xaver)	3:18-cr-00095 (W.D.N.C.)	Victim (1)
7	US v. Brown (Walter) et al	3:17-cr-30021 (D.Mass.)	Cannot determine (1)
8	US v. Canady	8:13-cr-00165 (C.D. Cal.)	Non-victim (1), Victim (2)
9	US v. Cedana	4:10-cr-00693 (S.D. Tex.)	Victim (6)
10	US v. Church (Joseph) et al	3:17-cr-00025 (S.D. Tex.)	Cannot determine (1)
11	US v. Collier (Anthony) et al	3:16-cr-00194 (D.N.D.)	Non-victim (1), victim (1)
12	US v. Corley (Royce)	1:13-cr-00048 (S.D.N.Y.)	Victim (1)
13	US v. Curry (Willie) et al	2:13-cr-20887 (E.D. Mich.)	Non-victim (1)
14	US v. Davis (Joshua) et al	2:13-cr-00589 (C.D. Cal.)	Victim (1)
15	US v. Epps (Marvin)	2:09-cr-00043 (E.D. Cal.)	Victim (1)
16	US v. Fleeman	5:11-cr-02921 (D.N.M.)	Non-victim (1)
17	US v. Folks (Brian) et al	2:16-cr-00094 (D.Vt.)	Victim (1)
18	US v. Garcia-Gonzalez et al	7:10-cr-00134 (S.D. Tex.)	Non-victim (3)

19	US v. Gillispie (Corrie) et al	1:16-cr-00077 (E.D.Tenn.)	Victim (1)
20	US v. Gonzalez (Samuel)	8:11-cr-00193 (C.D. Cal.)	Victim (4)
21	US v. Graham (Kevino) et al	2:14-cr-00623 (E.D.Pa.)	Cannot determine (1), non-victim (1)
22	US v. Hall (Jessie)	5:17-cr-00056 (M.D. Ga.)	Non-victim (1)
23	US v. Harris (Kennedy)	6:16-cr-00083 (M.D.F-la.)	Victim (1)
24	US v. Hazley et al	1:17-cr-00439 (N.D.Ill.)	Non-victim (1)
25	US v. Hunt (Maurice)	1:13-cr-00189 (E.D. Cal.)	Victim (1)
26	US v. Jackson (Eddie)	1:13-cr-00246 (W.D. Mich.)	Victim (1)
27	US v. Kalu et al*	1:12-cr-00106 (D.Colo.)	Non-victim (1)
28	US v. Lawson (Dwayne)	8:09-cr-00095 (C.D. Cal.)	Victim (2)
29	US v. Leichleiter et al	3:11-cr-00524 (D.Or.)	Victim (1)
30	US v. Lockhart (Deion) et al	3:13-cr-01832 (W.D. Tex.)	Victim (1)
31	US v. Majeed et al*	3:16-cr-00819 (S.D. Cal.)	Non-victim (1), victim (1)
32	US v. Medeles-Arguello et al	4:13-cr-00628 (S.D. Tex.)	Cannot determine (25), non-victim (2)
33	US v. Miller (Harry)	3:17-cr-00082 (W.D.Wis.)	Cannot determine (1)
34	US v. Montes (Freddy) et al	4:17-cr-00651 (S.D. Tex.)	Cannot determine (1), victim (1)
35	US v. Murray (Jamil)	2:12-cr-00585 (E.D.Pa.)	Cannot determine (2), victim (4)
36	US v. Muslim (Jamil)	3:13-cr-00307 (W.D.N.C.)	Victim (1)
37	US v. Ned (Derrick) et al	2:10-cr-00023 (M.D.F-la.)	Non-victim (1), victim (1)
38	US v. Newman (Reginald) et al	5:15-cr-40035 (D.Kan.)	Non-victim (1), victim (1)
39	US v. Oneal (Irick)	7:16-cr-00283 (W.D. Tex.)	Cannot determine (1)
40	US v. Parks (Kyle)	4:15-cr-00553 (E.D. Mo.)	Victim (1)

41	US v. Pruitt (Brandon)	2:16-cr-00285 (D.Nev.)	Victim (1)
42	US v. Ray (Luther) et al	3:15-cr-00498 (S.D. Cal.)	Victim (1)
43	US v. Roach (Shane) et al	1:15-cr-02732 (D.N.M.)	Cannot determine (1), non-victim (1)
44	US v. Rojas et al	4:11-cr-00116 (S.D. Tex.)	Victim (9)
45	US v. Roy (Jermaine)	4:13-cr-00010 (E.D.Ark.)	Victim (1)
46	US v. Segaloff (Charles)	5:16-cr-00015 (W.D.Okla.)	Non-victim (1), victim (1)
47	US v. Smith (Devin Edward)	5:14-cr-20303 (E.D. Mich.)	Non-victim (1)
48	US v. Smith (Maurice)	3:11-cr-00471 (S.D. Cal.)	Victim (1)
49	US v. Sou (Mike) et al*	1:09-cr-00345 (D.Haw.)	Victim (2)
50	US v. Thompson (Anthony)	1:14-cr-00228 (W.D.N.Y.)	Cannot determine (1)
51	US v. Traylor (Rodney) et al	3:11-cr-1448 (S.D.Cal.)	Cannot determine (1)
52	US v. Vargas (Blasina) et al	4:14-cr-00387 (S.D. Tex.)	Victim (2)
53	US v. Velasquez (Jorge) et al	1:11-cr-20005 (S.D.F-la.)	Cannot determine (4), victim (1)
54	US v. Vianez	3:09-cr-05065 (W.D.Wash.)	Victim (1)
55	US v. Walls (Alexander) et al	3:11-cr-05408 (W.D.Wash.)	Victim (2)
56	US v. Wells (Eric) et al	8:12-cr-00120 (C.D. Cal.)	Victim (1)
57	US v. Williams (Edward) et al	3:10-cr-00377 (D.Or.)	Victim (1)
58	US v. Wills (David) et al	2:17-cr-00390 (S.D. Tex.)	Victim (1)

* Indicates labor trafficking case



About The Human Trafficking Legal Center

The Human Trafficking Legal Center is a not-for-profit, national legal clearinghouse for survivors of human trafficking. The Human Trafficking Legal Center creates a bridge between trafficking survivors and highly-skilled pro bono legal representation. Standing with trafficking survivors, the Human Trafficking Legal Center partners with pro bono firms nationwide to hold traffickers accountable for their crimes. The Human Trafficking Legal Center has placed more than 300 cases with pro bono legal counsel, trained more than 4,000 attorneys at top law firms to represent trafficking survivors, and educated more than 25,000 community leaders on victims' legal rights. With the support of pro bono attorneys, victims of trafficking can achieve safety and self-sufficiency, becoming survivors and leaders.

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