

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2015 ANALYSIS AND RECOMMENDATIONS MONTANA

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

#### *Legal Components:*

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

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

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

Montana law specifically criminalizes sex trafficking of minors under 18 and does not require proof of force, fraud, or coercion. The general human trafficking offense under Enacted House Bill 89 § 2<sup>2</sup> (Trafficking of persons) states,

- (1) A person commits the offense of trafficking of persons if the person purposely or knowingly:
  - (a) recruits, transports, transfers, harbors, receives, provides, obtains, isolates, maintains or entices another person intending or knowing that the person will be subjected to involuntary servitude or sexual servitude; or
  - (b) benefits, financially or by receiving anything of value, from participation in a venture that

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

<sup>2</sup> House Bill 89 was enacted during the 2015 Regular Session of the 64th Montana Legislature (effective July 1, 2015).

has subjected another person to involuntary servitude or sexual servitude.

Trafficking of persons is punishable by up to 50 years imprisonment and a possible fine up to \$100,000 when the victim is a child. Enacted House Bill 89 § 2(2)(b)(ii).<sup>3</sup>

Enacted House Bill 89 § 4 (Sexual servitude) specifically criminalizes sex trafficking of a minor without regard to force, fraud or coercion. It states,

- (1) A person commits the offense of sexual servitude if the person purposely or knowingly:
  - (a) uses coercion or deception to compel an adult to engage in commercial sexual activity;<sup>4</sup> or
  - (b) recruits, transports, transfers, harbors, receives, provides, obtains by any means, isolates, entices, maintains, or makes available a child for the purpose of commercial sexual activity.

Sexual servitude is punishable by up to 25 years imprisonment and possible fine not to exceed \$75,000 when the victim is a child. Enacted House Bill 89 § 4(3)(b).<sup>5</sup>

Enacted House Bill 89 § 5(1) (Patronizing victim of sexual servitude) makes it a crime when a person “purposely or knowingly gives, agrees to give, or offers to give anything of value so that a person may engage in commercial sexual activity with: (a) another person who the person knows is a victim of sexual servitude; or (b) a child.” Patronizing a victim of sexual servitude is punishable by up to 25 years imprisonment and a possible fine not to exceed \$75,000 when the victim is a child. Enacted House Bill 89 § 5(2)(b).<sup>6</sup>

Additionally, pursuant to Enacted House Bill § 1(5) (Definitions), “[h]uman trafficking” is defined as “the commission of an offense under [section 2, section 3, section 4, or section 5].”

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.*

The following statutes treat CSEC separately from non-commercial sex offenses:

1. Mont. Code Ann. § 45-5-603 (Aggravated promotion of prostitution) states,

- (1) A person commits the offense of aggravated promotion of prostitution if the person purposely or knowingly commits any of the following acts:
  - (a) compels another to engage in or promote prostitution;
  - (b) promotes prostitution of a child under the age of 18 years, whether or not the person is aware of

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<sup>3</sup> Enacted House Bill 89 § 6 (Aggravating circumstance) provides,

(1) An aggravating circumstance during the commission of an offense under [section 2, section 3, section 4, or section 5] occurs when the defendant recruited, enticed, or obtained the victim of the offense from a shelter that serves runaway youth, foster children, homeless persons, or persons subjected to human trafficking, domestic violence, or sexual assault.

(2) If the trier of fact finds that an aggravating circumstance occurred during the commission of an offense under [section 2, section 3, section 4, or section 5], the defendant may be imprisoned for up to 5 years in addition to the period of imprisonment prescribed for the offense. An additional sentence prescribed by this section must run consecutively to the sentence provided for the underlying offense.

<sup>4</sup> “Commercial sexual activity” is defined by Enacted House Bill 89 § 1(3) (Definitions) to mean “sexual activity for which anything of value is given to, promised to, or received by a person.”

<sup>5</sup> See *supra* note 3.

<sup>6</sup> See *supra* note 3.

the child's age;

(c) promotes the prostitution of one's spouse, child, ward, or any person for whose care, protection, or support the person is responsible.

A conviction under Mont. Code Ann. § 45-5-603(1)(b) (Aggravated promotion of prostitution) for promoting prostitution of a child is punishable by imprisonment for 100 years, 25 years of which cannot be suspended or eligible for parole, a \$50,000 fine, or both, an order to complete a sexual offender treatment program, and may be subject to supervision for the remainder of the offender's life. Mont. Code Ann. § 45-5-603(2)(b)(i)(A)–(C), (ii).

2. Mont. Code Ann. § 45-5-601 (Prostitution) states,

(1) A person commits the offense of prostitution if the person engages in or agrees or offers to engage in sexual intercourse with another person for compensation, whether the compensation is received or to be received or paid or to be paid.

A conviction under Mont. Code Ann. § 45-5-601 is punishable by imprisonment up to 1 year, a fine not to exceed \$1,000, or both. Mont. Code Ann. § 45-5-601(2)(b). Subsequent offenses are punishable by imprisonment up to 5 years, a fine not to exceed \$10,000, or both. Mont. Code Ann. § 45-5-601(2)(b). If the person patronized was a child and the patron was at least 18, a conviction under Mont. Code Ann. § 45-5-601 is punishable by imprisonment for 100 years, 25 years of which cannot be suspended or deferred (“except as provided in 46-18-222”<sup>7</sup>), and during which time the offender is not eligible for parole, is subject to a possible fine not to exceed \$50,000, and an order to enroll in a treatment program, and may be subject to supervision for the remainder of the offender's life. Mont. Code Ann. § 45-5-601(3)(a)(i), (ii), (iii), (b).

3. Mont. Code Ann. § 45-5-602 (Promoting prostitution) states,

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<sup>7</sup> Mont. Code Ann. § 46-18-222 (Exceptions to mandatory minimum sentences, restrictions on deferred imposition and suspended execution of sentence, and restrictions on parole eligibility) states,

Mandatory minimum sentences prescribed by the laws of this state, mandatory life sentences prescribed by 46-18-219 [Life sentence without possibility of release], the restrictions on deferred imposition and suspended execution of sentence prescribed by 46-18-201(1)(b) [Sentences that may be imposed], 46-18-205 [Mandatory minimum sentences —restrictions on deferral or suspension], 46-18-221(3) [Additional sentence for offenses committed with dangerous weapon], 46-18-224 [Additional sentence for offense committed while carrying a handgun loaded with armor-piercing ammunition], and 46-18-502(3) [Sentencing of persistent felony offender], and restrictions on parole eligibility do not apply if:

. . . .  
(6) the offense was committed under . . . 45-5-601(3) [Prostitution], 45-5-602(3) [Promoting prostitution], 45-5-603(2)(b) [Aggravated promotion of prostitution], or 45-5-625(4) [Sexual abuse of children] and the judge determines, based on the findings contained in a sexual offender evaluation report prepared by a qualified sexual offender evaluator pursuant to the provisions of 46-23-509, that treatment of the offender while incarcerated, while in a residential treatment facility, or while in a local community affords a better opportunity for rehabilitation of the offender and for the ultimate protection of the victim and society, in which case the judge shall include in its judgment a statement of the reasons for its determination.

The text of Mont. Code Ann. § 46-18-222 included here and elsewhere in this report includes amendments made by the enactment of House Bill 89 during the 2015 Regular Session of the 64th Montana Legislature (effective July 1, 2015).

(1) A person commits the offense of promoting prostitution if the person purposely or knowingly commits any of the following acts:

- (a) owns, controls, manages, supervises, resides in, or otherwise keeps, alone or in association with others, a house of prostitution or a prostitution business;
- (b) procures an individual for a house of prostitution or a place in a house of prostitution for an individual;
- (c) encourages, induces, or otherwise purposely causes another to become or remain a prostitute;
- (d) solicits clients for another person who is a prostitute;
- (e) procures a prostitute for a patron;
- (f) transports an individual into or within this state with the purpose to promote that individual's engaging in prostitution or procures or pays for transportation with that purpose;
- (g) leases or otherwise permits a place controlled by the offender, alone or in association with others, to be regularly used for prostitution or for the procurement of prostitution or fails to make reasonable effort to abate that use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means; or
- (h) lives in whole or in part upon the earnings of an individual engaging in prostitution, unless the person is the prostitute's minor child or other legal dependent incapable of self-support.

A conviction under Mont. Code Ann. § 45-5-602 (Promoting prostitution) is punishable by imprisonment up to 10 years, a fine not to exceed \$50,000, or both. Mont. Code Ann. § 45-5-602(2). However, if the victim is a minor under 18 and the offender is at least 18 or older, then a conviction under Mont. Code § 45-5-602 is punishable by imprisonment for 100 years, 25 years of which cannot be suspended, a possible fine not to exceed \$50,000, an order to complete a sexual offender treatment program, and may be subject to supervision for the remainder of the offender's life. Mont. Code Ann. § 45-5-602(3)(a)(i)-(iii),(b).

4. Mont. Code Ann. § 45-5-625(1) (Sexual abuse of children) states in part,

(1) A person commits the offense of sexual abuse of children if the person:

- (a) knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct,<sup>8</sup> actual or simulated;<sup>9</sup>
- (b) knowingly photographs, films, videotapes, develops or duplicates the photographs, films, or videotapes, or records a child engaging in sexual conduct, actual or simulated;
- (c) knowingly, by any means of communication, including electronic communication,<sup>10</sup> persuades,

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<sup>8</sup> Mont. Code Ann. § 45-5-625(5)(b) (Sexual abuse of children) defines "sexual conduct" as

(i) actual or simulated:

- (A) sexual intercourse, whether between persons of the same or opposite sex;
- (B) penetration of the vagina or rectum by any object, except when done as part of a recognized medical procedure;
- (C) bestiality;
- (D) masturbation;
- (E) sadomasochistic abuse;
- (F) lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person; or
- (G) defecation or urination for the purpose of the sexual stimulation of the viewer; or

(ii) depiction of a child in the nude or in a state of partial undress with the purpose to abuse, humiliate, harass, or degrade the child or to arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person.

<sup>9</sup> Mont. Code Ann. § 45-5-625(5)(c) (Sexual abuse of children) defines "simulated" as "any depicting of the genitals or pubic or rectal area that gives the appearance of sexual conduct or incipient sexual conduct."

<sup>10</sup> Mont. Code Ann. § 45-5-625(5)(a) (Sexual abuse of children) defines "electronic communication" as "a sign, signal, writing, image, sound, data, or intelligence of any nature transmitted or created in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system."

entices, counsels, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated;

....

A conviction under Mont. Code Ann. § 45-5-625(1)(a) (Sexual abuse of children) is punishable by life imprisonment or a term of imprisonment up to 100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a). However, if the victim is under 16, unless punished under Mont. Code Ann. § 46-18-219,<sup>11</sup> a conviction for sexual abuse of children is punishable by life imprisonment or by imprisonment for 4–100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(b). Penalties are enhanced when the child is under 13 and the offender is 18 or older to imprisonment for 100 years, 25 years of which cannot be suspended (“except as provided in 46-18-222”), a possible fine not to exceed \$50,000, an order to enroll in a treatment program, and possible supervision for the remainder of the offender’s life. Mont. Code Ann. § 45-5-625(4)(a), (b).

Certain non-commercial sexual offenses may be applicable in cases involving the commercial sexual exploitation of a child. These include the following:

1. Mont. Code Ann. § 45-5-503(1) (Sexual intercourse without consent) states in part, “A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent.” Mont. Code Ann. § 45-5-501(1)(a)(ii)(D) (Definitions) states in part, “As used in 45-5-503, the term ‘without consent’ means . . . the victim is incapable of consent because the victim is . . . less than 16 years old.” Pursuant to Mont. Code Ann. § 45-5-503,

(3)(a) If the victim is less than 16 years old and the offender is 4 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$50,000, except as provided in 46-18-219 and 46-18-222.

(b) If two or more persons are convicted of sexual intercourse without consent with the same victim in an incident in which each offender was present at the location where another offender’s offense occurred during a time period in which each offender could have reasonably known of the other’s

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<sup>11</sup> Mont. Code Ann. § 46-18-219(1) (Life sentence without possibility of release) states,

(1) (a) Except as provided in subsection (3), if an offender convicted of one of the following offenses was previously convicted of one of the following offenses or of an offense under the laws of another state or of the United States that, if committed in this state, would be one of the following offenses, the offender must be sentenced to life in prison, unless the death penalty is applicable and imposed:

....

(ii) 45-5-303, aggravated kidnapping;

(iii) 45-5-503, sexual intercourse without consent;

(iv) 45-5-625, sexual abuse of children; or

(v) 45-5-627, except subsection (1)(b), ritual abuse of a minor.

(b) Except as provided in subsection (3), if an offender convicted of one of the following offenses was previously convicted of two of the following offenses, two of any combination of the offenses listed in subsection (1)(a) or the following offenses, or two of any offenses under the laws of another state or of the United States that, if committed in this state, would be one of the offenses listed in subsection (1)(a) or this subsection, the offender must be sentenced to life in prison, unless the death penalty is applicable and imposed:

....

(iii) 45-5-302, kidnapping;

....

(v) 45-5-603, aggravated promotion of prostitution.

offense, each offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 5 years or more than 100 years and may be fined not more than \$50,000, except as provided in 46-18-219 and 46-18-222.

(c) If the offender was previously convicted of an offense under this section or of an offense under the laws of another state or of the United States that if committed in this state would be an offense under this section and if the offender inflicted serious bodily injury upon a person in the course of committing each offense, the offender shall be:

(i) punished by death as provided in 46-18-301 through 46-18-310, unless the offender is less than 18 years of age at the time of the commission of the offense; or

(ii) punished as provided in 46-18-219.

(4) (a) If the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offense, the offender:

(i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (4)(a)(i) except as provided in 46-18-222, and during the first 25 years of imprisonment, the offender is not eligible for parole.

(ii) may be fined an amount not to exceed \$50,000; and

(iii) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program provided or approved by the department of corrections.

(b) If the offender is released after the mandatory minimum period of imprisonment, the offender is subject to supervision by the department of corrections for the remainder of the offender's life and shall participate in the program for continuous, satellite-based monitoring provided for in 46-23-1010.

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## 2. Mont. Code Ann. § 45-5-625(1) (Sexual abuse of children) makes it a crime if a person

(h) knowingly travels within, from, or to this state with the intention of meeting a child under 16 years of age or a person the offender believes to be a child under 16 years of age in order to engage in sexual conduct, actual or simulated; or

(i) knowingly coerces, entices, persuades, arranges for, or facilitates a child under 16 years of age or a person the offender believes to be a child under 16 years of age to travel within, from, or to this state with the intention of engaging in sexual conduct, actual or simulated.

A conviction under Mont. Code Ann. § 45-5-625 is punishable by life imprisonment and a possible fine not to exceed \$10,000 or a term of imprisonment up to 100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a). However, if the victim is under 16, unless punished under Mont. Code Ann. § 46-18-219, a conviction for sexual abuse of children is punishable by life imprisonment or by imprisonment for 4–100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(b). Penalties are enhanced when the child is under 13 and the offender is 18 or older to imprisonment for 100 years, 25 years of which cannot be suspended (“except as provided in 46-18-222”), a possible fine not to exceed \$50,000, an order to enroll in a treatment program, and possible supervision for the remainder of the offender's life. Mont. Code Ann. § 45-5-625(4)(a), (b).

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

While Mont. Code Ann. § 45-5-601 (Prostitution) does not refer to Enacted House Bill 89 § 2<sup>12</sup> (Trafficking of persons), § 4 (Sexual servitude), or § 5 (Patronizing victim of sexual servitude) to clarify that a commercially sexually exploited child is a victim of sex trafficking, related provisions promote identification of commercially sexually exploited minors as victims of trafficking. Specifically, Enacted House Bill 89 § 10 (Affirmative defense) establishes an affirmative defense for human trafficking victims to prostitution and related charges and House Bill 89 § 9 (Immunity of child) eliminates criminal liability for minors under the prostitution law.

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.*

Montana has not enacted a racketeering statute. Although not a separate offense, Montana’s criminal street gang laws provide for enhanced sentences. Mont. Code Ann. § 45-8-404 states,

(1) (a) (Additional sentence for criminal street gang-related felony) states, “A person who is convicted of a felony that the person committed for the benefit of, at the direction of, or in association with any criminal street gang for the purpose of promoting, furthering, or assisting any criminal conduct by criminal street gang members shall, in addition to the punishment provided for the commission of the underlying offense, be sentenced to a term of imprisonment in a state prison of not less than 1 year or more than 3 years, except as provided in 46-18-222.

(b) If the underlying felony described in subsection (1)(a) is committed on the grounds of, or within 1,000 feet of, a public school, as defined in 20-6-501, during hours when the facility is open for classes or school-related programs or when minors are using the facility, the additional term provided for in subsection (1) is 2 to 4 years.

(2) The imposition or execution of the minimum sentences prescribed by this section may not be deferred or suspended, except as provided in 46-18-222.

(3) An additional sentence prescribed by this section shall run consecutively to the sentence provided for the underlying offense.

Pursuant to Mont. Code Ann. § 45-8-405(2)(h) (Pattern of criminal street gang activity), “The offenses that form a pattern of criminal street gang activity include . . . aggravated promotion of prostitution, as defined in 45-5-603. . . .”

- 1.4.1 Recommendation: Enact a racketeering statute that includes CSEC offenses of Mont. Code Ann. § 45-5-601 (Prostitution), § 45-5-602 (Promoting prostitution), § 45-5-603 (Aggravated promotion of prostitution), § 45-5-625(1) (Sexual abuse of children), as well as trafficking offenses under Enacted House Bill 89 § 2 (Trafficking of persons), § 4 (Sexual servitude), and § 5 (Patronizing victim of sexual servitude) as predicate crimes so it may be used to prosecute trafficking enterprises.

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<sup>12</sup> See *supra* note 2.

***Legal Components:***

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

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***Legal Analysis:***

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

Buyers of commercial sex acts with a child in Montana face prosecution and penalties under three provisions of the state human trafficking law. Enacted House Bill 89<sup>13</sup> § 2 (Trafficking of persons) and Enacted House Bill 89 § 4 (Sexual servitude)<sup>14</sup> apply to buyers of sex with minors following federal precedent<sup>15</sup> based on use of the term “obtains,” while Enacted House Bill 89 § 5 (Patronizing victim of sexual servitude) applies directly to the

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<sup>13</sup> See *supra* note 2.

<sup>14</sup> See section 1.1 for text of Enacted House Bill 89 § 4 (Sexual servitude).

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



conduct of buyers. Enacted House Bill 89 § 5 (Patronizing victim of sexual servitude) provides that “[a] person commits the offense of patronizing a victim of sexual servitude if the person purposely or knowingly gives, agrees to give, or offers to give anything of value so that a person may engage in commercial sexual activity with: (a) another person who the person knows is a victim of sexual servitude; or (b) a child.”

2.1.1 Recommendation: Amend the core sex trafficking offense, Enacted House Bill 89 § 4 (Sexual servitude), to clarify that buyer conduct is included as a violation of sexual servitude.<sup>16</sup>

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

A buyer of sex with a minor may be charged under Mont. Code Ann. § 45-5-601(1) (Prostitution). A conviction under Mont. Code Ann. § 45-5-601 (Prostitution) is punishable by imprisonment up to 1 year, a fine not to exceed \$1,000, or both. Mont. Code Ann. § 45-5-601(2)(b). Subsequent offenses are punishable by imprisonment up to 5 years, a fine not to exceed \$10,000, or both. Mont. Code Ann. § 45-5-601(2)(b). If the victim is a minor and the offender is at least 18, a conviction under Mont. Code Ann. § 45-5-601 is punishable by imprisonment for 100 years, 25 years of which cannot be suspended or deferred (“except as provided in 46-18-222”<sup>17</sup>), and during which time the offender is not eligible for parole, is subject to a possible fine not to exceed \$50,000 and to an order to enroll in a treatment program, and may be subject to supervision for the remainder of the offender’s life. Mont. Code Ann. § 45-5-601(3)(a)(i), (ii), (iii), (b).

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

Montana’s prostitution statute, Mont. Code Ann. § 45-5-601(3)(a) (Prostitution), which includes the crime of soliciting prostitution, heightens the penalties for soliciting a minor under 18.<sup>18</sup> Buyers convicted of soliciting prostitution from an adult face a \$1,000 fine and one year imprisonment under Mont. Code Ann. § 45-5-601(2)(b), while buyers convicted under § 45-5-601(3) of soliciting prostitution of a child face 100 years imprisonment and a possible fine up to \$50,000.<sup>19</sup>

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

A conviction under Enacted House Bill 89 § 2<sup>20</sup> (Trafficking of persons) is punishable by imprisonment for 50 years and a fine of not more than \$100,000. Enacted House Bill 89 § 2(2)(b)(ii). A conviction under Enacted House Bill 89 § 4 (Sexual servitude) or § 5 (Patronizing victim of sexual servitude) carries a 25 year jail term and a fine of not more than \$75,000.<sup>21</sup> Enacted House Bill 89 §§ 4(3)(b), 5(2)(b). A conviction under Mont. Code Ann. § 45-5-601(3)(a) (Prostitution) is punishable by imprisonment for 100 years, 25 years of which

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<sup>16</sup> See generally SHARED HOPE INTERNATIONAL, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), [http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper\\_Eliminating-Third-Party-Control\\_Final1.pdf](http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf) (discussing need to include buyer conduct in core sex trafficking offense regardless of whether victim is under control of a third party and explaining negative impact on victims and victim-identification when buyers are excluded as sex trafficking offenders).

<sup>17</sup> See *supra* note 7 for the substantive provision of Mont. Code Ann. § 46-18-222 (Exceptions to mandatory minimum sentences, restrictions on deferred imposition and suspended execution of sentence, and restrictions on parole eligibility).

<sup>18</sup> See *supra* Section 1.2 for substantive provisions of Mont. Code Ann. § 45-5-601.

<sup>19</sup> See Section 2.1 for further explanation of penalties for buyers under Mont. Code Ann. § 45-5-601(1) (Prostitution).

<sup>20</sup> See *supra* note 2.

<sup>21</sup> See *supra* note 3 for penalty enhancement applicable when an aggravating circumstance is established.

cannot be suspended or deferred (with certain exceptions provided in 46-18-222), and during which time the offender is not eligible for parole, is subject to a requirement to enroll in and complete a sex offender treatment program “provided or approved by the department of corrections,” and if released after serving the minimum sentence, is subject to supervision for the remainder of the offender’s life. Mont. Code Ann. § 45-5-601(3)(a)(i), (ii), (iii), (b).

In comparison, 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, if the victim is under the age of 14. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>22</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>23</sup> a conviction is punishable by penalties ranging from a fine of up to \$250,000 to life imprisonment plus a fine not to exceed \$250,000.<sup>24</sup>

2.5 *Using the Internet or other electronic communication 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.*

Mont. Code Ann. § 45-5-625 (Sexual abuse of children) states in part,

(1) A person commits the offense of sexual abuse of children if the person:

...

(c) knowingly, by any means of communication, including electronic communication,<sup>25</sup> persuades, entices, counsels, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct,<sup>26</sup> actual or simulated;<sup>27</sup>

....

A conviction under Mont. Code Ann. § 45-5-625(1)(a) is punishable by life imprisonment or a term of imprisonment up to 100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a).

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<sup>22</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

<sup>23</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

<sup>24</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(a)(2), (4) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>25</sup> *See supra* note 10 for the definition of “electronic communication.”

<sup>26</sup> *See supra* note 8 for the definition of “sexual conduct.”

<sup>27</sup> *See supra* note 9 for the definition of “simulated.”

However, if the victim is under 16, unless punished under Mont. Code Ann. § 46-18-219,<sup>28</sup> a conviction for sexual abuse of children is punishable by life imprisonment or by imprisonment for 4 –100 years and a possible fine not to exceed \$ 10,000. Mont. Code Ann. § 45-5-625(2)(b). Penalties are enhanced when the child is under 13 and the offender is 18 or older to imprisonment for 100 years, 25 years of which cannot be suspended (“except as provided in 46-18-222”), a possible fine not to exceed \$50,000, an order to enroll in a treatment program, and possible supervision for the remainder of the offender’s life. Mont. Code Ann. § 45-5-625(4)(a), (b).

Although more limited in scope, buyers may also face penalties under Mont. Code Ann. § 45-5-504<sup>29</sup> (Indecent exposure) for using the Internet to lure, entice, or purchase commercial sex acts with a minor. Pursuant to Mont. Code Ann. § 45-5-504,

(1) A person commits the offense of indecent exposure if the person knowingly or purposely exposes the person's genitals or intimate parts by any means, including electronic communication as defined in 45-5-625(5)(a), under circumstances in which the person knows the conduct is likely to cause affront or alarm in order to:

(a) abuse, humiliate, harass, or degrade another; or

(b) arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person.

....

(3) (a) A person commits the offense of indecent exposure to a minor if the person commits an offense under subsection (1) and the person knows the conduct will be observed by a person who is under 16 years of age and the offender is more than 4 years older than the victim.

Indecent exposure is punishable by a minimum of 4 years imprisonment and a possible fine not to exceed \$50,000, “unless the judge makes a written finding that there is good cause to impose a term of less than 4 years and imposes a term of less than 4 years, or more than 100 years, or both.”

2.5.1 Recommendation: Amend Mont. Code Ann. § 45-5-625 (Sexual abuse of children) to specifically include use of the Internet for the purpose of purchasing commercial sex acts with a minor under 18.

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

Enacted House Bill 89 § 4 (Sexual servitude) and § 5<sup>30</sup> (Patronizing victim of sexual servitude) expressly prohibit the use of mistake of age as a defense to prosecution. Specifically, Enacted House Bill 89 § 4(2) states in part, “It is not a defense in a prosecution under subsection (1)(b) [Sexual servitude involving a minor victim] . . . that the defendant believed the child was an adult.” Similarly, Enacted House Bill 89 § 5(2)(b) imposes a heightened penalty “if the individual patronized was a child . . . whether or not the person believed the child was an adult.”

Additionally, under Mont. Code Ann. § 45-5-601(3)(a) (Prostitution), buyers are not allowed a mistake of age defense. This section is violated “[i]f the person patronized was a child and the patron was 18 years of age or

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<sup>28</sup> See *supra* note 11 for the substantive provision of Mont. Code Ann. § 46-18-219 (Life sentence without possibility of release).

<sup>29</sup> The text of Mont. Code Ann. § 45-5-504 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 60 during the 2015 Regular Session of the 64th Montana Legislature (effective October 1, 2015).

<sup>30</sup> See *supra* note 2.

older at the time of the offense, whether or not the patron was aware of the child's age.” Mont. Code Ann. § 45-5-601(3)(a).

Mont. Code Ann. § 45-5-511(1) (Provisions generally applicable to sexual crimes) provides, “When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that the offender reasonably believed the child to be above that age. The belief may not be considered reasonable if the child is less than 14 years old.” As the heading of this statute indicates, this defense likely only applies to offenses under Part 5 (Sexual crimes).

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

The penalties for violating Mont. Code Ann. § 45-5-601 (Prostitution) are equally high for all offenses involving a victim under 18 and are not staggered or eliminated for older minors. If the victim is under 18 and the offender is at least 18, a conviction under Mont. Code Ann. § 45-5-601 is punishable by imprisonment for 100 years, 25 years of which cannot be suspended or deferred (“except as provided in 46-18-222”), and during which time the offender is not eligible for parole, is subject to a possible fine not to exceed \$50,000 and to an order to enroll in a treatment program, and may be subject to supervision for the remainder of the offender’s life. Mont. Code Ann. § 45-5-601(3)(a)(i), (ii), (iii), (b). Similarly, Enacted House Bill 89 § 4 (Sexual servitude) and § 5<sup>31</sup> (Patronizing victim of sexual servitude) apply equally high penalties to all offenses against a minor victim under the age of 18.

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

A conviction under Mont. Code § 45-5-601(3)(a) (Prostitution), is punishable by a possible fine not to exceed \$50,000. Mont. Code Ann. §§ 45-5-601(3)(a)(ii). Enacted House Bill §§ 4(3)(b), 5(2)(b), 2(2)(b).

Buyers are subject to a mandatory order of restitution in any case that the victim suffers “an economic loss,” pursuant to Mont. Code Ann. § 46-18-241(1) (Condition of restitution), which states,

As provided in 46-18-201,<sup>32</sup> a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss. The duty to pay full restitution under the sentence remains with the

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<sup>31</sup> See *supra* note 2.

<sup>32</sup> Mont. Code Ann. § 46-18-201(5) (Sentences that may be imposed) provides,

In addition to any other penalties imposed, if a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere and the sentencing judge finds that a victim, as defined in 46-18-243, has sustained a pecuniary loss, the sentencing judge shall, as part of the sentence, require payment of full restitution to the victim, as provided in 46-18-241 through 46-18-249, whether or not any part of the sentence is deferred or suspended.

Mont. Code Ann. § 46-18-243(2)(a)(i) states,

(2)(a) “Victim” means:

(i) a person who suffers loss of property, bodily injury, or death as a result of:

(A) the commission of an offense;

. . . .

Mont. Code Ann. § 46-18-243(2)(b) further provides, “Victim does not include a person who is accountable for the crime or accountable for a crime arising from the same transaction.”

offender or the offender's estate until full restitution is paid, whether or not the offender is under state supervision. If the offender is under state supervision, payment of restitution is a condition of any probation or parole.

If a buyer's property was used or intended for use in violation of Enacted House Bill 89 § 2 (Trafficking of persons), § 4 (Sexual servitude) or § 5 (Patronizing victim of sexual servitude) that property is subject to asset forfeiture under Enacted House Bill 89 § 7(1)<sup>33</sup> (Property subject to forfeiture) which provides,

- (b) Property is subject to criminal forfeiture under this section if it is used or intended for use in violation of [section 2, section 3, section 4, or section 5].
- (c) The following property is subject to criminal forfeiture under this section:
  - (i) money, raw materials, products, equipment, and other property of any kind;
  - (ii) property used or intended for use as a container for property enumerated in subsection (1)(c)(i);
  - (iii) except as provided in subsection (2), a conveyance, including an aircraft, vehicle, or vessel;<sup>34</sup>
  - (iv) books, records, research products and materials, formulas, microfilm, tapes, and data;
  - (v) anything of value furnished or intended to be furnished in exchange for the provision of labor or services or commercial sexual activity and all proceeds traceable to the exchange;
  - (vi) negotiable instruments, securities, and weapons; and
  - (vii) personal property constituting or derived from proceeds obtained directly or indirectly from the provision of labor or services or commercial sexual activity.

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

Mont. Code Ann. § 45-5-625 (Sexual abuse of children) states,

- (1) A person commits the offense of sexual abuse of children if the person:
  - ....
  - (e) knowingly possesses any visual or print medium,<sup>35</sup> including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;
  - ....

A conviction under Mont. Code Ann. § 45-5-625(1)(e) is punishable by imprisonment up to 10 years, a fine not to exceed \$10,000, or both. Mont. Code Ann. § 45-5-625(2)(c). However, if the victim is under 13 and the offender is 18 or older, a conviction under Mont. Code Ann. § 45-5-625(1)(e) is punishable by imprisonment for 100 years, 25 years of which cannot be suspended ("except as provided in 46-18-222"), a possible fine not to exceed \$50,000, an order to enroll in a treatment program, and possible supervision for the remainder of the offender's life. Mont. Code Ann. § 45-5-625(4)(a), (b).

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<sup>33</sup> [bill citation needed]

<sup>34</sup> Pursuant to Enacted House Bill 89 § 7(2), "A conveyance is not subject to criminal forfeiture under this section unless the owner or other person in charge of the conveyance knowingly used the conveyance or knowingly consented to its use for the purposes described in subsection (1)(b)."

<sup>35</sup> Mont. Code Ann. § 45-5-625(5)(d) defines "visual medium" as

- (i) any film, photograph, videotape, negative, slide, or photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or
- (ii) any disk, diskette, or other physical media that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method.

In comparison, a federal conviction for possession of child pornography<sup>36</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>37</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>38</sup>

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

Under the Sexual or Violent Offender Registration Act, Mont. Code Ann. § 46-23-504(1) (Persons required to register—procedure) states,

(1) Except as provided in 41-5-1513 [Disposition—delinquent youth—restrictions], a sexual or violent offender:

- (a) shall register immediately upon conclusion of the sentencing hearing if the offender is not sentenced to confinement or is not sentenced to the department and placed in confinement by the department;
- (b) must be registered as provided in 46-23-503 [Release of sexual or violent offender from place of confinement—duties of official in charge] at least 10 days prior to release from confinement if sentenced to confinement or sentenced to the department and placed in confinement by the department;
- (c) shall register within 3 business days of entering a county of this state for the purpose of residing or setting up a temporary residence for 10 days or more or for an aggregate period exceeding 30 days in a calendar year; and
- (d) who is a transient shall register within 3 business days of entering a county of this state.

Mont. Code Ann. § 46-23-502(10)<sup>39</sup> (Definitions) defines “sexual or violent offender” as “a person who has been convicted of or, in youth court, found to have committed or been adjudicated for a sexual or violent offense.” Pursuant to Mont. Code Ann. § 46-23-502(9), “sexual offense” is defined as the following:

- (a) any violation of or attempt, solicitation, or conspiracy to commit a violation of . . . 45-5-502(3) [Sexual assault] (if the victim is less than 16 years of age and the offender is 3 or more years older than the victim), 45-5-503 [Sexual intercourse without consent], . . . 45-5-504(3) [Indecent exposure] (if the victim is less than 16 years of age and the offender is 4 or more years older than the victim) . . . . 45-5-

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<sup>36</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>37</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>38</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>39</sup> The text of Mont. Code Ann. § 46-23-502 included here and elsewhere in this report includes amendments made by the enactment of House Bill 89 and Senate Bill 60 during the 2015 Regular Session of the 64th Montana Legislature (effective July 1, 2015).

601(3) [Prostitution], . . . 45-5-625 [Sexual abuse of children], section 4 [Sexual servitude], or section 5 [Patronizing victim of sexual servitude];<sup>40</sup> or

(b) any violation of a law of another state, a tribal government, or the federal government that is reasonably equivalent to a violation listed in subsection (9)(a) or for which the offender was required to register as a sexual offender after an adjudication or conviction.

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<sup>40</sup> Enacted House Bill 89 § 25(9)(a) (“Sexual offense” defined).

***Legal Components:***

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*
  - 3.2 *Creating and distributing child pornography carries penalties as high as similar federal offenses.*
  - 3.3 *Using the Internet or other electronic communication 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.*
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***Legal Analysis:***

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

Traffickers convicted under Enacted House Bill 89 § 2<sup>41</sup> (Trafficking of persons) face imprisonment up to 50 years, a fine not to exceed \$100,000, or both if the victim is a minor. Enacted House Bill 89 § 2(2)(b). A conviction of sexual servitude<sup>42</sup> under Enacted House Bill § 4 carries a prison term of up to 25 years and a fine of \$75,000 when the victim is a minor. Enacted House Bill 89 § 4(3)(b). ).

A conviction under Mont. Code Ann. § 45-5-602 (Promoting prostitution) is punishable by imprisonment up to 10 years, a fine not to exceed \$50,000, or both. Mont. Code Ann. § 45-5-602(2). If the victim is a minor under 18 and the buyer is at least 18 or older, then a conviction under Mont. Code § 45-5-602 is punishable by imprisonment for 100 years, the first 25 of which cannot be suspended or eligible for parole, a possible fine not to exceed \$50,000, an order to complete a sexual offender treatment program, and may be subject to supervision for the remainder of the offender's life. Mont. Code Ann. § 45-5-602(3)(a)(i)–(iii),(b).

A conviction under Mont. Code Ann. § 45-5-603(1)(b) (Aggravated promotion of prostitution) is punishable by imprisonment for 100 years, the first 25 of which cannot be suspended or eligible for parole, a possible fine not to exceed \$50,000, an order to complete a sexual offender treatment program, and may be subject to supervision for the remainder of the offender's life. Mont. Code Ann. § 45-5-603(2)(b)(i)(A)–(C), (ii).

A conviction under Mont. Code Ann. § 45-5-625(1)(a) (Sexual abuse of children) is punishable by life imprisonment or a term of imprisonment up to 100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a). However, if the victim is under 16, unless punished under Mont. Code Ann. § 46-18-219,<sup>43</sup> a conviction for sexual abuse of children is punishable by life imprisonment or by imprisonment for 4–100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(b). Penalties are enhanced when the child is under 13 and the offender is 18 or older to imprisonment for 100 years, 25 years of which cannot be suspended (“except as provided in 46-18-222”<sup>44</sup>), a possible fine not to exceed \$50,000, an

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<sup>41</sup> See *supra* note 2.

<sup>42</sup> See *supra* section 1.1 for a discussion of “Sexual servitude.”

<sup>43</sup> See *supra* note 11 for the substantive provision of Mont. Code Ann. § 46-18-219 (Life sentence without possibility of release).

<sup>44</sup> See *supra* note 7 for the substantive provision of Mont. Code Ann. § 46-18-222 (Exceptions to mandatory minimum sentences, restrictions on deferred imposition and suspended execution of sentence, and restrictions on parole eligibility).



order to enroll in a treatment program, and possible supervision for the remainder of the offender's life. Mont. Code Ann. § 45-5-625(4)(a), (b).

Traffickers may also face prosecution for money laundering pursuant to Mont. Code Ann. § 45-6-341(1), (2) (Money laundering), for receiving, acquiring or engaging in transactions involving the proceeds of any unlawful activity. A conviction under Mont. Code Ann. § 45-6-341(1) is punishable by a fine not to exceed \$1,500, up to 6 months imprisonment, or both. However, "if the money laundering is part of a common scheme or if the value of the proceeds or item of value exceeds \$1,500, the person shall be fined not to exceed \$50,000 or be imprisoned in the state prison for a term not to exceed 20 years, or both." Mont. Code Ann. § 45-6-341(2).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA) for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>45</sup> against a minor.

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

Creating and distributing child pornography is contained within the same statute of other forms of commercial sex abuse of a minor. Mont. Code Ann. § 45-5-625 (Sexual abuse of children) states,

- (1) A person commits the offense of sexual abuse of children if the person:
  - (a) knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct,<sup>46</sup> actual or simulated;<sup>47</sup>
  - (b) knowingly photographs, films, videotapes, develops or duplicates the photographs, films, or videotapes, or records a child engaging in sexual conduct, actual or simulated;  
.....
  - (d) knowingly processes, develops, prints, publishes, transports, distributes, sells, exhibits, or advertises any visual or print medium, including a medium by use of electronic communication<sup>48</sup> in which a child is engaged in sexual conduct, actual or simulated;  
.....
  - (g) possesses with intent to sell any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;  
.....

A conviction under Mont. Code Ann. § 45-5-625(1)(a) (Sexual abuse of children) is punishable by life imprisonment or a term of imprisonment up to 100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a). However, if the victim is under 16, unless punished under Mont. Code Ann. § 46-18-219, a conviction for sexual abuse of children is punishable by life imprisonment or by imprisonment for 4–100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(b). Penalties are enhanced when the child is under 13 and the offender is 18 or older to imprisonment for 100 years, 25 years if which cannot be suspended ("except as provided in 46-18-222"), a possible fine not to exceed \$50,000, an order to enroll in a treatment program, and possible supervision for the remainder of the offender's life. Mont. Code Ann. § 45-5-625(4)(a), (b).

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<sup>45</sup> See *supra* note 22 for the definition of "federal sex offense."

<sup>46</sup> See *supra* note 8 for the definition of "sexual conduct."

<sup>47</sup> See *supra* note 9 for the definition of "simulated."

<sup>48</sup> See *supra* note 10 for the definition of "electronic communication."

In comparison, 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, if the victim is under the age of 14. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>49</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>50</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>51</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>52</sup>

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

Use of the Internet to lure, entice, recruit, or purchase commercial sex acts with a minor is not a separate crime and does not result in an enhanced penalty for traffickers. Use of the Internet may be criminalized, however, under Mont. Code Ann. § 45-5-625(1) (Sexual abuse of children), which provides in part,

(1) A person commits the offense of sexual abuse of children if the person:

....

(c) knowingly, by any means of communication, including electronic communication, persuades, entices, counsels, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated;

....

A conviction under Mont. Code Ann. § 45-5-625(1)(c) (Sexual abuse of children) is punishable by life imprisonment or a term of imprisonment up to 100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a). However, if the victim is under 16, unless punished under Mont. Code Ann. § 46-18-219, a conviction for sexual abuse of children is punishable by life imprisonment or by imprisonment for 4–100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(b). Penalties are enhanced when the child is under 13 and the offender is 18 or older to imprisonment for 100 years, 25 years of which cannot be suspended (“except as provided in 46-18-222”), a possible fine not to exceed \$50,000, an order to enroll in a treatment program, and possible supervision for the remainder of the offender’s life. Mont. Code Ann. § 45-5-625(4)(a), (b).

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<sup>49</sup> See *supra* note 22 for the definition of “federal sex offense.”

<sup>50</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>51</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>52</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

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

Traffickers convicted under Enacted House Bill 89 § 2<sup>53</sup> (Trafficking of persons) face financial penalties up to \$100,000. Enacted House Bill 89 § 2(2)(b). Under § 4 (Sexual servitude) convicted traffickers face a fine of up to \$75,000 when the victim is a minor. Enacted House Bill 89 § 4(3)(b). Mont. Code Ann. § 45-5-602 (Promoting prostitution) or § 45-5-603(1)(b) (Aggravated promotion of prostitution) face a possible fine not to exceed \$50,000. Mont. Code Ann. §§ 45-5-602(2), (3)(a)(ii), 45-5-603(2)(b)(i)(B).

A conviction under Mont. Code Ann. § 45-5-625 (Sexual abuse of children) is punishable by a possible fine not to exceed \$10,000, but if the child is under 16, then the offense is punishable by a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a), (b). A conviction under Mont. Code Ann. § 45-5-625 when the victim was 12 or younger is punishable by a possible fine not to exceed \$50,000. Mont. Code Ann. § 45-5-625(4)(a)(ii).

Mandatory restitution must be ordered where the victim suffers “an economic loss,” pursuant to Mont. Code Ann. § 46-18-241(1) (Condition of restitution),<sup>54</sup> which states,

As provided in 46-18-201,<sup>55</sup> a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss. The duty to pay full restitution under the sentence remains with the offender or the offender’s estate until full restitution is paid, whether or not the offender is under state supervision. If the offender is under state supervision, payment of restitution is a condition of any probation or parole.

If convicted of Mont. Code Ann. § 45-6-341(1) (Money laundering), a trafficker faces a fine not to exceed \$1,500, unless “the money laundering is part of a common scheme or if the value of the proceeds or item of value exceeds \$1,500,” in which case the fine is not to exceed \$50,000. Mont. Code Ann. § 45-6-341(2). In addition, pursuant to Mont. Code Ann. § 45-6-341(3)(a), the court shall order a convicted trafficker to forfeit

- (i) money, including digital currency, and raw materials, products, equipment of any kind, and any other personal property involved in the money laundering;
- (ii) personal property constituting or derived from proceeds obtained directly or indirectly from the money laundering; and
- (iii) real property, including any right, title, and interest in any lot or tract of land and any appurtenances or improvements, that is directly used or intended to be used in any manner to commit or facilitate the commission of, or that is derived from or maintained by the proceeds resulting from, the money laundering.

Pursuant to Mont. Code Ann. § 45-6-341(3)(b), “The sheriff of the county where forfeited property is located shall sell the property at auction. The proceeds of the sale must be deposited in the state general fund.”

Traffickers also face asset forfeiture when convicted of human trafficking offenses, including Enacted House Bill 89 § 2 (Trafficking of persons), § 4 (Sexual servitude) § 5 (Patronizing victim of sexual servitude). Pursuant to Enacted House Bill 89 § 7(1)<sup>56</sup> (Property subject to forfeiture),

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<sup>53</sup> See *supra* note 2.

<sup>54</sup> The text of Mont. Code Ann. § 46-18-241(1) indicates that this provision will be effective July 1, 2015.

<sup>55</sup> See *supra* note 32 for the substantive provision of Mont. Code Ann. § 46-18-201 (Sentences that may be imposed).

<sup>56</sup> See *supra* note 33.

- (b) Property is subject to criminal forfeiture under this section if it is used or intended for use in violation of [section 2, section 3, section 4, or section 5].
- (c) The following property is subject to criminal forfeiture under this section:
  - (i) money, raw materials, products, equipment, and other property of any kind;
  - (ii) property used or intended for use as a container for property enumerated in subsection (1)(c)(i);
  - (iii) except as provided in subsection (2), a conveyance, including an aircraft, vehicle, or vessel;<sup>57</sup>
  - (iv) books, records, research products and materials, formulas, microfilm, tapes, and data;
  - (v) anything of value furnished or intended to be furnished in exchange for the provision of labor or services or commercial sexual activity and all proceeds traceable to the exchange;
  - (vi) negotiable instruments, securities, and weapons; and
  - (vii) personal property constituting or derived from proceeds obtained directly or indirectly from the provision of labor or services or commercial sexual activity.

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

Under the Sexual or Violent Offender Registration Act, Mont. Code Ann. § 46-23-504(1) (Persons required to register—procedure) requires that a sex offender,

- (1) Except as provided in 41-5-1513 [Disposition—delinquent youth—restrictions], a sexual or violent offender:
  - (a) shall register immediately upon conclusion of the sentencing hearing if the offender is not sentenced to confinement or is not sentenced to the department and placed in confinement by the department;
  - (b) must be registered as provided in 46-23-503 [Release of sexual or violent offender from place of confinement--duties of official in charge] at least 10 days prior to release from confinement if sentenced to confinement or sentenced to the department and placed in confinement by the department;
  - (c) shall register within 3 business days of entering a county of this state for the purpose of residing or setting up a temporary residence for 10 days or more or for an aggregate period exceeding 30 days in a calendar year; and
  - (d) who is a transient shall register within 3 business days of entering a county of this state.

Mont. Code Ann. § 46-23-502(10)<sup>58</sup> (Definitions) defines “sexual or violent offender” as “a person who has been convicted of or, in youth court, found to have committed or been adjudicated for a sexual or violent offense.” Pursuant to Mont. Code Ann. § 46-23-502(9), “sexual offense” is defined as the following:

- (a) any violation of or attempt, solicitation, or conspiracy to commit a violation of 45-5-301 [Unlawful restraint] (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-302 [Kidnapping] (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-303 [Aggravated kidnapping] (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-502(3) [Sexual assault] (if the victim is less than 16 years of age and the offender is 3 or more years older than the victim), 45-5-503 [Sexual intercourse without consent], . . . 45-5-601(3) [Prostitution if the prostitute was a child and the patron was 18 years of age or older], 45-

<sup>57</sup> Pursuant to Enacted House Bill 89 § 7(2), “A conveyance is not subject to criminal forfeiture under this section unless the owner or other person in charge of the conveyance knowingly used the conveyance or knowingly consented to its use for the purposes described in subsection (1)(b).”

<sup>58</sup> See *supra* note 39.

5-602(3) [Promoting prostitution], 45-5-603(1)(b) or (2)(b) [Aggravated promotion of prostitution], or 45-5-625 [Sexual abuse of children], section 4 [Sexual servitude]<sup>59</sup> . . . or  
(b) any violation of a law of another state, a tribal government, or the federal government that is reasonably equivalent to a violation listed in subsection (9)(a) or for which the offender was required to register as a sexual offender after an adjudication or conviction.

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.*

Pursuant to Mont. Code Ann. § 41-3-609(1) (Criteria for termination),

(1) The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence, except as provided in the federal Indian Child Welfare Act, if applicable, that any of the following circumstances exist:

. . .

(c) the parent is convicted of a felony in which sexual intercourse occurred or is a minor adjudicated a delinquent youth because of an act that, if committed by an adult, would be a felony in which sexual intercourse occurred and, as a result of the sexual intercourse, the child is born;

(d) the parent has subjected a child to any of the circumstances listed in 41-3-423(2)(a) [Reasonable efforts required to prevent removal of child or to return -- exemption -- findings -- permanency plan] through (2)(e);

. . . .

The grounds provided pursuant to Mont. Code Ann. § 41-3-423(2)(a) include when a parent has “subjected a child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child.”

Mont. Code Ann. § 41-3-102(27)(a) (Definitions) states, “(a) ‘Sexual abuse’ means the commission of sexual assault, sexual intercourse without consent, indecent exposure, deviate sexual conduct, sexual abuse, ritual abuse, or incest, as described in Title 45, chapter 5.” Pursuant to Mont. Code Ann. § 41-3-102(7)(a), (b)(i)(A) (Definitions),

(a) “Child abuse or neglect” means:

(i) actual physical or psychological harm to a child;

(ii) substantial risk of physical or psychological harm to a child; or

(iii) abandonment.

(b) (i) The term includes:

(A) actual physical or psychological harm to a child or substantial risk of physical or psychological harm to a child by the acts or omissions of a person responsible for the child’s welfare; . . .

Mont. Code Ann. § 41-3-102(21)(a) states,

“Physical or psychological harm to a child” means the harm that occurs whenever the parent or other person responsible for the child’s welfare:

(i) inflicts or allows to be inflicted upon the child physical abuse, physical neglect, or psychological abuse or neglect;

(ii) commits or allows sexual abuse or exploitation of the child;

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<sup>59</sup> See *supra* note 2.

....

Mont. Code Ann. § 41-3-102(28) defines “sexual exploitation” as “allowing, permitting, or encouraging a child to engage in a prostitution offense, as described in 45-5-601 through 45-5-603 [Prostitution, Promoting prostitution, Aggravated promotion of prostitution], or allowing, permitting, or encouraging sexual abuse of children as described in 45-5-625.”

Additionally if a victim of domestic minor sex trafficking has a child as a result of sexual intercourse without consent, the offender forfeits and terminates all parental rights. Mont. Code § 45-5-503 (Sexual intercourse without consent) states,

(7) If as a result of sexual intercourse without consent a child is born, the offender who has been convicted of an offense under this section, and who is the biological parent of the child resulting from the sexual intercourse without consent, forfeits all parental and custodial rights to the child if the provisions of 46-1-401 have been followed.

Parenting plans may be altered and subject to court ordered mediation when trafficking occurs. However, termination of parental rights is still not specifically listed in these provisions. Pursuant to Mont. Code Ann. § 40-4-219 (Amendment of parenting plan—mediation),

The court may in its discretion amend a prior parenting plan if it finds, upon the basis of facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and that the amendment is necessary to service the best interest of the child. In determining the child’s best interest under this section, the court may, in addition to the criteria in 40-4-212 [Best interest of the child], also consider whether . . . a parent or other person residing in that parent’s household has been convicted of any of the crimes listed in subsection 8(b).

The crimes included in Mont. Code Ann. § 40-4-219 subsection 8(b) include (iii) sexual assault, as described in 45-5-502, (iv) sexual intercourse without consent, as described in 45-5-503, (vii) aggravated promotion of prostitution of a child, as described in 45-5-603(1)(b); (viii) engendering the welfare of children, as described in 45-5-622, and (x) sexual abuse of children, as described in 45-5-625.

***Legal Components:***

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

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

The state sex trafficking law includes financially benefitting from domestic minor sex trafficking under Enacted House Bill 89 § 2<sup>60</sup> (Trafficking of persons) which provides,

- (1) A person commits the offense of trafficking of persons if the person purposely or knowingly:
  - ....
  - (b) benefits, financially or by receiving anything of value, from participation in a venture that has subjected another person to involuntary servitude or sexual servitude.

Trafficking of persons is punishable by up to 50 years imprisonment and a possible fine up to \$100,000 when the victim is a child. Enacted House Bill 89 § 2(2)(b)(ii).<sup>61</sup>

Mont. Code Ann. § 45-5-602 (Promoting prostitution) is also applicable to facilitators who participate in transporting minors or provide premises for domestic minor sex trafficking. A conviction under Mont. Code Ann. § 45-5-602 (Promoting prostitution) is punishable by imprisonment up to 10 years, a fine not to exceed \$50,000, or both. Mont. Code Ann. § 45-5-602(2). If the person being prostituted was a child and the patron is at least 18 or older, then a conviction under Mont. Code Ann. § 45-5-602 is punishable by imprisonment for 100 years, 25 years of which cannot be suspended, a possible fine not to exceed \$50,000, an order to complete a sexual offender treatment program, and may be subject to supervision for the remainder of the offender's life Mont. Code Ann. § 45-5-602(3)(a)(i)–(iii), (b).

Mont. Code Ann. §45-5-603(1)(b)-(c) (Aggravated promotion of prostitution) may also be applicable to facilitation. Subsections (b)-(c) state,

- (1) A person commits the offense of aggravated promotion of prostitution if the person purposely or knowingly commits any of the following acts:
  - ....
  - (b) promotes prostitution of a child, whether or not the person is aware of the child's age;
  - (c) promotes the prostitution of one's spouse, child, ward, or any person for whose care, protection, or support the person is responsible.

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<sup>60</sup> See *supra* note 2.

<sup>61</sup> See *supra* note 3.

As discussed above, promotion of prostitution includes the keeping a house of prostitution, procuring an individual for prostitution, transporting an individual with the purpose to promote that individual's engaging prostitution, leases or permits a place to be used for prostitution. Mont. Code Ann. §45-5-602(1)(a)-(g).

A facilitator may also face charges under Mont. Code Ann. § 45-5-625(1)(i) (Sexual abuse of children), assuming it encompasses transporting a child to engage in sexual conduct with a third party.<sup>62</sup> A conviction under Mont. Code Ann. § 45-5-625(1)(a) (Sexual abuse of children) is punishable by life imprisonment or a term of imprisonment up to 100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a). However, if the victim is under 16, unless punished under Mont. Code Ann. § 46-18-219,<sup>63</sup> a conviction for sexual abuse of children is punishable by life imprisonment or by imprisonment for 4–100 years and a possible fine not to exceed \$ 10,000. Mont. Code Ann. § 45-5-625(2)(b). Penalties are enhanced when the child is under 13 and the offender is 18 or older to imprisonment for 100 years, 25 years of which cannot be suspended (“except as provided in 46-18-222”<sup>64</sup>), a possible fine not to exceed \$50,000, an order to enroll in a treatment program, and possible supervision for the remainder of the offender's life. Mont. Code Ann. § 45-5-625(4)(a), (b).

Pursuant to Mont. Code Ann. § 45-6-341(1), (2) (Money laundering),

- (1) A person commits the offense of money laundering if the person knowingly:
  - (a) receives or acquires the proceeds of, or engages in transactions involving proceeds of, any activity that is unlawful under the laws of the United States or the state in which the activity occurred;
  - (b) gives, sells, transfers, trades, invests, conceals, transports, or otherwise makes available anything of value that the person knows is intended to be used for the purpose of committing or furthering the commission of any activity that is unlawful under the laws of the United States or the state in which the committing or furthering of the commission of the activity occurs;
  - (c) directs, plans, organizes, initiates, finances, manages, supervises, or facilitates the transportation or transfer of proceeds that the person knows are derived from any activity that is unlawful under the laws of the United States or the state in which the activity occurred; or
  - (d) conducts a financial transaction involving proceeds that the person knows are derived from any activity that is unlawful under the laws of the United States or the state in which the activity occurred when the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds or to avoid a transaction reporting requirement under federal law.
- (2) A person convicted of money laundering shall be fined an amount not to exceed \$1,500 or be imprisoned in the county jail for a term not to exceed 6 months, or both. If the money laundering is part of a common scheme or if the value of the proceeds or item of value exceeds \$1,500, the person shall be fined not to exceed \$50,000 or be imprisoned in the state prison for a term not to exceed 20 years, or both.

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<sup>62</sup> See *supra* Section 1.2 for the relevant text of Mont. Code Ann. § 45-5-625(1)(i) (Sexual abuse of children).

<sup>63</sup> See *supra* note 11 for the substantive provision of Mont. Code Ann. § 46-18-219 (Life sentence without possibility of release).

<sup>64</sup> See *supra* note 7 for the substantive provision of Mont. Code Ann. § 46-18-222 (Exceptions to mandatory minimum sentences, restrictions on deferred imposition and suspended execution of sentence, and restrictions on parole eligibility).



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.*

Facilitators convicted under Enacted House Bill 89 § 2<sup>65</sup> (Trafficking of persons) face fines up to \$100,000. Enacted House Bill 89 § 2(2)(b). A facilitator convicted under Mont. Code Ann. § 45-5-602(1)(g) (Promoting prostitution) faces a fine of up to \$50,000. Mont. Code Ann. § 45-5-602(2).

Restitution must be ordered by the court in any case that the victim suffers “an economic loss,” pursuant to Mont. Code Ann. § 46-18-241(1) (Condition of restitution), which states,

As provided in 46-18-201,<sup>66</sup> a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss. The duty to pay full restitution under the sentence remains with the offender or the offender’s estate until full restitution is paid, whether or not the offender is under state supervision. If the offender is under state supervision, payment of restitution is a condition of any probation or parole.

Convicted facilitators face asset forfeiture for human trafficking offenses. If a facilitator’s property was used or intended for use in violation of Enacted House Bill 89 § 2 (Trafficking of persons), § 4 (Sexual servitude) or § 5 (Patronizing victim of sexual servitude) that property is subject to asset forfeiture under Enacted House Bill 89 § 7(1)<sup>67</sup> (Property subject to forfeiture) which provides,

(b) Property is subject to criminal forfeiture under this section if it is used or intended for use in violation of [section 2, section 3, section 4, or section 5].

(c) The following property is subject to criminal forfeiture under this section:

- (i) money, raw materials, products, equipment, and other property of any kind;
- (ii) property used or intended for use as a container for property enumerated in subsection (1)(c)(i);
- (iii) except as provided in subsection (2), a conveyance, including an aircraft, vehicle, or vessel;<sup>68</sup>
- (iv) books, records, research products and materials, formulas, microfilm, tapes, and data;
- (v) anything of value furnished or intended to be furnished in exchange for the provision of labor or services or commercial sexual activity and all proceeds traceable to the exchange;
- (vi) negotiable instruments, securities, and weapons; and
- (vii) personal property constituting or derived from proceeds obtained directly or indirectly from the provision of labor or services or commercial sexual activity.

Forfeiture may also be available to the extent that trafficker is found guilty of money laundering under Mont. Code Ann. § 45-6-341(1) (Money laundering).<sup>69</sup> If convicted, a facilitator faces a fine not to exceed \$1,500, unless “the money laundering is part of a common scheme or if the value of the proceeds or item of value exceeds \$1,500,” in which case the fine is not to exceed \$50,000. Mont. Code Ann. § 45-6-341(2). In addition, pursuant to Mont. Code Ann. § 45-6-341(3)(a), the court shall order a convicted trafficker to forfeit

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<sup>65</sup> See *supra* note 2.

<sup>66</sup> See *supra* note 32 for the substantive provision of Mont. Code Ann. § 46-18-201 (Sentences that may be imposed).

<sup>67</sup> See *supra* note 33.

<sup>68</sup> See *supra* note 34.

<sup>69</sup> See *supra* Section 3.4 for the relevant provisions of Mont. Code Ann. § 45-6-341(1) (Money laundering).

- (i) money, including digital currency, and raw materials, products, equipment of any kind, and any other personal property involved in the money laundering;
- (ii) personal property constituting or derived from proceeds obtained directly or indirectly from the money laundering; and
- (iii) real property, including any right, title, and interest in any lot or tract of land and any appurtenances or improvements, that is directly used or intended to be used in any manner to commit or facilitate the commission of, or that is derived from or maintained by the proceeds resulting from, the money laundering.

Pursuant to Mont. Code Ann. § 45-6-341(3)(b), “The sheriff of the county where forfeited property is located shall sell the property at auction. The proceeds of the sale must be deposited in the state general fund.”

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

Montana has no specific provision expressly prohibiting the promoting or selling of child sex tourism in Montana.

- 4.3.1 Recommendation: Enact a law that prohibits selling or offering to sell travel services that include or facilitate travel in or outside of Montana for the purpose of engaging in commercial sexual exploitation of a minor under the age of 18.

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

Mont. Code Ann. § 45-5-625(1) (Sexual abuse of children) states,

- (1) A person commits the offense of sexual abuse of children if the person:

....

- (d) knowingly processes, develops, prints, publishes, transports, distributes, sells, exhibits, or advertises any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;

....

- (f) finances any of the activities described in subsections (1)(a) through (1)(d) and (1)(g), knowing that the activity is of the nature described in those subsections;

- (g) possesses with intent to sell any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;

....

A conviction under Mont. Code Ann. § 45-5-625(1)(a) (Sexual abuse of children) is punishable by life imprisonment or a term of imprisonment up to 100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a). However, if the victim is under 16, unless punished under Mont. Code Ann. § 46-18-219, a conviction for sexual abuse of children is punishable by life imprisonment or by imprisonment for 4–100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(b). Penalties are enhanced when the child is under 13 and the offender is 18 or older to imprisonment for 100 years, 25 years of which cannot be suspended (“except as provided in 46-18-222”), a possible fine not to exceed \$50,000, an order to enroll in a treatment program, and possible supervision for the remainder of the offender’s life. Mont. Code Ann. § 45-5-625(4)(a), (b).

***Legal Components:***

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

Enacted House Bill 89 § 12 (Eligibility for benefit or service) clarifies human trafficking victims’ status as victims for purposes of establishing their eligibility to receive benefits and services available through the state. It states,

- (1) A victim of human trafficking is eligible for a benefit or service available through the state, including compensation under Title 53, chapter 9, part 1 [The Crime Victims Compensation Act of Montana], regardless of immigration status.
- (2) A child who has engaged in commercial sexual activity is eligible for a benefit or service available through the state, including compensation under Title 53, chapter 9, part 1 [The Crime Victims Compensation Act of Montana], regardless of immigration status or factors described in 53-9-125 [Limitations on awards].
- (3) As soon as practicable after a first encounter with a person who reasonably appears to be a victim of human trafficking or a child who has engaged in commercial sexual activity, law enforcement shall notify the appropriate state agency that the person may be eligible for a benefit or service under the laws of this state.

(4) For the purposes of sections 12 through 14,<sup>70</sup> the terms “commercial sexual activity”<sup>71</sup> and “human trafficking”<sup>72</sup> have the meanings provided in section 1 [Definitions].

The broad eligibility for services established under section 12 of Enacted House Bill 89 appears to provide access for human trafficking victims to a broad range of state services and benefits in addition to crime victim compensation under Title 53, chapter 9, part 1. Other services that should be available to human trafficking victims under Enacted House Bill 89 § 12 include crime victim advocate services pursuant to Mont. Code § 26-1-812 (Advocate privilege.), victim restitution pursuant to Mont. Code Ann. § 46-18-243 and § 41-5-103, and services generally available to victims of crime provided under Title 46, Chapter 24, Part 2 (Services to victims and witnesses) and Mont. Code Ann. § 46-24-201 (Services to victims of crime.)<sup>73</sup>

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.*

Enacted House Bill 89 § 4(2)<sup>74</sup> (Sexual servitude) expressly prohibits a defense to prosecution under Enacted House Bill 89 § 4(1)(b) based on consent of the victim to commercial sexual activity. Montana’s CSEC offenses under Mont. Code Ann. § 45-5-601 (Prostitution), § 45-5-602 (Promoting prostitution), § 45-5-603 (Aggravated promotion of prostitution), and § 45-5-625 (Sexual abuse of children) neither authorize nor specifically prohibit a defense based on consent of the minor to sex acts.

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

Enacted House Bill 89 § 9 prohibits criminalization of juvenile sex trafficking victims for prostitution and non-violent offenses directly related to their victimization. It states,

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<sup>70</sup> Enacted House Bill 89 §§ 12–14 include the following: § 12 (Eligibility for benefit or service), § 13 (Law enforcement protocol), § 14 (Human trafficking education account).

<sup>71</sup> Pursuant to Enacted House Bill 89 § 1(3), “[c]ommercial sexual activity” is defined as “sexual activity for which anything of value is given to, promised to, or received by a person.”

<sup>72</sup> Pursuant to Enacted House Bill 89 § 1(5), “[h]uman trafficking” is defined as “the commission of an offense under section 2 [Trafficking of persons], section 3 [Involuntary servitude], section 4 [Sexual servitude], or section 5 [Patronizing victim of sexual servitude].”

<sup>73</sup> Services provided pursuant to Mont. Code Ann. § 46-24-201 include:

(1) Law enforcement personnel shall ensure that a victim of a crime receives emergency social and medical services as soon as possible and that the victim is given written notice, in the form supplied by the attorney general, of the following:

- (a) the availability of crime victim compensation;
- (b) access by the victim and the defendant to information about the case, including the right to receive documents under 46-24-106;
- (c) the role of the victim in the criminal justice process, including what the victim can expect from the system, as well as what the system expects from the victim, and including the right to be accompanied during interviews as provided in 46-24-106; and
- (d) stages in the criminal justice process of significance to a crime victim and the manner in which information about the stages may be obtained.

(2) In addition to the information supplied under subsection (1), law enforcement personnel shall provide the victim with written information on community-based victim treatment programs, including medical, housing, counseling, and emergency services available in the community.

(3) As soon as possible, law enforcement personnel shall give to the victim the following information:

- (a) the name, office address, and telephone number of a law enforcement officer assigned to investigate the case; and
- (b) the prosecuting attorney's name, office address, and telephone number.

<sup>74</sup> See *supra* note 2.

(1) A person is not criminally liable or subject to proceedings under Title 41, chapter 5 [Youth Court Act], for prostitution, promoting prostitution, or other nonviolent offenses if the person was a child at the time of the offense and committed the offense as a direct result of being a victim of human trafficking.

(2) A person who has engaged in commercial sexual activity is not criminally liable or subject to proceedings under Title 41, chapter 5 [Youth Court Act], for prostitution or promoting prostitution if the person was a child at the time of the offense.

(3) A child who under subsection (1) or (2) is not subject to criminal liability or proceedings under Title 41, chapter 5 [Youth Court Act], is presumed to be a youth in need of care under Title 41, chapter 3 [Child Abuse and Neglect].<sup>75</sup>

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

**Child Identified as Youth in Need of Care (Abused/Neglected)**

A juvenile sex trafficking victim is likely to be identified as a youth in need of care under Enacted House Bill 89<sup>76</sup> § 9(3) which states, “A child who under subsection (1) or (2)<sup>77</sup> is not subject to criminal liability or proceedings under Title 41, chapter 5, is presumed to be a youth in need of care under Title 41, chapter 3.” However, specialized services are not statutorily mandated for minor victims of sex trafficking or CSEC offenses. A victim of child sex trafficking may receive child protective services if reported as abused<sup>78</sup> through a mandatory report made pursuant to Mont. Code Ann. § 41-3-201 (Reports) or if presumed to be a youth in need of care under Enacted House Bill 89 § 9(3).

Under Mont. Code Ann. § 41-3-201(1),

When the professionals and officials listed in subsection (2)<sup>79</sup> know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or

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<sup>75</sup> Enacted House Bill 89 § 9(4) further provides that “[t]his section does not apply in a prosecution under 45-5-601 [Prostitution] or a proceeding under Title 41, chapter 5 [Youth Court Act], for patronizing a prostitute.”

<sup>76</sup> See supra note 2.

<sup>77</sup> Enacted House Bill 89 §9(1)–(2) states,

(1) A person is not criminally liable or subject to proceedings under Title 41, chapter 5, for prostitution, promoting prostitution, or other nonviolent offenses if the person was a child at the time of the offense and committed the offense as a direct result of being a victim of human trafficking.

(2) A person who has engaged in commercial sexual activity is not criminally liable or subject to proceedings under Title 41, chapter 5, for prostitution or promoting prostitution if the person was a child at the time of the offense.

<sup>78</sup> See *infra* section 5.5 and 5.6 for discussion of definitions relating to abuse and neglect.

<sup>79</sup> Pursuant to Mont. Code Ann. 41-3-201(2) (Reports),

Professionals and officials required to report are:

- (a) a physician, resident, intern, or member of a hospital’s staff engaged in the admission, examination, care, or treatment of persons;
- (b) a nurse, osteopath, chiropractor, podiatrist, medical examiner, coroner, dentist, optometrist, or any other health or mental health professional;
- (c) religious healers;
- (d) school teachers, other school officials, and employees who work during regular school hours;
- (e) a social worker, operator or employee of any registered or licensed day-care or substitute care facility, staff of a resource and referral grant program organized under 52-2-711 or of a child and adult food care program, or an operator or employee of a child-care facility;

neglected by anyone regardless of whether the person suspected of causing the abuse or neglect is a parent or other person responsible for the child's welfare, they shall report the matter promptly to the department of public health and human services.

Additionally, Mont. Code Ann. § 41-3-201(5) further expands child protection reporting requirements, stating,

- (a) When a professional or official required to report under subsection (2) makes a report, the department may share information with:
  - (i) that professional or official; or
  - (ii) other individuals with whom the professional or official works in an official capacity if the individuals are part of a team that responds to matters involving the child or the person about whom the report was made and the professional or official has asked that the information be shared with the individuals.
- (b) The department may provide information in accordance with 41-3-202(8) [as amended by Ch. 61, L. 2013] and also share information about the investigation, limited to its outcome and any subsequent action that will be taken on behalf of the child who is the subject of the report.
- (c) Individuals who receive information pursuant to this subsection (5) shall maintain the confidentiality of the information as required by 41-3-205.

Additionally, pursuant to Mont. Code Ann. § 41-3-202(1), (5)(a), (8) (Action on reporting),

(1) Upon receipt of a report that a child is or has been abused or neglected, the department shall promptly assess the information contained in the report and make a determination regarding the level of response required and the timeframe within which action must be initiated. If the department determines that an investigation is required, a social worker, the county attorney, or a peace officer shall promptly conduct a thorough investigation into the circumstances surrounding the allegations of abuse or neglect of the child.

...

(5) (a) If from the investigation the department has reasonable cause to suspect that the child suffered abuse or neglect, the department may provide emergency protective services to the child, pursuant to 41-3-301, or voluntary protective services pursuant to 41-3-302, and may provide protective services to any other child under the same care.

...

(8) The department shall, upon request from any reporter of alleged child abuse or neglect, verify whether the report has been received, describe the level of response and timeframe for action that the department has assigned to the report, and confirm that it is being acted upon.<sup>80</sup>

## I. *Initial Custody*

### a. Authority for initial custody and placement

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- (f) a foster care, residential, or institutional worker;
  - (g) a peace officer or other law enforcement official;
  - (h) a member of the clergy, as defined in 15-6-201(2)(b);
  - (i) a guardian ad litem or a court-appointed advocate who is authorized to investigate a report of alleged abuse or neglect; or
  - (j) an employee of an entity that contracts with the department to provide direct services to children.

<sup>80</sup> In addition to reporting requirements, pursuant to Mont. Code Ann. § 44-4-1501 (Human trafficking hotline), a human trafficking hotline must be operated 24/7. Under Mont. Code Ann. § 60-2-244 (Human trafficking hotline—posted notice required at rest areas) notification of this human trafficking hotline is to be included on posters “at each rest area within the limits of the right-of-way of interstate highways and other state highways” in Montana.

In exigent circumstances, Mont. Code Ann. § 41-3-301(1) (Emergency protective service) permits “[a]ny child protective social worker of the department, a peace officer, or the county attorney who has reason to believe any youth is in immediate or apparent danger of harm . . . [to] immediately remove the child and place the child in a protective facility.”

## *II. Process following initial custody*

Mont. Code Ann. § 41-3-427(1)(a) (Petition for immediate protection and emergency protective services—order—service) provides that “[i]n a case in which it appears that a child is abused or neglected or is in danger of being abused or neglected, the county attorney, the attorney general, or an attorney hired by the county may file a petition for immediate protection and emergency protective services. In implementing the policy of this section, the child’s health and safety are of paramount concern.” A child in need of care may be able to receive services if a child protective team is established as provided in Mont. Code Ann. § 41-3-108 (Child protective teams), which states,

The county attorney, county commissioners, guardian ad litem, or department may convene one or more temporary or permanent interdisciplinary child protective teams. These teams may assist in assessing the needs of, formulating and monitoring a treatment plan for, and coordinating services to the child and the child’s family. The supervisor of child protective services in a local service area or the supervisor’s designee shall serve as the team’s coordinator. Members must include:

- (1) a social worker;
- (2) a member of a local law enforcement agency;
- (3) a representative of the medical profession;
- (4) a representative of a public school system;
- (5) a county attorney; and
- (6) if an Indian child or children are involved, someone, preferably an Indian person, knowledgeable about Indian culture and family matters.

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

Mont. Code Ann. § 41-3-427(2) states, “Pursuant to subsection (1), if the court finds probable cause . . . the court may issue an order for immediate protection of the child. The court shall consider the parents’ statements, if any, included with the petition and any accompanying affidavit or report to the court.” If probable cause is found, the court may grant certain forms of relief, including, in part, “the right of entry by a peace officer or department worker;” “the right to place the child in temporary medical or out-of-home care, including but not limited to care provided by a noncustodial parent, kinship or foster family, group home, or institution;” and “any other temporary disposition that may be required in the best interests of the child that does not require an expenditure of money by the department unless the court finds after notice and a hearing that the expenditure is reasonable and that resources are available for payment. The department is the payor of last resort after all family, insurance, and other resources have been examined.” Mont. Code Ann. § 41-3-427(2).

## *IV. Adjudication*

Mont. Code Ann. § 41-3-422(1)(a) (Abuse and neglect petitions—burden of proof) provides in part that

A petition may request the following relief:<sup>81</sup>

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<sup>81</sup> An alternative to filing an abuse and neglect petition is provided through a pilot project diversion process established under Enacted House Bill 612. Enacted House Bill 612 § 1(1) states,

- (i) immediate protection and emergency protective services, as provided in 41-3-427;
- (ii) temporary investigative authority, as provided in 41-3-433;
- (iii) temporary legal custody, as provided in 41-3-442;
- (iv) long-term custody, as provided in 41-3-445;
- (v) termination of the parent-child legal relationship, as provided in 41-3-607;
- (vi) appointment of a guardian pursuant to 41-3-444;
- (vii) a determination that preservation or reunification services need not be provided; or
- (viii) any combination of the provisions of subsections (1)(a)(i) through (1)(a)(vii) or any other relief that may be required for the best interests of the child.

“The court may make an adjudication on a petition under 41-3-422 if the court determines by a preponderance of the evidence . . . that the child is a youth in need of care.” Mont. Code § 41-3-437(2). “If the child is adjudicated a youth in need of care, the court shall set a date for a dispositional hearing to be conducted within 20 days, as provided in 41-3-438(1), and order any necessary or required investigations. The court may issue a temporary dispositional order pending the dispositional hearing.” Mont. Code Ann. § 41-3-437(6)(b).

#### V. *Outcomes*

Pursuant to Mont. Code Ann. § 41-3-438(3) (Disposition—hearing—order), “If a child is found to be a youth in need of care under 41-3-437, the court may enter its judgment, making any of the following dispositions to protect the welfare of the child,” including allowing the child to remain with the child’s parents subject to certain court-ordered conditions; “order the department to evaluate the noncustodial parent as a possible caretaker;” “order the temporary placement of the child with the noncustodial parent, superseding any existing custodial order, and keep the proceeding open pending completion by the custodial parent of any treatment plan ordered pursuant to 41-3-443;” or “transfer temporary legal custody” of the child to the department, a child-placing agency, or a relative or other person.

#### **Child Identified as Delinquent or Youth in Need of Intervention**

Juvenile sex trafficking victims cannot be charged with a delinquent offense for prostitution and non-violent offenses committed as a result of their victimization. Enacted House Bill 89 § 9 (Immunity of child) states,

- (1) A person is not criminally liable or subject to proceedings under Title 41, chapter 5, for prostitution, promoting prostitution, or other nonviolent offenses if the person was a child at the time of the offense and committed the offense as a direct result of being a victim of human trafficking.
- (2) A person who has engaged in commercial sexual activity is not criminally liable or subject to proceedings under Title 41, chapter 5, for prostitution or promoting prostitution if the person was a child at the time of the offense.

To the extent a juvenile sex trafficking victim is charged with an offense that does not fall into the categories in Enacted House Bill 89 § 9(1) or (2), a juvenile victim faces possible adjudication under Montana’s Youth Court Act<sup>82</sup> as a “youth in need of intervention,” as defined in Mont. Code Ann. § 41-5-103(51)(a) (Definitions), or as a “delinquent youth,” which pursuant to Mont. Code Ann. § 41-5-103(11) is defined as

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There is a child abuse court diversion pilot project. The purpose of the pilot project is to use meetings facilitated by a court diversion officer to informally resolve cases, prior to the filing of an abuse and neglect petition under Title 41, chapter 3, part 4, in which the department has exercised emergency protective services pursuant to 41-3-301 and has removed a child from the custody of a parent, guardian, or other person having physical or legal custody of the child.

House Bill 612 was enacted during the 2015 regular session of the 64<sup>th</sup> Legislature (effective July 1, 2015).

<sup>82</sup> Mont. Code Ann. §§ 41-5-101– 2510.



- [A] youth who is adjudicated under formal proceedings under the Montana Youth Court Act as a youth:
- (a) who has committed an offense that, if committed by an adult, would constitute a criminal offense; or
  - (b) who has been placed on probation as a delinquent youth and who has violated any condition of probation.

Under Mont. Code Ann. § 41-5-103(51)(b), a minor who has committed acts that would qualify him or her as a delinquent youth may also be treated as a “youth in need of intervention” at the court’s discretion.

## *I. Initial Custody*

### *a. Authority for Initial Custody*

A youth may be taken into custody by law enforcement for a “violation of the law” or “pursuant to a lawful order or process of any court.” Mont. Code Ann. § 41-5-321(1). Within 24 hours (excluding weekends and holidays) of initial custody, the court must hold “a hearing to determine whether there is probable cause to believe the youth is a delinquent youth or a youth in need of intervention” unless “the youth is released” before the 24 hours has passed. Mont. Code Ann. § 41-5-332(1).

### *b. Placement*

During initial custody, the decision immediate placement of the minor are at the discretion of the peace officer. Under Mont. Code Ann. §41-5-322 (Release from custody -- detention -- shelter care):

- (1) Whenever a peace officer believes, on reasonable grounds, that a youth can be released to a responsible person, the peace officer may release the youth to that person upon receiving a written promise from the person to bring the youth before the juvenile probation officer at a time and place specified in the written promise, or a peace officer may release the youth under any other reasonable circumstances.
- (2) Whenever the peace officer believes, on reasonable grounds, that the youth must be detained, the peace officer shall notify the juvenile probation officer immediately and shall, as soon as practicable, provide the juvenile probation officer with a written report of the peace officer's reasons for holding the youth in detention. If it is necessary to hold the youth pending appearance before the youth court, then the youth must be held in a place of detention, as provided in 41-5-348, that is approved by the youth court.
- (3) If the peace officer believes that the youth must be sheltered, the peace officer shall notify the juvenile probation officer immediately and shall provide a written report of the peace officer's reasons for placing the youth in shelter care. If the youth is then held, the youth must be placed in a shelter care facility approved by the youth court.

## *II. Process following initial custody*

Montana provides for a process within its juvenile justice response to identify and provide services to minors who are also victims of abuse and neglect. Under Mont. Code Ann. § 41-5-1201 (Preliminary inquiry -- referral of youth in need of care),

- (1) Whenever the court receives information from an agency or person, including a parent or guardian of a youth, based upon reasonable grounds, that a youth is or appears to be a delinquent youth or a youth in need of intervention or that the youth is subject to a court order or consent order and has violated the terms of an order, a juvenile probation officer or an assessment officer shall make a preliminary inquiry into the matter.

(2) If the juvenile probation officer or assessment officer determines that the facts indicate that the youth is a youth in need of care, as defined in 41-3-102, the matter must be immediately referred to the department of public health and human services.

## *II. Placement process pending adjudication*

Mont. Code Ann. § 41-5-334 (Custody—hearing for probable cause—determinations—detention—release) provides,

If, at a probable cause hearing held pursuant to 41-5-332 [Custody-hearing for probable cause], it is determined that there is probable cause to believe that the youth is a delinquent youth or a youth in need of intervention, the court having jurisdiction in the case shall determine whether the youth should be retained in custody. If the court determines that continued custody of the youth is necessary and if the youth meets the criteria in 41-5-341 [Criteria for placement of youth in secure detention facilities] through 41-5-343 [Criteria for placement of youth in youth assessment centers], the youth may be placed in a detention facility, a youth assessment center, or a shelter care facility . . . but may not be placed in a jail or other facility used for the confinement of adults accused or convicted of criminal offenses.

If at this stage, the court elects in its discretion to treat the minor as a Youth In Need of Intervention, detention is not an option under Mont. Code Ann. § 41-5-345 (Limitation on placement of youth in need of intervention):

- (1) After a probable cause hearing provided for in 41-5-332, a youth alleged to be a youth in need of intervention may be placed only in shelter care, as provided in 41-5-347.
- (2) A youth alleged or found to be a youth in need of intervention may not be placed in a jail, secure detention facility, or correctional facility.

If a youth is alleged a delinquent or in need of intervention, the youth must admit or deny the offenses. Mont. Code Ann. § 41-5-1502(1). If the youth denies the offenses, an adjudicatory hearing must be set “to determine whether the contested offenses are supported by proof beyond a reasonable doubt in cases involving a youth alleged to be delinquent or in need of intervention.” Mont. Code Ann. § 41-5-1502(2). If the court finds the youth delinquent or in need of intervention by the youth’s admissions or through the adjudicatory hearing, a dispositional hearing will occur “as soon as practicable.” Mont. Code Ann. §§ 41-5-1502(8).

## *III. Adjudication/Alternative Process*

Before the formal hearing process commences, the county attorney may elect to move through an alternative process under Mont. Code Ann. § 41-5-1302 (Consent adjustment without petition):

- (1) Before referring the matter to the county attorney and subject to the limitations in subsection (3), the juvenile probation officer or assessment officer may enter into a consent adjustment and give counsel and advice to the youth, the youth's family, and other interested parties if it appears that:
  - (a) the admitted facts bring the case within the jurisdiction of the court;
  - (b) counsel and advice without filing a petition would be in the best interests of the child, the family, and the public; and
  - (c) the youth may be a youth in need of intervention and the juvenile probation officer or assessment officer believes that the parents, foster parents, physical custodian, or guardian exerted all reasonable efforts to mediate, resolve, or control the youth's behavior and the youth continues to exhibit behavior beyond the control of the parents, foster parents, physical custodian, or guardian.

- (2) Any probation or other disposition imposed under this section against a youth must conform to the following procedures:
- (a) Every consent adjustment must be reduced to writing and signed by the youth and the youth's parents or the person having legal custody of the youth.
  - (b) If the juvenile probation officer or assessment officer believes that the youth is a youth in need of intervention, the juvenile probation officer or assessment officer shall determine that the parents, foster parents, physical custodian, or guardian exerted all reasonable efforts to mediate, resolve, or control the youth's behavior and that the youth continues to exhibit behavior beyond the control of the parents, foster parents, physical custodian, or guardian.
  - (c) Approval by the youth court judge is required if the complaint alleges commission of a felony or if the youth has been or will be in any way detained.
- (3) A consent adjustment without petition under this section may not be used to dispose of a youth's alleged second or subsequent offense if:
- (a) the youth has admitted commission of or has been adjudicated or sentenced for a prior offense that would be a felony if committed by an adult;
  - (b) the second or subsequent offense would be a felony if committed by an adult and was committed within 3 years of a prior offense; or
  - (c) the second or subsequent offense would be a misdemeanor if committed by an adult and was committed within 3 years of a prior offense, other than a felony, unless the juvenile probation officer notifies the youth court and obtains written approval from the county attorney and the youth court judge.
- (4) For purposes of subsection (3), related offenses committed by a youth during the same 24-hour period must be considered a single offense.

#### *IV. Outcomes*

Pursuant to Mont. Code Ann. § 41-5-1512(1) (Disposition of youth in need of intervention or youth who violate consent adjustments), a youth in need of intervention may be placed in several dispositions including on probation, committed to a private out-of-home facility, be ordered to perform community service, receive treatment or care the court considers appropriate, placed on house arrest, placed in a “youth assessment center for up to 10 days,” or placed “in a residence that ensures the youth is accountable, that provides for rehabilitation, and that protects the public.”

The court may give a delinquent youth any disposition the court may order for a youth in need of intervention or “commit the youth to the department for placement in a state youth correctional facility and recommend to the department that the youth not be released until the youth reaches 18 years of age.” Mont. Code Ann. § 41-5-1513(1)(a)–(b). However, pursuant to Mont. Code Ann. § 41-5-1513(1)(b) (Disposition—delinquent youth—restrictions), “The court may not place a youth adjudicated to be a delinquent youth in a state youth correctional facility for an act that would be a misdemeanor if committed by an adult unless: (i) the youth committed four or more misdemeanors in the prior 12 months . . . .”

Pursuant to Mont. Code Ann. § 41-5-1522 (Commitment to department—restrictions on placement)

When a youth is committed to the department, the department shall determine the appropriate placement and rehabilitation program for the youth after considering the recommendations made by the youth placement committee. Placement is subject to the following limitations:

- (1) A youth may not be held in a state youth correctional facility for a period of time in excess of the maximum period of imprisonment that could be imposed on an adult convicted of the offense or offenses that brought the youth under the jurisdiction of the youth court. This section does not limit the power of the department to enter into a parole agreement with the youth pursuant to 52-5-126.
- (2) A youth may not be placed in or transferred to a state adult correctional facility or other facility used for the execution of sentences of adults convicted of crimes.

(3) The department may not place a youth in need of intervention, a youth adjudicated delinquent for commission of an act that would not be an offense if committed by an adult, or a youth who violates a consent adjustment in a state youth correctional facility.

The placement outcomes are dependent on whether or not the youth was adjudicated as a Youth in Need of Intervention or a Delinquent Youth.

Under Mont. Code Ann. § 41-5-342 (Criteria for placement of youth in shelter care facilities),

A youth may be placed in a shelter care facility only if:

- (1) the youth and the youth's family need shelter care to address their problematic situation and it is not possible for the youth to remain at home;
- (2) the youth needs to be protected from physical or emotional harm;
- (3) the youth needs to be deterred or prevented from immediate repetition of troubling behavior;
- (4) shelter care is necessary to assess the youth and the youth's environment;
- (5) shelter care is necessary to provide adequate time for case planning and disposition; or
- (6) shelter care is necessary to intervene in a crisis situation and provide intensive services or attention that might alleviate the problem and reunite the family.

A delinquent youth may be placed in a secure detention facility under Mont. Code Ann. § 41-5-341 (Criteria for placement of youth in secure detention facilities) which states in part,

A youth may be placed in a secure detention facility only if the youth:

...

(2) is alleged to be a delinquent youth and:

- (a) has escaped from a correctional facility or secure detention facility;
  - (b) has violated a valid court order or a parole agreement;
  - (c) the youth's detention is required to protect persons or property;
  - (d) the youth has pending court or administrative action or is awaiting a transfer to another jurisdiction and may abscond or be removed from the jurisdiction of the court;
  - (e) there are not adequate assurances that the youth will appear for court when required; or
  - (f) the youth meets additional criteria for secure detention established by the youth court in the judicial district that has current jurisdiction over the youth; or
- (3) has been adjudicated delinquent and is awaiting final disposition of the youth's case.

5.4.1 Recommendation: Enact a law providing access to specialized multidisciplinary services for juvenile sex trafficking victims.

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

Under Chapter 3 (Child abuse and neglect), commercial sexual exploitation is identified as a type of abuse and neglect. Mont. Code Ann. § 41-3-102(7)(a) (Definitions) defines "child abuse or neglect" as

- (i) actual physical or psychological harm to a child;
- (ii) substantial risk of physical or psychological harm to a child; or
- (iii) abandonment.

Pursuant to Mont. Code Ann. § 41-3-102(7)(b)(i)(A), "The term includes: (A) actual physical or psychological harm to a child or substantial risk of physical or psychological harm to a child by the acts or omissions of a person responsible for the child's welfare."

Mont. Code Ann. § 41-3-102(21)(a) defines "physical or psychological harm to a child" as

- [H]arm that occurs whenever the parent or other person responsible for the child's welfare:
- (i) inflicts or allows to be inflicted upon the child physical abuse, physical neglect, or psychological abuse or neglect;
  - (ii) commits or allows sexual abuse or exploitation of the child;
  - (iii) induces or attempts to induce a child to give untrue testimony that the child or another child was abused or neglected by a parent or other person responsible for the child's welfare;
  - ...
  - (v) exposes or allows the child to be exposed to an unreasonable risk to the child's health or welfare by failing to intervene or eliminate the risk; or;
  - ....

Mont. Code Ann. § 41-3-102(28) defines "sexual exploitation" as "allowing, permitting, or encouraging a child to engage in a prostitution offense, as described in 45-5-601 [Prostitution] through 45-5-603 [Aggravated promotion of prostitution], or allowing, permitting, or encouraging sexual abuse of children as described in 45-5-625."

In addition, Enacted House Bill § 9(3) (Immunity of child) provides that "[a] child who under subsection (1)<sup>83</sup> or (2)<sup>84</sup> is not subject to criminal liability or proceedings under Title 41, chapter 5 [Youth Court Act], is presumed to be a youth in need of care under Title 41, chapter 3."

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

The term "caregiver" is not utilized in the Montana child welfare statutes. Instead, the applicable phrase is as follows: "A person responsible for a child's welfare." Mont. Code Ann. § 41-3-102(2)(a) (Definitions) defines "a person responsible for a child's welfare" to include "an adult who resides in the same home in which the child resides," which is likely too narrow to apply to an exploiter who is not a family member or household member. However, the definition of "person responsible for a child's welfare" does not appear to limit child welfare's authority to intervene on behalf of a juvenile sex trafficking victim because Enacted House Bill<sup>85</sup> § 9(3) (Immunity of child) provides that "[a] child who under subsection (1)<sup>86</sup> or (2)<sup>87</sup> is not subject to criminal liability or proceedings under Title 41, chapter 5 [Youth Court Act], is presumed to be a youth in need of care under Title 41, chapter 3."

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<sup>83</sup> Enacted House Bill 89 § 9(1) states, "A person is not criminally liable or subject to proceedings under Title 41, chapter 5 [Youth Court Act], for prostitution, promoting prostitution, or other nonviolent offenses if the person was a child at the time of the offense and committed the offense as a direct result of being a victim of human trafficking."

<sup>84</sup> Enacted House Bill 89 § 9(2) states, "A person who has engaged in commercial sexual activity is not criminally liable or subject to proceedings under Title 41, chapter 5 [Youth Court Act], for prostitution or promoting prostitution if the person was a child at the time of the offense."

<sup>85</sup> See *supra* note 2.

<sup>86</sup> Enacted House Bill 89 § 9(1) states, "A person is not criminally liable or subject to proceedings under Title 41, chapter 5 [Youth Court Act], for prostitution, promoting prostitution, or other nonviolent offenses if the person was a child at the time of the offense and committed the offense as a direct result of being a victim of human trafficking."

<sup>87</sup> Enacted House Bill 89 § 9(2) states, "A person who has engaged in commercial sexual activity is not criminally liable or subject to proceedings under Title 41, chapter 5 [Youth Court Act], for prostitution or promoting prostitution if the person was a child at the time of the offense."

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.*

Enacted House Bill 89 § 12(2)<sup>88</sup> (Eligibility for benefit or service) identifies victims of human trafficking as victims for purposes of accessing crime victims compensation and provides a specific exemption to ineligibility factors for juvenile sex trafficking victims, stating, “A child who has engaged in commercial sexual activity is eligible for a benefit or service available through the state, including compensation under Title 53, chapter 9, part 1, regardless of immigration status or factors described in 53-9-125 [Mont. Code Ann. § 53-9-125 (Limitations on awards)].”

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

There are victim-friendly criminal justice procedures provided in the court system process in Montana. In addition to Montana’s rape shield law under Mont. Code Ann. § 45-5-511 (Provisions generally applicable to sexual crimes),<sup>89</sup> Enacted House Bill 89 § 8<sup>90</sup> (Past sexual behavior of victim) provides,

In a prosecution for an offense under section 2 [Trafficking of persons], section 3 [Involuntary servitude], section 4 [Sexual servitude], or section 5 [Patronizing victim of sexual servitude] or a civil action under section 11 [Civil action—human trafficking victim], evidence concerning a specific instance of the victim’s past sexual behavior or reputation or opinion evidence of the victim’s past sexual behavior is inadmissible unless the evidence is admitted in accordance with 45-5-511(2)<sup>91</sup> or offered by the prosecution to prove a pattern of human trafficking by the defendant.

There are also rules of evidence in cases involving sexual offenses (including Mont. Code Ann. § 45-5-603 (Aggravated promotion of prostitution) and § 45-5-625 (Sexual abuse of children)), which are victim-friendly. Mont. Code Ann. § 46-16-226. Under Mont. Code Ann. § 46-16-220 (Child hearsay exception—criminal proceedings), a court may allow the out-of-court statement of a child under 15 who is “an alleged victim of a sexual offense<sup>92</sup> or other crime of violence” and “unavailable as a witness” in certain circumstances if the requirements of the statute are met. Mont. Code Ann. § 46-16-220(1), (4). Pursuant to Mont. Code Ann. § 46-

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<sup>88</sup> See *supra* note 2.

<sup>89</sup> Mont. Code Ann. § 45-5-511(2)–(5) (Provisions generally applicable to sexual crimes) provides,

(2) Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions under this part except evidence of the victim’s past sexual conduct with the offender or evidence of specific instances of the victim’s sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution.

(3) If the defendant proposes for any purpose to offer evidence described in subsection (2), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (2).

(4) Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim.

(5) Resistance by the victim is not required to show lack of consent. Force, fear, or threat is sufficient alone to show lack of consent.

<sup>90</sup> See *supra* note 2.

<sup>91</sup> Mont. Code Ann. § 45-5-511(2) (Provisions generally applicable to sexual crimes) provides, “Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions under this part except evidence of the victim’s past sexual conduct with the offender or evidence of specific instances of the victim’s sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution.”

<sup>92</sup> Pursuant to Mont. Code Ann. § 46-16-226(2) (Definitions) “‘Sexual offense’ means any violation of or attempt, solicitation, or conspiracy to commit a violation of 45-5-502 [Sexual assault], 45-5-503 [Sexual intercourse without consent], 45-5-504 [Indecent exposure], 45-5-507 [Incest], 45-5-603 [Aggravated promotion of prostitution], or 45-5-625 [Sexual abuse of children].”

16-229(1), (2) (Order for two-way electronic audio-video communication testimony—finding by court—procedure for conducting testimony),

(1) The court shall order that the testimony of a child witness be taken by two-way electronic audio-video communication if, after considering the factors set forth in 46-16-228(3) [Hearing—procedure — evidence that may be received—protection for child witness],<sup>93</sup> the court finds by clear and convincing evidence that the child witness is unable to testify in open court in the presence of the defendant for any of the following reasons:

- (a) the child witness is unable to testify because of fear caused by the presence of the defendant;
- (b) the child witness would suffer substantial emotional trauma from testifying in the presence of the defendant; or
- (c) conduct by the defendant or the defendant's attorney causes the child witness to be unable to continue testifying.

(2) If the court orders that the child witness's testimony be taken by two-way electronic audio-video communication, the testimony must be taken outside the courtroom in a suitable location designated by the judge. Examination and cross-examination of the child witness must proceed as though the child witness were testifying in the courtroom. . . .

. . . .

Enacted House Bill 89 § 16(1) (Nondisclosure of information about victim) states that if the victim requests confidentiality,

a criminal justice agency may not disseminate, except to another criminal justice agency, the address, telephone number, or place of employment of the victim or a member of the victim's family unless disclosure is of the location of a crime scene, is required by law, is necessary for law enforcement purposes, or is authorized by a district court upon a showing of good cause.

(2) The court may not compel a victim or a member of the victim's family who testifies in a criminal justice proceeding to disclose on the record in open court a residence address or place of employment unless the court determines that disclosure of the information is necessary.

(3) A criminal justice agency may not disseminate to the public any information directly or indirectly identifying the victim of an offense committed under . . . section 2 [Trafficking of persons], . . . section 4 [Sexual servitude], or section 5 [Patronizing victim of sexual servitude] unless disclosure is of the location of a crime scene, is required by law, is necessary for law enforcement purposes, or is authorized by a district court upon a showing of good cause.

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<sup>93</sup> Mont. Code Ann. § 46-16-228(3) states,

(3) In ruling on the motion, the court shall consider the following factors:

- (a) the age and maturity of the child witness;
- (b) the possible effect that testifying in person might have on the child witness;
- (c) the extent of the trauma that the child witness has already suffered;
- (d) the nature of the testimony to be given by the child witness;
- (e) the nature of the offense;
- (f) threats made to the child witness or the child witness's family in order to prevent or dissuade the child witness from attending or giving testimony at any trial or court proceeding;
- (g) conduct on the part of the defendant or the defendant's attorney that causes the child witness to be unable to continue the child witness's testimony; and
- (h) any other matter that the court considers relevant.

Lastly, Mont. Code Ann. § 46-18-255(3)<sup>94</sup> (Sentence upon conviction -- restriction on employment and residency) states, “If requested by a victim of a sexual offense committed by the defendant, or if requested by an immediate family member of the victim, the judge sentencing a person convicted of a sexual offense shall, as a condition to probation, parole, or deferment or suspension of sentence, impose on the defendant a restriction prohibiting the defendant from directly or indirectly contacting the victim or the immediate family member of the victim. If the victim is a minor, a parent or guardian of the victim may make the request on the victim's behalf.”

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

Juvenile criminal records may be sealed pursuant to Mont. Code Ann. § 41-5-216 (Disposition of youth court, law enforcement, and department records—sharing and access to records), which states,

(1) Formal youth court records, law enforcement records, and department records that are not exempt from sealing under subsections (4) and (6) and that pertain to a youth covered by this chapter must be physically sealed on the youth's 18th birthday. In those cases in which jurisdiction of the court or any agency is extended beyond the youth's 18th birthday, the records must be physically sealed upon termination of the extended jurisdiction.

....

(3) Except as provided in subsection (6), this section does not prohibit the destruction of records with the consent of the youth court judge or county attorney after 10 years from the date of sealing.

....

(5) After formal youth court records, law enforcement records, and department records are sealed, they are not open to inspection except, upon order of the youth court, for good cause, including when a youth commits a new offense, to:

(a) those persons and agencies listed in 41-5-215(2) [Youth court and department records—notification of school]; and

(b) adult probation professional staff preparing a presentence report on a youth who has reached the age of majority.

....

(7) (a) Informal youth court records for a youth for whom formal proceedings have been filed must be physically sealed on the youth's 18th birthday or, in those cases in which jurisdiction of the court or any agency is extended beyond the youth's 18th birthday, upon termination of the extended jurisdiction and may be inspected only pursuant to subsection (5).

(b) The informal youth court records may be maintained and inspected only by youth court personnel upon a new offense prior to the youth's 18th birthday.

(c) Except as provided in subsection (7)(a), when a youth becomes 18 years of age or when extended supervision ends and the youth was involved only in informal proceedings, informal youth court records that are in hard-copy form must be destroyed and any electronic records in the youth court management information system must disassociate the offense and disposition information from the name of the youth and may be used only for the following purposes:

(i) for research and program evaluation authorized by the office of the court administrator and subject to any applicable laws; and

(ii) as provided in Title 5, chapter 13.

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<sup>94</sup> The text of Mont. Code Ann. § 46-18-255 included here and elsewhere in this report includes amendments made by the enactment of House Bill 186 during the 2015 Regular Session of the 64th Montana Legislature (effective October 1, 2015).



Victims of sex trafficking may vacate prostitution charges under Mont. Code Ann. § 46-18-608<sup>95</sup> (Motion to vacate prostitution conviction—trafficking victims) stating, “(1) On the motion of a person, a court may vacate the person's conviction of prostitution, promoting prostitution, or another nonviolent offense if the court finds that the person's participation in the offense was a direct result of having been a victim of human trafficking or of sex trafficking under the federal Trafficking Victims Protection Act, 22 U.S.C. 7103 through 7112.”

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.*

Restitution is mandatory in a case where the victim suffers “an economic loss,” pursuant to Mont. Code Ann. § 46-18-241(1) (Condition of restitution),<sup>96</sup> which states,

As provided in 46-18-201,<sup>97</sup> a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim<sup>98</sup> who has sustained pecuniary loss, including a person suffering an economic loss. The duty to pay full restitution under the sentence remains with the offender or the offender’s estate until full restitution is paid, whether or not the offender is under state supervision. If the offender is under state supervision, payment of restitution is a condition of any probation or parole.

Mont. Code Ann. § 46-18-249 (Civil actions by victim) provides,

- (1) The total amount that a court orders to be paid to a victim may be treated as a civil judgment against the offender and may be collected by the victim at any time, including after state supervision of the offender ends, using any method allowed by law, including execution upon a judgment, for the collection of a civil judgment. However, 46-18-241 through 46-18-248 and this section do not limit or impair the right of a victim to sue and recover damages from the offender in a separate civil action.
- (2) The findings in the sentencing hearing and the fact that restitution was required or paid are not admissible as evidence in a separate civil action and have no legal effect on the merits of a separate civil action.
- (3) Any restitution paid by the offender to the victim under a restitution order contained in a criminal sentence, including an amount or amounts paid in a civil proceeding to enforce payment of a restitution order contained in a criminal sentence, must be set off against any pecuniary loss awarded to the victim in a separate civil action arising out of the facts or events that were the basis for the restitution. The

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<sup>95</sup> The text of Mont. Code Ann. § 46-18-608 included here and elsewhere in this report includes amendments made by the enactment of House Bill 89 during the 2015 Regular Session of the 64th Montana Legislature (effective July 1, 2015).

<sup>96</sup> Mont. Code Ann. § 46-18-241 contains one set of provisions that terminates on June 30, 2015 and another set of provisions that become effective July 1, 2015. Here and elsewhere in this report that Mont. Code Ann. § 46-18-241 is mentioned, the current provisions have been used for citations and quotations, unless indicated otherwise.

<sup>97</sup> See *supra* note 32.

<sup>98</sup> Mont. Code Ann. § 46-18-243(2)(a)(i) states,

- (2)(a) “Victim” means:
  - (i) a person who suffers loss of property, bodily injury, or death as a result of:
    - (A) the commission of an offense;

Mont. Code Ann. § 46-18-243(2)(b) further provides, “Victim does not include a person who is accountable for the crime or accountable for a crime arising from the same transaction.”

court trying the separate civil action shall determine the amount of any setoff asserted by the defendant under this section.

In addition, Mont. Code Ann. § 27-1-104 (Bases for civil actions) states, “A civil action arises out of: (1) an obligation; [or] (2) an injury.”<sup>99</sup> Mont. Code Ann. § 27-1-202 (Right to compensatory damages) states, “Every person who suffers detriment<sup>100</sup> from the unlawful act or omission of another may recover from the person in fault a compensation therefor [sic] in money, which is called damages.”

Enacted House Bill 89 § 11(1)<sup>101</sup> (Civil action—human trafficking victim) allows victims to bring a civil claim<sup>102</sup> “for compensatory damages, punitive damages, injunctive relief, and any other appropriate relief” against “a person who commits an offense against the victim under section 2 [Trafficking of persons], section 3 [Involuntary servitude], section 4 [Sexual servitude], or section 5 [Patronizing a victim of sexual servitude].”

*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.*

Mont. Code Ann. § 45-1-205 (General time limitations) establishes the statutes of limitations in prosecutions as follows:

(1) . . . .

(b) Except as provided in subsection (9) [DNA], a prosecution for a felony offense under 45-5-502 [Sexual assault], 45-5-503 [Sexual intercourse without consent], or 45-5-507 [Incest] (4) or (5) may be commenced within 10 years after it is committed, except that it may be commenced within 10 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred. A prosecution for a misdemeanor offense under those provisions may be commenced within 1 year after the offense is committed, except that it may be commenced within 5 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred.

(c) Except as provided in subsection (9), a prosecution under . . . 45-5-625 [Sexual abuse of children], . . . may be commenced within 5 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred.

(2) Except as provided in subsection (7)(b) or as otherwise provided by law, prosecutions for other offenses are subject to the following periods of limitation:

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<sup>99</sup> Mont. Code Ann. § 27-1-106(1)(a) (Injury defined) defines “injury” as “to the person.”

<sup>100</sup> Mont. Code Ann. § 27-1-201 defines “detriment” as “a loss or harm suffered in person or property.”

<sup>101</sup> See *supra* note 2.

<sup>102</sup> Pursuant to Enacted House Bill 89 § 11 (Civil action—human trafficking victim),

(2) If a victim prevails in an action under this section, the court shall award the victim reasonable attorney fees and costs.

. . . .

(4) This section does not preclude any other remedy available to the victim under federal or state law.

(5) For the purposes of this section, the term “human trafficking” has the meaning provided in section 1 [Definitions].

Pursuant to Enacted House Bill 89 § 1(5), “‘Human trafficking’ means the commission of an offense under section 2 [Trafficking of persons], section 3 [Involuntary servitude], section 4 [Sexual servitude], or section 5 [Patronizing a victim of sexual servitude].”

- (a) A prosecution for a felony must be commenced within 5 years after it is committed.
- (b) A prosecution for a misdemeanor must be commenced within 1 year after it is committed. . . .

Statutes of limitations for civil actions brought by human trafficking victims are specifically lengthened. Enacted House Bill 89 § 11 (Civil Action—human trafficking victim) provides,

- (3) An action under this section must be commenced not later than 10 years after the later of:
  - (a) the date on which the victim no longer was subject to human trafficking; or
  - (b) the date on which the victim reached 18 years of age.

Statutes of limitations for related civil actions are not similarly extended. Mont. Code Ann. § 27-2-216 (Tort actions—childhood sexual abuse) provides,

- (1) An action based on intentional conduct brought by a person for recovery of damages for injury suffered as a result of childhood sexual abuse must be commenced not later than:
  - (a) 3 years after the act of childhood sexual abuse that is alleged to have caused the injury; or
  - (b) 3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse.
- (2) It is not necessary for a plaintiff to establish which act, in a series of acts of childhood sexual abuse, caused the injury that is the subject of the suit. The plaintiff may compute the period referred to in subsection (1)(a) from the date of the last act by the same perpetrator.
- (3) As used in this section, “childhood sexual abuse” means any act committed against a plaintiff who was less than 18 years of age at the time the act occurred and that would have been a violation of 45-5-502 [Sexual assault], 45-5-503 [Sexual intercourse without consent], 45-5-504 [Indecent Exposure], 45-5-507 [Incest], 45-5-625 [Sexual abuse of children], or prior similar laws in effect at the time the act occurred.

. . . .

Pursuant to Mont. Code Ann. § 27-2-204(1) (Tort actions—general and personal injury), the “commencement of an action upon a liability not founded upon an instrument in writing is within 3 years.” Statute of limitations can be tolled under Mont. Code Ann. § 27-2-401(1), if the person bringing the action “is, at the time the cause of action accrues, either a minor or has been committed pursuant to 53-21-127 [Post trial disposition], the time of the disability is not part of the time limit for commencing the action. However, the time limit cannot be extended more than 5 years by the disability of commitment.”

- 5.11.1 Recommendation: Amend Mont. Code Ann. § 45-1-205 (General time limitations) to allow prosecutions under Enacted House Bill 89 § 2 (Trafficking of persons), § 4 (Sexual servitude), § 5<sup>103</sup> (Patronizing victim of sexual servitude), Mont. Code Ann. § 45-5-601 (Prostitution), § 45-5-602 (Promoting prostitution) and § 45-5-603 (Aggravated promotion of prostitution) to be brought at any time.

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<sup>103</sup> See *supra* note 2.

***Legal Components:***

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

***Legal Analysis:***

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

Pursuant to Mont. Code Ann. § 44-10-201 (Department of justice to govern academy), “[t]he Montana law enforcement academy shall be governed by the department of justice” and pursuant to Mont. Code Ann. § 44-10-202 (Powers and duties of department), the department of justice shall

- (1) establish qualifications for admission to the academy;
- (2) select from among qualified applicants those officers and other individuals who are to attend the academy each year;
- (3) determine the curriculum and methods of training for officers and other individuals attending the academy;
- (4) select and hire staff as it considers necessary to implement this chapter;
- (5) establish rules for the conduct of officers and other individuals enrolled at the academy;
- (6) award appropriate certificates to officers and other individuals who successfully complete their training;
- (7) provide for the keeping of permanent records of enrollment, attendance, and graduation and other records as the department considers necessary;
- (8) make a yearly report in writing of the activities of the academy. Copies of this report shall be sent to the governor, attorney general, and secretary of state.
- (9) do all other things necessary and desirable for the establishment and operation of the academy not inconsistent with this chapter or the constitution and statutes of the state of Montana;
- (10) accept and expend grants from federal, state, county, and city governments or private persons, associations, or corporations.

Enacted House Bill 89 § 14 establishes a “human trafficking education account in the state special revenue fund for the purposes of preventing and detecting human trafficking. Money in this account may be expended by the department of justice to . . . educate . . . law enforcement on how to prevent and detect human trafficking in this state.”

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

Mont. Code Ann. § 45-8-213 (Privacy in communications) states,

(1) Except as provided in 69-6-104 [Control of telephone communications to and from a person holding hostages—nonliability of telephone company officials], a person commits the offense of violating privacy in communications if the person knowingly or purposely:

....

(c) records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation. This subsection (1)(c) does not apply to:

(i) elected or appointed public officials or to public employees when the transcription or recording is done in the performance of official duty;

....

(2) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person purposely intercepts an electronic communication.<sup>104</sup> This subsection does not apply to elected or appointed public officials or to public employees when the interception is done in the performance of official duty or to persons given warning of the interception.

6.2.1 Recommendation: Amend Mont. Code Ann. § 45-8-213 (Privacy in communications) to permit single party consent to audiotaping.

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

Mont. Code Ann. § 45-8-213 (Privacy in communications) states,

(1) Except as provided in 69-6-104 [Control of telephone communications to and from a person holding hostages—nonliability of telephone company officials], a person commits the offense of violating privacy in communications if the person knowingly or purposely:

....

(c) records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation. This subsection (1)(c) does not apply to:

(i) elected or appointed public officials or to public employees when the transcription or recording is done in the performance of official duty;

....

(2) Except as provided in 69-6-104 [Control of telephone communications to and from a person holding hostages—nonliability of telephone company officials], a person commits the offense of violating privacy in communications if the person purposely intercepts an electronic communication.<sup>105</sup> This subsection does not apply to elected or appointed public officials or to public employees when the interception is done in the performance of official duty or to persons given warning of the interception.

6.3.1 Recommendation: Amend Mont. Code Ann. § 45-8-213 (Privacy in communications) to permit wiretapping in investigations of Enacted House Bill 89 § 2 (Trafficking of persons), § 4 (Sexual servitude), § 5<sup>106</sup> (Patronizing victim of sexual servitude), Mont. Code Ann. § 45-5-601 (Prostitution), § 45-5-602 (Promoting prostitution) and § 45-5-603 (Aggravated promotion of prostitution).

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<sup>104</sup> Mont. Code Ann. § 45-8-213(4) (Privacy in communications) defines “electronic communication” as “any transfer between persons of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.”

<sup>105</sup> *Id.*

<sup>106</sup> *See supra* note 2.

6.4 *Using a law enforcement 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.*

The use of a decoy by law enforcement may be permissible for investigating violations of Mont. Code Ann. § 45-5-625(1) (Sexual abuse of children), which states,

A person commits the offense of sexual abuse of children if the person:

...

(c) knowingly, by any means of communication, including electronic communication, persuades, entices, counsels, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated;

...

(i) knowingly coerces, entices, persuades, arranges for, or facilitates a child under 16 years of age or a person the offender believes to be a child under 16 years of age to travel within, from, or to this state with the intention of engaging in sexual conduct, actual or simulated.

The language “a person the offender believes to be a child under 16 years of age” indicates that a law enforcement officer may serve as a decoy in investigations.

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

The use of a decoy by law enforcement may be permissible in an investigation under Mont. Code Ann. § 45-5-625(1) (Sexual abuse of children), which states,

A person commits the offense of sexual abuse of children if the person:

...

(c) knowingly, by any means of communication, including electronic communication, persuades, entices, counsels, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated;

....

The language “a person the offender believes to be a child under 16 years of age” indicates that a law enforcement officer may use the Internet in investigations.

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

Under Montana’s Missing Children Act of 1985, Mont. Code Ann. § 44-2-503 (Missing children information program) states

(1) The department of justice shall establish a missing children<sup>107</sup> information program to create a central repository to aid in the location of missing children in Montana.

(2) The missing children information program shall:

(a) establish a system of intrastate communication of information relating to any child determined to be missing by the parent, guardian, or legal custodian of the child or by a law enforcement authority;

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<sup>107</sup> Mont. Code Ann. § 44-2-502(1) (Definitions) defines “missing child” as “any person who has been reported as missing to a law enforcement authority and: (a) who is under 21 years of age; (b) whose temporary or permanent residence is in Montana or is believed to be in Montana; and (c) whose location has not been determined.”

- (b) provide a centralized file for the exchange of information on missing children within the state, including information obtained under the provisions of 44-2-401;
- (c) interface with the national crime information center computer system for exchange of information on children suspected of interstate travel; and
- (d) provide the superintendent of public instruction each month with a list of missing Montana school children for the purposes of 44-2-506.

Pursuant to Mont. Code Ann. § 44-2-505<sup>108</sup> (Duties of law enforcement authority),

Whenever a parent, guardian, or legal custodian of a child files a report with a law enforcement authority that the child is missing, the law enforcement authority shall within 2 hours of the report:

- (1) inform all on-duty law enforcement officers of the existence of the missing child report;<sup>109</sup>
- (2) communicate the report to all other law enforcement authorities having jurisdiction in the county; and
- (3) enter the missing child report into the national crime information center computer system.

Mont. Code Ann. § 44-2-506 (List of missing Montana school children) mandates

- (1) The superintendent of public instruction shall assist the missing children information program provided for in 44-2-503 [Missing children information program] in identifying and locating missing children who are enrolled in Montana public school districts in kindergarten through grade 12 by:
  - (a) collecting each month a list of missing Montana school children as provided by the missing children information program provided for in 44-2-503;
  - (b) distributing the list of missing school children on a monthly basis, unless the list has no change from the previous month's information, to all school districts admitting children to kindergarten through grade 12;
  - (c) designing the list to include pertinent available information for identification of the missing school child, including if possible a recent photograph of the child; and
  - (d) notifying the appropriate law enforcement agency and the missing children information program as soon as any additional information is obtained or contact is made with respect to a missing school child.
- (2) Each school district in Montana shall:
  - (a) distribute to each school building within the district the list of missing school children provided for in subsection (1); and
  - (b) notify the appropriate law enforcement agency at the earliest known contact with any child whose name appears on the list of missing school children.

When a missing child is located, Mont. Code Ann. § 44-2-504(3) (Reports to missing children information program) states that the “parent, guardian, or legal custodian responsible for notifying the missing children information program or a law enforcement authority of a missing child shall immediately notify the authority and the program of any child whose location has been determined.”

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<sup>108</sup> The text of Mont. Code Ann. § 44-2-505 (Duties of law enforcement authority) included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 67 during the 2015 Regular Session of the 64th Montana Legislature (effective July 1, 2015).

<sup>109</sup> Mont. Code Ann. § 44-2-502(2) (Definitions) defines “missing child report” as “a report prepared on a form designed by the department of justice for use by private citizens and law enforcement authorities to report information about missing children to the missing children information program provided for in 44-2-503.”

Mont. Code Ann. § 46-4-307 (Sexual abuse of children—report to national center for missing and exploited children) states

A peace officer who, pursuant to a criminal investigation, recovers images or movies of a child in an exhibition of sexual conduct, actual or simulated, or images or movies of a child engaging in sexual conduct, actual or simulated, shall:

- (1) provide the images or movies to the law enforcement contact at the child victim identification program at the national center for missing and exploited children;
- (2) request the law enforcement contact at the child victim identification program to identify any images or movies recovered that contain an identified victim of child sexual abuse as defined by 45-5-625; and
- (3) provide case information to the child victim identification program in any case in which the peace officer identifies a previously unidentified victim of child sexual abuse.

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