

PROTECTED INNOCENCE INITIATIVE

STATE ACTION. NATIONAL CHANGE.

ANALYSIS AND RECOMMENDATIONS KENTUCKY

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

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

Legal Analysis¹:

- 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, 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) 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, 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 is the crime of promoting human trafficking, which states in part, “(1) A person is guilty of promoting human trafficking when

¹ Unless otherwise specified, all references to Kentucky statutes were taken from the Kentucky Revised Statutes Annotated (LEXIS through 2010 1st Extraordinary Sess.) and all federal statutes were taken from United States Code (LEXIS through PL 112-54, approved 11/12/11).

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).² 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 and related definitions in Ky. Rev. Stat. Ann. § 529.010, the following laws criminalize CSEC in Kentucky:

1. Under Ky. Rev. Stat. Ann. § 531.310(1), “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), “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

² During the 2011 Regular Session, the Kentucky legislature passed House Bill 463, which, among other things, amended Ky. Rev. Stat. Ann. § 532.060(2) to state in part “Unless otherwise provided by law, the authorized maximum terms of imprisonment for felonies are” 2001 Ky. Acts 2, § 38.

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), “(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).

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. Ky. Rev. Stat. Ann. § 510.060(1)(b), (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 contact³ 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 CSEC or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.

Kentucky’s CSEC statutes do not refer to Ky. Rev. Stat. Ann. 529.100 (Human trafficking), even though “human trafficking” is defined in Ky. Rev. Stat. Ann. 529.010(5)(b) as including “subjecting a person to “[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, 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).

³ “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).

- 1.3.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 531.310 (Use of a minor in a sexual performance) and § 531.320 (Promoting a sexual performance by a minor) to refer to Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) to ensure CSEC victims are identified as sex trafficking victims.

FRAMEWORK ISSUE 2: CRIMINAL PROVISIONS ADDRESSING DEMAND

Legal Components:

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts with a victim of domestic minor sex trafficking.*
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under 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 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 are sufficiently high for all minors under 18 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 victim of domestic minor sex trafficking.*

It is possible that Kentucky's human trafficking statute under Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking) could apply to buyers of commercial sex with minors. Although it is unsettled, the word "obtain" in the federal TVPA has been used to apply the crime of human trafficking to attempted buyers of commercial sex with minors.⁴

Ky. Rev. Stat. Ann. § 529.100 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). 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." Ky. Rev. Stat. Ann. § 529.010(5)(b). Since "commercial sexual activity" is defined as including "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).

⁴ See, e.g., Indictment at 1, United States v. Oflyng, No. 09-00084-01-CR-W-SOW (W.D. Mo. March 10, 2009); see also News Release, U.S. Department of Justice, Office of the United States Attorney for the Western District of Missouri, Human Trafficking Rescue Project, Operation Guardian Angel, Final Defendant Pleads Guilty to Sex Trafficking of a Child, (December 18, 2009), <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm>.

- 2.1.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) to clarify that the statute applies to buyers of commercial sex with minors.

2.2 *Buyers of commercial sex acts with a minor can be prosecuted under 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).

- 2.2.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree) to refer to Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) and Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking) when the unlawful transaction is a “commercial sexual act” as defined in Ky. Rev. Stat. Ann. § 529.010(2).

- 2.2.2 Recommendation: Remove the exception for commercial sexual activity in Ky. Rev. Stat. Ann. § 530.064(1).

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 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. §§ 530.090(1), 534.040(2)(a).

- 2.3.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 506.030 (Criminal solicitation) in cases in which the buying of sex with a minor is involved and Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree), when the unlawful transaction is “commercial sexual activity” as defined in Ky. Rev. Stat. Ann. § 529.010(2), so that both statutes refer to Ky. Rev. Stat. Ann. § 529.100 (Human trafficking).

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

If the human trafficking statute can be applied to a buyer, then 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)⁵ 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 offense⁶ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,⁷ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.⁸

2.4.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) to include the term “purchase” and clarify that the statute applies to buyers of commercial sex with minors.

2.5 Using the Internet 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

⁵ 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).

⁶ 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).

⁷ 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).

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

pursuant to Ky. Rev. Stat. Ann. § 529.100 “where that offense involves commercial sexual activity” or Ky. Rev. Stat. Ann. Chapter 531 (pornography). 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).

2.5.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 510.155 to include the crimes of Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree) in order to include buyers of commercial sex with minors.

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

Ky. Rev. Stat. Ann. § 531.330(1) (Presumption as to minority) states that for certain offenses, including Ky. Rev. Stat. Ann. § 529.100, if the offense involves commercial sexual activity, “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.” However, Ky. Rev. Stat. Ann. § 531.330(2) states that “the defendant may prove in exculpation that he in good faith reasonably believed that the person involved in the performance was not a minor.” Finally, Ky. Rev. Stat. Ann. § 531.330(3) states, “The presumption raised in subsection (1) of this section may be rebutted by any competent evidence.”

Mistake of age is also a defense in the non-commercial sexual offense statutes. Ky. Rev. Stat. Ann. § 510.030 (Defenses) states,

In any prosecution under this chapter [Chapter 510 (Sexual Offenses)] in which the victim’s lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old, mentally retarded, mentally incapacitated or physically helpless, the defendant may prove in exculpation that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent.

2.6.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 531.330(2) (Presumption as to minority) to state that in cases of human trafficking, the defendant’s good faith belief may not be based solely on the minor victim’s oral assertions or apparent age.

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

Kentucky’s human trafficking law does not provide graduated punishments for buying sex with a minor based on the age of the minor involved, but some of the commercial sexual exploitation of children laws do stagger punishments based on the minor’s age. A minor is defined as “any person who has not reached the age of majority as defined in KRS § 2.015,” which is 18. Ky. Rev. Stat. Ann. §§ 500.080(9), 2.015.

When the victim is under 18, human trafficking is a Class B felony or a Class A felony if the victim suffers a “serious physical injury” pursuant to Ky. Rev. Stat. Ann. § 529.100(2)(a), (b). However, unlawful transaction with a minor in the third degree is just a Class A misdemeanor pursuant to Ky. Rev. Stat. Ann. § 530.070(2), allowing buyers of sex with a minor to receive relatively inconsequential penalties of imprisonment up to 1 year, a fine up to \$500, or both. Ky. Rev. Stat. Ann. §§ 532.090(1), 534.040(2)(a).

Some of the laws against CSEC crimes do stagger punishments based on the age of the minor. Under Ky. Rev. Stat. Ann. § 531.310 (Use of a minor in a sexual performance), if the victim is under 18, the crime is a Class C felony. Ky. Rev. Stat. Ann. § 531.310(2)(a). If the victim is under 16, however, the crime is a Class B felony.

Ky. Rev. Stat. Ann. § 531.310(2)(b). Likewise, under Ky. Rev. Stat. Ann. § 531.320 (Promoting a sexual performance by a minor), if the victim is under 18, the crime is a Class C felony. Ky. Rev. Stat. Ann. § 531.320(2)(a). If the victim is under 16, however, the crime is a Class B felony. Ky. Rev. Stat. Ann. § 531.320(2)(b).

- 2.7.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree) to refer to Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) when the unlawful transaction is “commercial sexual activity” as defined in Ky. Rev. Stat. Ann. § 529.010(2) in order to ensure sufficiently high penalties for buyers of sex with minors.
- 2.7.2 Recommendation: Amend Ky. Rev. Stat. Ann. § 531.310 (Use of a minor in a sexual performance) and Ky. Rev. Stat. Ann. § 531.320 (Promoting a sexual performance by a minor) to increase penalties for offenses against older minors in order to bring adequate protection to all minors under 18.

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.*

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) states,

(3) 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 Web site or instant messaging or chat room program accessible by minors].
- (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 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). Notably absent from the list of crimes permitting forfeiture in Ky. Rev. Stat. Ann. § 500.092(3) are the crimes of human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.100, promoting human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.110, and promoting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.040.

Ky. Rev. Stat. Ann. § 532.032 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) 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, which applies to buyers of commercial sex with minors.

2.8.1 Recommendation: Add mandatory restitution to Ky. Rev. Stat. Ann. § 529.100 (Human trafficking), Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking), Ky. Rev. Stat. Ann. § 531.310 (Use of a minor in a sexual performance), and Ky. Rev. Stat. Ann. § 531.320 (Promoting a sexual performance by a minor).

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

Ky. Rev. Stat. Ann. § 531.335(1) (Possession 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 performance⁹ 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.” 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).

In comparison, a federal conviction for possession of child pornography¹⁰ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.¹¹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.¹²

⁹ “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).

¹⁰ 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).

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, 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;¹³ 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,

(3)(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;
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.

¹¹ 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).

¹² 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).

¹³ “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;”

(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.

2.10.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 17.500 to include a violation of Ky. Rev. Stat. Ann. § 530.70 (Unlawful transaction with a minor in the third degree) as a “criminal offense against a victim who is a minor” requiring sex offender registration if the offense involves commercial sexual activity with a minor.

FRAMEWORK ISSUE 3: CRIMINAL PROVISIONS FOR TRAFFICKERS

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 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 CSEC offenses in order to remove the children of traffickers from their control and potential exploitation.*

Legal Analysis:

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

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 advances¹⁴ or profits from prostitution.” Under

¹⁴ “A person ‘advances prostitution’ when acting other than as a prostitute or as a patron thereof, he knowingly causes or aids a person to engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution

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).

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)¹⁵ 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 offense¹⁶ against a minor.

- 3.1.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 529.040(2) (Promoting prostitution) to refer to Ky. Rev. Stat. Ann. § 529.100 (Human trafficking) to ensure that prostitution of a minor is properly classified as a sex trafficking case with its appropriately higher penalties.

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).

¹⁵ See *supra* note 5.

¹⁶ See *supra* note 6.

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)¹⁷ and Ky. Rev. Stat. Ann. § 531.320 (Promoting¹⁸ 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 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 offense¹⁹ against a minor. Additionally, a federal conviction for distribution of child pornography²⁰

¹⁷ “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.*

¹⁸ “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).

¹⁹ See *supra* note 6.

is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.²¹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.²²

3.3 *Using the Internet 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.” 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).

- 3.3.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 510.155 to include the crimes of promoting human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.110, promoting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.040(2), and promoting a sexual performance by a minor pursuant to Ky. Rev. Stat. Ann. § 531.320 as predicate crimes for the offense of “[u]nlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities” under Ky. Rev. Stat. Ann. § 510.155(1).

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

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 may be subject to asset forfeiture if convicted of certain offenses. Ky. Rev. Stat. Ann. § 500.092(3) allows asset forfeiture for the following crimes:

²⁰ 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).

²¹ 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).

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

- (a) KRS 17.546 [Registrant prohibited from using social networking Web site or instant messaging or chat room program accessible by minors].
- (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 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 this statute, 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). Notably absent from the list of crimes permitting forfeiture in Ky. Rev. Stat. Ann. § 500.092(3) are the crimes of human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.100, promoting human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.110, and promoting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.040.

Additionally, a trafficker 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 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 court could require a trafficker to pay restitution. Ky. Rev. Stat. Ann. § 532.032 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) 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.”

- 3.4.1 Recommendation: Add the crimes of human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.100, promoting human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.110, and promoting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.040 to the list of crimes allowing asset forfeiture under Ky. Rev. Stat. Ann. § 500.092(3).

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;²³ 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,

- (3)(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;
 8. Sexual abuse, as set forth in KRS 510.120 and 510.130;

²³ “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;”

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 CSEC offenses in order to remove the children of traffickers from their control and potential exploitation.*

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, 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, 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).²⁴ 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 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.”

Lastly, 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).

- 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.*

Under Ky. Rev. Stat. Ann. § 500.092(3) a facilitator of domestic minor sex trafficking may be subject to asset forfeiture if convicted of certain offenses, including the following:

²⁴ 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.”

- (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].

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). Notably absent from the list of crimes permitting forfeiture in Ky. Rev. Stat. Ann. § 500.092(3) are the crimes of promoting human trafficking under Ky. Rev. Stat. Ann. § 529.110 and promoting prostitution under Ky. Rev. Stat. Ann. § 529.040.

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 and promoting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.040, 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). The same fine may be imposed on a facilitator convicted of Ky. Rev. Stat. Ann. § 506.120 (Engaging in organized crime), which defines “criminal syndicate” 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;

- 4.2.1 Recommendation: Add the crimes of human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.100, promoting human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.110, promoting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.040, and engaging in organized crime pursuant to Ky. Rev. Stat. Ann. § 506.120 to the list of crimes allowing asset forfeiture under Ky. Rev. Stat. Ann. § 500.092(3).

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.”²⁵ 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. 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) 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

²⁵ “A person ‘advances prostitution’ when acting other than as a prostitute or as a patron thereof, he 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).

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).

Legal Components:

- 5.1 *A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*
- 5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*
- 5.4 *Commercially sexually exploited children are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*
- 5.5 *Commercial sexual exploitation or sex trafficking is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of "caregiver" (or similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into the protection of child protective services.*
- 5.7 *Crime victims' compensation is specifically available to a child victim of sex trafficking or CSEC without regard to ineligibility factors.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile arrest or criminal 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 are authorized by law for minor victims of sex trafficking or CSEC.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or 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 *A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.*

For the purposes of crime victims' compensation, "victim" is defined as including "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" is broadly defined as including "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).

For the purpose of crime victim and witness protection statutes, Ky. Rev. Stat. Ann. §§ 421.500–421.575, the term "victim" includes "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime classified as stalking, unlawful imprisonment, use of a minor in a sexual performance, unlawful transaction with a minor in the first degree, terroristic threatening, menacing, harassing communications, intimidating a witness, criminal homicide, robbery, rape, assault, sodomy, kidnapping, burglary in the first or second degree, sexual abuse, wanton endangerment, criminal abuse, or incest." Ky. Rev. Stat. Ann. § 421.500(1). Notably absent from this definition are the crimes of human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.100, promoting human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.110, promoting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.040, and unlawful transaction with a minor in the

third degree pursuant to Ky. Rev. Stat. Ann. § 530.070. Thus, victims of these crimes are not considered victims for the purpose of crime victim and witness protection.

Some crimes related to commercial sexual exploitation of children are specifically included in the definition of “child sexual abuse and exploitation,” in Ky. Rev. Stat. Ann. § 15.900, which provides the definitions for Ky. Rev. Stat. Ann. § 15.905–Ky. Rev. Stat. Ann. § 15.940, some of the statutes concerning the “State Child Sexual Abuse and Exploitation Board.” Specifically, “child sexual abuse and exploitation” is defined 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).

5.1.1 Recommendation: Amend both Ky. Rev. Stat. Ann. § 421.500 (Definitions for crime victim and witness protection) and Ky. Rev. Stat. Ann. § 15.900 (Definitions for child sexual abuse and exploitation prevention) to include the crimes of human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.100, promoting human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.110, promoting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.040 when a minor is involved, and unlawful transaction with a minor in the third degree pursuant to Ky. Rev. Stat. Ann. § 530.070 in situations involving commercial sexual exploitation of children to expand the coverage of these statutes to all victims of domestic minor sex trafficking.

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

Ky. Rev. Stat. Ann. § 529.100 (Human trafficking), Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking), and Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree) do not refer to a defense based on consent of the minor to the commercial sex act. However, the code does not specifically prohibit a defendant from raising such a defense.

5.2.1 Recommendation: Enact a provision specifically prohibiting a defense to any sexual crime against a minor under 18 based on consent of the child to the sex act.

5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*

Ky. Rev. Stat. Ann. § 529.020 (Prostitution) does not exclude minors from prosecution. The law creates a Class B misdemeanor when a person “engages or agrees or offers to engage in sexual conduct with another person in return for a fee.” Ky. Rev. Stat. Ann. § 529.020. Similarly, Ky. Rev. Stat. Ann. § 529.080 (Loitering for prostitution purposes) does not exclude minors and states, “A person is guilty of loitering for prostitution purposes when he loiters or remains in a public place for the purpose of engaging or agreeing or offering to engage in prostitution.”

5.3.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 529.020 and Ky. Rev. Stat. Ann. § 529.080 to make the laws inapplicable to minors under 18.

5.4 *Commercially sexually exploited children are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*

The human trafficking laws and the CSEC laws do not refer to a specific protective response to the child victims of these crimes. However, if a minor’s case is successfully identified and prosecuted as a human trafficking case, 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.” However, this statute does not ensure that domestic minor sex trafficking victims will receive a child protective response because it does not direct these victims into the child protective system or other protective therapeutic response system. Additionally, many domestic minor sex trafficking victims may not be identified as victims of human trafficking if their case is brought under a CSEC law or if they are themselves prosecuted for prostitution or prostitution-related offenses.

Domestic minor sex trafficking victims frequently commit status offenses while being trafficked, leading to arrest and a juvenile justice response.²⁶ 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.

After being taken into custody as a status offender, pursuant to Ky. Rev. Stat. Ann. § 630.040, 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(5).” Ky. Rev. Stat. Ann. § 610.200(5) 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 (6) 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, a juvenile holding 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.

As the final step, if the child was not released, under Ky. Rev. Stat. Ann. § 630.040, “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

²⁶ 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(59).

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,

[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.

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, which states in subsections (1) and (2), “(1) 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; (2) 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.”

The commercially sexually exploited minor may also enter the juvenile justice system as a “public offender” if the child has committed a crime, such as prostitution. Ky. Rev. Stat. Ann. § 635.020(1), § 610.190(1)(d). 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), 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. 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.

When the dispositional hearing occurs for a public offender, the court has several options available pursuant to Ky. Rev. Stat. Ann. § 635.060 if the court finds that the minor is a public offender, including:

- (2) Place the child 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 place the child on probation under conditions that the court shall determine. . . . ; or
- (3) Commit or recommit the child to the custody of the Department of Juvenile Justice, or grant guardianship to a child-caring facility, a child-placing agency authorized to care for the child, or place the child under the custody and supervision of a suitable person. . . . ; or
- (4) If the child is fourteen (14) years of age but less than sixteen (16) years of age, order that the child be confined in an approved secure juvenile detention facility, juvenile holding facility, or approved detention program as authorized by the Department of Juvenile Justice in accordance with KRS Chapter

- 15A for a period of time not to exceed forty-five (45) days; or
- (5) If the child is sixteen (16) years of age or older, order that the child be confined in an approved secure juvenile detention facility, juvenile holding facility, or approved detention program as authorized by the Department of Juvenile Justice in accordance with KRS Chapter 15A for a period of time not to exceed ninety (90) days; or
- (6) Any combination of the dispositions listed above 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.

. . . .

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).

In contrast to receiving a criminal justice response, a commercially sexually exploited minor may be considered dependent,²⁷ neglected, or abused and receive a child protective response. The court may take emergency custody of a potentially dependent, neglected, or abused child under Ky. Rev. Stat. Ann. § 620.060, 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); 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.

Under Ky. Rev. Stat. Ann. § 620.080, 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”

Ky. Rev. Stat. Ann. § 620.090(1) 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.”

²⁷ Under Ky. Rev. Stat. Ann. § 600.020(19), “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.”

Subsection (5) 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.”

Under Ky. Rev. Stat. Ann. § 620.095, “[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.”

Ky. Rev. Stat. Ann. § 620.130 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, 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 403.740 [Emergency protective order] and 403.750 [Restraining orders]; Ky. Rev. Stat. Ann. § 620.140(b).

- 5.4.1 Recommendation: Establish a mandatory response law directing any minor involved in prostitution or who is a victim of trafficking of persons for commercial sexual exploitation under Ky. Rev. Stat. Ann. § 529.100 away from the criminal justice system and into a protective system.

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

Commercial sexual exploitation is a type of abuse and neglect in the Juvenile Code. An “abused or neglected child” includes “a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child: . . . ; (e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child; (f) 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)(e), (f). “Sexual exploitation” is further defined as behavior that “includes, but is not limited to, a situation in which a parent, guardian, 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 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(56).

5.6 *The definition of “caregiver” (or similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into the protection of child protective services.*

The Kentucky code uses the term “person exercising custodial control or supervision” over the child, which is defined for purposes of the Unified Juvenile Code (chapters 600 to 645) as meaning “a person or agency that has assumed the role and responsibility of a parent or guardian for the child, but that does not necessarily have

legal custody of the child.” Ky. Rev. Stat. Ann. § 600.020(43). This definition is likely broad enough to include a trafficker.

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or CSEC without regard to ineligibility factors.*

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 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 conduct, . . . contributed to the infliction of his 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 hardships, as a result of the loss of earnings or support and the out-of-pocket expenses incurred as a result of the injury, if not granted financial assistance,” then the victim may 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) states, in part, “in no case may an award be made where the police 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, “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) to stipulate an exception for child victims of the crimes of human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.100, promoting human trafficking pursuant to Ky. Rev. Stat. Ann. § 529.110, promoting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.040, use of a minor in a sexual performance pursuant to Ky. Rev. Stat. Ann. § 531.310, promoting a sexual performance by a minor pursuant to Ky. Rev. Stat. Ann. § 531.320, and unlawful transaction with minor in the third degree (in which prostitution is the transaction) pursuant to Ky. Rev. Stat. Ann. § 530.070 in recognition of the challenges these victims face through trauma-bonding, denial, and delayed disclosure.

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, 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).

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 [including promoting prostitution in the second and third degree], 529.070 [Permitting prostitution], 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.” Ky. Rev. Stat. Ann. § 421.350(1). These protections include, under particular circumstances and showing of compelling need,²⁸ 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 arrest or criminal 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.*

Ky. Rev. Stat. Ann. § 610.330(1) 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). Since prostitution is a Class B misdemeanor, and loitering for the purpose of prostitution is either a violation or a Class B misdemeanor, these crimes with which domestic minor sex trafficking victims are frequently charged could be expunged. Ky. Rev. Stat. Ann. §§ 529.020, 529.080.

²⁸ “[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).

5.10 *Victim restitution and civil remedies are authorized by law for minor victims of sex trafficking or CSEC.*

Ky. Rev. Stat. Ann. § 532.032 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) 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, 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), Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree), Ky. Rev. Stat. Ann. § 531.340 (Distribution of matter portraying a sexual performance by a minor), and Ky. Rev. Stat. Ann. § 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). “[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), 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, 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. § 412.249(1)(a).

- 5.10.1 Recommendation: Mandate restitution for convictions under Ky. Rev. Stat. Ann. § 529.100 (Human trafficking).

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

Ky. Rev. Stat. Ann. § 500.050(1) 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 unlawful transaction with a minor in the third degree pursuant to Ky. Rev. Stat. Ann. § 530.070, promoting prostitution of only one victim pursuant to Ky. Rev. Stat. Ann. § 529.040(2), permitting prostitution pursuant to Ky. Rev. Stat. Ann. § 529.070, and a first time offense of promoting sale of material portraying a sexual performance by a minor pursuant to Ky. Rev. Stat. Ann. § 531.350, 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.*
- 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
- 6.3 *Domestic minor sex trafficking investigations may use wiretapping to investigate the crime.*
- 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 to investigate buyers and traffickers is a permissible investigative technique.*
- 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*

Legal Analysis:

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

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, 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.

- 6.1.1 Recommendation: Amend Ky. Rev. Stat. Ann. § 15.946 (In-service training) to specifically include domestic minor sex trafficking in the statutorily provided in-service training for law enforcement officers and require all officers to participate in one of these trainings. Also add “child sexual abuse and exploitation” as defined in Ky. Rev. Stat. Ann. § 15.900 to the training program set out in Ky. Rev. Stat. Ann. § 15.946.

- 6.1.2 Recommendation: Expand the applicability of Ky. Rev. Stat. Ann. § 15.900 to include Ky. Rev. Stat. Ann. § 15.946. Amend the definition of “child sexual abuse and exploitation” in Ky. Rev. Stat. Ann. § 15.900 to clearly include all CSEC crimes, adding Ky. Rev. Stat. Ann. § 529.100 (Human Trafficking), Ky. Rev. Stat. Ann. § 529.110 (Promoting human trafficking), and Ky. Rev. Stat. Ann. § 529.040 (Promoting prostitution).

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 *Domestic minor sex trafficking investigations may use wiretapping to investigate the crime.*

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.”²⁹ *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.*

There is no specific statutory authority for law enforcement to use a decoy in investigating domestic minor sex trafficking. However, Ky. Rev. Stat. Ann. § 531.330(1) (Presumption as to minority) establishes a presumption in prosecutions under “KRS 529.040 [Promoting prostitution] or 529.100 [Human trafficking] where the offense involves commercial sexual activity and for the purposes of KRS § 530.070 [Unlawful transaction with a minor in the third degree], 531.080, and 531.300 to 531.370 [Sexual exploitation of minors]” and says that “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.” The statute’s presumption suggests the possibility that law enforcement can use a decoy.

- 6.4.1 Recommendation: Enact a law explicitly permitting the use of a decoy to investigate domestic minor sex trafficking related crimes. Alternatively, amend Ky. Rev. Stat. Ann. § 531.310 (Use of a minor in a sexual performance), Ky. Rev. Stat. Ann. § 531.320 (Promoting a sexual performance by a minor), Ky. Rev. Stat. Ann. § 530.070 (Unlawful transaction with a minor in the third degree), Ky. Rev. Stat. Ann. § 529.100 (Human trafficking), Ky. Rev. Stat. Ann. § 529.110 (Promoting

²⁹ 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.”

human trafficking), and Ky. Rev. Stat. Ann. § 529.040 (Promoting prostitution) when a minor is the victim to add a provision preventing a defense based on the supposed minor in the interaction actually being law enforcement or someone acting on behalf of law enforcement.

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

Law enforcement officers may use the Internet 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 and child welfare agencies are mandated to promptly report missing and recovered children.*

Ky. Rev. Stat. Ann. § 17.450(1) 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 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.

© Original version dated January 17, 2012 copyrighted by Shared Hope International and the American Center for Law and Justice. Subsequent versions have not been reviewed by the American Center for Law and Justice. All rights reserved