

HUMAN TRAFFICKING VICTIMS AS CRIMINAL DEFENDANTS

This information card is designed to provide information and ideas for state court judges on possible options for dealing with criminal cases in which a defendant is a victim of human trafficking. The card is designed to help judges spot issues and is not meant to provide comprehensive or definitive answers regarding legal rights in specific cases. Judges using this card should also be aware that the law is constantly changing and varies from state to state, and electronic statutory materials on which the card is based may not be up to date.

HOW CAN A JUDGE IDENTIFY THE POSSIBLE PRESENCE OF HUMAN TRAFFICKING VICTIMS?

Human trafficking victims may be coerced into the commission of crimes due to the physical or psychological trauma associated with being a victim of human trafficking. Some of the more common crimes that a trafficking victim may be forced to commit at the behest or under the influence of a trafficker include the following:

- Prostitution
- Drug sales
- Theft
- Illegal peddling
- Recruiting other victims

Other case types that may involve a crime committed under the influence of a trafficker or involve the possible presence of human trafficking victims include:

- Gang activity
- Drug use
- Code violations
- Delinquency
- Juvenile status offenses
- Child abuse and neglect
- Guardianship

Evidence that may indicate coercion due to human trafficking includes the following.

- Threatened or actual physical or non-physical harm which compels the victim to perform services to avoid harm;

- Use or threatened use of law to exert pressure on another person to perform services;
- Demeaning or demoralizing the victim (e.g. through verbal abuse or humiliation);
- Disorienting and depriving the victim of alternatives (e.g. isolation, restricted communication, debts, monitoring);
- Diminishing resistance and debilitating the victim (e.g. by denial of food, water, or medical care or by use of drugs or alcohol);
- Deceiving about consequences (e.g. overstating risks of leaving or rewards of staying, feigning ties to authorities or hit men/gangs); or
- Dominating, intimidating, and controlling (e.g. by abuse, an atmosphere of violence, display of weapons, rules, and punishments).

States may vary as to the admissible sources of evidence of coercion resulting from victimization. The evidence may come from the prosecutor's case against the defendant or presented as part of the defense. There may also be evidence from a prior prosecution of the trafficker that may support a determination that the present defendant is a trafficking victim, if that evidence is admissible in the present case.

WHAT ARE THE LEGAL EFFECTS OF COERCION ON CRIMINAL LIABILITY?

Note: The law discussed in this section is in flux, and state statutes and case law may vary. We caution judges to review the application of Supreme Court case law to their own state statutes and case law.

Coercion by a trafficker may have the following legal consequences for a victim-defendant's criminal liability for his or her acts.

- The coercion may negate the requisite criminal intent, so an essential element of the crime is missing and the offender cannot be convicted.
- Even if all elements of the crime are present under state law so that the offender may be found guilty of the criminal

charge, the coercion may justify absolving the offender in whole or in part from the consequences of the behavior.

- In at least one state, the coercion may provide grounds for vacating the conviction at a later date.
- The United States Supreme Court has made it clear in a number of opinions that the burden of proof regarding the consequences of coercion on criminal liability depends on whether the coercion affects the presence of an essential element of the crime as defined by state law.
- Coercion Affecting Criminal Intent. The prosecution has the burden of proving beyond a reasonable doubt every element of the crime charged. If the coercion is such that it negates the requisite criminal intent for a crime, once the issue of coercion has been raised, the burden of disproving coercion is placed on the prosecution. This is the case even if state law labels the defense an “affirmative defense.” The only burden placed on the defendant is the burden of producing some evidence in order to create a factual issue as to the lack of criminal intent due to coercion. Once this is done, the state then has the burden of proving beyond a reasonable doubt the absence of coercion.
- Coercion as a Mitigating Factor. If the coercion does not rise to the level of negating criminal intent, so that the offender has committed all the elements of the offense but is raising coercion as an affirmative defense in order to avoid the legal consequences of the offense, the burden of proving this defense is on the defendant. The required burden of proof of this affirmative defense may be proof by clear and convincing evidence or by a preponderance of the evidence, depending on state law, but not proof beyond a reasonable doubt.

The Supreme Court has struggled with the issues of determining the elements of a crime and how far the states can go in defining crimes in a way that narrows the elements without causing unconstitutional shifting of the burden of proof from the prosecution to the defendant. For example, the Supreme Court has rejected attempts to ease the prosecution’s burden of proof by creating presumptions regarding certain elements (including criminal intent and malice aforethought) and requiring the defendant to rebut the presumption. On the other hand, the Court has held that a federal firearms statute that makes duress an affirmative defense to be proved by the defendant does not violate the Constitution.

Example state statute on the legal effects of trafficking victimization

The following is an example of a state statute that specifically provides that a person is not guilty of a sexual crime if the crime was committed under coercion or deception while the offender was under the influence of a human trafficker. The statute reads as follows:

Affirmative defenses to certain sexual crimes

- A. 1. As used in this Code section, the term: “Coercion” shall have the same meaning as set forth in Code Section 16-5-46.
- 2. “Deception” shall have the same meaning as set forth in Code Section 16-5-46.
- 3. “Sexual crime” means prostitution, sodomy, solicitation of sodomy, or masturbation for hire as such offenses are proscribed in Chapter 6 of Title 16.
- 4. “Sexual servitude” shall have the same meaning as set forth in Code Section 16-5-46.
- B. A person shall not be guilty of a sexual crime if the conduct upon which the alleged criminal liability is based was committed under coercion or deception while the accused was being trafficked for sexual servitude in violation of subsection (c) of Code Section 16-5-46.
- C. A defense based upon any of the provisions of this Code section shall be an affirmative defense.

The state’s criminal jury instructions clarify what an affirmative defense requires regarding burden of proof.

Affirmative Defense; Definition; Burden of Proof

An affirmative defense is a defense that admits the doing of the act charged but seeks to justify, excuse, or mitigate it. Once the issue of an affirmative defense (except the defense of insanity) is raised, the burden is on the State to disprove it beyond a reasonable doubt.

WHAT OPTIONS MAY BE AVAILABLE TO THE JUDGE?

Some possible options that may be available to a judge where the commission of a crime may have been influenced by human trafficking victimization include the following:

- Refuse to accept a guilty plea where the defendant may have committed a crime due to the human trafficking victimization.
- Identify cases where the prosecution's proof may indicate that a crime was committed under coercion due to victimization so that criminal intent or another essential element of the crime is negated.
- Continue the case to allow the defendant to enter proof that a crime was committed as a result of victimization so that criminal intent or another essential element of the crime is negated, if the prosecution's case does not provide proof.
- Continue a case to allow the defendant to raise an affirmative defense if the victimization doesn't negate an essential element of the crime.

ADDITIONAL ISSUES

A court may not be able to send a human trafficking victim to counseling or other services without a criminal conviction to provide the court with some power over the victim.

If an immigrant defendant pleads guilty but asks to be absolved in whole or part from the consequences of the behavior, the guilty plea constitutes a conviction under Federal immigration law. The conviction may make the defendant deportable even if the state court judge determines that the defendant should not be punished for the crime due to mitigating circumstances stemming from the effects of being a human trafficking victim.



HUMAN TRAFFICKING
AND THE STATE COURTS COLLABORATIVE



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