

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2016 ANALYSIS AND RECOMMENDATIONS KENTUCKY

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

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#### *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 acknowledge the intersection of prostitution with trafficking victimization.*
- 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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#### *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.*

The Kentucky human trafficking law, codified at Kentucky Revised Statutes Annotated (Ky. Rev. Stat. Ann.) § 529.100 (Human trafficking), includes domestic minor sex trafficking. Human trafficking is committed when a “person intentionally subjects one (1) or more persons to human trafficking.” Ky. Rev. Stat. Ann. § 529.100(1). Human trafficking is defined in Ky. Rev. Stat. Ann. § 529.010(5) (Definitions) as “criminal activity whereby one (1) or more persons are subjected to engaging in: . . . (b) [c]ommercial sexual activity through the use of force, fraud, or coercion, except that if the trafficked person is under the age of eighteen (18), the commercial sexual activity need not involve force, fraud, or coercion.” “Commercial sexual activity” is defined as “prostitution, regardless of whether the trafficked person can be charged with prostitution,

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<sup>1</sup> This report includes legislation enacted as of August 1, 2016.

participation in the production of obscene material as set out in KRS Chapter 531, or engaging in a sexually explicit performance.” Ky. Rev. Stat. Ann. § 529.010(2). Separately codified at Ky. Rev. Stat. Ann. § 529.110(1) (Promoting human trafficking) is the crime of promoting human trafficking, which states in part,

A person is guilty of promoting human trafficking when the person intentionally:

- (a) Benefits financially or receives anything of value from knowing participation in human trafficking; or
- (b) Recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, knowing that the person will be subject to human trafficking.

Penalties for human trafficking are enhanced to a Class B felony if a child is involved, or a Class A felony if the child was seriously physically injured. Ky. Rev. Stat. Ann. § 529.100(2)(a)–(b). Class B felonies, unless the law provides otherwise, are punishable by an imprisonment term of 10-20 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 532.060(2)(b), 534.030(1). Class A felonies, unless the law provides otherwise, are punishable by an imprisonment term of 20-50 years or life imprisonment and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 532.060(2)(a), 534.030(1). The penalty for promoting sex trafficking under Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking) is enhanced if the victim is a minor under 18 to a Class C felony with an imprisonment term of 5-10 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 534.030(1), 529.110(2), 532.060(2)(c).

*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.*

In addition to the state human trafficking law pursuant to Ky. Rev. Stat. Ann. § 529.100 (Human Trafficking) and related definitions in Ky. Rev. Stat. Ann. § 529.010 (Definitions), the following laws criminalize CSEC in Kentucky:

1. Under Ky. Rev. Stat. Ann. § 531.310(1) (Use of a minor in a sexual performance), “A person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance.” If the minor is under 18 years of age, a violation of Ky. Rev. Stat. Ann. § 531.310 is a Class C felony punishable by an imprisonment term of 5-10 years and a fine of \$1,000–\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.310(2)(a), 532.060(2)(c), 534.030(1). If the minor is under 16, then the crime is a Class B felony punishable by an imprisonment term of 10-20 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.310(2)(b), 532.060(2)(b), 534.030(1). If the minor is physically injured during the sexual performance, then the crime is a Class A felony punishable by an imprisonment term of 20-50 years or life imprisonment and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.310(2)(c), 532.060(2)(a), 534.030(1).
2. Under Ky. Rev. Stat. Ann. § 531.320(1) (Promoting a sexual performance by a minor), “A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a minor.” When the minor involved is under 18, the crime is a Class C felony punishable by an imprisonment term of 5-10 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.320(2)(a), 532.060(2)(c), 534.030(1). When the minor involved is

under 16, the crime is a Class B felony punishable by an imprisonment term of 10-20 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.320(2)(b), 532.060(2)(b), 534.030(1). If the minor is physically injured while engaging in the sexual performance, the crime is a Class A felony punishable by an imprisonment term of 20-50 years or life imprisonment and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.320(2)(c), 532.060(2)(a), 534.030(1).

3. Under Ky. Rev. Stat. Ann. § 530.070(1)(b) (Using minors to distribute material portraying a sexual performance by a minor), “(1) A person is guilty of unlawful transaction with a minor in the third degree when: . . . (b) He knowingly induces, assists, or causes a minor to engage in any other criminal activity.” This crime is a Class A misdemeanor punishable by imprisonment up to 1 year, a fine up to \$500, or both. Ky. Rev. Stat. Ann. §§ 530.070(2), 532.090(1), 534.040(2)(a).
4. Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree) makes it a crime when an individual “knowingly induces, assists, or causes a minor to engage in any other criminal activity,”<sup>2</sup> including prostitution offenses. Ky. Rev. Stat. Ann. § 530.070(1)(b). Ky. Rev. Stat. Ann. § 530.070 is a Class A misdemeanor punishable by imprisonment up to 1 year, a fine not to exceed \$500, or both. Ky. Rev. Stat. Ann. §§ 530.070(2), 532.090(1), 534.040(2)(a).
5. Ky. Rev. Stat. Ann. § 510.155 (Unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities – Prohibition of multiple convictions arising from single course of conduct – Solicitation as evidence of intent) states,

(1) It shall be unlawful for any person to knowingly use a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief, for any activity in violation of KRS . . . 529.100 [Human trafficking] where that offense involves commercial sexual activity, or . . . KRS Chapter 531 [relating to child pornography].

. . . .

(3) The solicitation of a minor through electronic communication under subsection (1) of this section shall be prima facie evidence of the person's intent to commit the offense, and the offense is complete at that point without regard to whether the person met or attempted to meet the minor.

(4) This section shall apply to electronic communications originating within or received within the Commonwealth.

(5) A violation of this section is punishable as a Class D felony.

A Class D felony is punishable by an imprisonment term of 1-5 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 510.155(5), 532.060(2)(d), 534.030(1).

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<sup>2</sup> Notably, Ky. Rev. Stat. Ann. § 530.064 (Unlawful transaction with a minor in the first degree)—a more serious crime—specifically excludes offenses involving commercial sexual activity from its scope. Under Ky. Rev. Stat. Ann. § 530.064, a person commits an offense “when he or she knowingly induces, assists, or causes a minor to engage in: (a) illegal sexual activity; or . . . Except those offenses involving minors in KRS Chapter 531 [pornography] and in KRS 529.100 [human trafficking] where that offense involves commercial sexual activity.” Ky. Rev. Stat. Ann. § 530.064(1). A violation of § 530.064 is a Class C felony if the minor is under 18, a Class B felony if the minor is under 16, and a Class A felony if the minor is physically injured. Ky. Rev. Stat. Ann. § 530.064(2).

Though not specific to commercial sex offenses, the following offenses may also apply to commercial sexual exploitation of children cases:

1. Ky. Rev. Stat. Ann. § 510.040 (Rape in the first degree) makes it a Class A felony to, among other things, have sexual intercourse with a person under 12. This crime is punishable by an imprisonment term of 20-50 years or life imprisonment and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 510.040(2), 532.060(2)(a), 534.030(1). Ky. Rev. Stat. Ann. § 510.050 (Rape in the second degree) makes it a Class C felony, inter alia, for an individual 18 or older to have sexual intercourse with a person under 14. Ky. Rev. Stat. Ann. § 510.050. This crime is punishable by an imprisonment term of 5-10 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 510.050(2), 532.060(2)(c), 534.030(1). Finally, Ky. Rev. Stat. Ann. § 510.060 (Rape in the third degree) makes it a Class D felony, inter alia, when an individual 21 or older engages in sexual intercourse with someone under 16 years or if “being a person in a position of authority or position of special trust, as defined in KRS 532.045,<sup>3</sup> he or she engages in sexual intercourse with a minor under eighteen (18) years old with whom he or she comes into contact as a result of that position.” Ky. Rev. Stat. Ann. § 510.060(1)(b), (d), (2). This crime is punishable by an imprisonment term of 1-5 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 532.060(2)(d), 534.030(1).
2. Ky. Rev. Stat. Ann. § 510.110 (Sexual abuse in the first degree) makes it a crime for an individual to, among other things, “subject[] another person to sexual contact<sup>4</sup> who is incapable of consent because he or she: . . . 2. Is less than twelve (12) years old.” Ky. Rev. Stat. Ann. § 510.110(1)(b)(2). Ky. Rev. Stat. Ann. § 510.110 also makes it a crime for an individual 21 or older to “[s]ubject[] another person who is less than sixteen (16) years old to sexual contact.” Ky. Rev. Stat. Ann. § 510.110(c)(1). If the victim is under 12 years old, this crime is a Class C felony punishable by an imprisonment term of 5-10 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 510.110(2), 532.060(2)(c), 534.030(1). All other offenses under this statute are Class D felonies punishable by an imprisonment term of 1-5 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 510.110(2), 532.060(2)(d), 534.030(1).

*1.3 Prostitution statutes refer to the sex trafficking statute to acknowledge the intersection of prostitution with trafficking victimization.*

Ky. Rev. Stat. Ann. § 529.120 (Treatment of minor suspected of prostitution offense) refers to Ky. Rev. Stat. Ann. § 529.100 (Human Trafficking) when the person engaged in prostitution is a minor by not allowing minors to be charged under Ky. Rev. Stat. Ann. § 529.020 (Prostitution) and § 529.080 (Loitering for prostitution purposes). These statutes require instead that law enforcement take the minor into protective custody pursuant to Ky. Rev. Stat. Ann. § 620.030(3) (Duty to report dependency, neglect, abuse, or human trafficking – husband-wife and professional-client/patient privileges not grounds for refusal to report – exceptions – penalties) which provides in part,

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<sup>3</sup> “Position of authority” means but is not limited to the position occupied by a biological parent, adoptive parent, stepparent, foster parent, relative, household member. Ky. Rev. Stat. Ann. § 532.045(a). “Position of special trust” means a position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor. Ky. Rev. Stat. Ann. § 532.045(b).

<sup>4</sup> “Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.” Ky. Rev. Stat. Ann. § 510.010(7).

Any person who knows or has reasonable cause to believe that a child is a victim of human trafficking as defined in KRS 529.010 shall immediately cause an oral or written report to be made to a local law enforcement agency or the Department of Kentucky State Police; or the cabinet or its designated representative; or the Commonwealth's attorney or the county attorney; by telephone or otherwise. This subsection shall apply regardless of whether the person believed to have caused the human trafficking of the child is a parent, guardian, or person exercising custodial control or supervision.

Additionally, Ky. Rev. Stat. Ann. § 529.170 (Being victim of human trafficking is affirmative defense to violation of chapter) establishes an affirmative defense for victims of human trafficking. A person charged with under chapter 529 (Prostitution offenses) “or charged with an offense which is not a violent crime as defined in KRS 17.165 (Definitions – Criminal record check for job applicants at child-care centers – Restrictions on employing violent offenders or persons convicted of sex crimes), may assert being a victim of human trafficking as an affirmative defense to the charge.”

*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.*

Kentucky has not enacted a racketeering law, but gangs and criminal enterprises that sex traffic minors could be charged with Ky. Rev. Stat. Ann. § 506.120 (Engaging in organized crime), which defines “criminal syndicate” in part as meaning “five (5) or more persons . . . collaborating to promote or engage in any of the following on a continuing basis: . . . (b) Engaging in, promoting, or permitting prostitution or human trafficking in violation of KRS Chapter 529.” Ky. Rev. Stat. Ann. § 506.120(3)(b). Ky. Rev. Stat. Ann. § 506.120(1) states in part,

A person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall not do any of the following:

- (a) Organize or participate in organizing a criminal syndicate or any of its activities;
- (b) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
- (c) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;
- (d) Knowingly furnish legal, accounting, or other managerial services to a criminal syndicate;
- (e) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;
- (f) Commit, or conspire or attempt to commit or act as an accomplice in the commission of, any offense of violence;

. . . .

If guilty of organized crime under Ky. Rev. Stat. Ann. § 506.120, a trafficker faces a Class B felony, punishable by imprisonment for 10 to 20 years and a fine of \$1,000-\$10,000 “or double his gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 506.120(2), 534.030(1).

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

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

### ***Legal Analysis:***

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

Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) states, “A person is guilty of human trafficking when the person intentionally subjects one (1) or more persons to human trafficking.” Ky. Rev. Stat. Ann. § 529.100(1). Pursuant to Ky. Rev. Stat. Ann. § 529.010(5)(b) (Definitions), “Human trafficking” is defined as including “[c]ommercial sexual activity . . . that if the trafficked person is under the age of eighteen (18), the commercial sexual activity need not involve force, fraud, or coercion.” Since “commercial sexual activity” is defined as including “prostitution, regardless of whether the trafficked person can be charged with prostitution,” a buyer engaging in a prostitution activity could be seen as “intentionally subject[ing]” the minor to prostitution. Ky. Rev. Stat. Ann. §§ 529.010(2), 529.100(1).

Kentucky’s human trafficking statute under Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking) can also apply to buyers of commercial sex with minors following federal precedent through the term “obtain.”<sup>5</sup>

<sup>5</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

Ky. Rev. Stat. Ann. § 529.110(1)(b) (Promoting human trafficking), applies to a person who “(b) [r]ecruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, knowing that the person will be subject to human trafficking.”

- 2.1.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) to clarify that buyer conduct is included as a violation of Ky. Rev. Stat. Ann. § 529.100 (Human trafficking).

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

One who solicits a minor for prostitution could be found guilty of violating Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree). This crime is committed when, among other things, an individual “knowingly induces, assists, or causes a minor to engage in any other criminal activity.” Ky. Rev. Stat. Ann. § 530.070(1)(b). Ky. Rev. Stat. Ann. § 530.070 is a Class A misdemeanor punishable by imprisonment up to 1 year, a fine not to exceed \$500, or both. Ky. Rev. Stat. Ann. §§ 530.070(2), 532.090(1), 534.040(2)(a). Notably, Ky. Rev. Stat. Ann. § 530.064 (Unlawful transaction with a minor in the first degree)—a more serious crime—specifically excludes offenses involving commercial sexual activity from its scope. Under Ky. Rev. Stat. Ann. § 530.064, a person commits an offense “when he or she knowingly induces, assists, or causes a minor to engage in: (a) illegal sexual activity; or . . . ; Except those offenses involving minors in KRS Chapter 531 [pornography] and in KRS 529.100 [human trafficking] where that offense involves commercial sexual activity.” Ky. Rev. Stat. Ann. § 530.064(1). A violation of § 530.064 is a Class C felony if the minor is under 18, a Class B felony if the minor is under 16, and a Class A felony if the minor is physically injured. Ky. Rev. Stat. Ann. § 530.064(2).

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

Solicitation of prostitution does not differentiate between buying sex with an adult or a minor. Ky. Rev. Stat. Ann. § 506.030 (Criminal solicitation) states, “A person is guilty of criminal solicitation when, with the intent of promoting or facilitating the commission of a crime, he commands or encourages another person to engage in specific conduct which would constitute that crime or an attempt to commit that crime or which would establish the other’s complicity in its commission or attempted commission.” Ky. Rev. Stat. Ann. § 506.030(1). Since the crime of prostitution is a misdemeanor, criminal solicitation of prostitution would be a Class B misdemeanor punishable by imprisonment up to 90 days, a fine not to exceed \$250, or both. Ky. Rev. Stat. Ann. §§ 529.020(2), 506.030(2)(e), 532.090(2), 534.040(2)(b).

Those who purchase sex with a minor could be charged with unlawful transaction with a minor in the third degree. Ky. Rev. Stat. Ann. § 530.070. This statute makes it a Class A misdemeanor when another “knowingly induces, assists, or causes a minor to engage in any other criminal activity.” Ky. Rev. Stat. Ann. § 530.070(1)(b), (2). The crime is punishable by imprisonment up to 1 year, a fine not to exceed \$500, or both. Ky. Rev. Stat. Ann. §§ 532.090(1), 534.040(2)(a).

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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.

- 2.3.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 506.030 (Criminal solicitation) to provide heightened penalties in cases in which the buying of sex with a minor is involved.
- 2.3.2 Recommendation: Amend Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree) to provide heightened penalties when the unlawful transaction is “commercial sexual activity” as defined in Ky. Rev. Stat. Ann. § 529.010(2) (Definitions).

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

The penalty for child sex trafficking under Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) is a Class B felony, or a Class A felony if the child was seriously physically injured. Class B felonies are punishable by an imprisonment term of 10-20 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 532.060(2)(b), 534.030(1). Class A felonies are punishable by an imprisonment term of 20-50 years or life imprisonment and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 532.060(2)(a), 534.030(1).

Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree) is a Class A misdemeanor with possible imprisonment not to exceed one year and a possible fine not to exceed \$500. Ky. Rev. Stat. Ann. §§ 530.070(2); 532.090(1), 534.040(2)(a).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>6</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>7</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>8</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>9</sup>

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<sup>6</sup> Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, Division A, § 103(8), (9), 114 Stat. 1464 (signed into law on October 29, 2000); codified as amended at 22 U.S.C. 7102 § 103(8), (9).

<sup>7</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as an offense under section 1591 [18 USCS § 1591] (relating to sex trafficking of children), 2241 [18 USCS § 2241] (relating to aggravated sexual abuse), 2242 [18 USCS § 2242] (relating to sexual abuse), 2244(a)(1) [18 USCS § 2244(a)(1)] (relating to abusive sexual contact), 2245 [18 USCS § 2245] (relating to sexual abuse resulting in death), 2251 [18 USCS § 2251] (relating to sexual exploitation of children), 2251A [18 USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 USCS § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 USCS § 2423(a)] (relating to transportation of minors).

<sup>8</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>9</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(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.); *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).



2.5 *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.*

Ky. Rev. Stat. Ann. § 510.155(1) (Unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities) criminalizes the “knowing[] use [of] a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief, for any activity in violation” of certain listed crimes, including the crimes of human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) “where that offense involves commercial sexual activity” or Ky. Rev. Stat. Ann. Chapter 531 (Pornography). Moreover, under Ky. Rev. Stat. Ann. § 510.155(3), “the solicitation of a minor through electronic communication . . . shall be prima facie evidence of the person’s intent to commit the offense and the offense is complete at that point without regard to whether the person met or attempted to meet the minor.” This crime is a Class D felony punishable by an imprisonment term of 1-5 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 510.155(5), 532.060(2)(d), 534.030(1).

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

Pursuant to Ky. Rev. Stat. Ann. § 529.180 (Ignorance of human trafficking minor victim's actual age not a defense),

In any prosecution under KRS 529.100 [Human trafficking] or 529.110 [Promoting human trafficking] involving commercial sexual activity with a minor, it shall not be a defense that the defendant was unaware of the minor's actual age.

However, some CSEC offenses expressly provide for a defense based on a good faith belief that the victim was not a minor. Pursuant to Ky. Rev. Stat. Ann. § 531.330 (Presumption as to minority),

(1) For purposes of KRS 529.040 [Promoting prostitution] where the offense involves commercial sexual activity and for the purposes of KRS 530.070 [Unlawful transaction with minor in the third degree], 531.080 [Special verdict], and 531.300 to 531.370,<sup>10</sup> any person who appears to be under the age of eighteen (18), or under the age of sixteen (16), shall be presumed to be under the age of eighteen (18), or under the age of sixteen (16), as the case may be.

(2) In any prosecution under KRS 529.040 [Promoting prostitution] where the offense involves commercial sexual activity by a minor and in any prosecution under KRS 530.070 [Unlawful transaction with minor in the third degree], 531.080 (Special verdict), and 531.300 to 531.370,<sup>11</sup> the defendant may prove in exculpation that he in good faith reasonably believed that the person involved in the performance was not a minor.

(3) The presumption raised in subsection (1) of this section may be rebutted by any competent evidence.

2.6.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 531.330(2) (Presumption as to minority) to expressly prohibit a mistake of age defense in prosecutions of CSEC offenses.

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<sup>10</sup> Offenses in sections 531.300 to 531.370 include, among others: §§ 531.310 (Use of a minor in a sexual performance), 531.320 (Promoting a sexual performance by a minor) and 531.335 (Possession or viewing of matter portraying a sexual performance by a minor).

<sup>11</sup> See *supra* note 10.

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

Kentucky's human trafficking and buyer-applicable CSEC laws do not stagger base penalties based on the age of the minor involved in the commercial sex act. Pursuant to Ky. Rev. Stat. Ann. § 529.100(2)(a), (b) (Human trafficking), human trafficking of a minor is a Class B felony; it becomes a Class A felony if the victim suffers a "serious physical injury." Ky. Rev. Stat. Ann. § 529.100(2)(a), (b).

Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with minor in the third degree) is a Class A misdemeanor punishable by up to 90 days imprisonment, a fine not to exceed \$250, or both. Ky. Rev. Stat. Ann. §§ 532.090(1), 534.040(2)(a). Although penalties for this offense are relatively inconsequential, the same penalty applies regardless of the minor's age. Additionally, solicitation of prostitution does not differentiate between buying sex with an adult or a minor. Ky. Rev. Stat. Ann. § 506.030 (Criminal solicitation). Accordingly, solicitation of prostitution is a Class B misdemeanor punishable by imprisonment up to 90 days, a fine not to exceed \$250, or both, regardless of the victim's age. Ky. Rev. Stat. Ann. §§ 529.020(2), 506.030(2)(e), 532.090(2), 534.040(2)(b).

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.*

In addition to any other fines, penalties, or forfeitures buyers may be subject to, Ky. Rev. Stat. Ann. § 529.130 (Human trafficking victims service fee) creates a \$10,000 fee to be paid by all those convicted of Ky. Rev. Stat. Ann. §§ 529.100 (Human trafficking).

Fines are statutorily authorized in felony and misdemeanor commercial sexual offenses against children. Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree), which is most likely to apply if the human trafficking provision doesn't cover buyers, is a Class A misdemeanor carrying a fine of \$500. Ky. Rev. Stat. Ann. §§ 530.070(2), 534.040(2)(a). A buyer convicted of the felony offense of Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) or Ky. Rev. Stat. Ann. § 510.155 (Unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities) faces a fine of \$1,000-\$10,000 "or double his gain from commission of the offense, whichever is the greater." Ky. Rev. Stat. Ann. § 534.030(1).

A buyer may be subject to asset forfeiture if convicted of certain offenses. Ky. Rev. Stat. Ann. § 500.092(3) (Forfeiture of personal property not used as a residence triggered by violation or attempted violation of certain offenses – Forfeiture of real and personal property associated with violation or attempted violation of KRS 531.310 or 531.320) states,

The following offenses may trigger forfeiture of personal property under subsection (1) of this section:

- (a) KRS 17.546 [Registrant prohibited from using social networking websites, instant messaging or chat room programs accessible by minors, and may not "intentionally photograph, film, or video a minor through traditional or electronic means without the written consent of the minor's parent, legal custodian, or guardian unless the registrant is the minor's parent, legal custodian, or guardian."].
- (b) KRS 508.140 [Stalking in the first degree] and 508.150 [Stalking in the second degree] involving the use of any equipment, instrument, machine, or other device by which communication or information is transmitted, including computers, the Internet or other electronic network, cameras or other recording devices, telephones or other personal communications devices, scanners or other copying devices, and any device that enables the use of a transmitting device;
- (c) KRS 510.155 [Unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities];

- (d) KRS 530.064(1)(a) [Unlawful transaction with a minor in the first degree];
- (e) KRS 531.030 [Distribution of obscene matter to minors];
- (f) KRS 531.040 [Using minors to distribute obscene material];
- (g) KRS 531.310 [Use of a minor in a sexual performance];
- (h) KRS 531.320 [Promoting a sexual performance by a minor];
- (i) KRS 531.335 [Possession or viewing of matter portraying a sexual performance by a minor];
- (j) KRS 531.340 [Distribution of matter portraying a sexual performance by a minor];
- (k) KRS 531.350 [Promoting sale of material portraying a sexual performance by a minor];
- (l) KRS 531.360 [Advertising material portraying a sexual performance by a minor]; and
- (m) KRS 531.370 [Using minors to distribute material portraying a sexual performance by a minor].

Under Ky. Rev. Stat. Ann. § 500.092, property subject to forfeiture includes “all personal property which is not used as a permanent residence in this state which is used in connection with or acquired as a result of a violation or attempted violation of any of the statutes set out in subsection (3) . . .” Ky. Rev. Stat. Ann. § 500.092(1).

Ky. Rev. Stat. Ann. § 532.032 (Restitution) generally allows restitution to victims by stating that “[r]estitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section . . .” *Fields v. Commonwealth*, 123 S.W.3d 914, 916 (Ky. Ct. App. 2003) also confirms that “under this statute restitution must now be considered during sentencing in all appropriate cases, and therefore that the General Assembly contemplated ordinary sentencing procedures as the foundation for restitutionary sentences . . .” Ky. Rev. Stat. Ann. § 532.356(1) (Reimbursement and restitution as additional sanctions – Ineligibility to operate motor vehicle upon conviction of certain theft, fraud, and organized crime offenses) states in part, “Upon a person’s conviction and sentencing for any nonstatus juvenile offense, moving traffic violation, criminal violation, misdemeanor, or Class D felony offense, and, for the purposes of paragraph (b) of this subsection, any Class C felony offense listed in subsection (3) of this section, the court shall impose the following sanctions in addition to any imprisonment, fine, court cost, or community service . . .” The provision goes on to list in paragraph (a) “[r]eimbursement to the state or local government” of certain incarceration and medical expenses and, in paragraph (b), “[r]estitution to the crime victim as set out in KRS 439.563, 532.032, and 532.033.” Therefore, a buyer could be sentenced to pay restitution for the misdemeanor crime of unlawful transaction with a minor in the third degree pursuant to Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with minor in the third degree), which applies to buyers of commercial sex with minors.

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

Ky. Rev. Stat. Ann. § 531.335(1) (Possession or viewing of matter portraying a sexual performance by a minor) criminalizes possession of child pornography when an individual “having knowledge of its content, character, and that the sexual performance<sup>12</sup> is by a minor, . . . knowingly has in his or her possession or control any matter which visually depicts an actual sexual performance by a minor person; or intentionally views any matter which visually depicts an actual sexual performance by a minor person.” Inadvertently viewing such material or viewing it for investigative or law enforcement purposes or are exceptions under this statute. This crime is a Class D felony punishable by an imprisonment term of 1-5 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.335(2), 532.060(2)(d), 534.030(1). Ky. Rev. Stat. Ann. § 531.335 also subjects the buyer to asset forfeiture. Ky. Rev. Stat. Ann. § 500.092(3)(i).

<sup>12</sup> “Sexual performance” is defined for purposes of this provision as “any performance or part thereof which includes sexual conduct by a minor.” Ky. Rev. Stat. Ann. § 531.300(6). “Performance” is defined as “any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.” Ky. Rev. Stat. Ann. § 531.300(5).

In comparison, a federal conviction for possession of child pornography<sup>13</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>14</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>15</sup>

- 2.9.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 531.335(1) (Possession or viewing of matter portraying a sexual performance by a minor) to impose more substantial penalties 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.*

Under Ky. Rev. Stat. Ann. § 17.510(2) (Registration system for adults who have committed sex crimes or crimes against minors – persons required to register), “A registrant shall, on or before the date of his or her release by the court, the parole board, the cabinet, or any detention facility, register with the appropriate local probation and parole office in the county in which he or she intends to reside. The person in charge of the release shall facilitate the registration process.” The definition section, Ky. Rev. Stat. Ann. § 17.500 (Definitions for KRS 17.500 to 17.580), defines “registrant” as including “[a]ny person eighteen (18) years of age or older at the time of the offense or any youthful offender, as defined in KRS 600.020, who has committed: 1. A sex crime;<sup>16</sup> or 2. A criminal offense against a victim who is a minor.” Ky. Rev. Stat. Ann. § 17.500(5)(a). A “criminal offense against a victim who is a minor” is defined in Ky. Rev. Stat. Ann. § 17.500(3), which states,

(a) Except as provided in paragraph (b) of this subsection, “criminal offense against a victim who is a minor” means any of the following offenses if the victim is under the age of eighteen (18) at the time of the commission of the offense:

1. Kidnapping, as set forth in KRS 509.040, except by a parent;
2. Unlawful imprisonment, as set forth in KRS 509.020, except by a parent;

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<sup>13</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>14</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>15</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).

<sup>16</sup> “Sex crime” is defined in Ky. Rev. Stat. Ann. § 17.500(8) as “(a) A felony offense defined in KRS Chapter 510 [Sexual offenses], or KRS 530.020 [Incest], 530.064(1)(a) [Unlawful transaction with a minor in the first degree], 531.310 [Use of a minor in a sexual performance], or 531.320 [Promoting a sexual performance by a minor]; (b) A felony attempt to commit a felony offense specified in paragraph (a) of this subsection . . . .”

3. Sex crime;
  4. Promoting a sexual performance of a minor, as set forth in KRS 531.320;
  5. Human trafficking involving commercial sexual activity, as set forth in KRS 529.100;
  6. Promoting prostitution, as set forth in KRS 529.040, when the defendant advances or profits from the prostitution of a person under the age of eighteen (18);
  7. Use of a minor in a sexual performance, as set forth in KRS 531.310;
  8. Sexual abuse, as set forth in KRS 510.120 and 510.130;
  9. Unlawful transaction with a minor in the first degree, as set forth in KRS 530.064(1)(a);
  10. Any offense involving a minor or depictions of a minor, as set forth in KRS Chapter 531 [Pornography];
  11. Any attempt to commit any of the offenses described in subparagraphs 1. to 10. of this paragraph; and
  12. Solicitation to commit any of the offenses described in subparagraphs 1. to 10. of this paragraph.
- (b) Conduct which is criminal only because of the age of the victim shall not be considered a criminal offense against a victim who is a minor if the perpetrator was under the age of eighteen (18) at the time of the commission of the offense . . . .

Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree), however, is not included in the definition.

**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*

**Legal Analysis:**

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*

Traffickers of children for commercial sexual exploitation are subject to prosecution under several criminal statutes. Human trafficking of a minor for commercial sexual activity, including prostitution, pornography and sexual performance, is a Class B felony punishable by an imprisonment term of 10-20 years and a possible fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 529.100, 529.010(2), (5), 532.060(2)(b), 534.030(1). Additionally, if serious physical injury occurs to the minor victim, the crime becomes a Class A felony with an imprisonment term of 20-50 years or life imprisonment and a possible fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 529.100(2), 532.060(2)(a), 534.030(1).

Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking) is a Class C felony if the victim is under 18 and is punishable by an imprisonment term of 5-10 years and a possible fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 529.110 (2), 532.060(2)(c), 534.030(1).

If prosecuted as a prostitution case, Ky. Rev. Stat. Ann. § 529.040(1) (Promoting prostitution) states that “[a] person is guilty of promoting prostitution when he knowingly advances<sup>17</sup> or profits from prostitution.” Under subsection (2), “Promoting prostitution is a Class A misdemeanor unless the person managed, supervised, controlled, or owned, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two (2) or more prostitutes, in which case it is a Class D felony.” If the crime is a Class A misdemeanor, the individual faces up to 1 year imprisonment and a fine not to exceed \$500. Ky. Rev. Stat. Ann. §§ 532.090(1), 534.040(2)(a). If it is a Class D felony, the individual faces an imprisonment term of 1-5 years and a possible fine of \$1,000-\$10,000 “or double his gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 532.060(2)(d), 534.030(1).

<sup>17</sup> “A person ‘advances prostitution’ when acting other than as a prostitute or as a patron thereof, he or she knowingly causes or aids a person to engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any conduct designed to institute, aid or facilitate an act or enterprise of prostitution.” Ky. Rev. Stat. Ann. § 529.010(1).

A trafficker commits a Class C felony for Ky. Rev. Stat. Ann. § 531.310 (Use of a minor in a sexual performance) if the trafficker “employs, consents to, authorizes or induces a minor to engage in a sexual performance.” Ky. Rev. Stat. Ann. § 531.310(1). This crime is punishable by an imprisonment term of 5-10 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.310(2)(a), 532.060(2)(c), 534.030(1). If the minor is under 16, the crime is a Class B felony punishable by an imprisonment term of 10-20 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.310(2)(b), 532.060(2)(b), 534.030(1). If the minor is physically injured during the sexual performance, the crime is a Class A felony punishable by an imprisonment term of 20-50 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.310(2)(c), 532.060(2)(a), 534.030(1).

Similarly, a trafficker could be charged with Ky. Rev. Stat. Ann. § 531.320 (Promoting a sexual performance by a minor), which occurs when an individual “knowing the character and content thereof, . . . produces, directs or promotes any performance which includes sexual conduct by a minor.” Ky. Rev. Stat. Ann. § 531.320(1). When the minor involved is between 16 and 18, the crime is a Class C felony punishable by an imprisonment term of 5-10 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.320(2)(a), 532.060(2)(c), 534.030(1). When the minor involved is under 16, the crime is a Class B felony punishable by an imprisonment term of 10-20 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.320(2)(b), 532.060(2)(b), 534.030(1). If the minor is physically injured while engaging in the sexual performance, the crime is a Class A felony punishable by an imprisonment term of 20-50 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.320(2)(c), 532.060(2)(a), 534.030(1).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>18</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>19</sup> against a minor. 18 U.S.C. § 3559(e)(1).

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

Ky. Rev. Stat. Ann. § 531.310 (Use of a minor in a sexual performance)<sup>20</sup> and Ky. Rev. Stat. Ann. § 531.320 (Promoting<sup>21</sup> a sexual performance by a minor) are Class C felonies when the minor is between 16 and 18, punishable by an imprisonment term of 5-10 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.310(2)(a), 531.320(2)(a), 532.060(2)(c), 534.030(1). If the minor is under 16, the crimes are Class B felonies punishable by an

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<sup>18</sup> See *supra* note 6.

<sup>19</sup> See *supra* note 7.

<sup>20</sup> “Sexual performance” is defined as “any performance or part thereof which includes sexual conduct by a minor.” Ky. Rev. Stat. Ann. § 531.300(6). “Performance” is defined as “any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.” Ky. Rev. Stat. Ann. § 531.300(5). *Logston v. Commonwealth*, 973 S.W.2d 70, 73 (Ky. Ct. App. 1998) notes that “[t]he prohibition against ‘sexual conduct by a minor’ set forth in KRS 531.300(4) is directed at forbidding child pornography; therefore, . . . the state is not required to limit that prohibition to obscene sexual conduct as obscenity is defined in *Miller*.” *Id.*

<sup>21</sup> “Promot[ing]” is defined as “to prepare, publish, print, procure or manufacture, or to offer or agree to do the same.” Ky. Rev. Stat. Ann. § 531.300(7).

imprisonment term of 10-20 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.310(2)(b), 531.320(2)(b), 532.060(2)(b), 534.030(1). If the minor was physically injured during the sexual performance, they are Class A felonies punishable by an imprisonment term of 20-50 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.310(2)(c), 531.320(2)(c), 532.060(2)(a), 534.030(1).

Distribution of child pornography is a crime under Ky. Rev. Stat. Ann. § 531.340(1) (Distribution of matter portraying a sexual performance by a minor). Subsection (1) states,

A person is guilty of distribution of matter portraying a sexual performance by a minor when, having knowledge of its content and character, he or she:

- (a) Sends or causes to be sent into this state for sale or distribution; or
- (b) Brings or causes to be brought into this state for sale or distribution; or
- (c) In this state, he or she:
  - 1. Exhibits for profit or gain; or
  - 2. Distributes; or
  - 3. Offers to distribute; or
  - 4. Has in his or her possession with intent to distribute, exhibit for profit or gain or offer to distribute, any matter portraying a sexual performance by a minor.

The first offense is a Class D felony punishable by an imprisonment term of 1-5 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.340(3), 532.060(2)(d), 534.030(1). Second and subsequent offenses are Class C felonies subject to 5-10 year sentences and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.340(3), 532.060(2)(c), 534.030(1).

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>22</sup> against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of child pornography<sup>23</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>24</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>25</sup>

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<sup>22</sup> See *supra* note 7.

<sup>23</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>24</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) (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>25</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



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.*

Ky. Rev. Stat. Ann. § 510.155(1) (Unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities) states that

[i]t shall be unlawful for any person to knowingly use a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief, for any activity in violation of KRS 510.040 [Rape in the first degree], 510.050 [Rape in the second degree], 510.060 [Rape in the third degree], 510.070 [Sodomy in the first degree], 510.080 [Sodomy in the second degree], 510.090 [Sodomy in the third degree], 510.110 [Sexual abuse in the first degree], 529.100 [Human trafficking] where that offense involves commercial sexual activity, or 530.064(1)(a), or KRS Chapter 531.

Under this statute it is not necessary for the person to have met, or attempted to meet with the minor for the offense to be committed. The electronic solicitation of a minor is “prima facie evidence of the person’s intent to commit the offense.” Ky. Rev. Stat. Ann. § 510.155 (3). This crime is a Class D felony punishable by an imprisonment term of 1-5 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 510.155(5), 532.060(2)(d), 534.030(1).

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

In addition to any other fines, penalties, or forfeitures traffickers may be subject to, Ky. Rev. Stat. Ann. § 529.130 (Human trafficking victims service fee) creates a \$10,000 fee to be paid by all those convicted of Ky. Rev. Stat. Ann. §§ 529.100 (Human trafficking) or 529.110 (Promoting human trafficking).

A trafficker convicted of the felony offenses of Ky. Rev. Stat. Ann. § 529.100 (Human trafficking), Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking), or Ky. Rev. Stat. Ann. § 510.155 (Unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities) faces a fine of \$1,000-\$10,000 “or double his gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. § 534.030(1).

A trafficker shall be subject to mandatory, criminal asset forfeiture if convicted of certain offenses. Ky. Rev. Stat. Ann. § 500.092(3) (Forfeiture of personal property not used as a residence triggered by violation or attempted violation of certain offenses – Forfeiture of real and personal property associated with violation or attempted violation of KRS 531.310 or 531.320) allows asset forfeiture for the following crimes:

- (a) KRS 17.546 [Registrant prohibited from using social networking Web site or instant messaging or chat room program accessible by minors, or intentionally photograph, film, or video a minor through traditional or electronic means without written consent].
- (b) KRS 508.140 [Stalking in the first degree] and 508.150 [Stalking in the second degree] involving the use of any equipment, instrument, machine, or other device by which communication or information

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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).

is transmitted, including computers, the Internet or other electronic network, cameras or other recording devices, telephones or other personal communications devices, scanners or other copying devices, and any device that enables the use of a transmitting device;

(c) KRS 510.155 [Unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities];

(d) KRS 530.064(1)(a) [Unlawful transaction with a minor in the first degree];

(e) KRS 531.030 [Distribution of obscene matter to minors];

(f) KRS 531.040 [Using minors to distribute obscene material];

(g) KRS 531.310 [Use of a minor in a sexual performance];

(h) KRS 531.320 [Promoting a sexual performance by a minor];

(i) KRS 531.335 [Possession or viewing of matter portraying a sexual performance by a minor];

(j) KRS 531.340 [Distribution of matter portraying a sexual performance by a minor];

(k) KRS 531.350 [Promoting sale of material portraying a sexual performance by a minor];

(l) KRS 531.360 [Advertising material portraying a sexual performance by a minor]; and

(m) KRS 531.370 [Using minors to distribute material portraying a sexual performance by a minor].

Under Ky. Rev. Stat. Ann. § 500.092, property subject to forfeiture includes

all personal property which is not used as a permanent residence in this state which is used in connection with or acquired as a result of a violation or attempted violation of any of the statutes set out in subsection (3), and notwithstanding KRS 500.090 [Forfeiture], all real and personal property in this state which is used in connection with or acquired as a result of a violation or attempted violation of KRS 531.310 [Use of a minor in a sexual performance] or 531.320 [Promoting a sexual performance by a minor] shall be subject to forfeiture under the same terms, conditions, and defenses and using the same process as set out in KRS 218A.405 to 218A.460 for property subject to forfeiture under that chapter. Ky. Rev. Stat. Ann. § 500.092(1).

The property may be seized upon process issued by the court, or without process where the seizure of property is incident to lawful arrest, incident to a search under a valid search warrant, where the property has been the subject of a prior judgment in favor of the state, or where the law enforcement agency has probable cause to believe the property is dangerous or subject to forfeiture, pursuant to Ky. Rev. Stat. Ann. § 218A.415 (Procedure for seizure of property). Following an order of forfeiture, 85 percent of the value of the property shall be paid to the law enforcement agency who seized the property and 15 percent shall be paid to the Office of the Attorney General, pursuant to Ky. Rev. Stat. Ann. § 218A.420(4) (Procedure for disposal of seized and forfeited property – Distribution of proceeds – Administrative regulations on use of funds – Adoption of policies for seizure of forfeitable assets – Asset-forfeiture training – Vehicles – Joint operations).

Where a trafficker is convicted of engaging in organized crime, pursuant to Ky. Rev. Stat. Ann § 506.120 (Engaging in organized crime),<sup>26</sup> a trafficker faces a Class B felony, punishable by a fine of \$1,000-\$10,000 “or double his gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 506.120(2), 534.030(1).

Lastly, for certain crimes a trafficker is subject to mandatory restitution. Ky. Rev. Stat. Ann. § 532.032 (Restitution) generally allows restitution to victims by stating that “[r]estitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section . . . .” Ky. Rev. Stat. Ann. § 532.032(1). *Fields v. Commonwealth*, 123 S.W.3d 914, 916 (Ky. Ct. App. 2003) also confirms that “under this statute restitution must now be considered during sentencing in all appropriate cases,

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<sup>26</sup> See *supra* Component 3.1 for a discussion of the relevant provision of Ky. Rev. Stat. Ann. § 506.120.

and therefore that the General Assembly contemplated ordinary sentencing procedures as the foundation for restitutionary sentences . . . .” Ky. Rev. Stat. Ann. § 532.356(1) (Reimbursement and restitution as additional sanctions – Ineligibility to operate motor vehicle upon conviction of certain theft, fraud, and organized crime offenses) states in part, “Upon a person’s conviction and sentencing for any nonstatus juvenile offense, moving traffic violation, criminal violation, misdemeanor, or Class D felony offense, and, for the purposes of paragraph (b) of this subsection, any Class C felony offense listed in subsection (3) of this section,<sup>27</sup> the court shall impose the following sanctions in addition to any imprisonment, fine, court cost, or community service . . . .” The provision goes on to list in paragraph (a) “[r]eimbursement to the state or local government” of certain incarceration and medical expenses and, in paragraph (b), “[r]estitution to the crime victim as set out in KRS 439.563, 532.032, and 532.033.”

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

A convicted offender of child sex trafficking is required to register under the sex offender registry law in Kentucky. Under Ky. Rev. Stat. Ann. § 17.510(2) (Registration system for adults who have committed sex crimes or crimes against minors – persons required to register), “A registrant shall, on or before the date of his or her release by the court, the parole board, the cabinet, or any detention facility, register with the appropriate local probation and parole office in the county in which he or she intends to reside. The person in charge of the release shall facilitate the registration process.” The definition section, Ky. Rev. Stat. Ann. § 17.500, defines “registrant” as including “[a]ny person eighteen (18) years of age or older at the time of the offense or any youthful offender, as defined in KRS 600.020, who has committed: 1. A sex crime;<sup>28</sup> or 2. A criminal offense against a victim who is a minor.” Ky. Rev. Stat. Ann. § 17.500(5)(a). A “criminal offense against a victim who is a minor” is defined in Ky. Rev. Stat. Ann. § 17.500(3), which states,

(a) Except as provided in paragraph (b) of this subsection, “criminal offense against a victim who is a minor” means any of the following offenses if the victim is under the age of eighteen (18) at the time of the commission of the offense:

1. Kidnapping, as set forth in KRS 509.040, except by a parent;
2. Unlawful imprisonment, as set forth in KRS 509.020, except by a parent;
3. Sex crime;
4. Promoting a sexual performance of a minor, as set forth in KRS 531.320;
5. Human trafficking involving commercial sexual activity, as set forth in KRS 529.100;
6. Promoting prostitution, as set forth in KRS 529.040, when the defendant advances or profits from the prostitution of a person under the age of eighteen (18);
7. Use of a minor in a sexual performance, as set forth in KRS 531.310;

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<sup>27</sup> Pursuant to Ky. Rev. Stat. § 532.356 (Reimbursement and restitution as additional sanctions – Ineligibility to operate motor vehicle upon conviction of certain theft, fraud, and organized crime offenses),

In addition to any other penalty allowed by law, a court may declare the defendant ineligible to operate a motor vehicle for the period of time that any amount of restitution ordered under this section remains unpaid, where the restitution is imposed as the result of the commission of the following offenses:

. . . .

KRS 506.120 (engaging in organized crime).

<sup>28</sup> “Sex crime” is defined in Ky. Rev. Stat. Ann. § 17.500(8) as “(a) A felony offense defined in KRS Chapter 510 [Sexual offenses], or KRS 530.020 [Incest], 530.064(1)(a) [Unlawful transaction with a minor in the first degree], 531.310 [Use of a minor in a sexual performance], or 531.320 [Promoting a sexual performance by a minor]; (b) A felony attempt to commit a felony offense specified in paragraph (a) of this subsection . . . .”

8. Sexual abuse, as set forth in KRS 510.120 and 510.130;
  9. Unlawful transaction with a minor in the first degree, as set forth in KRS 530.064(1)(a);
  10. Any offense involving a minor or depictions of a minor, as set forth in KRS Chapter 531 [Pornography];
  11. Any attempt to commit any of the offenses described in subparagraphs 1. to 10. of this paragraph; and
  12. Solicitation to commit any of the offenses described in subparagraphs 1. to 10. of this paragraph.
- (b) Conduct which is criminal only because of the age of the victim shall not be considered a criminal offense against a victim who is a minor if the perpetrator was under the age of eighteen (18) at the time of the commission of the offense;

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.*

In Kentucky, a human trafficker would likely lose parental rights under Ky. Rev. Stat. Ann. § 625.090 (Grounds for termination). Ky. Rev. Stat. Ann. § 625.090 allows for termination “if the Circuit Court finds from the pleadings and by clear and convincing evidence that: . . . ; 3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and (b) Termination would be in the best interest of the child.” Ky. Rev. Stat. Ann. § 625.090(1)(a)(3), (1)(b). Subsection (3) sets out factors to consider “[i]n determining the best interest of the child and the existence of a ground for termination . . . .” Ky. Rev. Stat. Ann. § 625.090(2) further states that “[n]o termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds: . . . (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child; . . . (f) That the parent has caused or allowed the child to be sexually abused or exploited . . . .” Ky. Rev. Stat. Ann. § 625.090(2)(d), (f). Since human trafficking could seriously injure a minor victim, it is possible that parental rights can be terminated through this statute.

**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.*

**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.*

A facilitator can be charged with promoting human trafficking under Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking), which includes when a person intentionally “[b]enefits financially or receives anything of value from knowing participation in human trafficking.” Ky. Rev. Stat. Ann. § 529.110(1)(a). Promoting human trafficking of a minor is a Class C felony. Ky. Rev. Stat. Ann. § 529.110(2).

A facilitator may also be charged with the Class D felony of promoting prostitution under Ky. Rev. Stat. Ann. § 529.040 (Promoting prostitution), which is defined as including an individual “engag[ing] in any conduct designed to institute, aid or facilitate an act or enterprise of prostitution” when two or more individuals are prostituted. Ky. Rev. Stat. Ann. §§ 529.010(1), 529.040(2).<sup>29</sup> Similarly, if the facilitator promotes the prostitution of only one victim, then the facilitator can be charged with a Class A misdemeanor. Ky. Rev. Stat. Ann. § 529.040(2). Similarly, the crime of permitting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.070 (Permitting prostitution) applies to facilitators and creates a Class B misdemeanor when an individual “having possession or control of premises which he knows or has reasonable cause to know are being used for prostitution purposes, . . . fails to make reasonable and timely effort to halt or abate such use.”

Under Ky. Rev. Stat. Ann. § 531.320 (Promoting a sexual performance by a minor) it is unlawful when an individual “knowing the character and content thereof, . . . produces, directs or promotes any performance which includes sexual conduct by a minor.” Ky. Rev. Stat. Ann. § 531.320(1). A first time offender of this crime is guilty of a Class C felony if the minor is between the ages of sixteen and eighteen, a class B felony if the minor is under the age of sixteen, and a Class A felony if the minor suffers physical injury as the result of the performance. Ky. Rev. Stat. Ann. § 531.320(2). These offenses could be punishable by an imprisonment term ranging from 5-50 years or life imprisonment and a possible fine of \$1,000-\$10,000. Ky. Rev. Stat. Ann. §§ 531.320(2), 532.060(2), 534.030(1).

Finally, a facilitator may be convicted of engaging in organized crime, pursuant to Ky. Rev. Stat. Ann. § 506.120 (Engaging in organized crime).<sup>30</sup> A conviction under this section is a Class B felony, punishable by a

<sup>29</sup> The definition of “advancing prostitution” from Ky. Rev. Stat. Ann. § 529.010 is used, since one is guilty of promoting prostitution under Ky. Rev. Stat. Ann. § 529.040 if one “knowingly advances or profits from prostitution.”

<sup>30</sup> See *supra* Component 3.1 for a discussion of the relevant provision of Ky. Rev. Stat. Ann. § 506.120.

term of imprisonment of 10 to 20 years and a fine of \$1,000-\$10,000 “or double his gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 506.120(2), 534.030(1).

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.*

In addition to any other fines, penalties, or forfeitures facilitators may be subject to, Ky. Rev. Stat. Ann. § 529.130 (Human trafficking victims service fee) creates a \$10,000 fee to be paid by all those convicted of Ky. Rev. Stat. Ann. §§ 529.100 (Human trafficking) or 529.110 (Promoting human trafficking).

Under Ky. Rev. Stat. Ann. § 500.092(3) (Forfeiture of personal property not used as a residence triggered by violation or attempted violation of certain offenses – Forfeiture of real and personal property associated with violation or attempted violation of KRS 531.310 or 531.320) a facilitator of domestic minor sex trafficking may be subject to asset forfeiture if convicted of certain offenses, including the following:

....

(e) KRS 531.030 [Distribution of obscene matters to minors];

(f) KRS 531.040 [Using minors to distribute obscene material];

....

(h) KRS 531.320 [Promoting a sexual performance by a minor];

....

(j) KRS 531.340 [Distribution of matter portraying a sexual performance by a minor];

(k) KRS 531.350 [Promoting sale of material portraying a sexual performance by a minor];

(l) KRS 531.360 [Advertising material portraying a sexual performance by a minor]; and

(m) KRS 531.370 [Using minors to distribute material portraying a sexual performance by a minor].

Under Ky. Rev. Stat. Ann. § 500.092, property subject to forfeiture includes “all personal property which is not used as a permanent residence in this state which is used in connection with or acquired as a result of a violation or attempted violation of any of the statutes set out in subsection (3) . . . .” Ky. Rev. Stat. Ann. § 500.092(1). The property may be seized upon process issued by the court, or without process where the seizure of property is incident to lawful arrest, incident to a search under a valid search warrant, where the property has been the subject of a prior judgment in favor of the state, or where the law enforcement agency has probable cause to believe the property is dangerous or subject to forfeiture, pursuant to Ky. Rev. Stat. Ann. § 218A.415 (Procedure for seizure of property). Following an order of forfeiture, 85 percent of the value of the property shall be paid to the law enforcement agency who seized the property and 15 percent shall be paid to the Office of the Attorney General, pursuant to Ky. Rev. Stat. Ann. § 218A.420(4) (Procedure for disposal of seized and forfeited property – Distribution of proceeds – Administrative regulations on use of funds – Adoption of policies for seizure of forfeitable assets – Asset-forfeiture training – Vehicles – Joint operations).

Other financial penalties related to facilitating domestic minor sex trafficking may be imposed upon conviction. Promoting human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking) and promoting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.040 (Promoting prostitution), in addition to prison sentences, carry fines of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. § 534.030(1).

Lastly, for certain crimes a facilitator is subject to mandatory restitution. Ky. Rev. Stat. Ann. § 532.032 (Restitution) generally allows restitution to victims by stating that “[r]estitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section . . . .” Ky. Rev. Stat. Ann. § 532.032(1). *Fields v. Commonwealth*, 123 S.W.3d 914, 916 (Ky. Ct. App. 2003) also confirms that “under this statute restitution must now be considered during sentencing in all appropriate cases,

and therefore that the General Assembly contemplated ordinary sentencing procedures as the foundation for restitutionary sentences . . . .” Ky. Rev. Stat. Ann. § 532.356(1) (Reimbursement and restitution as additional sanctions – Ineligibility to operate motor vehicle upon conviction of certain theft, fraud, and organized crime offenses) states in part, “Upon a person’s conviction and sentencing for any nonstatus juvenile offense, moving traffic violation, criminal violation, misdemeanor, or Class D felony offense, and, for the purposes of paragraph (b) of this subsection, any Class C felony offense listed in subsection (3) of this section, the court shall impose the following sanctions in addition to any imprisonment, fine, court cost, or community service . . . .” The provision goes on to list in paragraph (a) “[r]eimbursement to the state or local government” of certain incarceration and medical expenses and, in paragraph (b), “[r]estitution to the crime victim as set out in KRS 439.563 [Restitution as condition of parole – board order – effect on length of parole], 532.032 [Restitution], and 532.033 [Order of restitution].”

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

Kentucky has no statute specifically related to sex tourism. However, Ky. Rev. Stat. Ann. § 529.040 (Promoting prostitution) might be applicable to certain forms of sex tourism. Under this statute, a person commits a crime when “he knowingly advances or profits from prostitution.”<sup>31</sup> Ky. Rev. Stat. Ann. § 529.040. The statute further clarifies that “[p]romoting prostitution is a Class A misdemeanor unless the person managed, supervised, controlled, or owned, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two (2) or more prostitutes, in which case it is a Class D felony.” Ky. Rev. Stat. Ann. § 529.040(2).

- 4.3.1 Recommendation: Enact a law prohibiting selling or offering to sell travel services that include or facilitate travel for the purpose of engaging in commercial sexual exploitation of a minor or prostitution of a minor, if occurring in Kentucky.

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

Kentucky criminalizes promoting child pornography through Ky. Rev. Stat. Ann. § 531.340 (Distribution of matter portraying a sexual performance by a minor), which states in subsections (1) and (2),

- (1) A person is guilty of distribution of matter portraying a sexual performance by a minor when, having knowledge of its content and character, he or she:
  - (a) Sends or causes to be sent into this state for sale or distribution; or
  - (b) Brings or causes to be brought into this state for sale or distribution; or
  - (c) In this state, he or she:
    - 1. Exhibits for profit or gain; or
    - 2. Distributes; or
    - 3. Offers to distribute; or
    - 4. Has in his or her possession with intent to distribute, exhibit for profit or gain or offer to distribute, any matter portraying a sexual performance by a minor.
- (2) Any person who has in his or her possession more than one (1) unit of material coming within the provision of KRS 531.300(2) shall be rebuttably presumed to have such material in his or her possession with the intent to distribute it.

The first offense is a Class D felony punishable by a possible imprisonment term of 1-5 years and a possible fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky.

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<sup>31</sup> See *supra* note 17.

Rev. Stat. Ann. §§ 531.340(3), 532.060(2) (d), 534.030(1). Second and subsequent offenses are Class C felonies punishable by an imprisonment term of 5-10 years and a fine of \$1,000-\$10,000 “or double [the] gain from commission of the offense, whichever is the greater.” Ky. Rev. Stat. Ann. §§ 531.340(3), 532.060(2)(c), 534.030(1).

Similarly, under Ky. Rev. Stat. Ann. § 531.360(1) (Advertising material portraying a sexual performance by a minor) an individual commits a felony if the individual “having knowledge of its content and character thereof, . . . writes or creates advertising or solicits anyone to publish such advertising or otherwise promotes the sale or distribution of matter portraying a sexual performance by a minor.” A first offense of this crime is a Class D felony. Ky. Rev. Stat. Ann. § 531.360(2). Second and subsequent offenses are Class C felonies. Ky. Rev. Stat. Ann. § 531.360(2).

Lastly, a facilitator could be guilty of Ky. Rev. Stat. Ann. § 531.350 (Promoting sale of material portraying a sexual performance by a minor) when the individual

knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any matter portraying a sexual performance by a minor, or he denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept such matter, or by reason of the return of such matter. Ky. Rev. Stat. Ann. § 531.350(1).

A first offense of this statute is a Class A misdemeanor. Ky. Rev. Stat. Ann. § 531.350(2). A second offense is a Class D felony. Ky. Rev. Stat. Ann. § 531.350(2). Third and subsequent offenses are Class C felonies. Ky. Rev. Stat. Ann. § 531.350(2).

- 4.4.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 531.350 (Promoting sale of material portraying a sexual performance by a minor) to impose substantial penalties for a first offense to reflect the seriousness of the offense.



**Legal Components:**

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor under 18 to engage in the commercial sex act.*
- 5.3 *State law prohibits the 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 *Child 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).*
- 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 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*<sup>32</sup>

Kentucky’s human trafficking offense includes all commercial sexual exploitation of minors. Under Ky. Rev. Stat. Ann. § 529.010(5)(b), when the victim is a minor, means of force, fraud, or coercion are not required.<sup>33</sup> In addition, the human trafficking law applies to buyers; thus, buying commercial sex with a person who is under the age of eighteen constitutes human trafficking.<sup>34</sup> Ky. Rev. Stat. Ann. §§ 529.100, 529.010(2), (5)(b). Finally, the definition of human trafficking under Ky. Rev. Stat. Ann. §§ 529.010(2), (5)(b), does not require that a trafficker or controlling third party be identified. Consequently, Kentucky’s human trafficking offense includes any child who is bought for sex, regardless of whether force, fraud or coercion is used, regardless of whether a buyer exploited the youth without a trafficker’s involvement, and regardless of whether the victim identifies a trafficker. Ky. Rev. Stat. Ann. §§ 529.010(2), (5)(b).

<sup>32</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 all commercially sexually exploited children within sex trafficking definitions and corresponding need to include buyer conduct in core sex trafficking offenses regardless of whether victim is under control of a third party).

<sup>33</sup> See *supra* discussion in Component 1.1.

<sup>34</sup> See *supra* discussion of buyer applicability in Component 2.1.

5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor under 18 to engage in the commercial sex act.*

Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) is silent with regard to the availability of a defense based on the willingness of the minor to engage in the commercial sex act, meaning that a defendant may seek to assert such a defense.

- 5.2.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) to expressly prohibit a defendant from asserting a defense based on the minor victim's willingness to engage in the commercial sex act.

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>35</sup>

Under Ky. Rev. Stat. Ann. § 529.120 (Treatment of minor suspected of prostitution offense), “[n]otwithstanding KRS 529.020 [Prostitution] or 529.080 [Loitering for prostitution purposes], if it is determined after a reasonable period of custody for investigative purposes, that the person suspected of prostitution or loitering for prostitution is under the age of eighteen (18), then the minor shall not be prosecuted for an offense under KRS 529.020 or 529.080.”

Pursuant to Ky. Rev. Stat. Ann. § 529.120(2), (3), a law enforcement officer who encounters a minor suspected of prostitution may take the minor into protective custody, and must make an immediate report to the Cabinet for Health and Family Services, who shall commence an investigation in a child dependency, abuse, or neglect proceeding.

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

**Child Identified as Dependent/Neglected/Abused**

Kentucky provides a protective response for victims of domestic minor sex trafficking through the Cabinet for Health and Family Services. Pursuant to Ky. Rev. Stat. § 620.029(1) (Duties of cabinet relating to children who are victims of human trafficking),

In order to provide the most effective treatment for children who are victims of human trafficking, as defined in KRS 529.010, the cabinet shall:

- (a) Investigate a report alleging a child is a victim of human trafficking pursuant to KRS 620.030(3);
- (b) Provide or ensure the provision of appropriate treatment, housing, and services consistent with the status of the child as a victim of human trafficking; and
- (c) Proceed in the case in accordance with applicable statutes governing cases involving dependency,<sup>36</sup> neglect, or abuse<sup>37</sup> regardless of whether the person believed to have caused the

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<sup>35</sup> For more information regarding recent federal legislation impacting this component see:

<http://go.sharedhope.org/stateimpactmemo>.

<sup>36</sup> Under Ky. Rev. Stat. Ann. § 600.020(20), “dependent child” is defined as “any child, other than an abused or neglected child, who is under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child.”

The text of Ky. Rev. Stat. Ann. § 600.020 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 174 during the 2016 Regular Session of the Kentucky Legislature (effective July 15, 2016).

<sup>37</sup> An “abused or neglected child” includes “a child whose health or welfare is harmed or threatened with harm when . . . [a] person twenty-one (21) years of age or older commits or allows to be committed an act of sexual abuse,

human trafficking of the child is a parent, guardian, or person exercising custodial control or supervision.

### *I. Initial custody*

#### *a. Authority for initial custody*

Law enforcement officer may take emergency protective custody of a child and initiate a child protective response when they suspect that the child is engaged in prostitution. Ky. Rev. Stat. Ann. § 529.120 (Treatment of minor suspected of prostitution offense). Additionally, the court may take emergency custody of a potentially dependent, neglected, or abused child under Ky. Rev. Stat. Ann. § 620.060 (Definitions for the chapter), which states in part,

(1) The court for the county where the child is present may issue an ex parte emergency custody order when it appears to the court that removal is in the best interest of the child and that there are reasonable grounds to believe, as supported by affidavit or by recorded sworn testimony, that one (1) or more of the following conditions exist and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child:

- (a) The child is in danger of imminent death or serious physical injury or is being sexually abused;
- (b) The parent has repeatedly inflicted or allowed to be inflicted by other than accidental means physical injury or emotional injury. This condition shall not include reasonable and ordinary discipline recognized in the community where the child lives, as long as reasonable and ordinary discipline does not result in abuse or neglect as defined in KRS 600.020(1)<sup>38</sup>; or
- (c) The child is in immediate danger due to the parent's failure or refusal to provide for the safety or needs of the child.

(2) Custody may be placed with a relative taking into account the wishes of the custodial parent and child or any other appropriate person or agency including the cabinet.

Additionally, pursuant to Ky. Rev. Stat. Ann. § 610.050 (Temporary change in custody), a court may also order temporary custody of a child if, “that the child is a danger to himself or the community, or is in such condition

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sexual exploitation, or prostitution upon a child less than sixteen (16) years of age.” Ky. Rev. Stat. Ann. § 600.020(1)(b) (Definitions for KRS Chapters 600 to 645). The definition of an “abused or neglected child” also covers a child whose “parent, guardian, or other person exercising custodial control or supervision of the child . . . . (5) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child; (6) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child . . . .” Ky. Rev. Stat. Ann. § 600.020(1)(a)(5), (6). “Sexual exploitation” is further defined as behavior that

. . . [I]ncludes, but is not limited to, a situation in which a parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045 [Persons prohibited from probation or post incarceration supervision – Procedure when probation or post incarceration supervision not prohibited], or other person having custodial control or supervision of a child or responsible for his welfare, allows, permits, or encourages the child to engage in an act which constitutes prostitution under Kentucky law; or a parent, guardian, or other person having custodial control or supervision of a child or responsible for his or her welfare, allows, permits, or encourages the child to engage in an act of obscene or pornographic photographing, filming, or depicting of a child as provided for under Kentucky law. Ky. Rev. Stat. Ann. § 600.020(61).

<sup>38</sup> See *infra* Component 5.5 for definition of abuse and neglect.

or surroundings that his welfare is being harmed or threatened with harm to such a degree that his best interest requires that his custody be immediately changed.”

Ky. Rev. Stat. Ann. § 620.040(5) (Duties of prosecutor, police, and cabinet – prohibition as to school personnel – multidisciplinary teams) further offers a process for bringing the minor into custody:

(a) If, after receiving the report, the law enforcement officer, the cabinet, or its designated representative cannot gain admission to the location of the child, a search warrant shall be requested from, and may be issued by, the judge to the appropriate law enforcement official upon probable cause that the child is dependent, neglected, or abused. If, pursuant to a search under a warrant, a child is discovered and appears to be in imminent danger, the child may be removed by the law enforcement officer.

(b) If a child who is in a hospital or under the immediate care of a physician appears to be in imminent danger if he or she is returned to the persons having custody of him or her, the physician or hospital administrator may hold the child without court order, provided that a request is made to the court for an emergency custody order at the earliest practicable time, not to exceed seventy-two (72) hours.

(c) Any appropriate law enforcement officer may take a child into protective custody and may hold that child in protective custody without the consent of the parent or other person exercising custodial control or supervision if there exist reasonable grounds for the officer to believe that the child is in danger of imminent death or serious physical injury, is being sexually abused, or is a victim of human trafficking and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child. The officer or the person to whom the officer entrusts the child shall, within twelve (12) hours of taking the child into protective custody, request the court to issue an emergency custody order.

Specific to a DMST victim, a report is required by Ky. Rev. Stat. Ann. § 620.030(3) (Duty to report dependency, neglect, or abuse – husband-wife and professional-client/patient privileges not grounds for refusal to report – exceptions – penalties), which states that

Any person who knows or has reasonable cause to believe that a child is a victim of human trafficking as defined in Section 7 of this Act shall immediately cause an oral or written report to be made to a local law enforcement agency or the Department of Kentucky State Police; or the cabinet or its designated representative; or the Commonwealth's attorney or the county attorney; by telephone or otherwise. This subsection shall apply regardless of whether the person believed to have caused the human trafficking of the child is a parent, guardian, or person exercising custodial control or supervision.

#### b. Placement

Pursuant to Ky. Rev. Stat. Ann. § 620.060(2), “Custody may be placed with a relative taking into account the wishes of the custodial parent and child or any other appropriate person or agency including the cabinet.” Additionally, under Ky. Rev. Stat. Ann. § 620.095 (Restriction on placement of nonoffender), “[a] nonoffender, as defined in KRS 600.020 [“a child alleged to be dependent, neglected, or abused and who has not been otherwise charged with a status or public offense”], shall not be placed in secure or nonsecure detention.”

However, if a minor is identified as a victim of human trafficking, then Ky. Rev. Stat. Ann. § 431.063 (Human trafficking victim not to be incarcerated pending trial – exceptions) could prohibit the detention of a human

trafficking victim for any offenses the victim committed as a result of the trafficking prior to trial. The statute states,

A victim of human trafficking shall not be held in a detention center, jail, or other secure facility pending trial for an offense arising from the human trafficking situation, except where the incarceration is found to be the least restrictive alternative to securing the appearance of that person before the court or the release of the person under any other reasonable condition would be a clear threat to public safety.

## *II. Process following initial custody*

Under Ky. Rev. Stat. Ann. § 620.080 (Temporary removal hearing), unless waived, the court must hold a temporary removal hearing, “[w]ithin seventy-two (72) hours, excluding weekends and holidays, of the time when an emergency custody order is issued or when a child is taken into custody without the consent of his parent or other person exercising custodial control or supervision; and (b) In cases commenced by the filing of a petition, within ten (10) days of the date of filing.” At the hearing, the court “shall determine whether there are reasonable grounds to believe that the child would be dependent, neglected or abused if returned to or left in the custody of his parent or other person exercising custodial control or supervision . . . .”

If a law enforcement officer takes a minor into protective custody on suspicion of prostitution under Ky. Rev. Stat. Ann. § 529.120(2), (3) (Treatment of minor suspected of prostitution offense), the abuse and neglect protective response commences:

(2) A law enforcement officer who takes a minor into custody under subsection (1) of this section shall immediately make a report to the Cabinet for Health and Family Services pursuant to KRS 620.030 [Duty to report dependency, neglect, abuse, or human trafficking – Husband-wife and professional-client/patient privileges not grounds for refusal to report – Exceptions – Penalties]. Pursuant to KRS 620.040 [Duties of prosecutor, police, and cabinet – Prohibition as to school personnel – Multidisciplinary teams], the officer may take the minor into protective custody.

(3) The Cabinet for Health and Family Services shall commence an investigation into child dependency, neglect, or abuse pursuant to KRS 620.029 [Duties of cabinet relating to children who are victims of human trafficking].

Under Ky. Rev. Stat. Ann. § 620.029(1), once a report of suspected human trafficking is made the cabinet is required to:

- (a) Investigate a report alleging a child is a victim of human trafficking . . . ;
- (b) Provide or ensure the provision of appropriate treatment, housing, and services consistent with the status of the child as a victim of human trafficking; and
- (c) Proceed in the case in accordance with applicable statutes governing cases involving dependency, neglect, or abuse regardless of whether the person believed to have caused the human trafficking of the child is a parent, guardian, or person exercising custodial control or supervision.

## *III. Placement process pending adjudication/investigation*

Ky. Rev. Stat. Ann. § 620.090(1) (Temporary custody orders) states in part, “If, after completion of the temporary removal hearing, the court finds there are reasonable grounds to believe the child is dependent, neglected or abused, the court shall issue an order for temporary removal and shall grant temporary custody to the cabinet or other appropriate person or agency. Preference shall be given to available and qualified relatives of the child considering the wishes of the parent or other person exercising custodial control or supervision, if

known. The order shall state the specific reasons for removal and show that alternative less restrictive placements and services have been considered.” However, specifically under Ky. Rev. Stat. Ann. § 620.095 (Restriction on placement of nonoffender), “[a] nonoffender, as defined in KRS 600.020 [“a child alleged to be dependent, neglected, or abused and who has not been otherwise charged with a status or public offense”], shall not be placed in secure or nonsecure detention.”

#### *IV. Adjudication or referral to alternate process*

Ky. Rev. Stat. Ann. § 620.090(5) (Temporary custody orders) states,

The child shall remain in temporary custody with the cabinet for a period of time not to exceed forty-five (45) days from the date of the removal from his home. The court shall conduct the adjudicatory hearing and shall make a final disposition within forty-five (45) days of the removal of the child. The court may extend such time after making written findings establishing the need for the extension and after finding that the extension is in the child’s best interest.

The adjudicatory proceeding is also explained under Ky. Stat. Ann. § 610.070 (Hearings), which states that, “All cases involving children brought before the court whose cases are under the jurisdiction of the court shall be granted a speedy hearing and shall be dealt with by the court without a jury.”

Ky. Rev. Stat. Ann. § 620.140(1)(a) (Dispositional alternatives) states that the disposition of a case must be “in the best interest of the child,” and such a disposition may include “an informal adjustment of the case.”

Procedures for informal adjustments are provided in Ky. Rev. Stat. Ann. § 610.105 (Informal adjustment permissible at any time with notice to parties), which states,

- (1) Upon the court's motion or the motion of any party, following notice to the county attorney, an informal adjustment may be made at any time during the proceedings and with the victim and with those persons specified in KRS 610.070 having prior notification of the motion.
- (2) An informal adjustment does not require adjudication of the case. If an adjudication has occurred, the court shall dismiss the case following successful completion under subsection (3) of this section.
- (3) If the court orders an informal adjustment, the order may include any of the following:
  - (a) Referral of the case to diversion, but, if the child does not successfully complete the terms of the diversion, the case shall not be dismissed as a result of the diversion but shall be returned to court; or
  - (b) Placement of the child on community supervision or monitoring by the court under the informal adjustment with additional conditions as determined appropriate by the court for a period not to exceed six (6) months.

#### *V. Outcomes*

Ky. Rev. Stat. Ann. § 620.130 (Alternatives to removal from custody) sets out “alternatives less restrictive than removal” from custody for the court to consider in cases under Chapter 620. Ky. Rev. Stat. Ann. § 620.140 (Dispositional alternatives) sets forth possible court options for “disposition of all cases brought on behalf of

dependent, neglected, or abused children,” including admission of the child into “custody of the cabinet for placement” not to exceed the age of 18, or upon request 21,<sup>39</sup> or for protective orders, such as:

1. Requiring the parent or any other person to abstain from any conduct abusing, neglecting, or making the child dependent;
  2. Placing the child in his own home under supervision of the cabinet or its designee with services as determined to be appropriate by the cabinet; and
  3. Orders authorized by KRS 403.715 [Interpretation of KRS 403.715 to 403.785] to 403.785 [Duties of law enforcement agencies] and by KRS Chapter 456 [Civil orders of protection] [.]
- Ky. Rev. Stat. Ann. § 620.140(b).

Ky. Rev. Stat. Ann. § 620.230(g), (i) (Case permanency plans) requires that children who are placed in the custody of the cabinet will have a case permanency plan, which will include:

(g) A description of the type of home, child-caring facility, child-placing agency or facility in which the child is to be placed or has been placed, and a statement why the placement is appropriate for the child, including but not limited to:

1. Age;
2. Educational needs;
3. Medical needs;
4. Emotional needs;
5. Relationship with parents; and
6. Number of children the home is authorized to care for and the number of children currently residing in the home;

....

(i) A description of the services for the child and his family to be provided or arranged by the cabinet to facilitate the return of the child to his own home or to another permanent placement;

Under 620.029(2)(a) (Duties of cabinet relating to children who are victims of human trafficking), at least some of the services provided to victims of human trafficking will be set up to address their specific needs:

In order to effectuate the requirements of this section, the cabinet shall:

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<sup>39</sup> Pursuant to Ky. Rev. Stat. Ann. § 620.140(1)(d) (Dispositional alternatives),

Commitment of the child to the custody of the cabinet for placement [is] for an indeterminate period of time not to exceed his or her attainment of the age eighteen (18), unless the youth elects to extend his or her commitment beyond the age of eighteen (18) under paragraph (e) of this subsection. Beginning at least six (6) months prior to an eligible youth attaining the age of eighteen (18), the cabinet shall provide the eligible youth with education, encouragement, assistance, and support regarding the development of a transition plan, and inform the eligible youth of his or her right to extend commitment beyond the age of eighteen (18) . . . .

Pursuant to Ky. Rev. Stat. Ann. § 600.020(24) (Definitions), “[e]ligible youth’ means a person who is or has been committed to the cabinet as dependent, neglected, or abused; is eighteen (18) years of age to nineteen (19) years of age, and is requesting to extend or reinstate his or her commitment to the cabinet in order to participate in state or federal educational programs or to establish independent living arrangements.” Pursuant to Ky. Rev. Stat. Ann. § 600.020(67), “‘Transition plan’ means a plan that is personalized at the direction of the youth that includes specific options on housing; health insurance; education; local opportunities for mentors and continuing support services; and work force supports and employment services; and is as detailed as the youth may elect . . . .”

(a) Consult with agencies serving victims of human trafficking to promulgate administrative regulations for the treatment of children who are reported to be victims of human trafficking as dependent, neglected, or abused children, including providing for appropriate screening, assessment, treatment, services, temporary and long-term placement of these children, training of staff, the designation of specific staff, and collaboration with service providers and law enforcement . . . .

## **Child Identified as Runaway**

### *I. Initial custody*

#### *a. Authority for initial custody*

Pursuant to Ky. Rev. Stat. Ann. § 610.190(2) (Arrest laws applicable to child taken into custody –Applicability of bail laws –Custody by person other than peace officer), a child suspected to be a runaway may be taken into protective custody by a peace officer. Subsection (3) asserts that if the person taking the child into custody is not a peace officer, such person “shall as soon as possible place the child in the custody of a peace officer.” Ky. Rev. Stat. Ann. § 610.190(3).

#### *b. Placement*

Pursuant to Ky. Rev. Stat. Ann. § 610.190(2), “A child taken into protective custody under this subsection shall not be considered to have been arrested and may be held at the locations specified in KRS 610.220(1), after which the officer shall proceed with an initial investigation as provided for in KRS 610.200”

### *II. Process following initial custody*

Under Ky. Rev. Stat. Ann. § 610.200(2)(a) (Duties of peace officer), the peace officer who has taken or received a child suspected of being a runaway into protective custody shall immediately notify:

1. The child's parent, guardian, or person exercising custodial control or supervision of the child, if determined;
2. The cabinet or Department of Juvenile Justice, if appropriate; and
3. The court-designated worker.

If a parent, guardian, or person exercising custodial control or supervision of the child is identified and notified, the child may remain within the custody of the peace officer for a reasonable period of time pending the collection of the child by the person notified. Ky. Rev. Stat. Ann. § 610.200(2)(b). If no such person can be identified or located, then the period of custody may be extended not beyond 2 hours for the peace officer to continue his investigation. Ky. Rev. Stat. Ann. § 610.200(2)(c).

Two possible outcomes may occur at the conclusion of the peace officer's investigation. Pursuant to Ky. Rev. Stat. Ann. § 610.200(2)(d), (e), if at the conclusion of the investigation:

- (d) . . . the parent, guardian, or person exercising custodial control or supervision of the child is identified and notified, the peace officer shall return the child to the custody of that person and shall file a status offense case with the court-designated worker.



(e) . . . the parent, guardian, or person exercising custodial control or supervision of the child cannot be identified or located, or that person refuses to collect the child, the peace officer shall file a complaint pursuant to Section 34 of this Act.

After being taken into custody on suspicion of being a runaway, pursuant to Ky. Rev. Stat. Ann. § 630.040 (Duties of person taking child into custody), the law enforcement officer must follow a series of sequential steps and notify the court-designated worker as discussed in Ky. Rev. Stat. Ann. § 610.200(2)(a)(3). Under Ky. Rev. Stat. Ann. § 630.040(2), the law enforcement officer must “[c]ontact a court designated worker who shall have the responsibility for determining appropriate placement pursuant to” KRS § 610.200(6). Ky. Rev. Stat. Ann. § 610.200(6) states,

Unless the child is subject to trial as an adult, if the child is not released, the peace officer shall contact the court-designated worker who may:

- (a) Release the child to his parents;
- (b) Release the child to such other persons or organizations as are authorized by law;
- (c) Release the child to either of the above subject to stated conditions; or
- (d) Except as provided in subsection (7) of this section, authorize the peace officer to retain custody of the child for an additional period not to exceed twelve (12) hours during which the peace officer may transport the child to a secure juvenile detention facility or a nonsecure facility. If the child is retained in custody, the court-designated worker shall give notice to the child’s parents or person exercising custodial control or supervision of the fact that the child is being retained in custody.

### *III. Placement process pending adjudication/investigation*

Ky. Rev. Stat. Ann. § 610.012 (Exclusive jurisdiction of District Court or family division of Circuit Court concerning temporary detention of suspected runaway) creates specific court hearing procedures for children suspected of being runaways and confers exclusive jurisdiction of such proceedings to the District Court of the family division of the Circuit Court. Pursuant to subsection (2), “Proceedings to temporarily detain a child suspected of being a runaway by means of an emergency protective custody order, pending further appropriate court action, shall be initiated by filing a complaint with the court-designated worker.”

### *IV. Adjudication or referral to alternate process*

The adjudicatory proceeding is explained under Ky. Stat. Ann. § 610.070 (Hearings), which states that, “All cases involving children brought before the court whose cases are under the jurisdiction of the court shall be granted a speedy hearing and shall be dealt with by the court without a jury.”

As specified in Ky. Rev. Stat. Ann § 610.012(3) (Exclusive jurisdiction of District Court or family division of Circuit Court concerning temporary detention of suspected runaway),

Notwithstanding any other provision of law to the contrary, a child who is suspected of being a runaway may be detained in a nonsecure facility for a period of time not to exceed seventy-two (72) hours, exclusive of weekends and holidays, or, if the court makes a finding on the record that no less restrictive alternative is available, in a secure juvenile detention facility for a period of time not to exceed twenty-four (24) hours, exclusive of weekends and holidays, pursuant to an ex parte emergency protective order pending a court hearing to determine whether to return the child to his or her custodian or give custody of the child to the cabinet.

## *V. Outcomes*

Ky. Rev. Stat. Ann § 610.012(6) (Exclusive jurisdiction of District Court or family division of Circuit Court concerning temporary detention of suspected runaway) provides that court-designated workers must initiate a status offense case for released children, except in situations where children are released to the cabinet pursuant to an emergency custody order.

Concerning unreleased children, Ky. Rev. Stat. Ann § 610.012(4) dictates that “If, at the hearing held as provided for in subsection (3) of this section, the child is not released, the court shall issue an emergency custody order pursuant to KRS Chapter 620 and place the child with the cabinet and the cabinet shall file a dependency, neglect, or abuse action.”

Ky. Rev. Stat. Ann. § 620.230 (Case permanency plans) requires that children who are placed in the custody of the cabinet will have a case permanency plan, which will include:

(g) A description of the type of home, child-caring facility, child-placing agency or facility in which the child is to be placed or has been placed, and a statement why the placement is appropriate for the child, including but not limited to:

1. Age;
2. Educational needs;
3. Medical needs;
4. Emotional needs;
5. Relationship with parents; and
6. Number of children the home is authorized to care for and the number of children currently residing in the home;

....

(i) A description of the services for the child and his family to be provided or arranged by the cabinet to facilitate the return of the child to his own home or to another permanent placement;

Under 620.029(2)(a) (Duties of cabinet relating to children who are victims of human trafficking), at least some of the services provided to victims of human trafficking will be set up to address their specific needs:

In order to effectuate the requirements of this section, the cabinet shall:

- (a) Consult with agencies serving victims of human trafficking to promulgate administrative regulations for the treatment of children who are reported to be victims of human trafficking as dependent, neglected, or abused children, including providing for appropriate screening, assessment, treatment, services, temporary and long-term placement of these children, training of staff, the designation of specific staff, and collaboration with service providers and law enforcement . . . .

## Child Identified as Status Offender<sup>40</sup>

Pursuant to Ky. Rev. Stat. Ann. § 630.020 (Jurisdiction of court), a status offender is defined as a child that “(1) [h]as been an habitual runaway from his parent or person exercising custodial control or supervision of the child, “or “(2) [i]s beyond the control of the school or beyond the control of parents as defined in KRS 600.020 (Definitions for KRS Chapters 600 to 645)<sup>41</sup> . . . .”

### *I. Initial custody*

#### *a. Authority for initial custody*

Domestic minor sex trafficking victims frequently commit status offenses while being trafficked, leading to arrest and a juvenile justice response.<sup>42</sup> Under Chapter 630 (Status offenders), a minor may be taken into custody by law enforcement: “(1) Pursuant to an order of the court for failure to appear before the court for a previous status offense; or (2) If there are reasonable grounds to believe that the child has been an habitual runaway from his parent or person exercising custodial control or supervision of the child.” Ky. Rev. Stat. Ann. § 630.030.

Additionally, pursuant to Ky. Rev. Stat. Ann. § 610.050 (Temporary change in custody), a court may also order temporary custody of a child if, “that the child is a danger to himself or the community, or is in such condition

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<sup>40</sup> The system response to status offenses occurs at the intersection of the Cabinet for Health and Family Services and the Department of Juvenile Justice. Under Ky. Rev. Stat. Ann. § 600.040 (Division of responsibility between cabinet and Department of Juvenile Justice): When KRS 605.090, 605.100, 605.110, 605.115, 610.110, or any other section of this code refer jointly to the operation of a program or service by both the Department of Juvenile Justice and the Cabinet for Health and Family Services, the following divisions are intended:

- (1) Facilities, programs, and services relating to juveniles under KRS Chapter 635 or 640, or under KRS Chapter 645 as relates to a child who is mentally ill and who also comes within the purview of KRS Chapter 635 or 640, shall be the responsibility of the Department of Juvenile Justice.
- (2) Facilities, programs, and services relating to juveniles under other chapters of the code, including KRS Chapter 630, shall be the responsibility of the Cabinet for Health and Family Services.

<sup>41</sup>Pursuant to Ky. Rev. Stat. Ann. § 600.020 (4)–(5),

- (4) "Beyond the control of parents" means a child who has repeatedly failed to follow the reasonable directives of his or her parents, legal guardian, or person exercising custodial control or supervision other than a state agency, which behavior results in danger to the child or others, and which behavior does not constitute behavior that would warrant the filing of a petition under KRS Chapter 645;
- (5) “Beyond the control of school” means any child who has been found by the court to have repeatedly violated the lawful regulations for the government of the school as provided in KRS 158.150, and as documented in writing by the school as a part of the school's petition or as an attachment to the school's petition. The petition or attachment shall describe the student's behavior and all intervention strategies attempted by the school;

<sup>42</sup> A “[s]tatus offense action” is any action brought in the interest of a child who is accused of committing acts, which if committed by an adult, would not be a crime. Such behavior shall not be considered criminal or delinquent and such children shall be termed status offenders. Status offenses shall include: 1. Beyond the control of school or beyond the control of parents; 2. Habitual runaway; 3. Habitual truant; 4. Tobacco offenses as provided in KRS 438.305 to 438.340; and 5. Alcohol offenses as provided in KRS 244.085. (b) Status offenses shall not include violations of state or local ordinances which may apply to children such as a violation of curfew.” Ky. Rev. Stat. Ann. § 600.020(64).

or surroundings that his welfare is being harmed or threatened with harm to such a degree that his best interest requires that his custody be immediately changed.”

Kentucky law also prevents victims of DMST from prosecution as status offenders. Specifically, pursuant to Ky. Rev. Stat. Ann. § 630.125 (Child not to be charged with or found guilty of status offense related to human trafficking),

If reasonable cause exists to believe the child is a victim of human trafficking, as defined in [Ky. Rev. Stat. Ann. § 529.010 (Definitions)], the child shall not be charged with or adjudicated guilty of a status offense related to conduct arising from the human trafficking of the child unless it is determined at a later time that the child was not a victim of human trafficking at the time of the offense.

#### b. Placement

After being taken into custody as a status offender, pursuant to Ky. Rev. Stat. Ann. § 630.040 (Duties of person taking child into custody), the law enforcement officer must follow a series of sequential steps. Under subsection (2), the law enforcement officer must “[c]ontact a court designated worker who shall have the responsibility for determining appropriate placement pursuant to” KRS § 610.200(6). Ky. Rev. Stat. Ann. § 610.200(6) (Duties of peace officer) states,

Unless the child is subject to trial as an adult, if the child is not released, the peace officer shall contact the court-designated worker who may:

- (a) Release the child to his parents;
- (b) Release the child to such other persons or organizations as are authorized by law;
- (c) Release the child to either of the above subject to stated conditions; or
- (d) Except as provided in subsection (7) of this section, authorize the peace officer to retain custody of the child for an additional period not to exceed twelve (12) hours during which the peace officer may transport the child to a secure juvenile detention facility or a nonsecure facility. If the child is retained in custody, the court-designated worker shall give notice to the child’s parents or person exercising custodial control or supervision of the fact that the child is being retained in custody.

However, if a minor is identified as a victim of human trafficking, then Ky. Rev. Stat. Ann. § 431.063 (Human trafficking victim not to be incarcerated pending trial – exceptions) could prohibit the detention of a human trafficking victim for any offenses the victim committed as a result of the trafficking prior to trial. The statute states

A victim of human trafficking shall not be held in a detention center, jail, or other secure facility pending trial for an offense arising from the human trafficking situation, except where the incarceration is found to be the least restrictive alternative to securing the appearance of that person before the court or the release of the person under any other reasonable condition would be a clear threat to public safety.

#### *II. Process following initial custody*

If the child was not released, under Ky. Rev. Stat. Ann. § 630.040 (Duties of person taking child into custody), “The peace officer taking the child into custody shall within three (3) hours of taking a child into custody file a complaint with the court, stating the basis for taking the child into custody and the reason why the child was not released to the parent or other adult exercising custodial control or supervision of the child, relative or other responsible adult, a court designated agency, an emergency shelter or medical facility,” and could release the

status offender to “a responsible adult who can provide adequate care and supervision.” Ky. Rev. Stat. Ann. § 630.040(7).

Before an alleged status offender enters any judicial proceedings on the alleged offense, pursuant to Ky. Rev. Stat. Ann. § 630.050 (Conference with court-designated worker),

[T]he party or parties seeking such court action shall meet for a conference with a court-designated worker for the express purpose of determining whether or not:

- (1) To refer the matter to the court by assisting in the filing of a petition under KRS 610.020 [Complaints];
- (2) To refer the child and his family to a public or private social service agency . . . ; or
- (3) To enter into a diversionary agreement.

Under Ky. Rev. Stat. Ann. § 630.080(1) (Detention in secure juvenile detention facility or juvenile holding facility – Limitation on detention of child)

In order for the court to detain a child after the detention hearing, the Commonwealth shall establish probable cause at the detention hearing that the child is a status offender and that further detention of the child is necessary for the protection of the child or the community . . . . If grounds are established that the child is a status offender, and that further detention is necessary, the child may be placed in a nonsecure setting approved by the Department of Juvenile Justice . . . .

Additionally, under Ky. Rev. Stat. Ann. § 15A.068(1) (Duties of department if child may be victim of human trafficking – administrative regulations), a child may be screened as a potential victim of human trafficking. If that occurs, the Department of Juvenile Justice must:

- (a) File a report with the Cabinet for Health and Family Services pursuant to [KRS 620.030 (Duty to report dependency, neglect, abuse, or human trafficking – husband-wife and professional-client/patient privileges not grounds for refusal to report – exceptions – penalties)];
- (b) Notify the child's attorney that the child may be a victim of human trafficking; and
- (c) If the child does not pose a threat to public safety, petition the court to transfer custody from the department to the Cabinet for Health and Family Services.

Under Ky. Rev. Stat. Ann. § 620.029 (Duties of cabinet relating to children who are victims of human trafficking) once a report of suspected human trafficking is made the cabinet is required to:

- (a) Investigate a report alleging a child is a victim of human trafficking . . . ;
- (b) Provide or ensure the provision of appropriate treatment, housing, and services consistent with the status of the child as a victim of human trafficking; and
- (c) Proceed in the case in accordance with applicable statutes governing cases involving dependency, neglect, or abuse regardless of whether the person believed to have caused the human trafficking of the child is a parent, guardian, or person exercising custodial control or supervision.

### *III. Placement process pending adjudication/investigation*

If the status offender is sent to a detention proceeding, the court could order that the status offender be detained in juvenile detention under Ky. Rev. Stat. Ann. § 630.080(2) (Detention in secure juvenile detention facility or juvenile holding facility – Limitation on detention of child), which states that

A status offender may be securely detained if the cabinet has initiated or intends to initiate transfer of the youth by competent document under the provisions of the interstate compact pursuant to KRS Chapter 615.

However, if a minor is identified as a victim of human trafficking, then Ky. Rev. Stat. Ann. § 431.063 (Human trafficking victim not to be incarcerated pending trial – exceptions) could prohibit the detention of a human trafficking victim for any offenses the victim committed as a result of the trafficking prior to trial. The statute states

A victim of human trafficking shall not be held in a detention center, jail, or other secure facility pending trial for an offense arising from the human trafficking situation, except where the incarceration is found to be the least restrictive alternative to securing the appearance of that person before the court or the release of the person under any other reasonable condition would be a clear threat to public safety.

#### *IV. Adjudication or referral to alternate process*

The adjudicatory proceeding is explained under Ky. Stat. Ann. § 610.070 (Hearings), which states that, “All cases involving children brought before the court whose cases are under the jurisdiction of the court shall be granted a speedy hearing and shall be dealt with by the court without a jury.”

Ky. Rev. Stat. Ann. § 620.140(1)(a) (Dispositional alternatives) states that the disposition of a case must be “in the best interest of the child,” and such a disposition may include “an informal adjustment of the case.”

Procedures for informal adjustments are provided in Ky. Rev. Stat. Ann § 610.105 (Informal adjustment permissible at any time with notice to parties), which states,

- (1) Upon the court's motion or the motion of any party, following notice to the county attorney, an informal adjustment may be made at any time during the proceedings and with the victim and with those persons specified in KRS 610.070 [Hearings] having prior notification of the motion.
- (2) An informal adjustment does not require adjudication of the case. If an adjudication has occurred, the court shall dismiss the case following successful completion under subsection (3) of this section.
- (3) If the court orders an informal adjustment, the order may include any of the following:
  - (a) Referral of the case to diversion, but, if the child does not successfully complete the terms of the diversion, the case shall not be dismissed as a result of the diversion but shall be returned to court; or
  - (b) Placement of the child on community supervision or monitoring by the court under the informal adjustment with additional conditions as determined appropriate by the court for a period not to exceed six (6) months.

#### *V. Outcomes*

Under Ky. Rev. Stat. Ann. § 610.110 (Disposition), a child may be committed to the Department of Juvenile Justice as a disposition of the adjudication hearing or placed, “on probation in a home or boarding home . . . .” Additionally, under subsection (6), “the court may authorize an extension of commitment up to age twenty - one (21) for the purpose of permitting the Department of Juvenile Justice or the cabinet, as appropriate, to assist the child in establishing independent living arrangements if a return to the child's home is not in his or her best interest.”

## **Child Identified as a Public Offender**

A public offense is an action “. . . brought in the interest of a child who is accused of committing an offense under KRS Chapter 527 or a public offense which, if committed by an adult, would be a crime, whether the same is a felony, misdemeanor, or violation . . .” Ky. Rev. Stat. § 600.020(50) (Definitions for KRS Chapters 600 to 645). However, under Ky. Rev. Stat. § 529.120(1) (Treatment of minor suspected of prostitution offense), “[n]otwithstanding KRS 529.020 [Prostitution] or 529.080 [Loitering for prostitution purposes], if it is determined after a reasonable period of custody for investigative purposes, that the person suspected of prostitution or loitering for prostitution is under the age of eighteen (18), then the minor shall not be prosecuted for an offense under 529.020 or 529.080.”

### *I. Initial custody*

#### *a. Authority for initial custody*

A law enforcement officer may take a minor into custody under the same rules that allow for any public offender to be taken into custody, which include with a warrant or “without a warrant when a misdemeanor as defined in KRS § 431.060 [Felonies, misdemeanors, and violations defined], has been committed in his presence.” Ky. Rev. Stat. Ann. § 610.190(1), § 431.005(1)(a), (d). If the domestic minor sex trafficking victim is taken into custody for a crime, first, the court will determine how the minor will be adjudicated under Ky. Rev. Stat. Ann. § 635.020(1) (Criteria for determining how child is to be tried), which provides that if reasonable cause exists to believe a minor committed a felony (with certain exceptions, one of which is related to prior felonies) or a misdemeanor, the court should proceed with the public offender provisions. This custody is only termed an “arrest” when the court decides to try the minor as an adult.

#### *b. Placement*

The detention of a potential public offender is allowed following adjudication, as well as before disposition if the court finds, “by a preponderance of the evidence that the circumstances surrounding the child are such as to endanger his safety or welfare or that of the community.” Ky. Rev. Stat. Ann. § 635.050.

### *II. Process following initial custody*

Where a commercially sexually exploited minor enters the juvenile justice system as a “public offender” for committing a crime other than prostitution or a status offense, the minor may still be able to access a protective response through the Cabinet for Health and Family Services. Ky. Rev. Stat. Ann. § 15A.068(1) (Duties of department if child may be victim of human trafficking – administrative regulations) states,

If, during the course of screening, assessing, or providing services to a child committed to or in the custody of the department, there is reasonable cause to believe that the child is a victim of human trafficking as defined in KRS 529.010, the department shall:

- (a) File a report with the Cabinet for Health and Family Services pursuant to KRS 620.030;
- (b) Notify the child's attorney that the child may be a victim of human trafficking; and
- (c) If the child does not pose a threat to public safety, petition the court to transfer custody from the department to the Cabinet for Health and Family Services.

If a child is not identified as a DMST victim, then under Ky. Rev. Stat. Ann. § 610.200 (Duties of peace officer), the peace officer shall inform the child of his rights, and notify the parent, guardian, or custodian of the child of the child's procedural rights as well as the nature of the charges.

Ky. Rev. Stat. Ann. § 610.030 (Preliminary inquiry procedures) provides that once a person has filed a complaint about a juvenile alleged to be a public offender, “the court-designated worker shall refer the complaint to the county attorney for review pursuant to KRS 635.010 . . . . If after review the county attorney elects to proceed, the court-designated worker shall conduct a preliminary intake inquiry to recommend whether the interests of the child or the public require that further action be taken or whether, in the interest of justice, the complaint can be resolved informally without the filing of a petition.” Ky. Rev. Stat. Ann. § 610.030(2). If the complaint filed alleges that the juvenile is a status offender, “the court-designated worker shall conduct a preliminary intake inquiry to determine whether the interests of the child or the public require that further action be taken.” Ky. Rev. Stat. Ann. § 610.030(3).

Pursuant to Ky. Rev. Stat. Ann. § 610.030(6), once the court-designated worker makes the preliminary intake inquiry, then he or she may:

- (a) If the complaint alleges a status offense, determine that no further action be taken subject to review by the family accountability, intervention, and response team;
- (b) If the complaint alleges a public offense, refer the complaint to the county attorney;
- (c) Refer a public offense complaint for informal adjustment; or
- (d) Based upon the results of the preliminary intake inquiry, other information obtained, and a determination that the interests of the child and the public would be better served, and with the written approval of the county attorney for a public offense complaint, if necessary, conduct a formal conference and enter into a diversion agreement;

The authority to proceed does not lie solely with the court worker, however: “At any stage in the proceedings described in this section, the court or the county attorney may review any decision of the court-designated worker. The court upon its own motion or upon written request of the county attorney may refer any complaint for a formal hearing.” Ky. Rev. Stat. Ann. § 610.030(11).

### *III. Placement process pending adjudication/investigation*

Under circumstances where a child continues in the juvenile justice process, under most circumstances the child will initially be released. Ky. Rev. Stat. Ann. § 610.200 (Duties of peace officer) requires:

....

(3) Unless the child is subject to trial as an adult or unless the nature of the offense or other circumstances are such as to indicate the necessity of retaining the child in custody, the officer shall release the child to the custody of his parent or if the child is committed, the Department of Juvenile Justice or the cabinet, as appropriate; or if the parent is not available, then a relative, guardian, or person exercising custodial control or supervision or other responsible person or agency approved by the court upon the written promise, signed by such person or agency, to bring the child to the court at a stated time or at such time as the court may order . . . .

....

(6) Unless the child is subject to trial as an adult, if the child is not released, the peace officer shall contact the court-designated worker who may:

- (a) Release the child to his parents;
- (b) Release the child to such other persons or organizations as are authorized by law;
- (c) Release the child to either of the above subject to stated conditions; or
- (d) Except as provided in subsection (7) of this section, authorize the peace officer to retain custody of the child for an additional period not to exceed twelve (12) hours during which the peace officer may transport the child to a secure juvenile detention facility or a nonsecure facility. If the child is



- retained in custody, the court-designated worker shall give notice to the child's parents or person exercising custodial control or supervision of the fact that the child is being retained in custody.
- (7) (a) Except as provided in paragraph (b) of this subsection, no child ten (10) years of age or under shall be taken to or placed in a juvenile detention facility.
- (b) Any child ten (10) years of age or under who has been charged with the commission of a capital offense or with an offense designated as a Class A or Class B felony may be taken to or placed in a secure juvenile detention facility or youth alternative center when there is no available less restrictive alternative.

#### *IV. Adjudication or referral to alternate process*

At the hearing phase, Ky. Rev. Stat. Ann. § 610.070 (Hearings) requires that hearings be speedy, and are conducted without a jury, in a formal procedure. Only immediate family, necessary witnesses, representatives of government agencies, or those approved by the child and his lawyer may be present.

Ky. Rev. Stat. Ann. § 620.140(1)(a) (Dispositional alternatives) states that the disposition of a case must be “in the best interest of the child,” and such a disposition may include “an informal adjustment of the case.”

Procedures for informal adjustments are provided in Ky. Rev. Stat. Ann. § 610.105 (Informal adjustment permissible at any time with notice to parties), which states,

- (1) Upon the court's motion or the motion of any party, following notice to the county attorney, an informal adjustment may be made at any time during the proceedings and with the victim and with those persons specified in KRS 610.070 having prior notification of the motion.
- (2) An informal adjustment does not require adjudication of the case. If an adjudication has occurred, the court shall dismiss the case following successful completion under subsection (3) of this section.
- (3) If the court orders an informal adjustment, the order may include any of the following:
  - (a) Referral of the case to diversion, but, if the child does not successfully complete the terms of the diversion, the case shall not be dismissed as a result of the diversion but shall be returned to court; or
  - (b) Placement of the child on community supervision or monitoring by the court under the informal adjustment with additional conditions as determined appropriate by the court for a period not to exceed six (6) months.

#### *V. Outcomes*

When the dispositional hearing occurs for a public offender, the court has several options available and may “impose any combination of the following, except that the court shall, if a validated risk and needs assessment tool is available, consider the validated risk and needs assessment submitted to the court and parties by the Department of Juvenile Justice or other agency before imposing any disposition” pursuant to Ky. Rev. Stat. Ann. § 635.060 (Options of court at dispositional hearing). These options are available if the court finds that the minor is a public offender, including:

....

- (2) (a) Place the child:
  1. Under parental supervision in the child's own home or in a suitable home or boarding home, upon the conditions that the court shall determine, or
  2. On probation under conditions that the court shall determine.

- ....
- (3) (a) If the child was adjudicated for an offense other than an offense that would be a violation if committed by an adult, order the child confined in an approved secure detention facility or detention program, as authorized by KRS Chapter 15A, as follows:
1. If the child is fourteen (14) years of age but less than sixteen (16) years of age, the child may be confined for a period of time not to exceed forty-five (45) days; or
  2. If the child is sixteen (16) years of age or older, the child may be confined for a period of time not to exceed ninety (90) days.
- (b) The Department of Juvenile Justice shall pay for the confinement of children confined pursuant to this subsection in accordance with the statewide detention plan and administrative regulations implementing the plan;
- (4) (a) Order the child to be committed or recommitted to the custody of the Department of Juvenile Justice, grant guardianship to a child-caring facility or a child-placing agency authorized to care for the child, or place the child under the custody and supervision of a suitable person if:
1. The child was adjudicated for an offense that would be a misdemeanor or Class D felony if committed by an adult and the child has at least three (3) prior adjudications, excluding prior adjudications of offenses designated as a violation, or at least four (4) prior adjudications of violations, which do not arise from the same course of conduct; or
  2. The child was adjudicated for an offense involving a deadly weapon, an offense in which the child has been declared a juvenile sexual offender under KRS 635.510, or an offense that would be a felony offense if committed by an adult, other than a Class D felony.
- (b) The commitment shall be for the following term, subject to KRS 635.070 and the power of the court to terminate the order and discharge the child prior thereto:
1. If the child was adjudicated for an offense that would be a misdemeanor if committed by an adult, other than an offense for which a child has been declared a juvenile sex offender under KRS 635.510 or an offense involving a deadly weapon, the child may be committed for a period not to exceed twelve (12) months, including all time spent in the treatment plan established pursuant to Section 5 of this Act;
  2. If the child was adjudicated for an offense that would be a Class D felony if committed by an adult, other than an offense for which a child has been declared a juvenile sex offender under KRS 635.510 or an offense involving a deadly weapon, the child may be committed for a period not to exceed eighteen (18) months, including all time spent in the treatment plan established pursuant to Section 5 of this Act;
  3. If the child was adjudicated for an offense that would be a felony offense if committed by an adult, other than a Class D felony offense, or an offense involving a deadly weapon, the child may be committed up to age eighteen (18);
  4. If the child was adjudicated for an offense that results in the child being declared a juvenile sexual offender, the commitment shall be as provided in KRS 635.515;
  5. The court, in its discretion, upon motion by the child and with the concurrence of the Department of Juvenile Justice, may authorize an extension of commitment up to age twenty-one (21) to permit the Department of Juvenile Justice to assist the child in establishing independent living arrangements; and
  6. If a child is committed after the child reaches the age of seventeen (17) years and six (6) months, and except as provided in subparagraph 4. of this paragraph, the commitment shall be for a period not to exceed one (1) year.
- (c) The Department of Juvenile Justice shall:
1. Accept physical custody of a child who is detained in an approved secure juvenile detention facility-in accordance with KRS 15A.200 to 15A.240 at the time the child is committed or recommitted to the custody of the Department of Juvenile Justice. The Department of Juvenile Justice shall-remove the child from the approved secure juvenile detention facility and secure

- appropriate placement as soon as possible but not to exceed thirty-five (35) days of the time of commitment or recommitment; and
2. Pay for the cost of detention from the date of commitment or recommitment, on the current charge, until the child is removed from the detention facility and placed.
- (d) All orders of commitment may include advisory recommendations the court may deem proper in the best interests of the child and of the public or
- (5) (a) The court may probate or suspend a commitment ordered pursuant to subsection (4) of this section, except that if a court probates or suspends a commitment in conjunction with any other dispositional alternative, that fact shall be explained to the juvenile and contained in a written order.
- (b) Any probation or suspension imposed shall not exceed the time limitations established under subsection (2) of this section.
- (c) If the child successfully completes the conditions of probation, the court shall terminate the case.
- (d) 1. The court may, for violations of the conditions of probation, revoke the probation or suspension ordered under this section and order the child committed.
2. The period of the commitment shall not exceed the terms established under subsection (4) of this section.
3. Any time a child has spent in out-of-home placement as a result of a violation of a condition of probation or suspension under this section shall be credited toward the period of commitment.
4. If a commitment is probated or suspended after a child reaches the age of seventeen (17) years and six (6) months, the period of the suspension, and commitment if revoked, shall be for a period not to exceed one (1) year, but not to exceed age nineteen (19).

As a public offender, a minor could potentially receive imposition of a fine up to \$250 for committing a misdemeanor. Ky. Rev. Stat. Ann. § 635.085(1)(b).

#### 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*<sup>43</sup>

Although child sex trafficking is not expressly identified as a type of abuse and neglect within Kentucky's child protection statutes, Kentucky law specifically allows for protective services intervention in domestic minor sex trafficking cases. Pursuant to Ky. Rev. Stat. § 620.029(1) (Duties of cabinet relating to children who are victims of human trafficking),

In order to provide the most effective treatment for children who are victims of human trafficking, as defined in KRS 529.010, the cabinet shall:

- (a) Investigate a report alleging a child is a victim of human trafficking pursuant to KRS 620.030(3);
- (b) Provide or ensure the provision of appropriate treatment, housing, and services consistent with the status of the child as a victim of human trafficking; and
- (c) Proceed in the case in accordance with applicable statutes governing cases involving dependency,<sup>44</sup> neglect, or abuse regardless of whether the person believed to have caused the human trafficking of the child is a parent, guardian, or person exercising custodial control or supervision.

<sup>43</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>44</sup> Under Ky. Rev. Stat. Ann. § 600.020(20), "dependent child" is defined as "any child, other than an abused or neglected child, who is under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child."

Ky. Rev. Stat. Ann. § 620.040 (1)(a) (Duties of prosecutor, police, and cabinet – Prohibition as to school personnel – Multidisciplinary teams) authorizes intervention “Upon receipt of a report alleging abuse or neglect by a parent, guardian, or person exercising custodial control or supervision, pursuant to KRS 620.030(1) or (2), or a report alleging a child is a victim of human trafficking.” “Victim of human trafficking,” is defined to mean, “a person who has been subjected to human trafficking.” Ky. Rev. Stat. Ann. § 529.010(13).

Further, commercial sexual exploitation is a type of abuse and neglect in the Juvenile Code. Under Ky. Rev. Stat. Ann. § 600.020(1)(b), an “abused or neglected child” includes

a child whose health or welfare is harmed or threatened with harm when . . . [a] person twenty-one (21) years of age or older commits or allows to be committed an act of sexual abuse,<sup>45</sup> sexual exploitation, or prostitution upon a child less than sixteen (16) years of age.

Under Ky. Rev. Stat. Ann. § 600.020(1)(a), the definition of an “abused or neglected child” also covers a child whose

parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:

....

5. Commits or allows to be committed an act of sexual abuse,<sup>46</sup> sexual exploitation, or prostitution upon the child;

6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;

....

Under Ky. Rev. Stat. Ann. § 600.020(61), “Sexual exploitation” is further defined as behavior that

includes but is not limited to a situation in which a parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045,<sup>47</sup> or other person having custodial control or supervision of a child or responsible for his or her welfare, allows, permits, or encourages the child to engage in an act which constitutes prostitution under Kentucky law; or a parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person having custodial control or supervision of a child or responsible for his or her welfare, allows, permits, or encourages the child to engage in an act of obscene or pornographic photographing, filming, or depicting of a child as provided for under Kentucky law;

*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.*

Kentucky’s definitions of “caregiver” and related terms are not barriers to a sex trafficked child accessing the protection of child welfare. When the Cabinet for Health and Family Services receives a report that a child is a

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<sup>45</sup> “Sexual abuse” includes, but is not necessarily limited to, any contacts or interactions in which the parent, guardian, person in a position of authority or special trust . . . or other person having custodial control or supervision of the child or responsibility for his or her welfare, uses or allows, permits, or encourages the use of the child for the purposes of the sexual stimulation of the perpetrator or another person. Ky. Rev. Stat. Ann. § 600.020(60).

<sup>46</sup> See *supra* note 36.

<sup>47</sup> See *supra* note 3.

victim of human trafficking, the child's case must proceed as abused, neglected or dependent regardless of whether the abuser is a parent or guardian of the child. Pursuant to Ky. Rev. Stat. § 620.029(1)(c) (Duties of cabinet relating to children who are victims of human trafficking), "the cabinet shall . . . [p]roceed in the case in accordance with applicable statutes governing cases involving dependency, neglect, or abuse regardless of whether the person believed to have caused the human trafficking of the child is a parent, guardian, or person exercising custodial control or supervision."

Additionally, if not identified a victim of human trafficking, a victim of trafficking who is under 16 years old and is commercially sexually exploited by someone over the age of 21 is likely to receive assistance from the Cabinet for Health and Family Services based on the definition of abuse under Ky. Rev. Stat. Ann. § 600.020(1)(b)<sup>48</sup> (Definitions for KRS Chapters 600 to 645), which includes "[a] person twenty-one (21) years of age or older [who] commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon a child less than sixteen (16) years of age." This broadens the jurisdictional scope of abuse cases beyond abuse which occurs at the fault of a parent, guardian, household member, or person of authority or trust to include instances of non-familial trafficking.

Further, in defining "abused or neglected child," Ky. Rev. Stat. Ann. § 600.020(1)(a) refers to a "person in a position of authority or special trust, as defined in KRS 532.045 [Persons prohibited from probation or post incarceration supervision – procedure when probation or post incarceration supervision not prohibited]." Ky. Rev. Stat. Ann. § 532.045(a) (Persons prohibited from probation or postincarceration supervision – Procedure when probation or postincarceration supervision not prohibited) defines "position of authority" to include "the position occupied by . . . a household member" and § 532.045(b) defines "position of special trust" as "a position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor." These definitions are also likely broad enough to include instances of non-familial trafficking.

#### 5.7 *Crime victims' compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC).*

For the purposes of crime victims' compensation, "victim" is defined as "a needy person who suffers personal physical or psychological injury or death from a criminal act in Kentucky as a result of: 1. Criminally injurious conduct . . . ." Ky. Rev. Stat. Ann. § 346.020(6)(a). "Criminally injurious conduct" has a broad definition and includes "conduct that occurs or is attempted in this jurisdiction, poses a substantial threat of personal physical, psychological injury, or death, and is punishable by fine, imprisonment, or death." Ky. Rev. Stat. Ann. § 346.020(4). As all crimes related to commercial sexual exploitation of children have some form of fine or imprisonment, these crimes are "criminally injurious conduct," and a victim of these crimes is a victim for the purpose of victims' compensation funds.

Few barriers to recovery by domestic minor sex trafficking victims are evident in the crime victims' compensation statutes. Ky. Rev. Stat. Ann. § 346.020, et seq. Even if the commercially sexually exploited minor was living with the trafficker, she is still eligible for recovery because "[n]o victim or dependent shall be denied compensation solely because he is a relative of the offender or was living with the offender as a family or household member at the time of the injury or death. However, the board may award compensation to a victim or dependent who is a relative, family or household member of the offender only if the board can reasonably determine the offender will not receive significant economic benefit or unjust enrichment from the compensation." Ky. Rev. Stat. Ann. § 346.050(2). A crime victim has five years from the date of the injurious

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<sup>48</sup> See *supra* note 36.

criminal conduct to file a claim for victim compensation, except “that upon good cause shown, the board may extend the time for filing if, in a particular case, the interest of justice so requires.” Ky. Rev. Stat. Ann. § 346.060(2).

One potential barrier to recovery of victim compensation for victims of domestic minor sex trafficking lies in the potential ineligibility of a victim who “because of his or her conduct, . . . contributed to the infliction of the victim’s injury.” Ky. Rev. Stat. Ann. § 346.140(2). If the victim is found to have contributed to the injury, then the claim may be reduced or rejected. Ky. Rev. Stat. Ann. § 346.140(2). Furthermore, if it is found that the claimant will not “suffer serious financial hardship if not granted financial assistance,” then the victim will be denied compensation. Ky. Rev. Stat. Ann. § 346.140(3). Another potential ineligibility can stem from a delay in reporting the injury to police. Ky. Rev. Stat. Ann. § 346.130(1)(c) (Awards, findings, and amounts) states, in part, “in no case may an award be made where the police or court records show that such report was made more than forty-eight (48) hours after the occurrence of such crime unless the board, for good cause shown, finds the delay to have been justified.” Lastly, “[e]xcept for claims related to sexual assault or domestic violence, the board upon finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies shall deny, reconsider, or reduce an award.” Ky. Rev. Stat. Ann. § 346.130(2).

5.7.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 346.060(2) (Application for award) to stipulate an exception for child victims of Ky. Rev. Stat. Ann. § 529.100 (Human trafficking), § 529.110 (Promoting human trafficking), § 529.040 (Promoting prostitution), § 531.310 (Use of a minor in a sexual performance), § 531.320 (Promoting a sexual performance by a minor), and § 530.070 (Unlawful transaction with minor in the third degree) (in which prostitution is the transaction) in recognition of the challenges these victims face through trauma-bonding, denial, and delayed disclosure.

5.7.2 Recommendation: Amend Ky. Rev. Stat. Ann. § 346.130(2) (Awards, findings, and amounts) to explicitly include victims of human trafficking along with victims of sexual assault and domestic violence.

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

Kentucky Rules of Evidence (KRE) § 412, which applies to “any civil or criminal proceeding involving alleged sexual misconduct.” KRE § 412(a). Under this statute, in both civil and criminal proceedings generally, “Evidence offered to prove that any alleged victim engaged in other sexual behavior” and “[e]vidence offered to prove any alleged victim’s sexual predisposition” is inadmissible with certain exceptions. KRE § 412. However, in the case of a prosecution of a trafficker for promoting prostitution under Ky. Rev. Stat. Ann. § 529.040 (Promoting prostitution), one may not be convicted of promoting prostitution “solely on the uncorroborated testimony of a person whose prostitution activity he is alleged to have advanced or from whose prostitution activity he is alleged to have profited,” making a child victim’s testimony potentially insufficient to convict her trafficker. Ky. Rev. Stat. Ann. § 529.060(2).

Pursuant to Ky. Rev. Stat. Ann. § 421.350(1) (Testimony of child allegedly victim of illegal sexual activity), certain protections are given to child victim-witnesses under the age of 12 in prosecutorial proceedings:

under KRS 510.040 [Rape in the first degree] to 510.155 [including all degrees of rape, sodomy, sexual abuse, indecent exposure, and unlawful use of electronic means], 529.030 [Promoting prostitution in the

first degree] to 529.050 [Promoting prostitution],<sup>49</sup> 529.070 [Permitting prostitution], 529.100 [Human trafficking], 529.110 [Promoting human trafficking], 530.020 [Incest], 530.060 [Endangering welfare of a minor], 530.064(1)(a) [Unlawful transaction with a minor in the first degree], 531.310 [Use of a minor in a sexual performance], 531.320 [Promoting a sexual performance by a minor], 531.370 [Using minors to distribute material portraying a sexual performance], or any specified in KRS 439.3401 [includes human trafficking] and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection.

These protections include, under particular circumstances and showing of compelling need,<sup>50</sup> closed circuit testimony that allows the defendant to “observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.” Ky. Rev. Stat. Ann. § 421.350(2). The court may also order that a child’s testimony be recorded out of court for use in trial with the defendant able to listen and observe but not be seen or heard by the child. Ky. Rev. Stat. Ann. § 421.350(3). The recording must be “both visual and oral” and the defendant must be “afforded an opportunity to view the recording before it is shown in the courtroom.” Ky. Rev. Stat. Ann. § 421.350(3)(a), (d).

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.*

Juvenile sex trafficking victims can avoid adjudication for prostitution offenses,<sup>51</sup> and records related to their trafficking victimization can be expunged. Ky. Rev. Stat. Ann. § 610.330(1) (Expungement of juvenile court records) states in part,

Any child who has been adjudicated as coming within the purview of KRS Chapters 630, 635 (with regard to status offenses, misdemeanors, or violations only), or 645, but not KRS Chapters 620 or 640, may petition the court for the expungement of his or her juvenile court record, except for adjudications involving guilt of an offense which would have been a felony if the offense was committed by an adult.

The minor must petition no sooner than “two (2) years after the date of termination of the court’s jurisdiction over the person, or two (2) years after his or her unconditional release from commitment to the Department of Juvenile Justice . . .” Ky. Rev. Stat. Ann. § 610.330(1). However, “the two (2) year period may be waived if the court finds that such extraordinary circumstances exist with regard to the petitioner as to make the waiver advisable.” Ky. Rev. Stat. Ann. § 610.330(1).

Moreover, Ky. Rev. Stat. Ann. § 529.160 (Expungement of records relating to violation of chapter when person charged or convicted was a victim of human trafficking at time of offense – Motion – Finding – Presumption)

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<sup>49</sup> Ky. Rev. Stat. Ann. § 529.030 (Promoting prostitution in the first degree) and 529.050 (Promoting prostitution in the second and third degree) were repealed on June 26, 2007. Ky. Rev. Stat. § 529.040 (Promoting prostitution) is the one offense included in this provision range.

<sup>50</sup> “[C]ompelling need” is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant’s presence.” Ky. Rev. Stat. Ann. § 421.350(5).

<sup>51</sup> Ky. Rev. Stat. Ann. § 529.120 (Treatment of minor suspected of prostitution offense), provides that “if it is determined after a reasonable period of custody for investigative purposes, that the person suspected of prostitution or loitering for prostitution is under the age of eighteen (18) then the minor shall not be prosecuted for § 529.020 or § 529.080.”

allows expungement of non-violent offenses committed as a result of trafficking victimization. Motions to the court may be made in the court in which the charges were originally filed to expunge all records of offenses charged and convicted under chapter 529 (Prostitution offenses) “or with an offense which is not a violent crime as defined in KRS 17.165,” provided that, “the person’s participation in the offense is determined to be the direct result of being a victim of human trafficking . . . .” Ky. Rev. Stat. Ann. § 529.160(1).

Ky. Rev. Stat. Ann. § 529.160(2), (3) further provides,

(2) The motion shall be filed no sooner than sixty (60) days following the date the final judgment was entered by the court in which the charges were filed.

(3) (a) A motion filed under this section, any hearing conducted on the motion, and any relief granted, are governed by KRS 431.076 [Expungement of criminal records for those found not guilty of crimes, for whom charges have been dismissed with prejudice, or against whom charges have been dismissed with prejudice, or against whom charges have not resulted in an indictment], 431.078 [Expungement of misdemeanor, violation, and traffic infraction records of convictions and dismissed or amended charges], and 431.079 [Petition or application seeking expungement to include certification of eligibility for expungement from Department of Kentucky State Police and Administrative Office of the Courts – Administrative Regulations] unless otherwise provided in this section.

(b) For the purposes of expungement under KRS 431.076, a finding by the court that the person’s participation in the offense was a direct result of being a victim of human trafficking shall deem the charges as dismissed with prejudice.

(c) No official determination or documentation is required to find that the person’s participation in the offense was a direct result of being a victim of human trafficking, but documentation from a federal, state, local, or tribal governmental agency indicating that the defendant was a victim at the time of the offense shall create a presumption that the defendant’s participation in the offense was a direct result of being a victim.

While Ky. Rev. Stat. Ann. § 529.160 allows for the expungement of criminal convictions without a waiting period, it does not appear to apply to delinquency adjudications.

5.9.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 529.160 (Expungement of records relating to violation of chapter when person charged or convicted was a victim of human trafficking at time of offense – Motion – Finding – Presumption) to specifically permit trafficking victims to file a motion to expunge records related to their victimization.

#### 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.*

Ky. Rev. Stat. Ann. § 532.032 (Restitution) generally allows restitution to victims by stating that “[r]estitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section . . . .” *Fields v. Commonwealth*, 123 S.W.3d 914, 916 (Ky. Ct. App. 2003) also confirms that “under this statute restitution must now be considered during sentencing in all appropriate cases, and therefore that the General Assembly contemplated ordinary sentencing procedures as the foundation for restitutionary sentences . . . .” Ky. Rev. Stat. Ann. § 532.356(1) (Reimbursement and restitution as additional sanctions – Ineligibility to operate motor vehicle upon conviction of certain theft, fraud, and organized crime offenses) states in part, “Upon a person’s conviction and sentencing for any nonstatus juvenile offense, moving traffic violation, criminal violation, misdemeanor, or Class D felony offense, and, for the purposes of paragraph



(b) of this subsection, any Class C felony offense listed in subsection (3)<sup>52</sup> of this section, the court shall impose the following sanctions in addition to any imprisonment, fine, court cost, or community service . . .” The provision goes on to list in paragraph (a) “[r]eimbursement to the state or local government” of certain incarceration and medical expenses and, in paragraph (b), “[r]estitution to the crime victim as set out in KRS 439.563, 532.032, and 532.033.” Therefore, for certain crimes related to domestic minor sex trafficking that are misdemeanors or Class D felonies, including Ky. Rev. Stat. Ann. § 529.040 (Promoting prostitution), § 530.070 (Unlawful transaction with a minor in the third degree), § 531.340 (Distribution of matter portraying a sexual performance by a minor), and § 531.350 (Promoting the sale of material portraying a sexual performance by a minor), the victim can receive restitution.

In the event a defendant is sentenced to only probation or conditional discharge, restitution is also set out pursuant to Ky. Rev. Stat. Ann. § 533.030(3) (Conditions of probation and conditional discharge – Restitution to victim):

[W]here the victim suffered actual medical expenses, direct out-of-pocket losses, or loss of earning as a direct result of the crime, or where the victim incurred expenses in relocating for the purpose of the victim’s safety or the safety of a member of the victim’s household . . . the court shall order the defendant to make restitution . . . . Restitution shall be ordered in the full amount of the damages, unless the damages exceed one hundred thousand dollars (\$100,000) or twice the amount of the gain from the commission of the offense, whichever is greater, in which case the higher of these two (2) amounts shall be awarded. The court may, in lieu of ordering monetary restitution, order the defendant to make restitution by working for or on behalf of the victim. Ky. Rev. Stat. Ann. § 533.030(3).

Under Ky. Rev. Stat. Ann. § 413.249(1)(a) (Action relating to childhood sexual abuse or childhood sexual assault), domestic minor sex trafficking victims may also bring civil cases for “childhood sexual assault,” which includes Ky. Rev. Stat. Ann. § 529.100 (Human trafficking). Specifically, “childhood sexual assault” for which civil cases may occur means “an act or series of acts against a person less than eighteen (18) years old and which meets the criteria defining a felony in KRS 510.040 [Rape in the first degree], 510.050 [Rape in the second degree], 510.060 [Rape in the third degree], 510.070 [Sodomy in the first degree], 510.080 [Sodomy in the second degree], 510.090 [Sodomy in the third degree], 510.110 [Sexual abuse in the first degree], 529.100 [Human trafficking] where the offense involves commercial sexual activity, 529.110 [Promoting human trafficking] where the offense involved commercial sexual activity, 530.020 [Incest], 530.064 [Unlawful transaction with a minor in the first degree], 531.310 [Use of a minor in a sexual performance], or 531.320 [Promoting a sexual performance by a minor].” Ky. Rev. Stat. Ann. § 413.249(1)(a).

*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.*

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<sup>52</sup> Ky. Rev. Stat. Ann. § 532.356(3) lists fraud, theft, and organized crime offenses: “1. KRS 434.650 [Fraudulent use – Presumption as to knowledge of revocation]; 2. KRS 434.655 [Fraudulent use of credit or debit card after reporting it lost, as stolen, or not received]; 3. KRS 434.660 [Fraud by authorized persons, business organization, or financial institution]; 4. KRS 434.670 [Failure to furnish goods, services, etc., represented in writing as furnished]; 5. KRS 434.690 [Receiving goods, services, etc., obtained by fraud – presumption as to possession of transportation tickets fraudulently obtained]; 6. KRS 514.030 [Theft by unlawful taking or disposition – Penalties]; 7. KRS 514.040 [Theft by deception]; 8. KRS 514.050 [Theft of property lost, mislaid, or delivered by mistake]; 9. KRS 514.060 [060 Theft of services]; 10. KRS 514.070 [070 Theft by failure to make required disposition of property]; 11. KRS 514.080 [Theft by extortion]; 12. KRS 514.090 [Theft of labor already rendered]; 13. KRS 514.110 [Receiving stolen property]; 14. KRS 514.120 [Obscuring identity of machine or other property]; or 15. KRS 506.120 [Engaging in organized crime].

Ky. Rev. Stat. Ann. § 500.050(1) (Time limitations) states, “Except as otherwise expressly provided, the prosecution of a felony is not subject to a period of limitation and may be commenced at any time.” If the crime charged is a misdemeanor, such as Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree), § 529.040(2) (Promoting prostitution of only one victim), § 529.070 (Permitting prostitution), and a first time offense of § 531.350 (Promoting sale of material portraying a sexual performance by a minor), the case must be brought within one year of the offense. Ky. Rev. Stat. Ann. § 500.050(2).

The statute of limitations to bring a civil case under Ky. Rev. Stat. Ann. § 413.249(2)(a) (Action relating to childhood sexual abuse or childhood sexual assault) expires within the longest of the following periods  
“(a) Within five (5) years of the commission of the act or the last of a series of acts by the same perpetrator; (b) Within five (5) years of the date the victim knew, or should have known, of the act; or (c) Within five (5) years after the victim attains the age of eighteen (18) years.”

**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 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.*

Under KRS 15.334, the Kentucky Law Enforcement Council “shall approve mandatory training subjects to be taught to all students attending a law enforcement basic training course that include but are not limited to:

- (a) Abuse, neglect, and exploitation;
- (b) Dynamics of domestic violence, pediatric abusive head trauma, child physical and sexual abuse, and rape . . . .
- . . . .
- (e) Characteristics and dynamics of human trafficking, state and federal laws relating to human trafficking, the investigation of cases involving human trafficking, including but not limited to screening for human trafficking, and resources for assistance to the victims of human trafficking.

In addition to this human trafficking specific training, under Ky. Rev. Stat. Ann. § 15.946 (In-service training for peace officers on child sexual abuse), “The Kentucky Law Enforcement Council shall provide an in-service training program for peace officers in child development, the dynamics of physical and sexual abuse, the impact of violence on child development, the treatment of offenders, and related issues. Each peace officer desiring to participate in the Kentucky Law Enforcement Foundation Fund program, if eligible to participate, shall successfully complete the in-service training.”

Also, certain other training related to child sexual abuse and victim protections is provided for law enforcement. Ky. Rev. Stat. Ann. § 15.942 (Training plan for investigation of child sexual abuse and protection of victims) states, “The Justice and Public Safety Cabinet, the Attorney General, the Administrative Office of the Courts, and the Cabinet for Health and Family Services shall develop a training plan for investigation of child sexual abuse cases and protection of child sexual abuse victims within the Commonwealth. They may seek assistance from any educational, legal, and mental and physical health-care professionals needed for implementation of training programs.”

Ky. Rev. Stat. Ann. § 15.900 (Definitions for KRS 15.910 to 15.940), which provides the definitions for Ky. Rev. Stat. Ann. §§ 15.910-15.940, defines “child sexual abuse and exploitation” for this section related to training as “harm to a child’s health or welfare by any person, responsible or not for the child’s health or

welfare, which harm occurs or is threatened through nonaccidental sexual contact which includes violations of KRS 510.040 [Rape in the first degree] to 510.150 [Indecent exposure in the second degree], 530.020 [Incest], 530.070 [Unlawful transaction with a minor in the third degree], 531.310 [Use of a minor in a sexual performance], 531.320 [Promoting a sexual performance by a minor], and 531.370 [Using minors to distribute material portraying a sexual performance by a minor].” Ky. Rev. Stat. Ann. § 15.900(2). These CSEC crimes and domestic minor sex trafficking-related crimes are included therefore in the training parameters.

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

Kentucky allows for single party consent to audiotaping. Eavesdropping is a crime defined as “to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other device.” Ky. Rev. Stat. Ann. §§ 526.010, 526.020.

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

Kentucky law prohibits wiretaps without exception. *Basham v. Commonwealth*, 675 S.W.2d 376, 379 (Ky. 1984), reemphasizes, “Kentucky has not enacted legislation authorizing electronic surveillance by state law enforcement officials. Such an operation by the Kentucky State Police, just as with any other person, is unlawful under the Kentucky statute prohibiting eavesdropping.” *Id.* *Basham* notes that the legislature has the prerogative “to exclude all use of evidence obtained by electronic surveillance or eavesdropping, wheresoever and however obtained. But we must resist the impulse to legislate an evidentiary exclusion that the legislation does not itself provide.” *Id.* at 381. The only way information from a wiretap may enter a state prosecution is if the prosecution uses information “obtained by federal officers conducting electronic surveillance in Kentucky pursuant to a federal wiretap order.”<sup>53</sup> *Id.*

- 6.3.1 Recommendation: Introduce an exception to the state wiretap prohibition to allow wiretaps and make resulting evidence admissible in investigations of domestic minor sex trafficking as a life-saving and harm prevention tool for law enforcement investigating these dangerous crimes.

## 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.*

Ky. Rev. Stat. Ann. § 510.155(1) (Unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities) specifically allows for the use of a law enforcement decoy when the defendant uses a computer to commit various sex offenses, sex trafficking and CSEC offenses. It states,

It shall be unlawful for any person to knowingly use a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief, for any activity in violation of KRS 510.040 [Rape in the first degree], 510.050 [Rape in the second degree], 510.060 [Rape in the third degree], 510.070 [Sodomy in the first degree], 510.080 [Sodomy in the second

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<sup>53</sup> See also *Howard v. Commonwealth*, 787 S.W.2d 264, 265 (Ky. App. Ct. 1989), which states, “In *Basham v. Commonwealth*, Ky., 675 S.W.2d 376 (1984), the Supreme Court ruled evidence obtained in a wiretap operation conducted by federal law enforcement officers in accordance with federal law and pursuant to a federal court order is admissible in state court proceedings absent collusion between the state and federal authorities to circumvent the state statute prohibiting wiretaps.”

degree], 510.090 [Sodomy in the third degree], 510.110 [Sexual abuse in the first degree], 529.100 [Human trafficking] where that offense involves commercial sexual activity, or 530.064(1)(a) [Unlawful transaction with a minor in the first degree], or KRS Chapter 531 [Pornography].

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

Law enforcement officers may use the Internet or electronic communications to investigate buyers and traffickers of domestic minor sex trafficking. Ky. Rev. Stat. Ann. § 510.155(1) (Unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities) states,

It shall be unlawful for any person to knowingly use a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief, for any activity in violation of KRS 510.040 [Rape in the first degree], 510.050 [Rape in the second degree], 510.060 [Rape in the third degree], 510.070 [Sodomy in the first degree], 510.080 [Sodomy in the second degree], 510.090 [Sodomy in the third degree], 510.110 [Sexual abuse in the first degree], 529.100 [Human trafficking] where that offense involves commercial sexual activity, or 530.064(1)(a) [Unlawful transaction with a minor in the first degree], or KRS Chapter 531 [Pornography].

6.6 *Law enforcement are mandated to promptly report missing and recovered children.*

Ky. Rev. Stat. Ann. § 17.450(1) (Kentucky Missing Child Information Center) establishes the “Kentucky Missing Child Information Center” in order to create a “central repository of and clearinghouse for information about Kentucky children believed to be missing and children from other states believed to be missing in Kentucky.” When law enforcement receives a report of a missing child, Ky. Rev. Stat. Ann. § 17.460(Procedure by law enforcement agency upon receipt of report of missing child – Transportation and return of child once located) requires the following:

1. Upon notification by a parent, guardian, person exercising custodial control or supervision, or the authorized representative of the Department for Community Based Services of the Cabinet for Health and Family Services if the child is a ward of the state, that a child is missing, the law enforcement agency receiving notification shall immediately complete a missing person’s report in a form prescribed by the Justice and Public Safety Cabinet which shall include information the Justice and Public Safety Cabinet deems necessary for the identification of the missing child, including the child’s physical description, last known location, and known associates.
2. Within twenty-four (24) hours after completion of the missing person’s report form, the law enforcement agency shall transmit the report for inclusion within the Kentucky Missing Child Information Center computer and shall cause the report to be entered into the National Crime Information Center computer.
3. Within twenty-four (24) hours thereafter, the law enforcement agency shall investigate the report, shall inform all appropriate law enforcement officers of the existence of the missing child report, and shall communicate the report to every other law enforcement agency having jurisdiction in the area.
- ....
5. Within twenty-four (24) hours after a missing child is located and returned to the appropriate caretaker pursuant to subsection (4) of this section, the law enforcement agency which transported, found, or returned the missing child shall notify both the Missing Child Information Center and the National Crime Information Center of that fact.

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