

2017 ANALYSIS AND RECOMMENDATIONS

WEST VIRGINIA

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

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

Legal Analysis¹:

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

Paralleling federal law, West Virginia's human trafficking law does not require use of force, fraud, or coercion if the victim is under 18 years of age. W. Va. Code Ann. § 61-14-2(b)² (Human trafficking of an individual; penalties) prohibits a person from “knowingly and willfully traffic[king] a minor” W. Va. Code Ann. § 61-14-1(6)³ (Definitions) defines trafficking as “knowingly recruiting, transporting, transferring, harboring, receiving, providing, obtaining, isolating, maintaining or enticing an individual to engage in . . . sexual servitude.” In turn, “sexual servitude” is defined under W. Va. Code Ann. § 61-14-

¹ This report includes legislation enacted as of August 1, 2017.

² The text of W. Va. Code Ann. § 61-14-2 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2318 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017).

³ The text of W. Va. Code Ann. § 61-14-1 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2318 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017).

1(14)(A) as “[m]aintaining or making available a minor for the purpose of engaging the minor in commercial sexual activity⁴”

A conviction under W. Va. Code Ann. § 61-14-2(b) is punishable by 5–20 years imprisonment, a possible fine up to \$300,000, or both. W. Va. Code Ann. § 61-14-2(b).

Sexual servitude is punishable as a separate offense under W. Va. Code Ann. § 61-14-5(b)⁵ (Sexual servitude; penalties), which states, “[a]ny person who knowingly maintains or makes available a minor for the purposes of engaging the minor in commercial sexual activity is guilty of a felony” A conviction under W. Va. Code Ann. § 61-14-5(b) is punishable by 10–20 years imprisonment and a possible fine up to \$300,000, or both. W. Va. Code Ann. § 61-14-5(b).

Further, W. Va. Code Ann. § 61-14-6(b)⁶ (Patronizing a victim of sexual servitude; penalties) prohibits a person from “knowingly patroniz[ing] a minor to engage in commercial sexual activity” if the person “knows or has reason to know that said minor is a victim of sexual servitude” A conviction under W. Va. Code Ann. § 61-14-6(b) is punishable by 3–15 years imprisonment and a possible fine up to \$300,000, or both. W. Va. Code Ann. § 61-14-6(b).

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

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

1. W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties) states, in part, “Any person who . . . takes away a child under the age of sixteen years from any person having lawful charge of such child, for the purpose of prostitution or concubinage, shall be guilty of a felony” A conviction under this statute is punishable by imprisonment for 3–10 years. W. Va. Code Ann. § 61-2-14(a).⁷
2. W. Va. Code Ann. § 61-8-6 (Detention of person in place of prostitution; penalty) states,

⁴ W. Va. Code Ann. § 61-14-1(3) defines “commercial sexual activity” as “sexual activity for which anything of value is given to, promised to or received by a person.”

⁵ The text of W. Va. Code Ann. § 61-14-5 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2318 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017).

⁶ The text of W. Va. Code Ann. § 61-14-6 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2318 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017).

⁷ Pursuant to W. Va. Code Ann. § 61-11-18(a) (Punishment for second or third offense of felony), with some exceptions,

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

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

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

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

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

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

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

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

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

5. W. Va. Code Ann. § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties) states, “Any adult who, with knowledge that a person is a minor or who fails to exercise reasonable care in ascertaining the age of a minor,⁸ hires, employs or uses such minor to produce obscene matter⁹ or to do or assist in doing any sexually explicit conduct,¹⁰

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

⁹ “Obscene Matter” is defined as “matter that: (1) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest; (2) An average person, applying community standards, would find depicts or

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

6. W. Va. Code Ann. § 61-8C-2(a) (Use of minors in filming sexually explicit conduct prohibited; penalty) states, “Any person who causes or knowingly permits, uses, persuades, induces, entices or coerces such minor to engage in or uses such minor to do or assist in any sexually explicit conduct¹¹ shall be guilty of a felony when such person has knowledge that any such act is being photographed or filmed.”

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

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

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

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

7. According to W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties),

(a) Any person over the age of eighteen, who knowingly uses [or attempts to use] a computer to solicit, entice, seduce or lure . . . a minor known or believed to be at least four years younger than the person using the computer . . . in order to engage in . . . [several crimes, including prostitution] is guilty of a felony . . . [punishable by imprisonment for 2–10 years, a fine not to exceed \$5,000, or both].

(b) Any person over the age of eighteen who uses a computer in the manner proscribed by the provision of subsection (a) of this section and who additionally engages in any overt act designed to bring himself or herself into the minor's, or the person believed to be a minor's, physical presence with the intent to engage in any sexual activity or conduct with such minor that is

describes, in a patently offensive way, sexually explicit conduct; and (3) A reasonable person would find, taken as a whole, lacks serious literary, artistic, political or scientific value.” W. Va. Code Ann. § 61-8A-1(j).

¹⁰ “Sexually explicit conduct” is defined as “an ultimate sexual act, normal or perverted, actual or simulated, including sexual intercourse, sodomy, oral copulation, sexual bestiality, sexual sadism and masochism, masturbation, excretory functions and lewd exhibition of the genitals.” W. Va. Code Ann. § 61-8A-1(m).

¹¹ Pursuant to W. Va. Code Ann. § 61-8C-1(c) (Definitions),

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

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

prohibited by law, is guilty of a felony . . . [punishable by imprisonment for 5–30 years, a fine not to exceed \$25,000, or both].

Several other laws, while not expressly commercial in nature, may also apply in cases involving CSEC.¹² These include the following:

1. Pursuant to W. Va. Code Ann. § 61-8B-3(a)(2), (b) (Sexual assault in the first degree), a person older than 14 years old who “engages in sexual intercourse¹³ or sexual intrusion¹⁴ with another person who is younger than twelve years old and is “not married to that person” is guilty of a felony. A conviction under W. Va. Code § 61-8B-3 is punishable by imprisonment for 15–35 years in a state correctional facility and a possible fine of \$1,000–\$10,000. W. Va. Code Ann. § 61-8B-3(b). However, if the defendant is 18 or older and the victim is under 12, a conviction is punishable by imprisonment for 25–100 years in a state correctional facility and a mandatory fine of \$5,000–\$25,000. W. Va. Code Ann. § 61-8B-3(c).
2. W. Va. Code Ann. § 61-8B-5(a)(2), (b) (Sexual assault in the third degree) states that a person, who is at least 16 years old, who “engages in sexual intercourse or sexual intrusion with another person who

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

one of the following aggravating circumstances exists:

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

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

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

¹³ W. Va. Code Ann. § 61-8B-1(7) (Definition of terms) defines “sexual intercourse” as “any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.”

¹⁴ “Sexual intrusion” is defined as “any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.” W. Va. Code Ann. § 61-8B-1(8).

is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant” is guilty of a felony punishable by imprisonment for 1–5 years in a state correction facility and a possible fine not to exceed \$10,000. W. Va. Code Ann. § 61-8B-5(b).

3. W. Va. Code Ann. § 61-8B-7(a)(3), (b) (Sexual abuse in the first degree) states that a person 14 years or older who “subjects another person to sexual contact¹⁵ who is younger than twelve years old” commits a felony. A conviction under this statute is punishable by imprisonment for 1–5 years in a state correctional facility and a possible fine not to exceed \$10,000. W. Va. Code Ann. § 61-8B-7(b). However, if the defendant is 18 or older and the victim is under 12, a conviction is punishable by imprisonment for 5–25 years and a mandatory fine of \$1,000–\$5,000. W. Va. Code Ann. § 61-8B-7(c).
4. W. Va. Code Ann. § 61-8B-9(a), (c) (Sexual abuse in the third degree) makes it a misdemeanor when a person, 16 years or older and 4 years older than the victim, “subjects another person to sexual contact without the latter’s consent, when such lack of consent is due to the victim’s incapacity to consent by reason of being less than sixteen years old.” A conviction under this statute is punishable by up to 90 days in jail and a possible fine not to exceed \$500. W. Va. Code Ann. § 61-8B-9(c).

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

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

Although West Virginia’s prostitution statute, W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties), does not refer to W. Va. Code Ann. § 61-14-2(b)¹⁶ (Human trafficking of an individual; penalties) when a minor is engaged in prostitution, W. Va. Code Ann. § 61-14-8¹⁷ (Immunity of a minor victim of sex trafficking) acknowledges the intersection of prostitution with trafficking victimization. W. Va. Code Ann. § 61-14-8(a) states,

In a prosecution or a juvenile prosecution for an offense of prostitution in violation of [§ 61-8-5(b)], a minor shall not be held criminally liable if the Court determines that the minor is a victim of an offense under this article [Human Trafficking]: *Provided*, That subject to proof, a minor so charged shall be rebuttably presumed to be a victim under the provisions of this article.

¹⁵ W. Va. Code § 61-8B-1(6) defines “sexual contact” as the following:

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

¹⁶ *See supra* note 2.

¹⁷ The text of W. Va. Code Ann. § 61-14-8 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2318 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017).

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

West Virginia's Anti-Organized Criminal Enterprise Act includes commercial sexual exploitation of children, but not sex trafficking, as predicate activity. W. Va. Code Ann. § 61-13-3(a), (b) (Offenses) states,

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

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

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

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

Legal Components:

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

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

W. Va. Code Ann § 61-14-2(b)¹⁸ (Human trafficking of an individual; penalties) could apply to buyers of sex with minors based on the definition of “trafficking” under W. Va. Code Ann. § 61-14-1(6)¹⁹ (Definitions), which, following federal precedent,²⁰ applies to those who “obtain[] . . . an individual to engage in . . . sexual servitude.” However, the definition of “sexual servitude” limits applicability to those who “maintain[] or make[] available a minor for the purpose of engaging the minor in commercial sexual activity . . .” W. Va. Code Ann. § 61-14-1(14)(A).

¹⁸ See *supra* note 2.

¹⁹ See *supra* note 3.

²⁰ 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.

Buyers may be convicted under W. Va. Code Ann. § 61-14-6(b)²¹ (Patronizing a victim of sexual servitude; penalties), however, which applies to “any person who knowingly patronizes²² a minor to engage in commercial sexual activity and who knows or has reason to know that said minor is a victim of sexual servitude” As stated, however, the buyer must know or have reason to know “that the minor is a victim sexual servitude.” W. Va. Code Ann. § 61-14-6(b).

- 2.1.1 Recommendation: Amend W. Va. Code Ann. § 61-14-2(b) (Human trafficking of an individual; penalties) to clarify that the conduct of all buyers of sex with children is included as a violation of W. Va. Code Ann. § 61-14-2.

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

Buyers can be prosecuted under West Virginia's CSEC laws. W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) includes soliciting prostitution with a minor through electronic communications, stating,

- (a) Any person over the age of eighteen, who knowingly uses [or attempts to use] a computer to solicit, entice, seduce or lure . . . a minor known or believed to be at least four years younger than the person using the computer . . . in order to engage in . . . [several crimes, including prostitution] is guilty of a felony . . . [punishable by imprisonment for 2–10 years, a fine not to exceed \$5,000, or both].
- (b) Any person over the age of eighteen who uses a computer in the manner proscribed by the provision of subsection (a) of this section and who additionally engages in any overt act designed to bring himself or herself into the minor's, or the person believed to be a minor's, physical presence with the intent to engage in any sexual activity or conduct with such minor that is prohibited by law, is guilty of a felony . . . [punishable by imprisonment for 5–30 years, a fine not to exceed \$25,000, or both].

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

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

Several sexual offenses could be used to prosecute some buyers of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child, and do not identify the

²¹ See *supra* note 6.

²² W. Va. Code Ann. § 61-14-1(10) defines “patronize” as “giving, agreeing to give or offering to give anything of value to another person in exchange for commercial sexual activity.”

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

minors involved as human trafficking victims.²⁴ Furthermore, although these statutes may apply to buyers for CSEC crimes, they are of limited usefulness in sex offense prosecutions against older minors because a buyer can raise a consent defense when the victim is 16 years of age or older. W. Va. Code Ann. § 61-8B-2(a), (c)(1) (Lack of consent).

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

West Virginia's general solicitation laws do not differentiate between buying sex with an adult and buying sex with a minor; however, if a computer is used, solicitation of a minor for prostitution is separately criminalized under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties), which states,

(a) Any person over the age of eighteen, who knowingly uses [or attempts to use] a computer to solicit, entice, seduce or lure . . . a minor known or believed to be at least four years younger than the person using the computer . . . in order to engage in . . . [several crimes, including prostitution] is guilty of a felony

(b) Any person over the age of eighteen who uses a computer in the manner proscribed by the provision of subsection (a) of this section and who additionally engages in any overt act designed to bring himself or herself into the minor's, or the person believed to be a minor's, physical presence with the intent to engage in any sexual activity or conduct with such minor that is prohibited by law, is guilty of a felony

Otherwise, buyers of commercial sex with adults and commercial sex with minors will be guilty of W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties).

2.3.1 Recommendation: Amend W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts) to distinguish between buying sex with an adult and buying sex with a child and provide heightened penalties for buying sex with a child.

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

If the victim is a minor, W. Va. Code Ann. § 61-14-6(b)²⁵ (Patronizing a victim of sexual servitude; penalties) makes patronizing a victim of sexual servitude a felony punishable by 3–15 years imprisonment, a possible fine of up to \$300,000, or both.

A conviction under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) is punishable by imprisonment for 2–10 years, a fine not to exceed \$5,000, or both unless the enhanced penalty in subsection (b) applies, which makes a conviction punishable by imprisonment for 5–30 years, a fine not to exceed \$25,000, or both. W. Va. Code Ann. § 61-3C-14b(a), (b). Further, buyers of sex with minors may be prosecuted under the general solicitation statute, W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties). First offenses are punishable by 60 days–6 months in jail and a fine of \$50–\$100. W. Va. Code Ann. § 61-8-5(b). Second convictions are punishable by 6 months–1 year in jail and a fine of \$100–\$250. W. Va. Code Ann. § 61-8-5(b).

Several sexual offense laws may be used to prosecute certain buyers of sex acts with a minor.²⁶

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

²⁵ See *supra* note 6.

²⁶ See discussion of relevant provisions that may apply to certain buyers *supra* Component 1.2.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)²⁷ for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense²⁸ against a minor. To the extent buyers can be prosecuted under other federal CSEC laws,²⁹ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.³⁰

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

W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) makes the use of a computer to lure or entice commercial sex acts with a minor illegal. Pursuant to W. Va. Code Ann. § 61-3C-14b,

(a) Any person over the age of eighteen, who knowingly uses [or attempts to use] a computer to solicit, entice, seduce or lure . . . a minor known or believed to be at least four years younger than the person using the computer or a person he or she believes to be such a minor, in order to engage in any illegal act proscribed by the provisions of article 8 [Crimes against chastity, morality and decency], eight-b [Sexual offenses], eight-c [Filming of sexually explicit conduct of minors], or eight-d [Child abuse] of this chapter . . . is guilty of a felony . . . [punishable by imprisonment for 2–10 years, a fine not to exceed \$5,000, or both].

(b) Any person over the age of eighteen who uses a computer in the manner proscribed by the provision of subsection (a) of this section and who additionally engages in any overt act designed to bring himself or herself into the minor's, or the person believed to be a minor's, physical presence with the intent to engage in any sexual activity or conduct with such minor that is prohibited by law, is guilty of a felony . . . [punishable by imprisonment for 5–30 years, a fine not to exceed \$25,000, or both].

²⁷ Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

²⁸ Pursuant to 18 U.S.C. § 3559(e)(2) (Sentencing classification of offenses), “federal sex offense” is defined as

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

²⁹ 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).

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

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

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

Neither W. Va. Code Ann. § 61-14-6³¹ (Patronizing a victim of sexual servitude; penalties) nor § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) expressly prohibit a mistake of age defense.³²

- 2.6.1 Recommendation: Amend W. Va. Code Ann. § 61-14-6(b) (Patronizing a victim of sexual servitude; penalties) and § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) to expressly prohibit a defendant from asserting a mistake of age defense.

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

West Virginia’s buyer-applicable trafficking law, W. Va. Code Ann. § 61-14-6(b)³³ (Patronizing a victim of sexual servitude; penalties), and buyer-applicable CSEC law, W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) do not stagger penalties based on a minor’s age and provide sufficiently high penalties. When the victim is a minor, a conviction under W. Va. Code Ann. § 61-14-6 is punishable by imprisonment for 3–15 years, while a conviction under W. Va. Code Ann. § 61-3C-14b is punishable by imprisonment for 2–10 years unless the enhanced penalty in subsection (b) applies, which makes a conviction punishable by imprisonment for 5–30 years. W. Va. Code Ann. § 61-14-6(b), 61-3C-14b(a), (b).

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

W. Va. Code Ann. § 61-14-6(b)³⁴ (Patronizing a victim of sexual servitude; penalties) makes those who purchase sex with minors under 18 subject to a possible fine not to exceed \$300,000. Convicted buyers over 18 who use a computer to solicit a child for prostitution in violation of W. Va. Code Ann. § 61-3C-14b(a) (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) may be fined up to \$5,000, and buyers over 18 who use a computer and engage in an overt act to solicit a child for prostitution in violation of W. Va. Code Ann. § 61-3C-14b(b) may be fined up to \$25,000. W. Va. Code Ann. § 61-3C-14b.

Further, W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties; jurisdiction of courts), which carries a fine of \$50–\$100 for a first conviction and a fine of \$100–\$250 for a second conviction, may apply to some buyers. W. Va. Code Ann. § 61-8-5(b).

³¹ See *supra* note 6.

³² W. Va. Code Ann. § 61-14-5(c) (Sexual servitude; penalties) prohibits a mistake of age defense, stating, “It is not a defense in a prosecution under subsection (b) of this section that the minor consented to engage in commercial sexual activity, or that the defendant believed the minor was an adult.” However, this offense is inapplicable to buyers of commercial sex acts with minors.

See *supra* note 5.

³³ See *supra* note 6.

³⁴ See *supra* note 6.

W. Va. Code Ann. § 61-14-7(f)³⁵ (General Provisions and other penalties) allows for the forfeiture of assets related to the commission of trafficking offenses, stating,

- (a) The following are declared to be contraband and no person shall have a property interest in them:
 - (1) All property which is directly or indirectly used or intended for use in any manner to facilitate a violation of this article [Human Trafficking]; and
 - (2) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this article.
- (b) In any action under this section, the court may enter such restraining orders or take other appropriate action, including acceptance of performance bonds, in connection with any interest that is subject to forfeiture.

....

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

- (1) All visual depictions which have been manufactured, distributed, dispensed, or possessed in violation of article eight-a [§§ 61-8A-1 et seq.]³⁶ or eight-c [§§ 61-8C-1 et seq.]³⁷ of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (2) All raw materials, products and equipment of any kind which are used, intended for use, in manufacturing, processing, delivering, importing or exporting any visual depictions or any crimes against children in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (3) All books, records, research products and materials, including hard drives, microfilm, tapes and data which are used, or have been used, or are intended for use in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter
- (4) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter by any person in exchange for a visual depiction, all proceeds traceable to the exchange and all moneys, negotiable instruments, and securities used, or which are intended to be used, to facilitate any violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter . . . ;

³⁵ The text of W. Va. Code Ann. § 61-14-7 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2318 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017).

³⁶ The relevant criminal offenses under W. Va. Code Ann. §§ 61-8A (Preparation, distribution or exhibition of obscene matter to minors) include § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), § 61-8A-4 (Use of obscene matter with intent to seduce minor), and § 61-8A-1 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties).

³⁷ The relevant criminal offenses under W. Va. Code Ann. §§ 61-8C (Filming of sexually explicit conduct of minors) include § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct; penalty), and § 61-8C-3a (Promoting child erotica; penalties).

(5) All conveyances, including aircraft, vehicles or vessels, which are used, have been used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in (1), (2) or (3) of this subsection³⁸....”

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

W. Va. Code Ann. § 61-14-7(c)(1) (General Provisions and other penalties) mandates restitution for trafficking related offenses, stating “The court shall order a person convicted of an offense under this article [Human Trafficking] to pay restitution to the victim of the offense.” Accordingly, buyers convicted under W. Va. Code Ann. § 61-14-6 must pay restitution. Additionally, West Virginia’s general restitution statute may apply to buyers in certain instances. Restitution is mandatory where a defendant is “convicted of a felony or misdemeanor causing physical, psychological or economic injury or loss to a victim . . . unless the court finds restitution to be wholly or partially impractical as set forth” in the Victim Protection Act of 1984. Pursuant to W. Va. Code Ann. § 61-11A-4(b)(2) (Restitution; when ordered), where the victim suffers “bodily injury,” a defendant shall be ordered to

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

³⁸ Exceptions under W. Va. Code § 61-8C-7(a)(5) include the following:

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

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

2.9 *Buying and possessing images of child sexual exploitation carries penalties as high as similar federal offenses.*

W. Va. Code Ann. § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) criminalizes the possession of images of child sexual exploitation (ICSE). W. Va. Code Ann. § 61-8C-3(a) provides that “[a]ny person who, knowingly and willfully, sends or causes to be sent or distributes, exhibits, possesses, electronically accesses with intent to view or displays or transports any material visually portraying a minor engaged in any sexually explicit conduct³⁹ is guilty of a felony” Penalties for violations of this statute vary depending on the severity of the crime in relation to the amount and types of materials accessed by the perpetrator. § 61-8C-3 states,

. . . .

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

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

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

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

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

In comparison, a federal conviction for possession of ICSE⁴⁰ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁴¹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁴²

³⁹ See *supra* note 10.

⁴⁰ 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).

⁴¹ 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

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

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

Pursuant to W. Va. Code Ann. § 15-12-2(b)⁴³ (Registration), buyers convicted under the trafficking law, W. Va. Code § 61-14-6⁴⁴ (Patronizing a victim of sexual servitude; penalties), the CSEC law, W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties), and certain offenses involving images of child sexual exploitation (ICSE) will be required to register as sex offenders.

West Virginia’s Sex Offender Registration Act, W. Va. Code Ann. § 15-12-1 et seq., establishes sex offender registration requirements. Specifically, W. Va. Code Ann. § 15-12-2(b) requires any person convicted of specified offenses to register as a sex offender. Qualifying convictions include those under the following: W. Va. Code Ann. § 61-14-6 (Patronizing a victim of sexual servitude; penalties), § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), § 61-8A-4 (Use of obscene matter with intent to seduce minor), § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties), § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty), § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties), § 61-8B-3(a)(2) (Sexual assault in the first degree), § 61-8B-5(a)(2) (Sexual assault in the third degree), § 61-8B-7(a)(3) (Sexual abuse in the first degree), and § 61-8B-9(a) (Sexual abuse in the third degree). Furthermore, “[a]ny person who has been convicted of a criminal offense and the sentencing judge made a written finding that the offense was sexually motivated⁴⁵ shall also register as set forth in this article.” W. Va. Code Ann. § 15-12-2(c).

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

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).

⁴² 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).

⁴³ The text of W. Va. Code Ann. § 15-12-2 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2318 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017).

⁴⁴ *See supra* note 6.

⁴⁵ “For purposes of this article, the term ‘sexually motivated’ means that one of the purposes for which a person committed the crime was for any person’s sexual gratification.” W. Va. Code Ann. § 15-12-2(j).

Legal Components:

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

Legal Analysis:

- 3.1 Penalties for trafficking a child for sexual exploitation are as high as federal penalties.⁴⁶

Traffickers convicted under W. Va. Code Ann. § 61-14-2(b)⁴⁷ (Human trafficking of an individual; penalties) face 5–20 years imprisonment, a possible fine up to \$300,000, or both. W. Va. Code Ann. § 61-14-2(b). A conviction under W. Va. Code Ann. § 61-14-5(b)⁴⁸ (Sexual servitude; penalties) is punishable by 10–20 years imprisonment, a possible fine up to \$300,000, or both. W. Va. Code Ann. § 61-14-5(b).

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

Traffickers could also be prosecuted under W. Va. Code Ann. § 61-8-8 (Receiving support from prostitution; pimping; penalty), which provides,

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

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

Traffickers may also face prosecution under W. Va. Code Ann. § 61-8-6 (Detention of person in place of prostitution; penalty) and § 61-8-7 (Procuring for house of prostitution; penalty), both of which are

⁴⁶ See *supra* Component 1.2 for a full description of the substantive provisions of the West Virginia CSEC laws applicable to traffickers.

⁴⁷ See *supra* note 2.

⁴⁸ See *supra* note 5.

considered felonies when the victim is a minor and are punishable by imprisonment for 2–5 years, a fine not to exceed \$5,000, or both. W. Va. Code Ann. §§ 61-8-6, 61-8-7. Traffickers convicted under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) will receive a sentence of imprisonment for 2–10 years in a state correctional facility, a fine not to exceed \$5,000, or both unless the enhanced penalty in subsection (b) applies, which makes a conviction punishable by imprisonment for 5–30 years, a fine not to exceed \$25,000, or both. W. Va. Code Ann. § 61-3C-14b.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)⁴⁹ 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 offense⁵⁰ against a minor. 18 U.S.C. § 3559(e)(1).

3.2 *Creating and distributing images of child sexual exploitation carries penalties as high as similar federal offenses.*

Pursuant to W. Va. Code Ann. § 61-8C-2(a) (Use of minors in filming sexually explicit conduct prohibited; penalty), “[a]ny person who causes or knowingly permits, uses, persuades, induces, entices or coerces such minor to do or assist in any sexually explicit conduct⁵¹ shall be guilty of a felony when such person has knowledge that any such act is being photographed or filmed.” Under subsection (b), “any person who photographs or films such minor engaging in any sexually explicit conduct shall be guilty of a felony” W. Va. Code Ann. § 61-8C-2(a), (b). Additionally, pursuant to W. Va. Code Ann. § 61-8C-2(c),

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

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

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

[a]ny adult who, with knowledge that a person is a minor or who fails to exercise reasonable care in ascertaining the age of a minor, hires, employs or uses such minor to produce obscene matter⁵² or to do or assist in doing any sexually explicit conduct, is guilty of a felony

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

⁴⁹ See *supra* note 27.

⁵⁰ See *supra* note 28.

⁵¹ See *supra* note 10.

⁵² See *supra* note 9.

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense⁵³ against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of images of child sexual exploitation (ICSE)⁵⁴ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁵⁵ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁵⁶

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

W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) criminalizes the use of a computer to lure or entice a minor to perform commercial sex acts. Pursuant to W. Va. Code Ann. § 61-3C-14b,

(a) Any person over the age of eighteen, who knowingly uses [or attempts to use] a computer to solicit, entice, seduce or lure . . . a minor known or believed to be at least four years younger than the person using the computer or a person he or she believes to be such a minor, in order to engage in any illegal act proscribed by the provisions of article 8 [Crimes against chastity, morality and decency], eight-b [Sexual offenses], eight-c [Filming of sexually explicit conduct of minors], or eight-d [Child abuse] of this chapter . . . is guilty of a felony . . .

(b) Any person over the age of eighteen who uses a computer in the manner proscribed by the provision of subsection (a) of this section and who additionally engages in any overt act designed to bring himself or herself into the minor's, or the person believed to be a minor's, physical presence with the intent to engage in any sexual activity or conduct with such minor that is prohibited by law, is guilty of a felony . . . [punishable by imprisonment for 5–30 years, a fine not to exceed \$25,000, or both].

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

⁵³ See *supra* note 28.

⁵⁴ 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).

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

⁵⁶ 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 W. Va. Code Ann. § 61-14-2(b)⁵⁷ (Human trafficking of an individual; penalties) or § 61-14-5(b)⁵⁸ (Sexual Servitude; penalties) are subject to a possible fine up to \$300,000. However, no fines are imposed on traffickers convicted under W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), but traffickers convicted under W. Va. Code Ann. § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-8-7 (Procuring for house of prostitution; penalty), § 61-8-8 (Receiving support from prostitution; pimping; penalty), or § 61-3C-14b(a) (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) are subject to a possible fine up to \$5,000, if the victim is a minor. Traffickers convicted under W. Va. Code Ann. § 61-3C-14b(b) are subject to a possible fine up to \$25,000, and traffickers convicted under W. Va. Code Ann. § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty) are subject to a possible fine up to \$10,000. Lastly, a trafficker convicted under W. Va. Code Ann. § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties) is subject to a possible fine up to \$50,000.

Further, W. Va. Code Ann. § 61-14-7(c)(1)⁵⁹ (General Provisions and other penalties) mandates restitution for trafficking related offenses, stating “The court shall order a person convicted of an offense under this article [Human Trafficking] to pay restitution to the victim of the offense.” Accordingly, traffickers convicted under W. Va. Code Ann. § 61-14-2(b) or § 61-14-5(b) must pay restitution. Additionally, West Virginia’s general restitution statute may apply to traffickers. Restitution is mandatory where a defendant is “convicted of a felony or misdemeanor causing physical, psychological or economic injury or loss to a victim . . . unless the court finds restitution to be wholly or partially impractical as set forth” in the Victim Protection Act of 1984.” W. Va. Code Ann. § 61-11A-4(a) (Restitution; when ordered). Pursuant to W. Va. Code Ann. § 61-11A-4(b)(2), where the victim suffers “bodily injury,” a defendant shall be ordered to

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

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

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

Traffickers convicted under W. Va. Code Ann. § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty) may also be required, in addition to any penalties and restitution imposed by the court, to “pay all or any portion of the cost of medical, psychological or psychiatric treatment of the

⁵⁷ See *supra* note 2.

⁵⁸ See *supra* note 5.

⁵⁹ See *supra* note 35.

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

W. Va. Code Ann. § 61-14-7(f) (General Provisions and other penalties) allows for the forfeiture of assets related to the commission of trafficking offenses:

- (a) The following are declared to be contraband and no person shall have a property interest in them:
 - (1) All property which is directly or indirectly used or intended for use in any manner to facilitate a violation of this article [Human Trafficking]; and
 - (2) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this article.
- (b) In any action under this section, the court may enter such restraining orders or take other appropriate action, including acceptance of performance bonds, in connection with any interest that is subject to forfeiture.

....

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

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

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

⁶⁰ See *supra* note 36.

⁶¹ See *supra* note 37.

⁶² See *supra* note 38.

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

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

Traffickers convicted of child sex trafficking, creating images of child sexual exploitation (ICSE), and certain CSEC offenses will be required to register as sex offenders. West Virginia's Sex Offender Registration Act, W. Va. Code Ch. 15 (Public Safety), Art. 12 (Sex offender registration act), establishes sex offender registration requirements. W. Va. Code Ann. § 15-12-2(b)⁶³ (Registration) requires registration by any person convicted of one of the following qualifying offenses: W. Va. Code Ann. § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), § 61-8A-4 (Use of obscene matter with intent to seduce minor), § 61-8A-5 (Employment or use of minor to produce obscene matter or assist in doing sexually explicit conduct; penalties), § 61-2-14 (Abduction of person; kidnapping or concealing child; penalties), § 61-8-6 (Detention of person in place of prostitution; penalty), § 61-8-7 (Procuring for house of prostitution; penalty), § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties), § 61-14-2⁶⁴ (Human trafficking of an individual; penalties), and § 61-14-5⁶⁵ (Sexual servitude; penalties).

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

3.6 *Laws relating to termination of parental rights include sex trafficking or commercial sexual exploitation of children (CSEC) offenses as grounds for termination in order to prevent traffickers from exploiting their parental rights as a form of control.*

Child sex trafficking is included as a ground for terminating parental rights based on the definition of “abuse.”⁶⁶ Pursuant to W. Va. Code Ann. § 49-4-604(b)(6) (Disposition of neglected or abused children; case plans; dispositions; factors to be considered; reunification; orders; alternative dispositions), the court may terminate parental rights of an abusive parent where the court has determined a child to be abused or neglected and finds that “there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child.” Because the definition of abuse includes child sex trafficking, a conviction under West Virginia's trafficking law could result in the termination of parental rights. However, subsection (b) also requires that “[t]he court shall give precedence to dispositions in . . . sequence,” giving precedence to subsections (b)(1) through (b)(5)—all of which contemplate family reunification—before terminating parental rights under subsection (b)(6). Nevertheless, W. Va. Code Ann. § 49-4-604(b)(7) states that the department “is not required to make reasonable efforts to preserve the family if the court determines:

⁶³ See *supra* note 43.

⁶⁴ See *supra* note 2.

⁶⁵ See *supra* note 5.

⁶⁶ See *infra* Component 5.5 for a full discussion of the definition of “abuse.”

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

(B) The parent has:

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

.....

Another provision, W. Va. Code Ann. § 49-4-605(a)⁶⁷ (When department efforts to terminate parental rights required), requires that legal efforts be taken (e.g., filing of a petition) in order to terminate parental rights in any of the following situations:

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

Termination of parental rights may also be based on the conviction of a sexual offense; W. Va. Code Ann. § 61-8B-11a (Convictions for offenses against children) states,

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

Accordingly, traffickers who commit sexual offenses against children in their custody or control may have their parental rights terminated. However, the sexual offense laws included within Chapter 8B do not include West Virginia's CSEC offenses or laws relating to the creation of images of child sexual

⁶⁷ The text of W. Va. Code Ann. § 49-4-605 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 456 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017).

exploitation (ICSE), excluding these as grounds for terminating parental rights under W. Va. Code Ann. § 61-8B-11a.

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 images of child sexual exploitation carries penalties as high as similar federal offenses.*

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.*

W. Va. Code Ann. § 61-14-2(b)⁶⁸ (Human trafficking of an individual; penalties) does not prohibit the acts of assisting, enabling, or financially benefitting from child sex trafficking. Rather, W. Va. Code Ann. § 61-14-1(6)⁶⁹ (Definitions) defines “human trafficking” to include “knowingly recruiting, transporting, transferring, harboring, receiving, providing, obtaining, isolating, maintaining or enticing an individual to engage in . . . sexual servitude.” While this language could reach some facilitators, it does not include terms such as benefiting, assisting, or aiding, which are more broadly applicable to facilitators. A conviction under W. Va. Code Ann. § 61-14-2(b) is a felony punishable by 5–20 years imprisonment, a possible fine up to \$300,000, or both. W. Va. Code Ann. § 61-14-2(b).

Similarly, W. Va. Code Ann. § 61-14-5(b)⁷⁰ (Sexual servitude; penalties) prohibits a person from “knowingly maintain[ing] or mak[ing] available a minor for the purpose of engaging the minor in commercial sexual activity” A conviction under W. Va. Code Ann. § 61-14-5(b) is a felony punishable by 10–20 years imprisonment, a possible fine up to \$300,000, or both. W. Va. Code Ann. § 61-14-5(b).

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

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

⁶⁸ See *supra* note 2.

⁶⁹ See *supra* note 3.

⁷⁰ See *supra* note 5.

- 4.1.1 Recommendation: Amend W. Va. Code Ann. § 61-14-1(6) (Definitions) to include “aiding,” “assisting,” or “knowingly benefitting” from human trafficking to ensure that W. Va. Code Ann. § 61-14-2(b) (Human trafficking of an individual; penalties) expressly applies to facilitators.

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

To the extent that W. Va. Code Ann. § 61-14-2(b)⁷¹ (Human trafficking of an individual; penalties) or § 61-14-5(b)⁷² (Sexual servitude; penalties) apply to facilitators, a conviction under either is punishable by a possible fine up to \$300,000. W. Va. Code Ann. §§ 61-14-2(b), 61-14-5(b).

Further, W. Va. Code Ann. § 61-8-6 (Detention of persons in place of prostitution; penalty) applies to facilitators who “indirectly keep[], hold[], detain[] or restrain[], or attempt[] to keep, hold, detain or restrain, in any house of prostitution or other place where prostitution is practiced or allowed . . . a minor . . .” A conviction under W. Va. Code Ann. § 61-8-6 is a felony punishable by a possible fine up to \$5,000. W. Va. Code Ann. § 61-8-6.

Facilitators can also be convicted under the Anti-Organized Criminal Enterprise Act. Pursuant to W. Va. Code Ann. § 61-13-3(a) (Offenses) convicted facilitators face a possible fine up to \$25,000.

Facilitators convicted under W. Va. Code Ann. § 61-8C-3 (Distributing and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty) are subject to mandatory fines not to exceed \$25,000 depending on the severity of the crime. When the conduct involves 50 or fewer images, the perpetrator may be fined up to \$2,000. W. Va. Code Ann. § 61-8C-3(b). A person convicted of conduct involving more than 50 but fewer than 600 images, “or depicts violence against a child or a child engaging in bestiality” is subject to a possible fine not to exceed \$5,000. W. Va. Code Ann. § 61-8C-3(c). Visual depictions in the form of a “video clip, movie or similar recording of five minutes or less shall constitute seventy five images. A video clip, movie or similar recording of a duration longer than five minutes shall be deemed to constitute seventy-five images for every two minutes in length it exceeds five minutes.” W. Va. Code Ann. § 61-8C-3(e).⁷³

W. Va. Code Ann. § 61-14-7(f)⁷⁴ (General Provisions and other penalties) allows for the forfeiture of assets related to the commission of trafficking offenses:

- (a) The following are declared to be contraband and no person shall have a property interest in them:
- (1) All property which is directly or indirectly used or intended for use in any manner to facilitate a violation of this article [Human Trafficking]; and
 - (2) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this article.
- (b) In any action under this section, the court may enter such restraining orders or take other appropriate action, including acceptance of performance bonds, in connection with any interest that is subject to forfeiture.

....

Furthermore, pursuant W. Va. Code Ann. § 61-8C-7 (Items subject to forfeiture; persons authorized to seize property subject to forfeiture), facilitators who violate W. Va. Code Ann. § 61-8C-2 (Use of minors

⁷¹ See *supra* note 2.

⁷² See *supra* note 5.

⁷³ See *infra* discussion in Component 4.4.

⁷⁴ See *supra* note 35.

in filming sexually explicit conduct prohibited; penalty), § 61-8A-2 (Distribution and display to minor of obscene matter; penalties; defenses), or § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties) are subject to discretionary civil forfeiture of property possessed in violation of the offense, including:

- (1) All visual depictions which have been manufactured, distributed, dispensed, or possessed in violation of article eight-a [§§ 61-8A-1 et seq.]⁷⁵ or eight-c [§§ 61-8C-1 et seq.]⁷⁶ of this chapter or section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (2) All raw materials, products and equipment of any kind which are used, intended for use, in manufacturing, processing, delivering, importing or exporting any visual depictions or any crimes against children in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (3) All books, records, research products and materials, including hard drives, microfilm, tapes and data which are used, or have been used, or are intended for use in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter;
- (4) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished in violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter by any person in exchange for a visual depiction, all proceeds traceable to the exchange and all moneys, negotiable instruments, and securities used, or which are intended to be used, to facilitate any violation of article eight-a [§§ 61-8A-1 et seq.] or eight-c [§§ 61-8C-1 et seq.] of this chapter of section fourteen-b [§ 61-3C-14b], article three-c of this chapter . . . ;
- (5) All conveyances, including aircraft, vehicles or vessels, which are used, have been used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in (1), (2) or (3) of this subsection⁷⁷”

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

W. Va. Code Ann. § 61-14-7(c)(1) (General Provisions and other penalties) also mandates restitution for trafficking related offenses, stating “The court shall order a person convicted of an offense under this article [Human Trafficking] to pay restitution to the victim of the offense.” Accordingly, facilitators convicted under W. Va. Code Ann. § 61-14-2(b) or § 61-14-5(b) must pay restitution. Additionally, West Virginia’s general restitution statute may apply to facilitators in certain instances. Restitution is mandatory where a facilitator is “convicted of a felony or misdemeanor causing physical, psychological or economic injury or loss to a victim . . . unless the court finds restitution to be wholly or partially

⁷⁵ See *supra* note 36.

⁷⁶ See *supra* note 37.

⁷⁷ See *supra* note 38.

impractical as set forth” in the Victim Protection Act of 1984. W. Va. Code Ann. § 61-11A-4(a) (Restitution; when ordered). Pursuant to W. Va. Code Ann. § 61-11A-4(b)(2), where the victim suffers “bodily injury,” a defendant shall be ordered to

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

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

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

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

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

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

4.4 *Promoting and selling images of child sexual exploitation carries penalties as high as similar federal offenses.*

Pursuant to W. Va. Code Ann. § 61-8C-3(a) (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty), “[a]ny person who, knowingly and willfully, sends or causes to be sent or distributes, exhibits, possesses, electronically accesses with intent to view or displays or transports any material visually portraying a minor engaged in any sexually explicit conduct⁷⁸ is guilty of a felony” Penalties for violations of this statute vary depending on the severity of the crime in relation to the amount and types of materials accessed by the perpetrator. W. Va. Code Ann. § 61-8C-3 provides the following penalty structure,

-
- (b) Any person who violates the provisions of subsection (a) of this section when the conduct involves fifty or fewer images shall, upon conviction, be imprisoned in a state correctional facility for not more than two years or fined not more than \$2,000 or both.
- (c) Any person who violates the provisions of subsection (a) of this section when the conduct involves more than fifty but fewer than six hundred images shall, upon conviction, be imprisoned in a state correctional facility for not less than two nor more than ten years or fined not more than \$5,000, or both.
- (d) Notwithstanding the provisions of subsections (b) and (c) of this section any person who violates the provisions of subsection (a) of this section when the conduct involves six hundred or more images or depicts violence against a child or a child engaging in bestiality shall, upon

⁷⁸ See *supra* note 11.

conviction, be imprisoned in a state correctional facility for not less than five nor more than fifteen years or fined not more than \$25,000, or both.

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

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

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

Legal Components:

- 5.1 *Victims under the core child sex trafficking offense include all commercial sexually exploited children.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor to engage in the commercial sex act.*
- 5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*
- 5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*
- 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*
- 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC).*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Child sex trafficking victims may vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.*
- 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 to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

Legal Analysis:

- 5.1 *Victims under the core child sex trafficking offense include all commercial sexually exploited children.⁷⁹*

W. Va. Code Ann. § 61-14-2(b)⁸⁰ (Human trafficking of an individual; penalties), West Virginia’s core human trafficking offense, does not include all commercially sexually exploited children as victims of trafficking.

W. Va. Code Ann. § 61-14-1(6)⁸¹ (Definitions)—which defines “trafficking” for purposes of W. Va. Code Ann. § 61-14-2(b)—does not require means of force, fraud, or coercion when the victim is a minor.⁸² Further, following federal precedent, W. Va. Code Ann. § 61-14-1(6) includes language that is applicable to buyers (“obtains”).⁸³ However, W. Va. Code Ann. § 61-14-1(6) requires that a minor be obtained to engage in sexual servitude. “Sexual servitude” is defined as “maintaining or making available a minor for the purpose of engaging the minor in commercial sexual activity” W. Va. Code Ann. § 61-14-1(14). Accordingly, an offender must “obtain” a minor for the purpose of making him or her available for commercial sexual activity, rather than for directly engaging in a commercial sex act. As such, W. Va. Code Ann. § 61-14-1(6) seemingly requires involvement by a trafficker or controlling third party.

⁷⁹ 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 (discussing need to include all commercially sexually exploited children within sex trafficking definitions and corresponding need to include buyer conduct in core sex trafficking offenses regardless of whether victim is under control of a third party).

⁸⁰ See *supra* note 2.

⁸¹ See *supra* note 3.

⁸² See *supra* discussion in Component 1.1.

⁸³ See *supra* discussion of buyer applicability in Component 2.1.

Consequently, all commercially sexually exploited children will not be identified as human trafficking victims based on the third party control requirement.

5.1.1 Recommendation: Amend W. Va. Code Ann. § 61-14-2(b) (Human trafficking of an individual; penalties) and § 61-14-6 (Patronizing a victim of sexual servitude; penalties) so that all commercially sexually exploited children are identifiable as victims and eligible for protections pursuant to their victim status.

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

W. Va. Code Ann. § 61-14-5(c)⁸⁴ (Sexual servitude; penalties) expressly prohibits a defendant from asserting a defense based on the willingness of a minor to engage in the commercial sex act, stating, “It is not a defense in a prosecution under subsection (b) of this section that the minor consented to engage in commercial sexual activity”

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*⁸⁵

Although West Virginia’s prostitution offense, W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties), is age-neutral, W. Va. Code Ann. § 61-14-8⁸⁶ (Immunity for minor victim of sex trafficking) prohibits the criminalization of minors for prostitution based on their status as trafficking victims. W. Va. Code Ann. § 61-14-8 states,

(a) In a prosecution or a juvenile prosecution for an offense of prostitution in violation of subsection (b), section five, article eight of this chapter, [§ 61-8-5 (Houses of ill fame and assignation; penalties)] a minor shall not be held criminally liable if the Court determines that the minor is a victim of an offense under this article [Human Trafficking]: *Provided*, That subject to proof, a minor so charged shall be rebuttably presumed to be a victim under the provisions of this article.

(b) This section does not apply in a prosecution of juvenile proceeding for any other offenses under subsection (b), section five, article eight of this chapter, including soliciting, inducing, enticing or procuring another to commit an act or offense of prostitution, unless it is determined by the court that the minor was coerced into the criminal behavior.

(c) A minor who, under subsection (a) or (b) of this section, is not subject to criminal liability or adjudication as a juvenile delinquent is presumed to be an abused child, as defined in section two-hundred-one, article one, chapter forty-nine of this code [§ 49-1-201 (Definitions related, but not limited, to abuse and neglect)], and may be eligible for services under chapter forty-nine of this code including, but not limited to, appropriate child welfare services.

Therefore, while the state prostitution statute, W. Va. Code Ann. § 61-8-5(b) does not prevent minors under 18 years of age from facing prosecution for prostitution, minors identified as child sex trafficking victims are provided a specific exemption from criminalization.

5.3.1 Recommendation: Clarify W. Va. Code Ann. § 61-8-5(b) (Houses of ill fame and assignation; penalties) to specify that all minors shall be protected from criminal or delinquency charges for prostitution-related offenses.

⁸⁴ See *supra* note 5.

⁸⁵ For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

⁸⁶ See *supra* note 17.

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

W. Va. Code Ann. § 61-14-7(e)⁸⁷ (General provisions and other penalties) requires a law enforcement officer to report suspected cases of child sex trafficking to the Department of Health and Human Resources (DHHR); it states,

Should a law enforcement officer encounter a child who reasonably appears to be a victim of an offense under this article [Human Trafficking], the officer shall notify [DHHR]. If available, [DHHR] may notify the Domestic Violence Program serving the area where the child is found.

Additionally, W. Va. Code Ann. § 61-14-8(a)⁸⁸ (Immunity for minor victim of sex trafficking) prohibits a juvenile sex trafficking victim from being adjudicated as delinquent for prostitution.⁸⁹ Instead, a juvenile sex trafficking victim will be identified as an abused child and provided with services under W. Va. Code Ann. § 61-14-8(c), which states,

A minor who, under subsection (a) or (b) of this section, is not subject to criminal liability or adjudication as a juvenile delinquent is presumed to be an abused child, as defined in section two-hundred-one, article one, chapter forty-nine of this code [§ 49-1-201 (Definitions related, but not limited, to abuse and neglect)], and may be eligible for services under chapter forty-nine of this code including, but not limited to, appropriate child welfare services.

Summary

Although West Virginia law mandates the referral of juvenile sex trafficking victims to child welfare and allows delinquency adjudications to be avoided based on immunity for prostitution offenses, services are not required to be specialized to the needs of these children.

5.4.1 Recommendation: Amend West Virginia’s protective response for juvenile sex trafficking victims to require specialized services.⁹⁰

5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*⁹¹

West Virginia identifies child sex trafficking as a type of abuse. Specifically, W. Va. Code Ann. § 49-1-201⁹² (Definitions related, but not limited, to child abuse and neglect) defines an “abused child” to include:

- (1) A child whose health or welfare is being harmed or threatened by:
 -
 - (B) Sexual abuse or sexual exploitation;
 - (C) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section fourteen-h, article two, chapter sixty-one of this code [§ 61-2-14h];
 -

⁸⁷ See *supra* note 3535.

⁸⁸ See *supra* note 17.

⁸⁹ See *supra* Component 5.3 for a full discussion of the non-criminalization of minors.

⁹⁰ The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

⁹¹ For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

⁹² The text of W. Va. Code Ann. § 49-1-201 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2318 and Senate Bill 445 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017 and July 2, 2017, respectively).

(E) Human trafficking of a child, or attempting to traffic a child, in violation of section two, article fourteen, chapter sixty-one of this code [§ 61-14-2].

....

W. Va. Code Ann. § 49-1-201 further defines “sexual abuse” as

(A) Sexual intercourse, sexual intrusion, sexual contact, or conduct proscribed by section three, article eight-c, chapter sixty-one [Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited], which a parent, guardian or custodian engages in, attempts to engage in, or knowingly procures another person to engage in with a child notwithstanding the fact that for a child who is less than sixteen years of age the child may have willingly participated in that conduct or the child may have suffered no apparent physical injury or mental or emotional injury as a result of that conduct or, for a child sixteen years of age or older the child may have consented to that conduct or the child may have suffered no apparent physical injury or mental or emotional injury as a result of that conduct

....

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

“Sexual exploitation” means an act where:

- (A) A parent, custodian or guardian, whether for financial gain or not, persuades, induces, entices or coerces a child to engage in sexually explicit conduct⁹³ as that term is defined in section one, article eight-c, chapter sixty-one [W. Va. Code § 61-8C-1 (Definitions)] of this code; or
- (B) A parent, guardian or custodian persuades, induces, entices or coerces a child to display his or her sex organs for the sexual gratification of the parent, guardian, custodian or a third person, or to display his or her sex organs under circumstances in which the parent, guardian or custodian knows that the display is likely to be observed by others who would be affronted or alarmed;
- (C) A parent, guardian or custodian knowingly maintains or makes available a child for the purpose of engaging the child in commercial sexual activity in violation of section five, article fourteen, chapter sixty-one [§ 61-14-5 (Sexual Servitude)] of this code.

Since “sexual exploitation” includes occurrences when a parent, guardian or custodian “for financial gain . . . persuades, induces, entices or coerces a child to engage in sexually explicit conduct,” this definition also brings victims of child sex trafficking and commercial sexual exploitation offenses within the definition of abuse.

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 definition of “custodian” is not a barrier to a sex trafficked child accessing the protection of child welfare because the definition of abuse does not require fault by a parent, guardian, or custodian in cases related to child sex trafficking. In other cases of sexual abuse or sexual exploitation,⁹⁴ however, the definition of “custodian” becomes a relevant consideration since both require a parent, guardian, or custodian to have inflicted the harm.

“Custodian” is defined as “a person who has or shares actual physical possession or care and custody of a child, regardless of whether such person has been granted custody of the child by any contract or agreement.” W. Va. Code Ann. § 49-1-204 (Definitions related, but not limited, to custodians, legal guardians and family). Because W. Va. Code Ann. § 49-1-204 does not require a person to have legal custody of a child, but only to have or share “actual physical possession or care and custody of a child,”

⁹³ See *supra* note 11.

⁹⁴ See *supra* definitions of “sexual abuse” and “sexual exploitation” in Component 5.5.

this broad definition likely includes cases where a non-familial third party is in custody or control of a child.

The West Virginia Child Welfare Act also employs the term "caregiver," which is more narrowly defined as "any person who is at least eighteen years of age and: (A) Is related by blood, marriage or adoption to the minor, but who is not the legal custodian or guardian of the minor; or (B) Has resided with the minor continuously during the immediately preceding period of six months or more. W. Va. Code Ann. § 49-1-204. However, "caregivers" are primarily discussed in the context of providing consent for medical treatment,⁹⁵ while "custodian" is used within the definition of an "abused child" and affects access to services.

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

Pursuant to W. Va. Code Ann. § 61-14-7(d)⁹⁶ (General provisions and other penalties), a victim of human trafficking is considered a victim under the West Virginia Crime Victims Compensation Act. W. Va. Code Ann. § 61-14-7(d) states,

Notwithstanding the definition of victim in section three, article two-a, chapter fourteen of this code [§ 14-2A-3 (Definitions)], a victim of any offense under this article [Human Trafficking] is a victim for all purposes of article two-a, chapter fourteen of this code [§ 61-14-2a (Compensation Awards to Victims)]

Under the West Virginia Crime Victims Compensation Act, a victim or other claimant is entitled to compensation for economic loss sustained as a result of any injury to the victim and attorney's fees. W. Va. Code Ann. §§ 14-2A-14(g)(1), 14-2A-19. Pursuant to W. Va. Code Ann. § 14-2A-14(g)(1) (Grounds for denial of claim or reduction of awards; maximum awards),

Except in the case of death, or as provided in subdivision (2) of this subsection, compensation payable to a victim and to all other claimants sustaining economic loss because of injury to that victim may not exceed \$35,000 in the aggregate. Compensation payable to all claimants because of the death of the victim may not exceed \$50,000 in the aggregate.⁹⁷

Victims may also be eligible for an additional award not to exceed \$100,000, if their injuries qualify as a disability under the Social Security Act, 42 U. S. C. § 423 (Disability insurance benefit payments). W. Va. Code Ann. § 14-2A-14(g)(2).

However, several requirements for compensation could present difficulties for child sex trafficking victims. W. Va. Code Ann. § 14-2A-10(b) (Filing of application for compensation award; contents) requires an application for an award of compensation to "be filed within two years after the occurrence of the criminally injurious conduct that is the basis of the application." A claim will also be denied where the victim is considered an "offender or an accomplice of the offender." W. Va. Code Ann. § 14-2A-

⁹⁵ See W. Va. Code Ann. §§ 49-2-701 – 49-2-708 (Part VII. Caregivers consent act). "Caregivers" are also referenced with respect to receiving services for disabled persons. See W. Va. Code Ann. §§ 49-2-601 – 49-2-605 (Part VI. West Virginia family support Program).

⁹⁶ See *supra* note 35.

⁹⁷ "Economic loss" means economic detriment consisting only of allowable expense, work loss and replacement services loss. If criminally injurious conduct causes death, economic loss includes a dependent's economic loss and a dependent's replacement services loss. Noneconomic detriment is not economic loss, however, economic loss may be caused by pain and suffering or physical impairment. For purposes of this article, the term "economic loss" includes a lost scholarship as defined in this section." W. Va. Code Ann. § 14-2A-3(e). See W. Va. Code Ann. § 14-2A-3(f)–(j) (defining allowable expense, work loss, replacement services loss, dependent's economic loss and dependent's replacement services loss).

14(c). Lastly, an award of compensation may be denied, reduced or reconsidered, if an award was previously approved, “upon a finding that the claimant or victim has not fully cooperated with appropriate law-enforcement agencies or the claim investigator.” W. Va. Code Ann. § 14-2A-14(d). Although nothing expressly exempts child sex trafficking victims from these requirements or award reduction factors, W. Va. Code Ann. § 61-14-7(d) specifically exempts child sex trafficking victims from another requirement, which would have required the victim to report the crime “to a law-enforcement officer or agency within seventy-two hours after the occurrence of the conduct, unless . . . good cause existed for the failure to report the conduct within the 72-hour period.” W. Va. Code Ann. §§ 61-14-7(d), 14-2A-14(b). W. Va. Code Ann. § 61-14-7(d) states in part,

for purposes of subsection (b), section fourteen, article two-a, chapter fourteen of this code [§ 14-2A-14(b)], if otherwise qualified, a victim of any offense under this article may not be denied eligibility solely for the failure to report to law enforcement within the designated time frame.

5.7.1 Recommendation: Amend W. Va. Code Ann. § 14-2A-14 (Grounds for denial of claim or reduction of awards; maximum awards) to exempt child sex trafficking victims from the above listed ineligibility criteria.⁹⁸

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

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

Special protections are afforded to child-witnesses⁹⁹ who are called to testify as victims in criminal prosecutions involving sexual assault in the first, second, or third degree, or sexual abuse in the first degree. W. Va. Code Ann. § 62-6B-2(1) (Definitions). Pursuant to W. Va. Code Ann. § 62-6B-3(b)–(d) (Findings of fact required for taking testimony of child witness by closed-circuit television; considerations for court),

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

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

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

- (1) The age and maturity of the child witness;
- (2) The facts and circumstances of the alleged offense;
- (3) The necessity of the child’s live testimony to the prosecution's ability to proceed as well as any prejudice to the defendant by allowing testimony through closed-circuit television;

⁹⁸ The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

⁹⁹ Pursuant to W. Va. Code Ann. § 62-6B-2(1), “[c]hild witness’ means a person under the age of sixteen years of age who is or will be called to testify in a criminal matter concerning an alleged violation of [§ 61-8B-3 (Sexual assault in the first degree), § 61-8B-4 (Sexual assault in the second degree), § 61-8B-5 (Sexual assault in the third degree), or § 61-8B-7 (Sexual abuse in the first degree)] of this code in which the child is the alleged victim.”

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

When a child-witness gives testimony via live closed-circuit television, “[o]nly the prosecuting attorney, the attorney for the defendant and the operator of the equipment may be present in the room with the child witness during testimony,” and “[o]nly the court, the prosecuting attorney and the attorney for the defendant may question the child.” W. Va. Code Ann. § 62-6B-4(b)(1) (Procedures required for taking testimony of child witness by closed-circuit television; election of defendant; jury instruction; sanction for failure to follow procedures; additional accommodation options; recordings and confidentiality).¹⁰⁰ Additionally, under W. Va. Code Ann. § 62-6B-5 (Memorialization of statements of certain child witnesses; admissibility; hearing), when any

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

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

¹⁰⁰ Pursuant to W. Va. Code Ann. § 62-6B-4(b)(1) (Procedures required for taking testimony of child witness by closed-circuit television; election of defendant; jury instruction; sanction for failure to follow procedures; additional accommodation options; recordings and confidentiality), “[i]n pro se proceedings, the court may modify the provisions of this subdivision relating to the role of the attorney for the defendant to allow the pro se defendant to question the child witness in such a manner as to cause as little psychological trauma as possible under the circumstances.”

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

- (a) In any prosecution under [Article 8B, Sexual offenses] in which the victim’s lack of consent is based solely on the incapacity to consent because such victim was below a critical age [i.e., prosecutions for violations of W. Va. Code Ann. § 61-8B-3(a)(2) (Sexual assault in the first degree), § 61-8B-5(a)(2) (Sexual assault in the third degree), § 61-8B-7(a)(3) (Sexual abuse in the first degree), and § 61-8B-9(a) (Sexual abuse in the third degree)],¹⁰¹ evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct and reputation evidence of the victim’s sexual conduct shall not be admissible. In any other prosecution under [Article 8B, Sexual offenses], evidence of specific instances of the victim’s prior sexual conduct with the defendant shall be admissible on the issue of consent: Provided, that such evidence heard first out of the presence of the jury is found by the judge to be relevant.
- (b) In any prosecution under [Article 8B, Sexual offenses] evidence of specific instances of the victim’s sexual conduct with persons other than the defendant, opinion evidence of the victim’s sexual conduct and reputation evidence of the victim’s sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.

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

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

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

5.9 *Child sex trafficking victims may vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.*

West Virginia law does not provide a mechanism for minors to vacate delinquency adjudications related to trafficking victimization, and juvenile records may only be moved to a separate secure confidential place after a waiting period.

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

¹⁰¹ W. Va. Code Ann. § 61-8B-2(a) (Lack of consent) provides, “Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.” Under subsection (c)(1), “A person is deemed incapable of consent when such person is: (1) Less than sixteen years old.”

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

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

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

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

Because W. Va. Code Ann. § 49-5-104 mandates a minimum 1 year waiting period, however, child sex trafficking victims may face collateral consequences associated with having accessible delinquency records during that time.

Regarding vacatur, W. Va. Code Ann. § 61-14-9¹⁰² (Petition to vacate and expunge conviction of sex trafficking victim) allows a victim of human trafficking to vacate a conviction for prostitution after a minimum 1 year waiting period,¹⁰³ stating,

(a) Notwithstanding the age and criminal history limitations set forth in section twenty-six, article eleven of this chapter, an individual convicted of prostitution in violation of subsection (b), section five, article eight of this chapter as a direct result of being a victim of trafficking, may apply by petition to the circuit court in the county of conviction to vacate the conviction and expunge the record of conviction. The court may grant the petition upon a finding that the individual’s participation in the offense was a direct result of being a victim of trafficking.

....

(c) A petition filed under subsection (a) of this section, any hearing conducted on the petition, and any relief granted are subject to the procedural requirements of section twenty-six, article eleven of this chapter: *Provided*, That the age or criminal history limitations in that section are inapplicable to victims of human trafficking.

Pursuant to W. Va. Code Ann. § 49-4-103 (Proceedings may not be evidence against child, or be published; adjudication is not a conviction and not a bar to civil service eligibility), an adjudication shall not be deemed a conviction. Because W. Va. Code Ann. § 61-14-9 applies specifically to convictions, a delinquency adjudication cannot be vacated and related records cannot be expunged under this law.

¹⁰² The text of W. Va. Code Ann. § 61-14-9 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2318 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017).

¹⁰³ Pursuant to W. Va. Code Ann. § 61-11-26(b) (Expungement of certain criminal convictions; procedures; effect), which governs the procedural requirements for vacatur under W. Va. Code Ann. § 61-14-9, states, “[n]o person shall be eligible . . . until one year after the conviction, completion of any sentence of incarceration or probation, whichever is later in time.”

Further, W. Va. Code Ann. § 61-14-9 applies only to prostitution offenses, foreclosing the law’s applicability to other offenses related to trafficking victimization. Finally, the 1 year waiting period may subject a victim to collateral consequences associated with having an accessible record during that time.

- 5.9.1 Recommendation: Amend W. Va. Code Ann. § 61-14-9 (Petition to vacate and expunge conviction of sex trafficking victim) to allow child sex trafficking victims to vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.

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.

W. Va. Code Ann. § 61-14-7(c)(1)¹⁰⁴ (General Provisions and other penalties) mandates restitution for trafficking related offenses, stating “The court shall order a person convicted of an offense under this article [Human Trafficking] to pay restitution to the victim of the offense.” Further, commercially sexually exploited children whose offenders are convicted of a felony or misdemeanor may be eligible to receive restitution under W. Va. Code Ann. § 61-11A-4(a) (Restitution; when ordered). Pursuant to W. Va. Code Ann. § 61-11A-4(a),

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

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

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

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

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

¹⁰⁴ See *supra* note 35.

In addition to restitution, civil remedies may be available for commercially sexually exploited children. To the extent that a child is injured by a violation of W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties), the child may receive relief under W. Va. Code Ann. § 61-3C-16(a) (Civil relief; damages). Pursuant to W. Va. Code Ann. § 61-3C-16(a),

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

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

....

If the petitioner of a civil action is also determined to be a victim of domestic violence,¹⁰⁵ pursuant to W. Va. Code Ann. § 48-26-603(b) (Domestic Violence Legal Services Fund), the court may order the defendant to pay “an amount equivalent to the reasonable attorney’s fee to which the prevailing litigant would be entitled into the Domestic Violence Legal Services Fund”¹⁰⁶ In order for this to occur, (1) a prevailing litigant must be entitled by statute or common law to a reasonable attorney’s fee, and (2) the prevailing party’s legal counsel must inform the court that they will not request a fee. W. Va. Code Ann. § 48-26-603(b)(1)–(2).

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

No statutes of limitations apply to the prosecution of felonies under West Virginia law.¹⁰⁷ However, prosecutions for misdemeanors must commence within 1 year of the commission of the crime. W. Va. Code Ann. § 61-11-9 (Limitation of prosecution; lost indictment).

Additionally, a victim must bring a civil action under W. Va. Code Ann. § 61-3C-16(d) (Civil relief; damages) seeking damages for a violation of W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via

¹⁰⁵ The crime of domestic violence is addressed under W. Va. Code Ann. § 61-2-28 (Domestic Violence—Criminal Acts), which states,

(a) Domestic battery. --Any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for not more than twelve months, or fined not more than five hundred dollars, or both.

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

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

¹⁰⁷ See *State v. Parsons*, 589 S.E.2d 226, 237 (W. Va. 2003) (noting “West Virginia has no statute of limitations affecting felony prosecutions.” (quoting *State v. Carrico*, 427 S.E.2d 474, 477 (W. Va.1993))).

computer; soliciting a minor to engage the minor in prohibited sexual activity; penalties) “before the earlier of: (1) Five years after the last act in the course of conduct constituting a violation of this article; or (2) two years after the plaintiff discovers or reasonably should have discovered the last act in the course of conduct constituting a violation of this article.” For any civil action where no statute of limitations is provided, a claim must be commenced within 2 years of the accrual date, if the claim relates to property damage or personal injuries. W. Va. Code Ann. § 55-2-12(a), (b) (Personal actions not otherwise provided for).

However, special provisions apply when the victim is a minor. Pursuant to W. Va. Code Ann. § 55-2-15(a) (Special and general savings as to persons under disability), the applicable statute of limitations for civil actions “resulting from sexual assault or sexual abuse of a [minor], shall be brought against the perpetrator of the sexual assault or abuse within four years after [turning 18] or within four years after discovery of the sexual assault or sexual abuse, whichever is longer.” Otherwise, the applicable statute of limitations for civil actions will toll until a minor turns 18, at which point the victim may bring a claim “within the like number of years after his becoming of full age . . . that is allowed to a person having no such impediment to bring the same after the right accrues . . . except that it shall in no case be brought after twenty years from the time when the right accrues.” W. Va. Code Ann. § 55-2-15(b).

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 and commercial sexual exploitation of children (CSEC).*
- 6.4 *Using a law enforcement decoy posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*
- 6.5 *Using the Internet or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*
- 6.6 *State law requires reporting of missing children and recovered missing children.*

Legal Analysis:

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

Law enforcement officers in West Virginia are not expressly required to complete training on human trafficking or domestic minor sex trafficking. However, pursuant to W. Va. Code Ann. § 30-29-3(a)(6) (Duties of the Governor’s committee and the subcommittee), the West Virginia Governor’s committee on crime, delinquency and corrections along with its law-enforcement professional standards subcommittee shall “[p]romulgate standards governing the training, firearms qualifications, and ongoing professional certification of law-enforcement officers and the entry-level law-enforcement training curricula.” The committee and subcommittee also shall, pursuant to W. Va. Code Ann. § 30-29-3(a)(9), “[e]stablish standards governing mandatory training to effectively investigate organized criminal enterprises as defined in [W. Va. Code Ann. § 61-13-2 (Definitions)¹⁰⁸] . . . for entry level training curricula and for law-enforcement officers who have not received such training as certified by the subcommittee as required in this section”. Given that West Virginia’s CSEC laws are included within the definition of “qualifying offense,”¹⁰⁹ under the training requirements mandated in W. Va. Code Ann. § 30-29-3(a)(9), it is possible that training on these provisions may be required for law-enforcement in West Virginia.

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

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

¹⁰⁸ W. Va. Code Ann. § 61-13-2 defines “organized criminal enterprise” as “a combination of five or more persons engaging over a period of not less than six months in one or more of the qualifying offenses set forth in this section.”

¹⁰⁹ Pursuant to W. Va. Code Ann. § 61-13-2, “qualifying offenses” include violations of W. Va. Code Ann. § 61-2-14(a) (Abduction of person; kidnapping or concealing child; penalties), § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties), § 61-8-8 (Receiving support from prostitution; pimping; penalty), § 61-8C-2 (Use of minors in filming sexually explicit conduct prohibited; penalty), and § 61-8C-3 (Distribution and exhibiting of material depicting minors engaged in sexually explicit conduct prohibited; penalty).

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

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

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

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

6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking and commercial sexual exploitation of children (CSEC).*

Wiretapping is available to investigate West Virginia's trafficking offenses and W. Va. Code Ann. § 61-2-14 (Abduction of person; kidnapping, or concealing a child; penalties), a CSEC offense. Under W. Va. Code Ann. § 62-1D-8¹¹⁰ (County prosecuting attorney or duly appointed special prosecutor may apply for order authorizing interception),

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

Any information obtained through a wiretap authorized by an order granted under W. Va. Code Ann. § 62-1D-8, whether obtained by a law enforcement officer or other person receiving the information, may be disclosed in testimony given during “any criminal proceeding held under the authority of this state or of any political subdivision of this state.” W. Va. Code Ann. § 62-1D-9(c), (f) (Lawful disclosure or use of contents of communication).¹¹¹

¹¹⁰ The text of W. Va. Code Ann. § 62-1D-8 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2318 during the 2017 Regular Session of the West Virginia Legislature (effective June 15, 2017).

¹¹¹ To the extent evidence of other crimes not the basis for authorizing the wiretap is obtained through use of an authorized wiretap, W. Va. Code Ann. § 62-1D-9(e) and (g) authorize the use of such evidence by law enforcement and its introduction in evidence through testimony in the criminal prosecution. W. Va. Code Ann. § 62-1D-9(e) and (g) provide,

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

Although West Virginia’s trafficking law does not expressly prohibit a defense to prosecution based on the use of a law enforcement decoy posing as a minor, W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties), a buyer applicable CSEC offense, prohibits a defendant from asserting this defense when charged with using the computer to solicit a minor for commercial sex. Specifically, W. Va. Code Ann. § 61-3C-14b uses the phrases “a person he or she believes to be such a minor . . .” and “the person believed to be a minor’s . . .” W. Va. Code Ann. § 61-3C-14b(a), (b). Based on this language, buyers charged with attempting to solicit or purchase sex with a minor under W. Va. Code Ann. § 61-3C-14b would be prohibited from asserting a defense based on the fact that an actual minor was not involved.

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

Use of the Internet to investigate buyers and traffickers appears to be a permissible investigative technique under W. Va. Code Ann. § 61-3C-14b (Soliciting, etc. a minor via computer; soliciting a minor and traveling to engage the minor in prohibited sexual activity; penalties). According to W. Va. Code Ann. § 61-3C-14b,

(a) Any person over the age of eighteen, who knowingly uses [or attempts to use] a computer to solicit, entice, seduce or lure . . . a minor known or believed to be at least four years younger than the person using the computer or a person he or she believes to be such a minor, in order to engage in . . . [several crimes, including prostitution], is guilty of a felony

(b) Any person over the age of eighteen who uses a computer in the manner proscribed by the provision of subsection (a) of this section and who additionally engages in any overt act designed to bring himself or herself into the minor's, or the person believed to be a minor's, physical presence with the intent to engage in any sexual activity or conduct with such minor that is prohibited by law, is guilty of a felony

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

. . . .

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

6.6 *State law requires reporting of missing children and recovered missing children.*

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

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

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

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

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

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

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

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

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

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