

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2015 ANALYSIS AND RECOMMENDATIONS WEST VIRGINIA

### FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

#### *Legal Components:*

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*
- 1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*
- 1.3 *Prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*
- 1.4 *The state racketeering or gang crimes statute includes sex trafficking and commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute trafficking crimes.*

#### *Legal Analysis<sup>1</sup>:*

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*

Paralleling federal law, West Virginia's human trafficking law does not require a showing of force, fraud, or coercion of minors under 18 to qualify as sex trafficking. Pursuant to W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties), sex trafficking of minors is defined as

the promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining or receipt of a person under the age of eighteen by any means, whether a United States citizen or foreign national, for the purpose of causing the minor to engage in sexual acts, or in sexual conduct violating the provisions of subsection (b), section five, article eight of this chapter [§ 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts)]<sup>2</sup> or article eight-c of this chapter [Filming of Sexually Explicit Conduct of Minors]<sup>3</sup>.

<sup>1</sup> This report includes legislation enacted as of August 1, 2015.

<sup>2</sup> W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts) states that,

Pursuant to W. Va. Code Ann. § 61-2-17(b) (Human trafficking; criminal penalties), “any person who knowingly and willfully engages in human trafficking is guilty of a felony.” However, under W. Va. Code Ann. § 61-2-17(a)(3), human trafficking is defined as “labor trafficking<sup>4</sup> or sex trafficking<sup>5</sup> involving adults or minors where two or more persons are trafficked within any one year period.” W. Va. Code Ann. § 61-2-17(a)(3) (Human trafficking; penalties). Therefore, for a person to be convicted of human trafficking under W. Va. Code Ann. § 61-2-17(a)(3), the State must establish that the offender at least twice engaged in conduct that constitutes “labor trafficking” as defined under § 61-2-17(a)(4), “sex trafficking of minors” as defined under § 61-2-17(a)(5), and/or “sex trafficking of adults” as defined under § 61-2-17(a)(6), “within any one year period.”

A conviction under W. Va. Code Ann. § 61-2-17(b) is punishable by 3–15 years imprisonment and a possible fine of up to \$200,000.

*1.2 Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*

West Virginia has several statutes specifically criminalizing CSEC, including the following:

1. W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties) states, in part, “Any person who . . . takes away a child under the age of sixteen years from any person having lawful charge of such child, for the purpose of prostitution or concubinage, shall be guilty of a felony . . . .” A conviction under this statute is punishable by imprisonment for 3–10 years. W. Va. Code Ann. § 61-2-14(a).<sup>6</sup>

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Any person who shall engage in prostitution, lewdness, or assignation, or who shall solicit, induce, entice, or procure another to commit an act of prostitution, lewdness, or assignation; or who shall reside in, enter, or remain in any house, place, building, hotel, tourist camp, or other structure, or enter or remain in any vehicle, trailer, or other conveyance for the purpose of prostitution, lewdness, or assignation; or who shall aid, abet, or participate in the doing of any of the acts herein prohibited, shall. . . be punished by imprisonment in the county jail for a period of not less than sixty days nor more than six months, and by a fine of not less than fifty dollars and not to exceed one hundred dollars. . . .

<sup>3</sup> W. Va. Code Ann. § 61-8C-2(a), (b), (c) (Filming of sexually explicit conduct of minors) prohibits “Any person who causes or knowingly permits, uses, persuades, induces, entices or coerces such minor to engage in or uses such minor to do or assist in any sexually explicit conduct . . . .”, “Any person who photographs or films such minor engaging in any sexually explicit conduct . . . .”, and “Any parent, legal guardian or person having custody and control of a minor, who photographs or films such minor in any sexually explicit conduct or causes or knowingly permits, uses, persuades, induces, entices or coerces such minor child to engage in or assist in any sexually explicit act . . . .”

<sup>4</sup> Under W. Va. Code Ann. § 61-2-17(a)(4) (Human trafficking; criminal penalties), labor trafficking means the promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining or receipt of a person by any means, whether a United States citizen or foreign national, for the purpose of:

(A) Debt bondage or forced labor or services;

(B) Slavery or practices similar to slavery.

<sup>5</sup> Pursuant to W. Va. Code Ann. § 61-2-17(a)(6), sex trafficking of adults is defined as “the promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining or receipt of a person eighteen years of age or older, whether a United States citizen or foreign national, for the purposes of engaging in violation . . . . by means of force, fraud, threat or deception.”

<sup>6</sup> Pursuant to W. Va. Code Ann. § 61-11-18(a) (Punishment for second or third offense of felony), with some exceptions,

when any person is convicted of an offense and is subject to confinement in the state correctional facility therefor, and it is determined, as provided in section nineteen [§ 61-11-19] of this article, that such person

2. W. Va. Code Ann. § 61-8-6 (Detention of person in place of prostitution; penalty) states,

Whoever shall by any means keep, hold, detain, or restrain any person in a house of prostitution or other place where prostitution is practiced or allowed; or whoever shall directly or indirectly, keep, hold, detain, or restrain, or attempt to keep, hold, detain, or restrain, in any house of prostitution or other place where prostitution is practiced or allowed, any person by any means, for the purpose of compelling such person, directly or indirectly, to pay, liquidate or cancel any debt, dues or obligations incurred or said to have been incurred by such person shall, . . . where the person so kept, held, detained or restrained is a minor, any person violating the provisions of this section shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than two years nor more than five years or fined not more than five thousand dollars, or both.

3. Pursuant to W. Va. Code Ann. § 61-8-7 (Procuring for house of prostitution; penalty),

[a]ny person who shall procure an inmate for a house of prostitution, or who, by promises, threats, violence, or by any device or scheme, shall cause, induce, persuade or encourage a person to become an inmate of a house of prostitution, or shall procure a place as inmate in a house of prostitution for a person; or any person who shall, by promises, threats, violence, or by any device or scheme cause, induce, persuade or encourage an inmate of a house of prostitution to remain therein as such inmate; or any person who shall, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procure any person to become an inmate of a house of ill fame, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into or leave this state for the purpose of prostitution, or who shall procure any person to become an inmate of a house of ill fame within this state or to come into or leave this state for the purpose of prostitution; or shall receive or give or agree to receive or give any money or thing of value for procuring or attempting to procure any person to become an inmate of a house of ill fame within this state, or to come into or leave this state for the purpose of prostitution, shall be guilty of pandering . . . .

A conviction under this statute, if the “inmate” is a minor, is punishable as a felony by imprisonment for 2–5 years, a fine not to exceed \$5,000, or both. W. Va. Code Ann. § 61-8-7.

4. W. Va. Code Ann. § 61-8-8 (Receiving support from prostitution; pimping; penalty) provides,

Any person who, knowing another person to be a prostitute, shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of the prostitution of such prostitute, or from money loaned or advanced to or charged against such prostitution by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or shall tout or receive compensation for touting for such prostitution, shall be guilty of pimping.

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had been before convicted in the United States of a crime punishable by confinement in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, the minimum term shall be twice the term of years otherwise provided for under such sentence.

Persons with two prior convictions for “crime[s] punishable by confinement in a penitentiary . . . shall be confined in the state correctional facility for life.” W. Va. Code Ann. § 61-11-18(c).

A conviction under this statute, if the prostituted person is a minor, is punishable as a felony by imprisonment for a minimum of 2 years, a fine not to exceed \$5,000, or both. W. Va. Code Ann. § 61-8-8.

5. W. Va. Code Ann. § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties) states, “Any adult who, with knowledge that a person is a minor or who fails to exercise reasonable care in ascertaining the age of a minor,<sup>7</sup> hires, employs or uses such minor to produce obscene matter<sup>8</sup> or to do or assist in doing any sexually explicit conduct,<sup>9</sup> is guilty of a felony . . . .” A conviction under this statute is punishable by imprisonment for up to 10 years, a fine not to exceed \$50,000, or both. W. Va. Code Ann. § 61-8A-5.
6. W. Va. Code Ann. § 61-8C-2(a) (Use of minors in filming sexually explicit conduct prohibited; penalty) states, “Any person who causes or knowingly permits, uses, persuades, induces, entices or coerces such minor to engage in or uses such minor to do or assist in any sexually explicit conduct<sup>10</sup> shall be guilty of a felony when such person has knowledge that any such act is being photographed or filmed.”

Under subsection (b), “[a]ny person who photographs or films such minor engaging in any sexually explicit conduct shall be guilty of a felony . . . .” W. Va. Code Ann. § 61-8C-2(b).

Additionally, pursuant to W. Va. Code Ann. § 61-8C-2(c),

Any parent, legal guardian or person having custody and control of a minor, who photographs or films such minor in any sexually explicit conduct or causes or knowingly permits, uses, persuades, induces, entices or coerces such minor child to engage in or assist in any sexually explicit act shall be guilty of a felony when such person has knowledge that any such act may be photographed or filmed.

A conviction under any of the provisions of this statute is punishable by imprisonment for up to 10 years, a fine not to exceed \$10,000, or both. W. Va. Code Ann. § 61-8C-2(a)–(c).

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<sup>7</sup> A “minor” is defined as “an unemancipated person under eighteen years of age.” W. Va. Code Ann. § 61-8A-1(i).

<sup>8</sup> “Obscene Matter” is defined as “matter that: (1) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest; (2) An average person, applying community standards, would find depicts or describes, in a patently offensive way, sexually explicit conduct; and (3) A reasonable person would find, taken as a whole, lacks serious literary, artistic, political or scientific value.” W. Va. Code Ann. § 61-8A-1(j).

<sup>9</sup> “Sexually explicit conduct” is defined as “an ultimate sexual act, normal or perverted, actual or simulated, including sexual intercourse, sodomy, oral copulation, sexual bestiality, sexual sadism and masochism, masturbation, excretory functions and lewd exhibition of the genitals.” W. Va. Code Ann. § 61-8A-1(m).

<sup>10</sup> Pursuant to W. Va. Code Ann. § 61-8C-1(c) (Definitions),

Sexually explicit conduct includes any of the following, whether actually performed or simulated:

- (1) Genital to genital intercourse;
- (2) Fellatio;
- (3) Cunnilingus;
- (4) Anal intercourse;
- (5) Oral to anal intercourse;
- (6) Bestiality;
- (7) Masturbation;
- (8) Sadomasochistic abuse, including, but not limited to, flagellation, torture or bondage;
- (9) Excretory functions in a sexual context; or
- (10) Exhibition of the genitals, pubic or rectal areas of any person in a sexual context.

7. According to W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), “Any person over the age of eighteen, who knowingly uses [or attempts to use] a computer to solicit, entice, seduce or lure . . . a minor known or believed to be at least four years younger than the person using the computer . . . to commit . . . [several crimes, including prostitution] is guilty of a felony . . . .” A conviction under this statute is punishable by imprisonment for 2–10 years, a fine not to exceed \$5,000, or both. W. Va. Code Ann. § 61-3C-14b.

Several other laws, while not expressly commercial in nature, may also apply in cases involving CSEC.<sup>11</sup> These include the following:

1. Pursuant to W. Va. Code Ann. § 61-8B-3(a)(2), (b) (Sexual assault in the first degree), a person older than 14 years old who “engages in sexual intercourse<sup>12</sup> or sexual intrusion<sup>13</sup> with another person who is younger than twelve years old and is not married to that person” is guilty of a felony. A conviction under W. Va. Code § 61-8B-3 is punishable by imprisonment for 15–35 years in a state correctional facility and a possible fine of \$1,000–\$10,000. W. Va. Code Ann. § 61-8B-3(b). However, if the defendant is 18 or older and the victim is under 12, a conviction is punishable by imprisonment for 25–100 years in a state correctional facility and a mandatory fine of \$5,000–\$25,000. W. Va. Code Ann. § 61-8B-3(c).

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<sup>11</sup> Pursuant to W. Va. Code Ann. § 61-8B-9a(a) (Mandatory sentence for person committing certain sex offenses against children), an offender convicted of certain sex crimes (sexual assault in the first, second, or third degree or sexual abuse in the first, second, or third degree) is not “eligible for probation, home incarceration or an alternative sentence” when the perpetrator is over 18, the victim is under 12, and

one of the following aggravating circumstances exists:

- (1) The person employed forcible compulsion in commission of the offense;
- (2) The offense constituted, resulted from or involved a predatory act as defined in subsection (m), section two, article twelve, chapter fifteen of this code;
- (3) The person was armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon and used or threatened to use the weapon or article to cause the victim to submit; or
- (4) The person removed the victim from one place to another and did not release the victim in a safe place. For the purposes of this section, “release the victim in a safe place” means release of a victim in a place and manner which realistically conveys to the victim that he or she is free from captivity in circumstances and surroundings wherein aid is readily available.

Subsequent convictions of certain sex offenses by persons with convictions for “sexually violent offenses” against a victim under 12 also result in enhanced penalties. W. Va. Code § 61-8B-9b. W. Va. Code Ann. § 15-12-2(i) defines a “sexually violent offense” as

- (1) Sexual assault in the first degree as set forth in section three, article eight-b, chapter sixty-one [§ 61-8B-3] of this code or of a similar provision in another state, federal or military jurisdiction;
- (2) Sexual assault in the second degree as set forth in section four, article eight-b, chapter sixty-one [§ 61-8B-4] of this code or of a similar provision in another state, federal or military jurisdiction;
- (3) Sexual assault of a spouse as set forth in the former provisions of section six, article eight-b, chapter sixty-one [§ 61-8B-6] of this code, which was repealed by an Act of the Legislature during the two thousand legislative session, or of a similar provision in another state, federal or military jurisdiction;
- (4) Sexual abuse in the first degree as set forth in section seven, article eight-b, chapter sixty-one of this code [§ 61-8B-7] or of a similar provision in another state, federal or military jurisdiction.

<sup>12</sup> W. Va. Code Ann. § 61-8B-1(7) (Definition of terms) defines “sexual intercourse” as “any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.”

<sup>13</sup> “Sexual intrusion” is defined as “any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.” W. Va. Code Ann. § 61-8B-1(8).

2. W. Va. Code Ann. § 61-8B-5(a)(2), (b) (Sexual assault in the third degree) states that a person, who is at least 16 years old, who “engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant” is guilty of a felony punishable by imprisonment for 1–5 years in a state correction facility and a possible fine not to exceed \$10,000. W. Va. Code Ann. § 61-8B-5(b).
3. W. Va. Code Ann. § 61-8B-7(a)(3), (b) (Sexual abuse in the first degree) states that a person 14 years or older who “subjects another person to sexual contact<sup>14</sup> who is younger than twelve years old” commits a felony. A conviction under this statute is punishable by imprisonment for 1–5 years in a state correctional facility and a possible fine not to exceed \$10,000. W. Va. Code Ann. § 61-8B-7(b). However, if the defendant is 18 or older and the victim is under 12, a conviction is punishable by imprisonment for 5–25 years and a mandatory fine of \$1,000–\$5,000. W. Va. Code Ann. § 61-8B-7(c).
4. W. Va. Code Ann. § 61-8B-9(a), (c) (Sexual abuse in the third degree) makes it a misdemeanor when a person, 16 years or older and 4 years older than the victim, “subjects another person to sexual contact without the latter’s consent, when such lack of consent is due to the victim’s incapacity to consent by reason of being less than sixteen years old.” A conviction under this statute is punishable by up to 90 days in jail and a possible fine not to exceed \$500. W. Va. Code Ann. § 61-8B-9(c).

Although these statutes may be applicable in prosecuting CSEC crimes, they have limited usefulness in sex offense prosecutions against older minors because a defendant can raise a consent defense when the victim is 16 years of age or older. W. Va. Code Ann. § 61-8B-2(a), (c)(1). W. Va. Code Ann. § 61-8B-2(a) specifically provides, “Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.” Under subsection (c)(1), “[a] person is deemed incapable of consent when such person is: (1) Less than sixteen years old.”

### 1.3 *Prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

West Virginia’s prostitution statute, W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties), does not refer to W. Va. Code Ann. § 61-2-17(b) (Human trafficking; criminal penalties) when a minor is engaged in prostitution.

- 1.3.1 Recommendation: Amend W. Va. Code Ann. § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-8-7 (Procuring for house of prostitution; penalty; venue; competency as witness; marriage no defense), § 61-8-8 (Receiving support from prostitution; pimping; penalty; prostitute may testify), and § 61-8-5(b) (Houses of ill fame and assignation; penalties) to refer to W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties) to identify all commercially sexually exploited and prostituted minors as victims of sex trafficking.

### 1.4 *The state racketeering or gang crimes statute includes sex trafficking and commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute trafficking crimes.*

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<sup>14</sup> W. Va. Code § 61-8B-1(6) defines “sexual contact” as the following:

[A]ny intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.

West Virginia's Anti-Organized Criminal Enterprise Act, W. Va. Code Ann. § 61-13-3(a), (b) (Offenses) states,

(a) Any person who knowingly and willfully becomes a member of an organized criminal enterprise and who knowingly promotes, furthers or assists in the commission of any qualifying offense himself or herself or in combination with another member of an organized criminal enterprise shall be guilty of a felony and, upon conviction, shall be confined in a state correctional facility for not more than ten years or fined not more than \$25,000, or both. The offense set forth in this subsection is separate and distinct from that of any qualifying offense and may be punished separately.

(b) Any person who knowingly solicits, invites, recruits, encourages or causes another to become a member of an organized criminal enterprise or to assist members of an organized criminal enterprise to aid or assist in the commission of a qualifying offense by one or more members of an organized criminal enterprise shall be guilty of a felony and, upon conviction, be confined in a state correctional facility for not more than five years or fined not more than \$10,000, or both.

W. Va. Code Ann. § 61-13-2 (Definitions) defines “organized criminal enterprise” as “a combination of five or more persons engaging over a period of not less than six months in one or more of the qualifying offenses set forth in this section.”

“Qualifying offense” is defined under § 61-13-2 to include felony violations of W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty), § 61-2-17 (Human trafficking; criminal penalties) and § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties) or any convictions under § 61-8-8 (Receiving support from prostitution; pimping; penalty). Based on this definition of racketeering, acts of commercial sexual exploitation of children constitute predicate crimes under the racketeering law, making it available for combatting criminal enterprises that engage in domestic minor sex trafficking.

Asset forfeiture applies pursuant to W. Va. Code Ann. § 61-13-5(a) (Forfeiture) which provides,

The following are declared to be contraband and no person shall have a property interest in them:

- (1) All property which is directly or indirectly used or intended for use in any manner to facilitate a violation of this article; and
- (2) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this article.

Additionally, any “private building or place used by members of an organized criminal enterprise for the commission of qualifying offenses” will be declared “a nuisance and may be the subject of an injunction or cause of action for damages or for abatement of the nuisance” as provided for in W. Va. Code Ann. Chapter 61 (Crimes and their punishment), Article 9 (Equitable remedies in aid of chastity, morality and decency). W. Va. Code Ann. § 61-13-4(a).

### ***Legal Components:***

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts with a victim of domestic minor sex trafficking.*
  - 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*
  - 2.3 *Solicitation of prostitution laws differentiate between buying sex acts with an adult and buying sex acts with a minor under 18.*
  - 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
  - 2.5 *Using the Internet or electronic communications to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*
  - 2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*
  - 2.7 *Base penalties for buying sex acts with a minor under 18 are sufficiently high and not reduced for older minors.*
  - 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
  - 2.9 *Buying and possessing child pornography carries penalties as high as similar federal offenses.*
  - 2.10 *Convicted buyers of commercial sex acts with minors and child pornography are required to register as sex offenders.*
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### ***Legal Analysis***

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts with a victim of domestic minor sex trafficking.*

W. Va. Code Ann. § 61-2-17(b) (Human trafficking; criminal penalties) might apply to buyers of sex with minors through the term “obtain.”<sup>15</sup> W. Va. Code Ann. § 61-2-17(a)(5) defines, “[s]ex trafficking of minors” in part as “the . . . obtaining or receipt of a person under the age of eighteen by any means, whether a United States

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<sup>15</sup> See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit held that the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers of sex with minors. Reversing a District of South Dakota ruling that Congress did not intend the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) (“recruits, entices, harbors, transports, provides, obtains, or maintains”) to reach the conduct of buyers (*United States v. Jungers*, 834 F. Supp. 2d 930, 931 (D.S.D. 2011)), the Eighth Circuit concluded that 18 U.S.C. § 1591 does not contain “a latent exemption for purchasers” because buyers can “engage in at least some of the prohibited conduct.” *Jungers*, 702 F. 3d 1066, 1072. Congress codified *Jungers* clarifying that the federal sex trafficking law is intended to apply to buyers in the Justice for Victims of Trafficking Act (JVTA) of 2015 Pub. L. No. 114-22, 129 Stat 227), enacted on May 29, 2015. The JVTA adds the terms “patronize” and “solicit” to the list of prohibited conduct and expressly states, “section 108 of this title amends section 1591 of title 18, United States Code, to add the words ‘solicits or patronizes’ to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.” *Id.* at Sec. 109. The Eighth Circuit decision in *United States v. Jungers* and the federal sex trafficking law as amended by the Justice for Victims of Trafficking Act establish persuasive authority when state courts interpret the string of verbs constituting prohibited conduct in state sex trafficking laws (in particular the term “obtains”) to the extent such interpretation does not conflict with state case law.



citizen or foreign national, for the purpose of causing the minor to engage in sexual acts, or in sexual conduct violating the provisions of subsection (b), section five, article eight of this chapter [§§ 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts)]<sup>16</sup> or article eight-c of this chapter [Filming of Sexually Explicit Conduct of Minors].”<sup>17</sup> However, pursuant to the definition of human trafficking under W. Va. Code Ann. § 61-2-17(a)(3) (Human trafficking; penalties), a buyer would have to obtain “two or more persons . . . within any one year period.”

- 2.1.1 Recommendation: Amend W. Va. Code Ann. § 61-2-17 (Human trafficking; criminal penalties) to clarify that buyer conduct is included as a violation of W. Va. Code Ann. § 61-2-17 (Human trafficking; criminal penalties).<sup>18</sup>

2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*

The CSEC offense under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) includes soliciting prostitution with a minor through electronic communications, stating, “Any person over the age of eighteen who knowingly uses a computer to solicit, entice, seduce or lure or attempt to solicit, entice, seduce, or lure . . . a minor known or believed to be at least four years younger than the person using the computer . . . to commit . . . [several crimes, including prostitution] is guilty of a felony . . .” A conviction under this statute is punishable by imprisonment for 2–10 years, a fine not to exceed \$5,000, or both. W. Va. Code Ann. § 61-3C-14b.

In the absence of another CSEC law to prosecute those buyers of commercial sex acts with minors who do not use a computer to commit the offense, a buyer most likely would be prosecuted under West Virginia’s general solicitation law, W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties). W. Va. Code Ann. § 61-8-5(b) makes it illegal for a person to “solicit, induce, entice, or procure another to commit an act of prostitution, lewdness, or assignation . . . enter, or remain in any house, place, building, hotel, tourist camp,<sup>19</sup> or other structure or enter or remain in any vehicle, trailer, or other conveyance for the purpose of prostitution, lewdness, or assignation; or . . . aid, abet, or participate in the doing of any of the acts herein . . .”

First convictions under W. Va. Code Ann. § 61-8-5(b) are punishable by 60 days–6 months in jail and a fine of \$50–\$100. W. Va. Code Ann. § 61-8-5(b). Second convictions are punishable by 6 months–1 year in jail and a fine of \$100–\$250. W. Va. Code Ann. § 61-8-5(b).

Several sexual offenses could be used to prosecute some buyers of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child, and do not identify the minors involved as human trafficking victims.<sup>20</sup> Furthermore, although these statutes may apply to buyers for CSEC crimes, they are of limited usefulness in sex offense prosecutions against older minors

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<sup>16</sup> See *supra* note 2.

<sup>17</sup> See *supra* note 3.

<sup>18</sup> See generally SHARED HOPE INTERNATIONAL, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), [http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper\\_Eliminating-Third-Party-Control\\_Final1.pdf](http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf) (discussing need to include buyer conduct in core sex trafficking offense regardless of whether victim is under control of a third party and explaining negative impact on victims and victim-identification when buyers are excluded as sex trafficking offenders).

<sup>19</sup> “Tourist camp” is defined as “any temporary or permanent buildings, tents, cabins, or structures, or trailers, or other vehicles which are maintained, offered, or used for dwelling or sleeping quarters for pay.” W. Va. Code Ann. § 61-8-5(c).

<sup>20</sup> See *supra* Section 1.2 for a full description of the sexual offense laws that may be used to prosecute certain buyers.

because a buyer can raise a consent defense when the victim is 16 years of age or older. W. Va. Code Ann. § 61-8B-2(a), (c)(1).

### 2.3 *Solicitation of prostitution laws differentiate between buying sex acts with an adult and buying sex acts with a minor under 18.*

West Virginia's general solicitation laws do not differentiate between buying sex with an adult and buying sex with a minor; however, if a computer is used, solicitation of a minor for prostitution is separately criminalized under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) which states, "Any person over the age of eighteen, who knowingly uses a computer to solicit, entice, seduce or lure or attempt to solicit, entice, seduce, or lure . . . a minor known or believed to be at least four years younger than the person using the computer . . . to commit . . . [several crimes, including prostitution] is guilty of a felony . . . ." Otherwise, buyers of commercial sex with adults and commercial sex with minors will be guilty of W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties).

- 2.3.1 Recommendation: Enact a law that makes purchasing commercial sex acts with children under 18 a separate offense or impose heightened penalties for buying sex with a minor under W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts).

### 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*

W. Va. Code Ann. § 61-2-17(b) (Human trafficking; criminal penalties) makes sex trafficking of minors a felony punishable by 3–15 years imprisonment or a possible fine of up to \$200,000, or both. W. Va. Code Ann. § 61-2-17(b).

A conviction under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) is punishable by imprisonment for 2–10 years, a fine not to exceed \$5,000, or both. W. Va. Code Ann. § 61-3C-14b. In the absence of a CSEC or trafficking law to prosecute buyers of commercial sex with minors who do not use a computer to commit the offense, buyers of sex with minors may be prosecuted under the general solicitation statute, W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties). First offenses are punishable by 60 days–6 months in jail and a fine of \$50–\$100. W. Va. Code Ann. § 61-8-5(b). Second convictions are punishable by 6 months–1 year in jail and a fine of \$100–\$250. W. Va. Code Ann. § 61-8-5(b).

Several sexual offense laws may be used to prosecute certain buyers of sex acts with a minor.<sup>21</sup>

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>22</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>23</sup> against a minor. To

<sup>21</sup> See discussion of relevant provisions that may apply to certain buyers *supra* Section 1.2.

<sup>22</sup> Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

<sup>23</sup> Pursuant to 18 U.S.C. § 3559(e)(2), "federal sex offense" is defined as

an offense under section 1591 [18 U.S.C.S. § 1591] (relating to sex trafficking of children), 2241 [18 U.S.C.S. § 2241] (relating to aggravated sexual abuse), 2242 [18 U.S.C.S. § 2242] (relating to sexual abuse), 2244(a)(1) [18 U.S.C.S. § 2244(a)(1)] (relating to abusive sexual contact), 2245 [18 U.S.C.S. § 2245] (relating to sexual abuse resulting in death), 2251 [18 U.S.C.S. § 2251] (relating to sexual

the extent buyers can be prosecuted under other federal CSEC laws,<sup>24</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>25</sup>

*2.5 Using the Internet or electronic communications to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*

W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) makes the use of a computer to lure or entice commercial sex acts with a minor illegal. Pursuant to W. Va. Code Ann. § 61-3C-14b,

Any person over the age of eighteen, who knowingly uses a computer to solicit, entice, seduce or lure, or attempt to solicit, entice, seduce or lure, a minor known or believed to be at least four years younger than the person using the computer or a person he or she reasonably believes to be a minor, to commit any illegal act proscribed by the provisions of article eight [Crimes against chastity, morality and decency], eight-b [Sexual offenses], eight-c [Filming of sexually explicit conduct of minors], or eight-d [Child abuse] of this chapter . . . is guilty of a felony . . .

Article 8, referred to in W. Va. Code Ann. § 61-3C-14b, includes W. Va. Code Ann. § 61-8-5(b), which makes it a crime for a person to “solicit, induce, entice, or procure another to commit an act of prostitution, lewdness, or assignation.”

A conviction under W. Va. Code Ann. § 61-3C-14b is punishable as a felony by imprisonment for 2–10 years in a state correctional facility, a fine not to exceed \$5,000, or both. W. Va. Code Ann. § 61-3C-14b.

*2.6 No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*

Neither W. Va. Code Ann. § 61-2-17 (Human trafficking; criminal penalties) nor § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) expressly prohibits a mistake of age defense.

2.6.1 Recommendation: Amend W. Va. Code Ann. § 61-2-17 (Human trafficking; criminal penalties) and § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) to expressly prohibit a mistake of age defense for these crimes.

*2.7 Base penalties for buying sex acts with a minor under 18 are sufficiently high and not reduced for older minors.*

W. Va. Code Ann. § 61-2-17 (Human trafficking; criminal penalties) and W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) do not stagger penalties based on the age of the minor victim.

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exploitation of children), 2251A [18 USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 U.S.C.S. § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 U.S.C.S. § 2423(a)] (relating to transportation of minors).

<sup>24</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

<sup>25</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(a)(2), (4) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both.); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*

W. Va. Code Ann. § 61-2-17(b) (Human trafficking; criminal penalties) makes those who purchase sex with minors under 18 subject to a possible fine not to exceed \$200,000. W. Va. Code Ann. § 61-2-17(b). Convicted buyers over 18 who use a computer to solicit a child for prostitution in violation of W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) may be fined up to \$5,000. W. Va. Code Ann. § 61-3C-14b.

Additionally, pursuant to W. Va. Code Ann. § 61-8C-7(a) (Items subject to forfeiture; persons authorized to seize property subject to forfeiture), buyers who violate W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) or possess child pornography in violation of § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct; penalty) may be subject to discretionary, civil asset forfeiture. The following items are subject to forfeiture pursuant to W. Va. Code Ann. § 61-8C-7:

- (1) All visual depictions which have been manufactured, distributed, dispensed, or possessed in violation of article eight-a [§§ 61-8A-1 et seq.]<sup>26</sup> or eight-c [§§ 61-8C-1 et seq.]<sup>27</sup> of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (2) All raw materials, products and equipment of any kind which are used, intended for use, in manufacturing, processing, delivering, importing or exporting any visual depictions or any crimes against children in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (3) All books, records, research products and materials, including hard drives, microfilm, tapes and data which are used, or have been used, or are intended for use in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter
- (4) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter by any person in exchange for a visual depiction, all proceeds traceable to the exchange and all moneys, negotiable instruments, and securities used, or which are intended to be used, to facilitate any violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter. . . .;
- (5) All conveyances, including aircraft, vehicles or vessels, which are used, have been used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in (1), (2) or (3) of this subsection<sup>28</sup> ....”

<sup>26</sup> The relevant criminal offenses under W. Va. Code Ann. §§ 61-8A (Preparation, distribution or exhibition of obscene matter to minors) include § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), § 61-8A-4 (Use of obscene matter with intent to seduce minor), and § 61-8A-1 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties).

<sup>27</sup> The relevant criminal offenses under W. Va. Code Ann. §§ 61-8C (Filming of sexually explicit conduct of minors) include § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct; penalty), and § 61-8C-3a (Promoting child erotica; penalties).

<sup>28</sup> Exceptions under W. Va. Code § 61-8C-7(a)(5) include:

- (A) A conveyance used by any person as a common carrier in the transaction of business as a common carrier shall not be forfeited under this section unless it appears that the person owning the conveyance is a consenting party or privy to a violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;

Pursuant to W.Va. Code Ann. § 61-8C-7(b), property subject to forfeiture may be seized by the state police. Disposition of forfeitable property is governed by W.Va. Code Ann. § 61-8C-10 and 61-8C-11, which provide for alternate dispositions of moneys, securities or negotiable instruments and other property. Moneys, securities and other negotiable instruments shall be distributed as follows: (1) 10% to the office of the prosecuting attorney that initiated the forfeiture proceeding, (2) the balance to a special law-enforcement investigation fund. W. Va. Code Ann. § 61-8C-10. The circuit court ordering the forfeiture of all other property, upon application by the prosecuting attorney or the Superintendent of the State Police or his or her designee, may direct: (1) Title to the forfeited property be vested in the law-enforcement agency so petitioning; (2) The law-enforcement agency responsible for the seizure retain the property for official use; or (3) The forfeited property shall be offered at public auction to the highest bidder for cash. W.Va. Code Ann. § 61-8C-11.

Absent a law that makes it a crime to purchase commercial sex acts with a minor without using a computer to accomplish the offense, a buyer might be convicted under W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts), which carries a fine of \$50–\$100 for a first conviction and a fine of \$100–\$250 for a second conviction. W. Va. Code Ann. § 61-8-5(b).

Additionally, West Virginia has a general restitution statute that may apply to buyers in certain instances. Restitution is mandatory where a defendant is “convicted of a felony or misdemeanor causing physical, psychological or economic injury or loss to a victim . . . unless the court finds restitution to be wholly or partially impractical as set forth” in the Victim Protection Act of 1984. Pursuant to W. Va. Code Ann. § 61-11A-4(b)(2), where the victim suffers “bodily injury,” a defendant shall be ordered to

- (A) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (B) Pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and
- (C) Reimburse the victim for income lost by the victim as a result of the offense.

Persons convicted under W. Va. Code Ann. § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty), discussed in Section 2.9, may also be required, in addition to any penalties and restitution imposed by the court, to “pay all or any portion of the cost of medical, psychological or psychiatric treatment of the minor resulting from the act or acts for which the person is convicted, whether or not the minor is considered to have sustained bodily injury.” W. Va. Code Ann. § 61-8C-4.

## 2.9 *Buying and possessing child pornography carries penalties as high as similar federal offenses.*

W. Va. Code Ann. § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) criminalizes the possession of child pornography. W. Va.

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- (B) A conveyance shall not be forfeited under the provisions of this article if the person owning the conveyance establishes that he or she neither knew, nor had reason to know, that the conveyance was being employed or was likely to be employed in a violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter; and
  - (C) A bona fide security interest or other valid lien in any conveyance shall not be forfeited under the provisions of this article, unless the state proves by a preponderance of the evidence that the holder of the security interest or lien either knew, or had reason to know, that the conveyance was being used or was likely to be used in a violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter.

Code Ann. § 61-8C-3(a) provides that “[a]ny person who, knowingly and willfully, sends or causes to be sent or distributes, exhibits, possesses, electronically accesses with intent to view or displays or transports any material visually portraying a minor engaged in any sexually explicit conduct<sup>29</sup> is guilty of a felony . . .” Penalties for violations of this statute vary depending on the severity of the crime in relation to the amount and types of materials accessed by the perpetrator. § 61-8C-3 states,

(b) Any person who violates the provisions of subsection (a) of this section when the conduct involves fifty or fewer images shall, upon conviction, be imprisoned in a state correctional facility for not more than two years or fined not more than \$2,000 or both.

(c) Any person who violates the provisions of subsection (a) of this section when the conduct involves more than fifty but fewer than six hundred images shall, upon conviction, be imprisoned in a state correctional facility for not less than two nor more than ten years or fined not more than \$5,000, or both.

(d) Notwithstanding the provisions of subsections (b) and (c) of this section any person who violates the provisions of subsection (a) of this section when the conduct involves six hundred or more images or depicts violence against a child or a child engaging in bestiality shall, upon conviction, be imprisoned in a state correctional facility for not less than five nor more than fifteen years or fined not more than \$25,000, or both.

(e) For purposes of this section each video clip, movie or similar recording of five minutes or less shall constitute seventy five images. A video clip, movie or similar recording of a duration longer than five minutes shall be deemed to constitute seventy-five images for every two minutes in length it exceeds five minutes.

In addition to criminal penalties and restitution imposed by the court, persons convicted under W. Va. Code Ann. § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) may also be required to “pay all or any portion of the cost of medical, psychological or psychiatric treatment of the minor resulting from the act or acts for which the person is convicted, whether or not the minor is considered to have sustained bodily injury.” W. Va. Code Ann. § 61-8C-4.

In comparison, a federal conviction for possession of child pornography<sup>30</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>31</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>32</sup>

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<sup>29</sup> See *supra* note 9.

<sup>30</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>31</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>32</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

- 2.9.1 Recommendation: Amend W. Va. Code Ann. § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) to increase the base penalty for possession of child pornography to reflect the seriousness of the offense.

2.10 *Convicted buyers of commercial sex acts with minors and child pornography are required to register as sex offenders.*

West Virginia's Sex Offender Registration Act, W. Va. Code Ann. § 15-12-1 et seq., establishes sex offender registration requirements. Specifically, W. Va. Code Ann. § 15-12-2(b) (Registration) requires any person convicted of specified offenses to register as a sex offender. Those specific offenses include convictions under the following statutes: W. Va. Code Ann. § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), § 61-8A-4 (Use of obscene matter with intent to seduce minor), § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties), § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty), § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), § 61-8B-3(a)(2) (Sexual assault in the first degree), § 61-8B-5(a)(2) (Sexual assault in the third degree), § 61-8B-7(a)(3) (Sexual abuse in the first degree), and § 61-8B-9(a) (Sexual abuse in the third degree). Furthermore, "[a]ny person who has been convicted of a criminal offense and the sentencing judge made a written finding that the offense was sexually motivated<sup>33</sup> shall also register as set forth in this article." W. Va. Code Ann. § 15-12-2(c).

A conviction under W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts), however, is not an enumerated offense in W. Va. Code Ann. § 15-12-2(b) automatically requiring a convicted defendant to register as a sex offender, even if the victim is a minor. Thus, registration as a sex offender could only be required for convictions under W. Va. Code Ann. § 61-8-5(b) pursuant to W. Va. Code Ann. § 15-12-2(c) by written findings of the court that the offense was sexually motivated.

Buyers convicted of W. Va. Code Ann. § 61-2-17 (Human trafficking; criminal penalties) are not required to register as sex offenders under W. Va. Code Ann. § 15-12-2(b) (Registration).

- 2.10.1 Recommendation: Amend W. Va. Code Ann. § 15-12-2(b) (Registration) to include W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts) and § 61-2-17 (Human trafficking; criminal penalties) as offenses that automatically require a convicted defendant to register as a sex offender when a minor victim is involved.

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<sup>33</sup> "For purposes of this article, the term 'sexually motivated' means that one of the purposes for which a person committed the crime was for any person's sexual gratification." W. Va. Code Ann. § 15-12-2(j).

**Legal Components:**

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*
- 3.2 *Creating and distributing child pornography carries penalties as high as similar federal offenses.*
- 3.3 *Using the Internet or electronic communications to lure, entice, recruit, or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*
- 3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*
- 3.5 *Convicted traffickers are required to register as sex offenders.*
- 3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or commercial sexual exploitation of children (CSEC) offenses in order to remove the children of traffickers from their control and potential exploitation.*

**Legal Analysis:**

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*<sup>34</sup>

Traffickers can be prosecuted under W. Va. Code Ann. § 61-2-17 (Human trafficking; criminal penalties). A person can be convicted of human trafficking under W. Va. Code Ann. § 61-2-17(b), only if “two or more persons are trafficked within any one year period” through conduct constituting “labor trafficking” under § 61-2-17(a)(4), “sex trafficking of minors” under § 61-2-17(a)(5), or “sex trafficking of adults” under § 61-2-17(a)(6). W. Va. Code Ann. § 61-2-17(a)(3). Human trafficking is a felony punishable by 3–15 years imprisonment. W. Va. Code Ann. § 61-2-17(b).

Traffickers may also be prosecuted under W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), which states that a person who “takes away a child under the age of sixteen years from any person having lawful charge of such child, for the purpose of prostitution or concubinage, shall be guilty of a felony . . .” W. Va. Code Ann. § 61-2-14(a). A conviction under this statute is punishable by imprisonment for 3–10 years in the penitentiary. W. Va. Code Ann. § 61-2-14(a).

Traffickers could also be prosecuted under W. Va. Code Ann. § 61-8-8 (Receiving support from prostitution; pimping; penalty), which provides, “Any person who, knowing another person to be a prostitute, shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of the prostitution of such prostitute, or from money loaned or advanced to or charged against such prostitution by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or shall tout or receive compensation for touting for such prostitution, shall be guilty of pimping . . .” When the person prostituted is a minor, a conviction under W. Va. Code Ann. § 61-8-8 is a felony punishable by a minimum of imprisonment for 2 years, a fine not to exceed \$5,000, or both.

Traffickers may also face prosecution under W. Va. Code Ann. § 61-8-6 (Detention of person in place of prostitution; penalty) and § 61-8-7 (Procuring for house of prostitution; penalty), both of which are considered felonies when the victim is a minor and are punishable by imprisonment for 2–5 years, a fine not to exceed \$5,000, or both. W. Va. Code Ann. §§ 61-8-6, 61-8-7. Traffickers convicted under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) will receive a sentence of imprisonment for 2–10 years in a state correctional facility, a fine not to exceed \$5,000, or both. W. Va. Code Ann. § 61-3C-14b.

<sup>34</sup> See *supra* Section 1.2 for a full description of the substantive provisions of the West Virginia CSEC laws applicable to traffickers.



In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>35</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>36</sup> against a minor.

### 3.2 *Creating and distributing child pornography carries penalties as high as similar federal offenses.*

Pursuant to W. Va. Code Ann. § 61-8C-2(a) (Use of minors in filming sexually explicit conduct prohibited; penalty), “[a]ny person who causes or knowingly permits, uses, persuades, induces, entices or coerces such minor to do or assist in any sexually explicit conduct<sup>37</sup> shall be guilty of a felony when such person has knowledge that any such act is being photographed or filmed.” Under subsection (b), “any person who photographs or films such minor engaging in any sexually explicit conduct shall be guilty of a felony . . .” W. Va. Code Ann. § 61-8C-2(a), (b). Additionally, pursuant to W. Va. Code Ann. § 61-8C-2(c),

[a]ny parent, legal guardian or person having custody and control of a minor, who photographs or films such minor in any sexually explicit conduct<sup>38</sup> or causes or knowingly permits, uses, persuades, induces, entices or coerces such minor child to engage in or assist in any sexually explicit act shall be guilty of a felony when such person has knowledge that any such act may be photographed or filmed.

A conviction under any of the provisions of this statute is punishable by imprisonment for up to 10 years, a fine not to exceed \$10,000, or both. W. Va. Code Ann. § 61-8C-2(a), (b).

Pursuant to W. Va. Code Ann. § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties),

[a]ny adult who, with knowledge that a person is a minor or who fails to exercise reasonable care in ascertaining the age of a minor, hires, employs or uses such minor to produce obscene matter<sup>39</sup> or to do or assist in doing any sexually explicit conduct,<sup>40</sup> is guilty of a felony . . .

A conviction under W. Va. Code Ann. § 61-8A-5 is punishable by imprisonment for up to 10 years, a fine not to exceed \$50,000, or both.

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>41</sup> against a minor. Additionally, a federal conviction for

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<sup>35</sup> See *supra* note 22.

<sup>36</sup> See *supra* note 23.

<sup>37</sup> See *supra* note 9.

<sup>38</sup> See *supra* note 9.

<sup>39</sup> See *supra* note 8.

<sup>40</sup> See *supra* note 9.

<sup>41</sup> See *supra* note 23.

distribution of child pornography<sup>42</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>43</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>44</sup>

3.3 *Using the Internet or electronic communications to lure, entice, recruit, or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*

W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) criminalizes the use of a computer to lure or entice a minor to perform commercial sex acts. Pursuant to W. Va. Code Ann. § 61-3C-14b,

[a]ny person over the age of eighteen, who knowingly uses a computer to solicit, entice, seduce or lure, or attempt to solicit, entice, seduce or lure, a minor known or believed to be at least four years younger than the person using the computer or a person he or she reasonably believes to be a minor, to commit any illegal act proscribed by the provisions of article eight [Crimes against chastity, morality and decency], eight-b [Sexual offenses], eight-c [Filming of sexually explicit conduct of minors], or eight-d [Child abuse] of this chapter . . . is guilty of a felony . . . .

Article 8 predicate offenses include W. Va. Code Ann. § 61-8-5 (Houses of ill fame and assignment; penalties; jurisdiction of courts), § 61-8-6 (Detention of person in place of prostitution; penalty), and § 61-8-7 (Procuring for house of prostitution; penalty).

A conviction under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) is a felony punishable by imprisonment for 2–10 years, a fine not to exceed \$5,000, or both.

3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*

A person convicted of sex trafficking of minors pursuant to W. Va. Code Ann. § 61-2-17(b) (Human trafficking; criminal penalties) is subject to a possible fine not to exceed \$200,000. However, traffickers are not subject to asset forfeiture if convicted under W. Va. Code Ann. § 61-2-17(b).

No fines are imposed on traffickers convicted under W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties). However, traffickers convicted under W. Va. Code Ann. § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-8-7 (Procuring for house of prostitution; penalty), § 61-8-8 (Receiving support from prostitution; pimping; penalty), or § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) are subject to a possible fine not to exceed \$5,000, if the

<sup>42</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>43</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (providing that a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>44</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

victim is a minor. Traffickers convicted under W. Va. Code Ann. § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty) are subject to a possible fine not to exceed \$10,000. Lastly, a trafficker convicted under W. Va. Code Ann. § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties) is subject to a possible fine not to exceed \$50,000.

Additionally, West Virginia has a general restitution statute that may apply to traffickers. Restitution is mandatory where a defendant is “convicted of a felony or misdemeanor causing physical, psychological or economic injury or loss to a victim . . . unless the court finds restitution to be wholly or partially impractical as set forth” in the Victim Protection Act of 1984.” W. Va. Code Ann. § 61-11A-4(a) (Restitution; when ordered). Pursuant to W. Va. Code Ann. § 61-11A-4(b)(2), where the victim suffers “bodily injury,” a defendant shall be ordered to

- (A) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (B) Pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and
- (C) Reimburse the victim for income lost by the victim as a result of the offense.

W. Va. Code Ann. § 61-11A-4(b)(1) further provides that a defendant who causes a victim to suffer “damage to, loss of, or destruction of property,” shall be ordered to

- (A) Return the property to the owner of the property or someone designated by the owner; or
- (B) If return of the property under subparagraph (A) is impossible, impractical or inadequate, pay an amount equal to the greater of: (i) The value of the property on the date of sentencing; or (ii) the value of the property on the date of the damage, loss or destruction less the value (as of the date the property is returned) of any part of the property that is returned.

Traffickers convicted under W. Va. Code Ann. § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty) may also be required, in addition to any penalties and restitution imposed by the court, to “pay all or any portion of the cost of medical, psychological or psychiatric treatment of the minor resulting from the act or acts for which the person is convicted, whether or not the minor is considered to have sustained bodily injury.” W. Va. Code Ann. § 61-8C-4.

Additionally, pursuant to W. Va. Code Ann. § 61-8C-7 (Items subject to forfeiture; persons authorized to seize property subject to forfeiture), traffickers who violate W. Va. Code Ann. § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), W. Va. Code Ann. § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), or W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) are subject to discretionary, civil forfeiture of property possessed in violation of the offense, including

- (1) All visual depictions which have been manufactured, distributed, dispensed, or possessed in violation of article eight-a [§§ 61-8A-1 et seq.]<sup>45</sup> or eight-c [§§ 61-8C-1 et seq.]<sup>46</sup> of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (2) All raw materials, products and equipment of any kind which are used, intended for use, in manufacturing, processing, delivering, importing or exporting any visual depictions or any crimes

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<sup>45</sup> See *supra* note 26.

<sup>46</sup> See *supra* note 27.

against children in violation of article eight-a [§§ 61-8A-1et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter;

(3) All books, records, research products and materials, including hard drives, microfilm, tapes and data which are used, or have been used, or are intended for use in violation of article eight-a [§§ 61-8A-1et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter;

(4) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished in violation of article eight-a [§§ 61-8A-1et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter by any person in exchange for a visual depiction, all proceeds traceable to the exchange and all moneys, negotiable instruments, and securities used, or which are intended to be used, to facilitate any violation of article eight-a [§§ 61-8A-1et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter. . . .; and

(5) All conveyances, including aircraft, vehicles or vessels, which are used, have been used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in (1), (2) or (3) of this subsection<sup>47</sup>....”

Pursuant to W.Va. Code Ann. § 61-8C-7(b), property subject to forfeiture may be seized by the state police. Disposition of forfeitable property is governed by W.Va. Code Ann. § 61-8C-10 and 61-8C-11, which provide for alternate dispositions for moneys, securities or negotiable instruments and other property. Moneys, securities and other negotiable instruments shall be distributed as follows: (1) 10% to the office of the prosecuting attorney that initiated the forfeiture proceeding, (2) the balance to a special law-enforcement investigation fund. W. Va. Code Ann. § 61-8C-10. The circuit court ordering the forfeiture of all other property, upon application by the prosecuting attorney or the Superintendent of the State Police or his or her designee, may direct that: (1) Title to the forfeited property be vested in the law-enforcement agency so petitioning; (2) The law-enforcement agency responsible for the seizure retain the property for official use; or (3) The forfeited property shall be offered at public auction to the highest bidder for cash. W.Va. Code Ann. § 61-8C-11.

### 3.5 *Convicted traffickers are required to register as sex offenders.*

West Virginia’s Sex Offender Registration Act, W. Va. Code. Ch. 15 (Public Safety), Art. 12 (Sex offender registration act), establishes sex offender registration requirements. W. Va. Code Ann. § 15-12-2(b) (Registration) requires any person convicted of specified offenses to register as a sex offender. Those specific offenses include convictions under the following statutes: W. Va. Code Ann. § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), § 61-8A-4 (Use of obscene matter with intent to seduce minor), § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties), § 61-2-14 (Abduction of person; kidnapping or concealing child; penalties), § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), § 61-8-6 (Detention of person in place of prostitution; penalty), and § 61-8-7 (Procuring for house of prostitution; penalty). Furthermore, “[a]ny person who has been convicted of a criminal offense and the sentencing judge made a written finding that the offense was sexually motivated shall also register as set forth in this article.” W. Va. Code Ann. § 15-12-2(c).

However, W. Va. Code Ann. § 15-12-2(b) (Registration) does not include § 61-2-17(a)(5) (Human trafficking; criminal penalties) as an offense which requires registration as a sex offender.

#### 3.5.1 Recommendation: Amend the sex offender registry statute, W. Va. Code Ann. § 15-12-2(b) (Registration), to include § 61-2-17(a)(5) (Human trafficking; criminal penalties).

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<sup>47</sup> See *supra* note 28.

3.6 *Laws relating to termination of parental rights for certain offenses include sex trafficking or commercial sexual exploitation of children (CSEC) offenses in order to remove the children of traffickers from their control and potential exploitation.*

No provision of West Virginia law expressly mandates the termination of parental rights upon a parent's conviction under any CSEC or sexual offense law. W. Va. Code Ann. § 49-4-605(a)<sup>48</sup> (When department efforts to terminate parental rights required), requires that legal efforts be taken (e.g., filing of a petition) in order to terminate parental rights in any of the following situations:

- (1) If a child has been in foster care for fifteen of the most recent twenty-two months as determined by the earlier of the date of the first judicial finding that the child is subjected to abuse or neglect<sup>49</sup> or the date which is sixty days after the child is removed from the home;
- (2) If a court has determined the child is abandoned, tortured, sexually abused, or chronically abused; or
- (3) If a court has determined the parent has committed murder or voluntary manslaughter of another of his or her children, another child in the household, or the other parent of his or her children; has attempted or conspired to commit murder or voluntary manslaughter or has been an accessory before or after the fact of either crime; has committed unlawful or malicious wounding resulting in serious bodily injury to the child or to another of his or her children, another child in the household, or to the other parent of his or her children; or the parental rights of the parent to another child have been terminated involuntarily.

Additionally, pursuant to W. Va. Code Ann. § 49-4-604(b)(6) (Disposition of neglected or abused children; case plans; dispositions; factors to be considered; reunification; orders; alternative dispositions), where the court has determined a child to be abused or neglected and finds that “there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child” the court may terminate parental rights of the abusive parent. However, subsection (b) also requires that “[t]he court shall give precedence to dispositions in . . . sequence,” giving precedence to subsections (b)(1) through (b)(5)—all of which contemplate family reunification—before terminating parental rights under subsection (b)(6). However, W. Va. Code Ann. § 49-4-604(b)(7) states that the department “is not required to make reasonable efforts to preserve the family if the court determines:

- (A) The parent has subjected the child, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated

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<sup>48</sup> The text of W. Va. Code Ann. Chapter 49 (Child Welfare) was revised, rearranged, consolidated, and recodified by House Bill 2200, 82nd West Virginia. Leg. 1st Regular Sess. (WV 2015)(effective February 16, 2015). Now titled the “West Virginia Child Welfare Act,” Chapter § 49-1-101 through § 49-7-304, included here and elsewhere in this report, has been reordered and renumbered. Substantive amendments will be discussed individually in the relevant sections.

<sup>49</sup> W. Va. Code Ann. § 49-1-201 defines “abused child” as “a child whose health or welfare is being harmed or threatened by . . . [s]exual abuse” or “sexual exploitation.” Pursuant to W. Va. Code Ann. § 49-1-201, “Sexual exploitation” is defined as an act where

- (1) A parent, custodian or guardian, whether for financial gain or not, persuades, induces, entices or coerces a child to engage in sexually explicit conduct as that term is defined in section one, article eight-c, chapter sixty-one [W. Va. Code Ann. § 61-8C-1 (Definitions)] of this code;
- (2) A parent, guardian or custodian persuades, induces, entices or coerces a child to display his or her sex organs for the sexual gratification of the parent, guardian, custodian or a third person, or to display his or her sex organs under circumstances in which the parent, guardian or custodian knows such display is likely to be observed by others who would be affronted or alarmed.

circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse;

(B) The parent has:

....

(v) Committed sexual assault or sexual abuse of the child, the child's other parent, guardian, or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

....

As an additional avenue for seeking termination of parental rights as provided in W. Va. Code Ann. § 49-4-604(b)(6), W. Va. Code Ann. § 61-8B-11a (Convictions for offenses against children) requires that,

In any case where a person is convicted of an offense described in this article [Article 8b (Sexual offenses)] against a child and the person has custodial, visitation or other parental rights to the child who is the victim of the offense or any child who resides in the same household as the victim, the court shall, at the time of sentencing, find that the person is an abusing parent within the meaning of article six, chapter forty-nine of this code [W. Va. Code Ann. Chap. 49, Art. 6 (Procedures in cases of child neglect or abuse)] as to the child victim, and may find that the person is an abusing parent as to any child who resides in the same household as the victim, and shall take such further action in accord with the provisions of said article.

Accordingly, a trafficker who has committed a sexual offense against a child in his custody or control may have his parental rights terminated at the time of sentencing with regard to the victimized child as well as any other child living in the same house as the victim pursuant to W. Va. Code Ann. § 49-4-604(b)(6) and (7). However, because the sexual offense laws under Chapter 8B do not encompass the CSEC and child pornography offenses for which a trafficker may be convicted, W. Va. Code Ann. § 61-8B-11(a) fails to ensure that children in the custody of traffickers are provided this protection.

- 3.6.1 Recommendation: Amend W. Va. Code Ann. § 61-8B-11a (Convictions for offenses against children) to include violations of W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child), § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties), § 61-8C-2(a) (Use of minors in filming sexually explicit conduct prohibited; penalty) when these offenses involve a child, and § 61-8-8 (Receiving support from prostitution; pimping; penalty), § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), § 61-8-7 (Procuring for house of prostitution; penalty), § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-2-17(a)(5) (Human trafficking; criminal penalties) when these offenses involve a minor, as grounds for adjudicating a convicted trafficker as an abusing parent and thereby terminating parental rights pursuant to W. Va. Code Ann. § 49-4-604(b)(6) and (7) (Disposition of neglected or abused children; case plans; dispositions; factors to be considered; reunification; orders; alternative dispositions).
- 3.6.2 Recommendation: Amend W. Va. Code Ann. § 49-4-605 (When department efforts to terminate parental rights required) to require that a petition to terminate parental rights be filed whenever a person is convicted of violating any of the above listed offenses in Recommendation 3.6.1.

**Legal Components:**

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*
- 4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*
- 4.3 *Promoting and selling child sex tourism is illegal.*
- 4.4 *Promoting and selling child pornography is illegal.*

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**Legal Analysis:**

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*

Under W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties), “sex trafficking of minors” means “promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining or receipt of a person under the age of eighteen by any means, whether a United States citizen or foreign national, for the purpose of causing the minor to engage in sexual acts, or in sexual conduct.”<sup>50</sup> W. Va. Code Ann. § 61-2-17(a)(5). This language could reach some facilitators, but does not include terms such as benefitting, assisting or aiding, which are terms more broadly applicable to facilitators.

Furthermore, for a facilitator to be convicted of human trafficking under W. Va. Code Ann. § 61-2-17(a)(3), the facilitator must engage in conduct constituting “labor trafficking” under § 61-2-17(a)(4), “sex trafficking of minors” under § 61-2-17(a)(5), or “sex trafficking of adults” under § 61-2-17(a)(6) that results in “two or more persons trafficked within any one year period.” W. Va. Code Ann. § 61-2-17(a)(3). Human trafficking is a felony punishable by 3–15 years imprisonment. W. Va. Code Ann. § 61-2-17(b).

Other laws may apply to facilitators. Under W. Va. Code Ann. § 61-2-14e (One aiding or abetting in offense under §§ 61-2-14, 61-2-14a, 61-2-14c or 61-2-14d guilty as principal), those who knowingly aid and abet in the offense of kidnapping face the same criminal liability as the principal for aiding and abetting the commission of certain offenses, including W. Va. Code Ann. § 61-2-14 (Abduction of person; kidnapping or concealing child; penalties), which criminalizes conduct constituting minor sex trafficking. W. Va. Code Ann. § 61-2-14e states,

If any person in any way knowingly aid or abet any other person in the commission of any offense described in section fourteen [§ 61-2-14 (Abduction of person; kidnapping or concealing child)],, fourteen-a [§ 61-2-14a (Penalty for enticing away, kidnapping or holding hostage any person)],, fourteen-c [§ 61-2-14c (Penalty for threats to kidnap or demand ransom)] or fourteen-d [§ 61-2-14d (Concealment or removal of minor child from custodian or from person entitled to visitation; penalties; defenses)] of this article, either as accessory before or an accessory after the fact, such person so aiding and abetting shall be guilty as a principal in the commission of such offense and shall be punished in the same manner and to the same extent as is provided in said sections for the person who committed the offense . . . .

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<sup>50</sup> See *supra* note 2.

- 4.1.1 Recommendation: Amend W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties) to include “aiding,” “assisting,” and “knowingly benefitting,” from human trafficking to ensure that § 61-2-17(b) expressly applies to facilitators.

4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*

To the extent that W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties), applies to facilitators, a person convicted of “sex trafficking of minors” is subject to a felony punishable by a fine not more than \$200,000. W. Va. Code Ann. § 61-2-17(b). Facilitators convicted under W. Va. Code Ann. § 61-13-3(a) (Offenses) are subject to a possible fine not to exceed \$25,000.

Facilitators convicted under W. Va. Code Ann. § 61-8C-3 (Distributing and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) are subject to mandatory fines not to exceed \$25,000 depending on the severity of the crime. When the conduct involves 50 or fewer images, the perpetrator may be fined up to \$2,000. W. Va. Code Ann. § 61-8C-3(b). A person convicted of conduct involving more than 50 but fewer than 600 images, “or depicts violence against a child or a child engaging in bestiality” is subject to a possible fine not to exceed \$5,000. W. Va. Code Ann. § 61-8C-3(c). Visual depictions in the form of a “video clip, movie or similar recording of five minutes or less shall constitute seventy five images. A video clip, movie or similar recording of a duration longer than five minutes shall be deemed to constitute seventy-five images for every two minutes in length it exceeds five minutes.” W. Va. Code Ann. § 61-8C-3(e).<sup>51</sup>

Furthermore, pursuant W. Va. Code Ann. § 61-8C-7 (Items subject to forfeiture; persons authorized to seize property subject to forfeiture), facilitators who violate W. Va. Code Ann. § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), or § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) are subject to discretionary civil forfeiture of property possessed in violation of the offense, including

- (1) All visual depictions which have been manufactured, distributed, dispensed, or possessed in violation of article eight-a [§§ 61-8A-1 et seq.]<sup>52</sup> or eight-c [§§ 61-8C-1 et seq.]<sup>53</sup> of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (2) All raw materials, products and equipment of any kind which are used, intended for use, in manufacturing, processing, delivering, importing or exporting any visual depictions or any crimes against children in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (3) All books, records, research products and materials, including hard drives, microfilm, tapes and data which are used, or have been used, or are intended for use in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (4) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter by any person in exchange for a visual depiction, all proceeds traceable to the exchange and all moneys, negotiable instruments, and securities used, or which are intended to be used, to facilitate any violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter. . . . ;

<sup>51</sup> See Discussion *infra* Section 4.4.

<sup>52</sup> See *supra* note 26.

<sup>53</sup> See *supra* note 27.



(5) All conveyances, including aircraft, vehicles or vessels, which are used, have been used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in (1), (2) or (3) of this subsection<sup>54</sup> . . . .”

Pursuant to W.Va. Code Ann. § 61-8C-7(b), property subject to forfeiture may be seized by the state police. Disposition of forfeitable property is governed by W.Va. Code Ann. § 61-8C-10 and 61-8C-11, which provide for alternate dispositions for moneys, securities or negotiable instruments and other property. Moneys, securities and other negotiable instruments shall be distributed as follows (1) 10% to the office of the prosecuting attorney that initiated the forfeiture proceeding, (2) the balance to a special law-enforcement investigation fund. W. Va. Code Ann. § 61-8C-10. The circuit court ordering the forfeiture of all other property, upon application by the prosecuting attorney or the Superintendent of the State Police or his or her designee, may direct that: (1) Title to the forfeited property be vested in the law-enforcement agency so petitioning; (2) The law-enforcement agency responsible for the seizure retain the property for official use; or (3) The forfeited property shall be offered at public auction to the highest bidder for cash. W.Va. Code Ann. § 61-8C-11.

Additionally, West Virginia has a general restitution statute that may apply to facilitators in certain instances. Restitution is mandatory where a facilitator is “convicted of a felony or misdemeanor causing physical, psychological or economic injury or loss to a victim . . . unless the court finds restitution to be wholly or partially impractical as set forth” in the Victim Protection Act of 1984. W. Va. Code Ann. § 61-11A-4(a) (Restitution; when ordered). Pursuant to W. Va. Code Ann. § 61-11A-4(b)(2), where the victim suffers “bodily injury,” a defendant shall be ordered to

- (A) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (B) Pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and
- (C) Reimburse the victim for income lost by the victim as a result of the offense.

W. Va. Code Ann. § 61-11A-4(b)(1) further provides that a defendant who causes a victim to suffer “damage to, loss of, or destruction of property,” shall be ordered to

- (A) Return the property to the owner of the property or someone designated by the owner; or
- (B) If return of the property under subparagraph (A) is impossible, impractical or inadequate, pay an amount equal to the greater of: (i) The value of the property on the date of sentencing; or (ii) the value of the property on the date of the damage, loss or destruction less the value (as of the date the property is returned) of any part of the property that is returned.

#### 4.3 *Promoting and selling child sex tourism is illegal.*

West Virginia has no specific provision criminalizing the promotion or selling of child sex tourism.

- 4.3.1 Recommendation: Enact a law that prohibits selling or offering to sell travel services that include or facilitate travel for the purpose of engaging in commercial sexual exploitation of a minor, if the offer, sale, or travel occurs in West Virginia.

#### 4.4 *Promoting and selling child pornography is illegal.*

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<sup>54</sup> See *supra* note 28.

Pursuant to W. Va. Code Ann. § 61-8C-3(a) (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty), “[a]ny person who, knowingly and willfully, sends or causes to be sent or distributes, exhibits, possesses, electronically accesses with intent to view or displays or transports any material visually portraying a minor engaged in any sexually explicit conduct<sup>55</sup> is guilty of a felony . . . .” Penalties for violations of this statute vary depending on the severity of the crime in relation to the amount and types of materials accessed by the perpetrator. W. Va. Code Ann. § 61-8C-3 provides the following penalty structure,

(b) Any person who violates the provisions of subsection (a) of this section when the conduct involves fifty or fewer images shall, upon conviction, be imprisoned in a state correctional facility for not more than two years or fined not more than \$2,000 or both.

(c) Any person who violates the provisions of subsection (a) of this section when the conduct involves more than fifty but fewer than six hundred images shall, upon conviction, be imprisoned in a state correctional facility for not less than two nor more than ten years or fined not more than \$5,000, or both.

(d) Notwithstanding the provisions of subsections (b) and (c) of this section any person who violates the provisions of subsection (a) of this section when the conduct involves six hundred or more images or depicts violence against a child or a child engaging in bestiality shall, upon conviction, be imprisoned in a state correctional facility for not less than five nor more than fifteen years or fined not more than \$25,000, or both.

(e) For purposes of this section each video clip, movie or similar recording of five minutes or less shall constitute seventy five images. A video clip, movie or similar recording of a duration longer than five minutes shall be deemed to constitute seventy-five images for every two minutes in length it exceeds five minutes.

In addition to criminal penalties and restitution imposed by the court, persons convicted under W. Va. Code Ann. § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) may also be required to “pay all or any portion of the cost of medical, psychological or psychiatric treatment of the minor resulting from the act or acts for which the person is convicted, whether or not the minor is considered to have sustained bodily injury.” W. Va. Code Ann. § 61-8C-4.

- 4.4.1. Recommendation: Raise the base penalty for a violation of W. Va. Code Ann. § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) to reflect the seriousness of the offense.

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<sup>55</sup> See *supra* note 10.

***Legal Components:***

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*
- 5.3 *Prostitution laws apply only to adults, preventing criminalization of minors under 18 for prostitution offenses.*
- 5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*
- 5.5 *Commercial sexual exploitation or sex trafficking is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*
- 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

***Legal Analysis:***

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*

West Virginia’s Victim Protection Act of 1984, Chapter 61, Article 11A, does not provide a general definition of “victim.” Instead, varying definitions of “victim” are provided throughout the Victim Protection Act. For example, for purposes of W. Va. Code § 61-11A-2 (Testimony of crime victim at sentencing hearing), “victim” is defined in part as a “person who is a victim of a felony,” and for purposes of W. Va. Code § 61-11A-8 (Notification to victim of offender’s release, placement or escape from custody), “victim” is any person who is a “victim of [certain specified crimes, including kidnapping or any sexual offense against a minor] . . . who is alive and competent.” W. Va. Code Ann. §§ 61-11A-2(a), 61-11A-8(i)(2).

However, pursuant to W. Va. Code § 61-2-17(d) (Human trafficking; criminal penalties), victims of human trafficking are considered victims under the West Virginia Crime Victims Compensation Act. W. Va. Code § 61-2-17(d) provides that “[n]otwithstanding the definition of victim in subsection (k), section three, article two-a, chapter fourteen of this code [14-2A-3(k) (Definitions)], a person who is a victim of human trafficking is a victim for all purposes of article two-a, chapter fourteen [14-2A (Compensation awards to victims of crime)] of this code.”

Pursuant to W. Va. Code Ann. § 14-2A-3(k) (Definitions), a “victim” includes “[a] person who suffers personal injury or death as a result of . . . [c]riminally injurious conduct . . .” “Criminally injurious

conduct” is defined, in part, as conduct “which poses a substantial threat of personal injury or death and is punishable by fine or imprisonment.” W. Va. Code Ann. § 14-2A-3(c).

5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*

W. Va. Code Ann. § 61-2-17 (Human trafficking; criminal penalties), § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-8-7 (Procuring for house of prostitution; penalty), § 61-8-8 (Receiving support from prostitution; pimping; penalty), § 61-8-5(b) (Houses of ill fame and assignation; penalties), § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), and § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) do not expressly provide that the consent of a minor to a commercial sex act is immaterial to the crime.

To the extent that sex offenses are used to prosecute trafficking crimes in West Virginia, W. Va. Code Ann. § 61-8B-2(a) specifically provides, “Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.”

Under subsection (c)(1), “[a] person is deemed incapable of consent when such person is: (1) Less than sixteen years old.”

- 5.2.1 Recommendation: Amend W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties) § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-8-7 (Procuring for house of prostitution; penalty), § 61-8-8 (Receiving support from prostitution; pimping), § 61-8-5(b) (Houses of ill fame and assignation; penalties), § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), and § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) to expressly provide that the minor’s consent to a commercial sex act is not a defense to the crime.

5.3 *Prostitution laws apply only to adults, preventing criminalization of minors under 18 for prostitution offenses.*

W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties) is age-neutral, and therefore, applies to minors. The applicable portion of W. Va. Code Ann. § 61-8-5(b) states:

Any person who shall engage in prostitution, lewdness, or assignation . . . shall, upon conviction for the first offense under this section, be punished by imprisonment in the county jail for a period of not less than sixty days nor more than six months . . . .

- 5.3.1 Recommendation: Amend W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts) to eliminate liability for prostitution offenses for all minors under 18.

5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*

**Child Initially Identified as Abused/Neglected**

West Virginia provides some protective provisions to commercially sexually exploited<sup>56</sup> children. Pursuant to W. Va. Code Ann. § 49-1-201<sup>57</sup> (Definitions related to, but not limited, to abuse and neglect),<sup>58</sup> a sexually exploited child is likely to be identified as abused or neglected. If a child is identified as abused or neglected under W. Va. Code Ann. § 49-1-201, the definition of caregiver or “custodian” under W. Va. Code Ann. § 49-1-204 (Definitions related, but not limited, to custodians, legal guardians and family)<sup>59</sup> is sufficiently broad enough to involve Child Protective Services in investigations where the child is in the custody or control of a non-family trafficker.

To the extent that a victim of child sex trafficking is identified as abused or neglected, the child may initially come to the attention of law enforcement or other specified persons, including healthcare professionals, through the filing of a mandatory report of abuse pursuant to W. Va. Code Ann. § 49-2-803<sup>60</sup> (Persons mandated to report suspected abuse and neglect; requirements).

## *I. Initial Custody*

### *a. Authority for Initial Custody*

Pursuant to W. Va. Code Ann. § 49-2-803, when certain specified persons, including healthcare professionals, social service workers, school personnel, and law enforcement officers, have “reasonable cause to suspect that a child is neglected or abused or observe the child being subjected to conditions that are likely to result in abuse or neglect,” they must

report the circumstances or cause a report to be made to the Department of Health and Human Resources. In any case where the reporter believes that the child suffered serious physical abuse or sexual abuse or sexual assault, the reporter shall also immediately report, or cause a report to be made, to the State Police and any law-enforcement agency having jurisdiction to investigate the complaint.

Any other person “over the age of eighteen who receives a disclosure from a credible witness or observes any sexual abuse or sexual assault of a child” must report within forty-eight hours, or as soon as it is safe to do so. W. Va. Code Ann. § 49-2-803(b). Once a local child protective services office receives a report of alleged child abuse or neglect, the office must investigate the report, and, if necessary, “initiate the appropriate legal proceeding.” W. Va. Code Ann. § 49-2-802(c)(3), (d) (Establishment of child protective services; general duties and powers; administrative procedure; immunity from civil liability; cooperation of other state agencies). At that point, a child may be taken into custody pursuant to a court order when there is showing of probable cause for any of the following: “(2) the health, safety and welfare of the juvenile demand such custody . . .” W. Va. Code Ann. § 49-4-705(a)(2) (Taking a juvenile into custody; requirements; existing conditions; detention centers; medical aid).

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<sup>56</sup> See *supra* note 49.

<sup>57</sup> The text of W. Va. Code Ann. Chapter 49 (Child Welfare) was revised, rearranged, consolidated, and recodified by House Bill 2200, 82nd West Virginia Leg. 1st Regular Sess. (WV 2015)(effective February 16, 2015). Now titled the “West Virginia Child Welfare Act,” Chapter § 49-1-101 through § 49-7-304, included here and elsewhere in this report, has been reordered and renumbered. Substantive amendments will be discussed individually in the relevant sections.

<sup>58</sup> See *infra* section 5.5 for a full analysis of the definition of “abuse and neglect” as it relates to the identification of sexually exploited children.

<sup>59</sup> See *infra* section 5.6 for a full analysis of the definition of “custodian.”

<sup>60</sup> The text of W. Va. Code Ann. § 49-2-803 included here and elsewhere in this report includes amendments made by the enactment of House Bill 2939 and House Bill 2200, 82nd West Virginia Leg. 1st Regular Sess. (WV 2015) (effective February 16, 2015 and June 12, 2015 respectively).

Alternatively, pursuant to W. Va. Code Ann. § 49-4-301 (Custody of a neglected child by law enforcement in emergency situations; protective custody; requirements; notices; petition for appointment of special guardian; discharge; immunity) law enforcement and medical personnel may initiate custody if a child is believed to be neglected or abused.

b. Placement

Pursuant to W. Va. Code Ann. § 49-4-301(b), an abandoned child taken into protective custody can be housed by the state department or in any authorized child shelter facility. A child taken into protective custody

for emergency medical treatment may be held in a hospital under the care of a physician against the will of the child's parents, parent, guardian or custodian for a period not to exceed ninety-six hours.

W. Va. Code Ann. § 49-4-301(c).

II. Process following initial custody

a. Where is the child referred after initial custody?

Pursuant to W. Va. Code Ann. § 49-4-602(a)(1) (Petition to court when child believed neglected or abused; temporary care, custody, and control of child at different stages of proceeding; temporary care; orders; emergency removal; when reasonable efforts to preserve family are unnecessary) states,

the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the care, custody, and control of the department or a responsible person who is not the custodial parent or guardian of the child, if it finds that:

(A) There exists imminent danger to the physical well-being of the child; and

(B) There are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody.

(2) Where the alleged abusing person, if known, is a member of a household, the court shall not allow placement pursuant to this section of the child or children in the home unless the alleged abusing person is or has been precluded from visiting or residing in the home by judicial order.

....

b. When/how does the court assume jurisdiction?

Under W. Va. Code Ann. § 49-4-601(a) (Petition to the court when child believed neglected or abused; venue; notice; right to counsel; continuing legal education; findings; proceedings; procedure ), “[i]f the [Department of Health and Human Resources] or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court . . . .”

III. Placement process pending adjudication/investigation

a. Placement hearing

Under W. Va. Code Ann. § 49-4-602(b), if the child is in “imminent danger,”<sup>61</sup> the court may hold a preliminary hearing at which, if it determines that “there are no alternatives less drastic than removal of the child and that a hearing on the petition cannot be scheduled in the interim period,” it can “order that the child be delivered into the temporary care, custody, and control of the department or a responsible person or agency found by the court to be a fit and proper person for the temporary care of the child for a period not exceeding sixty days.”

Additionally, pursuant to W. Va. Code Ann. § 49-4-303 (Emergency removal by department before filing of petition; conditions; referee; application for emergency custody; order), a child protective service worker who observes a child whose “physical well-being” is in “imminent danger” may take a child into custody without a court order when there is

probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county before a petition can be filed and temporary custody can be ordered. . . . After taking custody of the child or children prior to the filing of a petition, the worker shall forthwith appear before a circuit judge or referee of the county where custody was taken and immediately apply for an order. If no judge or referee is available, the worker shall appear before a circuit judge or referee of an adjoining county, and immediately apply for an order. This order shall ratify the emergency custody of the child pending the filing of a petition. . . . If the emergency taking is ratified by the judge or referee, emergency custody of the child or children is vested in the department until the expiration of the next two judicial days, at which time any such child taken into emergency custody shall be returned to the custody of his or her parent or guardian or custodian unless a petition has been filed and custody of the child has been transferred under the provisions of section six hundred two of this article.

b. Placement Options

Pursuant to W. Va. Ann. § 49-4-602(a)(1),

([u]pon the filing of a petition, the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the care, custody, and control of the department or a responsible person who is not the custodial parent or guardian of the child if it finds that:

(A) There exists imminent danger to the physical well-being of the child; and

(B) There are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody.

(2) Where the alleged abusing person, if known, is a member of a household, the court shall not allow placement pursuant to this section of the child or children in the home unless the alleged abusing person is or has been precluded from visiting or residing in the home by judicial order.

(3) In a case where there is more than one child in the home, or in the temporary care, custody, or control of the alleged offending parent, the petition shall so state. Notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of those children, each child in the home for whom relief is sought shall be made a party to the proceeding.

IV. Adjudication or referral to alternate process

a. Adjudicatory/dispositional hearing

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<sup>61</sup> W. Va. Code Ann. § 49-1-201(8) (Definitions relating to abuse and neglect) defines “Imminent danger to the physical well-being of the child” in part as “an emergency situation in which the welfare or the life of the child is threatened. These conditions may include an emergency situation when there is reasonable cause to believe that any child in the home is or has been sexually abused or sexually exploited . . . .”

A child who is a victim of abuse or neglect and is “undergoing certain status offense and delinquency proceedings,” may be subject to a “multidisciplinary screening, advisory and planning system to assist courts in facilitating permanency planning . . . .” W. Va. Code Ann. § 49-4-401(a)(1), (2) (Purpose; system to be a complement to existing programs). Pursuant to W. Va. Code Ann. § 49-4-402(a), “[t]he prosecuting attorney shall establish a multidisciplinary investigative team in that county.” Under W. Va. Code Ann. § 49-4-402(c), “[t]he investigative team shall be responsible for coordinating or cooperating in the initial and ongoing investigation of all civil and criminal allegations pertinent to cases involving child sexual assault, child sexual abuse, child abuse and neglect and shall make a recommendation to the county prosecuting attorney as to the initiation or commencement of a civil petition and/or criminal prosecution.”

V. Outcomes (Final permanent placement)

a. Disposition

Pursuant to W. Va. Code Ann. § 49-4-405(a) (Multidisciplinary treatment planning process involving child abuse and neglect; team membership; duties; reports; admissions),

Within thirty days of the initiation of a judicial proceeding pursuant to article six of this article, the Department of Health and Human Services shall convene a multidisciplinary treatment team to assess, plan, and implement a comprehensive, individualized service plan for children who are victims of abuse or neglect and their families. The multidisciplinary team shall obtain and utilize any assessments for the children . . . respondents that it deems necessary to assist in the development of that plan.

After a case in juvenile court is commenced and “[p]rior to disposition, in each case in which a treatment planning team has been convened, the team shall advise the court as to the types of services the team has determined are needed and the type of placement, if any, which will best serve the needs of the child.” W. Va. Code Ann. § 49-4-405(c).

**Child Initially Identified as Delinquent**

Despite the protections highlighted above, a child may be arrested and detained by law enforcement for actions related to the child being trafficked.

I. Initial Custody

a. Authority for initial custody

Pursuant to W. Va. Code Ann. § 49-4-705(b), a child may be taken into custody by a law-enforcement officer without a court order under any of the following circumstances:

- (1) Grounds exist for the arrest of an adult in identical circumstances;
- (2) Emergency conditions exist which, in the judgment of the officer, pose imminent danger to the health, safety and welfare of the juvenile; [or]
- (3) The official has reasonable grounds to believe that the juvenile has left the care of his or her parents, guardian or custodian without the consent of the person and the health, safety and welfare of the juvenile is endangered . . . .

Alternatively, W. Va. Code Ann. § 49-4-705(a) states that a child may be taken into custody pursuant to a court order when there is showing of probable cause for any of the following: “(1) The petition shows that



grounds exist for the arrest of an adult in identical circumstances; (2) the health, safety and welfare of the juvenile demand such custody . . . .”

b. Placement

Under W. Va. Code Ann. § 49-4-705(c)(2) after a child is taken into custody, the child must be released to her parent, guardian or custodian, except under the following conditions:

- (A) Circumstances present an immediate threat of serious bodily harm to the juvenile if released;
- (B) No responsible adult can be found into whose custody the juvenile can be delivered. Each day the juvenile is detained, a written record must be made of all attempts to locate such a responsible adult;
- or
- ....

II. Process following initial custody

a. Where is the child referred after initial custody?

Under W. Va. Code. Ann. § 49-4-705(c)(3), “[i]f the juvenile is an alleged status offender . . . [‘the official shall’] immediately notify the Department of Health and Human Resources and, if the circumstances of either paragraph (A) or (B), subdivision (2) [§ 49-4-705(c)(2)(A), (B)] of this subsection exist and the requirements therein are met, the official may detain the juvenile, but only in a nonsecure or staff-secure facility.” Pursuant to W. Va. Code Ann. § 49-4-705(d),

In all cases when a juvenile is delivered into a sheriff’s or detention center director’s custody, that official shall release the juvenile to his or her parent, guardian or custodian by the end of the next day unless the juvenile has been placed in detention after a hearing conducted pursuant to section seven hundred six [§ 49-4-706] of this article.

At the detention hearing, under W. Va. Code Ann. § 49-4-706(a) (Detention hearing; rights of juvenile; notification; counsel; hearings), the judge or magistrate will determine “the possible need for detention

b. How does the court assume jurisdiction?

The judge or magistrate “shall, if the health, safety and welfare of the juvenile will not be endangered thereby, release the juvenile on recognizance to his or her parents, custodians or an appropriate agency . . . .” W. Va. Code Ann. § 49-4-706(a). Under subsection (a)(2), the court is directed to

Release the juvenile into the custody of his or her parent, guardian or custodian unless:

- (A) Circumstances present an immediate threat of serious bodily harm to the juvenile if released;
- (B) No responsible adult can be found into whose custody the juvenile can be delivered. However, each day the juvenile is detained, a written record must be made of all attempts to locate such a responsible adult; or
- (C) The juvenile is charged with an act of delinquency for which secure detention is permissible . . .

III. Placement process pending adjudication/investigation

a. Placement hearing.

Pursuant to W. Va. Ann. § 49-4-706(Detention hearing; counsel),

The circuit court judge or magistrate shall hear testimony concerning the circumstances for taking the juvenile into custody and the possible need for detention. The sole mandatory issue at the detention hearing is whether the juvenile should be detained pending further court proceedings. The court shall, if the health, safety and welfare of the juvenile will not be endangered thereby, release the juvenile on recognizance to his or her parents, custodians or an appropriate agency; however, if warranted, the court may require bail, except that bail may be denied in any case where bail could be denied if the accused were an adult. The court shall:

- (1) Immediately notify the juvenile's parent, guardian or custodian or, if the parent, guardian or custodian cannot be located, a close relative;
  - (2) Release the juvenile into the custody of his or her parent, guardian or custodian unless:
    - (A) Circumstances present an immediate threat of serious bodily harm to the juvenile if released;
    - (B) No responsible adult can be found into whose custody the juvenile can be delivered. However, each day the juvenile is detained, a written record must be made of all attempts to locate such a responsible adult; or
    - (C) The juvenile is charged with an act of delinquency for which secure detention is permissible; and
  - (3) If the juvenile is an alleged status offender, immediately notify the department of health and human resources, and, if the circumstances of either paragraph (A) or (B), subdivision (2) of this subsection [§ 49-4-706 (a)(2)(A), (B)] exist and the requirements therein are met, the court may order the juvenile detained, but only in a nonsecure or staff-secure facility. Any juvenile detained pursuant to this subdivision shall be placed in the legal custody of the Department of Health and Human Resources pending further proceedings by the court.
- (b) The circuit court judge or magistrate may, in conjunction with the detention hearing, conduct a preliminary hearing pursuant to section seven hundred and four of this article if all parties are prepared to proceed and the juvenile has counsel during the hearing.

b. Placement options.

Pursuant to W. Va. Ann. § 49-1-206 (Definitions related, but not limited, to child advocacy, care, residential, and treatment programs), a juvenile can be placed in any foster home, group home or other facility or residence. The court can also release the juvenile into the custody of his or her parent, guardian or custodian. W. Va. Ann. § 49-4-706.

IV. Adjudication or referral to alternative process.

a. Adjudicatory/dispositional hearing.

Pursuant to W. Va. Code Ann. § 49-4-406<sup>62</sup> (Multidisciplinary treatment process for status offenders or delinquents; requirements; custody; procedure; reports; cooperation; inadmissibility of certain statements),

- (a) When a juvenile is adjudicated as a status offender pursuant to section seven hundred eleven, of this article, the Department of Health and Human Resources shall promptly convene a multidisciplinary treatment team and conduct an assessment, utilizing a standard uniform comprehensive assessment instrument or protocol, to determine the juvenile's mental and physical condition, maturity and education level, home and family environment, rehabilitative needs and recommended service plan, which shall be provided in writing to the court and team members. Upon completion of the assessment, the treatment team shall prepare and implement a comprehensive, individualized service plan for the juvenile.

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<sup>62</sup> See *supra* note 48.

(b) When a juvenile is adjudicated as a delinquent or has been granted a preadjudicatory community supervision period pursuant to section seven hundred eight of this article, the court, either upon its own motion or motion of a party, may require the Department of Health and Human Resources to convene a multidisciplinary treatment team and conduct an assessment, utilizing a standard uniform comprehensive assessment instrument or protocol, to determine the juvenile's mental and physical condition, maturity and education level, home and family environment, rehabilitative needs and recommended service plan, which shall be provided in writing to the court and team members. A referral to the Department of Health and Human Resources to convene a multidisciplinary treatment team and to conduct an assessment shall be made when the court is considering placing the juvenile in the department's custody or placing the juvenile out-of-home at the department's expense pursuant to section seven hundred fourteen, of this article. In any delinquency proceeding in which the court requires the Department of Health and Human Resources to convene a multidisciplinary treatment team, the probation officer shall notify the department at least fifteen working days before the court proceeding in order to allow the department sufficient time to convene and develop an individualized service plan for the juvenile.

*b. Diversion or alternate process.*

W. Va. Code Ann. § 49-4-405(a) states that,

Within thirty days of the initiation of a judicial proceeding pursuant to part six, of this article, the Department of Health and Human Services shall convene a multidisciplinary treatment team to assess, plan, and implement a comprehensive, individualized service plan for children who are victims of abuse or neglect and their families. The multidisciplinary team shall obtain and utilize any assessments for the children or the adult respondents that it deems necessary to assist in the development of that plan.

After a case in juvenile court is commenced and “[p]rior to disposition, in each case in which a treatment planning team has been convened, the team shall advise the court as to the types of services the team has determined are needed and the type of placement, if any, which will best serve the needs of the child.”

W. Va. Code Ann. § 49-4-405(c).

*V. Outcomes (Final permanent placement)*

*a. Disposition*

After adjudication pursuant to W. Va. Code Ann § 49-4-711 (Adjudication for alleged status offenders and delinquents; mandatory initial disposition of status offenders; court orders), W. Va. Code Ann. § 49-4-714(b) (Disposition of juvenile delinquents; investigation; proceedings; court discretion; orders; appeal) permits the court to choose a disposition

from the following alternatives, consider[ing] the best interests of the juvenile and the welfare of the public:

- (1) Dismiss the petition;
- (2) Refer the juvenile and the juvenile’s parent or custodian to a community agency for needed assistance and dismiss the petition;
- (3) Upon a finding that the juvenile is in need of extra-parental supervision: (A) Place the juvenile under the supervision of a probation officer of the court or of the court of the county where the juvenile has his or her usual place of abode or other person while leaving the juvenile in custody of his or her parent or custodian; and (B) prescribe a program of treatment or therapy or limit the juvenile’s activities under terms which are reasonable and within the child’s ability to perform . . . ;

(4) Upon a finding that a parent or custodian is not willing or able to take custody of the juvenile, that a juvenile is not willing to reside in the custody of his parent or custodian or that a parent or custodian cannot provide the necessary supervision and care of the juvenile, the court may place the juvenile in temporary foster care or temporarily commit the juvenile to the department or a child welfare agency. . . . ;

(5)(A) Upon a finding that the best interests of the juvenile or the welfare of the public require it, and upon an adjudication of delinquency the court may commit the juvenile to the custody of the Director of the Division of Juvenile Services for placement in a juvenile services facility for the treatment, instruction and rehabilitation of juveniles. The court maintains discretion to consider alternative sentencing arrangements.

. . . .

(C) Commitments may not exceed the maximum term for which an adult could have been sentenced for the same offense and any such maximum allowable sentence to be served in a juvenile correctional facility may take into account any time served by the juvenile in a detention center pending adjudication, disposition or transfer. . . .

b. Ongoing services

Juveniles adjudicated to be status offenders<sup>63</sup> will be provided services in accordance with the West Virginia Juvenile Offender Rehabilitation Act,<sup>64</sup> which includes provisions regarding the treatment of status offenders in rehabilitative facilities and authorizes “[t]he Department of Health and Human Resources may require any juvenile committed to its legal custody to remain at and to return to the residence to which the juvenile is assigned by the department or by the juvenile court.” W. Va. Code Ann. §§ 49-2-1005 (Legal custody; law enforcement agencies).

c. Specialized long-term placement if identified as DMST

Additionally, a child who is a victim of abuse or neglect and is “undergoing certain status offense and delinquency proceedings,” may be subject to a “multidisciplinary screening, advisory and planning system to assist courts in facilitating permanency planning . . . .” W. Va. Code Ann. § 49-4-401(a)(1)-(2). Pursuant to W. Va. Code Ann. § 49-4-402(a), “[t]he prosecuting attorney shall establish a multidisciplinary investigative team in that county.” Under W. Va. Code Ann. § 49-4-402(c), “he investigative team shall be responsible for coordinating or cooperating in the initial and ongoing investigation of all civil and criminal allegations pertinent to cases involving child sexual assault, child sexual abuse, child abuse and neglect and shall make a recommendation to the county prosecuting attorney as to the initiation or commencement of a civil petition and/or criminal prosecution.”

5.4.1 Recommendation: Enact a mandatory protective response for juvenile sex trafficking victims that provides an avenue to specialized services outside detention.

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<sup>63</sup> “Status offender” is defined in W. Va. Code Ann. § 49-1-202 as

a juvenile who has been adjudicated as one:

- (A) Who habitually and continually refuses to respond to the lawful supervision by his or her parents, guardian or legal custodian such that the juvenile’s behavior substantially endangers the health, safety or welfare of the juvenile or any other person;
- (B) Who has left the care of his or her parents, guardian or custodian without the consent of such person or without good cause; or
- (C) Who is habitually absent from school without good cause.

<sup>64</sup> W. Va. Code Ann. §§ 49-4-1001 to -06.

5.5 *Commercial sexual exploitation or sex trafficking is identified as a type of abuse and neglect within child protection statutes.*

For purposes of W. Va. Code Ann. Chap. 49 (West Virginia Child Welfare Act), commercial sexual exploitation or sex trafficking of a child is not expressly identified as a type of child abuse.

W. Va. Code Ann. § 49-1-201<sup>65</sup> (Definitions related, but not limited, to child abuse and neglect) defines an “abused child” in part as a child “whose health or welfare is being harmed or threatened by: . . . (B) Sexual abuse<sup>66</sup> or sexual exploitation; (C) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section fourteen-h, article two, chapter sixty-one [W. Va. Code Ann. § 61-2-14h (Prohibition of purchase or sale of child; penalty; definitions; exceptions)] of this code . . . .”

Pursuant to W. Va. Code Ann. § 49-1-201,

“Sexual exploitation” means an act where:

- (A) A parent, guardian or custodian, whether for financial gain or not, persuades, induces, entices or coerces a child to engage in sexually explicit conduct<sup>67</sup> as that term is defined in section one, article eight-c, chapter sixty-one [W. Va. Code § 61-8C-1 (Definitions)] of this code; or
- (B) A parent, guardian or custodian persuades, induces, entices or coerces a child to display his or her sex organs for the sexual gratification of the parent, guardian, custodian or a third person, or to display his or her sex organs under circumstances in which the parent, guardian or custodian knows such display is likely to be observed by others who would be affronted or alarmed.

- 5.5.1. Recommendation: Amend W. Va. Code Ann. § 49-1-201(1), (B) (Definitions related, but not limited, to child abuse and neglect) to include a victim of sex trafficking in the definition of an “abused child” and to enumerate sex trafficking as an act constituting “sexual abuse or sexual exploitation.”

5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*

For purposes of the West Virginia Child Welfare Act “custodian” is a relevant term in determining whether a sexually exploited child would have access to services, because the definition of an “abused

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<sup>65</sup> The text of W. Va. Code Ann. Chapter 49 (Child Welfare) was revised, rearranged, consolidated, and recodified by House Bill 2200, 82nd West Virginia. Leg. 1st Regular Sess. (WV 2015)(effective February 16, 2015). Now titled the “West Virginia Child Welfare Act,” Chapter § 49-1-101 through § 49-7-304, included here and elsewhere in this report, has been reordered and renumbered. Substantive amendments will be discussed individually in the relevant sections.

<sup>66</sup> Pursuant to W. Va. Code Ann. § 49-1-201, “sexual abuse” is defined as

- (A) Sexual intercourse, sexual intrusion, sexual contact, or conduct proscribed by section three, article eight-c, chapter sixty-one, which a parent, guardian or custodian engages in, attempts to engage in, or knowingly procures another person to engage in with a child notwithstanding the fact that for a child who is less than sixteen years of age the child may have willingly participated in that conduct or the child may have suffered no apparent physical injury or mental or emotional injury as a result of that conduct or, for a child sixteen years of age or older the child may have consented to that conduct or the child may have suffered no apparent physical injury or mental or emotional injury as a result of that conduct; or
- (B) Any conduct where a parent, guardian or custodian displays his or her sex organs to a child, or procures another person to display his or her sex organs to a child, for the purpose of gratifying the sexual desire of the parent, guardian or custodian, of the person making that display, or of the child, or for the purpose of affronting or alarming the child.

<sup>67</sup> See *supra* note 10.

child” includes “sexual exploitation” at the hands of a “custodian.”<sup>68</sup> “Custodian” is defined as “a person who has or shares actual physical possession or care and custody of a child, regardless of whether such person has been granted custody of the child by any contract or agreement.” W. Va. Code Ann. § 49-1-204.<sup>69</sup> Because W. Va. Code Ann. § 49-1-204 does not require a person to have legal custody of a child, but only to have or share “actual physical possession or care and custody of a child,” this definition likely is broad enough to cover situations in which a trafficker is in custody or control of a child.

The West Virginia Child Welfare Act also employs the term “caregiver,” which is more narrowly defined as “any person who is at least eighteen years of age and: (A) Is related by blood, marriage or adoption to the minor, but who is not the legal custodian or guardian of the minor; or (B) Has resided with the minor continuously during the immediately preceding period of six months or more. W. Va. Code Ann. § 49-1-204. However, “caregivers” are primarily discussed in the context of providing consent for medical treatment,<sup>70</sup> while “custodian” is used within the definition of an “abused child” and affects access to services.

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*

Pursuant to W. Va. Code Ann. § 61-2-17(d) (Human trafficking; criminal penalties), a victim of human trafficking is considered a victim under the West Virginia Crime Victims Compensation Act and is thus eligible to receive crime victims’ compensation. In addition, a child victim may also receive compensation under the general statutory provisions that protect crime victims. However, certain criteria of article two-a, chapter fourteen of this code may limit the ability for these victims to receive compensation.

Under the West Virginia Crime Victims Compensation Act, a victim or other claimant is entitled to compensation for economic loss sustained as a result of any injury to the victim and attorneys fees. W. Va. Code Ann. § 14-2A-14(g)(1) (Grounds for denial of claim or reduction of awards; maximum Awards), W. Va. Code Ann. § 14-2A-19 (Attorney and witness fees). Pursuant to W. Va. Code Ann. § 14-2A-14(g)(1), “[e]xcept in the case of death, or as provided in subdivision (2) of this subsection, compensation payable to a victim and to all other claimants sustaining economic loss because of injury to that victim may not exceed \$35,000 in the aggregate. Compensation payable to all claimants because of the death of the victim may not exceed \$50,000 in the aggregate.”<sup>71</sup> They may also be eligible for an additional award not to exceed \$100,000, if their injuries qualify as a disability under the Social Security Act, 42 U. S. C. § 423. W. Va. Code Ann. § 14-2A-14(g)(2).

<sup>68</sup> See *supra* definitions of “abused child” and “sexual exploitation” in Section 5.5.

<sup>69</sup> The text of W. Va. Code Ann. Chapter 49 (Child Welfare) was revised, rearranged, consolidated, and recodified by House Bill 2200, 82nd West Virginia. Leg. 1st Regular Sess. (WV 2015)(effective February 16, 2015). Now titled the “West Virginia Child Welfare Act,” Chapter § 49-1-101 through § 49-7-304, included here and elsewhere in this report, has been reordered and renumbered. Substantive amendments will be discussed individually in the relevant sections.

<sup>70</sup> See W. Va. Code Ann. §§ ~~§49-2-701~~ – §49-2-708 (Part VII. Caregivers consent act). “Caregivers” are also referenced with respect to receiving services for disabled persons. See W. Va. Code Ann. §§ 49-2-601 – §49-2-605 (Part VI. West Virginia family support Program).

<sup>71</sup> “‘Economic loss’ means economic detriment consisting only of allowable expense, work loss and replacement services loss. If criminally injurious conduct causes death, economic loss includes a dependent’s economic loss and a dependent’s replacement services loss. Noneconomic detriment is not economic loss, however, economic loss may be caused by pain and suffering or physical impairment. For purposes of this article, the term “‘economic loss’” includes a lost scholarship as defined in this section.” W. Va. Code Ann. § 14-2A-3(e). See W. Va. Code Ann. § 14-2A-3(f)-(j) (defining allowable expense, work loss, replacement services loss, dependent’s economic loss and dependent’s replacement services loss).

Under W. Va. Code Ann. § 61-2-17(e), any rights to compensation for minor sex trafficking victims “are cumulative and in addition to other existing rights.”

W. Va. Code Ann. § 61-2-17(a)(3) defines human trafficking as “the labor trafficking or sex trafficking involving adults or minors where two or more persons are trafficked within any one year period.” W. Va. Code § 61-2-17(d) provides that “a person who is a victim of human trafficking is a victim for all purposes of article two-a, chapter fourteen [14-2A (Compensation awards to victims of crime)] of this code.” However, because the definition of human trafficking in W. Va. Code § 61-2-17(a)(3) requires “two or more persons” being “trafficked within any one year period,” it appears that a child victim will be precluded from receiving compensation under the Act if he or she is the only child exploited within a one year period.

Also, several additional requirements for compensation could present difficulties for victims of domestic minor sex trafficking. W. Va. Code Ann. § 14-2A-10(b) (Filing of application for compensation award; contents) requires an application for an award of compensation to “be filed within two years after the occurrence of the criminally injurious conduct that is the basis of the application.” Additionally, a victim will not receive an award unless “the criminally injurious conduct upon which the claim is based was reported to a law-enforcement officer or agency within seventy-two hours after the occurrence of the conduct, unless it is determined that good cause existed for the failure to report the conduct within the 72-hour period.” W. Va. Code Ann. § 14-2A-14(b). A claim will also be denied where the victim is considered an “offender or an accomplice of the offender.” W. Va. Code Ann. § 14-2A-14(c). Lastly, an award of compensation may be denied, reduced or reconsidered, if an award was previously approved, “upon a finding that the claimant or victim has not fully cooperated with appropriate law-enforcement agencies or the claim investigator.” W. Va. Code Ann. § 14-2A-14(d). Nothing expressly exempts domestic minor sex trafficking victims from these requirements or award reduction factors, or explains what constitutes good cause for the failure to report the crime to law enforcement within 72 hours.

5.7.1 Recommendation: Amend W. Va. Code Ann. § 14-2A-14 (Grounds for denial of claim or reduction of awards; maximum awards) to exempt domestic minor sex trafficking victims from the above listed ineligibility criteria, and to provide a good cause exception to the criterion listed in W. Va. Code Ann. § 14-2A-14(d), clarifying that a domestic minor sex trafficking victim has good cause for failure to report a crime related to the child’s commercial sexual exploitation within 72 hours of its commission.

5.7.2. Recommendation: Amend W. Va. Code Ann. § 61-2-17 (Human trafficking; criminal penalties) to remove the requirement that “two or more persons are trafficked within any one year period” so that a child victim is not precluded from receiving compensation under W. Va. Code Ann. § 14-2A (Compensation awards to victims of crime) if the child was the only one exploited.

## 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*

West Virginia law includes several victim-friendly criminal justice procedures and protections throughout the criminal justice process, but these are mainly limited to victims of sexual offenses.

Special protections are afforded to child-witnesses<sup>72</sup> who are called to testify as victims in criminal prosecutions involving sexual assault in the first, second, or third degree, or sexual abuse in the first

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<sup>72</sup> Pursuant to W. Va. Code Ann. § 62-6B-2(1), “[c]hild witness” means a person under the age of sixteen years of age who is or will be called to testify in a criminal matter concerning an alleged violation of [§ 61-8B-3 (Sexual assault in the first degree), § 61-8B-4 (Sexual assault in the second degree), § 61-8B-5 (Sexual assault in the third degree), or § 61-8B-7 (Sexual abuse in the first degree)] of this code in which the child is the alleged victim.

degree. W. Va. Code Ann. § 62-6B-2(1). Pursuant to W. Va. Code Ann. § 62-6B-3(b)–(d) (Findings of fact required for taking testimony of child witness by closed-circuit television; considerations for court),

(b) Prior to ordering that the testimony of a child witness may be taken through the use of live, closed-circuit television, the circuit court must find by clear and convincing evidence, after conducting an evidentiary hearing on this issue, that:

- (1) The child is an otherwise competent witness;
- (2) That, absent the use of live, closed-circuit television, the child witness will be unable to testify due solely to being required to be in the physical presence of the defendant while testifying;
- (3) The child witness can only testify if live, two-way closed-circuit television is used in the trial; and
- (4) That the state's ability to proceed against the defendant without the child witness' live testimony would be substantially impaired or precluded.

(c) The court shall consider the following factors in determining the necessity of allowing a child witness to testify by the use of live, closed-circuit television:

- (1) The age and maturity of the child witness;
- (2) The facts and circumstances of the alleged offense;
- (3) The necessity of the child's live testimony to the prosecution's ability to proceed as well as any prejudice to the defendant by allowing testimony through closed-circuit television;
- (4) Whether or not the facts of the case involve the alleged infliction of bodily injury to the child witness or the threat of bodily injury to the child or another; and
- (5) Any mental or physical handicap of the child witness.

(d) In determining whether to allow a child witness to testify through live, closed-circuit television the court shall appoint a psychiatrist, licensed psychologist with at least five years clinical experience who shall serve as an advisor or friend of the court to provide the court with an expert opinion as to whether, to a reasonable degree of professional certainty, the child witness will suffer severe emotional harm, be unable to testify based solely on being in the physical presence of the defendant while testifying and that the child witness does not evidence signs of being subjected to undue influence or coercion. The opinion of the psychiatrist or licensed psychologist shall be filed with the circuit court at least thirty days prior to the final hearing on the use of live, closed-circuit television and the defendant shall be allowed to review the opinion and present evidence on the issue by the use of an expert or experts or otherwise.

When a child-witness gives testimony via live closed-circuit television, “[o]nly the prosecuting attorney, the attorney for the defendant and the operator of the equipment may be present in the room with the child witness during testimony,” and “[o]nly the court, the prosecuting attorney and the attorney for the defendant may question the child.” W. Va. Code Ann. § 62-6B-4(b)(1).<sup>73</sup> Additionally, under W. Va. Code Ann. § 62-6B-5 (Memorialization of statements of certain child witnesses; admissibility; hearing), when any

law-enforcement officer, physician, psychologist, social worker or investigator, in the course of his or her employment or profession or while engaged in an active criminal investigation as a law-enforcement officer or an agent of a prosecuting attorney, obtains a statement from a child thirteen years of age or younger who is an alleged victim in an investigation or prosecution

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<sup>73</sup> Pursuant to W. Va. Code Ann. § 62-6B-4(b)(1) (Procedures required for taking testimony of child witness by closed-circuit television; election of defendant; jury instruction; sanction for failure to follow procedures; additional accommodation options; recordings and confidentiality), “[i]n pro se proceedings, the court may modify the provisions of this subdivision relating to the role of the attorney for the defendant to allow the pro se defendant to question the child witness in such a manner as to cause as little psychological trauma as possible under the circumstances.”



alleging a violation of [sexual assault in the first, second, or third degree, or sexual abuse in the first degree] he or she shall forthwith make a contemporaneous written notation and recitation of the statement received or obtained. An audio recording or video recording with sound capability of the statement may be used in lieu of the written recitation required by the provisions of this section. Failure to comply with the provisions of this section creates a presumption that the statement is inadmissible. The statement may be admitted if, after a hearing on the matter, the court finds by clear and convincing evidence that the failure to comply with the provisions of this section was a good faith omission and that the content of the proffered statement is an accurate recital of the information provided by the child and is otherwise admissible.

In any prosecution for W. Va. Code Ann. § 61-8B-3 (Sexual assault in the first degree), § 61-8B-5 (Sexual assault in the third degree), § 61-8B-7 (Sexual abuse in the first degree), § 61-8B-9 (Sexual abuse in the third degree), § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty) or § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty), the court may limit the number of interviews that a child victim who is under 11 years old may be required to give for “law enforcement or discovery purposes.” W. Va. Code Ann. §§ 61-8B-14, 61-8C-5(a). For prosecutions under article 8C (Filming of sexually explicit conduct of minors) the child may also be allowed to use “anatomically correct dolls, mannequins or drawings to assist such child in testifying.” W. Va. Code Ann. § 61-8C-5(b).

Pursuant to W. Va. Code Ann. § 61-8B-11(a), (b) (Sexual offenses; evidence),

(a) In any prosecution under [Article 8B, Sexual offenses] in which the victim’s lack of consent is based solely on the incapacity to consent because such victim was below a critical age [i.e., prosecutions for violations of W. Va. Code Ann. § 61-8B-3(a)(2) (Sexual assault in the first degree), § 61-8B-5(a)(2) (Sexual assault in the third degree), § 61-8B-7(a)(3) (Sexual abuse in the first degree), and § 61-8B-9(a) (Sexual abuse in the third degree)],<sup>74</sup> evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct and reputation evidence of the victim’s sexual conduct shall not be admissible. In any other prosecution under [Article 8B, Sexual offenses], evidence of specific instances of the victim’s prior sexual conduct with the defendant shall be admissible on the issue of consent: Provided, That such evidence heard first out of the presence of the jury is found by the judge to be relevant.

(b) In any prosecution under [Article 8B, Sexual offenses] evidence of specific instances of the victim’s sexual conduct with persons other than the defendant, opinion evidence of the victim’s sexual conduct and reputation evidence of the victim’s sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.

Additionally, pursuant to W. Va. Code Ann. § 49-4-601(f)<sup>75</sup> (Petition to court when child believed neglected or abused; venue; notice; right to counsel; continuing legal education; findings; proceedings; procedure), in child abuse and neglect proceedings,

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<sup>74</sup> W. Va. Code Ann. § 61-8B-2(a) (Lack of consent) provides, “Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.” Under subsection (c)(1), “A person is deemed incapable of consent when such person is: (1) Less than sixteen years old.”

<sup>75</sup> The text of W. Va. Code Ann. Chapter 49 (Child Welfare) was revised, rearranged, consolidated, and recodified by House Bill 2200, 82nd West Virginia. Leg. 1st Regular Sess. (WV 2015)(effective February 16, 2015). Now titled the “West Virginia Child Welfare Act,” Chapter § 49-1-101 through § 49-7-304, included here and elsewhere in this report, has been reordered and renumbered. Substantive amendments will be discussed individually in the relevant sections.

(1) In any proceeding under this article, the child, his or her or parents and his or her legally established custodian or other persons standing in loco parentis to him or her has the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed.

(2) Counsel shall be appointed in the initial order. . . .

5.8.1 Recommendation: Amend W. Va. Code Ann. § 61-8B-11(a), (b) (Sexual offenses; evidence), § 61-8B-14 (Limits on interviews of children eleven years old or less), § 61-8C-5(b) (Limits on interviews of children eleven years old or less; evidence), § 62-6B-5 (Memorialization of statements of certain child witnesses; admissibility; hearing), and § 62-6B-3(b) (Findings of fact required for taking testimony of child witness by closed-circuit television; considerations for court) to extend heightened protections to victims of CSEC offenses.

5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*

Under W. Va. Code Ann. § 49-5-104(a)-(d)<sup>76</sup> (Confidentiality of juvenile records for children who become of age while a ward of the state or who have been transferred to adult criminal jurisdiction; separate and secure location; penalties; damages),

(a) One year after the juvenile's eighteenth birthday, or one year after personal or juvenile jurisdiction has terminated, whichever is later, the records of a juvenile proceeding conducted under this chapter, including, but not limited to, law-enforcement files and records, may be kept in a separate secure confidential place and the records may not be inspected except by order of the circuit court.

(b) The records of a juvenile proceeding in which a juvenile was transferred to criminal jurisdiction pursuant to the provisions of section seven hundred ten, article four of this chapter [§ 49-5-710] shall be kept in a separate secure confidential place and the records may not be inspected except by order of the circuit court if the juvenile is subsequently acquitted or found guilty only of an offense other than an offense upon which the waiver or order of transfer was based, or if the offense upon which the waiver or order of transfer was based is subsequently dismissed.

(c) To keep the confidentiality of juvenile records, they shall be returned to the circuit court in which the case was pending and be kept in a separate confidential file. The records shall be physically marked to show that they are to remain confidential and shall be securely kept and filed in a manner so that no one can have access to determine the identity of the juvenile, except upon order of the circuit court.

(d) Marking the juvenile records to show they are to remain confidential has the legal effect of extinguishing the offense as if it never occurred.

5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*

Commercially sexually exploited children whose offenders are convicted of a felony or misdemeanor may be eligible to receive restitution under W. Va. Code Ann. § 61-11A-4(a) (Restitution; when ordered). Pursuant to W. Va. Code Ann. § 61-11A-4(a),

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<sup>76</sup> The text of W. Va. Code Ann. Chapter 49 (Child Welfare) was revised, rearranged, consolidated, and recodified by House Bill 2200, 82nd West Virginia. Leg. 1st Regular Sess. (WV 2015)(effective February 16, 2015). Now titled the "West Virginia Child Welfare Act," Chapter § 49-1-101 through § 49-7-304, included here and elsewhere in this report, has been reordered and renumbered. Substantive amendments will be discussed individually in the relevant sections.

The court, when sentencing a defendant convicted of a felony or misdemeanor causing physical, psychological or economic injury or loss to a victim, shall order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense, unless the court finds restitution to be wholly or partially impractical as set forth in this article. . .

Under W. Va. Code Ann. § 61-11A-4(b)(2), if the victim suffered bodily injury, the defendant will be required to do the following:

- (A) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (B) Pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and
- (C) Reimburse the victim for income lost by the victim as a result of the offense.

However, restitution will not be awarded to the victim to the extent that “the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for loss to the extent that the person paid the compensation.” W. Va. Code Ann. § 61-11A-4(e).

Defendants convicted of sexual offenses under Chapter 61 (Crimes and their punishment), Article 8B (Sexual offenses) of the West Virginia Code, W. Va. Code Ann. § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), or § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) may be required, in addition to any penalties and restitution imposed by the court, to “pay all or any portion of the cost of medical, psychological or psychiatric treatment of the minor resulting from the act or acts for which the person is convicted, whether or not the minor is considered to have sustained bodily injury.” W. Va. Code Ann. §§ 61-8B-13, 61-8C-4.

In addition to restitution, civil remedies are also available for victims of human trafficking. W. Va. Code Ann. § 61-2-17(c) (Human trafficking; criminal penalties) states,

“Any person who is a victim of human trafficking may bring a civil action in circuit court. The court may award actual damages, compensatory damages, punitive damages, injunctive relief and any other appropriate relief. A prevailing plaintiff is also entitled to attorneys fees and costs. Treble damages shall be awarded on proof of actual damages where defendant's acts were willful and malicious.”

However, there must be two or more victims in a one year period for a person to qualify as a victim of human trafficking under West Virginia law and be eligible to bring a civil suit. W. Va. Code Ann. § 61-2-17(a)(3). Pursuant to W. Va. Code Ann. § 61-2-17(e), the rights to a civil action for human trafficking victims “are cumulative and in addition to other existing rights.”

Additionally, to the extent that a child is injured by a violation of W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), the child may receive relief under W. Va. Code Ann. § 61-3C-16(a) (Civil relief; damages). Pursuant to W. Va. Code Ann. § 61-3C-16(a),

[a]ny person whose property or person is injured by reason of a violation of [the West Virginia Computer and Electronic Communications Device Crime and Abuse Act] may sue therefor in circuit court and may be entitled to recover for each violation:

- (1) Compensatory damages;
  - (2) Punitive damages; and
  - (3) Such other relief, including injunctive relief, as the court may deem appropriate.
- Without limiting the generality of the term, “damages” shall include loss of profits.

....

If the petitioner of a civil action is also determined to be a victim of domestic violence,<sup>77</sup> pursuant to W. Va. Code Ann. § 48-26-603(b) (Domestic Violence Legal Services Fund), the court may order the defendant to pay “an amount equivalent to the reasonable attorney’s fee to which the prevailing litigant would be entitled into the Domestic Violence Legal Services Fund . . . .”<sup>78</sup> In order for this to occur, 1) a prevailing litigant must be entitled by statute or common law to a reasonable attorney’s fee, and 2) the prevailing party’s legal counsel must inform the court that they will not request a fee. W. Va. Code Ann. § 48-26-603(b), (1)-(2).

*5.11 Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

No statutes of limitations apply to the prosecution of felonies under West Virginia law.<sup>79</sup> However, prosecutions for misdemeanors must commence within 1 year of the commission of the crime. W. Va. Code Ann. § 61-11-9 (Limitation of prosecution; lost indictment).

Additionally, a victim must bring a civil action under W. Va. Code Ann. § 61-3C-16(d) (Civil relief; damages) seeking damages for a violation of W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) “before the earlier of: (1) Five years after the last act in the course of conduct constituting a violation of this article; or (2) two years after the plaintiff discovers or reasonably should have discovered the last act in the course of conduct constituting a violation of this article.”

For any civil action where no statute of limitations is provided, a claim must be commenced within 2 years of the accrual date, if the claim relates to property damage or personal injuries. W. Va. Code Ann. § 55-2-12(a), (b). However, pursuant to W. Va. Code Ann. § 55-2-15 (General savings as to persons under disability), the applicable statute of limitations for civil actions will toll until a minor turns 18, at which point the victim may bring a claim “within the like number of years after his becoming of full age .

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<sup>77</sup> The crime of domestic violence is addressed under W. Va. Code Ann. § 61-2-28 (Domestic Violence—Criminal Acts), which states,

- (a) Domestic battery. -- Any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for not more than twelve months, or fined not more than five hundred dollars, or both.
- (b) Domestic assault. -- Any person who unlawfully attempts to commit a violent injury against his or her family or household member or unlawfully commits an act which places his or her family or household member in reasonable apprehension of immediately receiving a violent injury, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for not more than six months, or fined not more than one hundred dollars, or both.

Pursuant to W. Va. Code Ann. § 48-26-207 (Domestic Violence Legal Services Fund defined), “Domestic Violence Legal Services Fund” is defined as, “the special revenue account established by section six hundred three of this article for the purposes set forth in that section.”

<sup>79</sup> See *State v. Parsons*, 589 S.E.2d 226, 237 (W. Va. 2003) (noting ““West Virginia has no statute of limitations affecting felony prosecutions.”” (quoting *State v. Carrico*, 427 S.E.2d 474, 477 (W. Va.1993))).

. . that is allowed to a person having no such impediment to bring the same after the right accrues . . .  
except that it shall in no case be brought after twenty years from the time when the right accrues.”

**Legal Components:**

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*
- 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
- 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*
- 6.4 *Using a law enforcement decoy posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*
- 6.5 *Using the Internet or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*
- 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*

**Legal Analysis:**

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*

Law enforcement officers in West Virginia are not expressly required to complete training on human trafficking or domestic minor sex trafficking. However, pursuant to W. Va. Code Ann. § 30-29-3(a)(6)<sup>80</sup> (Duties of the Governor’s committee and the subcommittee), the West Virginia Governor’s committee on crime, delinquency and corrections along with its law-enforcement professional standards subcommittee shall “[p]romulgate standards governing the training, firearms qualifications, and ongoing professional certification of law-enforcement officers and the entry-level law-enforcement training curricula.” The committee and subcommittee also shall, pursuant to W. Va. Code Ann. § 30-29-3(a)(9), “[e]stablish standards governing mandatory training to effectively investigate organized criminal enterprises as defined in [W. Va. Code Ann. § 61-13-2 (Definitions)]<sup>81</sup> . . . for entry level training curricula and for law-enforcement officers who have not received such training as certified by the subcommittee as required in this section”. Given that West Virginia’s CSEC laws are included within the definition of “qualifying offense,”<sup>82</sup> under the training requirements mandated in W. Va. Code Ann. § 30-29-3(a)(9), it is possible that training on these provisions may be required for law-enforcement in West Virginia.

In addition, W. Va. Code Ann. § 30-29-3(b) provides,

In addition to the duties authorized and established by this section, the subcommittee may:  
 (1) Establish training to effectively investigate human trafficking offenses as defined in article two, chapter sixty-one of this code, for entry level training curricula and for law-enforcement officers who have not received such training as certified by the committee as required by this section; and

<sup>80</sup> The text of W. Va. Code Ann. § 30-29-3 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 370, 82nd West Virginia Leg. 1st Regular Sess. (WV 2015) (effective June 11, 2015).

<sup>81</sup> W. Va. Code Ann. § 61-13-2 defines “organized criminal enterprise” as “a combination of five or more persons engaging over a period of not less than six months in one or more of the qualifying offenses set forth in this section.”

<sup>82</sup> Pursuant to W. Va. Code Ann. § 61-13-2, “qualifying offenses” include violations of W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), § 61-8-8 (Receiving support from prostitution; pimping; penalty), § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), and § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty).

(2) Establish procedures for the implementation of a course in investigation of human trafficking offenses. The course may include methods of identifying and investigating human trafficking and methods for assisting trafficking victims. In order to implement and carry out the intent of this subdivision, the committee may promulgate emergency rules pursuant to section fifteen, article three, chapter twenty-nine-a of this code.

6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*

Single party consent to audiotaping is permitted in West Virginia. W. Va. Code Ann. § 62-1D-3(e) (Interception of communications generally) states,

It is lawful under this article for a person to intercept a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or the constitution or laws of this state.

6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*

Under W. Va. Code Ann. § 62-1D-8 (County prosecuting attorney or duly appointed special prosecutor may apply for order authorizing interception),

The prosecuting attorney of any county or duly appointed special prosecutor may apply to one of the designated circuit judges referred to in section seven [W. Va. Code Ann. § 62-1D-7] of this article and such judge, in accordance with the provisions of this article, may grant an order authorizing the interception of wire, oral or electronic communications by an officer of the investigative or law-enforcement agency when the prosecuting attorney or special prosecutor has shown reasonable cause to believe the interception would provide evidence of the commission of (i) kidnapping or abduction as defined and prohibited by [W. Va. Code Ann. § 61-2-14 (Abduction of person; kidnapping or concealing child; penalties) and § 61-2-14a (Penalty for enticing away, kidnapping or holding hostage any person)] and including threats to kidnap or demand ransom as defined and prohibited by [W. Va. Code Ann. § 61-2-14c (Penalty for threats to kidnap or demand ransom)] . . . or (iv) any aider or abettor to any of the foregoing offenses or any conspiracy to commit any of the foregoing offenses if any aider, abettor or conspirator is a party to the communication to be intercepted.

Any information obtained through a wiretap authorized by an order granted under W. Va. Code Ann. § 62-1D-8, whether obtained by a law enforcement officer or other person receiving the information, may be disclosed in testimony given during “any criminal proceeding held under the authority of this state or of any political subdivision of this state.” W. Va. Code Ann. § 62-1D-9(c), (f).<sup>83</sup>

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<sup>83</sup> To the extent evidence of other crimes not the basis for authorizing the wiretap is obtained through use of an authorized wiretap, W. Va. Code Ann. § 62-1D-9(e) and (g) authorize the use of such evidence by law enforcement and its introduction in evidence through testimony in the criminal prosecution. W. Va. Code Ann. § 62-1D-9(e) and (g) provide,

(e) When an investigative or law-enforcement officer, while engaged in intercepting wire, oral or electronic communications in the manner authorized herein, intercepts wire, oral or electronic communications relating to offenses other than those specified in the order of authorization, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (a) and (b) of this section. Such contents and any evidence derived therefrom may be used under subsection (c) of this section when authorized or approved by the designated circuit judge where such judge finds on subsequent application that the contents were

6.3.1 Recommendation: Amend W. Va. Code Ann. § 62-1D-8 (County prosecuting attorney or duly appointed special prosecutor may apply for order authorizing interception) to allow a judge to issue an order permitting law-enforcement to use wiretapping in investigating violations of W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties), § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-8-7 (Procuring for house of prostitution; penalty; venue; competency as witness; marriage no defense), § 61-8-8 (Receiving support from prostitution; pimping; penalty; prostitute may testify), and § 61-8C-2(a), (b) (Use of minors in filming sexually explicit conduct prohibited; penalty).

6.4 *Using a law enforcement decoy posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*

There is no law in place that explicitly permits the use of a decoy by law enforcement for the purpose of investigating prostitution or sex trafficking cases; however, as discussed in Section 6.5, decoys may be used under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty). In addition, case law addressing the defense of entrapment under West Virginia law indicates that to the extent that an undercover investigation of prostitution produces sufficient evidence to show that the buyer was predisposed to commit the crime, the defense of entrapment should not be available.<sup>84</sup>

6.4.1 Recommendation: Enact a law explicitly permitting the use of a decoy to investigate domestic minor sex trafficking related crimes.

6.5 *Using the Internet or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*

No statute expressly authorizes law enforcement to use the Internet or electronic communications to investigate buyers and traffickers of sex with minors; however, the use of the Internet to investigate buyers and traffickers appears to be a permissible investigative technique under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty). According to W. Va. Code Ann. § 61-3C-14b, “[a]ny person over the age of eighteen, who knowingly uses [or attempts to use] a computer to solicit, entice, seduce or lure . . . a minor known or believed to be at least four years younger than the person using the computer . . . to commit . . . [among other crimes, prostitution] is guilty of a felony . . . .” The use of the phrases “a minor . . . believed to be at least [4] years younger” and “believes to be such a

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otherwise intercepted in accordance with the provisions of this article. The application shall be made as soon as may be practicable after such contents or the evidence derived therefrom is obtained.

....  
(g) Any information relating to criminal activities other than those activities for which an order to intercept communications may be granted pursuant to section eight of this article may be disclosed only if such relates to the commission of a felony under the laws of this state, and such information may be offered, if otherwise admissible, as evidence in any such criminal proceeding, but shall not be used for the purpose of obtaining an arrest warrant, or an indictment under laws of this state.

<sup>84</sup> See *State v. Houston*, 475 S.E.2d 307, 318 (W. Va. 1996) (holding that the “defense of entrapment is fully contained within the subjective test standard” which focuses on the defendant’s predisposition to commit the crime). To prevail based on the defense of entrapment, a defendant must show that “the offense originates with law enforcement officers who procure its commission by an accused who would not have otherwise perpetrated it except for the instigation or inducement by the law enforcement officers.” *Id.* at 227. While no West Virginia case law discusses the application of the defense in a case involving an undercover law enforcement officer investigating prostitution, where a law enforcement officer posed as a buyer of illegal drugs, the court found the defense inapplicable where “the State offered evidence beyond a reasonable doubt that the defendant was predisposed to commit the crime.” *Id.* at 230.



minor” suggest that it is permissible for law enforcement to use the Internet to pose as a minor as part of an investigation under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty).

#### 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*

Investigating law enforcement agencies are required to update reports of missing children pursuant to W. Va. Code Ann. § 49-6-112(c)<sup>85</sup> (Agencies to receive report; law-enforcement agency requirements) which provides,

A law-enforcement agency involved in the investigation of a missing child shall:

- (1) Update the initial report filed by the agency that received notification of the missing child upon the discovery of new information concerning the investigation;
- (2) Forward the updated report to the appropriate agencies and organizations;
- (3) Search the national crime information center’s wanted person file for reports of arrest warrants issued for persons who allegedly abducted or unlawfully retained children and compare these reports to the missing child’s national crime information center’s missing person file; and
- (4) Notify all law-enforcement agencies involved in the investigation, the missing children information clearinghouse, and the national crime information center when the missing child is located.

Pursuant to W. Va. Code Ann. § 49-6-101 (Clearinghouse function; State Police requirements, rule-making), the West Virginia Missing Children Information Clearinghouse was established to serve as a “central repository of information on missing children” and, under subsection (c), it shall do the following:

- (1) Establish a system of intrastate communication of information relating to missing children;
- (2) Provide a centralized file for the exchange of information on missing children and unidentified bodies of children within the state;
- (3) Communicate with the National Crime Information Center for the exchange of information on missing children suspected of interstate travel;
- (4) Collect, process, maintain and disseminate accurate and complete information on missing children;
- (5) Provide a statewide toll-free telephone line for the reporting of missing children and for receiving information on missing children;
- (6) Disseminate to custodians, law-enforcement agencies, the state Department of Education, the Bureau for Children and Families and the general public information that explains how to prevent child abduction and what to do if a child becomes missing;
- (7) Compile statistics relating to the incidence of missing children within the state;
- (8) Provide training materials and technical assistance to law-enforcement agencies and social services agencies pertaining to missing children; and
- (9) Establish a media protocol for disseminating information pertaining to missing children.

Under W. Va. Code Ann. § 49-6-106(a) (Missing child reports; law-enforcement agency requirements; unidentified bodies), when law enforcement receives a report of a missing child, it shall,

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<sup>85</sup> The text of W. Va. Code Ann. Chapter 49 (Child Welfare) was revised, rearranged, consolidated, and recodified by House Bill 2200, 82nd West Virginia. Leg. 1st Regular Sess. (WV 2015)(effective February 16, 2015). Now titled the “West Virginia Child Welfare Act,” Chapter § 49-1-101 through § 49-7-304, included here and elsewhere in this report, has been reordered and renumbered. Substantive amendments will be discussed individually in the relevant sections.

- (1) Immediately start an investigation to determine the present location of the child if it determines that the child is in danger; and
- (2) Enter the name of the missing child into the clearinghouse and the national crime information center missing person file if the child meets the center's criteria, with all available identifying features, including dental records, fingerprints, other physical characteristics and a description of the clothing worn when the missing child was last seen.

If the missing child is under 13, law enforcement may forward the contents of the missing person report to the child's last known "[c]hild care center or child care home in which the child was enrolled" or "[s]chool the child attended in West Virginia, if any." W. Va. Code Ann. § 49-6-112(b).

If law enforcement finds an unidentified body of a child, it must report the information to the clearinghouse and to the National Crime Information Center Unidentified Person File and cross-check the information with missing child descriptions. W. Va. Code Ann. §§ 49-6-106(c),

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