

PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

ANALYSIS AND RECOMMENDATIONS NORTH DAKOTA

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

- 1.1 *The state sex 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 *Commercial sexual exploitation of children (CSEC) or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*
- 1.4 *The state racketeering or gang crimes statute includes sex trafficking and commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute trafficking crimes.*

Legal Analysis¹:

- 1.1 *The state sex 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.*

North Dakota's human trafficking law addresses sex trafficking and clearly defines as a human trafficking victim a minor under the age of 18 without regard to use of force, fraud, or coercion. North Dakota Century Code (N.D. Cent. Code) § 12.1-40-01(1) (Human trafficking—Penalty) states,

1. A person is guilty of human trafficking if the person:
 - a. Benefits financially or receives anything of value from knowing participation in human trafficking; or

¹ Unless otherwise specified, all references to North Dakota statutes were taken from the North Dakota Century Code (LEXIS through 2011 Reg. and Special Legis. Sess.) and all federal statutes were taken from United States Code (LEXIS through PL 112-173, approved 8/16/12). This report includes legislation enacted before August 1, 2012.

b. Promotes, recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to promote, recruit, entice, harbor, transport, provide, or obtain by any means, another person, knowing that the person will be subject to human trafficking.

“Human trafficking” is defined in N.D. Cent. Code § 12.1-40-02(3) (Definitions—Human Trafficking) as “labor trafficking or sex trafficking.” “Sex trafficking” is defined in N.D. Cent. Code § 12.1-40-02(5) as “the promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining, or receipt of a person by any means, whether a United States citizen or foreign national, for the purpose of: a. Causing the person or another to engage in sexual acts or sexual conduct in violation of chapter 12.1-20 [Sex offenses]; or b. Violating chapter 12.1-27.1 [Obscenity control], 12.1-27.2 [Sexual performances by children], or 12.1-29 [Prostitution].” Human trafficking is a Class AA felony if the victim is under 18, and carries a maximum penalty of life imprisonment. N.D. Cent. Code §§ 12.1-40-01(2), 12.1-32-01(1). Otherwise, human trafficking is a Class A felony punishable by imprisonment up to 20 years, a fine up to \$10,000, or both. N.D. Cent. Code §§ 12.1-40-01(2), 12.1-32-01(2).

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

The following laws criminalize CSEC in North Dakota:

1. N.D. Cent. Code § 12.1-29-02(1) (Facilitating prostitution) makes it a crime to, among other things, “Knowingly solicit[] a person to patronize a prostitute” or to “[k]nowingly procure[] a prostitute for a patron.” Under subsection (2), “

The offense is a class C felony if the actor intentionally causes another to remain a prostitute by force or threat, or the prostitute is the actor’s spouse, child, or ward, or a person for whose care, protection, or support he is responsible, or the prostitute is, in fact, less than sixteen years old. Otherwise it is a class A misdemeanor.

A Class C felony is punishable by imprisonment up to five years, a fine of \$5,000, or both. N.D. Cent. Code § 12.1-32-01(4). A Class A misdemeanor carries a penalty of imprisonment up to 1 year, a \$2,000 fine, or both. N.D. Cent. Code § 12.1-32-01(5).

2. N.D. Cent. Code § 12.1-27.2-02 (Use of a minor in a sexual performance) establishes a Class B felony when an individual “knowing the character and content of a performance, . . . employs, authorizes, or induces a minor to engage in sexual conduct during a performance or, if being a parent, legal guardian, or custodian of a minor, that person consents to the participation by the minor in sexual conduct during a performance.” A Class B felony is punishable by imprisonment up to 10 years, a \$10,000 fine, or both. N.D. Cent. Code § 12.1-32-01(3). However N.D. Cent. Code § 12.1-27.2-04.2 (Sexual performance by a minor—Enhanced penalties) provides for enhanced penalties, stating in subsection (2), “

Notwithstanding the provisions of sections 12.1-32-01 and 12.1-32-01.1 relating to fines, the court shall impose the following fine upon the conviction of a person or entity described in subsection 1 for a second or subsequent offense under this chapter:

a. For an individual, a fine not to exceed fifty thousand dollars; or

- b. For a corporation, limited liability company, association, partnership, or other legal entity, a fine not to exceed one hundred thousand dollars.
3. N.D. Cent. Code § 12.1-27.2-03 (Promoting or directing an obscene sexual performance by a minor) states, “A person is guilty of a class B felony if, knowing the character and content of a performance, that person produces, directs, or promotes² any obscene performance which includes sexual conduct by a person who was a minor at the time of the performance.” A Class B felony is punishable by imprisonment up to 10 years, a \$10,000 fine, or both. N.D. Cent. Code § 12.1-32-01(3). This offense is also subject to the enhanced penalties in N.D. Cent. Code § 12.1-27.2-04.2.
 4. N.D. Cent. Code § 12.1-27.1-03(2) (Promoting obscenity to minors—Minor performing in obscene performance) makes it a Class C felony “to permit a minor to participate in a performance which is harmful to minors.”³
 5. N.D. Cent. Code § 12.1-27.2-04 (Promoting a sexual performance by a minor) makes it a Class C felony if “knowing the character and content of a performance, [a] person produces, directs, or promotes any performance which includes sexual conduct by a person who was a minor at the time of the performance.” A Class C felony is punishable by imprisonment up to five years, a fine of \$5,000, or both. N.D. Cent. Code § 12.1-32-01(4). This offense is also subject to the enhanced penalties in N.D. Cent. Code § 12.1-27.2-04.2.

Non-commercial sex offenses that may apply in certain CSEC cases include the following:

1. N.D. Cent. Code § 12.1-20-03 (Gross sexual imposition) makes it a crime, among other things, when a person “engages in a sexual act with another, or . . . causes another to engage in a sexual act” or “engages in sexual contact with another, or . . . causes another to engage in sexual contact” when the victim is less than 15, or when “[t]hat person compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being.” N.D. Cent. Code § 12.1-20-03(1), (2). This crime is a Class AA felony if “serious bodily injury” was inflicted on the victim, the victim was under 15 and the offender over 22, or the victim subjected to the sexual act was compelled “to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being.” N.D. Cent. Code § 12.1-20-03(3)(a). The sentence for committing these Class AA felonies is imprisonment for not less than 20 years with probation to follow.⁴ N.D. Cent. Code § 12.1-20-03(3)(a). In all other cases,

² N.D. Cent. Code § 12.1-27.2-01(3) (Definitions—Sexual Performances by Children) defines “promote” as “to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise.”

³ “Harmful to minors” is defined in N.D. Cent. Code § 12.1-27.1-02(2) (Promoting obscenity to minors—Definitions) to mean

that quality of any description or representation, in whatever form of sexual conduct or sexual excitement, when such description or representation:

- a. Considered as a whole, appeals to the prurient sexual interest of minors;
- b. Is patently offensive to prevailing standards in the adult community in North Dakota as a whole with respect to what is suitable material for minors; and
- c. Considered as a whole, lacks serious literary, artistic, political, or scientific value for minors.

⁴ However, N.D. Cent. Code § 12.1-20-03(3)(a)(Gross sexual imposition—Penalty) states in part,

this is a Class A felony with possible imprisonment up to 20 years, a fine not to exceed \$10,000, or both. N.D. Cent. Code §§ 12.1-20-03(3)(b), 12.1-32-01(2).

2. N.D. Cent. Code § 12.1-20-04 (Sexual imposition) makes it a Class B felony to

“engage[] in a sexual act or sexual contact with another, or . . . cause[] another to engage in a sexual act or sexual contact, . . . if the actor:

1. Compels the other person to submit by any threat or coercion that would render a person reasonably incapable of resisting; or
2. Engages in a sexual act or sexual contact with another, whether consensual or not, as part of an induction, initiation, ceremony, pledge, hazing, or qualification to become a member or an associate of any criminal street gang as defined in section 12.1-06.2-01.”

A Class B felony is punishable by imprisonment up to 10 years, a \$10,000 fine, or both. N.D. Cent. Code § 12.1-32-01(3).

3. N.D. Cent. Code § 12.1-20-03.1(1) (Continuous sexual abuse of a child) makes it a crime for an adult to “engage[] in any combination of three or more sexual acts or sexual contacts with a minor under the age of fifteen years during a period of three or more months.” If the offender was at least 22 years of age at the time of the offense, the offense is a Class AA felony. N.D. Cent. Code § 12.1-20-03.1(1). For all other violations of this statute, the offense is a Class A felony. N.D. Cent. Code § 12.1-20-03.1(1).

4. N.D. Cent. Code § 12.1-20-07(1) (Sexual assault) makes it a Class C felony to

knowingly ha[ve] sexual contact with another person, or . . . cause[] another person to have sexual contact with that person . . . if:

...

- e. The other person is a minor, fifteen years of age or older, and the actor is the other person’s parent, guardian, or is otherwise responsible for general supervision of the other person’s welfare; or
- f. The other person is a minor, fifteen years of age or older, and the actor is an adult [at least 22 years old].

If the offender of subsection (f) is 18-21 years old, then the offense is a Class A misdemeanor. N.D. Cent. Code § 12.1-20-07(2).

5. N.D. Cent. Code § 12.1-20-05(1) (Corruption or solicitation of minors) makes it a Class A misdemeanor for an adult to “engage[] in, solicit[] with the intent to engage in, or cause[] another to engage in a sexual act with a minor” when the minor is 15 or older. Subsection (2) states,

The court may deviate from the mandatory sentence if the court finds that the sentence would impose a manifest injustice as defined in section 39-01-01 and the defendant has accepted responsibility for the crime or cooperated with law enforcement. However, a defendant convicted of a class AA felony under this section may not be sentenced to serve less than five years of incarceration.

An adult who solicits with the intent to engage in a sexual act with a minor under age fifteen or engages in or causes another to engage in a sexual act⁵ when the adult is at least twenty-two years of age and the victim is a minor fifteen years of age or older, is guilty of a class C felony.

A Class A misdemeanor carries a maximum penalty of imprisonment for one year, a fine of \$2,000, or both. N.D. Cent. Code § 12.1-32-01(5). A Class C felony is punishable by imprisonment up to five years, a fine of \$5,000, or both. N.D. Cent. Code § 12.1-32-01(4).

6. N.D. Cent. Code § 14-10-06 (Unlawful to encourage or contribute to the deprivation or delinquency of minor) states in subsection (2),

Any individual who by any act willfully encourages, causes, or contributes to the deprivation of a child less than sixteen years of age by causing that child to engage in sexual conduct as defined under section 12.1-27.2-01, in any play, motion picture, photograph, dance, or other visual representation is guilty of a class C felony.

1.3 Commercial sexual exploitation of children (CSEC) or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.

North Dakota's CSEC statutes do not refer to the human trafficking statute or otherwise specifically identify the victim of a CSEC crime as a trafficking victim, even though the definition of sex trafficking as defined in N.D. Cent. Code § 12.1-40-02(5) (Definitions—Human Trafficking) specifically refers to the CSEC statutes by criminalizing

the promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining, or receipt of a person by any means, whether a United States citizen or foreign national, for the purpose of:

- a. Causing the person or another to engage in sexual acts or sexual conduct in violation of chapter 12.1-20 [Sex offenses]; or
- b. Violating chapter 12.1-27.1 [Obscenity control], 12.1-27.2 [Sexual performances by children], or 12.1-29 [Prostitution].

Similarly, N.D. Cent. Code § 12.1-29-03 (Prostitution) does not distinguish between minors and adults or refer to § 12.1-40-01 (Human trafficking) to identify prostitution offenses involving a minor as domestic minor sex trafficking.

⁵ N.D. Cent. Code § 12.1-20-02(4) (Definitions—Sex Offenses) defines “sexual act” as

sexual contact between human beings consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any other portion of the human body and the penis, anus, or vulva; or the use of an object which comes in contact with the victim's anus, vulva, or penis. For the purposes of this subsection, sexual contact between the penis and the vulva, the penis and the anus, any other portion of the human body and the anus or vulva, or an object and the anus, vulva, or penis of the victim, occurs upon penetration, however slight. Emission is not required.

Subsection (5) defines “sexual contact” as

any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires.

- 1.3.1 Recommendation: Amend N.D. Cent. Code § 12.1-29-02 (Facilitating prostitution), § 12.1-27.2-02 (Use of a minor in a sexual performance), § 12.1-27.2-03 (Promoting or directing an obscene sexual performance by a minor), § 12.1-27.1-03(2) (Promoting obscenity to minors — Minor performing in obscene performance), and § 12.1-27.2-04 (Promoting a sexual performance by a minor) to refer cases of commercial sexual exploitation of minors to § 12.1-40-01 (Human trafficking) in order to clarify the status of such victims as human trafficking victims.
- 1.3.2 Recommendation: Amend N.D. Cent. Code § 12.1-29-03 (Prostitution) to refer to § 12.1-40-01 (Human trafficking) to identify prostitution offenses involving a minor as domestic minor sex trafficking.

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

N.D. Cent. Code §12.1-06.103 (Illegal control of an enterprise – Illegally conducting an enterprise) states,

- 1. A person is guilty of an offense if such person, through a pattern of racketeering activity or its proceeds, acquires or maintains, by investment or otherwise, control of any enterprise.
- 2. A person is guilty of an offense if the person is employed or associated with any enterprise and conducts or participates in the conduct of that enterprise's affairs through a pattern of racketeering activity.
- 3. A knowing violation of this section is a class B felony.

N.D. Cent. Code § 12.1-06.1-01(2)(f) (Definitions—Racketeer Influenced and Corrupt Organizations) defines “racketeering” in part as

any act including any criminal attempt, facilitation, solicitation, or conspiracy, committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving:

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- (17) Obscenity.
- (18) Child pornography.
- (19) Prostitution.
- (20) Human trafficking.

N.D. Cent. Code § 12.1-06.1-02 (Leading a criminal association) states in subsection (1),

- 1. A person is guilty of an offense by any of the following:
 - a. Intentionally organizing, managing, directing, supervising, or financing a criminal association.
 - b. Knowingly inciting or inducing others to engage in violence or intimidation to promote or further the criminal objectives of a criminal association.

- c. Willfully furnishing advice, assistance, or direction in the conduct, financing, or management of a criminal association's affairs with the intent to promote or further the criminal objectives of a criminal association.
- d. Intentionally promoting or furthering the criminal objectives of a criminal association by inducing or committing any act or omission by a public servant in violation of official duty.

N.D. Cent. Code § 12.1-06.1-01(1)(b) defines "criminal association" as

any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuing basis in conduct which violates any one or more provisions of any felony statute of this state or which is the willful and illegal transportation or disposal of radioactive waste material or hazardous waste.

A violation of this section is a Class B felony, subject to a maximum penalty of ten years' imprisonment, a fine of \$10,000 or both. N.D. Cent. Code §12.1-32-01(3). Additionally, an offender may be subject to asset forfeiture and civil remedies. Additionally, under these sections, a trafficker is subject to civil asset forfeiture. Pursuant to N.D. Cent. Code § 12.1-06.1-05(f) (Racketeering – Civil remedies), following a determination of liability, the court may order:

Forfeiture, pursuant to chapter 32-14, to the state school fund of the state or county as appropriate under section 29-27-02.1, to the extent not already ordered to be paid in other damages:

- (1) Any property or other interest acquired or maintained by a person in violation of section 12.1-06.1-02 (Leading a criminal association) or 12.1-06.1-03 (Illegal control of an enterprise).
- (2) Any interest in, security of, claims against, or property or contractual right of any kind affording a source of influence over any enterprise that a person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 12.1-06.1-02 or 12.1-06.1-03.
- (3) All proceeds traceable to an offense included in the definition of racketeering and all moneys, negotiable instruments, securities, and other things of value used or intended to be used to facilitate commission of the offense if upon application for the order it is shown to the satisfaction of the court that the racketeering offense has occurred as a part of a pattern of racketeering activity.

Furthermore, N.D. Cent. Code § 12.1-06.1-05(1) (Racketeering—Civil remedies) provides that

[a] person who sustains injury to person, business, or property by a pattern of racketeering activity or by a violation of section 12.1-06.1-02 [Leading a criminal association] or 12.1-06.1-03 [Illegal control of an enterprise] may file an action in district court for the recovery of treble damages and the costs of the suit, including reasonable attorney fees. The state may file an action in behalf of those persons injured or to prevent, restrain, or remedy a pattern of racketeering activity or a violation of section 12.1-06.1-02 or 12.1-06.1-03.

N.D. Cent. Code § 12.1-06.1-05(4) states,

Following a determination of liability, orders may include:

....

- d. Ordering the payment of treble damages and appropriate restitution to those persons injured by a pattern of racketeering activity or a violation of section 12.1-06.1-02 or 12.1-06.1-03.

e. Ordering the payment of all costs and expenses and reasonable attorneys' fees concerned with the prosecution and investigation of any offense included in the definition of racketeering if upon application for the order it is shown to the satisfaction of the court that the racketeering offense has occurred as a part of a pattern of racketeering activity or a violation of section 12.1-06.1-02 or 12.1-06.1-03, civil and criminal, incurred by the state or county as appropriate to be paid to the general fund of the state or county that brings the action.

Legal Components:

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts with a victim of domestic minor sex trafficking.*
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*
- 2.3 *Solicitation of prostitution laws differentiate between buying sex with an adult and buying sex 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 under 18 are sufficiently high and not reduced for older minors.*
- 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
- 2.9 *Buying and possessing child pornography carries penalties as high as those for sex trafficking of a minor, commercial sexual exploitation of a child, and 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 with a victim of domestic minor sex trafficking.*

N.D. Cent. Code § 12.1-40-01 (Human trafficking) makes it a crime to “[p]romote[], recruit[], entice[], harbor[], transport[], provide[], or obtain[] by any means, or attempt[] to promote, recruit, entice, harbor, transport, provide, or obtain by any means, another person, knowing that the person will be subject to human trafficking.” N.D. Cent. Code § 12.1-40-01(1)(b). The definition of “human trafficking” in N.D. Cent. Code § 12.1-40-02(3) is “labor trafficking or sex trafficking.” “Sex trafficking” is further defined as

promotion, recruitment, transportation, transfer, harboring, enticement, provision, obtaining, or receipt of a person by any means, whether a United States citizen or foreign national, for the purpose of:

- a. Causing the person or another to engage in sexual acts or sexual conduct in violation of chapter 12.1-20 [Sex offenses]; or
- b. Violating chapter 12.1-27.1 [Obscenity control], 12.1-27.2 [Sexual performances by children], or 12.1-29 [Prostitution].

Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),⁶ have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers attempted to

⁶ 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”⁷ a person under 18 to engage in commercial sex.⁸ It is unsettled whether the courts will uphold this interpretation of the TVPA. It is arguable, therefore, that the term “obtain” in North Dakota’s trafficking statute may be similarly applied, and could, therefore, implicate buyers under N.D. Cent. Code § 12.1-40-01. The same application of the state human trafficking law potentially could be employed against buyers in North Dakota with the additional required element of knowledge on the part of the buyer that “the person will be subject to human trafficking.” N.D. Cent. Code § 12.1-40-01(1)(b).

2.1.1 Recommendation: Amend N.D. Cent. Code § 12.1-40 (Human trafficking) to include the purchase of commercial sex with minors as prohibited conduct.

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

The CSEC laws are geared toward the prosecution of traffickers (e.g., facilitation of prostitution of a minor under 16 pursuant to N.D. Cent. Code § 12.1- 29-02(2), the use of or promotion of a minor in a sexual performance pursuant to N.D. Cent. Code § 12.1-27.2-02, et seq.) and do not apply to those who pay for sex with minors.

Although not specifically addressing commercial sex acts, N.D. Cent. Code § 12.1-20-05 (Corruption or solicitation of minors) makes it a distinct offense for adults to “engage[] in, solicit[] with the intent to engage in, or cause[] another to engage in a sexual act with a minor” Under N.D. Cent. Code § 12.1-20-05(1), this offense is “a class A misdemeanor if the victim is a minor fifteen years of age or older,” and this offense is a class C felony under § 12.1-20-05(2) “when the adult is at least twenty-two years of age and the victim is a minor fifteen years of age or older.” Under § 12.1-20-05(3), the penalty is enhanced by one offense level if the offense is committed “within fifty feet [15.24 meters] of or on the real property comprising a public or nonpublic elementary, middle, or high school.”

2.2.1 Recommendation: Enact a law to criminalize the purchase of commercial sex acts with any minor under 18. Alternatively, amend N.D. Cent. Code § 12.1-20-05 (Corruption or solicitation of minors) to specifically prohibit engaging in, or soliciting commercial sexual activity with a minor and provide penalties consistent with N.D. Cent. Code § 12.1-40-01 (Human trafficking).

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

N.D. Cent. Code § 12.1-29-06 (Hiring an individual to engage in sexual activity) applies to buyers of commercial sex, regardless of the age of the individual with whom the commercial sex act is purchased. Under this statute, “An individual who hires or offers or agrees to hire another individual with the intention of engaging in sexual activity is guilty of a class B misdemeanor.” N.D. Cent. Code § 12.1-29-06.

2.3.1 Recommendation: Amend N.D. Cent. Code § 12.1-29-06 (Hiring an individual to engage in sexual activity) to provide a heightened penalty for soliciting commercial sex acts with a minor.

⁷ 18 U.S.C. § 1591(a).

⁸ See, e.g., Indictment at 1, United States v. Oflyng, No. 09-00084-01-CR-W-SOW (W.D. Mo. March 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, (December 18, 2009), <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm>.

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

Penalties for buyers of commercial sex with minors vary depending on the law applied. N.D. Cent. Code § 12.1-40-01(Human trafficking) is a class AA felony if the victim is under 18. N.D. Cent. Code § 12.1-40-01(2). A conviction carries a maximum penalty of life imprisonment without consideration of parole for 30 years, “less sentence reduction earned for good conduct,” if the offender is sentenced to life imprisonment. N.D. Cent. Code §12.1-32-01(1).

N.D. Cent. Code § 12.1-20-05 (Corruption or solicitation of minors) by a person under 22 years of age when the minor involved is 15 or older is just a Class A misdemeanor with a maximum penalty of imprisonment for one year, a fine of \$2,000, or both. N.D. Cent. Code §§ 12.1-20-05(1), 12.1-32-01(5). When the minor is under 15, or the offender is 22 or older and the victim is 15 or older, the crime is a Class C felony punishable by imprisonment up to five years, a fine of \$5,000, or both. N.D. Cent. Code §§ 12.1-20-05(2), 12.1-32-01(4). The penalties for each crime are enhanced one level when the offense is committed “within fifty feet . . . of or on the real property comprising a public or nonpublic elementary, middle, or high school.” N.D. Cent. Code § 12.1-20-05(3).

N.D. Cent. Code § 12.1-29-06 (Hiring an individual to engage in sexual activity) is not limited in application to buying sex with adults and is a Class B misdemeanor punishable by a maximum penalty of thirty days imprisonment, a fine of \$1,000, or both. N.D. Cent. Code § 12.1-32-01(6).

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 offense⁹ against a minor. . 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,¹⁰ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.¹¹

⁹ 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).

¹⁰ 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).

¹¹ 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).

2.4.1 Recommendation: Enact a law to criminalize the purchase of commercial sex acts with any minor under 18 that provides penalties consistent with federal penalties. Alternatively, amend N.D. Cent. Code § 12.1-20-05 (Corruption or solicitation of minors) to specifically prohibit engaging in, or soliciting commercial sexual activity with a minor and provide penalties consistent with 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.*

Using the Internet to induce or engage a minor sexually is prohibited under N.D. Cent. Code § 12.1-20-05.1 (Luring minors by computer or other electronic means). Although the offense does not specifically refer to a commercial sexual arrangement, it may apply to CSEC situations. Subsection (1) states,

1. An adult is guilty of luring minors by computer or other electronic means when:
 - a. The adult knows the character and content of a communication that, in whole or in part, implicitly or explicitly discusses or depicts actual or simulated nudity, sexual acts, sexual contact, sadomasochistic abuse, or other sexual performances and uses any computer communication system or other electronic means that allows the input, output, examination, or transfer of data or programs from one computer or electronic device to another to initiate or engage in such communication with a person the adult believes to be a minor; and
 - b. By means of that communication the adult importunes, invites, or induces a person the adult believes to be a minor to engage in sexual acts or to have sexual contact with the adult, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for the adult's benefit, satisfaction, lust, passions, or sexual desires.

This offense has varying degrees of penalties depending on the age of the offender and the victim. It is a Class A misdemeanor with a maximum penalty of imprisonment for one year, a fine of \$2,000 if the offender is less than 22 and "reasonably believes the minor" is 15-17. N.D. Cent. Code §§ 12.1-20-05.1(2), 12.1-32-01(5), or both. It is a Class C felony with a maximum penalty of imprisonment for five years, a fine of \$5,000 if the adult is less than 22 and "reasonably believes the minor is under" 15, or if the adult is 22 or older and "reasonably believes the minor is" 15-17, or both. N.D. Cent. Code §§ 12.1-20-05.1(2), 12.1-32-01(4). Finally, it is a Class B felony with a maximum penalty of imprisonment for ten years, a fine of \$10,000 if the adult is 22 or older and "reasonably believes the minor is under" 15, or both. N.D. Cent. Code §§ 12.1-20-05.1(2), 12.1-32-01(3). "The court shall sentence an adult convicted of a class B or class C felony under this section to serve a term of imprisonment of at least one year, except the court may sentence an individual to less than one year if the individual did not take a substantial step toward meeting with the minor." N.D. Cent. Code § 12.1-20-05.1(2).

2.5.1 Recommendation: Amend N.D. Cent. Code § 12.1-20-05.1 (Luring minors by computer or other electronic means) to eliminate the staggered penalties based on the age of the victim in N.D. Cent. Code § 12.1-20-05.1 (Luring minors by computer or other electronic means) to make this a crime of equal severity for luring all minors under 18 and include as prohibited conduct luring minors by computer or other electronic means for the purpose of violating § 12.1-40-01 (Human trafficking) and North Dakota's CSEC laws.

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

N.D. Cent. Code § 12.1-40-01(3) (Human trafficking) eliminates a defense of mistake of age by stating, “If the person subject to human trafficking is under the age of eighteen years, it is no defense that the actor did not know the child’s age or reasonably believed the child to be eighteen years of age or older.”

However, pursuant to N.D. Cent. Code § 12.1-27.2-05 (Sexual performance by a minor—Affirmative defenses), “It is an affirmative defense to a prosecution under this chapter that: 1. The defendant in good faith reasonably believed the person appearing in the performance was eighteen years of age or older.”

Age mistake defenses are further provided to offenders of non-commercial sex offenses in N.D. Cent. Code § 12.1-20-03 through 12.1-20-08 (Sex offenses), which includes the crimes of gross sexual imposition, continuous sexual abuse of a child, sexual imposition, corruption or solicitation of minors, luring minors by computer, and sexual assault. N.D. Cent. Code § 12.1-20-01 (General provisions) provides,

1. When the criminality of conduct depends on a child’s being below the age of fifteen, it is no defense that the actor did not know the child’s age, or reasonably believed the child to be older than fourteen.
2. When criminality depends on the victim being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult.
3. When criminality depends on the victim being a minor fifteen years of age or older, the actor is guilty of an offense only if the actor is at least three years older than the minor.

2.6.1 Recommendation: Eliminate the mistake of age defense in N.D. Cent. Code § 12.1-27.2-05 (Sexual performance by a minor).

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

North Dakota’s CSEC offenses do not specifically criminalize the purchase of sex acts with minors.¹² Buyers may be prosecuted under N.D. Cent. Code § 12.1-20-05 (Corruption or solicitation of minors), which staggers its penalties based on the age of the victim, stating

1. An adult who engages in, solicits with the intent to engage in, or causes another to engage in a sexual act with a minor, is guilty of a class A misdemeanor if the victim is a minor fifteen years of age or older.
2. An adult who solicits with the intent to engage in a sexual act with a minor under age fifteen or engages in or causes another to engage in a sexual act when the adult is at least twenty-two years of age and the victim is a minor fifteen years of age or older, is guilty of a class C felony.”

2.7.1 Recommendation: Eliminate the staggered penalty approach in N.D. Cent. Code § 12.1-20-05 (Corruption or solicitation of minors) to ensure base penalties are sufficiently high for soliciting any minor under 18.

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

¹² See *supra* Section 2.2.

If applicable to a buyer of sex with a minor, then a buyer faces possible life in prison for violating the human trafficking law; however, there is no financial penalty directly tied to the offense. N.D. Cent. Code §§ 12.1-40-01(2), 12.1-32-01(1).

Financial penalties can be imposed during sentencing for a violation of N.D. Cent. Code § 12.1-20-05 (Corruption or solicitation of minors). Violation of subsection (1), which occurs when an adult “engages in, solicits with the intent to engage in, or causes another to engage in a sexual act with a minor” 15 or older, is a Class A misdemeanor and may be punishable by a fine of \$2,000. N.D. Cent. Code §§ 12.1-20-05(1), 12.1-32-01(5). Violation of subsection (2), which occurs when an adult “solicits with the intent to engage in a sexual act with a minor under age fifteen” or an adult over 22 “engages in . . . a sexual act” with a minor 15 or older, is a Class C felony and may be punishable by a fine of \$5,000. N.D. Cent. Code §§ 12.1-20-05(2), 12.1-32-01(4). The penalties for each crime are enhanced one level when the offense is committed “within fifty feet . . . of or on the real property comprising a public or nonpublic elementary, middle, or high school.” N.D. Cent. Code § 12.1-20-05(3).

A violation of N.D. Cent. Code § 12.1-29-06 (Hiring an individual to engage in sexual activity) is a Class B misdemeanor, which may be punishable by a fine of \$1,000. N.D. Cent. Code § 12.1-32-01(6).

A buyer could face discretionary civil asset forfeiture¹³ for certain property. N.D. Cent. Code § 29-31.1-04(1) (Forfeiture proceedings) states, “Forfeiture is a civil proceeding not dependent upon a prosecution for, or conviction of, a criminal offense and forfeiture proceedings are separate and distinct from any related criminal action.”¹⁴ Under N.D. Cent. Code § 29-31.1-01(1) (Definitions—Property Forfeiture and Disposition) “forfeitable property” is defined as including,

- a. Property that is illegally possessed or is contraband.
 - b. Property that has been used or is intended to be used to facilitate the commission of a criminal offense or to avoid detection or apprehension of a person committing a criminal offense
 - c. Property that is acquired as or from the proceeds of a criminal offense.
 - d. Property offered or given to another as an inducement for the commission of a criminal offense.
 - e. A vehicle or other means of transportation used in the commission of a felony, the escape from the scene of the commission of a felony, or in the transportation of property that is the subject matter of a felony.
-

N.D. Cent. Code § 29-31.1-03 (Seizure of forfeitable property) states in part, “Forfeitable property may be seized whenever and wherever the property is found within this state. Forfeitable property may be seized by taking custody of the property or by serving upon the person in possession of the property a notice of forfeiture and seizure.” N.D. Cent. Code §29-31.1-03 also governs disposition of the property and requires that

¹³ For additional information on asset forfeiture laws and procedures, please see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHIStateAssetForfeitureLawsChart.pdf>.

¹⁴ Under N.D. Cent. Code § 29-31.1-10 (Inapplicability of chapter), “The provisions of this chapter do not apply to forfeiture proceedings commenced under other specific provisions of law, including chapters 12.1-06.1 [Racketeer Influenced and Corrupt Organizations], 19-03.1 [Uniform Controlled Substances Act], and 20.1-10 [Confiscation under Title 20 (Game, Fish, Predators, and Boating)].”

[i]f the court finds that the forfeiture is warranted, an order transferring ownership to the seizing agency must be entered and the property must be delivered to the seizing agency for disposition as directed by the court. Property that has been seized for forfeiture, and is not already secured as evidence in a criminal case, must be safely secured or stored by the agency that caused its seizure.

A buyer of commercial sex with a minor may also be required to pay restitution under N.D. Cent. Code § 12.1-32-08 (Hearing prior to ordering restitution, reparation, or reimbursement of indigent defense costs and expenses—Conditions—Collection of restitution for insufficient funds checks—Continuing appropriation), which provides for restitution at the discretion of the court, unless the victim has suffered pecuniary damages. Where the victim suffers pecuniary damages, restitution is mandatory. N.D. Cent. Code § 12.1-32-08 (1) states in part,

Before imposing restitution or reparation as a sentence or condition of probation, the court shall hold a hearing on the matter with notice to the prosecuting attorney and to the defendant as to the nature and amount of restitution. The court, when sentencing a person adjudged guilty of criminal activities that have resulted in pecuniary damages, in addition to any other sentence the court may impose, shall order that the defendant make restitution to the victim or other recipient as determined by the court, unless the court states on the record, based upon the criteria in this subsection, the reason it does not order restitution or orders only partial restitution..”

The section also sets forth items the court is to consider “[i]n determining whether to order restitution” One of those items, subsection (1)(a) states that “[t]he defendant may be required as part of the sentence imposed by the court to pay the prescribed treatment costs for a victim of a sexual offense as defined in chapters 12.1-20 [Sex offenses] and 12.1-27.2 [Sexual performance by children].”

The human trafficking law authorizes mandatory restitution by stating, “In addition to any sentence or fine imposed for a conviction of an offense under this chapter, the court shall order the person convicted to make restitution to the victim of the crime.” N.D. Cent. Code § 12.1-40-01(4).

2.8.1 Recommendation: Amend human trafficking and CSEC offenses to require mandatory fines for these offenses.

2.9 *Buying and possessing child pornography carries penalties as high as those for sex trafficking of a minor, commercial sexual exploitation of a child, and similar federal offenses.*

Possession of child pornography is a Class C felony under N.D. Cent. Code § 12.1-27.2-04.1 (Possession of certain materials prohibited), which states, “A person is guilty of a class C felony if, knowing of its character and content, that person knowingly possesses any motion picture, photograph, or other visual representation that includes sexual conduct by a minor.” A Class C felony is punishable by imprisonment up to 5 years, a fine of \$5,000, or both. N.D. Cent. Code § 12.1-32-01(4).

In comparison, a federal conviction for possession of child pornography¹⁵ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.¹⁶ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.¹⁷

2.9.1 Recommendation: Amend N.D. Cent. Code § 12.1-27.2-04.1 (Possession of certain materials prohibited) to raise the penalty to align with federal penalties.

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

Convicted buyers of sex with minors may be required to register as sex offenders. In North Dakota, offenders could be required to register both for offenses against children and sexual offenses under N.D. Cent. Code § 12.1-32-15(2) (Offenders against children and sexual offenders—Sexually violent predators—Registration requirement—Penalty). Under N.D. Cent. Code § 12.1-32-15(1)(e), “sexual offender” is defined as

a person who has pled guilty to or been found guilty, including juvenile delinquent adjudications, of a violation of section 12.1-20-03 [Gross sexual imposition], 12.1-20-03.1 [Continuous sexual abuse of a child], 12.1-20-04 [Sexual imposition], 12.1-20-05 [Corruption or solicitation of minors], 12.1-20-05.1 [Luring minors by computer or other electronic means], 12.1-20-06 [Sexual abuse of wards], 12.1-20-06.1 [Sexual exploitation by therapist], 12.1-20-07 [Sexual assault] except for subdivision a, . . . chapter 12.1-27.2 [Sexual performances by children], or subsection 2 of section 12.1-22-03.1, sex trafficking in violation of chapter 12.1-40, or an equivalent offense from another court in the United States, a tribal court, or court of another country, or an attempt or conspiracy to commit these offenses.

However, N.D. Cent. Code § 12.1-32-15(2)(b) states in part,

The court shall require an individual to register by stating this requirement on the court records, if that individual:

....

b. Has pled guilty or nolo contendere to, or been found guilty as a sexual offender for, a misdemeanor or attempted misdemeanor. The court may deviate from requiring an individual to register if the court first finds the individual is no more than three years older than the victim if the

¹⁵ 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).

¹⁶ 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).

¹⁷ 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).

victim is a minor, the individual has not previously been convicted as a sexual offender or of a crime against a child, and the individual did not exhibit mental abnormality or predatory conduct in the commission of the offense.

Additionally, “a crime against a child” potentially requiring registration includes all prostitution-related offenses under chapter 12.1-29, “in which the victim is a minor or is otherwise of the age required for the act to be a crime or an attempt or conspiracy to commit these offenses.” N.D. Cent. Code § 12.1-32-15(1)(a).

- 2.10.1 Recommendation: Amend N.D. Cent. Code § 12.1-32-15(2) (Offenders against children and sexual offenders—Sexually violent predators—Registration requirement—Penalty) to make registration as a sex offender mandatory for convictions under § 12.1-40-01 (Human trafficking) and North Dakota’s CSEC laws.

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 commercial sexual exploitation of children (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.*

N.D. Cent. Code § 12.1-40-01(Human trafficking) is a Class AA felony when the victim is under 18. The maximum penalty is life imprisonment without parole. N.D. Cent. Code § 12.1-32-01(1).

N.D. Cent. Code § 12.1-27.2-03 (Promoting or directing an obscene sexual performance by a minor) states, “A person is guilty of a class B felony if, knowing the character and content of a performance, that person produces, directs, or promotes any obscene performance which includes sexual conduct by a person who was a minor at the time of the performance.” While a Class B felony typically carries a maximum penalty of imprisonment for 10 years, a fine up to \$10,000, or both, the financial penalty is enhanced for chapter 12.1-27.2 offenses (Sexual performances by children). N.D. Cent. Code §§ 12.1-32-01(3), 12.1-27.2-04.2(1). N.D. Cent. Code § 12.1-27.2-04.2(1) (Sexual performance by a minor—Enhanced penalties) states, “[A] person who commits an offense under this chapter and who acts in the course of a commercial or for-profit activity or transaction in which the offender had or shared ownership, control, managerial responsibility, or a financial interest other than wages is subject to” a fine of up to \$10,000 for individual offenders or a fine up to \$25,000 for a “corporation, limited liability company, association, partnership, or other legal entity.” Subsequent offenses receive increased penalties of up to \$50,000 for individuals and up to \$100,000 for a “corporation, limited liability company, association, partnership, or other legal entity.” N.D. Cent. Code § 12.1-27.2-04.2(2). N.D. Cent. Code § 12.1-27.2-04 (Promoting a sexual performance by a minor) makes it a Class C felony to “knowing the character and content of a performance, . . . produce[], direct[], or promote[] any performance which includes sexual conduct by a person who was a minor at the time of the performance.” This chapter 12.1-27.2 offense also receives enhanced penalties as outlined above. N.D. Cent. Code § 12.1-27.2-04.2. A Class C felony is typically punishable by imprisonment up to 5 years, a fine not to exceed \$5,000, or both. N.D. Cent. Code § 12.1-32-01(4).

A trafficker could also be charged with N.D. Cent. Code § 12.1-29-01(Promoting prostitution) or N.D. Cent. Code § 12.1-29-02 (Facilitating prostitution). N.D. Cent. Code § 12.1-29-01(1)(a) (Promoting prostitution) makes it a crime to “[o]perate[] a prostitution business or house of prostitution.” A violation of this provision is a Class A misdemeanor unless the “actor owns, controls, manages, or otherwise supervises the prostitution business or house of prostitution,” in which case it is a Class C felony. N.D. Cent. Code § 12.1-29-01(2). It is

also a Class C felony under this provision to “[i]nduce[] or otherwise intentionally cause[] another to become engaged in sexual activity as a business,” or to “[k]nowingly procure[] a prostitute for a prostitution business or a house of prostitution.” N.D. Cent. Code § 12.1-29-01. A Class C felony is punishable by imprisonment up to 5 years, a fine not to exceed \$5,000. N.D. Cent. Code § 12.1-32-01(4).

N.D. Cent. Code § 12.1-29-02 (Facilitating prostitution) makes it a crime to, among other things, “[k]nowingly solicit[] a person to patronize a prostitute” or to “[k]nowingly procure[] a prostitute for a patron.” The offense is a Class C felony, with a potential \$5,000 fine, if the prostituted individual is under 16. N.D. Cent. Code §§ 12.1-29-02(2), 12.1-32-01(4). If the prostituted individual is 16 or older, the crime is a Class A misdemeanor with a possible fine of \$2,000. N.D. Cent. Code §§ 12.1-29-02(2), 12.1-32-01(5).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)¹⁸ 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 offense¹⁹ against a minor.

- 3.1.1 Recommendation: Amend N.D. Cent. Code § 12.1-29-02 (Facilitating prostitution) to raise the age of a minor victim from under 16 to under 18 to protect all minors.

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

Several statutes prohibit the use of a minor to create pornography, as well as subsequently producing, promoting, and distributing of the materials. N.D. Cent. Code § 12.1-27.2-02 (Use of a minor in a sexual performance) is a Class B felony punishable by imprisonment up to 10 years, a possible fine of \$10,000, or both. N.D. Cent. Code § 12.1-32-01(3). N.D. Cent. Code § 12.1-27.2-02 states,

A person is guilty of a class B felony if, knowing the character and content of a performance, that person employs, authorizes, or induces a minor to engage in sexual conduct during a performance or, if being a parent, legal guardian, or custodian of a minor, that person consents to the participation by the minor in sexual conduct during a performance.²⁰

N.D. Cent. Code § 12.1-27.2-03 (Promoting or directing an obscene sexual performance by a minor) is a Class B felony with a maximum penalty of imprisonment for 10 years, a possible fine of \$10,000, or both. N.D. Cent.

¹⁸ See *supra* note 6.

¹⁹ See *supra* note 9.

²⁰ N.D. Cent. Code § 12.1-27.2-01 (Definitions—Sexual Performances by Children)

2. “Performance” means any play, motion picture, photograph, dance, or other visual representation, or any part of a performance.

....

4. “Sexual conduct” means actual or simulated sexual intercourse, sodomy, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the buttocks, breasts, or genitals, including the further definitions of sodomy and sadomasochistic abuse under section 12.1-27.1-01.

5. “Sexual performance” means any performance which includes sexual conduct by a minor.

....

Code § 12.1-32-01(3). The provision states, “A person is guilty of a class B felony if, knowing the character and content of a performance, that person produces, directs, or promotes any obscene performance, which includes sexual conduct by a person who was a minor at the time of the performance.” N.D. Cent. Code § 12.1-27.2-03.

Lastly, N.D. Cent. Code § 12.1-27.2-04 (Promoting a sexual performance by a minor) is a Class C felony punishable by imprisonment up to five years and possible fine of \$5,000. N.D. Cent. Code § 12.1-32-01(4). The provision states, “A person is guilty of a class C felony if, knowing the character and content of a performance, that person produces, directs, or promotes any performance which includes sexual conduct by a person who was a minor at the time of the performance.” N.D. Cent. Code § 12.1-27.2-04.

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 offense²¹ against a minor. Additionally, a federal conviction for distribution of child pornography²² is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.²³ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.²⁴

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.*

Using the Internet to initiate or engage in communications to invite or induce minors to engage in sexual acts is prohibited under N.D. Cent. Code § 12.1-20-05.1 (Luring minors by computer or other electronic means). Although the offense does not specifically refer to a commercial sexual arrangement, it may apply to CSEC situations. Subsection (1) states,

1. An adult is guilty of luring minors by computer or other electronic means when:
 - a. The adult knows the character and content of a communication that, in whole or in part, implicitly or explicitly discusses or depicts actual or simulated nudity, sexual acts, sexual contact, sadomasochistic abuse, or other sexual performances and uses any computer communication system or other electronic means that allows the input, output, examination, or transfer of data or programs

²¹ See *supra* note 9.

²² 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).

²³ 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).

²⁴ 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).

from one computer or electronic device to another to initiate or engage in such communication with a person the adult believes to be a minor; and

b. By means of that communication the adult importunes, invites, or induces a person the adult believes to be a minor to engage in sexual acts or to have sexual contact with the adult, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for the adult's benefit, satisfaction, lust, passions, or sexual desires.

This offense has varying degrees of penalties depending on the age of the offender and the victim. It is a Class A misdemeanor with a maximum penalty of imprisonment for one year, a fine of \$2,000 if the offender is less than 22 and "reasonably believes the minor" is 15-17, or both. N.D. Cent. Code §§ 12.1-20-05.1(2), 12.1-32-01(5). It is a Class C felony with a maximum penalty of imprisonment for five years, a fine of \$5,000 if the adult is less than 22 and "reasonably believes the minor is under" 15, or if the adult is 22 or older and "reasonably believes the minor is" 15-17, or both. N.D. Cent. Code §§ 12.1-20-05.1(2), 12.1-32-01(4). Finally, it is a Class B felony with a maximum penalty of imprisonment for 10 years, a fine of \$10,000 if the adult is 22 or older and "reasonably believes the minor is under" 15, or both. N.D. Cent. Code §§ 12.1-20-05.1(2), 12.1-32-01(3). "The court shall sentence an adult convicted of a class B or class C felony under this section to serve a term of imprisonment of at least one year, except the court may sentence an individual to less than one year if the individual did not take a substantial step toward meeting with the minor." N.D. Cent. Code § 12.1-20-05.1(2).

3.3.1 Recommendation: Eliminate the staggered penalty approach in N.D. Cent. Code § 12.1-20-05.1 (Luring minors by computer or other electronic means) to ensure base penalties are sufficiently high for luring any minor under 18 and include as prohibited conduct luring minors by computer or other electronic means for the purpose of violating § 12.1-40-01 (Human trafficking) and North Dakota's CSEC laws.

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

Various fines are associated with crimes traffickers commit. Although there is no fine directly tied to the Class AA felony of sex trafficking of a minor, there are fines for other crimes with which a trafficker may be charged. For facilitating prostitution, which includes "[k]nowingly solicit[ing] a person to patronize a prostitute" or "[k]nowingly procur[ing] a prostitute for a patron," a trafficker may face a Class C felony with a fine of \$5,000 if the prostituted individual is under 16. N.D. Cent. Code §§ 12.1-29-02(1)(a)-(b), (2), 12.1-32-01(4). If the prostituted individual is 16 or older, the trafficker may face a Class A misdemeanor with a possible fine of \$2,000. N.D. Cent. Code §§ 12.1-29-02(2), 12.1-32-01(5). If guilty of N.D. Cent. Code § 12.1-29-01(1)(a) (Promoting prostitution), which includes "[o]perat[ing] a prostitution business or a house of prostitution," the trafficker may face a Class A misdemeanor with a possible fine of \$2,000. N.D. Cent. Code §§ 12.1-29-01(2), 12.1-32-01(5). A trafficker may face a Class C felony and a possible \$5,000 fine if the trafficker is guilty of promoting prostitution and "owns, controls, manages, or otherwise supervises the prostitution business or house of prostitution." N.D. Cent. Code §§ 12.1-29-01(2), 12.1-32-01(4). The trafficker may also be guilty of promoting prostitution and face a Class C felony if the trafficker "[i]nduces or otherwise intentionally causes another to become engaged in sexual activity as a business," or "[k]nowingly procures a prostitute for a prostitution business or a house of prostitution." N.D. Cent. Code § 12.1-29-01.

Fines may be assessed against traffickers who use a minor to create pornography, as well as subsequently producing, promoting, and distributing the materials. As Class B felonies, N.D. Cent. Code § 12.1-27.2-02 (Use

of a minor in a sexual performance) and N.D. Cent. Code § 12.1-27.2-03 (Promoting or directing an obscene sexual performance by a minor) have possible fines of \$10,000. N.D. Cent. Code § 12.1-32-01(3). As a Class C felony, N.D. Cent. Code § 12.1-27.2-04 (Promoting a sexual performance by a minor) has a possible fine of \$5,000. N.D. Cent. Code § 12.1-32-01(4).

A trafficker may also be required to pay restitution under N.D. Cent. Code § 12.1-32-08 (Hearing prior to ordering restitution, reparation, or reimbursement of indigent defense costs and expenses—Conditions—Collection of restitution for insufficient funds checks—Continuing appropriation), which provides for mandatory restitution only where the victim suffered pecuniary damages, and for discretionary restitution in other cases. Subsection (1) states in part,

Before imposing restitution or reparation as a sentence or condition of probation, the court shall hold a hearing on the matter with notice to the prosecuting attorney and to the defendant as to the nature and amount of restitution. The court, when sentencing a person adjudged guilty of criminal activities that have resulted in pecuniary damages, in addition to any other sentence the court may impose, shall order that the defendant make restitution to the victim or other recipient as determined by the court, unless the court states on the record, based upon the criteria in this subsection, the reason it does not order restitution or orders only partial restitution.”

The section also sets forth items the court is to consider “[i]n determining whether to order restitution” One of those items, subsection (1)(a) states that “[t]he defendant may be required as part of the sentence imposed by the court to pay the prescribed treatment costs for a victim of a sexual offense as defined in chapters 12.1-20 [Sex offenses] and 12.1-27.2 [Sexual performance by children].”

The human trafficking law authorizes mandatory restitution by stating, “In addition to any sentence or fine imposed for a conviction of an offense under this chapter, the court shall order the person convicted to make restitution to the victim of the crime.” N.D. Cent. Code § 12.1-40-01(4).

Traffickers are also subject to discretionary civil asset forfeiture proceedings. N.D. Cent. Code § 29-31.1-04(1) (Forfeiture proceedings) states, “Forfeiture is a civil proceeding not dependent upon a prosecution for, or conviction of, a criminal offense and forfeiture proceedings are separate and distinct from any related criminal action.”²⁵ Under N.D. Cent. Code § 29-31.1-01(1) “forfeitable property” is defined as including,

- b. Property that has been used or is intended to be used to facilitate the commission of a criminal offense or to avoid detection or apprehension of a person committing a criminal offense
- c. Property that is acquired as or from the proceeds of a criminal offense.
- d. Property offered or given to another as an inducement for the commission of a criminal offense.
- e. A vehicle or other means of transportation used in the commission of a felony, the escape from the scene of the commission of a felony, or in the transportation of property that is the subject matter of a felony.
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N.D. Cent. Code § 29-31.1-03 (Seizure of forfeitable property) states in part, “Forfeitable property may be seized whenever and wherever the property is found within this state. Forfeitable property may be seized by

²⁵ See *supra*, note 14.

taking custody of the property or by serving upon the person in possession of the property a notice of forfeiture and seizure.” N.D. Cent. Code. §29-31.1-03 also governs disposition of forfeited property and states,

If the court finds that the forfeiture is warranted, an order transferring ownership to the seizing agency must be entered and the property must be delivered to the seizing agency for disposition as directed by the court. Property that has been seized for forfeiture, and is not already secured as evidence in a criminal case, must be safely secured or stored by the agency that caused its seizure.

3.4.1 Recommendation: Amend human trafficking and CSEC offenses to require mandatory fines for these offenses.

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

Convicted traffickers may be required to register as sex offenders. In North Dakota, offenders could be required to register both for offenses against children and sexual offenses under N.D. Cent. Code § 12.1-32-15(2) (Offenders against children and sexual offenders—Sexually violent predators—Registration requirement—Penalty).²⁶ Under N.D. Cent. Code § 12.1-32-15(1)(e), “sexual offender” is defined as

a person who has pled guilty to or been found guilty, including juvenile delinquent adjudications, of a violation of section 12.1-20-03 [Gross sexual imposition], 12.1-20-03.1 [Continuous sexual abuse of a child], 12.1-20-04 [Sexual imposition], 12.1-20-05 [Corruption or solicitation of minors], 12.1-20-05.1 [Luring minors by computer or other electronic means], 12.1-20-06 [Sexual abuse of wards], 12.1-20-06.1 [Sexual exploitation by therapist], 12.1-20-07 [Sexual assault] except for subdivision a, . . . chapter 12.1-27.2 [Sexual performances by children], or subsection 2 of section 12.1-22-03.1, sex trafficking in violation of chapter 12.1-40, or an equivalent offense from another court in the United States, a tribal court, or court of another country, or an attempt or conspiracy to commit these offenses.

However, N.D. Cent. Code § 12.1-32-15(2)(b) states in part,

The court shall require an individual to register by stating this requirement on the court records, if that individual:

. . . .

b. Has pled guilty or nolo contendere to, or been found guilty as a sexual offender for, a misdemeanor or attempted misdemeanor. The court may deviate from requiring an individual to register if the court first finds the individual is no more than three years older than the victim if the victim is a minor, the individual has not previously been convicted as a sexual offender or of a crime against a child, and the individual did not exhibit mental abnormality or predatory conduct in the commission of the offense.

Additionally “a crime against a child” potentially requiring registration includes all prostitution related offenses under chapter 12.1-29, “in which the victim is a minor or is otherwise of the age required for the act to be a crime or an attempt or conspiracy to commit these offenses.” N.D. Cent. Code § 12.1-32-15(1)(a).

²⁶ See *supra*, note 14.

3.5.1 Recommendation: Amend N.D. Cent. Code § 12.1-32-15(2) (Offenders against children and sexual offenders—Sexually violent predators—Registration requirement—Penalty) to require registration as a sex offender for convictions under § 12.1-40-01 (Human trafficking) and North Dakota’s CSEC laws.

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.*

Under N.D. Cent. Code § 27-20-44(1) (Termination of parental rights),

1. The court by order may terminate the parental rights of a parent with respect to the parent's child if:
 - a. The parent has abandoned the child;
 - b. The child is subjected to aggravated circumstances as defined under subsection 3 of section 27-20-02 [Definitions];
 - c. The child is a deprived child and the court finds:
 - (1) The conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm; or
 - (2) The child has been in foster care, in the care, custody, and control of the department, or a county social service board, or, in cases arising out of an adjudication by the juvenile court that a child is an unruly child, the division of juvenile services, for at least four hundred fifty out of the previous six hundred sixty nights; or
 - d. The written consent of the parent acknowledged before the court has been given.

“Aggravated circumstances” is defined in part in N.D. Cent. Code § 27-20-02(3)(a), (c) as “circumstances in which a parent: a. Abandons, tortures, chronically abuses, or sexually abuses a child; . . . ; c. Engages in conduct prohibited under sections 12.1-20-01 through 12.1-20-08 or chapter 12.1-27.2 [Sexual performances by children], in which a child is the victim or intended victim.” The provisions in N.D. Cent. Code §§ 12.1-20-01 through 12.1-20-08, include gross sexual imposition, sexual imposition, continuous sexual abuse of a child, corruption or solicitation of minors, luring minors by computer or other electronic means, and sexual assault.

Additionally, N.D. Cent. Code § 27-20-20.1 (Petition to terminate parental rights—When bought—Definitions) sets out certain circumstances, subject to some exceptions, when “a petition for termination of parental rights must be filed,” including, under subsection (2)(c)(1), “A violation of . . . subdivision a of subsection 1 of section 14-09-22 in which the victim is another child of the parent.” N.D. Cent. Code § 14-09-22(1)(a) (Abuse or neglect of child) states,

1. Except as provided in subsection 2 or 3, a parent, adult family or household member, guardian, or other custodian of any child, who willfully commits any of the following offenses is guilty of a class C felony except if the victim of an offense under subdivision a is under the age of six years in which case the offense is a class B felony:
 - a. Inflicts, or allows to be inflicted, upon the child, bodily injury, substantial bodily injury, or serious bodily injury as defined by section 12.1-01-04²⁷ or mental injury.²⁸

²⁷ N.D. Cent. Code § 12.1-01-04(4),(29), (31) (General definitions) defines “bodily injury” as “any impairment of physical condition, including physical pain,” “serious bodily injury” as “bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or

- 3.6.1 Recommendation: Amend N.D. Cent. Code § 27-20-44(1) (Termination of parental rights) to include convictions for sex trafficking or CSEC offenses against any child victim as grounds for terminating a trafficker’s parental rights.

impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs,” and “substantial bodily injury” as “a substantial temporary disfigurement, loss, or impairment of the function of any bodily member or organ.”

²⁸ The quoted language is the current version of N.D. Cent. Code § 14-09-22 (Abuse or neglect of child—Penalty), incorporating the amendment added by the passage of Senate Bill 2214. S.B. 2214, 62nd Leg. Assemb., Leg. Sess. (N.D. 2011).

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.*

Assisting, enabling, or financially benefitting from human trafficking are crimes under N.D. Cent. Code § 12.1-40-01 (Human trafficking—Penalty). It states in part,

- 1. A person is guilty of human trafficking if the person:
 - a. Benefits financially or receives anything of value from knowing participation in human trafficking; or
 - b. Promotes, recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to promote, recruit, entice, harbor, transport, provide, or obtain by any means, another person, knowing that the person will be subject to human trafficking.

This crime is a Class AA felony when the victim is under 18. N.D. Cent. Code § 12.1-40-01(2).

Additionally, N.D. Cent. Code § 12.1-29-02 (Facilitating prostitution) applies to facilitators. N.D. Cent. Code § 12.1-29-02(1) makes it a crime, among other things, when an individual does the following:

- c. Knowingly leases or otherwise permits a place controlled by the actor, alone or in association with others, to be regularly used for prostitution, promoting prostitution, or facilitating prostitution, or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or taking other legally available means; or
- d. Knowingly induces or otherwise intentionally causes another to remain a prostitute. A person who is supported in whole or substantial part by the proceeds of prostitution, other than the prostitute or the prostitute's minor child or a person whom the prostitute is required by law to support, is presumed to be knowingly inducing or intentionally causing another to remain a prostitute.

This crime is a Class C felony in certain circumstances, including if the minor is under 16 or force or threat is used to cause a person to remain a prostitute. N.D. Cent. Code § 12.1-29-02(2). Otherwise the crime is a Class A misdemeanor. N.D. Cent. Code § 12.1-29-02(2).

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.*

Various fines are associated with crimes facilitators commit. For facilitating prostitution, a facilitator may face a Class C felony with a fine of \$5,000 if the prostituted individual is under 16. N.D. Cent. Code §§ 12.1-29-02(1)(a)-(b), (2), 12.1-32-01(4). If the prostituted individual is 16 or older, the trafficker may face a Class A misdemeanor with a possible fine of \$2,000. N.D. Cent. Code §§ 12.1-29-02(2), 12.1-32-01(5).

A facilitator may also be required to pay restitution under N.D. Cent. Code § 12.1-32-08 (Hearing prior to ordering restitution, reparation, or reimbursement of indigent defense costs and expenses—Conditions—Collection of restitution for insufficient funds checks—Continuing appropriation), which provides for mandatory restitution only where the victim suffered pecuniary damages. Subsection (1) states in part,

Before imposing restitution or reparation as a sentence or condition of probation, the court shall hold a hearing on the matter with notice to the prosecuting attorney and to the defendant as to the nature and amount of restitution. The court, when sentencing a person adjudged guilty of criminal activities that have resulted in pecuniary damages, in addition to any other sentence the court may impose, shall order that the defendant make restitution to the victim or other recipient as determined by the court, unless the court states on the record, based upon the criteria in this subsection, the reason it does not order restitution or orders only partial restitution.

The section also sets forth items the court is to consider “[i]n determining whether to order restitution” One of those items, subsection (1)(a) states that “[t]he defendant may be required as part of the sentence imposed by the court to pay the prescribed treatment costs for a victim of a sexual offense as defined in chapters 12.1-20 [Sex offenses] and 12.1-27.2 [Sexual performance by children].”

The human trafficking law authorizes mandatory restitution by stating, “In addition to any sentence or fine imposed for a conviction of an offense under this chapter, the court shall order the person convicted to make restitution to the victim of the crime.” N.D. Cent. Code § 12.1-40-01(4).

Through civil forfeiture proceedings facilitators could be subject to property forfeiture. “Forfeiture is a civil proceeding not dependent upon a prosecution for, or conviction of, a criminal offense and forfeiture proceedings are separate and distinct from any related criminal action.”²⁹ N.D. Cent. Code § 29-31.1-04 (Forfeiture proceedings). N.D. Cent. Code § 29-31.1-01(1) defines “forfeitable property” as including the following:

- a. Property that is illegally possessed or is contraband.
- b. Property that has been used or is intended to be used to facilitate the commission of a criminal offense or to avoid detection or apprehension of a person committing a criminal offense. . . .
- c. Property that is acquired as or from the proceeds of a criminal offense.
- d. Property offered or given to another as an inducement for the commission of a criminal offense.
- e. A vehicle or other means of transportation used in the commission of a felony, the escape from the scene of the commission of a felony, or in the transportation of property that is the subject matter of a felony.

²⁹ See *supra*, note 14.

N.D. Cent. Code § 29-31.1-03 (Seizure of forfeitable property) states in part, “Forfeitable property may be seized whenever and wherever the property is found within this state. Forfeitable property may be seized by taking custody of the property or by serving upon the person in possession of the property a notice of forfeiture and seizure.” N.D. Cent. Code. §29-31.1-03, also governs the disposition of property and, in relevant part, requires

If the court finds that the forfeiture is warranted, an order transferring ownership to the seizing agency must be entered and the property must be delivered to the seizing agency for disposition as directed by the court. Property that has been seized for forfeiture, and is not already secured as evidence in a criminal case, must be safely secured or stored by the agency that caused its seizure.

- 4.2.1 Recommendation: Amend human trafficking and CSEC offenses to require mandatory fines for these offenses.

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

There are no laws in North Dakota related to sex tourism.

- 4.3.1 Recommendation: Enact a law prohibiting 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 occurring in North Dakota.

4.4 *Promoting and selling child pornography is illegal.*

N.D. Cent. Code § 12.1-27.2-03 (Promoting or directing an obscene sexual performance by a minor) states, “A person is guilty of a class B felony if, knowing the character and content of a performance, that person produces, directs, or promotes any obscene performance which includes sexual conduct by a person who was a minor at the time of the performance.” A Class B felony typically carries a maximum penalty of imprisonment for 10 years, a fine up to \$10,000, or both. N.D. Cent. Code § 12.1-32-01(3).

N.D. Cent. Code § 12.1-27.2-04 (Promoting a sexual performance by a minor) makes it a Class C felony to “knowing the character and content of a performance, . . . produce[], direct[], or promote[] any performance which includes sexual conduct by a person who was a minor at the time of the performance.” A Class C felony is typically punishable by imprisonment up to 5 years, a fine not to exceed \$5,000, or both. N.D. Cent. Code § 12.1-32-01(4).

These offenses are subject to enhanced penalties. N.D. Cent. Code § 12.1-27.2-04.2(1) (Sexual performance by a minor—Enhanced penalties) states, “[a] person who commits an offense under this chapter and who acts in the course of a commercial or for-profit activity or transaction in which the offender had or shared ownership, control, managerial responsibility, or a financial interest other than wages is subject to” a fine of up to \$10,000 for individual offenders or a fine up to \$25,000 for a “corporation, limited liability company, association, partnership, or other legal entity.” Subsequent offenses receive increased penalties of up to \$50,000 for individuals and up to \$100,000 for a “corporation, limited liability company, association, partnership, or other legal entity.” N.D. Cent. Code § 12.1-27.2-04.2(2).

The obscenity laws serve as a means for prosecuting promoters, as well as sellers. N.D. Cent. Code

§ 12.1-27.1-01(1) (Obscenity—Definitions—Dissemination—Classification of offenses) makes it a Class C felony “if, knowing of its character, [a] person disseminates obscene material or if the person produces, transports, or sends obscene material with intent that it be disseminated.” “Disseminate” in this section means “to sell, lease, rent, advertise, broadcast, transmit, exhibit, or distribute for pecuniary gain.” N.D. Cent. Code § 12.1-27.1-01(6).

Legal Components:

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*
- 5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*
- 5.4 *Child victims of sex trafficking or commercial sexual exploitation 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 commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

Legal Analysis:

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*

For the purposes of crime victims’ compensation, North Dakota defines a “victim” to include “a person who suffers bodily injury³⁰ or death as a result of criminally injurious conduct, the good-faith effort of any person to prevent criminally injurious conduct, or the good-faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct.”³¹ N.D. Cent. Code § 54-23.4-01(8) (Definitions—Crime Victims Compensation). Therefore, the term is potentially broad enough to cover commercially sexually exploited children but does not specifically define victims of domestic minor sex trafficking or CSEC offenses as victims for purposes of victim compensation.

³⁰ Pursuant to N.D. Cent. Code § 54-23.4-01(1), “Bodily injury’ means any harm that requires medical treatment and results in economic loss and includes pregnancy and nervous shock.”

³¹ N.D. Cent. Code § 54-23.4-01(4) (Definitions—Crime Victims Compensation) defines “criminally injurious conduct” in relevant part as “conduct that results in bodily injury or death, and is punishable by fine, imprisonment, or death, or would be so punishable but for the fact that the person engaging in the conduct was a minor or lacked capacity to commit the crime.”

- 5.1.1 Recommendation: Amend the definition of victim in N.D. Cent. Code § 54-23.4-01(8) (Definitions—Crime Victims Compensation) to expressly include victims of human trafficking and CSEC offenses.

- 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.*

Under N.D. Cent. Code § 12.1-17-08(1) (Consent as a defense),

When conduct is an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury by all persons injured or threatened by the conduct is a defense if:

- a. Neither the injury inflicted nor the injury threatened is such as to jeopardize life or seriously impair health;
- . . . ; or
- c. The conduct and the injury are reasonably foreseeable hazards of an occupation or profession or of medical or scientific experimentation conducted by recognized methods, and the persons subjected to such conduct or injury, having been made aware of the risks involved, consent to the performance of the conduct or the infliction of the injury.

Under subsection (2),

Assent does not constitute consent, within the meaning of this section, if:

- a. It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifest or known to the actor;
- b. It is given by a person who by reason of youth, mental disease or defect, or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or
- c. It is induced by force, duress, or deception.

- 5.2.1 Recommendation: Amend N.D. Cent. Code § 12.1-17-08(1) (Consent as a defense) to specifically eliminate any consent defense for CSEC crimes and domestic minor sex trafficking.

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

N.D. Cent. Code § 12.1-29-03 (Prostitution) is not limited in application to adults and does not identify a minor engaged in prostitution as a victim of sex trafficking.

- 5.3.1 Recommendation: Amend N.D. Cent. Code § 12.1-29-03 (Prostitution) to apply only to adults, making this offense specifically inapplicable to minors.

- 5.4 *Child victims of sex trafficking or commercial sexual exploitation are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*

If found to be an abused or neglected child, the commercially sexually exploited minor could be brought under the protections of N.D. Cent. Code § 50-25.1 (Child Abuse and Neglect), which serves “to protect the health

and welfare of children by encouraging the reporting of children who are known to be or suspected of being abused or neglected; the providing of adequate services for the protection and treatment of abused and neglected children and to protect them from further harm;” N.D. Cent. Code § 50-25.1-01 (Purpose). Upon a report of abuse or neglect, N.D. Cent. Code § 50-25.1-05(1) (Assessment) states that

[t]he [human services] department, in accordance with rules adopted by the department, immediately shall initiate an assessment, or cause an assessment, of any report of child abuse or neglect including, when appropriate, the assessment of the home or the residence of the child, any school or child care facility attended by the child, and the circumstances surrounding the report of abuse or neglect.

Under subsection (2), “If the report alleges a violation of a criminal statute involving sexual or physical abuse, the department and an appropriate law enforcement agency shall coordinate the planning and execution of their investigation efforts to avoid a duplication of fact finding efforts and multiple interviews.” N.D. Cent. Code § 50-25.1-05(2) further states that law enforcement may do any of the following:

- a. Refer the case to a children’s advocacy center for a forensic interview, forensic medical examination, and other services.
- b. Interview, without the consent of a person responsible for the child’s welfare, the alleged abused or neglected child and any other child who currently resides or who has resided with the person responsible for the child’s welfare or the alleged perpetrator.
- c. Conduct the interview at a school, child care facility, or any other place where the alleged abused or neglected child or other child is found.

If the report implicates a person who is not “responsible for the child’s health or welfare” then “[u]pon determination by the department or the department’s designee that a report made under this chapter implicates a person other than a person responsible for a child’s welfare, the department may refer the report to an appropriate law enforcement agency for investigation and disposition.” N.D. Cent. Code § 50-25.1-05.3 (Disposition of reports implicating a person not responsible for the child’s health or welfare).

N.D. Cent. Code § 50-25.1-05.1 (Services required—How determined) requires the human services department to make a decision “whether services are required to provide for the protection and treatment of an abused or neglected child” after an assessment of the reported child abuse or neglect is completed. Under N.D. Cent. Code § 50-25.1-06 (Protective and other services to be provided), the human services department or an authorized agent

shall provide protective services for the abused or neglected child and other children under the same care as may be necessary for their well-being and shall provide other appropriate social services, as the circumstances warrant, to the parents, custodian, or other persons serving in loco parentis with respect to the child or the other children.³²

³² “In loco parentis” does not appear to be defined in the Code; however, *State v. Johnson*, 88 N.W.2d 209, 216 (N.D. 1958) (superseded by statute with the adoption of the North Dakota Rules of Criminal Procedure (*State v. Allen*, 237 N.W.2d 154, 159 (N.D. 1975)). states,

A person who stands ‘in loco parentis’ is a person who stands in the place of a parent; charged, factitiously, with a parent’s rights, duties and responsibilities. *Black’s Law Dictionary*, 4th Ed., p. 896. The cases relating to the application of the terms ‘in loco parentis’ indicate that it does not refer to such a transitory

North Dakota’s laws appear to allow for law enforcement to take a commercially sexually exploited child into custody in certain circumstances. Specifically, N.D. Cent. Code § 27-20-13(1) (Taking into custody) allows a child to be taken into custody through the following means:

- a. Pursuant to an order of the court under this chapter;
- b. Pursuant to the laws of arrest;
- c. By a law enforcement officer if there are reasonable grounds to believe:
 - (1) That the child is suffering from illness or injury or is in immediate danger from the child’s surroundings, and that the child’s removal is necessary; or
 - (2) That the child has run away from the child’s parents, guardian, or other custodian; or
- d. By order of the director made pursuant to subdivision h of subsection 1 of section 27-20-06.³³

If taken into custody under N.D. Cent. Code § 27-20-13, this is not considered an arrest, “except for the purpose of determining its validity under the Constitution of North Dakota or the Constitution of the United States.” N.D. Cent. Code § 27-20-13(2). After being taken into custody the child

may not be detained or placed in shelter care prior to the hearing on the petition unless the child’s detention or care is required to protect the person or property of others or of the child or because the child may abscond or be removed from the jurisdiction of the court or because the child has no parent, guardian, or custodian or other person able to provide supervision and care for the child and return the child to the court when required, or an order for the child’s detention or shelter care has been made by the court pursuant to this chapter. N.D. Cent. Code § 27-20-14(1) (Detention of child—Juvenile drug court exception).

However, under subsection (2),

If a child is participating in a juvenile drug court program as a result of an adjudication for a delinquent offense, the drug court may order the child detained in a juvenile detention center operated pursuant to chapter 12-44.1. The child may be detained twice during the child’s participation in the program but the total period of detention under this subsection may not exceed four days in a one-year period.

arrangement as the defendant claims he had with some of the parents of the minors involved in this case. Nor does it refer to a temporary situation in which a minor is accompanied by someone over 18 to a public dance.

³³ N.D. Cent. Code § 27-20-06(1)(e), (h) (Powers and duties of director of juvenile court) states in part that

For the purpose of carrying out the objectives and purposes of this chapter and subject to the limitations of this chapter or imposed by the court, a director shall:

.....

e. Issue a temporary custody order concerning a child who is referred to the director's supervision or care as a delinquent, unruly, or deprived child. Except as provided by this chapter, a director does not have the powers of a law enforcement officer.

.....

h. Make such temporary order not to exceed ninety-six hours for the custody and control of a child alleged to be deprived as may be deemed appropriate. The order must be reduced to writing within twenty-four hours, excluding holidays and weekends.

N.D. Cent. Code § 27-20-16 (Place of detention) limits the places where allegedly deprived, unruly, or delinquent children may be detained. A deprived child may be detained to the facilities listed in subsections a, b, and d below and “may 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 or unruly.” N.D. Cent. Code § 27-20-16(4). Under subsection (5), “a child alleged to be unruly may be detained only in the facilities listed in subdivisions a, b, c, and d of subsection 1.” Subsection (1) states,

1. A child alleged to be delinquent or unruly may be detained only in:
 - a. A licensed foster home or a home approved by the court;
 - b. A facility operated by a licensed child welfare agency;
 - c. A detention home or center for delinquent or unruly children which is under the direction or supervision of the court or other public authority or of a private agency approved by the court;
 - d. Any other suitable place or facility, including a medical facility for the treatment of mental illness, alcoholism, or drug addiction, designated by the court; or
 - e. A jail or other facility for the detention of adults only if the facility in subdivision c is not available, the detention is in a room separate and removed from those for adults, it appears to the satisfaction of the court or the juvenile supervisor, intake officer, or other authorized officer of the court, that public safety and protection reasonably require detention, and it is so authorized.

In the event that a victim of domestic minor sex trafficking is arrested under the above authority or is determined to be ineligible for child welfare protection, the criminal justice system may find a commercially sexually exploited child to be an unruly child or a delinquent child. Pursuant to N.D. Cent. Code § 27-20-02(19) (Definitions—Uniform Juvenile Court Act), an “unruly child” is one that does any of the following:

- a. Is habitually and without justification truant from school;
- b. Is habitually disobedient of the reasonable and lawful commands of the child’s parent, guardian, or other custodian and is ungovernable or who is willfully in a situation dangerous or injurious to the health, safety, or morals of the child or others;
- c. Has committed an offense applicable only to a child, except for an offense committed by a minor fourteen years of age or older under subsection 2 of section 12.1-31-03[Sale of tobacco to minors and use by minors prohibited] or an equivalent local ordinance or resolution;
- ...
- f. In any of the foregoing instances is in need of treatment or rehabilitation.

An unruly child may receive any of the same disposition orders as a delinquent child, other than “commitment to a secure facility.” N.D. Cent. Code § 27-20-32 (Disposition of unruly child). However, under N.D. Cent. Code § 27-20-32, “If after making the disposition the court finds upon a further hearing that the child is not amenable to treatment or rehabilitation under the disposition made, it may make a disposition otherwise authorized by section 27-20-31.”

A “delinquent child” is “a child who has committed a delinquent act and is in need of treatment or rehabilitation.” N.D. Cent. Code § 27-20-02(7). A “delinquent act” is “an act designated a crime under the law, including local ordinances or resolutions of this state, or of another state if the act occurred in that state, or

under federal law, and the crime does not fall under subdivision c of subsection 19,”³⁴ which would include the crime of prostitution. N.D. Cent. Code § 27-20-02(6). Under N.D. Cent. Code § 27-20-31 (Disposition of delinquent child),

If the child is found to be a delinquent child, the court may make any of the following orders of disposition best suited to the child's treatment, rehabilitation, and welfare:

1. Any order authorized by section 27-20-30 for the disposition of a deprived child;
2. Placing the child on probation under the supervision of the director, probation officer, or other appropriate officer of the court or of the court of another state as provided in section 27-20-41 or the director of the county social service board under conditions and limitations the court prescribes;
...
4. Committing the child to the division of juvenile services or to another state department to which commitment of delinquent or unruly children may be made. When necessary, the commitment order may provide that the child initially be placed in a secure facility;
...
7. Ordering the child's participation in a juvenile drug court program.

Deprived children, under N.D. Cent. Code § 27-20-30(1) (Disposition of deprived child), may receive the following disposition orders “best suited to the protection and physical, mental, and moral welfare of the child:”

- a. Permit the child to reside with the child's parents, guardian, or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child.
- b. Subject to conditions and limitations as the court prescribes, transfer temporary legal custody to any of the following:
 - (1) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child.
 - (2) The director of the county social service board or other public agency authorized by law to receive and provide care for the child......
- e. Appoint a fit and willing relative or other appropriate individual as the child's legal guardian.
- f. In cases in which a compelling reason has been shown that it would not be in the child's best interests to return home, to have parental rights terminated, to be placed for adoption, to be placed with a fit and willing relative, or to be placed with a legal guardian, establish, by order, some other planned permanent living arrangement.

- 5.4.1 Recommendation: Enact a law mandating a child protection response upon identification of a CSEC victim and ensuring immediate and appropriate services and placement of the child victim.

³⁴ N.D. Cent. Code § 27-20-02(19)(c) states, “c. Has committed an offense applicable only to a child, except for an offense committed by a minor fourteen years of age or older under subsection 2 of section 12.1-31-03[Sale of tobacco to minors and use by minors prohibited] or an equivalent local ordinance or resolution.”

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

N.D. Cent. Code § 50-25.1-02(3) (Definitions—Child Abuse and Neglect) defines “abused child” to include a child who is commercially sexually exploited. It defines the term as

an individual under the age of eighteen years who is suffering from abuse as defined in subdivision a of subsection 1 of section 14-09-22 [Criminal abuse and neglect of child] caused by a person responsible for the child’s welfare and ‘sexually abused child’ means an individual under the age of eighteen years who is subjected by a person responsible for the child’s welfare, or by any individual who acts in violation of sections 12.1-20-01 through 12.1-20-07 [Sexual offenses, including luring a minor by computer and corruption or solicitation of minors], sections 12.1-20-11 through 12.1-20-12.2 [Non-commercial sexual offenses], or chapter 12.1-27.2 [Sexual performance by children].

5.5.1 Recommendation: Amend the definition of “abused child” under N.D. Cent. Code § 50-25.1-02(3) (Definitions—Child Abuse and Neglect) to include minor victims of §§ 12.1-40-01 (Human trafficking) and § 12.1-29-02 (Facilitating prostitution).

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.*

N.D. Cent. Code § 50-25.1-02(1) (Definitions—Child Abuse and Neglect) defines “a person responsible for the child’s welfare” for the chapter on “child abuse and neglect” in the title on “public welfare” as including “a person who has responsibility for the care or supervision of a child and who is the child’s parent, an adult family member of the child, any member of the child’s household, the child’s guardian, or the child’s foster parent”

5.6.1 Recommendation: Amend the definition of “person responsible for the child’s welfare” N.D. Cent. Code § 50-25.1-02(1) (Definitions—Child Abuse and Neglect) to include any person with custody or control of a child to allow for child welfare intervention when a non-familial trafficker has custody or control of a child.

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*

For the purposes of crime victims’ compensation, a “victim” includes “a person who suffers bodily injury or death as a result of criminally injurious conduct, the good-faith effort of any person to prevent criminally injurious conduct, or the good-faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct.”³⁵ N.D. Cent. Code § 54-23.4-01(8) (Definitions—Crime Victims Compensation). The term is likely broad enough to cover sexually exploited children. Upon successful application for compensation, under N.D. Cent. Code § 54-23.4-02 (Award of compensation), a victim of a

³⁵ N.D. Cent. Code § 54-23.4-01(4) defines “criminally injurious conduct” in relevant part as “conduct that results in bodily injury or death, and is punishable by fine, imprisonment, or death, or would be so punishable but for the fact that the person engaging in the conduct was a minor or lacked capacity to commit the crime.” “Bodily injury” is defined as “any harm that requires medical treatment and results in economic loss and includes pregnancy and nervous shock.” N.D. Cent. Code § 54-23.4-01(1)

crime may be awarded “economic loss arising directly from criminally injurious conduct if satisfied by a preponderance of the evidence that the requirements for compensation have been met.” Under N.D. Cent. Code § 54-23.4-01(7), “economic loss” is defined as “economic detriment consisting only of allowable expense, work loss, replacement services loss, and, if injury causes death, dependent’s economic loss and dependent’s replacement services loss. Noneconomic detriment is not loss. The term includes economic detriment caused by pain and suffering or physical impairment.” N.D. Cent. Code § 54-23.4-01(7)(d) defines “noneconomic detriment” as “pain, suffering, inconvenience, physical impairment, and other nonpecuniary damage.” N.D. Cent. Code § 54-23.4-01(7)(a) includes in its definition of “allowable expense” “reasonable charges incurred for reasonably needed products, services, and accommodations required due to the injury, including those for medical care, rehabilitation, rehabilitative occupational training, and other remedial treatment and care.”

However, several eligibility criteria in the victim of crime compensation statutes under N.D. Cent. Code §§ 54-23.4-01 et seq. might result in the inability of a domestic minor sex trafficking victim to receive compensation for injuries suffered as a result of commercial sexual exploitation. N.D. Cent. Code § 54-23.4-06(2) (Application for compensation—Awards—Limitations on awards) limits the time period to file a claim for compensation to “one year from the date the criminally injurious conduct was reported to a law enforcement officer.” However, “The division may extend the time for filing if it determines that the interests of justice so require.” Under N.D. Cent. Code § 54-23.4-06(3), “Compensation may not be awarded to a claimant who is the offender or an accomplice of the offender, nor to any claimant if the award would unjustly benefit the offender or an accomplice.” N.D. Cent. Code § 54-23.4-06(4) requires, “In the case of child abuse or sexual molestation of a child, the criminally injurious conduct must be reported to a law enforcement officer within three years after the child reaches the age of majority.” Under subsection (5), “The division, upon finding that the claimant has not fully cooperated with appropriate law enforcement agencies, may deny, reconsider, or reduce an award of compensation.” Moreover, N.D. Cent. Code § 54-23.4-06(6) states, “Compensation otherwise payable to a claimant must be reduced or denied: . . . ; b. To the extent the division deems reasonable because of the contributory misconduct of the claimant or of a victim on whose behalf compensation is claimed” Lastly, compensation may not exceed a total of \$25,000. N.D. Cent. Code § 54-23.4-06(8).

5.7.1 Recommendation: Amend Chapter 54-23.4 (Crime Victims Compensation) to add a specific exception to the ineligibility criteria for domestic minor sex trafficking victims.

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

Several victim-friendly criminal justice procedures and protections are provided to children. N.D. Cent. Code § 31-04-04.1(1) (Videotaped statement of a child sexual offense victim—Criteria for admission as evidence) allows “the oral statement of the child victim” to be recorded prior to trial and entered into evidence subject to certain conditions “[i]n any prosecution for a violation of section 12.1-20-03 [Gross sexual imposition], 12.1-20-03.1 [Continuous sexual abuse of a child], 12.1-20-04 [Sexual imposition], 12.1-20-05 [Corruption or solicitation of minors], 12.1-20-06 [Sexual abuse of wards], 12.1-20-07 [Sexual assault], or 12.1-20-11 [Incest] in which the victim is less than fifteen years of age” N.D. Cent. Code § 31-04-04.1(1). For this to be admitted into evidence, N.D. Cent. Code § 31-04-04.1(1) states that the following conditions must be satisfied:

- a. The court determines there is reasonable cause to believe that the child victim would experience serious emotional trauma as a result of in-court participation in the proceeding;
- b. The accused must be given reasonable written notice of the time and place for taking the videotaped statement;

- c. The accused must be afforded the opportunity to hear and view the testimony from outside the presence of the child by means of a two-way mirror or other similar method that will ensure that the child cannot hear or see the accused;
- d. The accused must have the opportunity to communicate orally with counsel by electronic means while the videotaped statement is being made; and
- e. All questioning must be done by the prosecutor or counsel for the defendant unless the defendant is an attorney pro se. An attorney pro se must conduct all questioning from outside the presence of the child. Upon request of any of the parties or upon the determination of the court that it would be appropriate, the court may appoint a person who is qualified as an expert and who has dealt with the child in a therapeutic setting to aid the court throughout proceedings conducted under this section and the court may appoint a guardian ad litem to protect the interests of the child.

Additionally, for the videotaped statement to be admitted into evidence, the court must find “that the child is unavailable as a witness to testify at trial and, upon viewing the videotape recording before it is shown to the jury, determines that it is sufficiently reliable and trustworthy and that the interests of justice will best be served by admission of the statement into evidence.” N.D. Cent. Code § 31-04-04.1(2). Under this subsection,

“[U]navailable” includes a determination, based on medical or psychological evidence or expert testimony, that the child would suffer serious emotional or psychological strain if required to testify at trial. The court, in making its findings and determinations under this subsection, shall consider at least the following:

- a. The nature of the offense;
- b. The significance of the child’s testimony to the case;
- c. The child’s age;
- d. The child’s psychological maturity and understanding; and
- e. The nature, degree, and duration of potential injury to the child from testifying.

N.D. Cent. Code § 12.1-35-02 (Additional services) encourages state’s attorneys to provide additional services to “children who are involved in criminal proceedings as victims or witnesses.” These include the following:

1. Explanations, in language understood by the child, of all legal proceedings in which the child will be involved.
2. Advice to the court concerning the ability of a child witness to cooperate with the prosecution and the potential effects of the proceedings on the child.
3. Information about, and referrals to, appropriate social services programs to assist the child and the child’s family members in coping with the emotional impact of the crime and the subsequent proceedings in which the child is involved.
4. Information about the availability of a child development specialist to ensure questions asked of the witness are chronologically and developmentally appropriate. N.D. Cent. Code § 12.1-35-02.

N.D. Cent. Code § 12.1-35-04(Limits on interviews and testimony) states, “The prosecuting attorney, the court, and appropriate law enforcement personnel, to the extent possible, shall protect the victim or witness from the psychological damage of repeated or lengthy interview, testimony, or discovery proceedings while preserving the rights of the public, the victim, and the person charged with the violation.” N.D. Cent. Code § 12.1-35-05 (Prompt disposition) states in part, “In all criminal cases and juvenile proceedings involving a child victim or witness, the court and the state’s attorney shall take appropriate action to ensure a speedy trial in order to

minimize the length of time the child must endure the stress of involvement in the proceedings.” Pursuant to the procedures in N.D. Cent. Code § 12.1-35-05.1 (Assistance during proceedings), child witnesses may be accompanied by a court selected person during proceedings for support while giving testimony. Certain information about child victims or witnesses, subject to exceptions, may not appear in public record. N.D. Cent. Code § 12.1-35-03 (Information about child victims or witnesses of crimes generally may not appear in public record).

Pursuant to N.D. Cent. Code 12.1-35-05.2 (Confidentiality of testimony),

In any criminal proceeding in which the defendant is charged with a violation of chapter 12.1-20 [Sex offenses, including luring a minor and solicitation of a minor] involving a child, the court, upon the motion of the prosecuting attorney, shall conduct a hearing to determine whether the testimony of and relating to a child may be closed to the public in order to protect the child’s reputation.

This provision does not apply to the prostitution statutes, the human trafficking statute or the sexual performances by children law.

North Dakota Rules of Evidence 412 (commonly called the “rape shield law”) protects testifying victims of sex crimes from examination leading to evidence about past or other sexual behavior. It states,

(a) Evidence generally inadmissible.

The following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and
- (2) evidence offered to prove any alleged victim’s sexual predisposition.

(b) Exceptions

In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

- (1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
- (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct, offered by the accused to prove consent or by the prosecution; and
- (3) evidence the exclusion of which would violate the constitutional rights of the defendant.

....

- 5.8.1 Recommendation: Modify the closed testimony law pursuant to N.D. Cent. Code § 12.1-35-05.2 (Confidentiality of testimony) to include protection for child victim-witnesses in cases of human trafficking for sexual exploitation, prostitution, and sexual performance of children.
- 5.8.2 Recommendation: Amend North Dakota Rules of Evidence 412 to extend the protection of the rape shield law to testifying victims of CSEC and sex trafficking.

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

Juvenile delinquency adjudications are not considered a crime. N.D. Cent. Code § 27-20-33 (Order of adjudication—Noncriminal). Under N.D. Cent. Code, § 27-20-33(2),

The disposition of a child and evidence adduced in a hearing in juvenile court may not be used against the child in any proceeding in any court other than a juvenile court, whether before or after reaching majority, except for impeachment or in dispositional proceedings after conviction of a felony for the purposes of a presentence investigation and report.

Under N.D. Cent. Code § 27-20-54 (Destruction of juvenile court records), “Except as otherwise required under section 25-03.3-0436, all juvenile court records must be retained and disposed³⁷ of pursuant to rules and policies established by the North Dakota supreme court.” Records of juvenile delinquency adjudications are “[r]etain[ed] for 10 years after expiration of final order, or age 18, whichever is later.” Unruly juvenile records are “[r]etain[ed] for 1 year after child turns 18 or final expiration of order, whichever is later.” Deprivation records (absent termination of parental rights) are “[r]etain[ed] for 10 years after child turns 18 or final expiration of order, whichever is later.” N.D. Admin. Code 19 (2011) (Records Retention Schedule—courts: Juvenile Case Files).³⁸

5.9.1 Recommendation: Amend N.D. Cent. Code § 27-20-54 (Destruction of juvenile court records) to require disposition of all records pertaining to an adjudicated minor who is also a victim of trafficking upon attaining the age of 18.

5.10 Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.

N.D. Cent. Code § 12.1-40-01(4) (Human trafficking) states, “In addition to any sentence or fine imposed for a conviction of an offense under this chapter, the court shall order the person convicted to make restitution to the victim of the crime.”

Restitution is also available under N.D. Cent. Code § 12.1-32-08 (Hearing prior to ordering restitution, reparation, or reimbursement of indigent defense costs and expenses—Conditions—Collection of restitution for insufficient funds checks—Continuing appropriation), which provides for mandatory restitution only where the victim suffered pecuniary damages. Subsection (1) states in part,

³⁶ N.D. Cent. Code § 25-03.3-04 (Retention of records) states, “Notwithstanding any other provision of law, all adult and juvenile case files and court records of an alleged offense defined by chapters 12.1-20 [Sex offenses] and 12.1-27.2 [Sexual performances by children] must be retained for fifty years and made available to any state’s attorney for purposes of investigation or proceedings pursuant to this chapter.” The quoted language above is the current version of N.D. Cent. Code § 25-03.3-04, incorporating the amendment added by the passage of House Bill 1464. H.B. 1464, 62nd Leg. Assemb., Leg. Sess. (N.D. 2011).

³⁷ N.D. Admin. Code 19, Sec. 5 (2011) (Disposition of Court Records),

The term "disposition" means:

- a.transfer of a record to the possession of the state archivist pursuant to the procedure in Section 10;
- b.destruction by burning or shredding, if the record is confidential; or
- c.destruction by ordinary means, such as landfill or recycling, if the record is not confidential.

See also North Dakota Supreme Court Rules, <http://www.ndcourts.gov/rules/Administrative/frameset.htm>. (last visited June July 13, 2012)

³⁸ The retention schedule can also be found at North Dakota Supreme Court Rules, <http://www.ndcourts.gov/rules/Administrative/frameset.htm> (click on Rule 19 and then on “records retention schedule”) (last visited July 13, 2012).

Before imposing restitution or reparation as a sentence or condition of probation, the court shall hold a hearing on the matter with notice to the prosecuting attorney and to the defendant as to the nature and amount of restitution. The court, when sentencing a person adjudged guilty of criminal activities that have resulted in pecuniary damages, in addition to any other sentence the court may impose, shall order that the defendant make restitution to the victim or other recipient as determined by the court, unless the court states on the record, based upon the criteria in this subsection, the reason it does not order restitution or orders only partial restitution.

The section also sets forth items the court is to consider “[i]n determining whether to order restitution” One of those items, subsection (1)(a) states that “[t]he defendant may be required as part of the sentence imposed by the court to pay the prescribed treatment costs for a victim of a sexual offense as defined in chapters 12.1-20 [Sex offenses] and 12.1-27.2 [Sexual performance by children].”

A domestic minor sex trafficking victim may avail herself of civil remedies only if the victim is also a victim of a racketeering offense. N.D. Cent. Code § 12.1-06.1-05(1) (Racketeering—Civil remedies) provides that

[a] person who sustains injury to person, business, or property by a pattern of racketeering activity or by a violation of section 12.1-06.1-02 [Leading a criminal association] or 12.1-06.1-03 [Illegal control of an enterprise] may file an action in district court for the recovery of treble damages and the costs of the suit, including reasonable attorney fees. The state may file an action in behalf of those persons injured or to prevent, restrain, or remedy a pattern of racketeering activity or a violation of section 12.1-06.1-02 or 12.1-06.1-03.

N.D. Cent. Code § 12.1-06.1-05(4) states,

Following a determination of liability, orders may include:

. . . .

- d. Ordering the payment of treble damages and appropriate restitution to those persons injured by a pattern of racketeering activity or a violation of section 12.1-06.1-02 or 12.1-06.1-03.
- e. Ordering the payment of all costs and expenses and reasonable attorneys’ fees concerned with the prosecution and investigation of any offense included in the definition of racketeering if upon application for the order it is shown to the satisfaction of the court that the racketeering offense has occurred as a part of a pattern of racketeering activity or a violation of section 12.1-06.1-02 or 12.1-06.1-03, civil and criminal, incurred by the state or county as appropriate to be paid to the general fund of the state or county that brings the action.

- 5.10.1 Recommendation: Amend N.D. Cent. Code § 12.1-40-01(4) (Human trafficking) to establish a cause of action for civil damages that trafficking victims may assert against their traffickers.

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

N.D. Cent. Code § 29-04-02 (Prosecution for felony other than murder within three years) provides a three-year statute of limitations for prosecution of felonies (other than murder). However, N.D. Cent. Code § 29-04-03.1 (Prosecution for sexual abuse of minors) lengthens this in certain cases, as follows:

A prosecution for violation of sections 12.1-20-03 through 12.1-20-08 [Continuous sexual abuse, sexual imposition, corruption or solicitation of minors, luring, sexual assault, fornication] or of section 12.1-20-11 [Incest] if the victim was under eighteen years of age at the time the offense was committed must be commenced in the proper court within seven years after the commission of the offense or, if the victim failed to report the offense within this limitation period, within three years after the offense was reported to law enforcement authorities.

N.D. Cent. Code § 29-04-02.1 (Prosecution for gross sexual imposition) provides a seven year statute of limitations for prosecution of N.D. Cent. Code § 12.1-20-03(1)(a) (Gross sexual imposition). In addition, N.D. Cent. Code § 29-04-03 (Prosecution for misdemeanor or infraction within two years) provides that prosecution of a misdemeanor or infraction must be commenced within two years after the commission of the misdemeanor or infraction.

For victims of sex offenses under chapter 12.1-20 who are under 15, “the applicable period of limitation, if any, does not begin to run until the victim has reached the age of fifteen.” N.D. Cent. Code § 29-04-03.2 (Statute of limitations as to child victims).

Under N.D. Cent. Code § 28-01-25 (Disabilities extend limitations on actions generally—Exceptions),

If a person who is entitled to bring an action other than for the recovery of real property, or for a penalty or forfeiture, or against a sheriff or other officer for an escape is: 1. Under the age of eighteen years; . . . , at the time the claim for relief accrues, the time of such disability is not a part of the time limited for the commencement of the action. However, the period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability ceases. In cases alleging professional malpractice, the extension of the limitation due to infancy is limited to twelve years.

However, N.D. Cent. Code § 12.1-06.1-05(7) (Racketeering—Civil Remedies) specifies that “[n]otwithstanding any law to the contrary, the initiation of civil proceedings related to violations of any offense included in the definition of racketeering or a violation of section 12.1-06.1-02 or 12.1-06.1-03 (Illegal control of an enterprise—Illegally conducting an enterprise) must be commenced within seven years of actual discovery of the violation.” Therefore, any statute of limitations for a civil claim brought under the racketeering provisions will not be tolled until the minor reaches the age of 18.

- 5.11.1 Recommendation: Amend N.D. Cent. Code § 29-04-02 (Prosecution for felony other than murder within three years) to eliminate the statutes of limitations for bringing prosecutions in human trafficking and CSEC cases.
- 5.11.2 Recommendation: Amend N.D. Cent. Code § 28-01-25 (Disabilities extend limitations on actions generally— Exceptions) to substantially lengthen the statute of limitations for minor trafficking victims to bring civil actions against their traffickers.

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 *Wiretapping is an available tool to investigate 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.*
- 6.5 *Using the Internet to investigate buyers and traffickers using the Internet is a permissible investigative technique.*
- 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and rescued children.*

Legal Analysis:

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

There is no mandated training on human trafficking in North Dakota for law enforcement. To “ensure adequate training for law enforcement and to ensure the comprehensive collection of crime statistics,” the attorney general is responsible for, among other things, “[d]etermin[ing] the specialized training needs of peace officers and conduct[ing] such training.” N.D. Cent. Code § 12-62-02(1) (Powers and duties). Training on human trafficking could be developed through the attorney general’s office. N.D. Cent. Code, § 12-62-01 (Criminal justice training and statistics—Personnel—Purpose) states, “Criminal justice training and the collection of statistics must be conducted by the office of attorney general. The office of attorney general shall conduct the training of peace officers and sheriffs and gather, analyze, and disseminate information regarding the state’s criminal justice system.” Information on human trafficking could be presented in training materials concerning missing persons. Under N.D. Cent. Code § 12-68-05 (Attorney general to develop missing person procedural policy), the attorney general is directed to “develop a procedures manual . . . relating to the investigation of missing person cases” and “distribute the manual to law enforcement agencies.”

N.D. Cent. Code § 50-25.1-19(2) (Child protective services duties—Training requirements) requires the department of human services to “provide training to all representatives of the child protective services system regarding the legal duties of the representatives . . . to protect the legal rights and safety of children and families from the initial time of contact during assessment through treatment.”

- 6.1.1 Recommendation: Amend N.D. Cent. Code, § 12-62-01 (Criminal justice training and statistics—Personnel—Purpose) to mandate that all law enforcement training includes training on the issues of human trafficking and domestic minor sex trafficking.

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

Single party consent to audio-taping is permitted. Under N.D. Cent. Code § 12.1-15-02(3)(c) (Interception of wire or oral communications—Eavesdropping),

- 3. It is a defense to a prosecution under subsection 1 [crime of interception] that:
 -

c. (1) The actor was a party to the communication or one of the parties to the communication had given prior consent to such interception, and (2) such communication was not intercepted for the purpose of committing a crime or other unlawful harm.

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

Under N.D. Cent. Code § 12.1-15-02 (Interception of wire or oral communications – Eavesdropping), interception of wire or oral communications is permitted in certain scenarios. It is a Class C felony to “a. Intentionally intercept[] any wire or oral communication by use of any electronic, mechanical, or other device; or b. Intentionally disclose[] to any other person or intentionally use[] the contents of any wire or oral communication, knowing that the information was obtained through the interception of a wire or oral communication” and a Class A misdemeanor to “secretly loiter[] about any building with intent to overhear discourse or conversation therein and to repeat or publish the same with intent to vex, annoy, or injure others.” N.D. Cent. Code § 12.1-15-02(1)-(2). N.D. Cent. Code § 12.1-15-02 provides a defense to prosecution under subsection (3) if,

- a. The actor was authorized by law to intercept, disclose, or use, as the case may be, the wire or oral communication;
- b. The actor was (1) a person acting under color of law to intercept a wire or oral communication, and (2) he was a party to the communication or one of the parties to the communication had given prior consent to such interception
- c. (1) The actor was a party to the communication or one of the parties to the communication had given prior consent to such interception, and (2) such communication was not intercepted for the purpose of committing a crime or other unlawful harm.

6.3.1 Recommendation: Amend N.D. Cent. Code § 12.1-15-02 (Interception of wire or oral communications – Eavesdropping) to expressly permit interception of wire or oral communications in trafficking or CSEC investigations.

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.*

N.D. Cent. Code § 12.1-20-05.1(1) (Luring minors by computer or other electronic means) uses the phrase “a person the adult believes to be a minor,” suggesting that decoys can be used in investigations of this offense.

6.4.1 Recommendation: Enact a law specifically permitting law enforcement to use undercover agents to investigate domestic minor sex trafficking. Alternatively, amend each of the CSEC laws and the human trafficking law to prohibit a defense to prosecution based on the victim actually being law enforcement or an agent of law enforcement.

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

N.D. Cent. Code § 12.1-20-05.1(1) (Luring minors by computer or other electronic means) states,

1. An adult is guilty of luring minors by computer or other electronic means when:

- a. The adult knows the character and content of a communication that, in whole or in part, implicitly or explicitly discusses or depicts actual or simulated nudity, sexual acts, sexual contact, sadomasochistic abuse, or other sexual performances and uses any computer communication system or other electronic means that allows the input, output, examination, or transfer of data or programs from one computer or electronic device to another to initiate or engage in such communication with a person the adult believes to be a minor; and
- b. By means of that communication the adult importunes, invites, or induces a person the adult believes to be a minor to engage in sexual acts or to have sexual contact with the adult, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for the adult's benefit, satisfaction, lust, passions, or sexual desires.

Because it is not required that the “minor” actually be a person under 18, it appears possible to use the Internet to investigate an offender of luring for commercial sexual exploitation by an adult law enforcement officer whom the accused believes is a minor.

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

N.D. Cent. Code § 12-60-25 (Lost, missing, or runaway children) requires a statewide reporting and response system for lost, missing or runaway children. The statute requires the Bureau of Criminal Investigations to implement a system in conjunction with the national crime information center that allows information regarding lost, missing, or runaway children to be shared with North Dakota law enforcement agencies as well as out-of-state law enforcement agencies. N.D. Cent. Code § 12-60-25(1). The bureau must also coordinate with law enforcement agencies regarding reports of lost, missing, or runaway children in order to properly notify the national crime information center. N.D. Cent. Code § 12-60-25(3). The bureau must also permit reports to be made by parents, guardians, or relatives regarding lost, missing, or runaway children. N.D. Cent. Code § 12-60-25(6). The law enforcement agency that filed the report will be responsible for maintaining the disposition of the case, and the bureau must compile and maintain these records. N.D. Cent. Code § 12-60-25(4), (7).

- 6.6.1 Recommendation: Amend N.D. Cent. Code § 12-60-25 (Lost, missing, or runaway children) to include a provision requiring entry of reports of rescued children.

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