

# PROTECTED INNOCENCE INITIATIVE

Creating A Uniform Standard Across States to Combat Domestic Minor Sex Trafficking



## ANALYSIS AND RECOMMENDATIONS

### KANSAS

**NOTE:** The Kansas State Legislature recently recodified the Kansas criminal code. The recodification became effective on July 1, 2011, and applies to crimes committed on or after that date. Kan. Stat. Ann. § 21-5102(d). Unless otherwise noted, all cites to the criminal code, Chapter 21, have been updated to reflect the amendments and recodification added by the passage of House Bill 2668. 2010 Kan. Sess. Laws 136 (effective July 1, 2011).

#### 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.*

Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking)<sup>2</sup> specifically applies to the sex trafficking of a minor and does not require that the trafficker use force, fraud, or coercion. Specifically, aggravated trafficking includes “recruiting, harboring, transporting, providing or obtaining, by any means, a person under 18 years of age

<sup>1</sup> Unless otherwise specified and with the exception of the criminal provisions as noted above, all references to Kansas statutes were taken from the Kansas Statutes Annotated (LEXIS through 2010 Supplement), and all federal statutes were taken from United States Code (LEXIS through PL 112-54, approved 11/12/11).

<sup>2</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 21-5426 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

knowing that the person, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another.” Kan. Stat. Ann. § 21-5426(b)(2). The crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000.<sup>3</sup> Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). However, if the victim is under 14, and the offender is 18 or older, the crime becomes the off-grid person felony of aggravated human trafficking and the penalties are heightened to a mandatory<sup>4</sup> imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A), 21-6611(a)(1).

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.*

CSEC is criminalized separately in the Kansas code through the following laws:

1. Pursuant to Kan. Stat. Ann. § 21-6420(a) (Promoting prostitution),<sup>5</sup> promoting prostitution is knowingly doing the following acts:

- (1) Establishing, owning, maintaining or managing a house of prostitution, or participating in the establishment, ownership, maintenance or management thereof;
- (2) permitting any place partially or wholly owned or controlled by the defendant to be used as a house of prostitution;
- (3) procuring a prostitute for a house of prostitution;
- (4) inducing another to become a prostitute;
- (5) soliciting a patron for a prostitute or for a house of prostitution;
- (6) procuring a prostitute for a patron;

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<sup>3</sup> Unless otherwise specified, the sentences of imprisonment for all felonies provided throughout this report are based on the assumption that the defendant has no prior felony convictions, and that none of the aggravating or mitigating factors listed in Kan. Stat. Ann. § 21-6804 (Sentencing grid for nondrug crimes) or in the sentencing provisions themselves are present. A defendant with prior felony convictions may be subject to a greater minimum sentence of imprisonment. Kan. Stat. Ann. § 21-6804(a). When using the sentencing grid to determine appropriate imprisonment ranges, the vertical axis on the grid represents the severity level of the offense, and the horizontal axis on the grid represents the criminal history of the defendant. Kan. Stat. Ann. § 21-6804(c). Aggravating factors, such as using a firearm to commit a felony, result in presumptive imprisonment and an optional nonimprisonment sentence if the offense falls into a grid labeled “border box.” Kan. Stat. Ann. § 21-6804(h). A border box penalty is governed by Kan. Stat. Ann. § 6804(q), which allows the court to “impose an optional nonprison sentence.” Subsection (q) states that the “optional nonprison sentence” may be imposed instead of a presumptive sentence if the court makes certain findings, such as the fact that “an appropriate treatment program exists,” the treatment program would admit the offender within a reasonable time, or that the nonprison sentence would “serve community safety interests by promoting offender reformation.” *State v. Sidders*, 888 P.2d 409, 412 (Kan. Ct. App. 1995) further clarifies border boxes by stating, “A border box classification means the grid block is neither a presumed imprisonment box nor a presumed nonimprisonment box. The trial court may impose a nonimprisonment sentence if it finds that a reasonably available treatment program would be more appropriate than prison or nonimprisonment would serve community interests and promote offender reformation.”

<sup>4</sup> Here and elsewhere that mandatory minimum imprisonments are mentioned in this report certain exceptions to the mandatory sentencing applies. Pursuant to Kan. Stat. Ann. § 21-6627(a)(2),

The provision of subsection (a)(1) requiring a mandatory minimum term of imprisonment of not less than 25 years shall not apply if the court finds:

- (A) The defendant is an aggravated habitual sex offender and sentenced pursuant to section 266 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto; or
- (B) the defendant, because of the defendant’s criminal history classification, is subject to presumptive imprisonment pursuant to the sentencing guidelines grid for nondrug crimes and the sentencing range exceeds 300 months. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established pursuant to the sentencing range.

<sup>5</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 21-6420 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

- (7) procuring transportation for, paying for the transportation of, or transporting a person within this state with the intention of assisting or promoting that person’s engaging in prostitution; or
- (8) being employed to perform any act which is prohibited by this section.

When the victim is under 14 and the offender is 18 or older, promoting prostitution is an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000.<sup>6</sup> Kan. Stat. Ann. §§ 21-6420(b)(2), 21-6627(a)(1)(E),<sup>7</sup> 21-6611(a)(1). If the victim is 14 or 15, the crime is a severity level 6, person felony with presumptive punishment of imprisonment for 17–19 months (18 months recommended sentence) and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-6420(b)(1)(C), 21-6804(a),<sup>8</sup> 21-6611(a)(3). When the victim is 16 or older, a first conviction for promoting prostitution is punishable as a Class A person misdemeanor with a “definite term of confinement in the county jail . . . fixed by the court” and not to exceed one year, a fine not to exceed \$2,500, or both. Kan. Stat. Ann. §§ 21-6420(b)(1)(A), 21-6602(1)(a), 21-6611(b)(1). However, if the offender has previously been convicted of promoting prostitution, and the victim is 16 or older, a violation is a severity level 7, person felony punishable by presumptive probation for 11–13 months (recommended 12 months) and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-6420 (b)(1)(B), 21-6804(a), 21-6611(a)(3).

2. Pursuant to Kan. Stat. Ann. § 21-5510(a) (Sexual exploitation of a child),<sup>9</sup>

(a) Sexual exploitation of a child is:

- (1) Employing, using, persuading, inducing, enticing or coercing a child under 18 years of age to engage in sexually explicit conduct<sup>10</sup> with the intent to promote any performance;
- ...
- (3) being a parent, guardian or other person having custody or control of a child under 18 years of age and knowingly permitting such child to engage in, or assist another to engage in, sexually explicit conduct for any purpose described in subsection (a)(1) or (2); or
- (4) promoting any performance that includes sexually explicit conduct by a child under 18 years of age, knowing the character and content of the performance.

As a severity level 5 felony, sexual exploitation of a child is punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(A), (B), 21-6804(a), 21-6611(a)(2). However, if the offender violated (a)(1) or (a)(4) and if the victim is under 14, and the offender is 18 or older, then the crime is an off-grid person felony with

<sup>6</sup> Kan. Stat. Ann. § 21-6611 provides for fines for crimes committed on or after July 1, 1993. Fines for crimes committed before July 1, 1993 are laid out in Kan. Stat. Ann. § 21-6710. Pursuant to Kan. Stat. Ann. § 21-6612,

- (a) When the law authorizes any other disposition, a fine shall not be imposed as the sole and exclusive punishment unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, the court finds that the fine alone suffices for the protection of the public.
- (b) The court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment, probation or assignment to a community correctional services program unless:
  - (1) The defendant has derived a pecuniary gain from the crime; or
  - (2) the court finds that a fine is adapted to deterrence of the crime involved or to the correction of the offender.

<sup>7</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 21-6627 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

<sup>8</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 21-6804 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

<sup>9</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 21-5510 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

<sup>10</sup> “Sexually explicit conduct” is defined as “actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sado-masochistic abuse with the intent of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person.” Kan. Stat. Ann. § 21-5510(d)(1).

mandatory imprisonment of 25 years to life, and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5510(b)(2), 21-6627(a)(1)(F), 21-6611(a)(1).

The following sexual offenses could also apply to cases of commercial sexual exploitation:

1. Pursuant to Kan. Stat. Ann. § 21-5508(a) (Indecent solicitation of a child),

Indecent solicitation of a child is enticing, commanding, inviting, persuading or attempting to persuade a child 14 or more years of age but less than 16 years of age to:

- (1) Commit or to submit to an unlawful sexual act; or
- (2) enter any vehicle, building, room or secluded place with intent to commit an unlawful sexual act upon or with the child.

This crime is a severity level 6, person felony with presumptive punishment of imprisonment for 17–19 months (recommended 18 months) and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-5508(c)(1), 21-6804(a); 21-6611(a)(3). The crime is raised to a severity level 5, person felony and considered aggravated when the child is under 14 and is punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5508(b), (c)(2), 21-6804(a), 21-6611(a)(2).

2. Pursuant to Kan. Stat. Ann. § 21-5503(a)(3) (Rape),<sup>11</sup> rape includes “sexual intercourse with a child under 14.” The crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5503(b)(1)(B), 21-6804(a), 21-6611(a)(2). However, when the victim is under 14 and the perpetrator is 18 or over, rape pursuant to Kan. Stat. Ann. § 21-5503(a)(3), or an “attempt, conspiracy or criminal solicitation to commit rape as defined in subsection (a)(3),” is an off-grid person felony with mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5503(b)(2), 21-6627(a)(1)(B), 21-6611(a)(1).

3. Pursuant to Kan. Stat. Ann. § 21-5506(a) (Indecent liberties with a child),<sup>12</sup> indecent liberties with a child occurs when an individual engages in the following acts with a child that is 14 or 15 years of age:

- (1) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child, or the offender, or both; or
- (2) soliciting<sup>13</sup> the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

A conviction under Kan. Stat. Ann. § 21-5506(a) is punishable as a severity level 5, person felony by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5506(c)(1), 21-6804(a), 21-6611(a)(2).

Pursuant to Kan. Stat. Ann. § 21-5506(b),

(b) Aggravated indecent liberties with a child is:

- (1) Sexual intercourse with a child who is 14 or more years of age but less than 16 years of age;

<sup>11</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 21-5503 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

<sup>12</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 21-5506 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

<sup>13</sup> “Solicit” or “solicitation” is defined in Kan. Stat. Ann. § 21-5111(cc) (Definitions) as “to command, authorize, urge, incite, request or advise another to commit a crime.” The definitions in Kan. Stat. Ann. § 21-5111 “shall apply when the words and phrases defined are used in this code, except when a particular context clearly requires a different meaning.”

...

- (3) engaging in any of the following acts with a child who is under 14 years of age:
- (A) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or
  - (B) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

A conviction under subsection (b)(1) is punishable as a severity level 3, person felony with presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5506(c)(2)(A), 21-6804(a), 21-6611(a)(2). A conviction under subsection (b)(3) is punishable as a severity level 3, person felony punishable by presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5506(c)(2)(C), 6804(a), 21-6611(a)(2). However, if the child is under 14 and the perpetrator is over 18, then a conviction under subsection (b)(3), or an “attempt, conspiracy or criminal solicitation to commit aggravated indecent liberties with a child as defined in subsection (b)(3),” is punishable as an off-grid person felony punishable by a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5506(c)(3), 21-6627(a)(1)(C), 21-6611(a)(1).

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

Kansas’s CSEC statutes do not refer to the human trafficking statute, nor do they refer to a minor subjected to sex trafficking as a victim.

- 1.3.1 Recommendation: Add specific references to Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking) in Kan. Stat. Ann. § 21-6420 (Promoting prostitution) and § 21-5510 (Sexual exploitation of a child) to clarify that the minor victims of these crimes are sex trafficking victims.

**Legal Components:**

- 2.1 *The state sex trafficking law can be applied to the buyers of commercial sex acts with a victim of domestic minor sex trafficking.*
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under CSEC laws.*
- 2.3 *Solicitation laws differentiate buying sex acts with an adult and buying sex acts with a minor under 18.*
- 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
- 2.5 *Using the Internet 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.*

Pursuant to Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking),<sup>14</sup> one commits a crime of aggravated human trafficking by “recruiting, harboring, transporting, providing or obtaining,<sup>15</sup> by any means, a person under 18 years of age knowing that the person, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another.” Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),<sup>16</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>17</sup> a person under 18 to engage in commercial sex.<sup>18</sup> It is unsettled whether the courts will uphold this interpretation of the TVPA. It is arguable, therefore, that the term “obtain” in Kansas’s trafficking statute may be similarly applied, and could, therefore, implicate buyers under Kan. Stat. Ann. § 21-5426(b)(2).

- 2.1.1 **Recommendation:** Amend Kan. Stat. Ann. § 21-5413(b)(2) (Human trafficking) to expressly cover buyers of commercial sex with minors.

<sup>14</sup> See *supra* note 2.

<sup>15</sup> “Obtain” is defined by Kan. Stat. Ann. § 21-5111(q) (Definitions) as “to bring about a transfer of interest or possession of property, whether to the offender or to another.” The definitions in Kan. Stat. Ann. § 21-5111 “shall apply when the words and phrase are used in this code, except when a particular context clearly requires a different meaning.” It would seem that in this instance a different meaning applies.

<sup>16</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>17</sup> 18 U.S.C. § 1591(a).

<sup>18</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>.

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

Kansas does not have a specific CSEC statute that applies to buying sex with a minor. Kan. Stat. Ann. § 21-6421(a) (Patronizing a prostitute), which applies to anyone who buys commercial sex regardless of the age of the person patronized, states, “(a) Patronizing a prostitute is knowingly: (1) entering or remaining in a house of prostitution with intent to engage in sexual intercourse, sodomy or any unlawful sexual act with a prostitute; or (2) hiring a prostitute to engage in sexual intercourse, sodomy or any unlawful sexual act.” This crime is a Class C misdemeanor punishable by a definite term of imprisonment in the county jail not to exceed one month, a fine not to exceed \$500, or both. Kan. Stat. Ann. §§ 21-6421(b), 21-6602(a)(3), 21-6611(b)(3).

Several sexual offenses could be used to prosecute certain buyers of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child, and do not refer to the human trafficking statute to bring these criminal offenses within the ambit of human trafficking under Kan. Stat. Ann. § 21-5426 (Human trafficking).<sup>19</sup>

- 2.2.1 Recommendation: Enact a separate statute to criminalize purchasing commercial sex acts with a minor with penalties equivalent to Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking).

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

The general solicitation statute, Kan. Stat. Ann. § 21-6421(a) (Patronizing a prostitute), applies to all buyers of commercial sex and does not differentiate between buying sex with an adult or buying sex with a minor. Kan. Stat. Ann. § 21-6421. Kan. Stat. Ann. § 21-5508 (Indecent solicitation of a child) makes “enticing, commanding, inviting, persuading or attempting to persuade” a child between 14 and 16 to “[c]ommit or to submit to an unlawful sexual act” or “enter any vehicle, building, room or secluded place with intent to commit an unlawful sexual act upon or with the child” a severity level 6, person felony punishable by presumptive imprisonment for 17–19 months (recommended 18 months) and a possible fine up to \$100,000. Kan. Stat. Ann. §§ 21-5508(a), (c)(1), 21-6804(a), 21-6611(a)(3). Aggravated indecent solicitation of a child involves a child under 14, which is a severity level 5, person felony punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine up to \$300,000. Kan. Stat. Ann. §§ 21-5508(b), (c)(2), 21-6804(a), 21-6611(a)(2).

- 2.3.1 Recommendation: Amend Kan. Stat. Ann. § 21-6421 (Patronizing a prostitute) to include a separate and enhanced penalty for soliciting a minor consistent with Kan. Stat. Ann. § 21-5426 (Human trafficking) or refer cases of patronizing a minor for commercial sex acts to Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking) for prosecution as a human trafficking case.

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

If the statute applies to buyers, Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking) is generally a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). However, if the victim is under 14 and the offender is 18 or older, the crime becomes the off-grid person felony of aggravated human trafficking and the penalties are heightened to a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A),<sup>20</sup> 21-6611(a)(1).

In contrast, Kan. Stat. Ann. § 21-6421(a) (Patronizing a prostitute), applicable to buyers of commercial sex with any age person, is a Class C misdemeanor punishable by a “definite term of confinement in the county jail . . .

<sup>19</sup> See *supra* Section 1.2 for a full description of the sexual offense laws that may be used to prosecute certain buyers.

<sup>20</sup> See *supra* note 7.

fixed by the court and shall not exceed one month,” a fine not to exceed \$500, or both. Kan. Stat. Ann. §§ 21-6421(b), 21-6602(a)(3), 21-6611(b)(3).

Pursuant to Kan. Stat. Ann. § 21-6804(j)(1), “The sentence for any persistent sex offender whose current convicted crime carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term.” For any fine for a felony or misdemeanor found in Kan. Stat. Ann. § 21-6611(a)–(b), “the fine imposed may [alternatively] be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender.” Kan. Stat. Ann. § 21-6611(c).

Several sexual offenses could be used to prosecute certain buyers of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child and do not refer to the human trafficking statute to bring these criminal offenses within the reach of human trafficking under Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking).<sup>21</sup>

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>22</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>23</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>24</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.*

Kan. Stat. Ann. § 21-5509(a) (Electronic solicitation) states, “Electronic solicitation is, by means of communication conducted through the telephone, internet or by other electronic means, enticing or soliciting<sup>25</sup> a person, whom the offender believes to be a child, to commit or submit to an unlawful sexual act.” If the offender believes the victim to be 14 or 15, electronic solicitation is a severity level 3, person felony with presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(1), 21-6804(a), 21-6611(a)(2). If the offender believes the child is under 14, the crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(2), 21-6804(a), 21-6611(a)(2).

<sup>21</sup> See *supra* Section 1.2 for a full description of the sexual offense laws that may be used to prosecute certain buyers.

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

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

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

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

<sup>25</sup> See *supra* note 13.



2.5.1 Recommendation: Amend Kan. Stat. Ann. § 21-5509(a) (Electronic solicitation) to specifically include solicitation of a minor under 18 for commercial sex acts as a crime and provide for enhanced penalties.

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

Kan. Stat. Ann. § 21-5426 (Human trafficking), does not contain a mistake of age defense. Since the statute that makes it a crime to patronize a prostitute, Kan. Stat. Ann. § 21-6421(a) (Patronizing a prostitute), is age-neutral in its scope, the mistake of age defense is irrelevant. There is no reference to a mistake of age defense in the potentially applicable sexual offense laws, such as Kan. Stat. Ann. § 21-5508 (Indecent solicitation of a child).

Pursuant to Kan. Stat. Ann. § 21-5207(a) (Ignorance or mistake), “A person’s ignorance or mistake as to a matter of either fact or law, except as provided in section 15 [Kan. Stat. Ann. § 21-5204], and amendments thereto, is a defense if it negates the existence of the culpable mental state which the statute prescribes with respect to an element of the crime.” However, Kan. Stat. Ann. § 21-5204 states, “Proof of a culpable mental state does not require proof . . . that the accused had knowledge of the age of the minor, even through age is a material element of the crime with which the accused is charged.” Kan. Stat. Ann. § 21-5204(b) (Culpable mental state; exclusions). Since the construction of Kan. Stat. Ann. § 21-5509 (Electronic solicitation) establishes the severity of the crime based on “if the offender believes” the child is a certain age, there could be a mistake of age defense for the crime of electronic solicitation. Kan. Stat. Ann. § 21-5509(b)(1), (2).

2.6.1 Recommendation: Amend Kan. Stat. Ann. § 21-5426 (Human trafficking), § 21-5508 (Indecent solicitation of a child), and § 21-5509 (Electronic solicitation) to clarify that mistake of age is not a defense.

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.*

Some statutes applicable to buyers of commercial sex with minors have penalties that vary based on the age of the minor. If Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking) is applicable to buyers, the crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). However, if the victim is under 14 and the offender is 18 or older, this crime is heightened to aggravated human trafficking, an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A), 21-6611(a)(1).

However, Kan. Stat. Ann. § 21-6421(a) (Patronizing a prostitute), does not distinguish penalties based on the age of the person patronized.

The sexual offense of Kan. Stat. Ann. § 21-5508 (Indecent solicitation of a child) staggers penalties based on the age of the victim. If the child is 14 or 15, the crime is a severity level 6, person felony with presumptive punishment of imprisonment for 17–19 months (recommended 18 months) and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-5508(a), (c)(1), 21-6804(a), 21-6611(a)(2). If the child is under 14, the crime is heightened to aggravated indecent solicitation, a severity level 5, person felony punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine of \$300,000. Kan. Stat. Ann. §§ 21-5508(b), (c)(2), 21-6804(a), 21-6611(a)(2).

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.*

Various fines apply to buyers of sex with minors. A conviction under Kan. Stat. Ann. § 21-5426(b) (Human trafficking) is punishable as a severity level 1, person felony by a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6611(a)(2). If the victim is under 14 and the offender is 18 or older, the crime is heightened to an off-grid felony punishable by a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6611(a)(1). A conviction under Kan. Stat. Ann. § 21-6421(a) (Patronizing a prostitute) is punishable as a Class C misdemeanor by a possible fine not to exceed \$500. Kan. Stat. Ann. §§ 21-6421(b), 21-6611(b)(3). A conviction under Kan. Stat. Ann. § 21-5508(a) (Indecent solicitation of a child) involving a 14 or 15 year old child, is a severity level 6, person felony punishable by a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-5508(a), (c)(1), 21-6611(a)(3). If the victim is under 14, the crime is heightened to a severity level 5, person felony punishable by a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5508(b), (c)(2), 21-6611(a)(2).

For any fine for a felony or misdemeanor found in Kan. Stat. Ann. § 21-6611(a), (b), “[T]he fine imposed may [alternatively] be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender.” Kan. Stat. Ann. § 21-6611(c).

In addition, pursuant to Kan. Stat. Ann. § 60-4104(o)–(p) (Covered offenses and conduct giving rise to forfeiture),<sup>26</sup> violations of both Kan. Stat. Ann. § 21-5426 (Human trafficking) and § 21-6421 (Patronizing a prostitute) give rise to forfeiture. Pursuant to Kan. Stat. Ann. § 60-4105 (Property subject to forfeiture),<sup>27</sup> property subject to forfeiture includes the following:

- (b) except as otherwise provided by law, all property, of every kind, including, but not limited to, cash and negotiable instruments and the whole of any lot or tract of land . . . that is either:
  - (1) Furnished or intended to be furnished by any person in an exchange that constitutes conduct giving rise to forfeiture; or
  - (2) used or intended to be used in any manner to facilitate conduct giving rise to forfeiture . . .
- (c) all proceeds of any conduct giving rise to forfeiture;
- (d) all property of every kind, including, but not limited to, cash and negotiable instruments derived from or realized through any proceeds which were obtained directly or indirectly from the commission of an offense listed in K.S.A. 60-4104, and amendments thereto;
- . . . .

Pursuant to Kan. Stat. Ann. § 22-3424(d) (Judgment and sentence), a buyer convicted of commercial sex with a minor may also be required to pay restitution. Kan. Stat. Ann. § 22-3424(d) states, if a defendant is found guilty and “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.”

Lastly, buyers who are “intentional possessors” of child pornography may be subject to a civil claim if the buyer is convicted of any offense listed under Chapter 21, Article 35 (Sex offenses) , including indecent liberties with a child, aggravated indecent liberties with a child, indecent solicitation of a child, and aggravated indecent solicitation of a child, “and any portion of such offense was used in the production of child pornography” and the victim suffered “personal or psychological injury as a result of the . . . possession of such child pornography.” Kan. Stat. Ann. § 60-5001(a).

<sup>26</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 60-4104 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2010 which was signed by the Governor on May 20, 2011. 2011 Kan. Sess. Laws 90 (effective July 1, 2011). Kan. Stat. Ann. § 60-4104 has also been amended by the passage of an earlier bill, House Bill 2339, which was signed by the Governor on April 8, 2011. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

<sup>27</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 60-4105 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

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

Possessing child pornography is a crime under Kan. Stat. Ann. § 21-5510(a)(2) (Sexual exploitation of a child),<sup>28</sup> which prohibits “possessing any visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person.” This crime is a severity level 5, person felony punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(A), 21-6804(a), 21-6611(a)(2).

In comparison, a federal conviction for possession of child pornography<sup>29</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>30</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>31</sup>

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

Offenders are required to register pursuant to Kan. Stat. Ann. § 22-4905(a) (Registration of offender) in person within 3 days of coming into any county or jurisdiction “in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school.”<sup>32</sup> Under Kan. Stat. Ann. § 22-4902(a)(1), (2) (Definitions),<sup>33</sup> “offender” includes both sex offenders and violent offenders. A “sex offender” is defined by Kan. Stat. Ann. § 22-4902(b) as

any person who:

- (1) On or after April 14, 1994, is convicted of any sexually violent crime set forth in subsection (c);
- (2) On or after April 14, 1994, is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime set forth in subsection (c), unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;
- ...
- (4) on or after May 29, 1997, is convicted of any of the following crimes when one of the parties involved is less than 18 years of age:

<sup>28</sup> See *supra* note 9.

<sup>29</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>30</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>31</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>32</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 22-4905 is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 37. 2011 Kan. Sess. Laws 95 (effective July 1, 2011).

<sup>33</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 22-4902 is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 37, which was signed by the Governor on May 25, 2011. 2011 Kan. Sess. Laws 95 (effective July 1, 2011). Kan. Stat. Ann. § 22-4902 had also been amended by the passage of an earlier bill, House Bill 2339, which was signed by the Governor on April 8, 2011. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

...

(D) patronizing a prostitute, as defined in K.S.A. [21-6421];

(E) lewd and lascivious behavior, as defined in K.S.A. [21-5513];

...

(6) is convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. [21-5301, 21-5302, or 21-5303]; or

(7) has been convicted of an offense in effect at any time prior to July 1, 2011, that is comparable to any crime defined in this subsection, or any out of state conviction for an offense that under the laws of this state would be an offense defined in this subsection.

Several of the crimes defined as sexually violent by Kan. Stat. Ann. § 22-4902(c) are crimes that could possibly be used to prosecute buyers of commercial sex acts with a minor. Sexually violent crimes include the following:

(1) Rape as defined in K.S.A. [21-5503];

(2) indecent liberties with a child as defined in K.S.A. [21-5506];

(3) aggravated indecent liberties with a child as defined in K.S.A. [21-5506];

...

(6) indecent solicitation of a child as defined in K.S.A. [21-5508];

(7) aggravated indecent solicitation of a child as defined in K.S.A. [21-5508(b)];

(8) sexual exploitation of a child as defined in K.S.A. [21-5510];

...

(11) electronic solicitation as defined by in K.S.A.[21-5509];

...

(13) any conviction for an offense in effect at any time prior to July 1, 2011, that is comparable to a sexually violent crime as defined in this subsection, or any out of state conviction for an offense that under the laws of this state would be a sexually violent crime as defined in this subsection;

(14) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. [21-5301, 21-5302, or 21-5303], of a sexually violent crime, as defined in this subsection; or

(15) any act which at the time of sentencing for the offense has been determined beyond a reasonable doubt to have been sexually motivated, unless the court, on the record, finds that the act involved nonforcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim. As used in this paragraph, “sexually motivated” means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant’s sexual gratification.

Pursuant to Kan. Stat. Ann. § 22-4902(e)(1)(I), a “violent offender” includes an person who is convicted of aggravated human trafficking under Kan Stat. Ann. § 21-5426(b) (Human trafficking), on or after May 29, 1997. It also includes “any person who . . . is convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. [21-5301, 21-5302, or 21-3303].” Kan. Stat. Ann. § 22-4902(e)(4).

**Legal Components:**

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

**Legal Analysis:**

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

Traffickers of children for commercial sexual exploitation are subject to prosecution under several criminal statutes. Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking),<sup>34</sup> which includes human trafficking of a person under 18 is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). If the victim is under 14 and the offender is 18 or older, aggravated human trafficking is an off-grid person felony with a mandatory imprisonment for 25 years and life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A), 21-6611(a)(1).

A trafficker may also be convicted under Kan. Stat. Ann. § 21-6420(a) (Promoting prostitution).<sup>35</sup> When the victim is under 14 and the offender is 18 or older, the crime is punishable as an off-grid person felony by mandatory imprisonment for 25 years and life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-6420(b)(2), 21-6627(a)(1), (a)(1)(E), 21-6611(a)(1). If the victim is under 16, the crime is a severity level 6, person felony punishable by presumptive imprisonment for 17–19 months (recommended 18 months) and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-6420(b)(1)(C), 21-6804(a),<sup>36</sup> 21-6611(a)(3). When the victim is 16 or older, a first conviction for promoting prostitution is punishable as a Class A person misdemeanor by a “definite term of confinement in the county jail . . . fixed by the court” and not to exceed one year, a fine not to exceed \$2,500, or both. Kan. Stat. Ann. §§ 21-6420(b)(1)(A), 21-6602(a)(1), 21-6611(b)(1). However, if the offender has previously been convicted of promoting prostitution, and the victim is 16 or older, the crime is punishable as a severity level 7, person felony punishable by presumptive probation for 11–13 months (recommended 12 months) and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-6420 (b)(1)(B), 21-6804(a), 21-6611(a)(3). Pursuant to Kan. Stat. Ann. § 21-6804(j)(1), “The sentence for any persistent sex offender whose current convicted crime carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term.” For any fine for a felony or misdemeanor found in Kan. Stat. Ann. § 21-6611(a)–(b), “[T]he fine imposed may [alternatively] be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender.” Kan. Stat. Ann. § 21-6611(c).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>37</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed

<sup>34</sup> See *supra* note 2.

<sup>35</sup> See *supra* note 5.

<sup>36</sup> See *supra* note 8.

<sup>37</sup> See *supra* note 16.

\$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>38</sup> against a minor.

3.1.1 Recommendation: Amend Kan. Stat. Ann. § 21-6420(b) (Promoting Prostitution) to eliminate the staggered penalties based on the age of the victim, thereby making it a serious crime to commercially sexually exploit all minors under 18. Amend Kan. Stat. Ann. § 21-6420 to refer cases of promoting prostitution of a minor to Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking) to ensure that minor victims of promoting prostitution are properly identified as sex trafficking victims and the perpetrators face penalties consistent with trafficking penalties.

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

Creating and distributing child pornography falls under Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child)<sup>39</sup> which states, in part, “(a) Sexual exploitation of a child is: (1) Employing, using, persuading, inducing, enticing or coercing a child under 18 years of age to engage in sexually explicit conduct<sup>40</sup> with the intent to promote any performance.” Kan. Stat. Ann. § 21-5510(a)(1). Under Kan. Stat. Ann. § 21-5510(d)(2), the term “promoting” is defined to include the following:

procuring, transmitting, distributing, circulating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting, or advertising:

(A) For pecuniary profit; or

(B) with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender or any other person.

Sexual exploitation of a child is a severity level 5, person felony, punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(1)(B), 21-6804(a), 21-6611(a)(2). However, when the child is under 14 and the offender is 18 or older, sexual exploitation of a child is an off-grid person felony with mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5510(b)(2), 21-6627(a)(1)(F),<sup>41</sup> 21-6611(a)(1).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>42</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>43</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>44</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>45</sup>

<sup>38</sup> See *supra* note 22.

<sup>39</sup> See *supra* note 9.

<sup>40</sup> See *supra* note 10 for the definition of sexually explicit conduct.

<sup>41</sup> See *supra* note 7.

<sup>42</sup> See *supra* note 22.

<sup>43</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>44</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.

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.*

Kan. Stat. Ann. § 21-5509(a) (Electronic solicitation) states, “Electronic solicitation is, by means of communication conducted through the telephone, internet or by other electronic means, enticing or soliciting<sup>46</sup> a person, whom the offender believes to be a child, to commit or submit to an unlawful sexual act.” If the offender believes the victim to be 14 or 15, electronic solicitation is a severity level 3, person felony with presumptive imprisonment for 55–61 months (recommended 59 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(1), 21-6804(a), 21-6611(a)(2). If the offender believes the child is under 14, the crime is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5509(b)(2), 21-6804(a), 21-6611(a)(2).

3.3.1 Recommendation: Amend Kan. Stat. Ann. § 21-5509(a) (Electronic solicitation) to specifically include luring or recruiting a minor under 18 for commercial sex acts as a crime and provide for enhanced penalties for traffickers who use the Internet.

3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*<sup>47</sup>

Traffickers are subject to both criminal and civil forfeiture provisions, restitution, and also may be required to pay financial penalties and civil damages for violations of Kansas’s laws. A conviction under Kan. Stat. Ann. § 21-5426(b) (Human trafficking) or Kan. Stat. Ann. § 21-6420(a) (Promoting prostitution) when the victim is under 14 and the offender is 18 or older is punishable by a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6420(b)(2), 21-6611(a)(1). Otherwise, a conviction under Kan. Stat. Ann. § 21-5426(b) (Human trafficking) when the victim is under 18 is punishable by a fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6611(a)(2). For a conviction under Kan. Stat. Ann. § 21-6420(a), traffickers could face penalties ranging from \$2,500–\$500,000 depending on the age of the victim and the age of the perpetrator and if the perpetrator had previous convictions. Kan. Stat. Ann. §§ 21-6420(b), 21-6611(a)(1), (a)(3), (b)(1).

For any fine for a felony or misdemeanor found in Kan. Stat. Ann. § 21-6611(a)–(b), “[T]he fine imposed may [alternatively] be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender.” Kan. Stat. Ann. § 21-6611(c).

Kansas’s asset forfeiture laws are applicable to traffickers who violate Kan. Stat. Ann. § 21-5426 (Human trafficking) and § 21-6420 (Promoting prostitution). Kan. Stat. Ann. § 60-4104(o)–(p). Pursuant to Kan. Stat. Ann. § 60-4105(b)–(d) (Property subject to forfeiture), property subject to forfeiture includes the following:

(b) except as otherwise provided by law,<sup>48</sup> all property, of every kind, including, but not limited to, cash and negotiable instruments and the whole of any lot or tract of land . . . that is either:

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§§ 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>45</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).

<sup>46</sup> *See supra* note 13.

<sup>47</sup> *See* discussion of relevant provisions *supra* Sections 1.1, 1.2, 3.1.

<sup>48</sup> Pursuant to Kan. Stat. Ann. § 60-4106 (Exemptions),

- (1) Furnished or intended to be furnished by any person in an exchange that constitutes conduct giving rise to forfeiture; or
- (2) used or intended to be used in any manner to facilitate conduct giving rise to forfeiture, including, but not limited to, any computer, computer system, computer network or any software or data owned by the defendant which is used during the commission of a violation of [21-6108 (Unlawful possession of scanning device or reencoder)];
- (c) all proceeds of any conduct giving rise to forfeiture;
- (d) all property of every kind, including, but not limited to, cash and negotiable instruments derived from or realized through any proceeds which were obtained directly or indirectly from the commission of an offense listed in K.S.A. 60-4104, and amendments thereto;

Pursuant to Kan. Stat. Ann. § 22-3424(d) (Judgment and sentence), a trafficker convicted of commercial sex with a minor may also be required to pay restitution. Kan. Stat. Ann. § 22-3424(d) states, if a defendant is found guilty and “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.”

Traffickers may face a civil claim by the victim for damages if the trafficker is convicted of certain offenses, including Kan. Stat. Ann. § 21-5506 (Indecent liberties with a child),<sup>49</sup> § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), or § 21-5510 (Sexual exploitation of a child). Kan. Stat. Ann. § 60-523(b)(2).

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

Sex offenders are required to register pursuant to Kan. Stat. Ann. § 22-4905(a) (Registration of offender) in person within 3 days of coming into any county or jurisdiction “in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school.” Under Kan. Stat. Ann. § 22-4902(a)(1)–(2) (Definitions), “offender” includes both sex offenders and violent offenders. A “sex offender” is defined by Kan. Stat. Ann. § 22-4902(b) as

any person who:

- (1) On or after April 14, 1994, is convicted of any sexually violent crime set forth in subsection (c);

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(a) All property, including all interests in property, described in K.S.A. 60-4105, is subject to forfeiture . . . except that property specifically exempted hereunder:

- (1) No real property or conveyance, or an interest therein, may be forfeited under this act unless the offense or conduct giving rise to forfeiture constitutes a felony.
- (2) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this act unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this act.
- (3) No property is subject to forfeiture under this act if the owner or interest holder acquired the property before or during the conduct giving rise to the property’s forfeiture, and such owner or interest holder:
  - (A) Did not know and could not have reasonably known of the act or omission or that it was likely to occur; or
  - (B) acted reasonably to prevent the conduct giving rise to forfeiture.
- (4) No property is subject to forfeiture if the owner or interest holder acquired the property after the conduct giving rise to the property’s forfeiture, including acquisition of proceeds of conduct giving rise to forfeiture, and the owner or interest holder acquired the property in good faith, for value and was not knowingly taking part in an illegal transaction.

. . . .

(b) Notwithstanding subsection (a), property is not exempt from forfeiture, even though the owner or interest holder lacked knowledge or reason to know that the conduct giving rise to property’s forfeiture had occurred or was likely to occur, if the:

- . . . .
- (2) owner or interest holder is criminally responsible for the conduct giving rise to the property’s forfeiture, whether or not there is a prosecution or conviction;
- . . . .

<sup>49</sup> See *supra* note 12.



(2) On or after April 14, 1994, is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime set forth in subsection (c), unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;

...

(4) on or after May 29, 1997, is convicted of any of the following crimes when one of the parties involved is less than 18 years of age:

...

(D) patronizing a prostitute, as defined in K.S.A. [21-6421];

(E) lewd and lascivious behavior, as defined in K.S.A. [21-5513];

...

(6) is convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. [21-5301, 21-5302, or 21-5303]; or

(7) has been convicted of an offense in effect at any time prior to July 1, 2011, that is comparable to any crime defined in this subsection, or any out of state conviction for an offense that under the laws of this state would be an offense defined in this subsection.

Several of the crimes defined as sexually violent by Kan. Stat. Ann. § 22-4902(c) are crimes applicable to traffickers. Pursuant to Kan. Stat. Ann. § 22-4902(c) these crimes include the following:

(8) sexual exploitation of a child as defined in K.S.A. [21-5510];

...

(11) electronic solicitation as defined by in K.S.A.[21-5509];

...

(13) any conviction for an offense in effect at any time prior to July 1, 2011, that is comparable to a sexually violent crime as defined in this subsection, or any out of state conviction for an offense that under the laws of this state would be a sexually violent crime as defined in this subsection;

(14) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. [21-5301, 21-5302, or 21-5303], of a sexually violent crime, as defined in this subsection; or

(15) any act which at the time of sentencing for the offense has been determined beyond a reasonable doubt to have been sexually motivated, unless the court, on the record, finds that the act involved nonforcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim. As used in this paragraph, “sexually motivated” means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant’s sexual gratification.

Pursuant to Kan. Stat. Ann. § 22-4902(e)(1)(I), a “violent offender” includes an person who is convicted of aggravated human trafficking under Kan Stat. Ann. § 21-5426(b) (Human trafficking) on or after May 29, 1997. It also includes “any person who . . . is convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. [21-5301, 21-5302, or 21-3303].” Kan. Stat. Ann. § 22-4902(e)(4).

### 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 Kan. Stat. Ann. § 38-2269(a) (Factors to be considered in termination of parental rights), “When the child has been adjudicated to be a child in need of care, the court may terminate parental rights or appoint a permanent custodian when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future.” One of the factors a court may consider in determining fitness is “conviction of a felony and imprisonment.” Kan. Stat. Ann. § 38-2269(b)(5). Additionally, a parent or guardian may be found unfit if he or she has been “convicted of a felony in which intercourse occurred, or if a juvenile is adjudicated a juvenile offender because of an act which, if committed by an adult, would be a felony

in which sexual intercourse occurred, and as a result of the sexual intercourse, a child is conceived . . . .” Kan. Stat. Ann. § 38-2269(e).

## 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 human trafficking provision may apply to facilitators. Under Kan. Stat. Ann. § 21-5426(a) (Human trafficking),<sup>50</sup> “Human trafficking is: (1) The intentional recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjecting the person to involuntary servitude or forced labor; (2) intentionally benefitting financially or by receiving anything of value from participation in a venture that the person has reason to know has engaged in acts set forth in subsection (a)(1).” Therefore, facilitators prosecuted under this provision would need to have reason to know that “force, fraud, threat or coercion will be used to cause the person to engage in forced labor or involuntary servitude.” Human trafficking is a severity level 2, person felony punishable by presumptive imprisonment for 109–123 months (recommended 117 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(1), 21-6804(a), 21-6611(a)(2).

Under Kan. Stat. Ann. § 21-5426(b)(2), aggravated trafficking includes “recruiting, harboring, transporting, providing or obtaining, by any means, a person under 18 years of age knowing that the person, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another.” Aggravated human trafficking is a severity level 1, person felony punishable by presumptive imprisonment for 147–165 months (recommended 155 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5426(c)(2), 21-6804(a), 21-6611(a)(2). If the victim is less than 14 and the offender is 18 or older, the crime is an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5426(c)(3), 21-6627(a)(1)(A),<sup>51</sup> 21-6611(a)(1).

Additionally, a facilitator could be charged under Kan. Stat. Ann. § 21-6420(a) (Promoting prostitution)<sup>52</sup> which includes knowingly

- (1) Establishing, owning, maintaining or managing a house of prostitution, or participating in the establishment, ownership, maintenance, or management thereof;

<sup>50</sup> See *supra* note 2.

<sup>51</sup> See *supra* note 7.

<sup>52</sup> See *supra* note 5.

(2) permitting any place partially or wholly owned or controlled by the defendant to be used as a house of prostitution;

...

(7) procuring transportation for, paying for the transportation of, or transporting a person within this state with the intention of assisting or promoting that person's engaging in prostitution; or

.....

When the victim is under 14 and the offender is 18 or older, promoting prostitution is an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-6420(b)(2), 21-6627(a)(1)(E), 21-6611(a)(1). If the victim is under 16, the crime is a severity level 6, person felony with presumptive punishment of imprisonment for 17–19 months and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-6420(b)(1)(C), 21-6804(a),<sup>53</sup> 21-6611(a)(3). When the victim is 16 or older, a first conviction for promoting prostitution is punishable as a Class A person misdemeanor by a “definite term of confinement in the county jail . . . fixed by the court” and not to exceed one year, a fine not to exceed \$2,500, or both. Kan. Stat. Ann. §§ 21-6420(b)(1)(A), 21-6602(1)(a), 21-6611(b)(1). However, if the offender has previously been convicted of promoting prostitution and the victim is 16 or older, the crime is punishable as a severity level 7, person felony by presumptive probation for 11–13 months (recommended 12 months) and a possible fine not to exceed \$100,000. Kan. Stat. Ann. §§ 21-6420 (b)(1)(B), 21-6804(a), 21-6611(a)(3).

4.1.1 Recommendation: Amend Kan. Stat. Ann. § 21-6420(a) (Promoting Prostitution) to eliminate the staggered penalties based on the age of the victim and make it an off-grid felony to facilitate the commercial sexual exploitation of any minor. Amend Kan. Stat. Ann. § 21-6420 to refer cases involving minor victims to Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking) for consistency in penalties.

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.*

Kansas's asset forfeiture laws are applicable to facilitators who violate Kan. Stat. Ann. § 21-5426 (Human trafficking) and § 21-6420 (Promoting prostitution). Kan. Stat. Ann. § 60-4104(o)–(p).<sup>54</sup> Pursuant to Kan. Stat. Ann. § 60-4105(b), (c), (d) (Property subject to forfeiture)<sup>55</sup> property subject to forfeiture includes the following:

(b) except as otherwise provided by law,<sup>56</sup> all property, of every kind, including, but not limited to, cash and negotiable instruments and the whole of any lot or tract of land . . . that is either:

(1) Furnished or intended to be furnished by any person in an exchange that constitutes conduct giving rise to forfeiture; or

(2) used or intended to be used in any manner to facilitate conduct giving rise to forfeiture . . .

(c) all proceeds of any conduct giving rise to forfeiture;

(d) all property of every kind, including, but not limited to, cash and negotiable instruments derived from or realized through any proceeds which were obtained directly or indirectly from the commission of an offense listed in K.S.A. 60-4104, and amendments thereto;

Pursuant to Kan. Stat. Ann. § 22-3424(d) (Judgment and sentence), a facilitator convicted of facilitating commercial sex with a minor may also be required to pay restitution. Kan. Stat. Ann. § 22-3424(d) states, if a defendant is found guilty and “upon request of the victim or the victim's family and before imposing sentence, the court shall hold a hearing to establish restitution.”

<sup>53</sup> See *supra* note 8.

<sup>54</sup> See *supra* note 26.

<sup>55</sup> See *supra* note 27.

<sup>56</sup> See *supra* note 48.

Facilitators may face a civil claim by the victim for damages if convicted of § 21-5510 (Sexual exploitation of a child).<sup>57</sup> Kan. Stat. Ann. § 60-523(b)(2).

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

Kansas has no law specifically prohibiting sex tourism.

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

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

Promoting child pornography is illegal under Kan. Stat. Ann. § 21-5510 (Sexual exploitation of a child), which states, among other things, “promoting any performance<sup>58</sup> that includes sexually explicit conduct<sup>59</sup> by a child under 18 years of age, knowing the character and content of the performance.” Kan. Stat. Ann. § 21-5510(a)(4). Under this statute, “promoting” is defined as “procuring, transmitting, distributing, circulating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting or advertising: (A) For pecuniary profit; or (B) with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender or any other person.” Kan. Stat. Ann. § 21-5510(d)(2). Generally, violating this provision of sexual exploitation of a child is a severity level 5, person felony punishable by presumptive imprisonment for 31–34 months (recommended 32 months) and a possible fine not to exceed \$300,000. Kan. Stat. Ann. §§ 21-5510(b)(2)(A), 21-6804(a), 21-6611(a)(2). If, however, the victim is under 14 and the offender is 18 or older, the crime is an off-grid person felony with a mandatory imprisonment of 25 years to life and a possible fine not to exceed \$500,000. Kan. Stat. Ann. §§ 21-5510(b)(2), 21-6627(a)(1)(F), 21-6611(a)(1).

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<sup>57</sup> See *supra* note 9.

<sup>58</sup> “Performance” is defined to include “any film, photograph, negative, slide, book, magazine or other printed or visual medium, any audio tape recording or any photocopy, video tape, video laser disk, computer hardware, software, floppy disk or any other computer related equipment or computer generated image that contains or incorporates in any manner any film, photograph, negative, photocopy, video tape or video laser disk or any play or other live presentation.” Kan. Stat. Ann. § 21-5510(d)(3).

<sup>59</sup> See *supra* note 10 for the definition of sexually explicit conduct.

**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 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 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 actions and legal remedies.*

**Legal Analysis:**

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

For the purposes of crime victims compensation, a "victim" is defined as "a person who suffers personal injury or death as a result of: (1) Criminally injurious conduct; (2) the good faith effort of any person to prevent criminally injurious conduct; or (3) the good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct." Kan. Stat. Ann. § 74-7301(m).<sup>60</sup> Pursuant to Kan. Stat. Ann. § 74-7301(e), (Definitions),

"Criminally injurious conduct" means conduct that:

(1) (A) Occurs or is attempted in this state or occurs to a person whose domicile is in Kansas who is the victim of a violent crime which occurs in another state, possession, or territory of the United States of America may make an application for compensation if:

- (i) The crimes would be compensable had it occurred in the state of Kansas; and
  - (ii) the places the crimes occurred are states, possessions or territories of the United States of America not having eligible crime victim compensation programs;
- (B) poses a substantial threat or personal injury or death; and
- (C) either is punishable by fine, imprisonment or death or would be so punishable but for the fact

<sup>60</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 74-7301 (Definitions) is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339, which was signed by the Governor on April 8, 2011. 2011 Kan. Sess. Laws 30 (effective July 1, 2011). Kan. Stat. Ann. § 74-7301 was also amended by the passage of a later bill, Senate Bill 6, which was signed by the Governor on May 25, 2011. 2011 Kan. Sess. Laws 105 (effective July 1, 2011).

that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state; . . .

. . . .

For the purpose of crime victim’s bill of rights, “victim” is defined as “any person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime against such person.” Kan. Stat. Ann. § 74-7333(b).

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.*

Kan. Stat. Ann. § 21-5426 (Human trafficking),<sup>61</sup> § 21-5509 (Electronic solicitation), § 21-5510 (Sexual exploitation of a child),<sup>62</sup> § 21-6420 (Promoting prostitution), and § 21-6421 (Patronizing a prostitute) do not refer to a defense based on consent of the minor to the commercial sex act. The code, however, does not specifically prohibit a defendant from raising such a defense.

5.2.1 Recommendation: Amend Kan. Stat. Ann. § 21-5426 (Human trafficking), § 21-5509 (Electronic solicitation), § 21-5510 (Sexual exploitation of a child), § 21-6420 (Promoting prostitution), and § 21-6421 (Patronizing a prostitute) to expressly provide that consent is not a defense to each crime.

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

Minors may still be prosecuted for prostitution under Kan. Stat. Ann. § 21-6419 (Prostitution).

5.3.1 Recommendation: Amend Kan. Stat. Ann. § 21-6419 (Prostitution) to make minors immune from prosecution and refer cases involving minors in prostitution to Kan. Stat. Ann. § 21-5426 (Human trafficking) for prosecution of the trafficker.

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.*

A commercially sexually exploited child could be considered a “child in need of care” in Kansas and thus be eligible for a child protective response. Under Kan. Stat. Ann. § 38-2202(d) (Definitions),<sup>63</sup>

(d) “Child in need of care” means a person less than 18 years of age at the time of filing of the petition or issuance of an ex parte protective custody order pursuant to K.S.A. 2010 Supp. 38-2242, and amendments thereto, who:

- (1) Is without adequate parental care, control or subsistence and the condition is not due solely to the lack of financial means of the child’s parents or other custodian;
- (2) is without the care or control necessary for the child’s physical, mental or emotional health;
- (3) has been physically, mentally or emotionally abused or neglected or sexually abused;
- . . .
- (5) has been abandoned or does not have a known living parent;
- (6) is not attending school as required . . . .
- . . .

(8) while less than 10 years of age, commits any act which if done by an adult would constitute the commission of a felony or misdemeanor as defined by [Kan. Stat. Ann. § 21-5102 (Crimes defined)]

<sup>61</sup> See *supra* note 2.

<sup>62</sup> See *supra* note 9.

<sup>63</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 38-2202 (Definitions) is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

- (9) is willfully and voluntarily absent from the child's home without the consent of the child's parent or other custodian;
- (10) is willfully and voluntarily absent at least a second time from a court ordered or designated placement, or a placement pursuant to court order, if the absence is without the consent of the person with whom the child is placed or, if the child is placed in a facility, without the consent of the person in charge of such facility or such person's designee;

....

In this statute, "[p]hysical, mental or emotional abuse' means the infliction of physical, mental or emotional harm or the causing or a deterioration of a child and may include, but shall not be limited to, maltreatment or exploiting a child to the extent that the child's health or emotional well-being is endangered." Kan. Stat. Ann. § 38-2202(y). Additionally, "[s]exual abuse' means any contact or interaction with a child in which the child is being used for the sexual stimulation of the perpetrator, the child or another person. Sexual abuse shall include allowing, permitting or encouraging a child to engage in prostitution or to be photographed, filmed or depicted in pornographic material." Kan. Stat. Ann. § 38-2202(dd).

Under Kan. Stat. Ann. § 38-2231(b)(1) (Child under 18, when law enforcement officers or court services officers may take into custody; sheltering a runaway), "A law enforcement officer shall take a child under 18 years of age into custody when: (1) The law enforcement officer reasonably believes the child will be harmed if not immediately removed from the place or residence where the child has been found." Kan. Stat. Ann. § 38-2231(b)(1). An officer may also take a child into custody "when the officer has probable cause to believe that the child is a missing person and a verified missing person entry for the child can be found in the national crime information center missing person system." Kan. Stat. Ann. § 38-2231(b)(2).

Pursuant to Kan. Stat. Ann. § 38-2232(a) (Child under 18 taken into custody), when a law enforcement officer takes a minor under 18 into custody, the officer must first attempt to deliver the child "to the custody of the child's parent or other custodian unless there are reasonable grounds to believe that such action would not be in the best interests of the child." Kan. Stat. Ann. § 38-2232(a). If the child is not returned to a parent or custodian, the child is to be delivered to a shelter facility or, if the child is 15 or younger or is 16 or 17 and "shows signs of physical, mental, emotional or sexual abuse," the child should be delivered "to a facility or person designated by the secretary." Kan. Stat. Ann. § 38-2232(a). If after a child is delivered to a shelter facility it is determined that the child will not remain in the facility but "the child is presently alleged, but not yet adjudicated, to be a child in need of care solely pursuant to subsection (d)(9) or (d)(10) of K.S.A. [38-2202], the law enforcement officer shall deliver the child to a juvenile detention facility or other secure facility, designated by the court, where the child shall be detained for not more than 24 hours, excluding Saturdays, Sundays, legal holidays, and days on which the office of the clerk of the court is not accessible. No child taken into custody pursuant to this code shall be placed in a juvenile detention facility or other secure facility, except as authorized by this section and by K.S.A. 2010 Supp. 38-2242 [Ex parte orders of protective custody], 38-2243 [Orders of temporary custody] and 38-2260 [Placement], and amendments thereto." Kan. Stat. Ann. § 38-2232(a).

Additionally, a child may be taken into custody and care by filing a petition. Pursuant to Kan. Stat. Ann. § 38-2242(a) [Ex parte orders of protective custody], the application must include the following:

- (a) The court, upon verified application, may issue ex parte an order directing that a child be held in protective custody and, if the child has not been taken into custody, an order directing that the child be taken into custody. The application shall state for each child:
  - (1) The applicant's belief that the child is a child in need of care;
  - (2) that the child is likely to sustain harm if not immediately removed from the home;
  - (3) that allowing the child to remain in the home is contrary to the welfare of the child; and

(4) the facts relied upon to support the application, including efforts known to the applicant to maintain the family unit and prevent the unnecessary removal of the child from the child’s home, or the specific facts supporting that an emergency exists which threatens the safety of the child.

If the court determines there is probable cause to believe the allegations in the application are true, the court may issue an order of protective custody. Kan. Stat. Ann. § 38-2242(b)(1). Under this statute, “No child shall be held in protective custody for more than 72 hours . . . unless within the 72-hour period a determination is made as to the necessity for temporary custody in a temporary custody hearing.” Kan. Stat. Ann. § 38-2242(b)(2). Under Kan. Stat. Ann. § 38-2243(f) (Orders of temporary custody) “The court may enter an order of temporary custody after determining there is probable cause to believe that the: (1) Child is dangerous to self or to others; (2) child is not likely to be available within the jurisdiction of the court for future proceedings; or (3) health or welfare of the child may be endangered without further care.” Through both Kan. Stat. Ann. § 38-2242(c)(1) and Kan. Stat. Ann. § 38-2243(g)(1), when the court determines it is necessary to order protective custody or temporary custody, the minor may be placed into the custody of one of the following:

- (A) A parent or other person having custody of the child and may enter a restraining order pursuant to [subsection (e) for Kan. Stat. Ann. § 38-2242 and subsection (h) for Kan. Stat. Ann. § 28-2243];
- (B) a person, other than the parent or other person having custody, who shall not be required to be licensed under article 5 of chapter 65 of the Kansas Statutes Annotated, and amendments thereto;
- (C) a youth residential facility;
- (D) a shelter facility; or
- (E) the secretary, if the child is 15 years of age or younger, or 16 or 17 years of age if the child has no identifiable parental or family resources or shows signs of physical, mental, emotional or sexual abuse.

If the court does choose to issue an order of temporary or protective custody, “the court may also enter an order restraining any alleged perpetrator of physical, sexual, mental or emotional abuse of the child from residing in the child’s home; visiting, contacting, harassing or intimidating the child;<sup>64</sup> or attempting to visit, contact, harass or intimidate the child, other family member or witnesses . . . .” Kan. Stat. Ann. §§ 38-2242(e), 38-2243(h).

At a dispositional hearing under Kan. Stat. Ann. § 38-2253 (Dispositional hearing; purpose; time), several dispositions are possible. Pursuant to Kan. Stat. Ann. § 38-2255 (Authorized dispositions),<sup>65</sup> the child may be placed with the parent or removed from the custody of the parent and custody awarded to “a relative of the child or to a person with whom the child has close emotional ties . . . to any other suitable person, to a shelter facility, to a youth residential facility or, if the child is 15 years of age or younger, or 16 or 17 years of age if the child has no identifiable parental or family resources or shows signs of physical, mental, emotional or sexual abuse, to the secretary.” Kan. Stat. Ann. § 38-2255(b), (c), (d).

A domestic minor sex trafficking victim could potentially be considered a “juvenile offender,” which includes “a person who commits an offense while 10 or more years of age but less than 18 years of age which if committed by an adult would constitute the commission of a felony or misdemeanor.” Kan. Stat. Ann. § 38-2302(n). Therefore, if a domestic minor sex trafficking victim is convicted of Kan. Stat. Ann. § 21-6419 (Prostitution), the victim could be considered a juvenile offender.

Pursuant to Kan. Stat. Ann. § 38-2330(a) (Juvenile taken into custody),

- (a) A law enforcement officer may take a juvenile into custody when:

<sup>64</sup> Kan. Stat. Ann. § 38-2242(e), adds “other family member or witness” here.

<sup>65</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 38-2255 (Authorized dispositions) is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bills 2105 and 2339. 2011 Kan. Sess. Laws 69 (effective July 1, 2011), 2011 Kan. Sess. Laws 30 (effective July 1, 2011).



- (1) Any offense has been or is being committed in the officer’s view;
- (2) the officer has a warrant commanding that the juvenile be taken into custody;
- ....
- (4) the officer has probable cause to believe that the juvenile is committing or has committed an act which, if committed by an adult, would constitute:
  - (A) A felony; or
  - (B) a misdemeanor and: (i) The juvenile will not be apprehended or evidence of the offense will be irretrievably lost unless the juvenile is immediately taken into custody; or (ii) the juvenile may cause injury to self or others or damage to property or may be injured unless immediately taken into custody;
- ....

After taking the juvenile into custody, the officer shall take the juvenile to an “intake and assessment worker” if the jurisdiction has one or “before the court for proceedings in accordance with this code . . .” Kan. Stat. Ann. § 38-2330(d)(1). If the court is closed, the juvenile may be taken to “to a court services officer, a juvenile intake and assessment worker, a juvenile detention facility or youth residential facility which the court or the commissioner shall have designated,” but the child will only taken to a juvenile detention center if certain criteria are met. Kan. Stat. Ann. § 38-2330(d)(1).

The intake worker has the option of, among other things, releasing the child to the parents, conditionally releasing the child to the parents, referring the child “to the secretary of social and rehabilitation services for investigations,” recommending “immediate intervention programs,” or “deliver[ing] the child to a shelter facility or a licensed attendant care center . . .” Kan. Stat. Ann. § 75-7023(e)(1)–(4).

Kan. Stat. Ann. § 38-2331(a) (Criteria for detention of juvenile in detention facility) states,

- (a) If no prior order removing a juvenile from the juvenile’s home pursuant to K.S.A. 2007 Supp. 38-2334 or 38-2335, and amendments thereto, has been made, the court shall not enter an order removing a juvenile from the custody of a parent pursuant to this section unless the court first finds probable cause that:
  - (1) (A) The juvenile is likely to sustain harm if not immediately removed from the home;
  - (B) allowing the juvenile to remain in home is contrary to the welfare of the juvenile; or
  - (C) immediate placement of the juvenile is in the juvenile’s best interest; and
  - (2) reasonable efforts have been made to maintain the family unit and prevent the unnecessary removal of the juvenile from the juvenile’s home or that an emergency exists which threatens the safety of the juvenile. The court shall state the basis for each finding in writing.

However, a juvenile may be taken into custody and detained in a detention facility pursuant to Kan. Stat. Ann. § 38-2330(c) or (d) and Kan. Stat. Ann. § 38-2331(b) if one of the following has occurred:

- (1) There is oral or written verification that the juvenile is a fugitive sought for an offense in another jurisdiction, that the juvenile is currently an escapee from a juvenile detention facility or that the juvenile has absconded from a placement that is court ordered or designated by the juvenile justice authority.
- (2) The juvenile is alleged to have committed an offense which if committed by an adult would constitute a felony or any crime described in [Kan. Stat. Ann. §§ 21-5501 to 5513 (Sex offenses) or Kan. Stat. Ann. §§ 21-6419 to 6421 (Prostitution statutes)].
- (3) The juvenile has been adjudicated for a nonstatus offense and is awaiting final court action on that offense.
- ....

Because prostitution is specifically included as a violation in Kan. Stat. Ann. § 38-2331(b)(2) domestic minor sex trafficking victims may be detained in juvenile detention facilities. However, sentencing alternatives may exist. Pursuant to Kan. Stat. Ann. § 38-2361 (Sentencing alternatives),

(a) Upon adjudication as a juvenile offender pursuant to K.S.A. 2010 Supp. 38-2356, and amendments thereto, modification of sentence pursuant to K.S.A. 2010 Supp. 38-2367, and amendments thereto, or violation of a condition of sentence pursuant to K.S.A. 2010 Supp. 38-2368, and amendments thereto, and subject to subsection (a) of K.S.A. 2010 Supp. 38-2365, and amendments thereto, the court may impose one or more of the following sentencing alternatives. In the event that any sentencing alternative chosen constitutes an order authorizing or requiring removal of the juvenile from the juvenile's home and such findings either have not previously been made or the findings are not or may no longer be current, the court shall make determinations as required by K.S.A. 2010 Supp. 38-2334 and 38-2335, and amendments thereto.

(1) Place the juvenile on probation through court services or community corrections for a fixed period, subject to terms and conditions the court deems appropriate consistent with juvenile justice programs in the community.

(2) Order the juvenile to participate in a community based program available in such judicial district subject to the terms and conditions the court deems appropriate. This alternative shall not be ordered with the alternative in paragraph (12) and when ordered with the alternative in paragraph (10) shall constitute a recommendation. Requirements pertaining to child support may apply if custody is vested with other than a parent.

(3) Place the juvenile in the custody of a parent or other suitable person, subject to terms and conditions consistent with juvenile justice programs in the community. This alternative shall not be ordered with the alternative in paragraph (10) or (12). Requirements pertaining to child support may apply if custody is vested with other than a parent.

(4) Order the juvenile to attend counseling, educational, mediation or other sessions, or to undergo a drug evaluation pursuant to subsection (b).

....

(9) Place the juvenile under a house arrest program administered by the court pursuant to K.S.A. 21-4603b, and amendments thereto.

(10) Place the juvenile in the custody of the commissioner as provided in K.S.A. 2010 Supp. 38-2365, and amendments thereto. This alternative shall not be ordered with the alternative in paragraph (3) or (12). Except for a mandatory drug and alcohol evaluation, when this alternative is ordered with alternatives in paragraphs (2), (4) and (9), such orders shall constitute a recommendation by the court. Requirements pertaining to child support shall apply under this alternative.

(11) Commit the juvenile to a sanctions house for a period no longer than 28 days subject to the provisions of subsection (f).

(12) Commit the juvenile directly to the custody of the commissioner for a period of confinement in a juvenile correctional facility and a period of aftercare pursuant to K.S.A. 2010 Supp. 38-2369, and amendments thereto. The provisions of K.S.A. 2010 Supp. 38-2365, and amendments thereto, shall not apply to juveniles committed pursuant to this provision. . . . This alternative may be ordered with the alternative in paragraph (7). . . .

Certain individuals have duties to report neglect and abuse of children including medical providers, educational provider, and social services providers. Kan. Stat. Ann. § 38-2223(a)(1).<sup>66</sup>

5.4.1 Recommendation: Establish a mandatory response law directing any minor involved in prostitution or who is a victim of aggravated human trafficking under Kan. Stat. Ann. § 21-

<sup>66</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 38-2223 (Authorized dispositions) is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2035. 2011 Kan. Sess. Laws 44 (effective July 1, 2011).

5426(b)(2) (Human trafficking) away from the criminal justice system and into a protective system.

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

Commercial sexual exploitation is identified as a type of abuse in Kansas’s child protection statutes. Specifically, “sexual abuse” is defined as “any contact or interaction with a child in which the child is being used for the sexual stimulation of the perpetrator, the child or another person” and includes “allowing, permitting or encouraging a child to engage in prostitution or to be photographed, filmed or depicted in pornographic material.” Kan. Stat. Ann. § 38-2202(dd). Additionally, “‘physical, mental or emotional abuse’ means the infliction of physical, mental or emotional harm or the causing of a deterioration of a child and may include, but shall not be limited to, maltreatment or exploiting a child to the extent that the child’s health or emotional well-being is endangered.” Kan. Stat. Ann. § 38-2202(y).

However, a commercially sexually exploited minor will not be considered neglected. Pursuant to Kan. Stat. Ann. § 38-2202(t) “neglect” is defined as

acts or omissions by a parent, guardian or person responsible for the care of a child resulting in harm to a child, or presenting a likelihood of harm, and the acts or omissions are not due solely to the lack of financial means of the child’s parents or other custodian. Neglect may include, but shall not be limited to:

- (1) Failure to provide the child with food, clothing or shelter necessary to sustain the life or health of the child;
- (2) failure to provide adequate supervision of a child or to remove a child from a situation which requires judgment or actions beyond the child’s level of maturity, physical condition or mental abilities and that results in bodily injury or a likelihood of harm to the child; or
- (3) failure to use resources available to treat a diagnosed medical condition if such treatment will make a child substantially more comfortable, reduce pain and suffering, or correct or substantially diminish a crippling condition from worsening. . . .

5.5.1 Recommendation: Amend the definition of “sexual abuse” in Kan. Stat. Ann. § 38-2202(dd) to include subjecting a minor to prostitution-related activity and sex trafficking of a minor under Kan. Stat. Ann. § 21-5426(b)(2) (Human trafficking).

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 protection of child protective services.*

Kansas does not contain a definition in its code that would cover traffickers in custody or in control of a child.

5.6.1 Recommendation: Add the definition of “person responsible for the care of a child” which includes a person in control and possession of a sexually exploited child to bring that child victim within the protection of Child Protective Services (CPS) to Kan. Stat. Ann. § 38-2202 (Definitions).

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

A trafficked child may qualify for compensation under Kansas’s crime victims compensation program. Within this program, a “victim” is defined as “a person who suffers personal injury or death as a result of: (1) Criminally injurious conduct; (2) the good faith effort of any person to prevent criminally injurious conduct; or (3) the good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct.” Kan. Stat. Ann. § 74-7301(m). Pursuant to Kan. Stat. Ann. § 74-7301(e) (Definitions),

“Criminally injurious conduct” means conduct that:

(1) (A) Occurs or is attempted in this state or occurs to a person whose domicile is in Kansas who is the victim of a violent crime which occurs in another state, possession, or territory of the United States of America may make an application for compensation if:

- (i) The crimes would be compensable had it occurred in the state of Kansas; and
  - (ii) the places the crimes occurred are states, possessions or territories of the United States of America not having eligible crime victim compensation programs;
- (B) poses a substantial threat or personal injury or death; and
- (C) either is punishable by fine, imprisonment or death or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state; or

....

Pursuant to Kan. Stat. Ann. § 74-7305 (Claims for compensation),<sup>67</sup> in order to receive compensation a victim must file a claim with the crime victims compensation board “within two years of the reporting of the incident to law enforcement officials if the victim was less than 16 years of age and the injury or death is the result of any of” certain listed crimes, including Kan. Stat. Ann. § 21-5506(a) (Indecent liberties with a child),<sup>68</sup> § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), and § 21-5510 (Sexual exploitation of a child).

Because the extended period for filing a claim only applies to specific crimes where the victim is under 16, minors aged 16 and 17 and victims of non-listed offenses have only two years from the occurrence of the crime to apply for victims compensation. If the victim must testify in a “sexually violent predator commitment,” a claim for compensation for mental health counseling may be filed up to two years after the testimony is given.<sup>69</sup> Kan. Stat. Ann. § 74-7305(b).

A victim may become ineligible for compensation if the crime victims compensation board determines that the victim suffered damages due to “contributory misconduct” or “the victim was likely engaging in, or attempting to engage in, unlawful activity at the time of the crime upon which the claim for compensation is based,” although, victims of domestic abuse or sexual assault may not have their awards reduced due to this latter provision. Kan. Stat. Ann. § 74-7305(c)(2)–(3). Additionally, under subsection (e), “Compensation may not be awarded unless the criminally injurious conduct resulting in injury or death was reported to a law enforcement officer within 72 hours after its occurrence or the board finds there was good cause for the failure to report within that time.” Finally, under subsection (g), “Except in [Kan. Stat. Ann. § 21-5604(a) (Incest) or (b) (Aggravated incest)], or cases of sex offenses established in [including Kan. Stat. Ann. § 21-5503 (Rape),<sup>70</sup> § 21-5506(a) (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), § 21-5509 (Electronic solicitation), § 21-5510 (Sexual exploitation of a child), § 21-6419 (Prostitution), § 21-6420 (Promoting prostitution), and § 21-6421 (Patronizing a prostitute)], compensation may not be awarded if the economic loss is less than \$ 100.”

<sup>67</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 74-7305 (Claims for compensation) is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

<sup>68</sup> See *supra* note 12.

<sup>69</sup> A “sexually violent predator” is “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.” Kan. Stat. Ann. § 59-29a02(a). Here and elsewhere in this report that Kan. Stat. Ann. § 59-29a02 (Commitment of sexually violent predators) is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

<sup>70</sup> See *supra* note 11.

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

Evidence of the victims' previous sexual conduct is generally inadmissible in prosecutions for certain offenses, unless the prosecutor decides to introduce it, including Kan. Stat. Ann. § 21-5426(b) (Aggravated human trafficking), § 21-5506(a) (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), § 21-5509 (Electronic solicitation), and § 21-5510 (Sexual exploitation of a child). Kan. Stat. Ann. § 21-5502(a). If the defense wishes the evidence to be introduced, the defense must make a motion and the judge, after reviewing the evidence in camera, will determine its relevance and admissibility. Kan. Stat. Ann. § 21-5502(b).

Pursuant to Kan. Stat. Ann. § 22-3434(a) (Videotape of testimony of child victim admissible in certain cases) children under 13 are allowed to testify via closed circuit television or by recorded testimony if the court so orders, upon motion by the attorney for any party. However, under Kan. Stat. Ann. § 22-3434(b), "The state must establish by clear and convincing evidence that to require the child who is the alleged victim to testify in open court will so traumatize the child as to prevent the child from reasonably communicating to the jury or render the child unavailable to testify." Furthermore, "The court shall make such an individualized finding before the state is permitted to proceed under this section." Kan. Stat. Ann. § 22-3434(b) During out-of-court testimony, the only individuals that may be present include "attorneys for the defendant, the state and the child, any person whose presence would contribute to the welfare and well-being of the child and persons necessary to operate the recording or closed-circuit equipment." Kan. Stat. Ann. § 22-3434(c)(1).

Similarly, for cases brought under the Revised Kansas Code for Care of Children in Kan. Stat. Ann. § 38-2249(c) (Rules of evidence),

(c) In any proceeding in which a child less than 13 years of age is alleged to have been physically, mentally or emotionally abused or neglected or sexually abused, a recording of an oral statement of the child, or of any witness less than 13 years of age, made before the proceeding began, is admissible in evidence if:

- (1) The court determines that the time, content and circumstances of the statement provide sufficient indicia of reliability;
- (2) no attorney for any party or interested party is present when the statement is made;
- (3) the recording is both visual and aural and is recorded on film, videotape or by other electronic means;
- (4) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;
- (5) the statement is not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the child's statement and not made solely as a result of a leading or suggestive question;
- (6) every voice on the recording is identified;
- (7) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify or be cross-examined by any party or interested party; and
- (8) each party or interested party to the proceeding is afforded an opportunity to view the recording before it is offered into evidence.

Law enforcement officers and government officials are prohibited from requiring or requesting a polygraph examination or similar truth telling test for anyone who is a victim of certain sex offenses, including Kan. Stat. Ann. § 21-5503 (Rape), § 21-5506(a) (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), § 21-5509 (Electronic solicitation), § 21-5510 (Sexual exploitation of a child), § 21-6420 (Promoting prostitution), and § 21-6421 (Patronizing a prostitute), as a condition for proceeding with an investigation or for prosecuting a suspect. Kan. Stat. Ann. § 22-4614.

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.*

Under Kan. Stat. Ann. §21-6614 (Expungement of certain convictions, arrest records and diversion agreements),<sup>71</sup> a person convicted of any misdemeanor, Class D or E felony, or nondrug crimes ranked in severity levels 6 through 10 can petition for the crime to be expunged from that person’s record “if three or more years have elapsed since the person: (A) Satisfied the sentence imposed; or (B) was discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence.” Kan. Stat. Ann. § 21-6614(a)(1). Because prostitution is a class B misdemeanor pursuant to Kan. Stat. Ann. § 21-6419(b) (Prostitution), and is not listed as an exception in the statute, domestic minor sex trafficking victims with a prostitution conviction may petition to have the crime expunged from their records.

Expungement is also available to domestic minor sex trafficking victims under the Juvenile Justice Code, which states, “Except as provided in subsection (b) [expungement not permitted for certain offenses] and (c) [expungement not permitted for those required to register as sex offenders], any records or files specified in this code concerning a juvenile may be expunged upon application to a judge of the court of the county in which the records or files are maintained.” Kan. Stat. Ann. § 38-2312(a).<sup>72</sup> An application must be made for expungement. Kan. Stat. Ann. § 38-2312(a). Pursuant to Kan. Stat. Ann. § 38-2312(e)(1),

After hearing, the court shall order the expungement of the records and files if the court finds that: (A) The juvenile has reached 23 years of age or that two years have elapsed since the final discharge; (B) since the final discharge of the juvenile, the juvenile has not been convicted of a felony or of a misdemeanor other than a traffic offense or adjudicated as a juvenile offender under the revised Kansas juvenile justice code and no proceedings are pending seeking such a conviction or adjudication; and (C) the circumstances and behavior of the petitioner warrant expungement.

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

Restitution is available to victims of crime in Kansas. Kan. Stat. Ann. § 22-3424 (Judgment and sentence). If, after a criminal trial, a verdict or finding of guilty occurs, “upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.” Kan. Stat. Ann. § 22-3424(d).

Some domestic minor sex trafficking victims may be able to bring a civil claim based on childhood sexual abuse. “Childhood sexual abuse” is defined as “any act committed against the person which act occurred when the person was under the age of 18 years and which act would have been a violation of” certain listed statutes, including Kan. Stat. Ann. § 21-5506 (Indecent liberties with a child), § 21-5506(b) (Aggravated indecent liberties with a child), § 21-5508(a) (Indecent solicitation of a child), § 21-5508(b) (Aggravated indecent solicitation of a child), or § 21-5510 (Sexual exploitation of a child). Kan. Stat. Ann. § 60-523(b)(2).<sup>73</sup>

<sup>71</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 21-6614 (Expungement of certain convictions, arrest records and diversion agreements) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 37. 2011 Kan. Sess. Laws 95 (effective July 1, 2011). Kan. Stat. Ann. § 21-6614 was also amended by Senate Bill 55 and House Bill 2339. 2011 Kan. Sess. Laws 100 (effective July 1, 2011), 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

<sup>72</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 38-2312 (Expungement of records) is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 37. 2011 Kan. Sess. Laws 95 (effective July 1, 2011).

<sup>73</sup> Here and elsewhere in this report that Kan. Stat. Ann. § 60-523 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2339. 2011 Kan. Sess. Laws 30 (effective July 1, 2011).

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 actions and legal remedies.*

For most crimes, prosecutions must generally occur within 5 years after the commission of the crime. Kan. Stat. Ann. § 21-5107(d).

Additionally, pursuant to Kan. Stat. Ann. § 21-5107((e)(6)(Time limitations for commencement of prosecutions), the period of time in which a prosecution must begin does not include a period where

(6) whether the fact of the crime is concealed by the active act or conduct of the accused, there is substantially competent evidence to believe two or more of the following factors are present:

(A) The victim was a child under 15 years of age at the time of the crime;

(B) the victim was of such age or intelligence that the victim was unable to determine that the acts constituted a crime;

(C) the victim was prevented by a parent or other legal authority from making known to law enforcement authorities the fact of the crime whether or not the parent or other legal authority is the accused; and

(D) there is substantially competent expert testimony indicating the victim psychologically repressed such witness' memory of the fact of the crime, and in the expert's professional opinion the recall of such memory is accurate and free of undue manipulation, and substantial corroborating evidence can be produced in support of the allegations contained in the complaint or information but in no event may a prosecution be commenced as provided in this section later than the date the victim turns 28 years of age. Corroborating evidence may include, but is not limited to, evidence the defendant committed similar acts against other persons or evidence of contemporaneous physical manifestations of the crime.

For civil actions, "Except as provided in K.S.A. 60-523, if any person entitled to bring an action, other than for the recovery of real property or a penalty or a forfeiture, at the time the cause of action accrued or at any time during the period the statute of limitations is running, is less than 18 years of age, . . . such person shall be entitled to bring such action within one year after the person's disability is removed, except that no such action shall be commenced by or on behalf of any person under the disability more than eight years after the time of the act giving rise to the cause of action." Kan. Stat. Ann. § 60-515(a). Therefore, a domestic minor sex trafficking victim may bring a claim until the victim reaches the age of 19 as long as it is within 8 years of the incident of trafficking. For victims of childhood sexual abuse, however, an action for damages may be commenced either within 3 years of the victim's 18th birthday or "[3] years from the date the person discovers or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse, whichever occurs later." Kan. Stat. Ann. § 60-523(a).

**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.*

Kansas does not require training specific to domestic minor sex trafficking. Kansas does specify that a law enforcement officer must attend 40 hours worth of training annually. Kan. Stat. Ann. § 74-5607a(b).

- 6.1.1 Recommendation: Add CSEC and domestic minor sex trafficking as topics for training in Kan. Stat. Ann. § 74-5607a(b)(Certification for full-time and part-time law enforcement officers).

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

Kansas does allow single party consent to audiotaping. A breach of privacy occurs when an individual “without the consent of the sender or receiver” intercepts the contents of a message sent via “telephone, telegraph, letter or other means of private communication” Kan. Stat. Ann. § 21-6101(a)(1).

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

Kansas does not specifically allow the use of wiretapping for domestic minor sex trafficking investigations. Kan. Stat. Ann. § 22-2515(a). However, certain domestic minor sex trafficking investigations could utilize wiretapping, assuming the other requirements are met, “when such interception may provide evidence of the commission” specified offense, including “[a]ny crime directly and immediately affecting the safety of a human life which is a felony,” kidnapping, racketeering, and “any conspiracy to commit any of the foregoing offenses.” Kan. Stat. Ann. § 22-2515(a)(1), (3), (6), (20).

- 6.3.1 Recommendation: Amend Kan. Stat. Ann. § 22-2515(a) (Same; order; application; crimes for which order may be issued) to expressly allow wiretapping for cases under Kan. Stat. Ann. § 21-5426 (Human trafficking), Kan. Stat. Ann. § 21-6420 (Promoting prostitution), or Kan. Stat. Ann. § 22-5510 (Sexual exploitation of a child).

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

There is no law in place that explicitly permits the use of a decoy by law enforcement for the purpose of investigating prostitution or sex trafficking cases, although decoys appear to be permitted under Kan. Stat. Ann. § 21-5509 (Electronic solicitation) through the use of the term “believes to be a child.”

However, Kan. Stat. Ann. § 21-5208 (Entrapment) states,



A person is not guilty of a crime if such person's criminal conduct was induced or solicited by a public officer or such officer's agent for the purposes of obtaining evidence to prosecute such person, unless:

- (a) The public officer or such officer's agent merely afforded an opportunity or facility for committing the crime in furtherance of a criminal purpose originated by such person or a co-conspirator; or
- (b) The crime was of a type which is likely to occur and recur in the course of such person's business, and the public officer or such officer's agent in doing the inducing or soliciting did not mislead such person into believing such person's conduct to be lawful.

Therefore, if the decoy "merely afforded an opportunity or facility for committing the crime," it is possible that a police officer could utilize a decoy in domestic minor sex trafficking cases. Kan. Stat. Ann. § 21-5209(a).

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

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

Kan. Stat. Ann. § 21-5509 (Electronic solicitation) provides a means for law enforcement to use the Internet to investigate buyers of commercial sex with minors. Under Kan. Stat. Ann. § 21-5509(a), "enticing or soliciting a person, whom the offender believes to be a child to commit an unlawful sexual act" through electronic means is a crime. Kan. Stat. Ann. § 21-5509(a). Because of the use of the language "believes to be a child," the provision appears to allow for prosecution in cases where an officer posed as a minor online and no real child was involved.

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

Pursuant to Kan. Stat. Ann. § 75-712b(a) (Same; missing and unidentified person system), "The Kansas bureau of investigation shall establish a missing and unidentified person system which shall be a central repository of information received by law enforcement agencies and coroners in this state relating to persons who have been reported missing or are unidentified." Under subsection (b), law enforcement agencies shall report all information received relating to missing persons or face a possible civil penalty not to exceed \$500. Kan. Stat. Ann. § 75-712b(b), (f). Pursuant to Kan. Stat. Ann. § 75-712c(a) (Same; reports of missing persons; duties of law enforcement agencies), law enforcement officers shall enter reports of missing persons "into the missing person system of the national crime information center and the missing and unidentified person system of the Kansas bureau of investigation." Additionally, "Any person or entity which has legal guardianship of a person or legal custody of a person, or both, pursuant to the Kansas code for care of children...shall notify a law enforcement agency immediately, and in no case later than two hours, if such person is unaccounted for or if such person's location is unknown." Kan. Stat. Ann. § 75-712f(a). Under subsection (b), "A person or entity required to notify a law enforcement agency pursuant to this section shall notify the law enforcement agency not later than 24 hours after the missing person returns or is located." Kan. Stat. Ann. § 75-712f(b).

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