Remarks of Emmet G. Sullivan

United States District Judge for the District of Columbia

at the

Freedom Network USA Human Trafficking Conference

March 20, 2019

Thank you, Ms. Bruggeman, for that very humbling introduction.

Several months ago, Martina Vandenberg, who as you all know is the founder and President of the Human Trafficking Pro Bono Legal Center, sent me the September 2018 report on the Federal Courts' Continuing Failure to Order Mandatory Restitution for Human Trafficking Victims. Reading the report, I was astonished to learn about the widespread failure of federal prosecutors to request, and federal judges, to order, the mandatory restitution required by law.

In my remarks today, I would like to share with you my approach to my Restitution Order in the 2009 case of *United States v. Shelby Lewis*, discuss issues that arose regarding compliance with that Order, and to offer suggestions for remedying the lack of compliance with the statutory mandate.

U.S. v. Lewis Restitution Order

On the last day of 2009, Mr. Lewis pleaded guilty to four counts of violating 18, U.S.C. § 1591, the Sex Trafficking of Children. Mr. Lewis's victims were 12, 13-, 14-, and 16-year old young women at the time he prostituted them. In August 2010, Mr. Lewis and the government filed their sentencing memoranda. In its memorandum, the government sought restitution in the amount of $980,860 - the amount of Mr. Lewis's "ill-gotten gains" - but it did not seek restitution for any of the psychological traumas suffered by the victims (which is directly provided for by Congress in 18 U.S.C. 3663A(b)(2)).

On November 1, 2010, I sentenced Mr. Lewis to 240 months incarceration and a lifetime of supervised release. I then began working on the issue of restitution for the victims.

I was disturbed by the fact that no one seemed to be advocating for the victims. This case came on the heels of the McKinley Hunt child sex abuse case, in which my appointment of a guardian ad litem was so critical. In that case, Mr. Hunt pleaded guilty to one count of production of child pornography and two counts of first degree child sexual abuse with aggravating circumstances for having sexually abused his own daughter beginning at age seven, and I ordered restitution be paid to his daughter.

My recent experience in that case, my experience as a Judge in the Probate Division of the Superior Court of the District of Columbia, along with the obvious holes in the government's sentencing memoranda in Mr. Lewis' case, led me to enter an order directing the parties to show cause as to why a guardian ad litem should not be appointed for the four victims pursuant to 18 U.S.C. 3509(h). The defendant had no objection to the appointment of a GAL. Interestingly, though, the government took the position that it was unnecessary to appoint a GAL in the case. Specifically, it stated that "[t]he Government's position is that the appointment for a Guardian ad litem for each of the victim's is not necessary in this case." The government said, however, that it would not object in the event that the court found it necessary to do so. I went ahead and appointed a GAL for the victims.

A significant issue that arose was to how the GAL was going to get paid. When I initially appointed the GAL, I believed there was funding for the GAL because 18 U.S.C. 3509(h) specifically states that "[t]he court may appointment, and provide reasonable compensation and payment of expenses for, a guardian ad litem . . . ." I soon learned, however, that this was an unfunded mandate of Congress. Thankfully, the GAL agreed to provide her services pro bono (as had been done in the McKinley Hunt case). Fixing the problem of this unfunded mandate would be a great help to judges in this situation.

The appointment of the GAL ended up being absolutely critical on the issue of restitution. The GAL met with each of the victims and obtained the services of a licensed psychologist, who in turn submitted evaluations for each of the victims in which he diagnosed them each with PTSD and proposed various treatment plans. The psychologist also testified in the restitution hearing.

Based on her work in the case, the GAL sought restitution not only for the amount of the defendant's ill-gotten gains but also for psychological treatment and tutoring expenses for the victims. It was all of the evidence that was assembled by the GAL that eventually allowed me to conclude that Mr. Lewis was the proximate cause of the girls' psychological trauma necessitating the requested therapy and not some other person or event (which was the defendant's main argument as to why only nominal restitution could be ordered in the case). Without that evidence, I would not have been able to order the full compensation of the young women as Congress intended. This evidence, in turn, ultimately allowed me to order Mr. Lewis to pay $3,892,055 in restitution to the victims. My huge takeaway from the Lewis case was the incredibly important role of the guardian ad litem in assembling evidence and the absolutely criticality of getting one appointed (especially given that the government did not think there needed to be one).

Oversight of the Restitution Order

My Restitution Order required the forfeiture of Mr. Lewis' limited assets in partial satisfaction of a money judgment. It further required him, during his incarceration, to pay to the victims: (1) 50% of any wages earned in a federal prison industries job towards restitution; or (2) $25 per quarter if he did not work.

Unfortunately, however, in 2017, I learned that my Restitution Order had not been complied with after my Chambers received a telephone call from the mother of one of the victims informing me that her daughter had not received any restitution payments at all. Researching this issue revealed a number of unanticipated issues: (1) None of the net proceeds from the assets seized from Mr. Lewis had been paid to the victims; (2) my Court did not plan to distribute any money to the victims until the special assessment of $400 was satisfied even though my order directed the special assessment be paid while Mr. Lewis is on supervised release; (3) Mr. Lewis was making quarterly payments, but the Bureau of Prison regulations provide that not all the funds in an inmate's account are eligible for restitution payments because BOP requires a minimum balance in the account; and (4) BOP had forwarded funds to my Court, but the Court did not have the current contact information for the victims, and so no funds had been forwarded to them.

Ultimately, I decided that the most effective way to deal with these issues was to require quarterly reporting from the Financial Litigation Office of the Civil Division of the United States Attorney's Office for the District of Columbia, which I learned is responsible for any restitution issues, including collection of restitution, after a defendant is released from incarceration.

This quarterly reporting relatively quickly resulted in locating three of the four victims, paying to them their pro-rata share of Mr. Lewis' forfeited assets, and paying to them their pro-rata share of Mr. Lewis' quarterly payments.

Due to Mr. Lewis' lack of assets and his incarceration, very little of the amount ordered in restitution has been paid to his victims. To date: Victim One has been paid $508.13; Victim Two has been paid $536.35; and Victim Three has been paid $300.38. When Victim Four had not been located after about a year and a half's worth of status reports, I directed the government to report on its efforts to locate Victim Four. Thereafter, the government located Victim Four, and reports that she will receive $378.42 in restitution that has been held for her. I am sure the victims find the amount of these payments to be dispiriting.

This narrative demonstrates that it is absolutely critical that Judges exercise oversight to ensure compliance with their Restitution Orders.

Remedying the Lack of Compliance with the Statutory Mandate

As a federal judge, I have had the honor of serving on two Committees of the Judicial Conference of the United States. For those of you who are unfamiliar with the Judicial Conference, it is the administrative policy-making body of the Judicial Branch of Government and is composed of federal judges representing each of the federal judicial circuits. As such, the Committees of the Judicial Conference provide a strong platform for getting things accomplished.

One of the Committees I served on was the Committee on Criminal Law, whose mission is to, among other things, monitor and analyze legislation relating to the administration of the criminal law. Historically, the Committee has had a major role in shaping federal criminal law policy. I served as the Chair of that Committee's Subcommittee on Legislation, and in that

capacity testified before Congress on various legislative proposals impacting the administration of the criminal law.

In 2000, I testified before the Subcommittee on the Constitution of the House Judiciary Committee regarding the then-proposed "Rights of Crime Victims Constitutional Amendment." The Judicial Conference opposed a constitutional amendment setting forth the rights of crime victims for a variety of reasons, instead advocating amending Title 18 to provide for crime victims rights.

Ultimately, in 2004, Title 18 ***was*** amended to provide crime victims with certain important rights, including: (1) the right to be reasonably protected from the accused; (2) the right to notice of any public court proceeding; and (3) the right to be heard at court proceedings involving release, plea, sentencing, or parole.

Also in 2000, I testified before the Subcommittee on Crime of the House Judiciary Committee regarding proposed legislation that was strenuously opposed by the Judiciary -- the Probation Officer's Protection Act of 2000 -- which was introduced as a knee-jerk and ill-advised reaction to the tragic killing of a probation officer by a person under supervision. Although the title of the legislation suggests that it would result in added protections for Probation Officers, the Judiciary's position was that it was a disaster waiting to happen because it proposed removing the control each federal district court had over the decision of whether to arm its probation officers. Thankfully, after the hearing, the legislation went nowhere.

Some of you may be aware of my interest in ensuring that prosecutors comply with their legal and ethical duty to turn over to the defense all evidence favorable to the accused that is in the possession of any government official as required by *Brady v. Maryland* and its progeny. And you may be aware that I am of the opinion that the rules of federal criminal procedure should be amended to explicitly incorporate these constitutionally-required disclosures. To that end, during my tenure on the Criminal Law Committee, I also strenuously advocated for the amendment of Federal Rule of Criminal Procedure 16 to incorporate the requirement that the government provide exculpatory and impeachment evidence to the defendant. Although those of

us who favor such an amendment have come close to prevailing, so far have not accomplished enacting the needed amendment. But we will not give up and hope springs eternal!

I offer these examples to show the influence Judicial Conference Committees can have on legislation and the administration of the criminal law. I urge you to reach out to the Criminal Law Committee of the Judicial Conference and the staff of that Committee at the Administrative Office of the U.S. Courts as you look for solutions to the problem of courts not ordering mandatory restitution for trafficking victims. And to solving the problem of the lack of funding for GALs!

In addition to federal issues involving human trafficking, as you all well know, the states also play a critical role, especially with regard to criminal records relief for sex-trafficking survivors. According to a recent Washington Post article, however, our neighboring state of Maryland ranks last out of 40 states in terms of the ease with which adult survivors of sex trafficking can clear their criminal records. In view of the negative collateral consequences of a felony conviction – including the impact on voting rights, getting a job, not to mention the nearly 50,000 federal and state statutes that impose penalties, disabilities, or disadvantages on convicted felons, it is a travesty that victims of sex trafficking encounter such difficulty in clearing their records.

Additionally, I have attended numerous educational workshops sponsored by the Federal Judicial Center. When federal judges are first appointed, they attend what is colloquially known as "Baby Judges School." And the FJC provides continuing support throughout our careers with numerous workshops.

Educating new judges on this issue, and reminding sitting judges of it, is critical.

And just so you know, I plan to reach out to the Committee on Criminal Law, to contacts in the State of Maryland, and to the FJC on your behalf.

Finally, I urge you to seek a meeting with Attorney General Barr. Not someone who works with him, but the attorney general. In view of the finding that judges are more likely to

issue restitution orders if requested to do so by prosecutors, it imperative that this be brought to the Attorney General's attention.

In closing, I thank you for inviting me here to speak to you today. I assure that you I will be following up with the Judicial Conference's Criminal Law Committee on this extremely important issue.