

PROTECTED INNOCENCE INITIATIVE

STATE ACTION. NATIONAL CHANGE.

ANALYSIS AND RECOMMENDATIONS TENNESSEE

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 Analysis¹:

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

Tennessee directly addresses human trafficking through Tenn. Code Ann. § 39-13-309(a) (Trafficking for sexual servitude), which states, “A person commits the offense of trafficking a person for sexual servitude when that person knowingly subjects or maintains another in sexual servitude or knowingly recruits, entices, harbors, transports, provides or obtains by any means another person for the purpose of sexual servitude.” Tenn. Code 39-13-301(12) (Part definitions) defines “sexual servitude” as the following:

(A) Any sexually explicit conduct² for which anything of value is directly or indirectly given, promised

¹ Unless otherwise specified, all references to Tennessee statutes were taken from Tennessee Code Annotated (LEXIS through 2011 Reg. Sess.) and all federal statutes were taken from United States Code (LEXIS through PL 112-54, approved 11/12/11).

² “Sexually explicit conduct” is defined in Tenn. Code Ann. § 39-13-301(11) (Part definitions) as the following:

actual or simulated:

- (A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- (B) Bestiality;
- (C) Masturbation;

to or received by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under eighteen (18) years of age; or
(B) Any sexually explicit conduct that is performed or provided by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under eighteen (18) years of age.

Given this definition, there is no requirement to show coercion or deception for minors. Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude) is Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000.³ Tenn. Code Ann. §§ 40-35-111(b)(2), 39-13-309(b).

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

Tennessee has several statutes specifically criminalizing CSEC, including the following:

1. Tenn. Code Ann. § 39-13-514(b)(4)(A) (Patronizing prostitution) states that “[p]atronizing prostitution from a person who is younger than eighteen (18) years of age or has an intellectual disability is a Class E felony.” “Patronizing prostitution” is defined as “soliciting or hiring another person with the intent that the other person engage in prostitution, or entering or remaining in a house of prostitution for the purpose of engaging in sexual activity.” Tenn. Code Ann. § 39-13-512(3). As a Class E felony, the crime is punishable by imprisonment for 1–6 years and a possible fine not to exceed \$3,000. Tenn. Code Ann. § 40-35-111(b)(5).
2. Tenn. Code Ann. § 39-13-515 (Promoting prostitution) makes promoting prostitution of a minor a Class E felony. “Promoting prostitution of a minor” is defined as “engaging in any of the activities described in subdivision (4) when one (1) or more of the persons engaged in prostitution is less than eighteen (18) years of age or has an intellectual disability.” Tenn. Code Ann. § 39-13-512(5). Pursuant to Tenn. Code Ann. § 39-13-512(4) (Prostitution–Definitions), “promoting prostitution” is defined as follows:
 - (A) Owning, controlling, managing, supervising, or in any way keeping, alone or in association with others, a business for the purpose of engaging in prostitution, or a house of prostitution;
 - (B) Procuring an inmate for a house of prostitution;
 - (C) Encouraging, inducing, or otherwise purposely causing another to become a prostitute;
 - (D) Soliciting a person to patronize a prostitute;
 - (E) Procuring a prostitute for a patron; or
 - (F) Soliciting, receiving, or agreeing to receive any benefit for engaging in any of the activities defined in subdivisions (4)(A)–(E).

The crime is punishable by imprisonment for 1–6 years and a possible fine not to exceed \$3,000. Tenn. Code Ann. § 40-35-111(b)(5).

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- (D) Lewd exhibition of the genitals or pubic area of any person;
 - (E) Flagellation or torture by or upon a person who is nude;
 - (F) Condition of being fettered, bound or otherwise physically restrained on the part of a person who is nude;
 - (G) Physical contact in an act of apparent sexual stimulation or gratification with any person’s unclothed genitals, pubic area or buttocks or with a female’s nude breasts;
 - (H) Defecation or urination for the purpose of sexual stimulation of the viewer; or
 - (I) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.

³ Tenn. Code Ann. § 40-35-111 (Authorized terms of imprisonment and fines for felonies and misdemeanors) lists the “authorized . . . fines for felonies” “unless otherwise provided by statute.”

3. Tenn. Code Ann. § 39-17-1005(a), (d) (Offense of especially aggravated sexual exploitation of a minor) makes it a Class B felony “for a person to knowingly promote, employ, use, assist, transport or permit a minor to participate in the performance of, or in the production of, acts or material that includes the minor engaging in: (1) Sexual activity; or (2) Simulated sexual activity that is patently offensive.” The crime is punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. § 40-35-111(b)(2). A person may be separately charged “for each individual performance, image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation.” Tenn. Code Ann. § 39-17-1005(b).

4. Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor) states,

It is an offense for a person eighteen (18) years of age or older, by means of oral, written or electronic communication, electronic mail or Internet services, directly or through another, to intentionally command, request, hire, persuade, invite or attempt to induce a person whom the person making the solicitation knows, or should know, is less than eighteen (18) years of age, or solicits a law enforcement officer posing as a minor, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age, to engage in conduct that, if completed, would constitute a violation by the soliciting adult of one (1) or more of the following offenses:

- (1) Rape of a child, pursuant to § 39-13-522;
- (2) Aggravated rape, pursuant to § 39-13-502;
- (3) Rape, pursuant to § 39-13-503;
- (4) Aggravated sexual battery, pursuant to § 39-13-504;
- (5) Sexual battery by an authority figure, pursuant to § 39-13-527;
- (6) Sexual battery, pursuant to § 39-13-505;
- (7) Statutory rape, pursuant to § 39-13-506;
- (8) Especially aggravated sexual exploitation of a minor, pursuant to § 39-17-1005; or
- (9) Sexual activity involving a minor, pursuant to § 39-13-529.

Pursuant to subsection (c), “A violation of this section shall constitute an offense one (1) classification lower than the most serious crime solicited, unless the offense solicited was a Class E felony, in which case the offense shall be a Class A misdemeanor.”

5. Tenn. Code Ann. § 39-13-529(a) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) makes it a crime for a person “eighteen (18) years or older, by means of oral, written or electronic communication, electronic mail or Internet service, including webcam communications, directly or through another, to intentionally command, hire, persuade, induce or cause a minor to engage in sexual activity⁴ or simulated sexual activity that is patently offensive,⁵ as defined in

⁴ “Sexual activity” is defined in Tenn. Code Ann. §39-17-1002(8) as

any of the following acts:

- (A) Vaginal, anal or oral intercourse, whether done with another person or an animal;
- (B) Masturbation, whether done alone or with another human or an animal;
- (C) Patently offensive, as determined by contemporary community standards, physical contact with or touching of a person’s clothed or unclothed genitals, pubic area, buttocks or breasts in an act of apparent sexual stimulation or sexual abuse;
- (D) Sadoomasochistic abuse, including flagellation, torture, physical restraint, domination or subordination by or upon a person for the purpose of sexual gratification of any person;
- (E) The insertion of any part of a person’s body or of any object into another person’s anus or vagina, except when done as part of a recognized medical procedure by a licensed professional;
- (F) Patently offensive, as determined by contemporary community standards, conduct, representations, depictions or descriptions of excretory functions; or

§ 39-17-1002 [Part definitions], where such sexual activity or simulated sexual activity is observed by that person or by another.” This crime is punishable as a Class B felony by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2).

Sexual offense laws that may apply in cases of commercial sexual exploitation of a child include the following:

1. Tenn. Stat. Ann. § 39-13-504(a) (Aggravated sexual battery) states,

(a) Aggravated sexual battery is unlawful sexual contact⁶ with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

- (1) Force or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon;
- (2) The defendant causes bodily injury to the victim;
- (3) The defendant is aided or abetted by one (1) or more other persons; and
 - (A) Force or coercion is used to accomplish the act; or
 - (B) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
- (4) The victim is less than thirteen (13) years of age.

This offense is punishable as a Class B felony by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 40-35-111(b)(2), 39-13-504(b).

2. Tenn. Stat. Ann. § 39-13-505(a) (Sexual battery) states,

(a) Sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

- (1) Force or coercion⁷ is used to accomplish the act;
- (2) The sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the contact that the victim did not consent;
- (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
- (4) The sexual contact is accomplished by fraud.

This offense is punishable as a Class E felony by imprisonment for 1–6 years and a possible fine not to exceed \$3,000. Tenn. Code Ann. §§ 39-13-505(c), 40-35-111(b)(5).

3. Tenn. Code Ann. § 39-13-506 (Statutory rape) criminalizes “unlawful sexual penetration” of minors when the defendant and minor are of certain ages. If the victim is 13 or 14, and the defendant is 4–9 years older than the victim, the crime is a Class E felony. Tenn. Code Ann. § 39-13-506(b)(1), (d)(2). If the victim is 15–17 and the defendant is 5–9 years older than the victim, the crime is a Class E felony. Tenn. Code Ann. § 39-13-506(b)(2), (d)(2). The crime is “mitigated statutory rape” and a

(G) Lascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person.
⁵ “Patently offensive” is defined as “that which goes substantially beyond customary limits of candor in describing or representing such matters.” Tenn. Code Ann. §39-17-1002(4).

⁶ Tenn. Stat. Ann. § 39-13-501(6) defines “sexual contact” as “the intentional touching of the victim’s, the defendant’s, or any other person’s intimate parts, or the intentional touching of the clothing covering the immediate area of the victim’s, the defendant’s, or any other person’s intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.”

⁷ “As used in this section, ‘coercion’ means the threat of kidnapping, extortion, force or violence to be performed immediately or in the future.” Tenn. Stat. Ann. § 39-13-505(b).

Class E felony when the victim is 15-17 years old and the defendant is 4–5 years older than the victim. Tenn. Code Ann. § 39-13-506(a), (d)(1). As Class E felonies, the categories of statutory rape above are punishable by imprisonment for 1–6 years and a possible fine not to exceed \$3,000. Tenn. Code Ann. § 40-35-111(b)(5). However, if the victim is 13–17 and the defendant is at least 10 years older, the crime becomes aggravated statutory rape, a Class D felony punishable by imprisonment for 2–12 years and a possible fine not to exceed \$5,000. Tenn. Code Ann. §§ 39-13-506(c), (d)(3), 40-35-111(b)(4).

4. Tenn. Code Ann. § 39-13-522(a) (Rape of a child [effective January 1, 2012]) states, “Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than three (3) years of age but less than thirteen (13) years of age.” The crime is a Class A felony and under Tenn. Code Ann. § 39-13-522(b)(2)(A) “a person convicted of a violation of this section shall be punished as a Range II offender; however, the sentence imposed upon such person may, if appropriate, be within Range III but in no case shall it be lower than Range II.” Therefore, in accordance to Range II and III penalties, this crime is punishable by imprisonment for 25–60 years and a possible fine not to exceed \$50,000. Tenn. Code Ann. §§ 39-13-522(b)(2)(A), 40-35-111(b)(1), 40-35-112(b), (c).

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

The CSEC statutes do not refer to Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude).

- 1.3.1 Recommendation: Amend Tenn. Code Ann. § 39-13-514 (Patronizing prostitution), § 39-13-515 (Promoting prostitution), § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means), § 39-17-1004 (Offense of aggravated sexual exploitation of a minor), and § 39-17-1005 (Offense of especially aggravated sexual exploitation of a minor) to refer to Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude) for cases of commercial sexual exploitation of a child to clarify these victims’ status as human trafficking victims.

Legal Components:

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

Legal Analysis:

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

Tenn. Code Ann. § 39-13-309(a) (Trafficking for sexual servitude) may apply to a buyer of commercial sex acts with a minor. Tenn. Code Ann. § 39-13-309(a) makes it a crime when a person “knowingly subjects or maintains another in sexual servitude or knowingly recruits, entices, harbors, transports, provides or obtains⁸ by any means another person for the purpose of sexual servitude.” Pursuant to Tenn. Code Ann. § 39-13-301(12),

“Sexual servitude” means:

- (A) Any sexually explicit⁹ conduct for which anything of value is directly or indirectly given, promised to or received by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under eighteen (18) years of age; or
- (B) Any sexually explicit conduct that is performed or provided by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under eighteen (18) years of age.

Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),¹⁰ have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers attempted to

⁸ Pursuant to Tenn. Code Ann. § 39-13-301(9), (10) “[o]btain’ means, in relation to labor or services, to secure performance of labor or services,” and “services” is defined as “between a person and the defendant in which the person performs activities under the supervision of or for the defendant.” However, the terms “labor or services” in the definition of “obtain” make the definition seemingly more applicable to Tenn. Code Ann. § 39-13-308 (Trafficking for labor or services). Accordingly, the term “obtain” could be used differently for Tenn. Code Ann.

§ 39-13-309 (Trafficking for sexual servitude).

⁹ See *supra* note 2.

¹⁰ 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.).

“obtain”¹¹ a person under 18 to engage in commercial sex.¹² It is unsettled whether the courts will uphold this interpretation of the TVPA. It is arguable, therefore, that the term “obtain” may be similarly applied against buyers in Tennessee. A conviction under Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude) is punishable as a Class B felony by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. § 40-35-111(b)(2).

2.1.1 Recommendation: Amend Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude) to make the statute clearly applicable to buyers of commercial sex acts induced through trafficking.

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

Tenn. Code Ann. § 39-13-514(b) (Patronizing prostitution) specifically makes it a crime to patronize a prostitute under 18. “Patronizing prostitution” is defined as “soliciting or hiring another person with the intent that the other person engage in prostitution, or entering or remaining in a house of prostitution for the purpose of engaging in sexual activity.” Tenn. Code Ann. § 39-13-512(3).

Additionally, pursuant to Tenn. Code Ann. § 39-13-529(a), (e)(1) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) a Class B felony occurs when an individual “eighteen (18) years of age or older, by means of oral, written or electronic communication, electronic mail or Internet service, including webcam communications, directly or through another, to intentionally command, hire, persuade, induce or cause a minor to engage in sexual activity¹³ or simulated sexual activity that is patently offensive,¹⁴ as defined in § 39-17-1002 [Part definitions], where such sexual activity or simulated sexual activity is observed by that person or by another.”

2.2.1 Recommendation: Amend Tenn. Code Ann. § 39-13-514(b) (Patronizing prostitution) and § 39-13-529(a), (e)(1) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) to refer cases of buying sex acts with a minor to Tenn. Code Ann. § 39-13-309(a) (Trafficking for sexual servitude) to ensure reporting of these cases as trafficking.

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

Tenn. Code Ann. § 39-13-514(b) (Patronizing prostitution) specifically criminalizes patronizing a prostitute under 18. “Patronizing prostitution” is defined as “soliciting or hiring another person with the intent that the other person engage in prostitution, or entering or remaining in a house of prostitution for the purpose of engaging in sexual activity.” Tenn. Code Ann. § 39-13-512(3). As a Class E felony, patronizing a prostitute under eighteen is punishable by imprisonment for 1–6 years and a possible fine not to exceed \$3,000. Tenn. Code Ann. §§ 39-13-514(b), 40-35-111(b)(5). In contrast, patronizing a prostitute over 18 is a Class B misdemeanor and is punishable by imprisonment for not more than 6 months, a possible fine not to exceed \$500, or both imprisonment and a fine. Tenn. Code Ann. §§ 39-13-514(b)(1), 40-35-111(e)(2).

2.3.1 Recommendation: Amend Tenn. Code Ann. § 39-13-514(b) (Patronizing prostitution) to refer cases of attempted or actual purchase of commercial sex acts with minors to Tenn. Code Ann. § 39-

¹¹ 18 U.S.C. § 1591(a).

¹² 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>.

¹³ See *supra* note 4.

¹⁴ See *supra* note 5.

13-309(a) (Trafficking for sexual servitude) to ensure that prostituted children are properly identified as trafficking victims.

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

If a buyer of commercial sex with a minor can be charged with Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude), the buyer will face a Class B felony conviction punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-309(b), 40-35-111(b)(2). When the victim is under 18, Tenn. Code Ann. § 39-13-514(b) (Patronizing prostitution) establishes a Class E felony for buying sex with a minor, punishable by imprisonment for 1–6 years and a possible fine not to exceed \$3,000. Tenn. Code Ann. § 40-35-111(b)(5). A violation of Tenn. Code Ann. § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means), is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2).

Several sexual offenses could be used to prosecute a buyer of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child, and do not refer to the human trafficking statute to bring these criminal offenses within the ambit of human trafficking under Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude).¹⁵

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 offense¹⁶ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,¹⁷ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.¹⁸

- 2.4.1 Recommendation: Amend Tenn. Code Ann. § 39-13-514(b) (Patronizing prostitution) to refer cases of attempted or actual purchase of commercial sex acts with minors to Tenn. Code Ann. § 39-13-309(a) (Trafficking for sexual servitude) and enhance the crime classification to a Class B felony for consistency in penalties.

¹⁵ See *supra* Section 1.2 for a full description of the sexual offense laws that may be used to prosecute buyers.

¹⁶ 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).

¹⁷ 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).

¹⁸ 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).

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.*¹⁹

Tenn. Code Ann. § 39-13-529(a) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) includes using “electronic communication, electronic mail or Internet service, including webcam communications, directly or through another, to intentionally command, hire, persuade, induce or cause a minor to engage in sexual activity or simulated sexual activity that is patently offensive, as defined in § 39-17-1002, where such sexual activity or simulated sexual activity is observed by that person or by another.” Although the crime is not applicable solely to commercial sexual exploitation, the inclusion of the term “hire” brings commercial sexual activity within its range. This crime is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2). Similarly, Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor) applies when a person uses electronic means to solicit a minor to engage in certain sexual conduct. Pursuant to subsection (c), “A violation of this section shall constitute an offense one (1) classification lower than the most serious crime solicited, unless the offense solicited was a Class E felony, in which case the offense shall be a Class A misdemeanor.”

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

Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) and Tenn. Code Ann. § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) do not expressly prohibit a defense of age mistake. Pursuant to Tenn. Code Ann. § 39-11-502(a) (Ignorance or mistake of fact), “Except in prosecutions for violations of §§ 39-13-504(a)(4) [Aggravated sexual battery where victim is under 13] and 39-13-522 [Rape of a child under 13], ignorance or mistake of fact is a defense to prosecution if the ignorance or mistake negates the culpable mental state of the charged offense.” Pursuant to subsection (b), “Although a person’s ignorance or mistake of fact may constitute a defense to the offense charged, the person may be convicted of the offense for which the person would be guilty if the fact were as the person believed.” Tenn. Code Ann. § 39-11-502(b).

2.6.1 Recommendation: Amend Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) and § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) to prohibit a mistake of age defense. Alternatively, amend Tenn. Code Ann. § 39-11-502(a) (Ignorance or mistake of fact) to prevent the mistake of fact defense for the age of a minor victim of Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) and § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means).

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.*

Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude), if applicable to buyers, does not differentiate between trafficking a minor and trafficking an adult, providing the same penalty. A violation of Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude) is a Class B felony punishable by imprisonment for 8-30 year and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-309(b), 40-35-111(b)(2).

Penalties for convictions under Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) and Tenn. Code Ann. § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) are not reduced based upon the age of the minor victim.

¹⁹ See discussion of relevant provisions *supra* Section 1.2.

In contrast, under Tenn. Code Ann. § 39-13-528 (Offense of solicitation of a minor), penalties vary based on the crime solicited, and some of the crimes listed in § 39-13-528 vary based on the age of the minor and age of the buyer. Pursuant to Tenn. Code Ann. § 39-13-528(c), “A violation of this section shall constitute an offense one (1) classification lower than the most serious crime solicited, unless the offense solicited was a Class E felony, in which case the offense shall be a Class A misdemeanor.” Therefore, when a buyer solicits a victim between 3–13 years of age to engage in conduct that, if it were to occur, would be rape under Tenn. Code Ann. § 39-13-522(a) (Rape of a child), a Class A felony, the crime is punishable as a class B felony with imprisonment between 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-522(a),(b)(1), 40-35-111(b)(2). If the defendant is at least 10 years older than the victim and solicits a victim between 13–17 to engage in conduct that, if it were to occur, would be aggravated statutory rape under Tenn. Code Ann. § 39-13-506(c), a Class D felony, the crime is a Class E felony punishable by imprisonment of 1–6 years and a possible fine not to exceed \$3,000. Tenn. Code Ann. §§ 39-13-506(c), (d)(3), 40-35-111(b)(5). Soliciting is a Class A misdemeanor if the solicited act, if it were to occur, would be mitigated statutory rape under Tenn. Code Ann. §§ 39-13-506(a), which is typically a Class E felony and occurs when the defendant is 4 or 5 years older than a victim between 15–18. Tenn. Code Ann. §§ 39-13-506(a), (d)(1). Soliciting would also be a Class A misdemeanor if the solicited conduct, if it were to occur, would be statutory rape under Tenn. Code Ann. §§ 39-13-506(b), which is typically a Class E felony, which occurs when the victim is 13 or 14 and the defendant is between 4–10 years older than the victim, or when the victim is between 15–18 and the defendant is between 5–10 years older than the victim. Tenn. Code Ann. §§ 39-13-506(a), (b)(1), (b)(2), (d)(1), (d)(2). Class A misdemeanors are punishable by up to 11 months, 29 days imprisonment, a fine not to exceed \$2,500, or both. Tenn. Code Ann. § 40-35-111(e)(1).

2.7.1 Recommendation: Amend Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) to set the penalty for soliciting a minor as a Class B felony consistent with Tenn. Code Ann. § 39-13-309(a) (Trafficking for sexual servitude).

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.*

Buyers of commercial sex with minors face fines, restitution, and asset forfeiture. For the Class E felony of patronizing a prostitute when the victim is a minor under 18, a buyer can receive a fine not to exceed \$3,000. Tenn. Code Ann. §§ 39-13-514(b), 40-35-111(b)(5). Hiring a minor online for sexual activity in violation of Tenn. Code Ann. § 39-13-529(a) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) is a Class B felony with a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2). An conviction under Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor) can result in a fine ranging between \$2,500 and \$25,000 based on the crime classification determined by the victim’s age and the defendant’s age. Tenn. Code Ann. § 40-25-111(b).

Buyers may be sentenced to pay restitution to a minor who has been sexually victimized through any of the trafficking, CSEC, or sexual offenses applicable to buyers of commercial sex acts with minors. Tennessee law allows a court to order restitution to victims of any crime. Tenn. Code Ann. §§ 39-11-118, 40-35-104(c)(2), 40-35-304.

Tenn. Code Ann. § 40-33-101 (Conveyances subject to forfeiture) provides for asset forfeiture, upon conviction, of “[a]ny conveyance, including a vehicle, aircraft or vessel used in the commission of,” among other offenses, a sexual “offense under title 39, chapter 13, part 5 [Sexual offenses],” which includes patronizing prostitution of adults or minors.²⁰ More specifically, Tenn. Code Ann. § 39-13-530(a) (Forfeiture of any conveyance or real or

²⁰ Tenn. Code Ann. § 40-33-101 does contain some exceptions, including that “(1) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture . . . unless it appears that the owner or

personal property used in a sexual offense committed against minors—Child abuse fund) provides for the forfeiture of “[a]ny conveyance or real or personal property used in the commission of an offense under this part [Sexual offenses],” which is committed “against a person under eighteen (18) years of age and was committed on or after July 1, 2006.” Also, vehicle forfeiture specifically for sexual exploitation of children crimes is found in Tenn. Code Ann. § 39-17-1008(a) (Forfeiture of any conveyance or real or personal property used in commission of an offense under this part), which provides that “[a]ny conveyance or real or personal property used in the commission of an offense under this part [Sexual exploitation of children] is subject to forfeiture under the provisions of title 40, chapter 33, part 2 [Forfeiture procedures generally].” Additionally, Tenn. Code Ann. § 29-3-101(e) (Definitions—Maintenance and abatement of nuisance—Forfeiture of property—Payment of moneys from forfeiture into general funds) states,

(e) (1) Upon a person’s second or subsequent conviction for promoting prostitution or patronizing prostitution, any vehicle in which such offense was committed is subject to seizure and forfeiture in accordance with the procedure established in title 39, chapter 11, part 7 [Disposition of forfeited property]; provided, however, that nothing contained within the provisions of this subsection (e) shall be construed to authorize seizure of such vehicle at any time prior to such conviction.

(2) The provisions of subdivision (e)(1) apply only if the violations making the vehicle subject to seizure and forfeiture occur in Tennessee and at least one (1) of the previous violations occurs on or after July 1, 2002, and the second or subsequent offense after July 1, 2002, occurs within five (5) years of the most recent prior offense occurring after July 1, 2002.

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

Pursuant to Tenn. Code Ann. § 39-17-1004(a)(1), (Offense of aggravated sexual exploitation of a minor), “(a)(1) It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material, or possess with the intent to promote, sell, distribute, transport, purchase or exchange material, that includes a minor engaged in: (A) Sexual activity;²¹ or (B) Simulated sexual activity that is patently offensive.”²² Under subsection (b)(1), “It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material that is obscene, as defined in § 39-17-901,²³ or possess material that is obscene, with the intent to promote, sell, distribute, transport, purchase or exchange the material, which includes a minor engaged in: (A) Sexual activity; or (B) Simulated sexual activity that is patently offensive.”

A person violating either subsection commits a Class C felony, and the person can be charged on individual counts for each image. Tenn. Code Ann. §§ 39-17-1004(a)(2), (4), (b)(2), (4). Class C felonies are punishable by imprisonment for 3–15 years and a possible fine not to exceed \$10,000. Tenn. Code Ann. § 40-35-111(b)(3). However, if the number of individual images is greater than 25, the crime is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-17-1004(a)(4), (b)(4), 40-35-111(b)(2).

Under Tenn. Code Ann. § 39-17-1003(a) (Offense of sexual exploitation of a minor), “[i]t is unlawful for any person to knowingly possess material that includes a minor engaged in: (1) Sexual activity; or (2) Simulated sexual activity that is patently offensive.” The crime is a Class D felony punishable by imprisonment for 2–12 years and a possible fine not to exceed \$5,000 for each individual image possessed. Tenn. Code Ann. §§ 39-17-

other person in charge of the conveyance is a consenting party or privy to a robbery offense under title 39, chapter 13, part 4, or felony theft under title 39, chapter 14, part 1.”

²¹ See *supra* note 4.

²² See *supra* note 5.

²³ “Obscene” is defined as follows: “(A) The average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (B) The average person applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct; and (C) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” Tenn. Code Ann. § 39-17-901(10).

1003(b), (d), 40-35-111(b)(4). If the number of images and materials exceeds 50, then the crime is a Class C felony punishable by imprisonment for 3–15 year and a possible fine not to exceed \$10,000. Tenn. Code Ann. §§ 39-17-1003(d), 40-35-111(b)(3) If the number of images and materials exceeds 100, then the crime is a Class B felony punishable by imprisonment for 8-30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-17-1003(d), 40-35-111(b)(2).

In comparison, a federal conviction for possession of child pornography²⁴ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.²⁵ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.²⁶

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

Persons in Tennessee convicted of a violent sexual offense or a sexual offense are required to register as sex offenders. Tenn. Code Ann. § 40-39-212(a). A “violent sexual offense” includes “[a]ggravated sexual exploitation of a minor, under § 39-17-1004,” “[s]olicitation of a minor, under § 39-13-528 [Offense of solicitation of a minor] when the offense is classified as a Class B or Class C felony,” and Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude). Tenn. Code Ann. §§ 40-39-202(30) (F), (K), (Y). “Sexual offense” includes “[s]exual exploitation of a minor, under § 39-17-1003,” “[s]olicitation of a minor under § 39-13-528 when the offense is classified as a Class D felony, Class E felony or a misdemeanor,” and “[s]oliciting sexual exploitation of a minor—Exploitation of a minor by electronic means, under § 39-13-529.” Tenn. Code Ann. § 40-39-202(20)(A)(iv), (viii), (xvii). Those buyers convicted of purchasing commercial sex acts with a minor under Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) are not required to register as sex offenders.

- 2.10.1 Recommendation: Amend Tenn. Code Ann. § 40-39-202(20)(A) (Part definitions) to include Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) as a sexual offense for which a person convicted or pleading guilty to the crime would be required to register if the victim is a minor.

²⁴ 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).

²⁵ 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).

²⁶ 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).

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.²⁷

Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude) is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000.²⁸ Tenn. Code Ann. § 40-35-111(b)(2). Additionally, a trafficker could be charged with promoting prostitution of a minor pursuant to Tenn. Code Ann. § 39-13-515 (Promoting prostitution) which is punishable as a Class E felony by imprisonment for 1–6 years and a possible fine not to exceed \$3,000. Tenn. Code Ann. § 40-35-111(b)(5).

Tenn. Code Ann. § 39-13-529(a) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) prohibits a person “eighteen (18) years or older, by means of oral, written or electronic

²⁷ See discussion of relevant provisions *supra* Sections 1.1, 1.2.

²⁸ Traffickers who are members of criminal gangs could receive enhanced penalties pursuant to Tenn. Code Ann. § 40-35-121(b) (Criminal gang offenses—Enhanced punishment—Procedure): “A criminal gang offense committed by a defendant who was a criminal gang member at the time of the offense shall be punished one (1) classification higher than the classification established by the specific statute creating the offense committed.” Furthermore, pursuant to subsection (e), “A criminal gang offense committed by a defendant who was a criminal gang member at the time of the offense shall be punished two (2) classifications higher than the classification established by the specific statute creating the offense committed if the criminal gang member was also a leader or organizer of the criminal gang at the time the offense was committed.” Tenn. Code Ann. § 40-35-121(e). A “criminal gang offense” is defined as “any violation of Tennessee law: (A) During the perpetration of which the defendant knowingly causes, or threatens to cause, death or bodily injury to another person or persons and specifically includes rape of a child, aggravated rape and rape; or (B) That results, or was intended to result, in the defendant’s receiving income, benefit, property, money or anything of value from the commission of any aggravated burglary, or from the illegal sale, delivery or manufacture of a controlled substance or firearm.” Tenn. Code Ann. § 40-35-121(a)(3). A “criminal gang member” is defined in Tenn. Code Ann. § 40-35-121(a)(2) as the following:

[A] person who is a member of a criminal gang, as defined in subdivision (a)(1), who meets two (2) or more of the following criteria:

- (A) Admits to criminal gang involvement;
- (B) Is identified as a criminal gang member by a parent or guardian;
- (C) Is identified as a criminal gang member by a documented reliable informant;
- (D) Resides in or frequents a particular criminal gang’s area, adopts their style or dress, their use of hand signs or their tattoos and associates with known criminal gang members;
- (E) Is identified as a criminal gang member by an informant of previously untested reliability and the identification is corroborated by independent information;
- (F) Has been arrested more than once in the company of identified criminal gang members for offenses that are consistent with usual criminal gang activity; or
- (G) Is identified as a criminal gang member by physical evidence such as photographs or other documentation.

“Criminal gang” is defined as “a formal or informal ongoing organization, association or group consisting of three (3) or more persons that has: (A) As one (1) of its activities the commission of criminal acts; and (B) Two (2) or more members who, individually or collectively, engage in or have engaged in a pattern of criminal gang activity.”

communication, electronic mail or Internet service, including webcam communications, directly or through another, to intentionally command, hire, persuade, induce or cause a minor to engage in sexual activity or simulated sexual activity that is patently offensive,²⁹ . . . where such sexual activity or simulated sexual activity is observed by that person or by another.” This crime is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2). Lastly, pursuant to Tenn. Code Ann. § 39-13-528(c) (Offense of solicitation of a minor), “A violation of this section shall constitute an offense one (1) classification lower than the most serious crime solicited, unless the offense solicited was a Class E felony, in which case the offense shall be a Class A misdemeanor.”

In addition to the above offenses, a trafficker could be found guilty of money laundering pursuant to Tenn. Code Ann. § 39-14-903. Tenn. Code Ann. § 39-14-903(b)(1) states, “It is an offense to knowingly use proceeds³⁰ derived directly or indirectly from a specified unlawful activity³¹ with the intent to promote, in whole or in part, the carrying on of a specified unlawful activity.” A violation of the money laundering statute constitutes a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-14-903(a)(2), (b)(2), 40-35-111(b)(2).

A trafficker could be convicted of racketeering and thus be subject to asset forfeiture. Pursuant to Tenn. Code Ann. § 39-12-204 (Unlawful activities),

- (a) It is unlawful for any person who has, with criminal intent, received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of the proceeds or the proceeds derived from the use or investment thereof, in the acquisition of any title to or any right, interest, or equity in, real or personal property or in the establishment or operation of any enterprise.
- (b) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, an interest in or control of any enterprise of real or personal property.
- (c) It is unlawful for any person employed by, or associated with, any enterprise³² to knowingly conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity or the collection of any unlawful debt.

A “pattern of racketeering activity” is defined as “engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are

²⁹ See *supra* note 5.

³⁰ “‘Proceeds’ includes gross profits from the commission of any specified unlawful activity, including property, real, personal or intangible of any kind, acquired or derived, directly or indirectly, from, produced through, realized through or caused by an act or omission.” Tenn. Code Ann. § 39-14-902(4).

³¹ “‘Knowingly uses or attempts to use proceeds derived directly or indirectly from a specified unlawful activity’ means that any person or party to the transaction or act knew that the property or proceeds involved in the transaction or act represented or constituted, either in whole or in part, proceeds from some form, though not necessarily which form, of any criminal offense under the laws of this state, or any other jurisdiction. A person, corporation or financial institution receiving funds or property in the ordinary course of business shall not have ‘knowledge’ that the funds or property so received represented proceeds of any specified unlawful activity solely because of: (A) The identity or reputation of the transferor of the funds or property; or (B) The identity or reputation of an associate of the transferor.” Tenn. Code Ann. § 39-14-902(3). Additionally, “‘Specified unlawful activity’ means any act, including any preparatory or completed offense, committed for financial gain that is punishable as a felony under the laws of this state, or if the act occurred outside this state, would be punishable by confinement for more than one (1) year under the laws of the state in which it occurred.” Tenn. Code Ann. § 39-14-902(6)(A). It “does not mean an act, including any preparatory or completed offense, committed for financial gain that is punishable under chapter 17, part 5 of this title, or similar provisions of law in another state.” Tenn. Code Ann. § 39-14-902(6)(B).

³² “Enterprise” is defined as “any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact, although not a legal entity, and it includes illicit as well as licit enterprises and governmental, as well as other, entities.” Tenn. Code Ann. § 39-12-203(3).

interrelated by distinguishing characteristics and are not isolated incidents; provided that at least one (1) of such incidents occurred after July 1, 1986, that the last of the incidents occurred within two (2) years after a prior incident of racketeering conduct.” Tenn. Code Ann. § 39-12-203(6). It is “racketeering activity” “to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain that is a criminal offense involving . . . aggravated sexual exploitation of a minor or especially aggravated sexual exploitation of a minor under §§ 39-17-1004(b)(1)(A) and 39-17-1005(a)(1).” Tenn. Code Ann. § 39-12-203(9). Conviction for racketeering is punishable as a Class B felony by imprisonment under the sentencing range within Range II or higher (imprisonment for 12–30 years), a fine up to \$250,000, or both. Tenn. Code Ann. §§ 39-12-205(a), 40-35-112(b)(2), (c)(2). Instead of a fine, a conviction for conduct “through which pecuniary value³³ is derived, or by which personal injury or property damage or other loss is caused, may be sentenced to pay a fine that does not exceed three (3) times the gross value gained or three (3) times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.” Tenn. Code Ann. § 39-12-205(b)(1).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)³⁴ 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 offense³⁵ against a minor.

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

Pursuant to Tenn. Code Ann. § 39-17-1004(a)(1), (Offense of aggravated sexual exploitation of a minor), “It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material, or possess with the intent to promote, sell, distribute, transport, purchase or exchange material, that includes a minor engaged in: (A) Sexual activity;³⁶ or (B) Simulated sexual activity that is patently offensive.”³⁷ Under subsection (b)(1), “It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material that is obscene, as defined in § 39-17-901,³⁸ or possess material that is obscene, with the intent to promote, sell, distribute, transport, purchase or exchange the material, which includes a minor engaged in: (A) Sexual activity; or (B) Simulated sexual activity that is patently offensive.”

A violation of Tenn. Code Ann. § 39-17-1004(a), (b) (Offense of aggravated sexual exploitation of a minor), is generally a Class C felony, and the individual can be charged on individual counts for each image. Tenn. Code Ann. § 39-17-1004(a)(2), (4), (b)(2), (4). Class C felonies are punishable by imprisonment for 3–15 year and a possible fine not to exceed \$10,000. Tenn. Code Ann. § 40-35-111(b)(3). However, if the number of individual images is greater than 25, the crime is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 1004(a)(4), (b)(4), 40-35-111(b)(2).

Under Tenn. Code Ann. § 39-17-1005(a) (Offense of especially aggravated sexual exploitation of a minor), “It is unlawful for a person to knowingly promote, employ, use, assist, transport or permit a minor

³³ Tenn. Code Ann. § 39-12-205(b)(2) (Penalties) provides,

For the purposes of subdivision (b)(1) “pecuniary value” means:

(A) Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else, the primary significance of which is economic advantage; or

(B) Any other property or service that has a value in excess of five hundred dollars (\$500).

³⁴ See *supra* note 10.

³⁵ See *supra* note 16.

³⁶ See *supra* note 4.

³⁷ See *supra* note 5.

³⁸ See *supra* note 23.

to participate in the performance of, or in the production of, acts or material that includes the minor engaging in: (1) Sexual activity; or (2) Simulated sexual activity that is patently offensive.” A violation of Tenn. Code Ann. § 39-17-1005(a) is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 40-35-111(b)(2), 39-17-1005(d). A person may be separately charged “for each individual performance, image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation.” Tenn. Code Ann. § 39-17-1005(b).

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 offense³⁹ against a minor. Additionally, a federal conviction for distribution of child pornography⁴⁰ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁴¹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁴²

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.*

Tenn. Code Ann. § 39-13-529(a) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) includes soliciting by electronic means, including “electronic communication, electronic mail or Internet service, including webcam communications” Although the crime is not applicable solely to commercial sexual exploitation, the inclusion of the term “hire” brings commercial sexual activity within its range. This crime is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2). Similarly, Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor) applies when a person uses electronic means to solicit a minor to engage in certain sexual conduct. Pursuant to subsection (c), “A violation of this section shall constitute an offense one (1) classification lower than the most serious crime solicited, unless the offense solicited was a Class E felony, in which case the offense shall be a Class A misdemeanor.”

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

Traffickers are subject to various criminal fines. Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude) is a Class B felony subject to a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 40-35-111(b)(2), 39-13-309(b). For violating Tenn. Code Ann. § 39-13-515 (Promoting prostitution), which is a Class E felony, a trafficker can receive a fine not to exceed \$3,000. Tenn. Code Ann. §§ 39-13-515, 40-35-111(b)(5).

³⁹ See *supra* note 16 for the definition of “federal sex offense.”

⁴⁰ 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).

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

⁴² 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).

Hiring a minor online for sexual activity in violation of Tenn. Code Ann. § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) is a Class B felony with a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2). An offense under Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor) can result in a fine ranging between \$2,500 and \$25,000 based on the crime classification determined by the age of the victim and the defendant. Tenn. Code Ann. § 40-35-111(b)(2). A money laundering violation under Tenn. Code Ann. § 39-14-903(b)(1) is a Class B felony subject to a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-14-903(b)(2), 40-35-111(b)(2).

Traffickers may be sentenced to pay restitution to a minor who has been sexually victimized through any of the trafficking or CSEC offenses. Tennessee law allows a court to order restitution to victims of any crime. Tenn. Code Ann. §§ 39-11-118, 40-35-104(c)(2), 40-35-304.

Pursuant to Tenn. Code Ann. § 39-11-703(c) (Criminal proceeds subject to forfeiture), a trafficker will be subject to asset forfeiture for violating Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude). Pursuant to Tenn. Code Ann. § 39-11-703(c) (Criminal proceeds subject to forfeiture),

The following items are subject to judicial forfeiture as provided in this part⁴³:

- (1) Conveyances, including aircraft, motor vehicles, and other vessels when used or intended to be used in connection with a violation of Sections 39-13-307 [Involuntary labor servitude—Restitution], 39-13-308 [Trafficking for forced labor or services] and 39-13-309 [Trafficking for sexual servitude] committed on or after July 1, 2011;
- (2) Books, records, telecommunication equipment, or computers when used or intended to be used in connection with a violation of Sections 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011;
- (3) Money or weapons when used or intended to be used in connection with a violation of Sections 39-13-307, 39-13-308 39-13-309 committed on or after July 1, 2011;
- (4) Real property when used or intended to be used in connection with a violation of Sections 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011;
- (5) Everything of value furnished, or intended to be furnished, in exchange for an act in connection with a violation of Sections 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011, all proceeds traceable to the exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate the violation;
- (6) Any property, real or personal, directly or indirectly acquired by or received in violation of such violation or as an inducement to violate such statutes, or any property traceable to the proceeds from the violation; and
- (7) Any real property, including any right, title and interest in the whole of or any part of any lot or tract of land and any property used as an instrumentality in or used in furtherance of a in connection with a violation of Sections 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011.

Additionally, pursuant to Tenn. Code Ann. § 39-11-703(a), (b) (Criminal proceeds subject to forfeiture),

⁴³ Pursuant to Tenn. Code Ann. § 39-13-312(c) after using the proceeds to pay for the cost of the proceedings, 20% will be awarded “to the law enforcement agency conducting the investigation that resulted in the forfeiture for use in training and equipment for the enforcement of human trafficking laws,” 20% will be awarded to “the district attorneys general conference for education, expenses, expert services, training or the enhancement of resources for the prosecution of and asset forfeiture in human trafficking cases.” After an additional 5% is awarded to the clerk of the court where the proceedings occurred, the remainder will go into “the anti-human trafficking fund” for grants to non-profits for services to victims of human trafficking, prevention programs, and education programs. Tenn. Code Ann. § 39-13-312(d)–(f). This provision has been added by the passage of House Bill 171 during the Tennessee 170th General Assembly. 2011 Tenn. Pub. Acts 354 (effective July 1, 2011).

- (a) Any property, real or personal, directly or indirectly acquired by or received in violation of any statute or as an inducement to violate any statute, or any property traceable to the proceeds from the violation, is subject to judicial forfeiture, and all right, title, and interest in any such property shall vest in the state upon commission of the act giving rise to forfeiture.
- (b) Any real property, including any right, title and interest in the whole of or any part of any lot or tract of land and any property used as an instrumentality in or used in furtherance of a violation of the following laws shall be subject to judicial forfeiture:

...
(2) The commission of three (3) or more acts occurring on three (3) or more separate days within a sixty-day period, and each act results in a conviction for promoting prostitution under chapter 13, part 5 of this title.

Additionally, a trafficker could lose any conveyance used in the commission of other related crimes. Tenn. Code Ann. § 40-33-101 (Conveyances subject to forfeiture) provides for asset forfeiture, upon conviction, of “[a]ny conveyance, including a vehicle, aircraft or vessel used in the commission of,” among other things, a sexual “offense under title 39, chapter 13, part 5,” which includes patronizing prostitution of adults or minors.⁴⁴ More specifically, Tenn. Code Ann. § 39-13-530(a) (Forfeiture of any conveyance or real or personal property used in a sexual offense committed against minors) provides for the forfeiture of “[a]ny conveyance or real or personal property used in the commission of an offense under this part [Sexual offenses],” which is committed “against a person under eighteen (18) years of age and was committed on or after July 1, 2006.” Also, vehicle forfeiture specifically for sexual exploitation of children crimes is found in Tenn. Code Ann. § 39-17-1008(a) (Forfeiture of any conveyance or real or personal property used in commission of an offense under this part), which provides that “[a]ny conveyance or real or personal property used in the commission of an offense under this part [Sexual exploitation of children] is subject to forfeiture under the provisions of title 40, chapter 33, part 2 [Forfeiture procedures generally].”

A trafficker could be convicted of racketeering and thus be subject to asset forfeiture. If convicted of racketeering, a trafficker may have to forfeit to the state, “[a]ll property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of a provision of this part” Tenn. Code Ann. § 39-12-206(b).

Furthermore, Tenn. Code Ann. § 29-3-101(e) (Definitions—Maintenance and abatement of nuisance—Forfeiture of property—Payment of moneys from forfeiture into general funds) states,

- (1) Upon a person’s second or subsequent conviction for promoting prostitution or patronizing prostitution, any vehicle in which such offense was committed is subject to seizure and forfeiture in accordance with the procedure established in title 39, chapter 11, part 7; provided, however, that nothing contained within the provisions of this subsection (e) shall be construed to authorize seizure of such vehicle at any time prior to such conviction.
- (2) The provisions of subdivision (e)(1) apply only if the violations making the vehicle subject to seizure and forfeiture occur in Tennessee and at least one (1) of the previous violations occurs on or after July 1, 2002, and the second or subsequent offense after July 1, 2002, occurs within five (5) years of the most recent prior offense occurring after July 1, 2002.

⁴⁴ Tenn. Code Ann. § 40-33-101 does contain some exceptions, including that “(1) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture . . . unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a robbery offense under title 39, chapter 13, part 4, or felony theft under title 39, chapter 14, part 1.”

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

Persons convicted of a violent sexual offense or a sexual offense are required to register as sex offenders. Tenn. Code Ann. § 40-39-212(a). A “sexual offense” includes Tenn. Code Ann. § 39-13-529 (Soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means). Tenn. Code Ann. §§ 40-39-202(20)(A)(iv), (xvii). Pursuant to Tenn. Code Ann. § 40-39-202(30) (Part definitions), a “violent sexual offense” includes: “(F) Aggravated sexual exploitation of a minor, under § 39-17-1004; (G) Especially aggravated sexual exploitation of a minor under § 39-17-1005; . . . (K) Solicitation of a minor, under § 39-13-528 when the offense is classified as a Class B or Class C felony; . . . (Y) Trafficking for sexual servitude, under § 39-13-309.”

Registration is not required for convictions under Tenn. Code Ann. § 39-13-515 (Promoting prostitution).

- 3.5.1 Recommendation: Amend Tenn. Code Ann. § 40-39-202 (Part definitions) to include Tenn. Code Ann. § 39-13-515 (Promoting prostitution) as a “sexual offense” or a “violent sexual offense” when it involves the trafficking of a minor in order to require registration for those who promote the prostitution of a minor.

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 Tenn. Code Ann. § 37-1-147 (Termination of parental rights), the reasons and methods for terminating parental rights are governed by Tenn. Code Ann. title 36, chapter 1, part 1 (Domestic Relations; Adoption; General Provisions). Tenn. Code Ann. § 36-1-113(a) (Termination of parental rights) states, “The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 [General provisions] and title 37, chapter 2, part 4 [Foster care].” Under subsection (c), “Termination of parental or guardianship rights must be based upon: (1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) That termination of the parent’s or guardian’s rights is in the best interests of the child.” Under subsection (g),

Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and non-exclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:

...

- (3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:
 - (A) The conditions that led to the child’s removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child’s safe return to the care of the parent(s) or guardian(s), still persist;
 - (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
 - (C) The continuation of the parent or guardian and child relationship greatly diminishes the child’s chances of early integration into a safe, stable and permanent home;
- (4) The parent or guardian has been found to have committed severe child abuse⁴⁵ as defined in

⁴⁵ “Severe child abuse” is defined in Tenn. Code Ann. § 37-1-102(b)(23) (Definitions [effective until June 30, 2012]) as

§ 37-1-102⁴⁶ [Definitions], under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against the child who is the subject of the petition or against any sibling or half-sibling of such child, or any other child residing temporarily or permanently in the home of such parent or guardian;

(5) The parent or guardian has been sentenced to more than two (2) years' imprisonment for conduct against the child who is the subject of the petition, or for conduct against any sibling or half-sibling of the child or any other child residing temporarily or permanently in the home of such parent or guardian, that has been found under any prior order of a court or that is found by the court hearing the petition to be severe child abuse, as defined in § 37-1-102. Unless otherwise stated, for purposes of this subdivision (g)(5), "sentenced" shall not be construed to mean that the parent or guardian must have actually served more than two (2) years in confinement, but shall only be construed to mean that the court had imposed a sentence of two (2) or more years upon the parent or guardian;

(6) The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court;

....

Additionally, parental rights may be terminated for specific crimes. Pursuant to Tenn. Code Ann. § 36-1-113(h)(1)(C) (Termination of parental rights) the Department of Human Services shall file a petition to terminate parental rights, among other reasons,

If a court of competent jurisdiction has made a determination in a criminal or civil proceeding that the parent has committed murder of any sibling or half-sibling of the child who is the subject of the petition or any other child residing temporarily or permanently in the home, committed voluntary manslaughter of another such child, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter of the child that is the subject of the petition or any sibling or half-sibling of the child who is the subject of the petition or any other child residing temporarily or permanently in the home, or committed a felony assault that has resulted in serious bodily injury or severe child abuse as defined at § 37-1-102 to the child that is the subject of the petition or any sibling or half-sibling of the child who is the subject of the petition or any other child residing temporarily or permanently in the home. For the purposes of this subsection (h), such a determination shall be made by a jury or trial court judge designated by § 16-2-502 [Titles of judges] through an explicit finding, or by such equivalent courts of other states or of the United States.

3.6.1 Recommendation: Amend Tenn. Code Ann. § 36-1-113(h)(1)(C) (Termination of parental rights)

(A)(i) The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause serious bodily injury or death and the knowing use of force on a child that is likely to cause serious bodily injury or death;

(ii) "Serious bodily injury" shall have the same meaning given in Section 39-15-402(d).

(B) Specific brutality, abuse or neglect towards a child that in the opinion of qualified experts has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or intellectual disability, or severe impairment of the child's ability to function adequately in the child's environment, and the knowing failure to protect a child from such conduct;

(C) The commission of any act towards the child prohibited by [Aggravated rape; Rape; Aggravated sexual battery], 39-13-522 [Rape of a child], 39-15-302 [Incest], 39-15-402 [Haley's Law—Aggravated child abuse and aggravated child neglect or endangerment—Definitions], and 39-17-1005 [Offense of especially aggravated sexual exploitation of a minor] or the knowing failure to protect the child from the commission of any such act towards the child; or

(D) Knowingly allowing a child to be present within a structure where the act of creating methamphetamine, as that substance is identified in § 39-17-408(d)(2), is occurring.

⁴⁶ The current version of Tenn. Code Ann. § 37-1-102 is only effective until June 30, 2012; however the only portion that will be removed after that date is Tenn. Code Ann. § 37-1-102(b)(4)(G). 2010 Tenn. Pub. Acts 1065.

to include Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude) and § 39-13-515 (Promoting prostitution) when the victim is a minor as crimes for which the department of human services may file a petition to terminate parental rights.

FRAMEWORK ISSUE 4: CRIMINAL PROVISIONS FOR FACILITATORS

Legal Components:

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

Legal Analysis:

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

Tenn. Code Ann. § 39-13-309(a) (Trafficking for sexual servitude) does not include all facilitators as it only applies to a person who “knowingly subjects or maintains another in sexual servitude or knowingly recruits, entices, harbors, transports, provides or obtains by any means another person for the purpose of sexual servitude.” Certain facilitators may be included in this definition of trafficking, such as those who transport victims. However, not all facilitators are covered by this definition. While Tenn. Code Ann. § 39-13-308(a)(2) (Trafficking for forced labor or services) includes other facilitators, it only applies to facilitators of labor trafficking.⁴⁷

However, Tenn. Code Ann. § 39-13-311 (Violations by corporations) states that corporate facilitators can be prosecuted for a violation of Tenn. Code Ann. § 39-13-309 subject to certain conditions. Pursuant to Tenn. Code Ann. § 39-13-311,

A corporation may be prosecuted for a violation of §§ 39-13-308 and 39-13-309 for an act or omission constituting a crime under this part only if an agent of the corporation performs the conduct that is an element of the crime while acting within the scope of the agent’s office or employment and on behalf of the corporation and the commission of the crime was either authorized, requested, commanded, performed or within the scope of the agent’s employment on behalf of the corporation or constituted a pattern of illegal activity that an agent of the company knew or should have known was occurring.

A facilitator could be charged with violating certain CSEC statutes. Tenn. Code Ann. § 39-13-515 (Promoting prostitution) creates a Class E felony for promoting prostitution of a minor. “Promoting prostitution of a minor” is defined as “engaging in any of the activities described in subdivision (4) when one (1) or more of the persons

⁴⁷ Tenn. Code Ann. § 39-13-308(a)(2) (Trafficking for forced labor or services) makes it a crime if a person “[b]enefits, financially or by receiving anything of value, from participation in a venture that has engaged in an act described in § 39-13-307[Involuntary labor servitude].” Tenn. Code Ann. §39-13-307(a) relates to “forced labor or services” where “labor” is defined as “work of economic or financial value” and “services” is defined as “an ongoing relationship between a person and the defendant in which the person performs activities under the supervision of or for the defendant.” Tenn. Code Ann. §§ 39-13-301(7), (10), 39-13-307(a).

engaged in prostitution is less than eighteen (18) years of age or has an intellectual disability.” Tenn. Code Ann. § 39-13-512(5). Pursuant to Tenn. Code Ann. § 39-13-512(4) (Prostitution—Definitions), “promoting prostitution” is defined as

- (A) Owning, controlling, managing, supervising, or in any way keeping, alone or in association with others, a business for the purpose of engaging in prostitution, or a house of prostitution;
- (B) Procuring an inmate for a house of prostitution;
- (C) Encouraging, inducing, or otherwise purposely causing another to become a prostitute;
- (D) Soliciting a person to patronize a prostitute;
- (E) Procuring a prostitute for a patron; or
- (F) Soliciting, receiving, or agreeing to receive any benefit for engaging in any of the activities defined in subdivisions (4)(A)–(E).

Additionally, a facilitator could be found guilty of money laundering pursuant to Tenn. Code Ann. § 39-14-903. Tenn. Code Ann. § 39-14-903(b)(1) states, “It is an offense to knowingly use proceeds⁴⁸ derived directly or indirectly from a specified unlawful activity⁴⁹ with the intent to promote, in whole or in part, the carrying on of a specified unlawful activity.” A violation of this statute constitutes a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-14-903 (b)(2), 40-35-111(b)(2).

- 4.1.1 Recommendation: Amend Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude) to include those who knowingly benefit financially from domestic minor sex trafficking, similar to the manner in which Tenn. Code Ann. § 39-13-308 (Trafficking for forced labor or services) criminalizes the facilitation of labor trafficking.

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.*

For those facilitators charged with Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude), the facilitator would be subject to fines, restitution and asset forfeiture. Tenn. Code Ann. § 39-13-309(b) is a Class B felony punishable by a possible fine not to exceed \$25,000. Tenn. Code Ann. § 40-35-111(b)(2). Tenn. Code Ann. § 39-13-515 (Promoting prostitution) is a Class E felony, punishable by a possible fine not to exceed \$3,000. Tenn. Code Ann. §§ 39-13-515, 40-35-111(b)(5).

Pursuant to Tenn. Code Ann. § 39-11-703(c) (Criminal proceeds subject to forfeiture), vehicles, money, property and computers used or intended to be used and everything of value furnished or intended to be furnished in commission of Tenn. Code Ann. § 39-13-309 may be forfeited to the state. A violation of Tenn. Code Ann. § 39-13-515 (Promoting prostitution) could also subject the offender to asset forfeiture under Tenn. Code Ann. § 39-11-703(a), (b) (Criminal proceeds subject to forfeiture), which states that

- (a) Any property, real or personal, directly or indirectly acquired by or received in violation of any statute or as an inducement to violate any statute, or any property traceable to the proceeds from the violation, is subject to judicial forfeiture, and all right, title, and interest in any such property shall vest in the state upon commission of the act giving rise to forfeiture.
- (b) Any real property, including any right, title and interest in the whole of or any part of any lot or tract of land and any property used as an instrumentality in or used in furtherance of a violation of the following laws shall be subject to judicial forfeiture:

...

⁴⁸ See *supra* note 30.

⁴⁹ See *supra* note 31.

(2) The commission of three (3) or more acts occurring on three (3) or more separate days within a sixty-day period, and each act results in a conviction for promoting prostitution under chapter 13, part 5 of this title.

Additionally, a facilitator could lose any conveyance used in committing certain crimes. Pursuant to Tenn. Code Ann. § 40-33-101 (Conveyances subject to forfeiture), “Any conveyance, including a vehicle, aircraft or vessel used in the commission of an offense under title 39, chapter 13, part 5 [Sexual offenses including Tenn. Code Ann. § 39-13-515 (Promoting prostitution)] . . . where there is a final judgment of conviction is, in the discretion of the court, subject to forfeiture” subject to some exceptions.

A facilitator could be convicted of racketeering and thus be subject to asset forfeiture. Pursuant to Tenn. Code Ann. § 39-12-204(b) (Unlawful activities), “It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, an interest in or control of any enterprise⁵⁰ of real or personal property.” Additionally, pursuant to Tenn. Code Ann. § 39-12-204(c), “It is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity or the collection of any unlawful debt.” A “pattern of racketeering activity” is defined as “engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided, that at least one (1) of such incidents occurred after July 1, 1986, . . . that the last of the incidents occurred within two (2) years after a prior incident of racketeering conduct.” Tenn. Code Ann. § 39-12-203(6). “Racketeering activity” is defined as “to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain that is a criminal offense involving . . . aggravated sexual exploitation of a minor or especially aggravated sexual exploitation of a minor under §§ 39-17-1004(b)(1)(A) and 39-17-1005(a)(1).” Tenn. Code Ann. § 39-12-203(9). If convicted of racketeering, pursuant to Tenn. Code Ann. § 39-12-206(b) (Civil proceedings—Injunctions—Forfeiture of property—Future criminal actions—Statute of limitations) a trafficker will forfeit to the state, “[a]ll property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of a provision of this part”

Pursuant to Tenn. Code Ann. § 29-3-101(b), (c) (Definitions—Maintenance and abatement of nuisance—Forfeiture of property—Payment of moneys from forfeiture into general funds),

(b) Any person who uses, occupies, establishes or conducts a nuisance,⁵¹ or aids or abets therein, and the owner, agent or lessee of any interest in any such nuisance, together with the persons employed in or in control of any such nuisance by any such owner, agent or lessee, is guilty of maintaining a nuisance and such nuisance shall be abated as provided hereinafter.

(c) All motor vehicles, furnishings, fixtures, equipment, moneys and stock, used in or in connection with the maintaining or conducting of a nuisance, are subject to seizure, immediately upon detection by any law enforcement officer and are subject to forfeiture to the state

Tenn. Code Ann. § 29-3-101(e) further states,

(1) Upon a person’s second or subsequent conviction for promoting prostitution or patronizing prostitution, any vehicle in which such offense was committed is subject to seizure and forfeiture in

⁵⁰ See *supra* note 32.

⁵¹ The definition of “nuisance” includes “[a]ny place in or upon which lewdness, prostitution, promotion of prostitution, patronizing prostitution, . . . any sale, exhibition or possession of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver or distribute . . . are carried on or permitted” Tenn. Code Ann. § 29-3-101(a)(2)(A).

accordance with the procedure established in title 39, chapter 11, part 7; provided, however, that nothing contained within the provisions of this subsection (e) shall be construed to authorize seizure of such vehicle at any time prior to such conviction.

(2) The provisions of subdivision (e)(1) apply only if the violations making the vehicle subject to seizure and forfeiture occur in Tennessee and at least one (1) of the previous violations occurs on or after July 1, 2002, and the second or subsequent offense after July 1, 2002, occurs within five (5) years of the most recent prior offense occurring after July 1, 2002.

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

There is no specific provision in the Tennessee code prohibiting child sex tourism.

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

4.4 *Promoting and selling child pornography is illegal.*

Pursuant to Tenn. Code Ann. § 39-17-1004(a)(1), (Offense of aggravated sexual exploitation of a minor), “(a)(1) It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material, or possess with the intent to promote, sell, distribute, transport, purchase or exchange material, that includes a minor engaged in: (A) Sexual activity;⁵² or (B) Simulated sexual activity that is patently offensive.”⁵³ Under subsection (b)(1), “It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material that is obscene, as defined in § 39-17-901,⁵⁴ or possess material that is obscene, with the intent to promote, sell, distribute, transport, purchase or exchange the material, which includes a minor engaged in: (A) Sexual activity; or (B) Simulated sexual activity that is patently offensive.”

Violating either subsection is a Class C felony and the individual can be charged on individual counts for each image. Tenn. Code Ann. § 39-17-1004(a)(2), (4), (b)(2), (4). Class C felonies are punishable by imprisonment for 3–15 years and a possible fine not to exceed \$10,000. Tenn. Code Ann. § 40-35-111(b)(3). However, if the number of individual images is greater than 25, the crime is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 1004(a)(4), (b)(4), 40-35-111(b)(2).

Additionally, Tenn. Code Ann. § 39-17-1005(a), (d) (Offense of especially aggravated sexual exploitation of a minor) makes it a Class B felony “for a person to knowingly promote, employ, use, assist, transport or permit a minor to participate in the performance of, or in the production of, acts or material that includes the minor engaging in: (1) Sexual activity; or (2) Simulated sexual activity that is patently offensive.” The crime is punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. § 40-35-111(b)(2). A person may be separately charged “for each individual performance, image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation.” Tenn. Code Ann. § 39-17-1005(b).

⁵² See *supra* note 4.

⁵³ See *supra* note 5.

⁵⁴ See *supra* note 23.

Legal Components:

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

Legal Analysis:

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

Pursuant to Tenn. Code Ann. § 29-13-102(12) (Definitions) within the Criminal Injuries Compensation provisions, a "victim" is defined as "a person who suffers personal injury or death as a direct and proximate result of any act of a person which is within the description of any of the offenses specified in § 29-13-104 [Offenses to which compensation applies]."⁵⁵

Additionally, for the purposes of civil action, pursuant to Tenn. Code Ann. § 29-13-402(4)(A) (Definitions), for the purpose of part 4 of title 29 (Victims' Compensation from the Proceeds of Crime), a "victim" is defined as including "[a] person, not an accomplice of the defendant, who suffers a specific physical, mental, or pecuniary injury as a direct result of a crime."

- 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.*

Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude), § 39-13-515 (Promoting prostitution), § 39-13-514 (Patronizing prostitution), § 39-17-1005 (Offense of especially aggravated sexual exploitation of a minor),

⁵⁵ Pursuant to Tenn. Code Ann. § 29-13-104(1), compensation can be paid, with some exceptions, for injury or death that was caused by "[a]n act committed in this state, which if committed by a mentally competent, criminally responsible adult, would constitute a crime under state or federal law"

and § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) do not refer to a defense based on consent of the minor to the commercial sex act. However, the code does not specifically prohibit a defendant from raising such a defense.

5.2.1 Recommendation: Add a provision that specifically prohibits a consent defense for CSEC offenses, such as human trafficking and prostitution when the victim is a minor.

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

As of 2011, minors under 18 are immune from being charged with Tenn. Code Ann. § 39-13-513 (Prostitution). Senate Bill 64, which was passed by the Tennessee legislature and approved by the Governor, amended Tenn. Code Ann. § 39-13-513 to create a new section which states,

Notwithstanding any provision of this section to the contrary, if it is determined after a reasonable detention for investigative purposes, that a person suspected of or charged with a violation of this section is under eighteen (18) years of age, that person shall be immune from prosecution for prostitution as a juvenile or adult. A law enforcement officer who takes a person under eighteen (18) years of age into custody for a suspected violation of this section shall, upon determination that the person is a minor, provide the minor with the telephone number for the National Human Trafficking Resource Center hotline and release the minor to the custody of a parent or legal guardian.

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.*

Since minors in Tennessee are not subject to prosecution for Tenn. Code Ann. § 39-13-513 (Prostitution), a prostituted minor will not be considered a delinquent child. A “delinquent child” is “a child who has committed a delinquent act and is in need of treatment or rehabilitation.” Tenn. Code Ann. § 37-1-102(b)(10).⁵⁶ A “delinquent act” is defined in part as “an act designated a crime under the law, including local ordinances of this state, or of another state if the act occurred in that state, or under federal law, and the crime is not a status offense under subdivision (b)(25)(A)(iii) [definition of severe child abuse]” Tenn. Code Ann. § 37-1-102(b)(9).

A domestic minor sex trafficking victim could be classified as a “dependent and neglected child.” Pursuant to Tenn. Code Ann. § 37-1-102(b)(12) (Definitions [effective until June 30, 2012]), a “dependent and neglected child” includes a child who is subject to any of the following situations:

(B) Whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child;

...

(E) Who, because of lack of proper supervision, is found in any place the existence of which is in violation of law;

(F) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others;

(G) Who is suffering from abuse⁵⁷ or neglect;

(H) Who has been in the care and control of one (1) or more agency or person not related to such child by blood or marriage for a continuous period of six (6) months or longer in the absence of a power of

⁵⁶ The current version of Tenn. Code Ann. § 37-1-102 is only effective until June 30, 2012; however the only portion that will be removed after that date is Tenn. Code Ann. § 37-1-102(b)(4)(G). 2010 Tenn. Pub. Acts 1065.

⁵⁷ Pursuant to Tenn. Code Ann. § 37-1-102(b)(1) (Definitions), “‘Abuse’ exists when a person under the age of eighteen (18) is suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions of a parent, relative, guardian or caretaker.”

attorney or court order, and such person or agency has not initiated judicial proceedings seeking either legal custody or adoption of the child;

(I) Who is or has been allowed, encouraged or permitted to engage in prostitution or obscene or pornographic photographing, filming, posing, or similar activity and whose parent, guardian or other custodian neglects or refuses to protect such child from further such activity; . . .

. . . .

Additionally, pursuant to Tenn. Code Ann. § 37-1-102(b)(23)(A) (Definitions), a domestic minor sex trafficking victim could be classified as an “unruly child,” which is a child who is,

(i) Habitually and without justification is truant from school while subject to compulsory school attendance under § 49-6-3007 [Attendance and truancy reports–Enforcement of compulsory attendance];

(ii) Habitually is disobedient of the reasonable and lawful commands of the child’s parent(s), guardian or other legal custodian to the degree that such child’s health and safety are endangered;

(iii) Commits an offense that is applicable only to a child; or

(iv) Is away from the home, residence or any other residential placement of the child’s parent(s), guardian or other legal custodian without their consent. Such child shall be known and defined as a “runaway.”

Under Tenn. Code Ann. § 37-1-113(a) (Taking into custody—Grounds), which is codified in part 1 of the chapter, a minor may be taken into custody under the following circumstances:

(1) Pursuant to an order of the court under this part;

(2) Pursuant to the laws of arrest;

(3) By a law enforcement officer, social worker of the department of human services, or duly authorized officer of the court, if there are reasonable grounds to believe that the conditions specified in § 37-1-114(a)(2) [Detention or shelter care of child prior to hearing on petition] exist; or

(4) By a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that the child has run away from the child’s parents, guardian or other custodian.

Thus, if the law enforcement officer has “reasonable grounds to believe” that the child is “a neglected, dependent or abused child,” then the law enforcement officer may take the child into custody. Tenn. Code Ann. §§ 37-1-113(a)(3), 37-1-114(a)(2). Pursuant to Tenn. Code Ann. § 37-1-102(b)(12)(I) (Definitions), a “dependent and neglected child” includes a child “[w]ho is or has been allowed, encouraged or permitted to engage in prostitution or obscene or pornographic photographing, filming, posing, or similar activity and whose parent, guardian or other custodian neglects or refuses to protect such child from further such activity.”

Pursuant to Tenn. Code Ann. § 37-1-114(a),

(a) A child taken into custody shall not be detained or placed in shelter care prior to the hearing on the petition unless there is probable cause to believe that the child:

(1) Has committed the delinquent or unruly act with which the child is charged; or

(2) Is a neglected, dependent or abused child, and in either case the child’s detention or shelter care is required because the child is subject to an immediate threat to the child’s health or safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm, or the child may abscond or be removed from the jurisdiction of the court, and in either case, there is no less drastic alternative to removal of the child from the custody of the child’s parent, guardian or legal custodian available that would reasonably and adequately protect the child’s health or safety or prevent the child’s removal from the jurisdiction of the court pending a hearing.

An allegedly unruly child may not be detained more than 24 hours, “excluding nonjudicial days unless there has been a detention hearing and a judicial determination that there is probable cause to believe the child has violated a valid court order, and in no event shall such a child be detained for more than seventy-two (72) hours exclusive of nonjudicial days prior to an adjudicatory hearing.” Tenn. Code Ann. § 37-1-114(b). However, pursuant to subsection (b), “Nothing herein prohibits the court from ordering the placement of children in shelter care where appropriate, and such placement shall not be considered detention within the meaning of this section.”

If an abused or neglected child is taken into custody under Tenn. Code Ann. § 37-1-113(a)(3) before a petition is filed, “a petition under § 37-1-120 shall be filed as soon as possible but in no event later than two (2) days after the child is taken into custody excluding Saturdays, Sundays and legal holidays.” Tenn. Code Ann. § 37-1-115(a)(2).

Pursuant to Tenn. Code Ann. § 37-1-116(a), (Place of detention—Escape or attempted escape—Shelter Care), an allegedly unruly or dependent child may be placed in

- (1) A licensed foster home or a home approved by the court;
 - (2) A facility operated by a licensed child care agency;
 - (3) A detention home or center for delinquent children that is under the direction or supervision of the court or other public authority or of a private agency approved by the court; or
 - (4) Subject to subsection (e), any other suitable place or facility designated or operated by the court.
- The child may be detained in a jail or other facility for the detention of adults only if:
- (A) Other facilities in subdivision (a)(3) are not available;
 - (B) The detention is in a room separate and removed from those for adults; and
 - (C) It appears to the satisfaction of the court that public safety and protection reasonably require detention, and it so orders.

However, “A child alleged to be dependent or neglected may be detained or placed in shelter care only in the facilities stated in subdivisions (a)(1), (2) and (4), and shall not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses or of children alleged to be delinquent.” Tenn. Code Ann. § 37-1-116(d).

Despite these provisions, in certain circumstances outlined in Tenn. Code Ann. § 37-1-116(h) (Place of detention—Escape or attempted escape—Shelter care), a domestic minor sex trafficking victim who is not identified as dependent or neglected may be detained in an adult jail for up to 48 hours if

- (1) The juvenile is accused of a serious crime against persons, including criminal homicide, forcible rape, mayhem, kidnapping, aggravated assault, robbery and extortion accompanied by threats of violence;
- (2) The county has a low population density not to exceed thirty-five (35) persons per square mile;
- (3) The facility and program have received prior certification by the Tennessee corrections institute as providing detention and treatment with total sight and sound separation from adult detainees and prisoners, including no access by trustees;
- (4) There is no juvenile court or other public authority, or private agency as provided in subsection (f), able and willing to contract for the placement of the juvenile; and
- (5) A determination is made that there is no existing acceptable alternative placement available for the juvenile.

If after a hearing, a child is found dependent or neglected, then pursuant to Tenn. Code Ann. § 37-1-130(a) (Dependent or neglected child—Disposition), the child may be allowed to remain in the custody of the parents, guardian, or other custodian, subject to the court’s conditions, or temporary custody may be transferred to a person “qualified to receive and care for the child,” the department of children’s services, “[a]n agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child,” or “[a]n individual

in another state with or without supervision by an appropriate officer under § 37-1-142 [Nonresident child—Transfer from another state].” Moreover, pursuant to Tenn. Code Ann. § 37-1-130(d),

No child who has been found to be a victim of severe child abuse shall be returned to the custody or residence of any person who engaged in or knowingly failed to protect the child from the brutality or abuse unless the court finds on the basis of clear and convincing evidence that the child will be provided a safe home free from further such brutality and abuse. . . .

When a child is determined to be an unruly child then the court may, among other dispositions, place the child in any of the same dispositions as a dependent or neglected child, place the child on probation, order community service, or assess a fine. Tenn. Code Ann. §§ 37-1-132(a), 37-1-131(a). If an unruly child is removed from the home, then the child must be placed in the “least drastic or restrictive alternative.” Tenn. Code Ann. § 37-1-132(b)(1).

Law enforcement agencies also have certain reporting duties related to domestic minor sex trafficking. Pursuant to Tenn. Code Ann. § 37-1-403 (Reporting of brutality, abuse, neglect or child sexual abuse—Notification to parents of abuse on school grounds or under school supervision—Confidentiality of records),

(a) (1) Any person who has knowledge of or is called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition shall report such harm immediately if the harm is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect or that, on the basis of available information, reasonably appears to have been caused by brutality, abuse or neglect.

....

(3) If any such person knows or has reasonable cause to suspect that a child has been sexually abused, the person shall report such information in accordance with § 37-1-605 [Reports of known or suspected child sexual abuse—Investigations—Notification to parents of abuse on school grounds or while under school supervision—Confidentiality of records], relative to the sexual abuse of children, regardless of whether such person knows or believes that the child has sustained any apparent injury as a result of such abuse.

....

(c) (1) If a law enforcement official or judge becomes aware of known or suspected child abuse, through personal knowledge, receipt of a report, or otherwise, such information shall be reported to the department immediately upon the receipt of such information, and, where appropriate, the child protective team shall be notified to investigate the report for the protection of the child in accordance with the provisions of this part. Further criminal investigation by such official shall be appropriately conducted in coordination with the team or department to the maximum extent possible.

....

(3) (A) If the department receives information containing references to alleged human trafficking or child pornography which does or does not result in an investigation by the department, the department shall notify the appropriate law enforcement agency immediately upon receipt of such information.
(B) If the department initiates an investigation of severe child abuse, including, but not limited to, child sexual abuse, the department shall notify the appropriate local law enforcement agency immediately upon assignment of such case to a department child protective services worker.
(C) Both the department and law enforcement shall maintain a log of all such reports of such information received and confirmation that the information was sent to the appropriate party, pursuant to this subdivision (c)(3).

Childhood sexual abuse victims,⁵⁸ including victims of commercial sexual exploitation under 13 years of age, may also be referred to a child protective response team for investigation. Tenn. Code Ann. §§ 37-1-602(a)(3)(C)(vi), 37-1-605(b)(2). Pursuant to Tenn. Code Ann. § 37-1-605(b)(2) (Reports of known or suspected child sexual abuse—Investigations—Notification to parents of abuse on school grounds or while under school supervision—Confidentiality of records), “If a law enforcement official or judge becomes aware of known or suspected child sexual abuse, through personal knowledge, receipt of a report or otherwise, such information shall be reported to the department immediately and the child protective team shall be notified to investigate the report for the protection of the child in accordance with the provisions of this part [Child Sexual Abuse].” The child protective investigation team must conduct an “on-site child protective investigation.” Tenn. Code Ann. § 37-1-607(b)(2)(A).

5.4.1 Recommendation: Establish a mandatory response law that directs any minor involved in prostitution or who is a victim of trafficking for sexual servitude away from the criminal justice system and into a protective system.

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

Commercial sexual exploitation is identified as a type of abuse and neglect in Tennessee. Pursuant to Tenn. Code Ann. § 37-1-102(12)(I) (Definitions), for purposes of the “Juvenile Courts and Proceedings” chapter, which includes the dependent and neglected children provisions, a “dependent and neglected child” includes a child “[w]ho is or has been allowed, encouraged or permitted to engage in prostitution or obscene or pornographic photographing, filming, posing, or similar activity and whose parent, guardian or other custodian neglects or refuses to protect such child from further such activity.”

Additionally, “severe child abuse” is defined as including “[t]he commission of any act towards the child prohibited by §§ 39-13-502–39-13-504 [Aggravated rape; Rape; Aggravated sexual battery], 39-13-522 [Rape of a child], 39-15-302 [Incest], 39-15-402 [Haley’s Law—Aggravated child abuse and aggravated child neglect or endangerment—Definitions], and 39-17-1005 [Offense of especially aggravated sexual exploitation of a minor] or the knowing failure to protect the child from the commission of any such act towards the child” Tenn. Code Ann. § 37-1-102(b)(23)(C).

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

Tenn. Code Ann. § 37-1-102(b)(7) (Definitions) defines “custodian” for purposes of the “Juvenile Courts and Proceedings” chapter, which includes the dependent and neglected children provisions (“unless the context otherwise requires”), as “a person, other than a parent or legal guardian, who stands in loco parentis to the child or a person to whom temporary legal custody of the child has been given by order of a court.”

⁵⁸ “Child sexual abuse” is defined to include “The sexual exploitation of a child, which includes allowing, encouraging, or forcing a child to: (a) Solicit for or engage in prostitution; or (b) Engage in an act prohibited by § 39-17-1003 [Offense of sexual exploitation of a minor].” Tenn. Code Ann. § 37-1-602(3)(C)(vi). Though Tenn. Code Ann. § 37-1-602(a)(3)(C) (Part definitions—Harm to child’s health or welfare) does not specify an age, other portions of the statute define “child sexual abuse” as limited to children under 13. Tenn. Code Ann. § 37-1-602(a)(3)(A), (B). Furthermore, Tenn. Code Ann. § 37-1-602(a)(3)(D) states “For the purposes of the reporting, investigation, and treatment provisions of §§ 37-1-603–37-1-615 ‘child sexual abuse’ also means the commission of any act specified in subdivisions (a)(3)(A)–(C) against a child thirteen (13) years of age through seventeen (17) years of age if such act is committed against the child by a parent, guardian, relative, person residing in the child’s home, or other person responsible for the care and custody of the child,” creating the same assumption that the child must be under 13 for purposes of Tenn. Code Ann. § 37-1-603(a)(3)(C).

5.6.1 Recommendation: Clarify that child protection laws reach traffickers by amending the definition of “custodian” to include a person who physically possesses or controls a child.

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

Pursuant to Tenn. Code Ann. § 29-13-102(12) (Definitions), a “victim” is defined as “a person who suffers personal injury or death as a direct and proximate result of any act of a person which is within the description of any of the offenses specified in § 29-13-104 [Offenses to which compensation applies].” Domestic minor sex trafficking victims are considered to be victims of offenses for which compensation applies, because offenses allowing for claims include, with some exceptions, “[a]n act committed in this state, which, if committed by a mentally competent, criminally responsible adult, would constitute a crime under state or federal law” Tenn. Code Ann. § 29-13-104(1).

Compensation is not allowed for “any personal injury or loss alleged to have been incurred as a result of pain and suffering, except for victims of the crime of rape and victims of crime involving sexual deviancy, including minors who are victims of the crimes contained in the provisions of §§ 39-13-502–39-13-505 [Aggravated rape; Rape; Aggravated sexual battery; Sexual battery], 39-12-101 [Criminal attempt], 39-13-522 [Rape of a child], 39-15-302 [Incest], 39-17-902 [Producing, importing, preparing, distributing, processing or appearing in obscene material or exhibition], 39-17-1003–39-17-1005 [Offense of sexual exploitation of a minor; Offense of aggravated sexual exploitation of a minor; Offense of especially aggravated sexual exploitation of a minor], and/or any attempt, conspiracy or solicitation to commit such offenses.” Tenn. Code Ann. § 29-13-106(c). This statute could be a barrier to compensation for victims of crimes stated in Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude), Tenn. Code Ann. § 39-13-515 (Promoting prostitution), or Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) from recovering for pain and suffering.

Nonetheless, eligible compensation includes “[i]n the case of a sexually-oriented crime committed against a victim who is under eighteen (18) years of age, where the compensation is for unreimbursed or unreimbursable mental health counseling or treatment made necessary by the sexually-oriented crime, any sibling or non-offending custodial parent of the victim, or both.” Tenn. Code Ann. § 29-13-105(a)(6) (Persons eligible for compensation).

Pursuant to Tenn. Code Ann. § 29-13-108(a) (Claims for compensation–Procedure),

(a) A claim for compensation shall be filed not later than one (1) year after the occurrence of the crime upon which the claim is based or one (1) year after the death of the victim or one (1) year after any mental or physical manifestation or injury is diagnosed as a result of an act committed against a minor that would constitute a criminal offense under the provisions of §§ 39-12-101 [Criminal attempt], 39-13-502–39-13-505 [Aggravated rape; Rape; Aggravated sexual battery; Sexual battery], 39-13-522 [Rape of a child], 39-15-302 [Incest], . . . 39-17-1003–39-17-1005 [Offense of sexual exploitation of a minor; Offense of aggravated sexual exploitation of a minor; Offense of especially aggravated sexual exploitation of a minor], and/or any attempt, conspiracy or solicitation to commit such offenses; provided, that upon good cause shown, the time period for filing such claim may be extended either before or after the expiration of the filing period. No claim shall be filed until the crime upon which the claim is based shall have been reported by the victim, or a member of the victim’s family, to the proper authorities; and in no case may an award be made where the law enforcement records show that such report was made more than forty-eight (48) hours after the occurrence of such crime unless, for good cause shown, it is found that the delay was justified. Failure of the victim to report a crime because:

- (1) The victim is physically unable;
- (2) The victim is a victim of sexual assault; or

- (3) The victim is a victim of domestic abuse;
may all constitute good cause.

Lastly, for a victim to receive compensation, it must be proven that the victim “fully cooperated with the police and the district attorney general in the investigation and prosecution of the offender.” Tenn. Code Ann. § 29-13-103(a)(4).

- 5.7.1 Recommendation: Amend Tenn. Code Ann. § 29-13-108 (Claims for compensation—Procedure) and § 29-13-105(b) (Persons eligible for compensation) to stipulate an exception to the listed ineligibility criteria for minor victims of Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude), § 39-13-514 (Patronizing prostitution), § 39-13-515 (Promoting prostitution), § 39-13-529 (Offense of especially aggravated sexual exploitation of a minor), § 39-17-1004 (Offense of aggravated sexual exploitation of a minor), and § 39-17-1005 (Offense of especially aggravated sexual exploitation of a minor) in recognition of the challenges these victims face through trauma-bonding, denial, and delayed disclosure. Amend Tenn. Code Ann. § 29-13-103(a)(4) to create a good cause exception for victims of the crimes listed above.

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

The court may order a child’s testimony to be taken by closed circuit television if the judge makes the necessary findings, the child is 13 or younger at the time of the offense, and the child is a victim of any of the enumerated offenses. Tenn. Code Ann. § 24-7-120(a), (e). Pursuant to Tenn. Code Ann. § 24-7-120(e) (Child’s testimony—Closed circuit television),

The offenses to which the provisions of this section apply are:

- (1) Aggravated sexual battery, as defined in § 39-13-504;
- (2) Rape of a child, as defined in § 39-13-522;
- (3) Incest, as defined in § 39-15-302;
- (4) Aggravated child abuse, as defined in § 39-15-402;
- (5) Kidnapping, as defined in § 39-13-303;
- (6) Aggravated kidnapping, as defined in § 39-13-304;
- (7) Especially aggravated kidnapping, as defined in § 39-13-305; and
- (8) Criminal attempt, as defined in § 39-12-101, to commit any of the offenses enumerated within this section.

However, pursuant to Tenn. Code Ann. § 24-7-123(a) (Admission of video recording of interview of child describing sexual conduct), “[A] video recording of an interview of a child by a forensic interviewer containing a statement made by the child under thirteen (13) years of age describing any act of sexual contact performed with or on the child by another is admissible and may be considered for its bearing on any matter to which it is relevant in evidence at the trial of the person for any offense arising from the sexual contact if the requirements of this section are met.” One of the requirements is that the child will have to “testif[y], under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination.” Tenn. Code Ann. § 24-7-123(b)(1).

Tenn. R. Evid. Rule 412 (Sex offense cases; relevance of victim’s sexual behavior) prevents the admission into evidence of reputation or opinion evidence of the victim’s sexual behavior, unless certain procedures are followed. Tenn. R. Evid. 412(a), (b). Rule 412 also excludes evidence of specific instances of a victim’s sexual behavior unless it relates to certain issues, such as consent or to show a person other than the defendant committed the crime. Tenn. R. Evid. 412 (a), (c). Rule 412, however, does not apply to domestic minor sex trafficking cases. Tenn. R. Evid. Rule 412 only applies at

a criminal trial, preliminary hearing, deposition, or other proceeding in which a person is accused of an offense under Tenn. Code Ann. §§ 39-13-502 [aggravated rape], 39-13-503 [rape], 39-13-504 [aggravated sexual battery], 39-13-505 [sexual battery], 39-13-507 [spousal sexual offenses], 39-13-522 [rape of a child], 39-15-302 [incest], 39-13-506 [statutory rape], 39-13-527 [sexual battery by an authority figure], 39-13-528 [solicitation of minors for sexual acts], or the attempt to commit any such offense

“Child sexual abuse” victims are entitled to a guardian ad litem who will “represent the child in any child sexual abuse civil or juvenile judicial proceeding and in general sessions or criminal court at the discretion of the court.” Tenn. Code Ann. § 37-1-610(a). Domestic minor sex trafficking victims are entitled to this guardian ad litem since the definition of “child sexual abuse” includes “[t]he sexual exploitation of a child, which includes allowing, encouraging, or forcing a child to: (a) Solicit for or engage in prostitution; or (b) Engage in an act prohibited by § 39-17-1003 [Offense of sexual exploitation of a minor].” Tenn. Code Ann. § 37-1-602(a)(3)(C)(vi).

One victim-friendly criminal justice procedure that extends to all victims is the availability of a crime victim advocate. Tenn. Code Ann. § 40-38-115. Pursuant to Tenn. Code Ann. § 40-38-115(a) (Crime victim advocate), “Any victim of crime may have a crime victim advocate from a crime assistance program or a victim-witness coordinator as provided for in § 8-7-206 present at any defense interviews with the victim. . . . The role of the crime victim advocate or victim-witness coordinator is to provide emotional support to the victim.”

- 5.8.1 Recommendation: Amend Tenn. Code Ann. § 24-7-120 (Child’s testimony—closed circuit television) to permit the use of closed circuit television testimony for domestic minor sex trafficking victims under 18, where the requirements of the statute are met, in any proceeding related to the prosecution of their offender in order to encourage testimony by reducing the trauma of facing the trafficker or buyer in court.
- 5.8.2 Recommendation: Amend Tenn. R. Evid. Rule 412(a), (b), (c) (Sex offense cases; relevance of victim’s sexual behavior) to include Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude), § 39-13-514 (Patronizing prostitution), § 39-13-515 (Promoting prostitution), § 39-13-529 (Offense of especially aggravated sexual exploitation of a minor), § 39-17-1004 (Offense of aggravated sexual exploitation of a minor), and § 39-17-1005 (Offense of especially aggravated sexual exploitation of a minor) as offenses that trigger the protection of testifying victims, when the victims are minors, from traumatizing cross-examination related to their sexual history.

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.*

Expungement is available to juveniles in Tennessee upon petition to the juvenile court. Tenn. Code Ann. § 37-1-153(f)(1). Pursuant to Tenn. Code Ann. § 37-1-153(f) (Court files and records—Inspection limited—Exceptions for certain violent offenders—Confidentiality),

(1) Notwithstanding the provisions of any law to the contrary, any person who is tried and adjudicated delinquent by a juvenile court may subsequently petition the juvenile court for expunction of all court files and records. The court may order all or any portion of the requested expunction if, by clear and convincing evidence, the court finds that the petitioner:

- (A) (i) Is currently eighteen (18) years of age or older;
 - (ii) Is at least one (1) year removed from the person’s most recent delinquency adjudication;
- and

(iii) Has never been convicted of a criminal offense as an adult, has never been convicted of a criminal offense following transfer from juvenile court pursuant to § 37-1-134 [Transfer from juvenile court], and has never been convicted of a sexual offense as defined in § 40-39-202 [Part definitions], whether in juvenile court, following transfer from juvenile court pursuant to § 37-1-134, or as an adult;

(iv) Does not have an adjudication of delinquency for a violent juvenile sexual offense as defined in Section 40-39-202(28).

(B) Has maintained a consistent and exemplary pattern of responsible, productive and civic-minded conduct for one (1) or more years immediately preceding the filing of the expunction petition; or

(C) The juvenile has made such an adjustment of circumstances that the court, in its discretion, believes that expunction serves the best interest of the child and the community.

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

Tennessee allows courts to order restitution to victims of crime. Tenn. Code Ann. §§ 39-11-118, 40-35-104(c)(2), 40-35-304. Tenn. Code Ann. § 39-11-118 (Restitution to victims of crime) states,

In addition to the punishment authorized by the specific statute prohibiting the conduct, it is a part of the punishment for any offense committed in this state that the person committing the offense may be sentenced by the court to pay restitution to the victim or victims of the offense in accordance with the provisions of §§ 40-35-104(c)(2) [Sentencing alternatives] and 40-35-304 [Restitution as condition for probation—Petition to modify—Civil judgment for non-payment—Procedure].

Additionally, when a victim “not an accomplice of the defendant . . . suffers a specific physical, mental, or pecuniary injury as a direct result of a crime,” the victim may bring a civil action for compensation. Tenn. Code Ann. § 29-13-402(4)(A). Pursuant to Tenn. Code Ann. § 29-13-403(a)(1) (Defendant’s income—Collection—Deposit), “The attorney general and reporter shall collect all income, from whatever source derived, which is owing to the defendant, or representative or assignee of the defendant, after the date of the crime.” Then, this money is to be placed in an interest bearing account payable to crime victims. Tenn. Code Ann. § 29-13-403(b). However, a crime victim may only receive money from this account if the victim “brings a civil action in a court of competent jurisdiction for money damages against the defendant within three (3) years from the date of the crime, subject to § 29-13-404.” Tenn. Code Ann. § 29-13-403(b).

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

While the criminal statute of limitations for the commission of certain sexual offenses against a child is tolled, the statute of limitations is not tolled for cases of domestic minor sex trafficking. Pursuant to Tenn. Code Ann. § 40-2-101(h), (i) (Felonies),

(h) A person may be prosecuted, tried and punished for any offense committed against a child on or after June 20, 2006, that constitutes a criminal offense under the provisions of §§ 39-13-502–39-13-505 [Aggravated rape; Rape; Aggravated sexual battery; Sexual battery], § 39-13-522 [Rape of a child], § 39-13-527 [Sexual battery by authority figure] or § 39-15-302 [Incest], no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.

(i) A person may be prosecuted, tried and punished for any offense committed against a child on or after July 1, 2007, that constitutes a criminal offense under the provisions of § 39-13-531 [Aggravated rape of a child] or § 39-13-532 [Statutory rape by an authority figure], no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.

For civil actions under Tenn. Code Ann. § 29-13-403 (Defendant’s income—Collection—Deposit) a three-year statute of limitation exists, but it is tolled until “[a]n escrow account has been established for the benefit of the defendant’s victims.” Tenn. Code Ann. § 29-13-404(2). Additionally, the right to bring a civil action by an individual under 18 is tolled until the minor reaches 18. Tenn. Code Ann. § 28-1-106. Then, pursuant to Tenn. Code Ann. § 28-1-106 (Persons under disability on accrual of right), the individual may bring the action “after legal rights are restored [of minority], within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from the restoration of legal rights.”

- 5.11.1 Recommendation: Amend Tenn. Code Ann. § 40-2-101(h) to include Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude), § 39-13-514 (Patronizing prostitution), § 39-13-515 (Promoting prostitution), § 39-13-529 (Offense of especially aggravated sexual exploitation of a minor), § 39-17-1004 (Offense of aggravated sexual exploitation of a minor), and § 39-17-1005 (Offense of especially aggravated sexual exploitation of a minor) as crimes which have a 25 year statute of limitations from the date the victim turns 18.

FRAMEWORK ISSUE 6: CRIMINAL JUSTICE TOOLS FOR INVESTIGATION AND PROSECUTIONS

Legal Components:

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

Legal Analysis:

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

Tennessee requires training on child sexual abuse pursuant to Tenn. Code Ann. § 37-1-603(b)(4)(A)(ii) (Comprehensive state plan), which states that “[t]he course of training leading to the basic certificate issued by the Tennessee peace officer standards and training commission shall include adequate instruction in the procedures described in subdivision (b)(4)(A)⁵⁹ and shall be included as a part of the in-service training requirement to be eligible for the salary supplement authorized in § 38-8-111 [In-service Training—Cash supplements].” Tenn. Code Ann. § 37-1-602(3)(C)(vi) (Part definitions—Harm to child’s health or welfare), defines “child sexual abuse” as including “[t]he sexual exploitation of a child, which includes allowing, encouraging, or forcing a child to: (a) Solicit for or engage in prostitution; or (b) Engage in an act prohibited by § 39-17-1003 [Offense of sexual exploitation of a minor.]” Therefore, it is possible that the childhood sexual abuse training required by Tenn. Code Ann. § 37-1-603(b)(4)(A)(ii) could include training on domestic minor sex trafficking.

⁵⁹ Tenn. Code Ann. § 37-1-603(b)(4)(A) states in part, “(A) The Jerry F. Agee Tennessee Law Enforcement Academy, the Tennessee peace officer standards and training commission, and the department of children’s services shall work together in developing ways to inform and instruct appropriate local law enforcement personnel in the detection of child sexual abuse and in the proper action that should be taken in a suspected case of child sexual abuse: (i) Guidelines shall be prepared establishing a standard procedure that may be followed by police agencies in the investigation of cases involving sexual abuse of children, including police response to, and treatment of, victims of such crimes; . . .”

Additionally, some proceeds obtained from asset forfeiture related to human trafficking will be allotted for training on human trafficking. Tenn. Code Ann. § 39-13-312(c). Specifically, after using the proceeds to pay for the cost of the proceedings, 20% of the proceeds from forfeiture will be awarded “to the law enforcement agency conducting the investigation that resulted in the forfeiture for use in training and equipment for the enforcement of human trafficking laws.” Tenn. Code Ann. § 39-13-312(c)(1).

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

Tennessee allows for single party consent to audiotaping. Pursuant to Tenn. Code Ann. § 39-13-601(b)(5) (Wiretapping and electronic surveillance—Prohibited acts—Exceptions), which regulates the interception of “wire, oral, or electronic communication,”

It is lawful under §§ 39-13-601–39-13-603 [Wiretapping and electronic surveillance—Prohibited acts—Exceptions, Penalty for violations, Civil actions—Injunctive relief—Damages—Defenses—Limitation of actions] and title 40, chapter 6, part 3 [Wiretapping and electronic surveillance] for a person not acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the state of Tennessee.

Similarly, pursuant to Tenn. Code Ann. § 39-13-604(b)(1) (Interception of cellular or cordless telephone transmissions), single party consent for audio recording is allowed. The statute states that “[a] person commits an offense who, without the consent of at least one (1) party to a communication transmitted between two (2) cellular radio telephones, a cellular radio telephone and a landline telephone, or a cordless telephone and a cellular radio telephone.”

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

Tennessee does not allow wiretapping for crimes related to domestic minor sex trafficking. Pursuant to Tenn. Code Ann. § 40-6-305 (Homicide evidence) and Tenn. Code Ann. § 40-6-304(a) (Order for electronic surveillance—Application—Required findings—Expiration order—Recordings—Evidence—Motions to suppress), an order for the “interception of wire, oral, or electronic communications” is allowed only if it can provide evidence of: “(1) The commission of criminal homicide, as defined in § 39-13-201; (2) Criminal conspiracy, as defined in § 39-12-103, to commit criminal homicide; or (3) The commission of a violation of § 39-17-417(j) [Criminal offenses and penalties involving controlled substances]; (4) The commission of, or conspiracy [to] commit, a criminal gang offense by a criminal gang member, as defined in Section 40-35-121.”

6.3.1 Recommendation: Enact a section in title 40, chapter 6, part 3 that allows for wiretapping for suspected cases of domestic minor sex trafficking.

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

Law enforcement is expressly allowed to utilize a decoy to investigate in some instances. Pursuant to Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor),

It is an offense for a person eighteen (18) years of age or older, by means of oral, written or electronic communication, electronic mail or Internet services, directly or through another, to intentionally command, request, hire, persuade, invite or attempt to induce a person whom the person making the solicitation knows, or should know, is less than eighteen (18) years of age, or solicits a law enforcement officer posing as a minor, and whom the person making the solicitation

reasonably believes to be less than eighteen (18) years of age, to engage in conduct that, if completed, would constitute a violation by the soliciting adult of one (1) or more of the following offenses:

- (1) Rape of a child, pursuant to § 39-13-522;
- (2) Aggravated rape, pursuant to § 39-13-502;
- (3) Rape, pursuant to § 39-13-503;
- (4) Aggravated sexual battery, pursuant to § 39-13-504;
- (5) Sexual battery by an authority figure, pursuant to § 39-13-527;
- (6) Sexual battery, pursuant to § 39-13-505;
- (7) Statutory rape, pursuant to § 39-13-506;
- (8) Especially aggravated sexual exploitation of a minor, pursuant to § 39-17-1005; or
- (9) Sexual activity involving a minor, pursuant to § 39-13-529.

Subsection (b) explains that “[i]t is no defense that the solicitation was unsuccessful, that the conduct solicited was not engaged in, or that the law enforcement officer could not engage in the solicited offense.” Subsection (d) expands the reach of this statute by providing, “A person is subject to prosecution in this state under this section for any conduct that originates in this state, or for any conduct that originates by a person located outside this state, where the person solicited the conduct of a minor located in this state, or solicited a law enforcement officer posing as a minor located within this state.”

- 6.4.1 Recommendation: Amend Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude), § 39-13-514 (Patronizing prostitution), § 39-13-515 (Promoting prostitution), and § 39-17-1004 (Offense of aggravated sexual exploitation of a minor) to prohibit a defendant from asserting a defense that the subject of the offense was a law enforcement officer.

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

As discussed above in 6.4, pursuant to Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor), law enforcement may investigate certain cases of CSEC through the Internet. Tenn. Code Ann. § 39-13-528(a) states,

It is an offense for a person eighteen (18) years of age or older by means of . . . electronic communication, . . . [to] solicit[] a law enforcement officer posing as a minor, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age, to engage in conduct that if completed would constitute a violation by the soliciting adult of one of the following offenses:

- (1) Rape of a child, pursuant to § 39-13-522;
- (2) Aggravated rape, pursuant to § 39-13-502;
- (3) Rape, pursuant to § 39-13-503;
- (4) Aggravated sexual battery, pursuant to § 39-13-504;
- (5) Sexual battery by an authority figure, pursuant to § 39-13-527;
- (6) Sexual battery, pursuant to § 39-13-505;
- (7) Statutory rape, pursuant to § 39-13-506;
- (8) Especially aggravated sexual exploitation of a minor, pursuant to § 39-17-1005; or
- (9) Sexual activity involving a minor, pursuant to § 39-13-529.

Subsection (b) provides, “It is no defense that the solicitation was unsuccessful, that the conduct solicited was not engaged in, or that the law enforcement officer could not engage in the solicited offense.”

- 6.5.1 Recommendation: Amend Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor) to include the offenses of Tenn. Code Ann. § 39-13-309 (Trafficking for sexual servitude), § 39-13-

514 (Patronizing prostitution), § 39-13-515 (Promoting prostitution), § 39-17-1004 (Offense of aggravated sexual exploitation of a minor), and § 39-17-1005 (Offense of especially aggravated sexual exploitation of a minor) to allow for criminal prosecutions in cases of Internet-based recruitment and exploitation.

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

Law enforcement agencies are required to report missing children.⁶⁰ Pursuant to Tenn. Code Ann. § 37-10-203 (Formal missing child report—Reports to law enforcement agencies),

Every law enforcement officer receiving information from a parent or any source that it deems creditable shall prepare a formal missing child report and transmit a copy thereof immediately to the Tennessee bureau of investigation by computer pursuant to title 38, chapter 10 [Intrastate Communication of Criminal Statistics], or in the absence of a computer terminal, by mail. A law enforcement agency reporting a missing child is further required to enter or cause to be entered the report of the missing child into the National Crime Information Center (NCIC) within two (2) hours of the receipt of the initial missing child report. The Tennessee bureau of investigation shall distribute the report among all law enforcement agencies in Tennessee or to any interstate and federal agencies that it may believe would be of assistance in locating the missing child.

Additionally, upon taking a report of a missing child, a law enforcement agency must submit the report to a juvenile court for review. Tenn. Code Ann. § 37-10-204. If the judge determines that the child classifies as a “missing child,” then “a ‘missing child’ order shall be issued and delivered to any lawful officer or the Tennessee bureau of investigation authorizing the bureau or any officer holding the order, a true copy thereof or possessing knowledge of the existence thereof, to investigate the circumstances relating to the missing child in compliance with existing constitutional, statutory and case law and upon identification or location of the missing child to take custody of the child, using legal process when necessary, for immediate delivery to a judge of any juvenile or other court of record for appropriate orders and disposition pursuant to law.” Tenn. Code Ann. § 37-10-204(c)(1). If the court finds that the child is not a “missing child” then “the missing child report should be cancelled by the bureau, which shall give notice of the cancellation to all appropriate law enforcement agencies.” Tenn. Code Ann. § 37-10-204(c)(2). “Missing child” is defined as “a child who is believed to have been removed by force, persuasion, trick, enticement, false pretense, has voluntarily left the custody of such child’s parent without permission or is absent for unexplained or unknown reasons.” Tenn. Code Ann. § 37-10-201(b)(2).

Pursuant to Tenn. Code Ann. § 37-10-205 (Forms—File of missing children—Monthly reports of missing children—Dissemination of information),

The Tennessee Bureau of Investigation (“TBI”) shall specify a uniform form for the missing child report and data, so that the same may be transmitted by computer or mail. TBI shall also establish, maintain and manage a file of ‘missing children’ and collect any available relevant data concerning the missing child and disseminate the same by computer, mail or any other reliable communication device to any law enforcement agency. The bureau shall publish a monthly report of all missing children and recovery of children and distribute the same to all full-time law enforcement agencies in the state, the general assembly, and executive branches of government, to the news media, and to every director of schools in the state, who shall then distribute the report to the principal of every school within such director’s school system

⁶⁰ For the purposes of these statutes, “child” is defined as “any person under twenty-one (21) years of age.” Tenn. Code Ann. § 37-10-201(b)(1).

Information on recovered missing children could appear in the missing children registry. Pursuant to Tenn. Code Ann. § 38-6-117(a) (Missing children registry) “The Tennessee bureau of investigation is authorized to create within the bureau a missing children registry. The registry shall contain pertinent information about, a picture of, and the current status of certain children in this state who have been reported missing.”

Additionally, pursuant to Tenn. Code Ann. § 37-1-403(c)(3)(A)(Reporting of brutality, abuse, neglect or child sexual abuse—Notification to parents of abuse on school grounds or under supervision—Confidentiality of records) “if the department⁶¹ receives information containing references to alleged human trafficking or child pornography which does or does not result in an investigation by the department, the department shall notify the appropriate law enforcement agency immediately upon receipt of such information.”

- 6.6.1 Recommendation: Mandate the entry of information regarding rescued missing children in the same manner as the report of the missing child to provide law enforcement with a history of the exploited children they encounter.

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⁶¹ Pursuant to Tenn. Code Ann. § 37-1-401(2) (Part definitions) “department” is defined as “the department of children’s services.”

