LAWYER'S MANUAL ON HUMAN TRAFFICKING

PURSUING JUSTICE FOR VICTIMS

EDITED BY JILL LAURIE GOODMAN AND DORCHEN A. LEIDHOLDT

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT • NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS

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Federal Prosecution of Human Traffickers

by Pamela Chen and Monica Ryan

In October 2000, Congress enacted the landmark Trafficking Victims Protection Act (TVPA or "the Act"),[1] which squarely targeted human trafficking for federal criminal prosecution. While anti-slavery and peonage statutes had long been on the books,[2] the Act specifically criminalized "forced labor" and "sex trafficking," thereby adding these concepts to the lexicon of criminal jurisprudence. Even more ground-breaking was Congress's holistic approach to the problem of human trafficking. In crafting the Act, Congress addressed three different aspects of the trafficking problem: (1) deterrence and punishment of traffickers through robust and far-reaching criminal statutes; (2) victim support and rehabilitation through the funding of human services for trafficking victims and immigration relief for alien victims; and (3) stemming the flow of trafficking from source countries by conditioning U.S. monetary assistance to foreign countries based on their efforts to combat trafficking. With each reauthorization and amendment of the TVPA in legislation known as the Trafficking Victims Protection Reauthorization Act (TVPRA),[3] Congress has strengthened and fine-tuned its provisions, as well as extended the reach of its criminal statutes.

The TVPRA, coupled with other federal criminal laws such as the Mann Act, Travel Act and alien smuggling statutes, provides a wide range of options for prosecuting human traffickers in federal court. Indeed, as discussed in this chapter, charging these different offenses in conjunction whenever possible is essential to any successful federal human trafficking prosecution.

Summary of Federal Criminal Statutes[4]

TVPRA (2008)

The new and amended criminal provisions of the 2008 TVPRA took effect on December 23, 2008. The core human trafficking offenses — forced labor and sex trafficking — are codified, respectively, at 18 U.S.C. §§ 1589 and 1591, and provide, in relevant part:

§ 1589. Forced labor

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means —

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).

(b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly —

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or

> **(2)** benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1);
>
> knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of eighteen years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).[5]
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> * * *
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> **(c)** In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of eighteen years.

The key element to any forced labor or sex trafficking charge, except where the victim is a minor, is the use of a prohibited means, such as force, threats, fraud, coercion, physical restraint and abuse or threatened abuse of legal process,[6] to compel a person's labor. In sex trafficking cases involving minor victims, compulsion is not required.[7] Rather, the government need only show that the defendant knew that the victim was a minor *or* that the defendant "had a reasonable opportunity to observe" the minor victim.

A common misconception is that forced labor and sex trafficking must involve the transport ation or smuggling of the victim across a state line or international border. In fact, neither Section 1589 nor 1591 has such a requirement, and Section 1589 does not even require a nexus to "interstate commerce." Indeed, the crime of forced labor under Section 1589 can be a purely domestic or local activity. And while Section 1591 requires that the sex trafficking conduct "affect interstate or foreign commerce," this element can be met without a showing that the victim traveled interstate or internationally as part of the crime. *See, e.g., United States v. Powell,* 2006 WL 1155947, at *3 (N.D. Ill. April 28, 2006) ("in passing 18 U.S.C. § 1591, Congress recognized that human trafficking adversely affected interstate commerce and sought to eliminate it"; thus, government need not prove crossing of state lines to satisfy interstate commerce element). For example, use of an interstate communication facility, such as pagers, telephones or the internet, should be sufficient to meet the interstate commerce element. *See, e.g.,*

United States v. Pipkins, 378 F.3d 1281, 1295 (11th Cir. 2004); *United States v. Atcheson,* 94 F.3d 1237, 1243 (9th Cir. 1996) (finding defendants' "placement of out-of-state phone calls" to be a "connection with interstate commerce"); *United States v. Muskovsky,* 863 F.2d 1319, 1325 (7th Cir. 1988) (finding effect on interstate commerce based on the use of interstate telephone calls to verify credit card transactions).[8] The Eleventh Circuit has also held that the use of goods, such as condoms, that were manufactured outside the state where the offense occurred was evidence of interstate commerce. *See United States v. Evans,* 476 F.3d 1176 (11th Cir. 2007); *Pipkins,* 378 F.3d at 1295.[9] Furthermore, the Eleventh Circuit recognized in *Evans* that the requisite effect on interstate commerce can arise from aggregating the effects of purely intrastate commercial or economic activity. 476 F.3d at 1178-79; *see also United States v. Paris,* 2007 WL 3124724, at *8 (D. Conn. 2007) (citing *Evans*).

It is important to note that sex trafficking and forced labor can sometimes be charged in conjunction with one another. This should be considered where: (1) the evidence does not clearly demonstrate that the victim performed a commercial sex act as opposed to some other form of labor, such as where the victim is required to perform massages or lap dances that may not include actual sex acts; (2) the victim performed different types of acts for the trafficker, some of which do not qualify as commercial sex acts, such as where the victim is required to provide restaurant labor by day and commercial sex acts by night; and (3) the evidence does not clearly establish that the prohibited means used by the trafficker was directed at, or resulted in, the compelling of the commercial sex act, as opposed to other labor performed by the victim. In addition, Section 1589 provides greater flexibility with respect to plea negotiations because, unlike Section 1591, Section 1589 has no statutory minimum sentence. *Compare* 18 U.S.C. § 1589(d) (providing for sentences from zero to twenty years) *with* 18 U.S.C. § 1591(b) (requiring mandatory minimum sentences of ten or fifteen years, depending on the victim's age, and providing for maximum sentences of life).

In addition to forced labor and sex trafficking, the TVPRA criminalizes other trafficking-related conduct, including, *inter alia,* confiscating a person's identification documents as part of a trafficking offense (18 U.S.C. § 1592), attempts or conspiracies to commit a trafficking offense (18 U.S.C. §§ 1594(a)-(c)), and obstruction of a trafficking investigation (18 U.S.C. §§ 1583(a)(3), 1584(b), 1591(d) and 1592(c)). The significance of the conspiracy offense, which was created as part of the 2008 TVPRA, is that it carries the same maximum sentence as the underlying substantive offense — life for sex trafficking and twenty years for forced labor — as compared to the five-year

statutory maximum available under the general conspiracy statute, 18 U.S.C. § 371. Also, the new trafficking-specific obstruction offenses appear to offer an advantage over general obstruction laws, which require proof that the defendant sought to obstruct or interfere with a federal investigation or judicial proceeding. *See, e.g.,* 18 U.S.C. §§ 1512, 1515 and 1519. So, for example, under the 2008 TVPRA, it might now be possible to prosecute a trafficker who lies to local, as opposed to federal, authorities about trafficking activity.

Mann Act

The Mann Act, passed in 1910 as the White Slave Traffic Act, prohibits the transportation of individuals across state lines for purposes of engaging in prostitution or other criminal sexual activity. See 18 U.S.C. §§ 2421 and 2423. The Mann Act has separate provisions relating to adult and minor "transportees":

> ***18 U.S.C. § 2421 (Adults)***
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> Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than ten years.
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> ***18 U.S.C. § 2423 (Minors)***
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> A person who knowingly transports an individual who has not attained the age of eighteen years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than ten years or life.

As Congress has increased the penalties under the TVPRA for crimes involving minors, it has done the same with respect to the Mann Act. Currently, the punishment for transporting a minor in violation of the Mann Act is the same as the punishment in Section 1591 for the sex trafficking of a minor between the ages of fourteen and eighteen, *i.e.,* a mandatory minimum sentence of ten years and a maximum sentence of life. *See* 18 U.S.C. § 2423; 18 U.S.C. § 1591(b)(2). By contrast, a Mann Act violation involving an adult has no mandatory minimum sentence and has a maximum sentence of ten years. 18 U.S.C. § 2421.

The most significant difference between human trafficking offenses, *i.e.,* forced labor and sex trafficking, and Mann Act violations is that the Mann Act does not require any showing that the transported individual was compelled

through improper means to engage in the prohibited sexual activity. In fact, under the Mann Act, it is not even necessary to show that the transported individual engaged in any sexual activity. Rather, it is the act of transporting the individual in interstate or foreign commerce "with the intent" that the individual engage in the prohibited sex act that violates the statute. At the same time, under the Mann Act, physical movement across a state line or international border is required. It also should be noted that the Mann Act does not require that the sexual activity for which the individual is transported be "commercial," as required by Section 1591. So, for example, a person who transports a minor to a different state simply for the purpose of having sex with the minor, *i.e.,* engaging in statutory rape, would be guilty of a Mann Act violation, even though the sexual activity involved no payment or commercial motivation. Lastly, the Mann Act provides an option for plea negotiations where the trafficking case involves adult victims and the evidence of compulsion is not strong, since Section 2421 contains no mandatory minimum sentence.

The Mann Act can be used to prosecute "sex tourism" cases, in which the defendant travels to another country for the purpose of engaging in sexual conduct that is illegal in the United States (and may also be illegal in the country where the conduct occurs), such as sex with minors. The Mann Act specifically prohibits persons from traveling from the United States to a foreign country to engage in illegal sexual activity and also prohibits U.S. citizens or permanent residents from traveling *between* foreign countries for this purpose.

Finally, a unique and seemingly under-utilized Mann Act provision is 18 U.S.C. § 2424, which criminalizes conduct relating to the keeping, harboring and controlling of illegal aliens for purposes of prostitution or "other immoral purpose[s]." 18 U.S.C. § 2424(a). Section 2424 requires, *inter alia,* that anyone who engages in this activity file a statement with the "Commissioner of Immigration" setting forth each alien's name, where the alien is being kept and all facts relating to the alien's entry into the United States. *Id.* The failure to file this report is punishable by up to ten years imprisonment. *Id.*

Travel Act

Title 18, U.S.C. § 1952, known as the "Travel Act," in essence federalizes the crime of operating a prostitution business.[10] It prohibits, in relevant part, anyone from:

> [T]ravel[ing] in interstate or foreign commerce or us[ing] the mail or any facility in interstate or foreign commerce, with intent to . . . promote, manage, establish, carry on, or facilitate

> the promotion, management, establishment, or carrying on, of any unlawful activity, [including] any business enterprise involving . . . prostitution offenses in violation of the laws of the State in which they are committed or of the United States.

18 U.S.C. § 1952(a)(3) and (b).

The Travel Act is similar to the Mann Act in that it does not require a showing of compelled prostitution. It does require a showing of a "business enterprise" that was involved in prostitution, which has been interpreted to mean "a continuous course of conduct" as opposed to "isolated, casual or sporadic activity." *United States v. Mukovsky,* 863 F.2d 1319, 1327 (7th Cir. 1988); *see United States v. Bates,* 840 F.2d 858, 863 (11th Cir. 1988) (same); *United States v. Davis,* 666 F.2d 195, 202 n. 10 (5th Cir. Unit B 1982) (same); *United States v. Corbin,* 662 F.2d 1066, 1073 (4th Cir. 1981) (same); *United States v. Cozzetti,* 441 F.2d 344, 348 (9th Cir. 1971) (same). However, the "business enterprise" need not be sophisticated nor prolific. *See, e.g., Cozzetti*, 441 F.2d at 347-48. The Travel Act, in contrast to the Mann Act, also requires the actual carrying on of the prostitution business as opposed to the mere intent to do so. Like the Mann Act, there is no statutorily mandated minimum sentence where adult transportees or victims are involved. The maximum sentence under the Travel Act is only five years (unless death results), as compared to ten years under the Mann Act.

The Travel Act, however, offers a distinct advantage over the Mann Act in that it proscribes the use of "any facility in interstate or foreign commerce," such as a telephone or the internet, to carry on the prostitution business. *See* 18 U.S.C. § 1952(a).[11] Thus, under the Travel Act, physical transportation or travel of the person who performs the prostitution is not required.

Alien Smuggling, Harboring and Transportation

There are various immigration statutes that can be applied to trafficking conduct that involves illegal aliens. *See, e.g.,* 8 U.S.C. § 1324(a) (alien smuggling, harboring and transportation). The obvious advantage of these statutes is that, because they are directed solely at illegal immigration activity, they do not require any showing of compelled labor or commercial sex acts. For this reason, they can be used in trafficking cases to supplement trafficking charges, thereby maximizing the chances for a conviction.

In addition, the immigration statutes can be used to arrest and detain a suspected trafficker while the trafficking allegations are still being investigated.

Because trafficking cases frequently are the product of reactive law enforcement activities, there often is an immediate need to detain the suspected trafficker to prevent his/her flight. The immigration statutes provide a means of arresting and detaining a defendant while the trafficking allegations are being investigated.

Prosecuting a Trafficking Case: Some Tips

Beware the Ex Post Facto Clause

Because the TVPRA was only passed in 2000 and has been amended several times since then, it is easy to forget that the particular statutory provision being charged, or the Act itself, might not have been in effect at the time of the crime. Trafficking, after all, almost always involves a course of conduct rather than a single incident, and this course of conduct frequently occurs over a long period of time. It is, therefore, critical to know the effective date of the statutory provision being charged to avoid running afoul of the Ex Post Facto Clause. *See* U.S. Const. Art. I, § 9, cl. 3. Trafficking conduct that occurred before October 2000 cannot be charged under the TVPRA unless the conduct continues after the effective date of the TVPRA. *See United States v. Harris,* 79 F.3d 223, 228-29 (2d Cir. 1996) ("It is well-settled that when a statute is concerned with a continuing offense, the *Ex Post Facto Clause* is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of the statute."); *United States v. Layne,* 43 F.3d 127, 132 (5th Cir. 1995) (finding *no ex post facto* violation where the government put on evidence showing defendant continued to possess child pornography material after the effective date of the statute). However, in this situation, the jury must make a specific finding that all elements of the trafficking offense were present after October 2000 in order to convict the defendant.[12] *See United States v. Marcus,* 538 F.3d 97 (2d Cir. 2008) (reversing sex trafficking and forced labor convictions where conduct straddled TVPRA effective date but the jury was not specifically instructed to find that all elements of the trafficking offenses were established post-TVPRA), *petition for cert. granted,* 130 S. Ct. 393 (Oct. 13, 2009). Similarly, where a defendant pleads guilty to a trafficking offense that straddles the TVPRA's effective date, the defendant must allocute to post-TVPRA conduct that establishes all elements of the trafficking offense. If a defendant's conduct straddled the date of an amendment to a TVPRA statute, it will be necessary to prove that the defendant's conduct met all of the elements of the offense that applied to each period of conduct, *i.e.*, before and after the amendment. The

different periods of conduct should be charged in separate counts, setting forth the time period and version of the statute that applies.[13] It will also be necessary, at trial, for the jury to be instructed on the different elements that apply to each version of the TVPRA offense.

A timely illustration of this issue is Congress's latest amendment to the sex trafficking statute, 18 U.S.C. § 1591(a), as it applies to minor victims. Prior to the 2008 TVPRA's amendment to Section 1591, which took effect on December 23, 2008, it was necessary to prove that the alleged sex trafficker *knew* that the victim was a minor. As part of the 2008 reauthorization, Congress changed this element to require *either* that the defendant knew or recklessly disregarded the fact that the victim was a minor *or* that the defendant had a "reasonable opportunity to observe" the victim. This is a significant change. It effectively makes Section 1591 a statutory offense with respect to minor victims. Any prosecutor considering whether to initiate a sex trafficking prosecution where the victim is a minor must determine which version or versions of Section 1591 apply to the defendant's course of conduct. If the conduct began prior to December 23, 2008, there must be evidence establishing that the defendant knew that the victim was underage at some point prior to December 23, 2008 in order to prove the sex trafficking crime. Furthermore, as previously discussed, the crime should be charged in two separate counts, one for the period prior to December 23, 2008 and one for the period thereafter.

Corroboration, Corroboration, Corroboration

You can never have too much corroboration in a human trafficking case. Ironically, in these cases there is as much focus on the victim's state of mind as on the defendant's intent. A key issue in a trafficking case is whether the victim remained in the service of the defendant voluntarily or because he or she was compelled to do so by the defendant's misconduct. On the face of it, this would seem easier than proving the defendant's intent, since the victim is usually cooperating with the government in its investigation and prosecution. But, in fact, proving the victim's state of mind is often the most difficult aspect of a trafficking case because frequently the sole source of this evidence is the victim himself or herself. Obviously, because the victim cannot be viewed as an unbiased witness, it is necessary to corroborate as much of his or her account as possible.

While by no means an exhaustive list, types of corroborating evidence include: (1) other victims' accounts; (2) cooperating witness testimony; (3) other witnesses such as neighbors, customers, housekeepers, staff, meter readers; (4) wiretap recordings; (5) audio or video recordings by undercovers, informants or victims;

(6) surveillance; (7) immigration records such as border crossing documents and entry visas; (8) passports, birth certificates and government issued identification; (9) ledgers, diaries and customer lists; (10) bank records; (11) wire transfer receipts; (12) telephone records; (13) computer records, including postings and communication on social networking and advertising sites such as MySpace, Facebook and craigslist, and IP address information; (14) the defendant's recorded prison telephone and visitor information; (15) the victim's reports to police and related law enforcement testimony; and (16) medical reports and other evidence regarding injuries and/or treatment of the victim.

This corroboration is important not only to confirm the victim's account but also to foreclose certain avenues of cross-examination of the victim and other witnesses. It also may be sufficient in itself to prove some offenses. For example, finding the victim's passport in the defendant's locked closet or safe alone may provide extremely strong evidence on an alien harboring or document confiscation charge.

Conclusion

Congress has provided federal prosecutors with an array of tools to combat human trafficking. It is vital that these tools be used to deter and punish those who engage in this form of modern-day slavery, and to vindicate and restore the dignity and well-being of its victims.

Notes

1. Pub. L. 106-386, Div. A, Oct. 28, 2000. Since 2000, Congress has reauthorized the Act under the title of Trafficking Victims Protection Reauthorization Act. *See* Pub. L. 108-193, Dec. 19, 2003; Pub. L. 110-457, Dec. 23, 2008.
2. *See* 18 U.S.C. §§ 1581-1588 (enacted in 1948).
3. *See* Pub. L. 108-193, Dec. 19, 2003; Pub. L. 110-457, Dec. 23, 2008. In addition to the mandatory restitution provision in the TVPRA's criminal statutes, Congress created a civil cause of action for trafficking victims to recover restitution and damages from their traffickers. 18 U.S.C. §§ 1593, 1595. A victim can initiate a civil action under the TVPRA independent of, and without, any criminal prosecution being brought.
4. This summary is not exhaustive. Depending on the facts of the case, different statutes might apply. *See, e.g.,* 18 U.S.C. § 1951(a) (extortion); 18 U.S.C. §§ 2252 and 2252A (production and distribution of child pornography).
5. The penalties for violating Section 1591 include: (1) a minimum term of fifteen years imprisonment if the offense "was effected by means of force, threats of force, fraud, or coercion … or by any combination of such means," or if the victim was younger than fourteen at the time of the offense; and (2) a minimum sentence of ten years imprisonment if the crime was not effected through force, threats of force, fraud or coercion *and* the victim was between fourteen and eighteen years old at the time of the offense.
6. "Abuse or threatened abuse of legal process" is defined as the "use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action." 18 U.S.C. § 1591(e)(1).
7. This is because, under the law, minors cannot "voluntarily" participate in commercial sex acts.
8. *See also United States v. Davila,* 2006 WL 2501459, at *8 (2d Cir. Aug. 30, 2006) (evidence of *de minimis* effect on interstate commerce will satisfy that element), *citing, inter alia, United States v. Fabian,* 312 F.3d 550, 554-55 (2d Cir. 2002); *United States v. Gregg,* 226 F.3d 253, 261-63 (3d Cir. 2000) (defining effect on interstate commerce broadly, to include minimal activity the impact of which is felt in the aggregate, where activity involved is economic or commercial in nature); *United States v. Toles,* 297 F.3d 959,

969 (10th Cir. 2002) (requiring only potential effect on commerce); *United States v. Gray,* 260 F.3d 1267, 1272-73 (11th Cir. 2001) (requiring only minimal effect on commerce); *United States v. Peterson,* 236 F.3d 848, 852 (7th Cir. 2001) (requiring only *de minimis* effect on commerce because of substantial effect when aggregated).

9. The use of this "depletion of assets" theory to prove interstate commerce is well-established in the context of Hobbs Act robbery and extortion cases. *See, e.g., United States v. Rivera-Rivera,* 555 F.3d 277, 287 (1st Cir. 2009) (evidence that lottery business that was robbed purchased goods from out of state and that the business served out-of-state tourists established effect on interstate commerce); *United States v. McAdory,* 501 F.3d 868, 871 (8th Cir. 2007) ("[R]obberies from small commercial establishments qualify as Hobbs Act violations so long as the commercial establishments deal in goods that move through interstate commerce."), *quoting United States v. Dobbs,* 449 F.3d 904, 912 (8th Cir. 2006); *United States v. Elias,* 285 F.3d 183, 189 (2d Cir. 2002) ("[A] robbery of a local distribution or retail enterprise may be said to affect interstate commerce if the robbery impairs the ability of the local enterprise to acquire — whether from out-of-state or in-state suppliers — goods originating out-of-state."); *United States v. Peterson,* 236 F.3d 848, 854 (7th Cir. 2001) (discussing "depletion of assets" theory pursuant to which *de minimis* interstate commerce requirement is met by a showing that "the business robbed either served out-of-state customers or bought inventory manufactured out-of-state").

10. The Travel Act criminalizes travel for the purpose of engaging in other criminal activity such as acts of violence, gambling and extortion. *See* 18 U.S.C. § 1952. In addition, as later discussed, the Travel Act also criminalizes the use of certain interstate facilities to commit crimes.

11. The Mann Act contains a much more limited version of this provision that prohibits the use or attempted use of an interstate facility to communicate information about a minor less than sixteen years old with the intent of enticing, encouraging, offering or soliciting someone to engage in criminal sexual activity with the minor. *See* 18 U.S.C. § 2425.

12. Similarly, where a defendant pleads guilty to a trafficking offense that straddles the TVPRA's effective date, the defendant must allocute to post-TVPRA conduct that establishes all elements of the trafficking offense.

13. However, to avoid a multiplicity issue, only one penalty should be applied to both counts, since together they are charging a single violation of the statute.