

# PROTECTED INNOCENCE INITIATIVE

STATE ACTION. NATIONAL CHANGE.

## ANALYSIS AND RECOMMENDATIONS MONTANA\*

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

#### *Legal Components:*

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

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

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

Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude—definitions), states,

(1) A person commits the offense of subjecting another to involuntary servitude if the person purposely or knowingly obtains<sup>2</sup> or maintains<sup>3</sup> the forced labor or services<sup>4</sup> of another person by any of the following actions or by threatening any of the following actions:

\* This document has not been fully reviewed and approved by ACLJ.

<sup>1</sup> Unless otherwise specified, all references to Montana statutes were taken from Montana Statutes (LEXIS current through 2011 Reg. and Spec. Sess.) and all federal statutes were taken from United States Code (LEXIS current through PL 112-54, approved 11/12/11).

<sup>2</sup> Pursuant to Mont. Code Ann. § 45-5-305(3)(f) (Subjecting another to involuntary servitude—definitions) “‘Obtain’ means to secure performance of labor or services.” Mont. Code Ann. § 45-5-305(3)(d) defines “labor” as “work of economic or financial value,” and Mont. Code Ann. § 45-5-305(3)(g) defines “services” as “an ongoing relationship between a person and the offender in which the person performs activities under the supervision of or for the benefit of the offender, including commercial sexual activity and sexually explicit performances.”

<sup>3</sup> Mont. Code Ann. § 45-5-305(3)(e) (Subjecting another to involuntary servitude—definitions) defines “maintain” as “to secure continued performance of labor or services, regardless of any initial agreement on the part of the victim to perform that type of service.”

- (a) causing physical harm to any person;
  - (b) damaging or destroying the property of any person;
  - (c) physically restraining another person;
  - (d) abusing the law or legal process;
  - (e) knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document or any other actual or purported government identification document of another person;
  - (f) blackmail;<sup>5</sup> or
  - (g) causing financial harm<sup>6</sup> to any person or using financial control over any person.
- (2) (a) Except as provided in subsection (2)(b), a person convicted of the offense of subjecting another to involuntary servitude shall be imprisoned in the state prison for a term of not more than 10 years, fined an amount not to exceed \$50,000, or both.
- (b) A person convicted of the offense of subjecting another to involuntary servitude, if the violation involves aggravated kidnapping, sexual intercourse without consent, or deliberate homicide, shall be punished by life imprisonment or by imprisonment in the state prison for a term of not more than 100 years and may be fined not more than \$50,000.

....

Mont. Code Ann. § 45-5-306 (Trafficking of persons for involuntary servitude) provides,

- (1) A person commits the offense of trafficking of persons for involuntary servitude if the person purposely or knowingly:
- (a) recruits, entices, harbors, transports, provides, or obtains<sup>7</sup> by any means another person, intending or knowing that the person will be subjected to involuntary servitude as described in 45-5-305 [Subjecting another to involuntary servitude—definitions]; or
  - (b) benefits financially by receiving anything of value from participation in a venture that has engaged in the offense of subjecting another to involuntary servitude as described in 45-5-305 [Subjecting another to involuntary servitude—definitions].
- (2) (a) Except as provided in subsection (2)(b), a person convicted of the offense of trafficking of persons for involuntary servitude shall be imprisoned in the state prison for a term of not more than 15 years, fined an amount not to exceed \$100,000, or both.

....

Mont. Code Ann. § 45-5-306(2)(b) provides a penalty enhancement that could apply to trafficking offenses involving prostituted minors under the age of 16, as well as kidnapped victims. It states, “A person convicted of the offense of trafficking of persons for involuntary servitude, if the violation involves aggravated kidnapping,<sup>8</sup> sexual intercourse without consent, or deliberate homicide, shall be punished by life imprisonment or by imprisonment in the state prison for a term of not more than 100 years and may be fined not more than \$100,000.” A person convicted under Mont. Code Ann. § 45-5-306 could receive additional punishment under Mont. Code Ann. § 45-5-503(1) (Sexual intercourse without consent), which states in part, “A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual

<sup>4</sup> Mont. Code Ann. § 45-5-305(3)(c) (Subjecting another to involuntary servitude—definitions) defines “forced labor or services” as “labor or services that are performed or provided by another person and are obtained or maintained through violation of subsection (1).” See *supra* note 2 for definitions of “labor” and “services.”

<sup>5</sup> Mont. Code Ann. § 45-5-305(3)(a) (Subjecting another to involuntary servitude—definitions) defines “blackmail” as “an unlawful demand of money, property, or services under threat to accuse another person of a crime or to expose any secret tending to subject a person to hatred, contempt, or ridicule.”

<sup>6</sup> Mont. Code Ann. § 45-5-305(3)(b) (Subjecting another to involuntary servitude—definitions) states, “‘Financial harm’ includes employment contracts that violate 28-2-903, taking, receiving, reserving, or charging a rate of interest greater than is allowed by 31-1-107, and defrauding creditors as defined in 45-6-315.”

<sup>7</sup> See *supra* note 2 for definition of “obtain.”

<sup>8</sup> See *infra* Section 1.2 for substantive discussion of the crime of aggravated kidnapping under Mont. Code Ann. § 45-5-303.

intercourse without consent. . . .” Mont. Code Ann. § 45-5-501(1)(a) (Definitions) states in part, “As used in 45-5-503, the term ‘without consent’ means . . . the victim is incapable of consent because the victim is . . . less than 16 years old.”

- 1.1.1 Recommendation: Amend Mont. Code Ann. § 45-5-306 (Trafficking of persons for involuntary servitude) and Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude—definitions) to eliminate the requirement of proof of force, fraud, or coercion when the offense is committed against a minor under the age of 18, or alternatively, enact a stand-alone child sex trafficking statute that applies without regard to the use of force, fraud, or coercion.<sup>9</sup>

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

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

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

- (1) A person commits the offense of prostitution if the person engages in or agrees or offers to engage in sexual intercourse with another person for compensation, whether the compensation is received or to be received or paid or to be paid.
- (2) (a) A prostitute convicted of prostitution shall be fined an amount not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.
- (b) Except as provided in subsection (3), a prostitute’s client who is convicted of prostitution shall for the first offense be fined an amount not to exceed \$1,000 or be imprisoned for a term not to exceed 1 year, or both, and for a second or subsequent offense shall be fined an amount not to exceed \$10,000 or be imprisoned for a term not to exceed 5 years, or both.
- (3) (a) If the prostitute was 12 years of age or younger and the prostitute’s client was 18 years of age or older at the time of the offense, the offender:
- (i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (3)(a)(i) except as provided in 46-18-222,<sup>10</sup> and during the first 25 years of imprisonment, the offender is not eligible for parole.
- (ii) may be fined an amount not to exceed \$50,000; and

<sup>9</sup> Subsequent recommendations in this report referring to the state human trafficking law(s) are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

<sup>10</sup> Mont. Code § 46-18-222 (Exceptions to mandatory minimum sentences, restrictions on deferred imposition and suspended execution of sentence, and restrictions on parole eligibility) states,

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

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

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

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

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

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

(a) owns, controls, manages, supervises, resides in, or otherwise keeps, alone or in association with others, a house of prostitution or a prostitution business;

(b) procures an individual for a house of prostitution or a place in a house of prostitution for an individual;

(c) encourages, induces, or otherwise purposely causes another to become or remain a prostitute;

(d) solicits clients for another person who is a prostitute;

(e) procures a prostitute for a patron;

(f) transports an individual into or within this state with the purpose to promote that individual's engaging in prostitution or procures or pays for transportation with that purpose;

(g) leases or otherwise permits a place controlled by the offender, alone or in association with others, to be regularly used for prostitution or for the procurement of prostitution or fails to make reasonable effort to abate that use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means; or

(h) lives in whole or in part upon the earnings of an individual engaging in prostitution, unless the person is the prostitute's minor child or other legal dependent incapable of self-support.

(2) Except as provided in subsection (3), a person convicted of promoting prostitution shall be fined an amount not to exceed \$50,000 or be imprisoned in a state prison for a term not to exceed 10 years, or both.

(3) (a) If the prostitute was 12 years of age or younger and the prostitute's client was 18 years of age or older at the time of the offense, the offender:

(i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (3)(a)(i) except as provided in 46-18-222, and during the first 25 years of imprisonment, the offender is not eligible for parole.

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

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

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

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

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

(a) compels another to engage in or promote prostitution;

(b) promotes prostitution of a child under the age of 18 years, whether or not the person is aware of the child's age;

- (c) promotes the prostitution of one's spouse, child, ward, or any person for whose care, protection, or support the person is responsible.
- (2) (a) Except as provided in subsections (2)(b) and (2)(c), a person convicted of aggravated promotion of prostitution shall be punished by:
- (i) life imprisonment; or
  - (ii) imprisonment in a state prison for a term not to exceed 20 years or a fine in an amount not to exceed \$50,000, or both.
- (b) Except as provided in 46-18-219<sup>11</sup> and 46-18-222,<sup>12</sup> a person convicted of aggravated promotion of prostitution of a child, who at the time of the offense is under 18 years of age, shall be punished by:
- (i) life imprisonment; or
  - (ii) imprisonment in a state prison for a term of not less than 4 years or more than 100 years or a fine in an amount not to exceed \$100,000, or both.
- (c) (i) If the prostitute was 12 years of age or younger and the prostitute's client was 18 years of age or older at the time of the offense, the offender:
- (A) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (2)(c)(i)(A) except as provided in 46-18-222, and during the first 25 years of imprisonment, the offender is not eligible for parole.
  - (B) may be fined an amount not to exceed \$50,000; and
  - (C) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program provided or approved by the department of corrections.
- (ii) If the offender is released after the mandatory minimum period of imprisonment, the offender is subject to supervision by the department of corrections for the remainder of the offender's life and shall participate in the program for continuous, satellite-based monitoring provided for in 46-23-1010.

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

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

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

- (1) (a) Except as provided in subsection (3), if an offender convicted of one of the following offenses was previously convicted of one of the following offenses or of an offense under the laws of another state or of the United States that, if committed in this state, would be one of the following offenses, the offender must be sentenced to life in prison, unless the death penalty is applicable and imposed:
- (i) 45-5-102, deliberate homicide;
  - (ii) 45-5-303, aggravated kidnapping;
  - (iii) 45-5-503, sexual intercourse without consent;
  - (iv) 45-5-625, sexual abuse of children; or
  - (v) 45-5-627, except subsection (1)(b), ritual abuse of a minor.
- (b) Except as provided in subsection (3), if an offender convicted of one of the following offenses was previously convicted of two of the following offenses, two of any combination of the offenses listed in subsection (1)(a) or the following offenses, or two of any offenses under the laws of another state or of the United States that, if committed in this state, would be one of the offenses listed in subsection (1)(a) or this subsection, the offender must be sentenced to life in prison, unless the death penalty is applicable and imposed:
- (i) 45-5-103, mitigated deliberate homicide;
  - (ii) 45-5-202, aggravated assault;
  - (iii) 45-5-302, kidnapping;
  - (iv) 45-5-401, robbery; or
  - (v) 45-5-603, aggravated promotion of prostitution.

<sup>12</sup> See *supra* note 10.

- (a) knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct,<sup>13</sup> actual or simulated;<sup>14</sup>
- (b) knowingly photographs, films, videotapes, develops or duplicates the photographs, films, or videotapes, or records a child engaging in sexual conduct, actual or simulated;
- (c) knowingly, by any means of communication, including electronic communication,<sup>15</sup> persuades, entices, counsels, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated;

....

(2) (a) Except as provided in subsection (2)(b), (2)(c), or (4), a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term not to exceed 100 years and may be fined not more than \$10,000.

(b) Except as provided in 46-18-219,<sup>16</sup> if the victim is under 16 years of age, a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$10,000.

....

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

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

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

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

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

#### 5. Mont. Code Ann. § 45-5-303 (Aggravated kidnapping) states,

(1) A person commits the offense of aggravated kidnapping if the person knowingly or purposely and without lawful authority restrains another person by either secreting or holding the other person in a place of isolation or by using or threatening to use physical force, with any of the following purposes:

<sup>13</sup> Mont. Code Ann. § 45-5-625(5)(b) (Sexual abuse of children) defines "sexual conduct" as

(i) actual or simulated:

(A) sexual intercourse, whether between persons of the same or opposite sex;

(B) penetration of the vagina or rectum by any object, except when done as part of a recognized medical procedure;

(C) bestiality;

(D) masturbation;

(E) sadomasochistic abuse;

(F) lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person; or

(G) defecation or urination for the purpose of the sexual stimulation of the viewer; or

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

<sup>14</sup> Mont. Code Ann. § 45-5-625(5)(c) (Sexual abuse of children) defines "simulated" as "any depicting of the genitals or pubic or rectal area that gives the appearance of sexual conduct or incipient sexual conduct."

<sup>15</sup> Mont. Code Ann. § 45-5-625(5)(a) (Sexual abuse of children) defines "electronic communication" as "a sign, signal, writing, image, sound, data, or intelligence of any nature transmitted or created in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system."

<sup>16</sup> See *supra* note 11.

....

(e) to hold another in a condition of involuntary servitude.

(2) Except as provided in 46-18-219<sup>17</sup> and 46-18-222,<sup>18</sup> a person convicted of the offense of aggravated kidnapping shall be punished by death or life imprisonment as provided in 46-18-301 through 46-18-310 or be imprisoned in the state prison for a term of not less than 2 years or more than 100 years and may be fined not more than \$50,000, unless the person has voluntarily released the victim alive, in a safe place, and with no serious bodily injury, in which event the person shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years and may be fined not more than \$50,000.

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

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

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

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

2. Mont. Code Ann. § 45-5-502(3) (Sexual assault) provides,

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault,<sup>19</sup> the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years, unless the judge makes a written finding that there is good cause to impose a term of less than 4 years and imposes a term of less than 4 years, or more than 100 years and may be fined not more than \$50,000.

3. Mont. Code Ann. § 45-5-503(3) (Sexual intercourse without consent) provides,

(3)(a) If the victim is less than 16 years old and the offender is 4 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$50,000, except as provided in 46-18-219<sup>20</sup> and 46-18-222.<sup>21</sup>

(b) If two or more persons are convicted of sexual intercourse without consent with the same victim in an incident in which each offender was present at the location where another offender's offense occurred during a time period in which each offender could have reasonably known of the other's offense, each offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 5 years or more than 100 years and may be fined not more than \$50,000, except as provided in 46-18-219<sup>22</sup> and 46-18-222.<sup>23</sup>

<sup>17</sup> See *supra* note 11.

<sup>18</sup> See *supra* note 10.

<sup>19</sup> Mont. Code Ann. § 45-5-502(4) (Sexual assault) defines an act "in the course of committing sexual assault" as including "an attempt to commit the offense or flight after the attempt or commission."

<sup>20</sup> See *supra* note 11.

<sup>21</sup> See *supra*, note 10.

<sup>22</sup> See *supra* note 11.

<sup>23</sup> See *supra*, note 10.

- (c) If the offender was previously convicted of an offense under this section or of an offense under the laws of another state or of the United States that if committed in this state would be an offense under this section and if the offender inflicted serious bodily injury upon a person in the course of committing each offense, the offender shall be:
- (i) punished by death as provided in 46-18-301 through 46-18-310, unless the offender is less than 18 years of age at the time of the commission of the offense; or
  - (ii) punished as provided in 46-18-219.
- (4) (a) If the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offense, the offender:
- (i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (4)(a)(i) except as provided in 46-18-222, and during the first 25 years of imprisonment, the offender is not eligible for parole.
  - (ii) may be fined an amount not to exceed \$50,000; and
  - (iii) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program provided or approved by the department of corrections.
- (b) If the offender is released after the mandatory minimum period of imprisonment, the offender is subject to supervision by the department of corrections for the remainder of the offender's life and shall participate in the program for continuous, satellite-based monitoring provided for in 46-23-1010.
- (5) In addition to any sentence imposed under subsection (2) or (3), after determining the financial resources and future ability of the offender to pay restitution as required by 46-18-242, the court shall require the offender, if able, to pay the victim's reasonable medical and counseling costs that result from the offense. The amount, method, and time of payment must be determined in the same manner as provided for in 46-18-244.

....

*1.3 CSEC or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

No CSEC laws refer to the human trafficking law.

- 1.3.1 Recommendation: Amend Mont. Code Ann. § 45-5-601(Prostitution), § 45-5-602 (Promoting prostitution), § 45-5-603 (Aggravated promotion of prostitution), § 45-5-622 (Endangering welfare of children) and § 45-5-625 (Sexual abuse of children) to refer to Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude—definitions) and Mont. Code Ann. § 45-5-306 (Trafficking of persons for involuntary servitude) for cases of commercial sexual exploitation of a child in order to clarify the status of the victim as a trafficking victim.

**Legal Components:**

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

**Legal Analysis:**

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

Mont. Code Ann. § 45-5-306(1)(a) (Trafficking of persons for involuntary servitude) states that “[a] person commits the offense of trafficking of persons for involuntary servitude if the person purposely or knowingly: (a) recruits, entices, harbors, transports, provides, or obtains by any means another person, intending or knowing that the person will be subjected to involuntary servitude as described in 45-5-305.” Mont. Code Ann. § 45-5-305(1) (Subjecting another to involuntary servitude—definitions), states that “[a] person commits the offense of subjecting another to involuntary servitude if the person purposely or knowingly obtains or maintains the forced labor or services of another person . . . .” Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),<sup>24</sup> have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers attempted to “obtain”<sup>25</sup> a person under 18 to engage in commercial sex.<sup>26</sup> It is unsettled whether the courts will uphold this interpretation of the TVPA. It is unlikely, however, that Mont. Code Ann. § 45-5-306(1)(a) and Mont. Code Ann. § 45-5-305(1) apply to buyers under the definition of the word “obtain” provided in Mont. Code Ann. § 45-5-305(3)(f) (Subjecting another to involuntary servitude—definitions).

Considering the definitions of “obtain,” “labor,” and “services,”<sup>27</sup> the requirement of an “ongoing relationship” appears specifically tailored to the conduct of traffickers and renders application to buyers unlikely. Moreover,

<sup>24</sup> 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.).

<sup>25</sup> 18 U.S.C. § 1591(a).

<sup>26</sup> See, e.g., Indictment at 1, United States v. Oflyng, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 10, 2009); see also News Release, U.S. Department of Justice, Office of the United States Attorney for the Western District of Missouri, Human Trafficking Rescue Project, Operation Guardian Angel, Final Defendant Pleads Guilty to Sex Trafficking of a Child, (Dec. 18, 2009), <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm>.

<sup>27</sup> See *supra* note 2 for relevant definitions.

Mont. Code Ann. § 45-5-305(1) requires proof of force, fraud, or coercion and for that reason as well, the statute is unlikely to cover buyers.

- 2.1.1 Amend Mont. Code Ann. § 45-5-306(1)(a) (Trafficking of persons for involuntary servitude) and Mont. Code Ann. § 45-5-305(1) (Subjecting another to involuntary servitude—definitions) to clarify that the statute is applicable to buyers of commercial sex with minors.

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

A buyer of sex with a minor may be charged under Mont. Code Ann. § 45-5-601(1) (Prostitution) which criminalizes the conduct of a person who “agrees or offers to engage in sexual intercourse with another person for compensation, whether the compensation is . . . paid or to be paid.” Pursuant to Mont. Code Ann. § 45-5-601(2)(b), “[A] prostitute’s client who is convicted of prostitution shall for the first offense be fined an amount not to exceed \$1,000 or be imprisoned for a term not to exceed 1 year, or both, and for a second or subsequent offense shall be fined an amount not to exceed \$10,000 or be imprisoned for a term not to exceed 5 years, or both.” However, under Mont. Code Ann. § 45-5-601(3),

- (a) If the prostitute was 12 years of age or younger and the prostitute’s client was 18 years of age or older at the time of the offense, the offender:
- (i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (3)(a)(i) except as provided in 46-18-222,<sup>28</sup> and during the first 25 years of imprisonment, the offender is not eligible for parole.
  - (ii) may be fined an amount not to exceed \$50,000; and
  - (iii) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program provided or approved by the department of corrections.
- (b) If the offender is released after the mandatory minimum period of imprisonment, the offender is subject to supervision by the department of corrections for the remainder of the offender’s life and shall participate in the program for continuous, satellite-based monitoring provided for in 46-23-1010.

A conviction under Mont. Code Ann. § 45-5-625(1)(a) (Sexual abuse of children) for a person who “knowingly employs . . . a child in an exhibition of sexual conduct,<sup>29</sup> actual or simulated,” is punishable by life imprisonment or a term of imprisonment up to 100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a). However, if the victim is under 16, a conviction for sexual abuse of children is punishable by life imprisonment or by imprisonment between 4 and 100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(b). Penalties are enhanced when the child is 12 years of age or younger to imprisonment for 100 years, of which term 25 years cannot be suspended, a possible fine not to exceed \$50,000, an order to enroll in a treatment program, and may be subject to supervision for the remainder of the offender’s life. Mont. Code Ann. § 45-5-625(4)(a)(i), (ii), (b). Although not specifically commercial in nature, a buyer may also be convicted under Mont. Code Ann. § 45-5-625(1)(h), (i) if the buyer “(h) knowingly travels within, from, or to this state with the intention of meeting a child under 16 years of age or a person the offender believes to be a child under 16 years of age in order to engage in sexual conduct, actual or simulated; or (i) knowingly coerces, entices, persuades, arranges for, or facilitates a child under 16 years of age or a person the offender believes to be a child under 16 years of age to travel within, from, or to this state with the intention of engaging in sexual conduct, actual or simulated.”

Several sexual offenses could be used to prosecute a buyer of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child or refer to the human trafficking statute to

<sup>28</sup> See *supra* note 10.

<sup>29</sup> See *supra* note 13 for the definition of “sexual conduct.”

bring these criminal offenses within the reach of human trafficking under Mont. Code Ann. § 45-5-306 (Trafficking of persons for involuntary servitude).<sup>30</sup>

2.2.1 Recommendation: Amend Mont. Code Ann. § 45-5-603 (Aggravated promotion of prostitution) and Mont. Code Ann. § 45-5-601(1) (Prostitution) to refer all cases of solicitation of a minor under 18 for commercial sex acts to Mont. Code Ann. § 45-5-306(1)(a) (Trafficking of persons for involuntary servitude) and Mont. Code Ann. § 45-5-305(1) (Subjecting another to involuntary servitude—definitions) for prosecution.

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

Montana’s prostitution statute, Mont. Code Ann. § 45-5-601(Prostitution), which includes the crime of soliciting prostitution, heightens the penalties for soliciting minors 12 or younger.<sup>31</sup>

2.3.1 Recommendation: Amend Mont. Code Ann. § 45-5-601(Prostitution) to make the purchase of commercial sex acts with a child under the age of 18 subject to the enhanced penalty and to refer to Mont. Code Ann. § 45-5-306(1)(a) (Trafficking of persons for involuntary servitude) and Mont. Code Ann. § 45-5-305(1) (Subjecting another to involuntary servitude—definitions) in order to prosecute the act as a trafficking offense.

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

If convicted of violating Mont. Code Ann. § 45-5-601 (Prostitution), a “prostitute’s client” or buyer, “shall for the first offense be fined an amount not to exceed \$1,000 or be imprisoned for a term not to exceed 1 year, or both, and for a second or subsequent offense shall be fined an amount not to exceed \$10,000 or be imprisoned for a term not to exceed 5 years, or both.” Mont. Code Ann. § 45-5-601(2)(b). However, penalties are heightened under Mont. Code Ann. § 45-5-601(3)(a) if the minor is 12 or younger.<sup>32</sup>

If a buyer is convicted under Mont. Code Ann. § 45-5-625 (Sexual abuse of children), the person “shall be punished by life imprisonment or by imprisonment in the state prison for a term not to exceed 100 years and may be fined not more than \$10,000.” Mont. Code Ann. § 45-5-625(2)(a). However, pursuant to Mont. Code Ann. § 45-5-625(2)(b) if the child was under 16 years of age, a buyer “shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$10,000.” Whereas, pursuant to Mont. Code Ann. § 45-5-625(4)(a), if the child was 12 years of age or younger and the offender was 18 years age or older, then the offender “(i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed . . . (ii) may be fined an amount not to exceed \$50,000; and (iii) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program provided or approved by the department of corrections.” Pursuant to Mont. Code Ann. § 45-5-624(4)(b), “If the offender is released after the mandatory minimum period of imprisonment, then the offender is subject to supervision by the department of corrections for the remainder of the offender’s life and shall participate in the program for continuous, satellite-based monitoring provided for in 46-23-1010.”

In contrast, 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

<sup>30</sup> See *supra* Section 1.2 for a full description of the sexual offense laws that may be used to prosecute buyers.

<sup>31</sup> See *supra* Section 2.2 for substantive provisions of Mont. Code Ann. § 45-5-601.

<sup>32</sup> See *supra* Section 2.2 for substantive provisions of Mont. Code Ann. § 45-5-601.

to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>33</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>34</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>35</sup>

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

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

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

...

(c) knowingly, by any means of communication, including electronic communication,<sup>36</sup> persuades, entices, counsels, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct,<sup>37</sup> actual or simulated;<sup>38</sup>

....

(2) (a) Except as provided in subsection (2)(b), (2)(c), or (4), a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term not to exceed 100 years and may be fined not more than \$10,000.

(b) Except as provided in 46-18-219,<sup>39</sup> if the victim is under 16 years of age, a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$10,000.

....

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

(i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (4)(a)(i) except as provided in 46-18-222,<sup>40</sup> and during the first 25 years of imprisonment, the offender is not eligible for parole.

<sup>33</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

<sup>34</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

<sup>35</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(a)(2), (4) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both.); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>36</sup> *See supra* note 15.

<sup>37</sup> *See supra* note 13.

<sup>38</sup> *See supra* note 14.

<sup>39</sup> *See supra* note 11.

<sup>40</sup> *See supra* note 10.

- (ii) may be fined an amount not to exceed \$50,000; and
- (iii) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program provided or approved by the department of corrections.

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

2.5.1 Recommendation: Enact a law that separately criminalizes use of the Internet to lure, entice, recruit, or purchase commercial sex acts with a minor.

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

Mont. Code Ann. § 45-5-603(1)(b) (Aggravated promotion of prostitution) does not permit a mistake of age defense and criminalizes any person who “purposely or knowingly . . . promotes prostitution of a child under the age of 18 years, whether or not the person is aware of the child's age.”

Mont. Code Ann. § 45-5-511(1) (Provisions generally applicable to sexual crimes) provides, “When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that the offender reasonably believed the child to be above that age. The belief may not be considered reasonable if the child is less than 14 years old.” While it is unclear from the statutory language whether Mont. Code Ann. § 45-5-511 is intended to apply only to offenses in the sexual offenses chapter, as the provision title indicates, the CSEC offense to which this defense could potentially apply is Mont. Code Ann. § 45-5-625(c) (Sexual abuse of children) because “criminality depends on the child being less than 16 years old.”

2.6.1 Recommendation: Amend Mont. Code Ann. § 45-5-306(1)(a) (Trafficking of persons for involuntary servitude), Mont. Code Ann. § 45-5-305(1) (Subjecting another to involuntary servitude—definitions), Mont. Code Ann. § 45-5-601 (Prostitution), and Mont. Code Ann. § 45-5-625 (Sexual abuse of children) to expressly prohibit a mistake of age defense in trafficking or CSEC prosecutions.

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

A buyer convicted of violating Mont. Code Ann. § 45-5-601 (Prostitution) “shall for the first offense be fined an amount not to exceed \$1,000 or be imprisoned for a term not to exceed 1 year, or both, and for a second or subsequent offense shall be fined an amount not to exceed \$10,000 or be imprisoned for a term not to exceed 5 years, or both.” Mont. Code Ann. § 45-5-601(2)(b). However, under Mont. Code Ann. § 45-5-601(3)(a), “If the prostitute was 12 years of age or younger and the prostitute's client was 18 years of age or older at the time of the offense, the offender: (i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed . . . and during the first 25 years of imprisonment, the offender is not eligible for parole. (ii) may be fined an amount not to exceed \$50,000; and (iii) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program . . . .” Furthermore, the offender may be “subject to supervision by the department of corrections for the remainder of the offender's life and shall participate in the program for continuous, satellite-based monitoring provided for in 46-23-1010.” Mont. Code Ann. § 45-5-601(3)(b).

A buyer convicted of Mont. Code Ann. § 45-5-603(2)(b) (Aggravated promotion of prostitution) where the child is under 18 years of age “shall be punished by: (i) life imprisonment; or (ii) imprisonment in a state prison for a term of not less than 4 years or more than 100 years or a fine in an amount not to exceed \$100,000, or both.” While pursuant to Mont. Code Ann. § 45-5-603(2)(c)(i), “If the prostitute was 12 years of age or

younger and the prostitute's client was 18 years of age or older at the time of the offense, the offender: (A) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed . . . and during the first 25 years of imprisonment, the offender is not eligible for parole. (B) may be fined an amount not to exceed \$50,000; and (C) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program . . .” Furthermore the offender may be subject “to supervision by the department of corrections for the remainder of the offender’s life and shall participate in the program for continuous, satellite-based monitoring provided for in 46-23-1010.” Mont. Code Ann. § 45-5-601(2)(c)(ii).

If a buyer is convicted under Mont. Code Ann. § 45-5-625 (Sexual abuse of children), the person “shall be punished by life imprisonment or by imprisonment in the state prison for a term not to exceed 100 years and may be fined not more than \$10,000.” Mont. Code Ann. § 45-5-625(2)(a). However, pursuant to Mont. Code Ann. § 45-5-625(2)(b), if the child was under 16, a buyer “shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$10,000.” Whereas, pursuant to Mont. Code Ann. § 45-5-625(4)(a), if the child was 12 years of age or younger and the offender was 18 years age or older, then the offender “(i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed . . . (ii) may be fined an amount not to exceed \$50,000; and (iii) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program provided or approved by the department of corrections.” If the offender is released post-mandatory period of imprisonment then he is subject to supervision for the remainder of his life. Mont. Code Ann. § 45-5-625(4)(b).

2.7.1 Recommendation: Amend all laws applicable to buyers to refer cases involving commercial sexual exploitation of all minors under 18 for prosecution under Mont. Code Ann. § 45-5-306(1)(a) (Trafficking of persons for involuntary servitude) and Mont. Code Ann. § 45-5-305(1) (Subjecting another to involuntary servitude—definitions) to avoid staggered penalties for buying sex with 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.*

A conviction under Mont. Code § 45-5-601(1) (Prostitution) for soliciting sex is punishable by a possible fine not to exceed \$1,000, while subsequent convictions are punishable by a possible fine not to exceed \$10,000. Mont. Code § 45-5-601(2)(b). Penalties are enhanced when the person solicited is a child 12 years of age or younger to a possible fine not to exceed \$50,000. Mont. Code Ann. § 45-5-601(3)(a)(i)–(ii), (b).

A conviction under Mont. Code Ann. § 45-5-625(1)(a) (Sexual abuse of children) for a person who “knowingly employs . . . a child in an exhibition of sexual conduct,<sup>41</sup> actual or simulated” is punishable by a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a), (b). However, penalties are enhanced when the child is 12 years of age or younger to a possible fine not to exceed \$50,000. Mont. Code Ann. § 45-5-625(4)(a)(i)–(ii), (b).

Restitution may be ordered by the court in any case that the victim suffers “an economic loss,” pursuant to Mont. Code Ann. § 46-18-241(1) (*Temporary*) Condition of restitution<sup>42</sup> which states, “As provided

<sup>41</sup> See *supra* note 13 for the definition of “sexual conduct.”

<sup>42</sup> Mont. Code Ann. § 46-18-241 contains one set of provisions that terminates on June 30, 2015 and another set of provisions that become effective July 1, 2015. Here and elsewhere in this report that Mont. Code Ann. § 46-18-241 is mentioned, the current provisions have been used for citations and quotations.

in 46-18-201,<sup>43</sup> a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss. The duty to pay full restitution under the sentence remains with the offender or the offender's estate until full restitution is paid, whether or not the offender is under state supervision. If the offender is under state supervision, payment of restitution is a condition of any probation or parole."

2.8.1 Recommendation: Amend Mont. Code § 45-5-601(1) (Prostitution) to establish an asset forfeiture scheme to reach the assets of buyers and mandate civil remedies for victims.

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

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

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

....

(e) knowingly possesses any visual or print medium,<sup>44</sup> including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;

(2) ....

(c) Except as provided in 46-18-219, a person convicted of the offense of sexual abuse of children for the possession of material, as provided in subsection (1)(e), shall be fined not to exceed \$10,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.

....

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

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

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

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

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<sup>43</sup> Mont. Code Ann. § 46-18-201(5) (Sentences that may be imposed) provides, "In addition to any other penalties imposed, if a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere and the sentencing judge finds that a victim, as defined in 46-18-243, has sustained a pecuniary loss, the sentencing judge shall, as part of the sentence, require payment of full restitution to the victim, as provided in 46-18-241 through 46-18-249, whether or not any part of the sentence is deferred or suspended." Mont. Code Ann. § 46-18-243(2)(a) states,

(2)(a) "Victim" means:

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

(A) the commission of an offense;

....

(v) the crime victims compensation and assistance program established under Title 53, chapter 9, part 1, to the extent that it has reimbursed a victim for pecuniary loss; and

(vi) any person or entity whom the offender has voluntarily agreed to reimburse as part of a voluntary plea bargain.

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

<sup>44</sup> Mont. Code Ann. § 45-5-625(5)(d) defines "visual medium" as

(i) any film, photograph, videotape, negative, slide, or photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or

(ii) any disk, diskette, or other physical media that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method.

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

In contrast, a federal conviction for possession of child pornography<sup>45</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>46</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>47</sup>

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

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

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

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

- (a) any violation of or attempt, solicitation, or conspiracy to commit a violation of 45-5-301 [Unlawful restraint] (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-302 [Kidnapping] (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-303 [Aggravated kidnapping] (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-502(3) [Sexual assault] (if the victim is less than 16 years of age and the offender is 3 or more years older than the victim), 45-5-503 [Sexual intercourse without consent], 45-5-504(1) [Indecent exposure] (if the victim is under 18 years of age and the offender is 18 years of age or older), 45-5-504(2)(c), 45-5-507 [Incest] (if the victim is under 18 years of age and the offender

<sup>45</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>46</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>47</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

is 3 or more years older than the victim or if the victim is 12 years of age or younger and the offender is 18 years of age or older at the time of the offense), 45-5-601(3) [Prostitution if the prostitute was 12 years of age or younger and the prostitute's client was 18 years of age or older], 45-5-602(3) [Promoting prostitution], 45-5-603(1)(b) or (2)(c) [Aggravated promotion of prostitution], or 45-5-625 [Sexual abuse of children]; or

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

A buyer convicted of any of the following offenses would be required to register as a sex offender: Mont. Code Ann. §§ 45-5-502(3) (Sexual assault when the victim is under 16 and the offender is at least 3 years older), 45-5-503 (Sexual intercourse without consent), 45-5-601(3) (Prostitution when the prostitute is 12 or younger and the buyer is at least 18), and 45-5-625 (Sexual abuse of children).

### FRAMEWORK ISSUE 3: CRIMINAL PROVISIONS FOR TRAFFICKERS

#### *Legal Components:*

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

#### *Legal Analysis:*

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

Traffickers convicted under Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude—definitions) can be punished by imprisonment up to 10 years, a fine not to exceed \$50,000, or both. Mont. Code § 45-5-305(2)(a). Heightened penalties exist where a violation of Mont. Code Ann. § 45-5-305 involves “aggravated kidnapping, sexual intercourse without consent, or deliberate homicide” and is punishable by life imprisonment or by imprisonment up to 100 years and possible fine not to exceed \$50,000. Mont. Code Ann. § 45-5-305(2)(b). A conviction under Mont. Code § 45-5-306 (Trafficking of persons for involuntary servitude) is punishable by imprisonment for up to 15 years, a fine not to exceed \$100,000, or both. Mont. Code § 45-5-306(2)(a). Heightened penalties exist where a violation of Mont. Code Ann. § 45-5-306 involves “aggravated kidnapping, sexual intercourse without consent, or deliberate homicide” and is punishable by life imprisonment or by imprisonment up to 100 years and possible fine not to exceed \$100,000. Mont. Code Ann. § 45-5-306(2)(b).

A conviction under Mont. Code Ann. § 45-5-602 (Promoting prostitution) is punishable by imprisonment up to 10 years, a fine not to exceed \$50,000, or both. Mont. Code Ann. § 45-5-602(2). If the child being prostituted was 12 or younger and the buyer is at least 18 or older, then a conviction under Mont. Code § 45-5-602 is punishable by imprisonment up to 100 years, 25 years of which cannot be suspended, a possible fine not to exceed \$50,000, and an order to complete a sexual offender treatment program. Mont. Code Ann. § 45-5-602(3)(a)(i)–(iii).

A conviction under Mont. Code Ann. § 45-5-603(1)(b) (Aggravated promotion of prostitution) is punishable by life imprisonment or by imprisonment for 4-100 years, a fine not to exceed \$100,000, or both, but if the child was 12 or younger and the buyer is at least 18, then a conviction is punishable by imprisonment for 100 years, 25 years of which cannot be suspended, a possible fine not to exceed \$50,000, and an order to complete a sexual offender treatment program. Mont. Code Ann. § 45-5-603(2)(b)(i)–(ii), (c)(i)(A), (B), (C).

A conviction under Mont. Code Ann. § 45-5-625 (Sexual abuse of children) is punishable by life or imprisonment up to 100 years, and a possible fine not to exceed \$10,000, but if the child is under 16, then the offense is punishable by imprisonment up to life or 4–100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a), (b). A conviction under Mont. Code Ann. §45-5-625 when the victim was 12 or younger is punishable by imprisonment for 100 years, 25 years of which cannot be suspended, a possible fine not to exceed \$50,000, and an order to complete a sexual offender treatment program. Mont. Code § 45-5-625(4)(a)(i)–(iii).

A conviction under Mont. Code Ann. § 45-5-303 (Aggravated kidnapping) is punishable by death or life imprisonment or imprisonment for 2–100 years and a possible fine not to exceed \$50,000, but if the offender has “voluntarily released the victim alive, in a safe place, and with no serious bodily injury,” the offense is punishable by imprisonment for 2–10 years and a possible fine not to exceed \$50,000. Mont. Code Ann. § 45-5-303(2).

In contrast, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>48</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>49</sup> against a minor.

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

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

- (1) A person commits the offense of sexual abuse of children if the person:
  - (a) knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct,<sup>50</sup> actual or simulated;<sup>51</sup>
  - (b) knowingly photographs, films, videotapes, develops or duplicates the photographs, films, or videotapes, or records a child engaging in sexual conduct, actual or simulated;  
.....
  - (d) knowingly processes, develops, prints, publishes, transports, distributes, sells, exhibits, or advertises any visual or print medium, including a medium by use of electronic communication<sup>52</sup> in which a child is engaged in sexual conduct, actual or simulated;  
.....
  - (g) possesses with intent to sell any visual or print medium, including a medium by use of electronic communication<sup>53</sup> in which a child is engaged in sexual conduct, actual or simulated;<sup>54</sup>  
.....

<sup>48</sup> 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.).

<sup>49</sup> See *supra* note 33.

<sup>50</sup> See *supra* note 13 for the definition of “sexual conduct.”

<sup>51</sup> See *supra* note 14 for the definition of “actual or simulated.”

<sup>52</sup> See *supra* note 15.

<sup>53</sup> See *supra* note 15.

(2) (a) Except as provided in subsection (2)(b), (2)(c), or (4), a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term not to exceed 100 years and may be fined not more than \$10,000.

(b) Except as provided in 46-18-219, if the victim is under 16 years of age, a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$10,000.

.....

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

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

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

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

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

In contrast, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>54</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>55</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>56</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>57</sup>

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<sup>54</sup> See *supra* note 14.

<sup>55</sup> See *supra* note 33.

<sup>56</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>57</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>58</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

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

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

- (1) A person commits the offense of sexual abuse of children if the person:  
.....  
(c) knowingly, by any means of communication, including electronic communication, persuades, entices, counsels, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated;  
.....
- (2) .....  
(b) Except as provided in 46-18-219,<sup>59</sup> if the victim is under 16 years of age, a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$10,000.  
.....
- .....  
(4) (a) If the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offense, the offender:  
(i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (4)(a)(i) except as provided in 46-18-222,<sup>60</sup> and during the first 25 years of imprisonment, the offender is not eligible for parole.  
(ii) may be fined an amount not to exceed \$50,000; and  
(iii) shall be ordered to enroll in and successfully complete the educational phase and the cognitive and behavioral phase of a sexual offender treatment program provided or approved by the department of corrections.  
(b) If the offender is released after the mandatory minimum period of imprisonment, the offender is subject to supervision by the department of corrections for the remainder of the offender's life and shall participate in the program for continuous, satellite-based monitoring provided for in 46-23-1010.

- 3.3.1 Recommendation: Enact a separate statute specifically criminalizing use of the Internet to lure, entice, or recruit minors for commercial sexual exploitation.

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

Traffickers convicted under Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude—definitions) can be punished by a fine not to exceed \$50,000. Mont. Code § 45-5-305(2)(a). Heightened penalties may result in a fine not to exceed \$50,000 when “the violation involves aggravated kidnapping, sexual intercourse without consent, or deliberate homicide.” Mont. Code Ann. § 45-5-305(2)(b). A conviction under Mont. Code § 45-5-306 (Trafficking of persons for involuntary servitude) is punishable by a fine not to exceed \$100,000. Mont. Code § 45-5-306(2)(a). Heightened penalties may result in a possible fine not to exceed \$100,000, “if the violation involves aggravated kidnapping, sexual intercourse without consent, or deliberate homicide.” Mont. Code Ann. § 45-5-306(2)(b).

<sup>59</sup> See *supra* note 11.

<sup>60</sup> See *supra* note 10.

A conviction under Mont. Code Ann. § 45-5-602 (Promoting prostitution) is punishable by a fine not to exceed \$50,000. Mont. Code Ann. § 45-5-602(2). If the child being prostituted was 12 years of age or younger and the client 18 years of age or older, then a conviction under Mont. Code § 45-5-602 is punishable by a possible fine not to exceed \$50,000. Mont. Code Ann. § 45-5-602(3)(a)(i)–(iii).

A conviction under Mont. Code Ann. § 45-5-603(1)(b) (Aggravated promotion of prostitution) is punishable by a fine not to exceed \$100,000, but if the child was 12 or younger and the buyer was at least 18, then a conviction is punishable by a possible fine not to exceed \$50,000. Mont. Code Ann. § 45-5-603(2)(b)(i)–(ii), (c)(i)(A), (B), (C).

A conviction under Mont. Code Ann. § 45-5-625 (Sexual abuse of children) is punishable by a possible fine not to exceed \$10,000, but if the child is under 16, then the offense is punishable by imprisonment up to life or 4–100 years and a possible fine not to exceed \$10,000. Mont. Code Ann. § 45-5-625(2)(a), (b). A conviction under Mont. Code Ann. § 45-5-625 when the victim was 12 or younger is punishable by imprisonment for 100 years, 25 years of which cannot be suspended, a possible fine not to exceed \$50,000, and an order to complete a sexual offender treatment program. Mont. Code § 45-5-625(4)(a)(i)–(iii).

A conviction under Mont. Code Ann. § 45-5-303 (Aggravated kidnapping) is punishable by a possible fine not to exceed \$50,000. Mont. Code Ann. § 45-5-303(2).

Restitution may be ordered by the court in any case that the victim suffers “an economic loss,” pursuant to Mont. Code Ann. § 46-18-241(1) (*Temporary*) Condition of restitution), which states, “As provided in 46-18-201,<sup>61</sup> a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss. The duty to pay full restitution under the sentence remains with the offender or the offender’s estate until full restitution is paid, whether or not the offender is under state supervision. If the offender is under state supervision, payment of restitution is a condition of any probation or parole.”

Forfeiture may also be available to the extent that the trafficker is found guilty of money laundering under Mont. Code Ann. § 45-6-341(1) (Money laundering), which criminalizes the conduct of a person who knowingly

- (a) receives or acquires the proceeds of, or engages in transactions involving proceeds of, any activity that is unlawful under the laws of the United States or the state in which the activity occurred;
- (b) gives, sells, transfers, trades, invests, conceals, transports, or otherwise makes available anything of value that the person knows is intended to be used for the purpose of committing or furthering the commission of any activity that is unlawful under the laws of the United States or the state in which the committing or furthering of the commission of the activity occurs;
- (c) directs, plans, organizes, initiates, finances, manages, supervises, or facilitates the transportation or transfer of proceeds that the person knows are derived from any activity that is unlawful under the laws of the United States or the state in which the activity occurred; or
- (d) conducts a financial transaction involving proceeds that the person knows are derived from any activity that is unlawful under the laws of the United States or the state in which the activity occurred when the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds or to avoid a transaction reporting requirement under federal law.

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

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<sup>61</sup> See *supra* note 43.

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

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

- 3.4.1 Recommendation: Amend Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude—definitions) and Mont. Code § 45-5-306 (Trafficking of persons for involuntary servitude) to establish an asset forfeiture scheme to reach the assets of convicted traffickers and mandate civil remedies for victims.

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

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

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

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

- (a) any violation of or attempt, solicitation, or conspiracy to commit a violation of 45-5-301 [Unlawful restraint] (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-302 [Kidnapping] (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-303 [Aggravated kidnapping] (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-502(3) [Sexual assault] (if the victim is less than 16 years of age and the offender is 3 or more years older than the victim), 45-5-503 [Sexual intercourse without consent], 45-5-504(1) [Indecent exposure] (if the victim is under 18 years of age and the offender is 18 years of age or older), 45-5-504(2)(c), 45-5-507 [Incest] (if the victim is under 18 years of age and the offender is 3 or more years older than the victim or if the victim is 12 years of age or younger and the offender is 18 years of age or older at the time of the offense), 45-5-601(3) [Prostitution if the prostitute was 12 years of age or younger and the prostitute’s client was 18 years of age or older], 45-5-602(3) [Promoting prostitution], 45-5-603(1)(b) or (2)(c) [Aggravated promotion of prostitution], or 45-5-625 [Sexual abuse of children]; or
- (b) any violation of a law of another state, a tribal government, or the federal government that is reasonably equivalent to a violation listed in subsection (9)(a) or for which the offender was required to

register as a sexual offender after an adjudication or conviction.

A trafficker convicted of any of the following offenses would be required to register as sex offender: Mont. Code Ann. § 45-5-302 [Kidnapping] (if the victim is less than 18 years of age and the offender is not a parent of the victim), § 45-5-303 [Aggravated kidnapping] (if the victim is less than 18 years of age and the offender is not a parent of the victim), § 45-5-602(3) [Promoting prostitution], § 45-5-603(1)(b) or (2)(c) [Aggravated promotion of prostitution], and § 45-5-625 [Sexual abuse of children], but not if convicted under Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude—definitions) or Mont. Code § 45-5-306 (Trafficking of persons for involuntary servitude).

3.5.1 Recommendation: Amend Mont. Code Ann. §46-23-502(10) (Definitions) to require sex offender registration for convictions under Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude—definitions) and Mont. Code § 45-5-306 (Trafficking of persons for involuntary servitude).

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

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

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

...

(c) the parent is convicted of a felony in which sexual intercourse occurred . . .

(d) the parent has subjected a child to any of the circumstances listed in 41-3-423(2)(a) through (2)(e);

....

The grounds provided pursuant to Mont. Code Ann. § 41-3-423(2)(a) include when a parent has “subjected a child to aggravated circumstances, including but not limited to abandonment,<sup>62</sup> torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child . . . .”

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

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

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<sup>62</sup> Mont. Code Ann. § 41-3-102(1)(a) (Definitions) states,

(1)(a) “Abandon”, “abandoned”, and “abandonment” mean:

(i) leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future;

(ii) willfully surrendering physical custody for a period of 6 months and during that period not manifesting to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child;

(iii) that the parent is unknown and has been unknown for a period of 90 days and that reasonable efforts to identify and locate the parent have failed; or

(iv) the voluntary surrender, as defined in 40-6-402, by a parent of a newborn who is no more than 30 days old to an emergency services provider, as defined in 40-6-402.

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

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

- (i) inflicts or allows to be inflicted upon the child physical abuse, physical neglect, or psychological abuse or neglect;
- (ii) commits or allows sexual abuse or exploitation of the child;

....

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

- 3.6.1 Recommendation: Amend Mont. Code § 41-3-609 (Criteria for termination) to specifically provide that a conviction for trafficking or CSEC offenses constitutes grounds for termination of parental rights.

## FRAMEWORK ISSUE 4: CRIMINAL PROVISIONS FOR FACILITATORS

### *Legal Components:*

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

### *Legal Analysis:*

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

The state human trafficking law includes financially benefitting under Mont. Code Ann. § 45-5-306(1)(b) (Trafficking of persons for involuntary servitude) provides,

(1) A person commits the offense of trafficking of persons for involuntary servitude if the person purposely or knowingly:

....

(b) benefits financially by receiving anything of value from participation in a venture that has engaged in the offense of subjecting another to involuntary servitude as described in 45-5-305 [Subjecting another to involuntary servitude—definitions].

(2) (a) Except as provided in subsection (2)(b), a person convicted of the offense of trafficking of persons for involuntary servitude shall be imprisoned in the state prison for a term of not more than 15 years, fined an amount not to exceed \$100,000, or both.

(b) A person convicted of the offense of trafficking of persons for involuntary servitude, if the violation involves aggravated kidnapping, sexual intercourse without consent,<sup>63</sup> or deliberate homicide, shall be punished by life imprisonment or by imprisonment in the state prison for a term of not more than 100 years and may be fined not more than \$100,000.

Mont. Code 45-5-602 (Promoting prostitution) is also applicable to facilitators who participate in transporting minors or provide premises for domestic minor sex trafficking. Mont. Code 45-5-602 states in part,

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

(a) owns, controls, manages, supervises, resides in, or otherwise keeps, alone or in association with others, a house of prostitution or a prostitution business;

....

(f) transports an individual into or within this state with the purpose to promote that individual's engaging in prostitution or procures or pays for transportation with that purpose;

(g) leases or otherwise permits a place controlled by the offender, alone or in association with others, to be regularly used for prostitution or for the procurement of prostitution or fails to make reasonable effort to abate that use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means . . .

....

A conviction under Mont. Code 45-5-602 is punishable by imprisonment up to 10 years, a fine not to exceed \$50,000, or both. Mont. Code 45-5-602(2). However, Mont. Code 45-5-602(3) provides,

(a) If the prostitute was 12 years of age or younger and the prostitute's client was 18 years of age or older at the time of the offense, the offender:

(i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (3)(a)(i) except as provided in 46-18-222, and during the first 25 years of imprisonment, the offender is not eligible for parole.

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

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

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

A facilitator may also face charges under Mont. Code Ann. § 45-5-625(1) (Sexual abuse of children) which states,

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

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

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<sup>63</sup> Mont. Code Ann. § 45-5-503(1) (Sexual intercourse without consent) states in part, "A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent." Mont. Code Ann. § 45-5-501(1)(a) (Definitions) states in part, "As used in 45-5-503, the term "without consent" means . . . the victim is incapable of consent because the victim is . . . less than 16 years old."

To the extent that the language of this could be interpreted to encompass transporting a child to engage in sexual conduct with a third party, a facilitator who violates Mont. Code Ann. § 45-5-625(1), shall be punished pursuant to Mont. Code Ann. § 45-5-625(2), (4) as follows:

(2) (a) Except as provided in subsection (2)(b), (2)(c), or (4), a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term not to exceed 100 years and may be fined not more than \$10,000.

(b) Except as provided in 46-18-219,<sup>64</sup> if the victim is under 16 years of age, a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$10,000.

....

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

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

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

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

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

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

Facilitators convicted of benefiting financially “by receiving anything of value from participation in a venture that has engaged in the offense of subjecting another to involuntary servitude as described in 45-5-305” pursuant to Mont. Code Ann. § 45-5-306(1)(b) (Trafficking of persons for involuntary servitude), face fines up to \$100,000. Mont. Code Ann. § 45-5-306(2)(b). A facilitator convicted under Mont. Code Ann. § 45-5-602(1)(g) (Promoting prostitution) who “leases or otherwise permits a place controlled by the offender, alone or in association with others, to be regularly used for prostitution or for the procurement of prostitution or fails to make reasonable effort to abate that use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means,” faces a fine of up to \$50,000. Mont. Code Ann. § 45-5-602(2).

Restitution may be ordered by the court in any case that the victim suffers “an economic loss,” pursuant to Mont. Code Ann. § 46-18-241(1) (*Temporary* Condition of restitution), which states, “As provided in 46-18-201,<sup>65</sup> a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss. The duty to pay full restitution under the sentence remains with the offender or the offender's estate until full restitution is paid, whether or not the offender is under state supervision. If the offender is under state supervision, payment of restitution is a condition of any probation or parole.”

Forfeiture may also be available to the extent that trafficker is found guilty of money laundering under Mont. Code Ann. § 45-6-341(1) (Money laundering), which criminalizes the conduct of a person who knowingly

<sup>64</sup> See *supra* note 11.

<sup>65</sup> See *supra* note 43.

- (a) receives or acquires the proceeds of, or engages in transactions involving proceeds of, any activity that is unlawful under the laws of the United States or the state in which the activity occurred;
- (b) gives, sells, transfers, trades, invests, conceals, transports, or otherwise makes available anything of value that the person knows is intended to be used for the purpose of committing or furthering the commission of any activity that is unlawful under the laws of the United States or the state in which the committing or furthering of the commission of the activity occurs;
- (c) directs, plans, organizes, initiates, finances, manages, supervises, or facilitates the transportation or transfer of proceeds that the person knows are derived from any activity that is unlawful under the laws of the United States or the state in which the activity occurred; or
- (d) conducts a financial transaction involving proceeds that the person knows are derived from any activity that is unlawful under the laws of the United States or the state in which the activity occurred when the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds or to avoid a transaction reporting requirement under federal law.

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

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

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

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

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

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

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

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

- (1) A person commits the offense of sexual abuse of children if the person:
  - ....
  - (d) knowingly processes, develops, prints, publishes, transports, distributes, sells, exhibits, or advertises any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;
  - ....
  - (f) finances any of the activities described in subsections (1)(a) through (1)(d) and (1)(g), knowing that the activity is of the nature described in those subsections;
  - (g) possesses with intent to sell any visual or print medium, including a medium by use of

electronic communication in which a child is engaged in sexual conduct, actual or simulated;

.....

(2) (a) Except as provided in subsection (2)(b), (2)(c), or (4), a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term not to exceed 100 years and may be fined not more than \$10,000.

(b) Except as provided in 46-18-219,<sup>66</sup> if the victim is under 16 years of age, a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$10,000.

.....

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

(i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (4)(a)(i) except as provided in 46-18-222,<sup>67</sup> and during the first 25 years of imprisonment, the offender is not eligible for parole.

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

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

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

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<sup>66</sup> See *supra* note 11.

<sup>67</sup> See *supra* note 10.

**Legal Components:**

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

**Legal Analysis:**

- 5.1 A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.

For purposes of Montana's Crime Victims Compensation Act, "victim" as defined in Mont. Code Ann. § 53-9-103(6) (Definitions) means,

- (a) a person who suffers bodily injury or death as a result of:
  - (i) criminally injurious conduct;<sup>68</sup>
  - (ii) the person's good faith effort to prevent criminally injurious conduct; or

<sup>68</sup> Mont. Code Ann. § 53-9-103(3) states,

- (3) "Criminally injurious conduct" means conduct that:
  - (a) occurs or is attempted in this state or an act of international terrorism, as defined in 18 U.S.C. 2331, committed outside of the United States against a resident of this state;
  - (b) results in bodily injury or death or involves domestic violence in a home where minor children were present; and
  - (c) is punishable by fine, imprisonment, or death or would be so punishable except that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state; however, criminally injurious conduct does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle unless the bodily injury or death occurred during the commission of an offense defined in Title 45 that requires the mental state of purposely as an element of the offense or the injury or death was inflicted by the driver of a motor vehicle who is found by the office, by a preponderance of the evidence, to have been operating the motor vehicle while under the influence, as that term is defined in 61-8-401; or

- (iii) the person’s good faith effort to apprehend a person reasonably suspected of engaging in criminally injurious conduct; or
- (b) a minor child present in a home where domestic violence occurred.

Under this definition, a sexually exploited child who suffers bodily injury or death as the result of a crime that is punishable by fine, imprisonment, or death is a victim.

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

Mont. Code Ann. § 45-5-306(2)(b) (Trafficking of persons for involuntary servitude) states, “A person convicted of the offense of trafficking of persons for involuntary servitude, if the violation involves . . . sexual intercourse without consent . . . shall be punished by life imprisonment or by imprisonment in the state prison for a term of not more than 100 years and may be fined not more than \$100,000.” Mont. Code Ann. § 45-5-503(1) (Sexual intercourse without consent) states in part, “A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent.” Moreover, Mont. Code Ann. § 45-5-501(1)(a) (Definitions) states in part, “As used in 45-5-503, the term “without consent” means . . . the victim is incapable of consent because the victim is . . . less than 16 years old.” Therefore, a minor under the age of 16 cannot consent to a violation under Mont. Code Ann. § 45-5-306(2)(b) (Trafficking of persons for involuntary servitude).

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

Mont. Code Ann. § 45-5-601 (Prostitution) states, “(1) A person commits the offense of prostitution if the person engages in or agrees or offers to engage in sexual intercourse with another person for compensation, whether the compensation is received or to be received or paid or to be paid. (2) (a) A prostitute convicted of prostitution shall be fined an amount not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.”

- 5.3.1 Recommendation: Amend Mont. Code Ann. § 45-5-601(1), (2) (Prostitution) to make minors expressly immune from prosecution for prostitution and identify all minors engaged in prostitution as victims of human trafficking under Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude—definitions) and Mont. Code Ann. § 45-5-306 (Trafficking of persons for involuntary servitude).

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

Although no special services are statutorily mandated for minor victims of sex trafficking or CSEC offenses, a minor victim of sex trafficking may receive child protective services if reported as abused through a mandatory report made pursuant to Mont. Code 41-3-201 (Reports). “When the professionals and officials listed in subsection (2)<sup>69</sup> know or have reasonable cause to suspect, as a result of information they receive in their

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(d) is committed in a state without a crime victims compensation program that covers a resident of this state if the conduct meets the requirements in subsections (3)(b) and (3)(c).

<sup>69</sup> Pursuant to Mont. Code Ann. 41-3-201(2) (Reports),

Professionals and officials required to report are:

- (a) a physician, resident, intern, or member of a hospital’s staff engaged in the admission, examination, care, or treatment of persons;
- (b) a nurse, osteopath, chiropractor, podiatrist, medical examiner, coroner, dentist, optometrist, or any other health or mental health professional;
- (c) religious healers;
- (d) school teachers, other school officials, and employees who work during regular school hours;



professional or official capacity, that a child is abused or neglected . . . they shall report the matter promptly to the department of public health and human services.” Mont. Code Ann. § 41-3-201(1). “Upon receipt of a report that a child is or has been abused or neglected, the department shall promptly assess the information contained in the report and make a determination regarding the level of response required and the timeframe within which action must be initiated. If the department determines that an investigation is required, a social worker, the county attorney, or a peace officer shall promptly conduct a thorough investigation into the circumstances surrounding the allegations of abuse or neglect of the child. . . . If from the investigation the department has reasonable cause to suspect that the child suffered abuse or neglect, the department may provide emergency protective services to the child, pursuant to 41-3-301, or voluntary protective services pursuant to 41-3-302, and may provide protective services to any other child under the same care.” Mont. Code Ann. § 41-3-202(1), (5)(a).

In exigent circumstances, Mont. Code Ann. § 41-3-301(1) (Emergency protective service) permits “[a]ny child protective social worker of the department, a peace officer, or the county attorney who has reason to believe any youth is in immediate or apparent danger of harm . . . [to] immediately remove the child and place the child in a protective facility.” Mont. Code Ann. § 41-3-427(1)(a) (Petition for immediate protection and emergency protective services—order—service) also provides that “[i]n a case in which it appears that a child is abused or neglected or is in danger of being abused or neglected, the county attorney, the attorney general, or an attorney hired by the county may file a petition for immediate protection and emergency protective services. In implementing the policy of this section, the child’s health and safety are of paramount concern.”

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

A petition may request the following relief:

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

. . . .

- (c) A petition for temporary legal custody may be the initial petition filed in a case.
- (d) A petition for the termination of the parent-child legal relationship may be the initial petition filed in a case if a request for a determination that preservation or reunification services need not be provided is made in the petition.

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

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- (e) a social worker, operator or employee of any registered or licensed day-care or substitute care facility, staff of a resource and referral grant program organized under 52-2-711 or of a child and adult food care program, or an operator or employee of a child-care facility;
  - (f) a foster care, residential, or institutional worker;
  - (g) a peace officer or other law enforcement official;
  - (h) a member of the clergy, as defined in 15-6-201(2)(a);
  - (i) a guardian ad litem or a court-appointed advocate who is authorized to investigate a report of alleged abuse or neglect; or
  - (j) an employee of an entity that contracts with the department to provide direct services to children.

necessary or required investigations. The court may issue a temporary dispositional order pending the dispositional hearing. . . .” Mont. Code 41-3-437(6)(b).

Pursuant to Mont. Code 41-3-438(3) (Disposition—hearing—order),

If a child is found to be a youth in need of care under 41-3-437, the court may enter its judgment, making any of the following dispositions to protect the welfare of the child:

- (a) permit the child to remain with the child’s custodial parent or guardian, subject to those conditions and limitations the court may prescribe;
- (b) order the department to evaluate the noncustodial parent as a possible caretaker;
- (c) order the temporary placement of the child with the noncustodial parent, superseding any existing custodial order, and keep the proceeding open pending completion by the custodial parent of any treatment plan ordered pursuant to 41-3-443;
- (d) order the placement of the child with the noncustodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the department to provide services to the parent with whom the child is placed or to work toward reunification of the child with the parent or guardian from whom the child was removed in the initial proceeding;
- (e) grant an order of limited emancipation to a child who is 16 years of age or older, as provided in 41-1-503;
- (f) transfer temporary legal custody to any of the following:
  - (i) the department;
  - (ii) a licensed child-placing agency that is willing and able to assume responsibility for the education, care, and maintenance of the child and that is licensed or otherwise authorized by law to receive and provide care of the child; or
  - (iii) a nonparent relative or other individual who has been evaluated and recommended by the department or a licensed child-placing agency designated by the court and who is found by the court to be qualified to receive and care for the child;
- (g) order a party to the action to do what is necessary to give effect to the final disposition, including undertaking medical and psychological evaluations, treatment, and counseling that does not require an expenditure of money by the department unless the department consents and informs the court that resources are available for payment. The department is the payor of last resort after all family, insurance, and other resources have been examined.
- (h) order further care and treatment as the court considers in the best interests of the child that does not require an expenditure of money by the department unless the department consents and informs the court that resources are available for the proposed care and treatment. The department is the payor of last resort after all family, insurance, and other resources have been examined pursuant to 41-3-446.

A child in need of care may be able to receive services if a child protective team is established as provided in Section 41-3-108 (Child protective teams), which states,

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

- (1) a social worker;
- (2) a member of a local law enforcement agency;
- (3) a representative of the medical profession;
- (4) a representative of a public school system;
- (5) a county attorney . . . .

. . . .



Where a minor is arrested for a juvenile or status offense, Montana’s Youth Court Act (Title 41 Minors, Chapter 5 Youth Court Art) does not identify or distinguish “commercially sexually exploited children,” but a process is available that makes it possible that a minor victim of commercial sexual exploitation could be determined to be a “youth in need of intervention” as defined in Mont. Code Ann. § 41-5-103(51) (Definitions) and should be placed in “shelter care” or a “youth assessment center” as opposed to a detention center. Mont. Code Ann. § 41-5-103(39), (47). Mont. Code Ann. § 41-5-103(51) provides,

“Youth in need of intervention” means a youth who is adjudicated as a youth and who:

(a) commits an offense prohibited by law that if committed by an adult would not constitute a criminal offense, including but not limited to a youth who:

- (i) violates any Montana municipal or state law regarding alcoholic beverages; or
- (ii) continues to exhibit behavior, including running away from home or habitual truancy, beyond the control of the youth’s parents, foster parents, physical custodian, or guardian despite the attempt of the youth’s parents, foster parents, physical custodian, or guardian to exert all reasonable efforts to mediate, resolve, or control the youth’s behavior; or

(b) has committed any of the acts of a delinquent youth but whom the youth court, in its discretion, chooses to regard as a youth in need of intervention.

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

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

5.4.1 Recommendation: Enact a law providing specialized multidisciplinary services for minor victims of sex trafficking that will divert them away from delinquency adjudication into child protective services.

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

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

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

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

the harm that occurs whenever the parent or other person responsible for the child’s welfare:

- (i) inflicts or allows to be inflicted upon the child physical abuse, physical neglect, or psychological abuse or neglect;
- (ii) commits or allows sexual abuse or exploitation of the child;

(iii) induces or attempts to induce a child to give untrue testimony that the child or another child was abused or neglected by a parent or other person responsible for the child’s welfare;

....

(v) exposes or allows the child to be exposed to an unreasonable risk to the child’s health or welfare by failing to intervene or eliminate the risk; or;

....

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

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

The term “caregiver” is not utilized in the Montana child welfare statutes. Instead, the applicable phrase is as follows: “A person responsible for a child’s welfare.” Mont. Code Ann. § 41-3-102(2)(a) (Definitions) defines “a person responsible for a child’s welfare” to include “an adult who resides in the same home in which the child resides,” which makes the definition broad enough to potentially apply to a trafficker who has custody or control of a minor victim.

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

Generally, victims<sup>70</sup> are eligible to receive an award under Montana’s Crime Victims Compensation Act under Mont. Code Ann. § 53-9-127 (Award of compensation). Several additional requirements for compensation may, however, present difficulties for victims of commercial sexual exploitation. Mont. Code Ann. § 53-9-125 (Limitations on awards) outlines the limitations on victims’ compensation awards including the following:

(1) Except as otherwise provided in this section, compensation may not be awarded unless the claim is filed with the office within 1 year after the day the criminally injurious conduct occurred causing the injury or death upon which the claim is based. Compensation in cases involving sexual offenses against minors may not be awarded unless the claim is filed with the office within 1 year after the day the criminally injurious conduct was reported to a law enforcement agency or an agency of the state responsible for provision of child welfare services, or within 1 year after the day the victim reaches 18

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<sup>70</sup> For purposes of Montana’s Crime Victims Compensation Act, “victim” as defined in Mont. Code § 53-9-103(6) (Definitions) means

- (a) a person who suffers bodily injury or death as a result of:
- (i) criminally injurious conduct;
  - (ii) the person’s good faith effort to prevent criminally injurious conduct; or
  - (iii) the person’s good faith effort to apprehend a person reasonably suspected of engaging in criminally injurious conduct; or
- (b) a minor child present in a home where domestic violence occurred.

Mont. Code § 53-9-103(3) (Definitions) defines “criminally injurious conduct” as conduct that

....

- (b) results in bodily injury or death or involves domestic violence in a home where minor children were present; and
- (c) is punishable by fine, imprisonment, or death or would be so punishable except that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state; . . .
- (d) is committed in a state without a crime victims compensation program that covers a resident of this state if the conduct meets the requirements in subsections (3)(b) and (3)(c).

years of age, whichever occurs last. The time for filing a claim may be extended by the office for good cause shown.

(2) Compensation may not be awarded to a claimant who is the offender or an accomplice of the offender or to any claimant if the award would unjustly benefit the offender or accomplice.

(3) Compensation may not be awarded unless the criminally injurious conduct resulting in injury or death was reported to a law enforcement officer. The report must be made within 72 hours after its occurrence, except in a case involving a sexual offense against a minor or when the office finds there was good cause for the failure to report within that time.

(4) In order to be entitled to benefits under this part, a claimant shall fully cooperate with all law enforcement agencies and prosecuting attorneys in the apprehension and prosecution of the offender causing the criminally injurious conduct. The office, upon finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies or prosecuting attorneys, may deny or reconsider and reduce an award of compensation.

(5) Compensation otherwise payable to a claimant must be reduced or denied to the extent the compensation benefits payable are or can be recouped from collateral sources.

(6) Persons serving a sentence of imprisonment or residing in any other public institution which provides for the maintenance of the person are not entitled to the benefits of this part.

(7) Compensation may be denied or reduced if the victim contributed to the infliction of death or injury with respect to which the claim is made. Any reduction in benefits under this subsection must be in proportion to what the office finds to be the victim's contribution to the infliction of death or injury.

Nothing in the code expressly exempts commercially sexually exploited victims from these requirements or award reduction factors, or explains what constitutes good cause for the failure to report the crime or cooperate with law enforcement.

- 5.7.1 Recommendation: Amend Mont. Code Ann. § 53-9-125 (Limitations on awards) to expressly provide that victims of domestic minor sex trafficking are exempt from all ineligibility and award reduction factors.

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

There are victim-friendly criminal justice procedures provided in the court system process, like Mont. Code Ann. § 45-5-511(2) through 45-5-511(5) (Provisions generally applicable to sexual crimes), Montana's rape shield laws, which state,

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

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

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

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

There are also rules of evidence in cases involving sexual offenses, children, or both, which are victim-friendly: Mont. Code Ann. § 46-16-220 (Child hearsay exception—criminal proceedings), § 46-15-402 (Procedure at videotaping), § 46-15-403 (Court order to protect privacy of victim), and § 46-15-411 (Payment for medical evidence—alleged sexual offenses). Further, Mont. Code Ann. § 46-16-229 (Order for two-way electronic

audio-video communication testimony—finding by court—procedure for conducting testimony) allows for “the testimony of a child witness be taken by two-way electronic audio-video communication . . . .”

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

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

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

(2) Except as provided in subsection (6), when the records pertaining to a youth pursuant to this section are sealed, an agency, other than the department, that has in its possession copies of the sealed records shall destroy the copies of the records. Anyone violating the provisions of this subsection is subject to contempt of court.

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

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

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

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

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

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

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

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

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

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

Restitution may be available pursuant to Mont. Code Ann. § 46-18-241 (Effective until June 30, 2015) ((*Temporary*) Condition of restitution),<sup>71</sup> which states,

<sup>71</sup> See *supra* note 42.

(1) As provided in 46-18-201 [Sentences that may be imposed], a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss. The duty to pay full restitution under the sentence remains with the offender or the offender's estate until full restitution is paid, whether or not the offender is under state supervision. If the offender is under state supervision, payment of restitution is a condition of any probation or parole.

....  
(3) If at any time the court finds that, because of circumstances beyond the offender's control, the offender is not able to pay any restitution, the court may order the offender to perform community service during the time that the offender is unable to pay. The offender must be given a credit against restitution due at the rate of the hours of community service times the state minimum wage in effect at the time that the community service is performed.

Pursuant to Mont. Code Ann. § 46-18-236 (Effective until June 30, 2015) (*Temporary*) Imposition of charge upon conviction or forfeiture— administration)<sup>72</sup>

(1) Except as provided in subsection (2), there must be imposed by all courts of original jurisdiction on a person upon conviction for any conduct made criminal by state statute or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or fines, as follows:

- (a) \$15 for each misdemeanor charge;
- (b) the greater of \$20 or 10% of the fine levied for each felony charge; and

....  
(3) The charges imposed by this section are not fines and must be imposed in addition to any fine and may not be used in determining the jurisdiction of any court.

....  
(7) (a) Except as provided in subsection (7)(b), each county, city, or town finance officer or treasurer may retain the charges collected under subsection (1)(c) for payment of the expenses of a victim and witness advocate program, including a program operated by a private, nonprofit organization, that provides the services specified in Title 40, chapter 15, and Title 46, chapter 24, and that is operated or used by the county, city, or town.

....  
(c) Except as provided in subsection (7)(b), if the county, city, or town does not operate or use a victim and witness advocate program, all charges collected under subsection (1)(c) must be paid to the crime victims compensation and assistance program in the department of justice for deposit in the account provided for in 53-9-113.<sup>73</sup>

Mont. Code Ann. § 46-18-251(2) (Effective until June 30, 2015) (Allocation of fines, costs, restitution, and other charges)<sup>74</sup> provides a defendant who “is subject to payment of restitution and any combination of fines, costs, charges under the provisions of 46-18-236 [Imposition of charge upon conviction or forfeiture— administration], or other payments, 50% of all money collected from the defendant must be applied to payment of restitution and the balance must be applied to other payments in the following order:

<sup>72</sup> Mont. Code Ann. § 46-18-236 contains one set of provisions that terminates on June 30, 2015 and another set of provisions that become effective July 1, 2015. Here and elsewhere in this report that Mont. Code Ann. § 46-18-236 is mentioned, the current provisions have been used for citations and quotations.

<sup>73</sup> Starting July 1, 2015, funds paid for crime victims' compensation will be deposited in a “state general fund to be used to provide services to crime victims as provided in Title 53, chapter 9, part 1.” Mont. Code Ann. § 46-18-236 (Effective July 1, 2015).

<sup>74</sup> Mont. Code Ann. § 46-18-251 contains one set of provisions that terminates on June 30, 2015 and another set of provisions that become effective July 1, 2015. Here and elsewhere in this report that Mont. Code Ann. § 46-18-251 is mentioned, the current provisions have been used for citations and quotations.

- (a) payment of charges imposed pursuant to 46-18-236;
- (b) payment of supervisory fees imposed pursuant to 46-23-1031;
- (c) payment of costs imposed pursuant to 46-18-232 or 46-18-233;
- (d) payment of fines imposed pursuant to 46-18-231 or 46-18-233; and
- (e) any other payments ordered by the court.

Furthermore, Mont. Code Ann. § 46-18-251(3) clarifies,

The money applied under subsection (2) to the payment of restitution must be paid in the following order:

- (a) to the victim until the victim’s unreimbursed pecuniary loss is satisfied;
- (b) to the crime victims compensation and assistance program in the department of justice for deposit in the account provided for in 53-9-113 until the state is fully reimbursed for compensation to the victim provided pursuant to Title 53, chapter 9, part 1;
- (c) to any other government agency that has compensated the victim for the victim’s pecuniary loss; and
- (d) to any insurance company that has compensated the victim for the victim’s pecuniary loss.

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

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

More generally, Mont. Code Ann. § 27-1-104 (Bases for civil actions) states, “A civil action arises out of: (1) an obligation; (2) an injury.”<sup>75</sup> Mont. Code Ann. § 27-1-202 (Right to compensatory damages) states, “Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.”

Punitive damages are permissible pursuant to Mont. Code Ann. § 27-1-220 (Punitive damages—when allowed—limitation) as follows:

- (1) Except as otherwise expressly provided by statute and subject to subsection (3), a judge or jury may award, in addition to compensatory damages, punitive damages for the sake of example and for the purpose of punishing a defendant.
- ...
- (3) An award for punitive damages may not exceed \$10 million or 3% of a defendant’s net worth, whichever is less. This subsection does not limit punitive damages that may be awarded in class action lawsuits.

<sup>75</sup> Mont. Code Ann. § 27-1-106(1)(a) (Injury defined) defines “injury” as “to the person.”

Mont. Code Ann. § 27-1-221 (Punitive damages—liability—proof—award) states,

- (1) Subject to the provisions of 27-1-220 [Punitive damages—when allowed—limitation] and this section, reasonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice.
- (2) A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:
  - (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
  - (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.
- ....
- (5) All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt.
- (6) Liability for punitive damages must be determined by the trier of fact, whether judge or jury.
- (7) (a) Evidence regarding a defendant's financial affairs, financial condition, and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages. When the jury returns a verdict finding a defendant liable for punitive damages, the amount of punitive damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review as provided in subsection (7)(c). In the separate proceeding to determine the amount of punitive damages to be awarded, the defendant's financial affairs, financial condition, and net worth must be considered.
  - (b) When an award of punitive damages is made by the judge, the judge shall clearly state the reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:
    - (i) the nature and reprehensibility of the defendant's wrongdoing;
    - (ii) the extent of the defendant's wrongdoing;
    - (iii) the intent of the defendant in committing the wrong;
    - (iv) the profitability of the defendant's wrongdoing, if applicable;
    - (v) the amount of actual damages awarded by the jury;
    - (vi) the defendant's net worth;
    - (vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;
    - (viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and
    - (ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.
  - (c) The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (7)(b). If after review the judge determines that the jury award of punitive damages should be increased or decreased, the judge may do so. The judge shall clearly state the reasons for increasing, decreasing, or not increasing or decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (7)(b).
- ....

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

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



- (1) . . . .
- (b) Except as provided in subsection (9), a prosecution for a felony offense under 45-5-502 [Sexual assault], 45-5-503 [Sexual intercourse without consent], or 45-5-507 [Incest] (4) or (5) may be commenced within 10 years after it is committed, except that it may be commenced within 10 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred. A prosecution for a misdemeanor offense under those provisions may be commenced within 1 year after the offense is committed, except that it may be commenced within 5 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred.
- (c) Except as provided in subsection (9), a prosecution under 45-5-504 [Indecent exposure], 45-5-505 [Deviate sexual conduct], 45-5-507 [Incest] (1), (2), (3), or (6), 45-5-625 [Sexual abuse of children], or 45-5-627 [Ritual abuse of minor—exceptions—penalty] may be commenced within 5 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred.
- (2) Except as provided in subsection (7)(b) or as otherwise provided by law, prosecutions for other offenses are subject to the following periods of limitation:
- (a) A prosecution for a felony must be commenced within 5 years after it is committed.
- (b) A prosecution for a misdemeanor must be commenced within 1 year after it is committed.
- . . . .
- (7) (a) An offense is committed either when every element occurs or, when the offense is based upon a continuing course of conduct, at the time when the course of conduct is terminated. Time starts to run on the day after the offense is committed.
- . . . .
- (8) A prosecution is commenced either when an indictment is found or an information or complaint is filed.
- (9) If a suspect is conclusively identified by DNA testing after a time period prescribed in subsection (1)(b) or (1)(c) has expired, a prosecution may be commenced within 1 year after the suspect is conclusively identified by DNA testing.
- . . . .

Statutes of limitations for civil actions for child sex trafficking offenses are not eliminated. Mont. Code Ann. § 27-2-216 (Tort actions—childhood sexual abuse) provides,

- (1) An action based on intentional conduct brought by a person for recovery of damages for injury suffered as a result of childhood sexual abuse must be commenced not later than:
- (a) 3 years after the act of childhood sexual abuse that is alleged to have caused the injury; or
- (b) 3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse.
- (2) It is not necessary for a plaintiff to establish which act, in a series of acts of childhood sexual abuse, caused the injury that is the subject of the suit. The plaintiff may compute the period referred to in subsection (1)(a) from the date of the last act by the same perpetrator.
- (3) As used in this section, “childhood sexual abuse” means any act committed against a plaintiff who was less than 18 years of age at the time the act occurred and that would have been a violation of 45-5-502 [Sexual assault], 45-5-503 [Sexual intercourse without consent] . . . 45-5-625 [Sexual abuse of children], or prior similar laws in effect at the time the act occurred.
- (4) The provisions of 27-2-401 [When person entitled to bring action is under a disability] apply to this section.

Pursuant to Mont. Code Ann. § 27-2-204(1) (Tort actions—general and personal injury), the “commencement of an action upon a liability not founded upon an instrument in writing is within 3 years.” Statute of limitations can be tolled under Mont. Code Ann. § 27-2-401(1) (When person entitled to bring action is under a disability), if the person bringing the action “is, at the time the cause of action accrues, either a minor or has been

committed pursuant to 53-21-127 [Posttrial disposition], the time of the disability is not part of the time limit for commencing the action. However, the time limit cannot be extended more than 5 years by the disability of commitment.”

- 5.11.1 Recommendation: Amend Mont. Code Ann. § 45-1-205 (General time limitations) to make Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude —definitions) and § 45-5-306 (Trafficking of persons for involuntary servitude) crimes for which a criminal action can be brought at any time.

## FRAMEWORK ISSUE 6: CRIMINAL JUSTICE TOOLS FOR INVESTIGATION AND PROSECUTIONS

### *Legal Components:*

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

### *Legal Analysis:*

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

The Montana Law Enforcement Academy Act establishes an “academy to provide Montana law enforcement officers and other qualified individuals with a means of securing training in the field of law enforcement.” Mont. Code Ann. § 44-10-102 (Purpose).

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

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

6.1.1 Recommendation: Enact a law under Montana’s Law Enforcement Academy Act in order to mandate that officers receive training on domestic minor sex trafficking issues.

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

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

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

....

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

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

....

(2) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person purposely intercepts an electronic communication.<sup>76</sup> This subsection does not apply to elected or appointed public officials or to public employees when the interception is done in the performance of official duty or to persons given warning of the interception.

Although Mont. Code Ann. § 45-8-213 does not facially exempt law enforcement officers or their agents from the prohibitions on recording conversations where one party has consented, Montana courts have interpreted the exemption for public officials and public employees as including law enforcement officers, making them exempt from the prohibitions of Mont. Code Ann. § 45-8-213.<sup>77</sup> The Supreme Court of Montana, however, has ruled that that single-party consent to warrantless monitoring and recording of a private conversation is an illegal search under Montana’s constitution, so any evidence derived would be inadmissible at trial.<sup>78</sup>

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

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

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

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

<sup>76</sup> Mont. Code Ann. § 45-8-213(4) (Privacy in communications) defines “electronic communication” as “any transfer between persons of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.”

<sup>77</sup> See *State v. Brown*, 755 P.2d 1364, 1368 (Mont. 1988) (“[D]efendant’s reliance on § 45-8-213 is misplaced. That statute defines when one violates privacy in communications and prohibits one from recording conversations without the knowledge of all participants. As noted by defendant, the statute clearly excepts ‘duly elected or appointed public officials or employees when the transcription or recording is done in the performance of official duty . . .’ The exception applies to law enforcement officers while performing their duty.”), *overruled by* *State v. Goetz*, 191 P.3d 489, 497 (Mont. 2008).

<sup>78</sup> See *State v. Goetz*, 191 P.3d 489, 504 (Mont. 2008) (“[W]e hold that the electronic monitoring and recording of the Defendants’ conversations with the confidential informants, notwithstanding the consent of the confidential informants, constituted searches subject to the warrant requirement of Article II, Section 11 of the Montana Constitution. The electronic monitoring and recording of those conversations without a warrant or the existence of an established exception to the warrant requirement violated the Defendants’ rights under Article II, Sections 10 and 11.”)

....

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

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

....

(2) Except as provided in 69-6-104 [Control of telephone communications to and from a person holding hostages—nonliability of telephone company officials], a person commits the offense of violating privacy in communications if the person purposely intercepts an electronic communication.<sup>79</sup> This subsection does not apply to elected or appointed public officials or to public employees when the interception is done in the performance of official duty or to persons given warning of the interception.

Although Mont. Code Ann. § 45-8-213 does not facially exempt law enforcement officers or their agents from the prohibitions on recording conversations where one party has consented, Montana courts have interpreted the exemption for public officials and public employees as including law enforcement officers, making them exempt from the prohibitions of Mont. Code Ann. § 45-8-213,<sup>80</sup> however based on the Supreme Court of Montana’s ruling that that warrantless monitoring and recording of a private conversation is an illegal search under Montana’s constitution, any evidence derived through warrantless wiretapping would likely be inadmissible at trial.<sup>81</sup> Thus, use of body wires for protection of law enforcement and law enforcement agents would not violate the criminal statute, however any evidence gathered as a result would not be admissible at trial.

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.*

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

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

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

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

6.4.1 Recommendation: Amend of Mont. Code Ann. § 45-5-305 (Subjecting another to involuntary servitude—definitions), § 45-5-306 (Trafficking of persons for involuntary servitude), § 45-5-601 (Prostitution), § 45-5-602 (Promoting prostitution), § 45-5-603(Aggravated promotion of prostitution), § 45-5-622 (Endangering welfare of children) and § 45-5-625 (Sexual abuse of children) to expressly provide that the use of a decoy by law enforcement in the investigation of any of the amended crimes is not a defense to the crime.

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

Although Mont. Code Ann. § 45-5-625(1) (Sexual abuse of children) seems to contemplate violations involving use of the Internet, no statute specifically authorizes use of the Internet to investigate buyers and traffickers.

<sup>79</sup> See supra note 76.

<sup>80</sup> See supra note 77.

<sup>81</sup> See supra note 78.



6.5.1 Recommendation: Amend Mont. Code Ann. § 45-5-625(1)(i) (Sexual abuse of children) to apply to all minors under 18.

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

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

- (1) The department of justice shall establish a missing children<sup>82</sup> information program to create a central repository to aid in the location of missing children in Montana.
- (2) The missing children information program shall:
  - (a) establish a system of intrastate communication of information relating to any child determined to be missing by the parent, guardian, or legal custodian of the child or by a law enforcement authority;
  - (b) provide a centralized file for the exchange of information on missing children within the state, including information obtained under the provisions of 44-2-401;
  - (c) interface with the national crime information center computer system for exchange of information on children suspected of interstate travel; and
  - (d) provide the superintendent of public instruction each month with a list of missing Montana school children for the purposes of 44-2-506.

Pursuant to Mont. Code Ann. § 44-2-505 (Duties of law enforcement authority), when a missing child report is filed, law enforcement must

- (1) immediately inform all on-duty law enforcement officers of the existence of the missing child report;<sup>83</sup>
- (2) communicate the report to all other law enforcement authorities having jurisdiction in the county; and
- (3) immediately enter the missing child report into the national crime information center computer system.

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

- (1) The superintendent of public instruction shall assist the missing children information program provided for in 44-2-503 [Missing children information program] in identifying and locating missing children who are enrolled in Montana public school districts in kindergarten through grade 12 by:
  - (a) collecting each month a list of missing Montana school children as provided by the missing children information program provided for in 44-2-503;
  - (b) distributing the list of missing school children on a monthly basis, unless the list has no change from the previous month's information, to all school districts admitting children to kindergarten through grade 12;
  - (c) designing the list to include pertinent available information for identification of the missing school child, including if possible a recent photograph of the child; and
  - (d) notifying the appropriate law enforcement agency and the missing children information program

<sup>82</sup> Mont. Code Ann. § 44-2-502(1) (Definitions) defines "missing child" as "any person who has been reported as missing to a law enforcement authority and: (a) who is under 18 years of age; (b) whose temporary or permanent residence is in Montana or is believed to be in Montana; and (c) whose location has not been determined."

<sup>83</sup> Mont. Code Ann. § 44-2-502(2) (Definitions) defines "missing child report" as "a report prepared on a form designed by the department of justice for use by private citizens and law enforcement authorities to report information about missing children to the missing children information program provided for in 44-2-503."

as soon as any additional information is obtained or contact is made with respect to a missing school child.

(2) Each school district in Montana shall:

- (a) distribute to each school building within the district the list of missing school children provided for in subsection (1); and
- (b) notify the appropriate law enforcement agency at the earliest known contact with any child whose name appears on the list of missing school children.

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

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

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

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

*NOTE: ENACTED LEGISLATION AS OF 8/1/11*