

PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

ANALYSIS AND RECOMMENDATIONS WEST VIRGINIA

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

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

Legal 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.*

Paralleling federal law, West Virginia's human trafficking law does not require a showing of force, fraud, or coercion of minors under 18 to qualify as sex trafficking. Pursuant to W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties),² passed in 2012 by the 80th West Virginia legislature, sex trafficking of minors is defined as

the promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining or receipt of a person under the age of eighteen by any means, whether a United States citizen or foreign national, for the purpose of causing the minor to engage in sexual acts, or in sexual conduct violating the provisions of subsection (b), section five, article eight of this chapter [§§

¹ Unless otherwise specified, all references to West Virginia's statutes were taken from West Virginia Code Annotated (LEXIS through 2012 First & Second Sess.) and all federal statutes were taken from United States Code (LEXIS through PL 112-173, approved 8/16/12). This report includes legislation enacted before August 1, 2012.

² The text of W. Va. Code Ann. § 61-2-17 included here and elsewhere in this report includes amendments made by the passage of House Bill 4053, 80th West Virginia Leg. 2nd Sess. (WV 2012) (effective June 8, 2012).

61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts)]³ or article eight-c of this chapter [Filming of Sexually Explicit Conduct of Minors]⁴.

Pursuant to W. Va. Code Ann. § 61-2-17(b), “Any person who knowingly and willfully engages in human trafficking is guilty of a felony.” However, pursuant to W. Va. Code Ann. § 61-2-17(a)(3), “[h]uman trafficking” is defined as “the labor trafficking⁵ or sex trafficking⁶ involving adults or minors where two or more persons are trafficked within any one year period.” W. Va. Code Ann. § 61-2-17(a)(3) (Human trafficking; penalties). Therefore, for a person to be convicted of human trafficking under W. Va. Code Ann. § 61-2-17(a)(3), the State must establish that the offender at least twice engaged in conduct that constitutes “labor trafficking” as defined under § 61-2-17(a)(4), “sex trafficking of minors” as defined under § 61-2-17(a)(5), and/or “sex trafficking of adults” as defined under § 61-2-17(a)(6), “within any one year period.”

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

- 1.1.1 Recommendation: Amend the definition of “human trafficking under W. Va. Code Ann. § 61-2-17(a)(3) (Human trafficking; penalties) to remove the requirement that “two or more persons are trafficked within any one year period” in order to establish a human trafficking offense.
- 1.1.2 Recommendation: Amend W. Va. Code Ann. § 61-2-17(b) to specify a heightened penalty when sex trafficking of minors is involved in commission of the human trafficking offense.⁷

³ W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts) states that,

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

⁴ W. Va. Code Ann. § 61-8C-2(a), (b), (c) (Filming of sexually explicit conduct of minors) prohibits “Any person who causes or knowingly permits, uses, persuades, induces, entices or coerces such minor to engage in or uses such minor to do or assist in any sexually explicit conduct . . .”, “Any person who photographs or films such minor engaging in any sexually explicit conduct . . .”, and “Any parent, legal guardian or person having custody and control of a minor, who photographs or films such minor in any sexually explicit conduct or causes or knowingly permits, uses, persuades, induces, entices or coerces such minor child to engage in or assist in any sexually explicit act . . .”

⁵ Under W. Va. Code Ann. § 61-2-17(a)(4) (Human trafficking; criminal penalties), labor trafficking means

the promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining or receipt of a person by any means, whether a United States citizen or foreign national, for the purpose of:

- (A) Debt bondage or forced labor or services;
- (B) Slavery or practices similar to slavery.

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

⁷ Subsequent recommendations in this report referring to the state human trafficking law are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

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

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

1. W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties) states in part, “Any person who . . . takes away a child under the age of sixteen years from any person having lawful charge of such child, for the purpose of prostitution or concubinage, shall be guilty of a felony” A conviction under this statute is punishable by imprisonment for 3–10 years. W. Va. Code Ann. § 61-2-14(a).⁸

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

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

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

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

⁸ Pursuant to W. Va. Code Ann. § 61-11-18(a) (Punishment for second or third offense of felony), with some exceptions,

when any person is convicted of an offense and is subject to confinement in the state correctional facility therefor, and it is determined, as provided in section nineteen [§ 61-11-19] of this article, that such person had been before convicted in the United States of a crime punishable by confinement in a penitentiary, the court shall, if the sentence to be imposed is for a definite term of years, add five years to the time for which the person is or would be otherwise sentenced. Whenever in such case the court imposes an indeterminate sentence, the minimum term shall be twice the term of years otherwise provided for under such sentence.

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

inmate of a house of ill fame within this state, or to come into or leave this state for the purpose of prostitution, shall be guilty of pandering

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

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

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

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

5. W. Va. Code Ann. § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties) states, “Any adult who, with knowledge that a person is a minor or who fails to exercise reasonable care in ascertaining the age of a minor,⁹ hires, employs or uses such minor to produce obscene matter¹⁰ or to do or assist in doing any sexually explicit conduct,¹¹ is guilty of a felony” A conviction under this statute is punishable by imprisonment for up to 10 years, a fine not to exceed \$50,000, or both. W. Va. Code Ann. § 61-8A-5.
6. W. Va. Code Ann. § 61-8C-2(a) (Use of minors in filming sexually explicit conduct prohibited; penalty) states, “Any person who causes or knowingly permits, uses, persuades, induces, entices or coerces such minor to engage in or uses such minor to do or assist in any sexually explicit conduct¹² shall be guilty of a felony when such person has knowledge that any such act is being photographed or filmed.”

⁹ A “minor” is defined as “an unemancipated person under eighteen years of age.” W. Va. Code Ann. § 61-8A-1(i).

¹⁰ “Obscene Matter” is defined as “matter that: (1) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest; (2) An average person, applying community standards, would find depicts or describes, in a patently offensive way, sexually explicit conduct; and (3) A reasonable person would find, taken as a whole, lacks serious literary, artistic, political or scientific value.” W. Va. Code Ann. § 61-8A-1(j).

¹¹ “Sexually explicit conduct” is defined as “an ultimate sexual act, normal or perverted, actual or simulated, including sexual intercourse, sodomy, oral copulation, sexual bestiality, sexual sadism and masochism, masturbation, excretory functions and lewd exhibition of the genitals.” W. Va. Code Ann. § 61-8A-1(m).

¹² Pursuant to W. Va. Code Ann. § 61-8C-1(c) (Definitions),

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

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

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

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

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

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

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

Several other laws, while not expressly commercial in nature, may also apply in cases involving CSEC.¹³ These include the following:

¹³ Pursuant to W. Va. Code Ann. § 61-8B-9a(a) (Mandatory sentence for person committing certain sex offenses against children), an offender convicted of certain sex crimes (sexual assault in the first, second, or third degree or sexual abuse in the first, second, or third degree) is not “eligible for probation, home incarceration or an alternative sentence” when the perpetrator is over 18, the victim is under 12, and

one of the following aggravating circumstances exists:

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

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

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

1. Pursuant to W. Va. Code Ann. § 61-8B-3(a)(2), (b) (Sexual assault in the first degree), a person older than 14 years old who “engages in sexual intercourse¹⁴ or sexual intrusion¹⁵ with another person who is younger than twelve years old and is not married to that person” is guilty of a felony. A conviction under W. Va. Code § 61-8B-3 is punishable by imprisonment for 15–35 years in a state correctional facility and a possible fine of \$1,000–\$10,000. W. Va. Code Ann. § 61-8B-3(b). However, if the defendant is 18 or older and the victim is under 12, a conviction is punishable by imprisonment for 25–100 years in a state correctional facility and a mandatory fine of \$5,000–\$25,000. W. Va. Code Ann. § 61-8B-3(c).
2. W. Va. Code Ann. § 61-8B-5(a)(2), (b) (Sexual assault in the third degree) states that a person, who is at least 16 years old, who “engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant” is guilty of a felony punishable by imprisonment for 1–5 years in a state correction facility and a possible fine not to exceed \$10,000. W. Va. Code Ann. § 61-8B-5(b).
3. W. Va. Code Ann. § 61-8B-7(a)(3), (b) (Sexual abuse in the first degree) states that a person 14 years or older who “subjects another person to sexual contact¹⁶ who is younger than twelve years old” commits a felony. A conviction under this statute is punishable by imprisonment for 1–5 years in a state correctional facility and a possible fine not to exceed \$10,000. W. Va. Code Ann. § 61-8B-7(b). However, if the defendant is 18 or older and the victim is under 12, a conviction is punishable by imprisonment for 5–25 years and a mandatory fine of \$1,000–\$5,000. W. Va. Code Ann. § 61-8B-7(c).
4. W. Va. Code Ann. § 61-8B-9(a), (c) (Sexual abuse in the third degree) makes it a misdemeanor when a person, 16 years or older and 4 years older than the victim, “subjects another person to sexual contact without the latter’s consent, when such lack of consent is due to the victim’s incapacity to consent by reason of being less than sixteen years old.” A conviction under this statute is punishable by up to 90 days in jail and a possible fine not to exceed \$500. W. Va. Code Ann. § 61-8B-9(c).

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

1.3 *Commercial sexual exploitation of children (CSEC) or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

¹⁴ W. Va. Code Ann. § 61-8B-1(7) (Definition of terms) defines “sexual intercourse” as “any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.”

¹⁵ “Sexual intrusion” is defined as “any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.” W. Va. Code Ann. § 61-8B-1(8).

¹⁶ W. Va. Code § 61-8B-1(6) defines “sexual contact” as the following:

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

The state CSEC statutes listed above do not reference W. Va. Code Ann. § 61-2-17(b) (Human trafficking; criminal penalties) in order to clarify that CSEC victims are sex trafficking victims. West Virginia's prostitution statute, W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties), also does not refer to W. Va. Code Ann. § 61-2-17(b) (Human trafficking; criminal penalties) when a minor is engaged in prostitution.

1.3.1 Recommendation: Amend W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-8-7 (Procuring for house of prostitution; penalty; venue; competency as witness; marriage no defense), § 61-8-8 (Receiving support from prostitution; pimping; penalty; prostitute may testify), § 61-8-5(b) (Houses of ill fame and assignation; penalties), § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) and § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty) to refer to W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties) to identify all commercially sexually exploited and prostituted minors as victims of sex trafficking.

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

West Virginia's Anti-Organized Criminal Enterprise Act¹⁷, W. Va. Code Ann. § 61-13-3(a), (b) (Offenses) states,

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

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

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

"Qualifying offense" is defined under § 61-13-2 to include felony violations of W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty), § 61-2-17 (Human trafficking; criminal penalties) and § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties) or any convictions under § 61-8-8 (Receiving support from prostitution; pimping; penalty).

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

¹⁷ For additional information on racketeering laws, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHI-WhitePaperFederalStateRacketeeringGangCrimeLaws.pdf>

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

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

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

- 1.4.1 Recommendation: Amend W. Va. Code Ann. § 61-13-2 to include § 61-8-6 (Detention of person in place of prostitution; penalty) and § 61-8-7 (Procuring for house of prostitution; penalty) as “qualifying offenses.”

Legal Components:

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

Legal Analysis

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

W. Va. Code Ann. § 61-2-17(b) (Human trafficking; criminal penalties) might apply to buyers of sex with minors through the term “obtain.” W. Va. Code Ann. § 61-2-17(a)(5) defines, “[s]ex trafficking of minors” in part as “the . . . obtaining or receipt of a person under the age of eighteen by any means, whether a United States citizen or foreign national, for the purpose of causing the minor to engage in sexual acts, or in sexual conduct violating the provisions of subsection (b), section five, article eight of this chapter [§§ 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts)]¹⁸ or article eight-c of this chapter [Filming of Sexually Explicit Conduct of Minors].”¹⁹ However, pursuant to the definition of human trafficking under W. Va. Code Ann. § 61-2-17(a)(3) (Human trafficking; penalties), a buyer would have to obtain “two or more persons . . . within any one year period.”

Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),²⁰ have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers attempted to “obtain”²¹ a person under 18 to engage in commercial sex.²² It is unsettled whether the courts will uphold this interpretation of the TVPA. It is arguable, therefore, that the term “obtain” in W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties) could apply to buyers of commercial sex in West Virginia.

¹⁸ See *supra* note 3.

¹⁹ See *supra* note 4.

²⁰ Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

²¹ 18 U.S.C. § 1591(a).

²² See, e.g., Indictment at 1, United States v. Oflyng, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 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, (Dec. 18, 2009), <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm>.

2.1.1 Recommendation: Amend W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties) to clarify that it applies to buyers of commercial sex with minors.

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

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

In the absence of another CSEC law to prosecute those buyers of commercial sex acts with minors who do not use a computer to commit the offense, a buyer most likely would be prosecuted under West Virginia’s general solicitation law, W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties). W. Va. Code Ann. § 61-8-5(b) makes it illegal for a person to “solicit, induce, entice, or procure another to commit an act of prostitution, lewdness, or assignation . . . enter, or remain in any house, place, building, hotel, tourist camp,²³ or other structure or enter or remain in any vehicle, trailer, or other conveyance for the purpose of prostitution, lewdness, or assignation; or . . . aid, abet, or participate in the doing of any of the acts herein”

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

Several sexual offenses could be used to prosecute some buyers of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child, and do not identify the minors involved as human trafficking victims.²⁴ Furthermore, although these statutes may apply to buyers for CSEC crimes, they are of limited usefulness in sex offense prosecutions against older minors because a buyer can raise a consent defense when the victim is 16 years of age or older. W. Va. Code Ann. § 61-8B-2(a), (c)(1).

2.2.1 Recommendation: Enact a law that makes purchasing commercial sex acts with children under 18 by any means a separate offense.

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

West Virginia’s general solicitation laws do not differentiate between buying sex with an adult and buying sex with a minor however, if a computer is used, solicitation of a minor for prostitution is separately criminalized under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) which states, “Any person over the age of eighteen, who knowingly uses a computer to solicit, entice, seduce or lure or attempt to solicit, entice, seduce, or lure . . . a minor known or believed to be at

²³ “Tourist camp” is defined as “any temporary or permanent buildings, tents, cabins, or structures, or trailers, or other vehicles which are maintained, offered, or used for dwelling or sleeping quarters for pay.” W. Va. Code Ann. § 61-8-5(c).

²⁴ See *supra* Section 1.2 for a full description of the sexual offense laws that may be used to prosecute certain buyers.

least four years younger than the person using the computer . . . to commit . . . [several crimes, including prostitution] is guilty of a felony” Otherwise, buyers of commercial sex with adults and commercial sex with minors will be guilty of W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties).

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

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

If the state human trafficking law applies to buyers, according to W. Va. Code Ann. § 61-2-17(b) (Human trafficking; criminal penalties), sex trafficking of minors is a felony punishable by 3–15 years imprisonment and a possible fine of up to \$200,000 fine, or both. W. Va. Code Ann. § 61-2-17(b).

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

Several sexual offense laws may be used to prosecute certain buyers of sex acts with a minor.²⁵

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)²⁶ 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 offense²⁷ against a minor. To the extent buyers can be prosecuted under other federal CSEC laws,²⁸ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.²⁹

²⁵ See discussion of relevant provisions that may apply to certain buyers *supra* Section 1.2.

²⁶ Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

²⁷ Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

an offense under section 1591 [18 U.S.C.S. § 1591] (relating to sex trafficking of children), 2241 [18 U.S.C.S. § 2241] (relating to aggravated sexual abuse), 2242 [18 U.S.C.S. § 2242] (relating to sexual abuse), 2244(a)(1) [18 U.S.C.S. § 2244(a)(1)] (relating to abusive sexual contact), 2245 [18 U.S.C.S. § 2245] (relating to sexual abuse resulting in death), 2251 [18 U.S.C.S. § 2251] (relating to sexual exploitation of children), 2251A [18 USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 U.S.C.S. § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 U.S.C.S. § 2423(a)] (relating to transportation of minors).

²⁸ 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).

²⁹ 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

- 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.*

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

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

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

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

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

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

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

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

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

- 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.*

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

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).

Additionally, pursuant to W. Va. Code Ann. § 61-8C-7(a) (Items subject to forfeiture; persons authorized to seize property subject to forfeiture),³⁰ buyers who violate W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) or possess child pornography in violation of § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct; penalty) may be subject to discretionary, civil asset forfeiture. The following items are subject to forfeiture pursuant to W.Va. Code Ann. § 61-8C-7:

- (1) All visual depictions which have been manufactured, distributed, dispensed, or possessed in violation of article eight-a [§§ 61-8A-1 et seq.]³¹ or eight-c [§§ 61-8C-1 et seq.]³² of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (2) All raw materials, products and equipment of any kind which are used, intended for use, in manufacturing, processing, delivering, importing or exporting any visual depictions or any crimes against children in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (3) All books, records, research products and materials, including hard drives, microfilm, tapes and data which are used, or have been used, or are intended for use in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter
- (4) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter by any person in exchange for a visual depiction, all proceeds traceable to the exchange and all moneys, negotiable instruments, and securities used, or which are intended to be used, to facilitate any violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter. . . .;
- (5) All conveyances, including aircraft, vehicles or vessels, which are used, have been used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in (1), (2) or (3) of this subsection³³....”

³⁰ The text of W. Va. Code Ann. § 61-8C-7 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 606, 80th Leg.. 2nd Sess. (WV 2012) (effective June 6, 2012).

³¹ The relevant criminal offenses under W. Va. Code Ann. §§ 61-8A (Preparation, distribution or exhibition of obscene matter to minors) include § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), § 61-8A-4 (Use of obscene matter with intent to seduce minor), and § 61-8A-1 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties).

³² The relevant criminal offenses under W. Va. Code Ann. §§ 61-8C (Filming of sexually explicit conduct of minors) include § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct; penalty), and § 61-8C-3a (Promoting child erotica; penalties).

³³ Exceptions under W. Va. Code § 61-8C-7(a)(5) include:

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

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

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

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

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

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

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

W. Va. Code Ann. § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) criminalizes the possession of child pornography. W. Va. Code Ann. § 61-8C-3 provides that “[a]ny person who, with knowledge . . . possesses . . . any material visually portraying a minor engaged in any sexually explicit conduct³⁴ is guilty of a felony” A conviction under this statute is punishable by imprisonment for up to 2 years in the penitentiary and a fine not to exceed \$2,000. W. Va. Code Ann. § 61-8C-3. In addition to criminal penalties and restitution imposed by the court, persons convicted under W. Va. Code Ann. § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) may also be required to “pay all or any portion of the cost of medical, psychological or psychiatric treatment of the

³⁴ See *supra* note 12.

minor resulting from the act or acts for which the person is convicted, whether or not the minor is considered to have sustained bodily injury.” W. Va. Code Ann. § 61-8C-4.

In comparison, a federal conviction for possession of child pornography³⁵ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.³⁶ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.³⁷

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

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

West Virginia’s Sex Offender Registration Act, W. Va. Code Ann. § 15-12-1 et seq., establishes sex offender registration requirements. Specifically, W. Va. Code Ann. § 15-12-2(b) (Registration)³⁸ requires any person convicted of specified offenses to register as a sex offender. Those specific offenses include convictions under the following statutes: W. Va. Code Ann. § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), § 61-8A-4 (Use of obscene matter with intent to seduce minor), § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties), § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty), § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), § 61-8B-3(a)(2) (Sexual assault in the first degree), § 61-8B-5(a)(2) (Sexual assault in the third degree), § 61-8B-7(a)(3) (Sexual abuse in the first degree), and § 61-8B-9(a) (Sexual abuse in the third degree). Furthermore, “Any person who has been convicted of a criminal offense and the sentencing judge made a written finding that the offense was sexually motivated³⁹ shall also register as set forth in this article.” W. Va. Code Ann. § 15-12-2(c).

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

³⁵ 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).

³⁶ 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).

³⁷ 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).

³⁸ The text of W. Va. Code Ann. § 15-12-2(b) included here and elsewhere in this report includes amendments made by the passage of Senate Bill 382, 80th Leg. 2nd Sess. (WV 2012) (effective June 3, 2012).

³⁹ “For purposes of this article, the term ‘sexually motivated’ means that one of the purposes for which a person committed the crime was for any person’s sexual gratification.” W. Va. Code Ann. § 15-12-2(j).

8-5(b) pursuant to W. Va. Code Ann. § 15-12-2(c) by written findings of the court that the offense was sexually motivated.

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

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

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

Legal Analysis:

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*⁴⁰

Traffickers now can be prosecuted under W. Va. Code Ann. § 61-2-17 (Human trafficking; criminal penalties).⁴¹ For a person to be convicted of human trafficking under W. Va. Code Ann. § 61-2-17(b) (Human trafficking; penalties), conduct constituting “labor trafficking” under § 61-2-17(a)(4), “sex trafficking of minors” under § 61-2-17(a)(5), or “sex trafficking of adults” under § 61-2-17(a)(6) must result in “two or more persons trafficked within any one year period.” W. Va. Code Ann. § 61-2-17(a)(3). Human trafficking is a felony punishable by 3–15 years imprisonment. W. Va. Code Ann. § 61-2-17(b).

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

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

Traffickers may also face prosecution under W. Va. Code Ann. § 61-8-6 (Detention of person in place of prostitution; penalty) and § 61-8-7 (Procuring for house of prostitution; penalty), both of which are considered felonies when the victim is a minor and are punishable by imprisonment for 2–5 years, a fine not to exceed \$5,000, or both. W. Va. Code Ann. §§ 61-8-6, 61-8-7. Traffickers convicted under W. Va.

⁴⁰ See *supra* Section 1.2 for a full description of the substantive provisions of the West Virginia CSEC laws applicable to traffickers.

⁴¹ See *supra* note 2.

Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) will receive a sentence of imprisonment for 2–10 years in a state correctional facility, a fine not to exceed \$5,000, or both. W. Va. Code Ann. § 61-3C-14b.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)⁴² 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 offense⁴³ against a minor.

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

Pursuant to W. Va. Code Ann. § 61-8C-2(a) (Use of minors in filming sexually explicit conduct prohibited; penalty), “Any person who causes or knowingly permits, uses, persuades, induces, entices or coerces such minor to do or assist in any sexually explicit conduct⁴⁴ shall be guilty of a felony when such person has knowledge that any such act is being photographed or filmed.” Under subsection (b), “Any person who photographs or films such minor engaging in any sexually explicit conduct shall be guilty of a felony . . .” W. Va. Code Ann. § 61-8C-2(a), (b). Additionally, pursuant to W. Va. Code Ann. § 61-8C-2(c),

Any parent, legal guardian or person having custody and control of a minor, who photographs or films such minor in any sexually explicit conduct⁴⁵ or causes or knowingly permits, uses, persuades, induces, entices or coerces such minor child to engage in or assist in any sexually explicit act shall be guilty of a felony when such person has knowledge that any such act may be photographed or filmed.

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

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

Any adult who, with knowledge that a person is a minor or who fails to exercise reasonable care in ascertaining the age of a minor, hires, employs or uses such minor to produce obscene matter⁴⁶ or to do or assist in doing any sexually explicit conduct,⁴⁷ is guilty of a felony

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

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

⁴² See *supra* note 26.

⁴³ See *supra* note 27.

⁴⁴ See *supra* note 3.

⁴⁵ See *supra* note 12.

⁴⁶ See *supra* note 10.

⁴⁷ See *supra* note 11.

prior conviction for a federal sex offense⁴⁸ against a minor. Additionally, a federal conviction for distribution of child pornography⁴⁹ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁵⁰ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁵¹

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.*

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

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

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

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

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

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

No fines are imposed on traffickers convicted under W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties). However, traffickers convicted under W. Va. Code Ann. § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-8-7 (Procuring for house of

⁴⁸ See *supra* note 27.

⁴⁹ 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).

⁵⁰ 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).

⁵¹ 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).

prostitution; penalty), § 61-8-8 (Receiving support from prostitution; pimping; penalty), or § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) are subject to a possible fine not to exceed \$5,000, if the victim is a minor. Traffickers convicted under W. Va. Code Ann. § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty) are subject to a possible fine not to exceed \$10,000. Lastly, a trafficker convicted under W. Va. Code Ann. § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties) is subject to a possible fine not to exceed \$50,000.

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

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

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

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

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

Additionally, pursuant to W. Va. Code Ann. § 61-8C-7 (Items subject to forfeiture; persons authorized to seize property subject to forfeiture),⁵² passed during 2012, traffickers who violate W. Va. Code Ann. § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), W. Va. Code Ann. § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), or W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) are subject to discretionary, civil forfeiture of property possessed in violation of the offense, including

- (1) All visual depictions which have been manufactured, distributed, dispensed, or possessed in violation of article eight-a [§§ 61-8A-1 et seq.]⁵³ or eight-c [§§ 61-8C-1 et seq.]⁵⁴ of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;

⁵² See *supra* note 30.

⁵³ See *supra* note 31.

⁵⁴ See *supra* note 32.

- (2) All raw materials, products and equipment of any kind which are used, intended for use, in manufacturing, processing, delivering, importing or exporting any visual depictions or any crimes against children in violation of article eight-a [§§ 61-8A-1et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (3) All books, records, research products and materials, including hard drives, microfilm, tapes and data which are used, or have been used, or are intended for use in violation of article eight-a [§§ 61-8A-1et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter
- (4) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished in violation of article eight-a [§§ 61-8A-1et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter by any person in exchange for a visual depiction, all proceeds traceable to the exchange and all moneys, negotiable instruments, and securities used, or which are intended to be used, to facilitate any violation of article eight-a [§§ 61-8A-1et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter. . . .;
- (5) All conveyances, including aircraft, vehicles or vessels, which are used, have been used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in (1), (2) or (3) of this subsection⁵⁵....”

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

- 3.4.1 Recommendation: Amend W. Va. Code Ann. § 61-8C-7 (Items subject to forfeiture; persons authorized to seize property subject to forfeiture) to include a specific asset forfeiture penalty for those assets gained from or used in the commission of W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties), § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-8-7 (Procuring for house of prostitution; penalty), and § 61-8-8 (Receiving support from prostitution; pimping; penalty).

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

West Virginia’s Sex Offender Registration Act, W. Va. Code. Ch. 15 (Public Safety), Art. 12 (Sex offender registration act), establishes sex offender registration requirements. W. Va. Code Ann. § 15-12-2(b) (Registration)⁵⁶ requires any person convicted of specified offenses to register as a sex offender. Those specific offenses include convictions under the following statutes: W. Va. Code Ann. § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), § 61-8A-4 (Use of obscene matter with intent to seduce minor), § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties), § 61-2-14 (Abduction of person; kidnapping or concealing child; penalties), § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), § 61-8-6 (Detention of person in place of prostitution; penalty), and § 61-8-7 (Procuring for house of prostitution;

⁵⁵ See *supra* note 33.

⁵⁶ See *supra* note 38.

penalty). Furthermore, “Any person who has been convicted of a criminal offense and the sentencing judge made a written finding that the offense was sexually motivated shall also register as set forth in this article.” W. Va. Code Ann. § 15-12-2(c).

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

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

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

No provision of West Virginia law expressly mandates the termination of parental rights upon a parent’s conviction under any CSEC or sexual offense law. W. Va. Code Ann. § 49-6-5b(a) (When efforts to terminate parental rights required), requires that legal efforts be taken (e.g., filing of a petition) in order to terminate parental rights in any of the following situations:

- (1) If a child has been in foster care for fifteen of the most recent twenty-two months as determined by the earlier of the date of the first judicial finding that the child is subjected to abuse or neglect⁵⁷ or the date which is sixty days after the child is removed from the home;
- (2) If a court has determined the child is abandoned; or
- (3) If a court has determined the parent has committed murder or voluntary manslaughter of another of his or her children or the other parent of his or her children; has attempted or conspired to commit such murder or voluntary manslaughter or has been an accessory before or after the fact of either crime; has committed unlawful or malicious wounding resulting in serious bodily injury to the child or to another of his or her children or to the other parent of his or her children; or the parental rights of the parent to a sibling have been terminated involuntarily.

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

⁵⁷ W. Va. Code Ann. § 49-1-3(d) defines “child abuse and neglect” to include the “sexual abuse” or “sexual exploitation . . . of a child by a parent, guardian or custodian who is responsible for the child’s welfare, under circumstances which harm or threaten the health and welfare of the child.” Pursuant to W. Va. Code Ann. § 49-1-3(n), “Sexual exploitation” is defined as an act where

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

(A) The parent has subjected the child, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse;

(B) The parent has:

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

.....

As an additional avenue for seeking termination of parental rights as provided in W. Va. Code Ann. § 49-6-5(a)(6), W. Va. Code Ann. § 61-8B-11a (Convictions for offenses against children) requires that,

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

Accordingly, a trafficker who has committed a sexual offense against a child in his custody or control may have his parental rights terminated at the time of sentencing with regard to the victimized child as well as any other child living in the same house as the victim pursuant to W. Va. Code Ann. § 49-6-5(a)(6) and (7). However, because the sexual offense laws under Chapter 8B do not encompass the CSEC and child pornography offenses for which a trafficker may be convicted, W. Va. Code Ann. § 61-8B-11(a) fails to ensure that children in the custody of traffickers are provided this protection.

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

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.*

Under W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties), “sex trafficking of minors” means “promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining or receipt of a person under the age of eighteen by any means, whether a United States citizen or foreign national, for the purpose of causing the minor to engage in sexual acts, or in sexual conduct.”⁵⁸ W. Va. Code Ann. § 61-2-17(a)(5) (Human trafficking; criminal penalties). This language could reach some facilitators, but does not include terms such as “benefiting,” “assisting,” or “aiding,” which are terms more broadly applicable to facilitators.

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

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

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

⁵⁸ See *supra* note 3.

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

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

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

Facilitators convicted under W. Va. Code Ann. § 61-8C-3 (Distributing and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) are subject to a mandatory fine not to exceed \$2,000. Also, facilitators convicted under W. Va. Code Ann. § 61-13-3(a) (Offenses) are subject to a possible fine not to exceed \$25,000.

Furthermore, pursuant W. Va. Code Ann. § 61-8C-7 (Items subject to forfeiture; persons authorized to seize property subject to forfeiture),⁵⁹ facilitators who violate e W. Va. Code Ann. § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), or § 61-3C-14b (Soliciting, etc. a minor via computer; penalty) are subject to discretionary civil forfeiture of property possessed in violation of the offense, including

- (1) All visual depictions which have been manufactured, distributed, dispensed, or possessed in violation of article eight-a [§§ 61-8A-1 et seq.]⁶⁰ or eight-c [§§ 61-8C-1 et seq.]⁶¹ of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (2) All raw materials, products and equipment of any kind which are used, intended for use, in manufacturing, processing, delivering, importing or exporting any visual depictions or any crimes against children in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (3) All books, records, research products and materials, including hard drives, microfilm, tapes and data which are used, or have been used, or are intended for use in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter
- (4) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter by any person in exchange for a visual depiction, all proceeds traceable to the exchange and all moneys, negotiable instruments, and securities used, or which are intended to be used, to facilitate any violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter. . . .;
- (5) All conveyances, including aircraft, vehicles or vessels, which are used, have been used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in (1), (2) or (3) of this subsection⁶²....”

Pursuant to W.Va. Code Ann. § 61-8C-7(b), property subject to forfeiture may be seized by the state police. Disposition of forfeitable property is governed by W.Va. Code Ann. § 61-8C-10 and 61-8C-11,

⁵⁹ See *supra* note 30.

⁶⁰ See *supra* note 31.

⁶¹ See *supra* note 32.

⁶² See *supra* note 33.

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

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

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

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

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

- 4.2.1 Recommendation: Amend W. Va. Code Ann. § 61-8C-7(3), (4) and (5) (Items subject to forfeiture; persons authorized to seize property subject to forfeiture) to include property used in committing violations of W. Va. Code Ann. §61-2-17 (Human trafficking; criminal penalties) as property subject to asset forfeiture.

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

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

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

4.4 *Promoting and selling child pornography is illegal.*

Pursuant to W. Va. Code Ann. § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty), “Any person who, with knowledge, sends or causes to be sent, or distributes . . . or transports any material visually portraying a minor engaged in any

sexually explicit conduct⁶³ is guilty of a felony” A conviction under W. Va. Code Ann. § 61-8C-3 is a felony punishable by a maximum of imprisonment for 2 years and a fine not to exceed \$2,000.

⁶³ *See supra* note 12.

Legal Components:

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*
- 5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*
- 5.4 *Child victims of sex trafficking or commercial sexual exploitation 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 commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

Legal Analysis:

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

West Virginia’s Victim Protection Act of 1984, Chapter 61, Article 11A, does not provide a general definition of “victim.” Specific definitions of “victim” are provided for certain sections of West Virginia’s Victim Protection Act, but no general definition is provided. For example, for purposes of W. Va. Code § 61-11A-2 (Testimony of crime victim at sentencing hearing), “victim” is defined in part as a “person who is a victim of a felony,” and for purposes of W. Va. Code § 61-11A-8 (Notification to victim of offender’s release, placement or escape from custody), “victim” is any person who is a “victim of [certain specified crimes, including kidnapping or any sexual offense against a minor] . . . who is alive and competent.” W. Va. Code Ann. §§ 61-11A-2(a), 61-11A-8(i)(2).

For purposes of the West Virginia Crime Victims Compensation Act,⁶⁴ “victim” includes “[a] person who suffers personal injury or death as a result of . . . [c]riminally injurious conduct” W. Va. Code Ann. § 14-2A-3(k)(1)(A). Pursuant to W. Va. Code Ann. § 14-2A-3(c), “criminally injurious conduct” is defined in part as conduct, “which poses a substantial threat of personal injury or death and is punishable

⁶⁴ W. Va. Code Ann. § 14-2A-1 et seq.

by fine, imprisonment or death or would be so punishable but for a finding by a court of competent jurisdiction that the person committing the crime lacked capacity.”

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

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

To the extent that sex offenses are used to prosecute trafficking crimes in West Virginia, W. Va. Code Ann. § 61-8B-2(a) specifically provides, “Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.” Under subsection (c)(1), “A person is deemed incapable of consent when such person is: (1) Less than sixteen years old.”

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

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

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

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

- 5.3.1 Recommendation: Amend W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts) to specify that this law does not apply to minors under 18.

5.4 *Child victims of sex trafficking or commercial sexual exploitation are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*

West Virginia provides some protective provisions to commercially sexually exploited⁶⁵ children. Pursuant to W. Va. Code Ann. § 49-6A-2, when certain specified persons, including healthcare professionals, social service workers, school personnel, and law enforcement officers, have “reasonable cause to suspect that a child is neglected or abused or observe[] the child being subjected to conditions that are likely to result in abuse or neglect,” they must

⁶⁵ See *supra* note 57.

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

Any other person who reasonably suspects that a child is abused or neglected may report child abuse. W. Va. Code Ann. § 49-6A-2. Once a local child protective services office receives a report of alleged child abuse or neglect, the office must investigate the report, and, if necessary, “initiate the appropriate legal proceeding.” W. Va. Code Ann. § 49-6A-9(b), (c).

Under W. Va. Code Ann. § 49-6-1(a) (Petition to the court when child believed neglected or abused; notice), “If the [Department of Health and Human Resources] or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court” After the petition is filed, W. Va. Code Ann. § 49-6-3(a) (Petition to court when child believed neglected or abused—temporary custody) states,

the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the custody of the state department or a responsible person found by the court to be a fit and proper person for the temporary care of the child pending a preliminary hearing, if it finds that:

- (1) There exists imminent danger to the physical well-being of the child; and
- (2) There are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child’s present custody: Provided, That where the alleged abusing person, if known, is a member of a household, the court shall not allow placement pursuant to this section of the child or children in said home unless the alleged abusing person is or has been precluded from visiting or residing in said home by judicial order. . . .

. . . .

Under W. Va. Code Ann. § 49-6-3(b), if the child is in “imminent danger,”⁶⁶ the court may hold a preliminary hearing at which, if it determines that “there are no alternatives less drastic than removal of the child and that a hearing on the petition cannot be scheduled in the interim period,” it can “order that the child be delivered into the temporary custody of the department or a responsible person or agency found by the court to be a fit and proper person for the temporary care of the child for a period not exceeding sixty days”

Additionally, pursuant to W. Va. Code Ann. § 49-6-3(c), a child protective service worker who observes a child whose “physical well-being” is in “imminent danger” and

has probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county before a petition can be filed and temporary custody can be ordered . . . may, prior to the filing of a petition, take the child or children into his or her custody without a court order: Provided, That after taking custody of such child or children prior to the filing of a petition, the worker shall forthwith appear before a circuit judge or a juvenile referee of the county wherein custody was taken, or if no such judge or referee be available, before a circuit judge or a juvenile referee of an

⁶⁶ W. Va. Code Ann. § 49-1-3(8) (Definitions relating to abuse and neglect) defines “Imminent danger to the physical well-being of the child” in part as “an emergency situation in which the welfare or the life of the child is threatened. Such emergency situation exists when there is reasonable cause to believe that any child in the home is or has been sexually abused or sexually exploited”

adjoining county, and shall immediately apply for an order ratifying the emergency custody of the child pending the filing of a petition. . . . If the emergency taking is ratified by the judge or referee, emergency custody of the child or children shall be vested in the department until the expiration of the next two judicial days, at which time any such child taken into emergency custody shall be returned to the custody of his or her parent or guardian or custodian unless a petition has been filed and custody of the child has been transferred under the provisions of section three of this article.

Despite these protections, however, a child may be arrested and detained by law enforcement for actions related to the child being trafficked. Pursuant to W. Va. Code Ann. § 49-5-8(b) (Taking a juvenile into custody), a child may be taken into custody by a law-enforcement officer without a court order under any of the following circumstances:

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

Alternatively, W. Va. Code Ann. § 49-5-8(a) states that a child may be taken into custody pursuant to a court order when there is showing of probable cause for any of the following: “(1) The petition shows that grounds exist for the arrest of an adult in identical circumstances; (2) the health, safety and welfare of the juvenile demand such custody”

Under W. Va. Code Ann. § 49-5-8(c)(2) (Taking a juvenile into custody) after a child is taken into custody, the child must be released to her parent, guardian or custodian, except under the following conditions:

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

. . . .

Under W. Va. Code. Ann. § 49-5-8(c)(3), “If the juvenile is an alleged status offender . . . [‘the official shall’] immediately notify the Department of Health and Human Resources and, if the circumstances of either paragraph (A) or (B), subdivision (2) [§ 49-5-8(c)(2)(A), (B)] of this subsection exist and the requirements therein are met, the official may detain the juvenile, but only in a nonsecure or staff-secure facility.” Pursuant to W. Va. Code Ann. § 49-5-8(d), “In all cases when a juvenile is delivered into a sheriff’s or detention center director’s custody, that official shall release the juvenile to his or her parent, guardian or custodian by the end of the next day unless the juvenile has been placed in detention after a hearing conducted pursuant to section eight-a [§ 49-5-8a] of this article.” At the detention hearing, under W. Va. Code Ann. § 49-5-8a(a), the judge, juvenile referee, or magistrate will determine “the possible need for detention in accordance with [W. Va. Code Ann. § 49-5A-2 (Investigation and release of child taken into custody; detention hearings)].” W. Va. Code Ann. § 49-5-8a(a). W. Va. Code Ann. § 49-5a-2 provides, in pertinent part, that

[i]t shall be the duty of the judge or referee to avoid incarceration of such child in any jail. Unless the circumstances of the case otherwise require, taking into account the welfare of the child as well as the interest of society, such child shall be released forthwith into the custody of his parent or parents, relative, custodian or other responsible adult or agency.

The judge, juvenile referee or magistrate “shall, if the health, safety and welfare of the juvenile will not be endangered thereby, release the juvenile on recognizance to his or her parents, custodians or an appropriate agency” W. Va. Code Ann. § 49-5-8a(a). Under subsection (a)(2), the court is directed to

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

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

After adjudication pursuant to W. Va. Code Ann § 49-5-11 (Adjudication for alleged status offenders and delinquents; mandatory initial disposition of status offenders), W. Va. Code Ann. § 49-5-13(b) (Disposition of juvenile delinquents; appeal) permits the court to choose a disposition

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

- (1) Dismiss the petition;
- (2) Refer the juvenile and the juvenile’s parent or custodian to a community agency for needed assistance and dismiss the petition;
- (3) Upon a finding that the juvenile is in need of extra-parental supervision: (A) Place the juvenile under the supervision of a probation officer of the court or of the court of the county where the juvenile has his or her usual place of abode or other person while leaving the juvenile in custody of his or her parent or custodian; and (B) prescribe a program of treatment or therapy or limit the juvenile’s activities under terms which are reasonable and within the child’s ability to perform . . . ;
- (4) Upon a finding that a parent or custodian is not willing or able to take custody of the juvenile, that a juvenile is not willing to reside in the custody of his parent or custodian or that a parent or custodian cannot provide the necessary supervision and care of the juvenile, the court may place the juvenile in temporary foster care or temporarily commit the juvenile to the department or a child welfare agency. . . ;
- (5) Upon a finding that the best interests of the juvenile or the welfare of the public require it, and upon an adjudication of delinquency pursuant to subdivision (1), section four, article one of this chapter,⁶⁷ the court may commit the juvenile to the custody of the Director of the Division of Juvenile Services for placement in a juvenile services facility for the treatment, instruction and rehabilitation of juveniles: Provided, That the court maintains discretion to consider alternative sentencing arrangements. . . . Commitments shall not exceed the maximum term for which an adult could have been sentenced for the same offense and any such maximum allowable sentence to be served in a juvenile correctional facility may take into account any time served by the juvenile in a detention center pending adjudication, disposition or transfer. . . ;

. . . .

⁶⁷ This statute incorrectly references W. Va. Code Ann. § 49-1-4(1) (Other definitions) (definition of “Child welfare agency”). Although speculative, it is likely that the correct reference should be directed to W. Va. Code Ann § 49-5-11 (Adjudication for alleged status offenders and delinquents; mandatory initial disposition of status offenders).

Juveniles adjudicated to be status offenders⁶⁸ will be provided services in accordance with W. Va. Code Ann. the West Virginia Juvenile Offender Rehabilitation Act,⁶⁹ which includes provisions regarding the treatment of status offenders in rehabilitative facilities and authorizes “[t]he Department of Health and Human Resources . . . to require any juvenile committed to its legal custody to remain at and to return to the residence to which the juvenile is assigned by the department or by the juvenile court.” W. Va. Code Ann. §§ 49-5B-5, 49-5B-6.

Additionally, a child who is a victim of abuse or neglect and is “undergoing certain status offense and delinquency proceedings,” may be subject to a “multidisciplinary screening, advisory and planning system to assist courts in facilitating permanency planning . . .” W. Va. Code Ann. § 49-5D-1(a). Pursuant to W. Va. Code Ann. § 49-5D-2(a), “The prosecuting attorney shall establish a multidisciplinary investigative team in each county.” Under W. Va. Code Ann. § 49-5D-2(c),⁷⁰ “The investigative team shall be responsible for coordinating or cooperating in the initial and ongoing investigation of all civil and criminal allegations pertinent to cases involving child sexual assault, child sexual abuse, child abuse and neglect and shall make a recommendation to the county prosecuting attorney as to the initiation or commencement of a civil petition and/or criminal prosecution.” Additionally, “Within thirty days of the initiation of a judicial proceeding pursuant to article six of this chapter, the Department of Health and Human Services shall convene a multidisciplinary treatment team to assess, plan, and implement a comprehensive, individualized service plan for children who are victims of abuse or neglect and their families. The multidisciplinary team shall obtain and utilize any assessments for the children . . . respondents that it deems necessary to assist in the development of such a plan. W. Va. Code Ann. § 49-5D-3b(a). After a case in juvenile court is commenced and “[p]rior to disposition, in each case in which a treatment planning team⁷¹ has been convened, the team shall advise the court

⁶⁸ “Status offender” is defined in W. Va. Code Ann. § 49-1-4(15) as

a juvenile who has been adjudicated as one:

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

⁶⁹ W. Va. Code Ann. §§ 49-5B-1 to -7.

⁷⁰ The text of W. Va. Code Ann. § 49-5D-2 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 484, 80th Leg. 2nd Sess. (WV 2012) (effective June 7, 2012).

⁷¹ Pursuant to W. Va. Code Ann. § 49-5D-3c(a) (Multidisciplinary treatment process for status offenders or delinquents),

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

(2) When a juvenile is adjudicated as a delinquent or has been granted an improvement period pursuant to section nine, article five of this chapter, the court, either upon its own motion or motion of a party, may require the Department of Health and Human Resources to convene a multidisciplinary treatment team and conduct an assessment, utilizing a standard uniform comprehensive assessment instrument or protocol, to determine the juvenile’s mental and physical condition, maturity and education level, home and family environment, rehabilitative needs and recommended service plan. A referral to the Department of Health and Human Resources to convene a multidisciplinary treatment team and to conduct such an assessment shall be made when the court is considering placing the juvenile in the department’s custody or placing the

as to the types of services the team has determined are needed and the type of placement, if any, which will best serve the needs of the child.” W. Va. Code Ann. § 49-5D-3b(c).⁷²

5.4.1 Recommendation: Establish a mandatory response law directing any minor who is a victim of sex trafficking away from the criminal justice system and into a child protective services system.

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

For purposes of W. Va. Code Ann. Chap. 49 (Child Welfare), the commercial sexual exploitation of a child is expressly identified as a type of child abuse.

W. Va. Code Ann. § 49-1-3(1), (B) (Definitions relating to abuse and neglect)⁷³ defines an “abused child” in part as a child “whose health or welfare is threatened by [, among other things,] . . . sexual abuse or sexual exploitation.” Additionally, the definition of “child abuse or neglect” includes the “sexual abuse,⁷⁴ sexual exploitation, sale or attempted sale or negligent treatment or maltreatment of a child by a parent, guardian or custodian who is responsible for the child’s welfare, under circumstances which harm or threaten the health and welfare of the child.” W. Va. Code Ann. § 49-1-3(4).

Pursuant to W. Va. Code Ann. § 49-1-3(17),⁷⁵

juvenile out-of-home at the department's expense pursuant to section thirteen, article five of this chapter. In any delinquency proceeding in which the court requires the Department of Health and Human Resources to convene a multidisciplinary treatment team, the probation officer shall notify the department at least fifteen working days before the court proceeding in order to allow the department sufficient time to convene and develop an individualized service plan for the juvenile.

⁷² The text of W. Va. Code Ann. § 49-5D-3 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 484, 80th Leg. 2nd Sess. (WV 2012) (effective June 7, 2012).

⁷³ The text of W. Va. Code Ann. § 49-1-3 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 484, 80th Leg. 2nd Sess. (WV 2012) (effective June 7, 2012).

⁷⁴ Pursuant to W. Va. Code Ann. § 49-1-3(15), “sexual abuse” is defined as

(A) As to a child who is less than sixteen years of age, any of the following acts which a parent, guardian or custodian shall engage in, attempt to engage in, or knowingly procure another person to engage in, with such child, notwithstanding the fact that the child may have willingly participated in such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct:

- (i) Sexual intercourse;
- (ii) Sexual intrusion; or
- (iii) Sexual contact;

(B) As to a child who is sixteen years of age or older, any of the following acts which a parent, guardian or custodian shall engage in, attempt to engage in, or knowingly procure another person to engage in, with such child, notwithstanding the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct:

- (i) Sexual intercourse;
- (ii) Sexual intrusion; or
- (iii) Sexual contact.

(C) Any conduct whereby a parent, guardian or custodian displays his or her sex organs to a child, or procures another person to display his or her sex organs to a child, for the purpose of gratifying the sexual desire of the parent, guardian or custodian, of the person making such display, or of the child, or for the purpose of affronting or alarming the child.

⁷⁵ See *supra* note 73.

“Sexual exploitation” means an act whereby:

- (A) A parent, custodian or guardian, whether for financial gain or not, persuades, induces, entices or coerces a child to engage in sexually explicit conduct⁷⁶ as that term is defined in section one, article eight-c, chapter sixty-one [W. Va. Code § 61-8C-1 (Definitions)] of this code;
- (B) A parent, guardian or custodian persuades, induces, entices or coerces a child to display his or her sex organs for the sexual gratification of the parent, guardian, custodian or a third person, or to display his or her sex organs under circumstances in which the parent, guardian or custodian knows such display is likely to be observed by others who would be affronted or alarmed.

5.6 *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.*

For purposes of West Virginia’s chapter on “Child Welfare,” “custodian” is defined as “a person who has or shares actual physical possession or care and custody of a child, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceedings.” W. Va. Code Ann. § 49-1-4(5). Because W. Va. Code Ann. § 49-1-4(5) does not require a person to have legal custody of a child, but only to have or share “actual physical possession or care and custody of a child,” this definition likely is broad enough to cover situations in which a trafficker is in custody or control of a child.

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

West Virginia does not make compensation available to children who are victims of commercial sexual exploitation without regard to ineligibility requirements. Pursuant to W. Va. Code Ann. § 14-2A-3(k)(1)(A) (Definitions), “victim” includes “[a] person who suffers personal injury or death as a result of . . . [c]riminally injurious conduct.” Additionally, “criminally injurious conduct” is defined in part as conduct “which poses a substantial threat of personal injury or death and is punishable by fine, imprisonment or death or would be so punishable but for a finding by a court of competent jurisdiction that the person committing the crime lacked capacity.” W. Va. Code Ann. § 14-2A-3(c).

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

5.7.1 **Recommendation:** Amend W. Va. Code Ann. § 14-2A-14 to exempt domestic minor sex trafficking victims from the above listed ineligibility criteria, and to provide a good cause exception to the criterion listed in W. Va. Code Ann. § 14-2A-14(d) clarifying that a domestic minor sex

⁷⁶ See *supra* note 12.

trafficking victim has good cause for failure to report a crime related to the child's commercial sexual exploitation within 72 hours of its commission.

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

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

Special protections are afforded to child-witnesses⁷⁷ who are called to testify as victims in criminal prosecutions involving sexual assault in the first, second, or third degree, or sexual abuse in the first degree. W. Va. Code Ann. § 62-6B-2(1). Pursuant to W. Va. Code Ann. § 62-6B-3(b)–(d) (Findings of fact required for taking testimony of child witness by closed-circuit television; considerations for court),

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

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

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

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

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

When a child-witness gives testimony via live two-way closed-circuit television, “[o]nly the prosecuting attorney, the attorney for the defendant and the operator of the equipment may be present in the room

⁷⁷ Pursuant to W. Va. Code Ann. § 62-6B-2(1), “Child witness” is defined as “a person thirteen years of age or less who is or will be called to testify in a criminal matter concerning an alleged violation of [§ 61-8B-3 (Sexual assault in the first degree), § 61-8B-4 (Sexual assault in the second degree), § 61-8B-5 (Sexual assault in the third degree), or § 61-8B-7 (Sexual abuse in the first degree)] of this code in which the child is the alleged victim.”

with the child witness during testimony,” and “[o]nly the court, the prosecuting attorney and the attorney for the defendant may question the child.” W. Va. Code Ann. § 62-6B-4(b)(1).⁷⁸ Additionally, under W. Va. Code Ann. § 62-6B-5 (Memorialization of statements of certain child witnesses; admissibility; hearing), when any

law-enforcement officer, physician, psychologist, social worker or investigator, in the course of his or her employment or profession or while engaged in an active criminal investigation as a law-enforcement officer or an agent of a prosecuting attorney, obtains a statement from a child thirteen years of age or younger who is an alleged victim in an investigation or prosecution alleging a violation of [sexual assault in the first, second, or third degree, or sexual abuse in the first degree] he or she shall forthwith make a contemporaneous written notation and recitation of the statement received or obtained. An audio recording or video recording with sound capability of the statement may be used in lieu of the written recitation required by the provisions of this section. Failure to comply with the provisions of this section creates a presumption that the statement is inadmissible. The statement may be admitted if, after a hearing on the matter, the court finds by clear and convincing evidence that the failure to comply with the provisions of this section was a good faith omission and that the content of the proffered statement is an accurate recital of the information provided by the child and is otherwise admissible.

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

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

(a) In any prosecution under [Article 8B, Sexual offenses] in which the victim’s lack of consent is based solely on the incapacity to consent because such victim was below a critical age [i.e., prosecutions for violations of W. Va. Code Ann. § 61-8B-3(a)(2) (Sexual assault in the first degree), § 61-8B-5(a)(2) (Sexual assault in the third degree), § 61-8B-7(a)(3) (Sexual abuse in the first degree), and § 61-8B-9(a) (Sexual abuse in the third degree)],⁷⁹ evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct and reputation evidence of the victim’s sexual conduct shall not be admissible. In any other prosecution under [Article 8B, Sexual offenses], evidence of specific instances of the victim’s prior sexual conduct with the defendant shall be admissible on the issue of consent: Provided, That such evidence heard first out of the presence of the jury is found by the judge to be relevant.

(b) In any prosecution under [Article 8B, Sexual offenses] evidence of specific instances of the victim’s sexual conduct with persons other than the defendant, opinion evidence of the victim’s sexual conduct and reputation evidence of the victim’s sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purpose of impeaching credibility,

⁷⁸ Pursuant to W. Va. Code Ann. § 62-6B-4(b)(1), “In pro se proceedings, the court may modify the provisions of this subdivision relating to the role of the attorney for the defendant to allow the pro se defendant to question the child witness in such a manner as to cause as little psychological trauma as possible under the circumstances.”

⁷⁹ W. Va. Code Ann. § 61-8B-2(a) provides, “Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.” Under subsection (c)(1), “A person is deemed incapable of consent when such person is: (1) Less than sixteen years old.”

if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.

Additionally, pursuant to W. Va. Code Ann. § 49-6-2(a), in child abuse and neglect proceedings under W. Va. Code Chapter 49 (Child welfare), Article 6 (Procedure in cases of child neglect or abuse),

the child, his or her or parents and his or her legally established custodian or other persons standing in loco parentis to him or her shall have the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed. Counsel of the child shall be appointed in the initial order. . . .

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

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

Under W. Va. Code Ann. § 49-5-18(a), (b) (Sealing of juvenile records),

(a) One year after the juvenile's eighteenth birthday, or one year after personal or juvenile jurisdiction has terminated, whichever is later, the records of a juvenile proceeding conducted under this chapter, including, but not limited to, law-enforcement files and records, shall be sealed by operation of law.

(b) The records of a juvenile proceeding in which a juvenile was transferred to criminal jurisdiction pursuant to the provisions of section ten [§ 49-5-10] of this article shall be sealed by operation of law if the juvenile is subsequently acquitted or found guilty only of an offense other than an offense upon which the waiver or order of transfer was based, or if the offense upon which the waiver or order of transfer was based is subsequently dismissed.⁸⁰

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

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

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

⁸⁰ W. Va. Code Ann. § 49-5-18(d) further states that “[s]ealed records may not be opened except upon order of the circuit court.”

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

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

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

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

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

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

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

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

No statutes of limitations apply to the prosecution of felonies under West Virginia law.⁸¹ However, prosecutions for misdemeanors must commence within 1 year of the commission of the crime. W. Va. Code Ann. § 61-11-9 (Limitation of prosecution; lost indictment).

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

⁸¹ See State v. Parsons, 589 S.E.2d 226, 237 (W. Va. 2003) (noting “West Virginia has no statute of limitations affecting felony prosecutions.” (quoting State v. Carrico, 427 S.E.2d 474, 477 (W. Va.1993))).

constituting a violation of this article; or (2) two years after the plaintiff discovers or reasonably should have discovered the last act in the course of conduct constituting a violation of this article.”

For any civil action where no statute of limitations is provided, a claim must be commenced within 2 years of the accrual date, if the claim relates to property damage or personal injuries. W. Va. Code Ann. § 55-2-12(a), (b). However, pursuant to W. Va. Code Ann. § 55-2-15 (General savings as to persons under disability), the applicable statute of limitations for civil actions will toll until a minor turns 18, at which point the victim may bring a claim “within the like number of years after his becoming of full age . . . that is allowed to a person having no such impediment to bring the same after the right accrues . . . except that it shall in no case be brought after twenty years from the time when the right accrues.”

- 5.11.1 Recommendation: Amend W. Va. Code Ann. § 61-3C-16(d) (Civil relief; damages) and § 55-2-12(a), (b) to provide an extended statute of limitations for civil claims by victims of sexual exploitation, to ensure that in conjunction with the tolling provided in W. Va. Code Ann. § 55-2-15 (General savings as to persons under disability), CSEC victims have an adequately long period of time after reaching the age of majority to bring civil claims.

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 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*
- 6.4 *Using a law enforcement decoy posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*
- 6.5 *Using the Internet 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.*

Law enforcement officers in West Virginia are not expressly required to complete training on human trafficking or domestic minor sex trafficking. However, pursuant to W. Va. Code Ann. § 30-29-3(a)(6)⁸² (Duties of the Governor’s committee and the subcommittee), the West Virginia Governor’s committee on crime, delinquency and corrections along with its law-enforcement professional standards subcommittee shall “[p]romulgate standards governing the qualifications of law-enforcement officers and the entry-level law-enforcement training curricula.” The committee and subcommittee also shall, pursuant to W. Va. Code Ann. § 30-29-3(a)(9), “[e]stablish standards governing mandatory training to effectively investigate organized criminal enterprises as defined in [W. Va. Code Ann. § 61-13-2 (Definitions)⁸³] . . . for entry level training curricula and for law-enforcement officers who have not received such training as certified by the Governor’s committee” Given that West Virginia’s CSEC laws are included within the definition of “qualifying offense,”⁸⁴ under the training requirements mandated in W. Va. Code Ann. § 30-29-3(a)(9), it is possible that training these provisions may be required for law-enforcement in West Virginia.

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

In addition to the duties authorized and established by this section, the Governor’s committee may:

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

⁸² The text of W. Va. Code Ann. § 30-29-3 included here and elsewhere in this report includes amendments made by the passage of House Bill 4053, 80th Leg. 2nd Sess. (WV 2012) (effective June 8, 2012).

⁸³ W. Va. Code Ann. § 61-13-2 defines “organized criminal enterprise” as “a combination of five or more persons engaging over a period of not less than six months in one or more of the qualifying offenses set forth in this section.”

⁸⁴ Pursuant to W. Va. Code Ann. § 61-13-2, “qualifying offenses” include violations of W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), § 61-3C-14b (Soliciting, etc. a minor via computer; penalty), § 61-8-8 (Receiving support from prostitution; pimping; penalty), § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), and § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty).

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

- 6.1.1 Recommendation: Amend W. Va. Code Ann. § 30-29-3 (Duties of the Governor’s committee and the subcommittee) to expressly mandate that law enforcement in West Virginia receive training regarding human trafficking and domestic minor sex trafficking.

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

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

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

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

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

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

Any information obtained through a wiretap authorized by an order granted under W. Va. Code Ann. § 62-1D-8, whether obtained by a law enforcement officer or other person receiving the information, may be disclosed in testimony given during “any criminal proceeding held under the authority of this state or of any political subdivision of this state.” W. Va. Code Ann. § 62-1D-9(c), (f).⁸⁵

⁸⁵ To the extent evidence of other crimes not the basis for authorizing the wiretap is obtained through use of an authorized wiretap, W. Va. Code Ann. § 62-1D-9(e) and (g) authorize the use of such evidence by law enforcement and its introduction in evidence through testimony in the criminal prosecution. W. Va. Code Ann. § 62-1D-9(e) and (g) provide,

(e) When an investigative or law-enforcement officer, while engaged in intercepting wire, oral or electronic communications in the manner authorized herein, intercepts wire, oral or electronic communications relating to offenses other than those specified in the order of authorization, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (a) and (b) of this section.

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

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

There is no law in place that explicitly permits the use of a decoy by law enforcement for the purpose of investigating prostitution or sex trafficking cases; however, as discussed in Section 6.5, decoys may be used under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; penalty). In addition, case law addressing the defense of entrapment under West Virginia law indicates that to the extent that an undercover investigation of prostitution produces sufficient evidence to show that the buyer was predisposed to commit the crime, the defense of entrapment should not be available.⁸⁶

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

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

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

Such contents and any evidence derived therefrom may be used under subsection (c) of this section when authorized or approved by the designated circuit judge where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this article. The application shall be made as soon as may be practicable after such contents or the evidence derived therefrom is obtained.

....

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

⁸⁶ See *State v. Houston*, 475 S.E.2d 307, 318 (W. Va. 1996) (holding that the “defense of entrapment is fully contained within the subjective test standard” which focuses on the defendant’s predisposition to commit the crime). To prevail based on the defense of entrapment, a defendant must show that “the offense originates with law enforcement officers who procure its commission by an accused who would not have otherwise perpetrated it except for the instigation or inducement by the law enforcement officers.” *Id.* at 227. While no West Virginia case law discusses the application of the defense in a case involving an undercover law enforcement officer investigating prostitution, where a law enforcement officer posed as a buyer of illegal drugs, the court found the defense inapplicable where “the State offered evidence beyond a reasonable doubt that the defendant was predisposed to commit the crime.” *Id.* at 230.

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

- 6.5.1 Recommendation: Enact a law that expressly authorizes law enforcement to use the Internet to investigate buyers and traffickers in domestic minor sex trafficking investigations.

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

Investigating law enforcement agencies are required to update reports of missing children pursuant to W. Va. Code Ann. § 49-9-14(c) which provides,

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

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

Pursuant to W. Va. Code Ann. § 49-9-3 (Clearinghouse function), the West Virginia Missing Children Information Clearinghouse was established to serve as a "central repository of information on missing children" and, under subsection (c), it shall do the following:

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

Under W. Va. Code Ann. § 49-9-8(a) (Law-enforcement requirements; missing child reports; unidentified bodies), when law enforcement receives a report of a missing child, it shall,

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

If the missing child is under 13, law enforcement may forward the contents of the missing person report to the child's last known "[c]hild care center or child care home in which the child was enrolled" or "[s]chool the child attended in West Virginia, if any." W. Va. Code Ann. § 49-9-14(b). Additionally, under W. Va. Code Ann. § 49-9-14(c) (Agencies that receive report),

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

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

If law enforcement finds an unidentified body of a child, it must report the information to the clearinghouse and to the National Crime Information Center Unidentified Person File and cross-check the information with missing child descriptions. W. Va. Code Ann. §§ 49-9-8(c), 49-9-10(a).

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