

PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

ANALYSIS AND RECOMMENDATIONS TENNESSEE

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

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

Tennessee directly addresses human trafficking through Tenn. Code Ann. § 39-13-309² (Trafficking for commercial sex acts), which states,

“(a) A person commits the offense of trafficking a person for a commercial sex act³ who:

¹ Unless otherwise specified, all references to Tennessee statutes were taken from Tennessee Code Annotated (LEXIS through 2012 Reg. 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.

² The text of Tenn. Code Ann. § 39-13-309 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 2371 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts (effective July 1, 2012).

³ Tenn. Code 39-13-301(4) (Part definitions) defines “commercial sex act” as “any sexual act for which something of value is given or received.” The text of Tenn. Code Ann. § 39-13-301(4) included here and elsewhere in this

- (1) Knowingly subjects, attempts to subject, benefits from or attempts to benefit from another person's provision of a commercial sex act; or
- (2) Recruits, entices, harbors, transports, provides or obtains by any means another person for the purpose of providing a commercial sex act.

(b) For purposes of subdivision (a)(2), such means may include, but are not limited to:

- (1) Causing or threatening to cause physical harm to the person;
- (2) Physically restraining or threatening to physically restrain the person;
- (3) Abusing or threatening to abuse the law or legal process;
- (4) Knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of the person;
- (5) Using blackmail or using or threatening to cause financial harm for the purpose of exercising financial control over the person; or
- (6) Facilitating or controlling a person's access to a controlled substance.

These specific provisions are not required to establish an offense under Tenn. Code Ann. § 39-13-309(a)(2) (Trafficking for commercial sex acts) for either minors⁴ or adults because this is a non-exhaustive list of circumstances under which an offense may arise in this section. Thus, there is no requirement to show coercion or deception for minors under Tenn. Code Ann. § 39-13-309(a)(1) or (a)(2).

Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts) is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000.⁵ Tenn. Code Ann. §§ 40-35-111(b)(2), 39-13-309(b). A violation of Tenn. Code Ann § 39-13-309 (Trafficking for commercial sex acts) is a Class A felony where:

[T]he victim of the offense is a child under (15) years of age or where the offense occurs on the grounds or facilities within 1,000 feet of a public or private school, secondary school, preschool, child care agency, public library, recreational center, or public park.

A Class A felony is punishable by imprisonment for 15–60 years and a possible fine not to exceed \$50,000. Tenn. Code Ann. §§ 39-13-309(c), 40-35-111(b)(1).

- 1.1.1 Recommendation: Amend Tenn. Code Ann. § 39-13-309⁶ (Trafficking for commercial sex acts) to apply the penalty enhancement to all offenses involving a minor under 18.

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.*

report includes amendments made by the passage of Senate Bill 2371 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 1075 (effective July 1, 2012).

⁴ Under Tenn. Code Ann. 39-13-301(11), “‘Minor’ means an individual who is less than eighteen years old.” The text of Tenn. Code Ann. § 39-13-301(11) included here and elsewhere in this report includes amendments made by the passage of Senate Bill 2371 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 1075 (effective July 1, 2012).

⁵ Tenn. Code Ann. § 40-35-111 (Authorized terms of imprisonment and fines for felonies and misdemeanors) lists the “authorized . . . fines for felonies” “unless otherwise provided by statute.”

⁶ The text of Tenn. Code Ann. § 39-13-309 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 2371 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts (effective July 1, 2012).

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

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

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

3. Tenn. Code Ann. § 39-17-1005(a), (d) (Offense of especially aggravated sexual exploitation of a minor) makes it a Class B felony “for a person to knowingly promote, employ, use, assist, transport or permit a minor to participate in the performance of, or in the production of, acts or material that includes the minor engaging in: (1) Sexual activity; or (2) Simulated sexual activity that is patently offensive.” The crime is punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. § 40-35-111(b)(2). A person may be separately charged “for each individual performance, image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation.” Tenn. Code Ann. § 39-17-1005(b).
4. Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor) states,

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

 - (1) Rape of a child, pursuant to § 39-13-522;
 - (2) Aggravated rape, pursuant to § 39-13-502;
 - (3) Rape, pursuant to § 39-13-503;

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

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

5. Tenn. Code Ann. § 39-13-529(a) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) makes it a crime for a person “eighteen (18) years or older, by means of oral, written or electronic communication, electronic mail or Internet service, including webcam communications, directly or through another, to intentionally command, hire, persuade, induce or cause a minor to engage in sexual activity⁷ or simulated sexual activity that is patently offensive,⁸ as defined in § 39-17-1002 [Part definitions], where such sexual activity or simulated sexual activity is observed by that person or by another.” This crime is punishable as a Class B felony by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2).

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

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

(a) Aggravated sexual battery is unlawful sexual contact⁹ with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

- (1) Force or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon;

⁷ “Sexual activity” is defined in Tenn. Code Ann. §39-17-1002(8) as

any of the following acts:

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

⁸“Patently offensive” is defined as “that which goes substantially beyond customary limits of candor in describing or representing such matters.” Tenn. Code Ann. §39-17-1002(4).

⁹ Tenn. Stat. Ann. § 39-13-501(6) defines “sexual contact” as “the intentional touching of the victim’s, the defendant’s, or any other person’s intimate parts, or the intentional touching of the clothing covering the immediate area of the victim’s, the defendant’s, or any other person’s intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.”

- (2) The defendant causes bodily injury to the victim;
- (3) The defendant is aided or abetted by one (1) or more other persons; and
 - (A) Force or coercion is used to accomplish the act; or
 - (B) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
- (4) The victim is less than thirteen (13) years of age.

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

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

- (a) Sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:
 - (1) Force or coercion¹⁰ is used to accomplish the act;
 - (2) The sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the contact that the victim did not consent;
 - (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
 - (4) The sexual contact is accomplished by fraud.

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

- 3. Tenn. Code Ann. § 39-13-506 (Statutory rape) criminalizes “unlawful sexual penetration” of minors when the defendant and minor are of certain ages. If the victim is 13 or 14, and the defendant is 4–9 years older than the victim, the crime is a Class E felony. Tenn. Code Ann. § 39-13-506(b)(1), (d)(2). If the victim is 15–17 and the defendant is 5–9 years older than the victim, the crime is a Class E felony. Tenn. Code Ann. § 39-13-506(b)(2), (d)(2). The crime is “mitigated statutory rape” and a Class E felony when the victim is 15-17 years old and the defendant is 4–5 years older than the victim. Tenn. Code Ann. § 39-13-506(a), (d)(1). As Class E felonies, the categories of statutory rape above are punishable by imprisonment for 1–6 years and a possible fine not to exceed \$3,000. Tenn. Code Ann. § 40-35-111(b)(5). However, if the victim is 13–17 and the defendant is at least 10 years older, the crime becomes aggravated statutory rape, a Class D felony punishable by imprisonment for 2–12 years and a possible fine not to exceed \$5,000. Tenn. Code Ann. §§ 39-13-506(c), (d)(3), 40-35-111(b)(4).
- 4. Tenn. Code Ann. § 39-13-522(a) (Rape of a child) states, “Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than three (3) years of age but less than thirteen (13) years of age.” The crime is a Class A felony and under Tenn. Code Ann. § 39-13-522(b)(2)(A) “a person convicted of a violation of this section shall be punished as a Range II offender; however, the sentence imposed upon such person may, if appropriate, be within Range III but in no case shall it be lower than Range II.” Therefore, in accordance to Range II and III penalties, this crime is punishable by imprisonment for 25–60 years and a possible fine not to exceed \$50,000. Tenn. Code Ann. §§ 39-13-522(b)(2)(A), 40-35-111(b)(1), 40-35-112(b), (c).

¹⁰ “As used in this section, ‘coercion’ means the threat of kidnapping, extortion, force or violence to be performed immediately or in the future.” Tenn. Stat. Ann. § 39-13-505(b).

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.*

The CSEC statutes do not refer to Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts). However, Tenn. Code Ann. § 39-13-513(e) (Prostitution)¹¹ refers to the human trafficking law to provide an affirmative defense to charges under this provision for trafficking victims. Additionally, Tenn. Code Ann. § 39-13-513(d)

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

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

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.*

Tennessee's racketeering statute¹² includes the CSEC offense of especially aggravated sexual exploitation of a minor as racketeering activity, but does not include human trafficking or the state's other CSEC offenses. Tenn. Code Ann. § 39-12-204 (Unlawful activities) states,

- (a) It is unlawful for any person who has, with criminal intent, received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of the proceeds or the proceeds derived from the use or investment thereof, in the acquisition of any title to or any right, interest, or equity in, real or personal property or in the establishment or operation of any enterprise.
- (b) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, an interest in or control of any enterprise of real or personal property.
- (c) It is unlawful for any person employed by, or associated with, any enterprise¹³ to knowingly conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity or the collection of any unlawful debt.

¹¹ Victim is defined under 22 U.S.C. § 7102 as a person subjected to either “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age” or “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” 22 U.S.C. § 7102 (8)(A), (B).

¹² For additional information on racketeering offenses, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHI-WhitePaperFederalStateRacketeeringGangCrimeLaws.pdf>.

¹³ “Enterprise” is defined as “any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of

A “pattern of racketeering activity” is defined as “engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided that at least one (1) of such incidents occurred after July 1, 1986, that the last of the incidents occurred within two (2) years after a prior incident of racketeering conduct.” Tenn. Code Ann. § 39-12-203(6). It is “racketeering activity” “to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain that is a criminal offense involving . . . aggravated sexual exploitation of a minor” and “especially aggravated sexual exploitation of a minor under §§ 39-17-1004(b)(1)(A) and 39-17-1005(a)(1). . . .” Tenn. Code Ann. § 39-12-203(9).¹⁴

Conviction for racketeering is punishable as a Class B felony by imprisonment under the sentencing range within Range II or higher (imprisonment for 12–30 years), a fine up to \$250,000, or both. Tenn. Code Ann. §§ 39-12-205(a), 40-35-112(b)(2), (c)(2). Instead of a fine, a conviction for conduct “through which pecuniary value¹⁵ is derived, or by which personal injury or property damage or other loss is caused, may be sentenced to pay a fine that does not exceed three (3) times the gross value gained or three (3) times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.” Tenn. Code Ann. § 39-12-205(b)(1). Additionally, asset forfeiture is permitted. An offender may have to forfeit to the state, “[a]ll property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of a provision of this part” Tenn. Code Ann. § 39-12-206(b).

- 1.3.2 Recommendation: Amend the definition of “racketeering activity” under Tenn. Code Ann. § 39-12-203 to include Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts), § 39-13-514(b)(4)(A) (Patronizing prostitution), § 39-13-515 (Promoting prostitution), § 39-13-528(a) (Offense of solicitation of a minor), and § 39-13-529(a) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means).

individuals associated in fact, although not a legal entity, and it includes illicit as well as licit enterprises and governmental, as well as other entities, including criminal gangs, as defined in Section 40-35-121(a).” The text of Tenn. Code Ann. § 39-12-203(3) included here and elsewhere in this report includes amendments made by the passage of Senate Bill 3005 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 1090 (effective July 1, 2012).

¹⁴ The text of Tenn. Code Ann. § 39-12-203(9) included here and elsewhere in this report includes amendments made by the passage of Senate Bill 3005 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 1090 (effective July 1, 2012).

¹⁵ Tenn. Code Ann. § 39-12-205(b)(2) (Penalties) provides,

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

- (A) Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else, the primary significance of which is economic advantage; or
- (B) Any other property or service that has a value in excess of five hundred dollars (\$500).

Legal Components:

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts from a victim of domestic minor sex trafficking.*
 - 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*
 - 2.3 *Solicitation of prostitution laws differentiate between buying sex acts with an adult and buying sex acts with a minor under 18.*
 - 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
 - 2.5 *Using the Internet 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 similar federal offenses.*
 - 2.10 *Convicted buyers of commercial sex acts with minors and child pornography are required to register as sex offenders.*
-

Legal Analysis:

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

Tenn. Code Ann. § 39-13-309(a)¹⁶ (Trafficking for commercial sex acts) may apply to a buyer of commercial sex acts with a minor through use of the word “obtain.” Tenn. Code Ann. § 39-13-309(a)(2) makes it a crime when a person “recruits, entices, harbors, transports, provides or obtains¹⁷ by any means another person for the purpose of providing a commercial sex act.” Pursuant to Tenn. Code Ann. § 39-13-301(4), “‘Commercial sex act’ means any sexual act for which something of value is given or received.”

Federal prosecutors, under the Trafficking Victims Protection Act (TVPA),¹⁸ have applied the crime of human trafficking to attempted buyers of commercial sex with minors by charging that the buyers attempted to “obtain”¹⁹ a person under 18 to engage in commercial sex.²⁰ It is unsettled whether the courts will uphold this

¹⁶ See *supra* note 2.

¹⁷ Pursuant to Tenn. Code Ann. § 39-13-301(9), (10) “[o]btain’ means, in relation to labor or services, to secure performance of labor or services,” and “services” is defined as “between a person and the defendant in which the person performs activities under the supervision of or for the defendant.” However, the terms “labor or services” in the definition of “obtain” make the definition seemingly more applicable to Tenn. Code Ann. § 39-13-308 (Trafficking for labor or services). Accordingly, the term “obtain” could be used differently for Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts).

¹⁸ 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.).

¹⁹ 18 U.S.C. § 1591(a).

²⁰ See, e.g., Indictment at 1, *United States v. Oflyng*, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 10, 2009); see also News Release, U.S. Department of Justice, Office of the United States Attorney for the Western District of Missouri, Human Trafficking Rescue Project, Operation Guardian Angel, Final Defendant Pleads Guilty to Sex Trafficking of a Child, (Dec. 18, 2009), <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm>.

interpretation of the TVPA. It is arguable, therefore, that the term “obtain” may be similarly applied against buyers in Tennessee. A conviction under Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts) is punishable as a Class B felony by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. § 40-35-111(b)(2). However, Tenn. Code Ann. § 39-13-309²¹ (Trafficking for commercial sex acts) is a Class A felony where:

[T]he victim of the offense is a child under fifteen (15) years of age, or where the offense occurs on the grounds or facilities or within one thousand feet (1,000’) of a public or private school, secondary school, preschool, child care agency, public library, recreational center, or public park.

A Class A felony is punishable by imprisonment for 15–60 years and a possible fine not to exceed \$50,000. Tenn. Code Ann. §§ 39-13-309(c), 40-35-111(b)(1).

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

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

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

Additionally, pursuant to Tenn. Code Ann. § 39-13-529(a), (e)(1) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) a Class B felony occurs when an individual “eighteen (18) years of age or older, by means of oral, written or electronic communication, electronic mail or Internet service, including webcam communications, directly or through another, to intentionally command, hire, persuade, induce or cause a minor to engage in sexual activity²² or simulated sexual activity that is patently offensive,²³ as defined in § 39-17-1002 [Part definitions], where such sexual activity or simulated sexual activity is observed by that person or by another.”

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

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

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

²¹ See *supra* note 2.

²² See *supra* note 5.

²³ See *supra* note 6.

If a buyer of commercial sex with a minor can be charged with Tenn. Code Ann. §39-13-309 (Trafficking for commercial sex acts), the buyer will face a Class B felony conviction punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. A buyer of commercial sex is subject to a Class A felony "if the victim of the offense is a child under (15) years of age, or where the offense occurs on the grounds or facilities or within 1,000 feet of a public or private school, secondary school, preschool, child care agency, public library, recreational center, or public park." A Class A felony is punishable by imprisonment for 15–60 years and a possible fine not to exceed \$50,000. Tenn. Code Ann. §§ 39-13-309(c), 40-35-111(b)(1). Tenn. Code Ann. §§ 39-13-309(b), 40-35-111(b)(2). When the victim is under 18, Tenn. Code Ann. § 39-13-514(b) (Patronizing prostitution) establishes a Class E felony for buying sex with a minor, punishable by imprisonment for 1–6 years and a possible fine not to exceed \$3,000. Tenn. Code Ann. § 40-35-111(b)(5). A violation of Tenn. Code Ann. § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means), is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2).

Several sexual offenses could be used to prosecute a buyer of commercial sex acts with a minor but do not specifically criminalize the commercial sexual exploitation of a child, and do not refer to the human trafficking statute to bring these criminal offenses within the ambit of human trafficking under Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts).²⁴

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 offense²⁵ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,²⁶ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.²⁷

2.2.1 Recommendation: Amend Tenn. Code Ann. § 39-13-514(b) (Patronizing prostitution) to enhance the crime classification to a Class A felony for consistency in penalties.

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

²⁵Pursuant 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).

²⁶ 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).

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

2.5 *Using the Internet to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*²⁸

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

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

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

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

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

Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts), if applicable to buyers, differentiates between trafficking a minor and trafficking an adult only “where the victim of the offense is a child under (15) years of age.” A Class A felony is punishable by imprisonment for 15–60 years and a possible fine not to exceed \$50,000. Tenn. Code Ann. §§ 39-13-309(c), 40-35-111(b)(1). For offenses involving victims 15 years of age and older, a violation of Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts) is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-309(b), 40-35-111(b)(2).

²⁸See discussion of relevant provisions *supra* Section 1.2.

Penalties for convictions under Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) and Tenn. Code Ann. § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) are not reduced based upon the age of the minor victim and all minors under 18 are protected by these statutes.

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

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

Buyers of commercial sex with minors face fines, restitution, and asset forfeiture. Buyers convicted under Tenn. Code Ann. § 39-13-309(a)²⁹ (Trafficking for commercial sex acts) face a possible fine not to exceed \$25,000, unless “the victim of the offense is a child under (15) years of age, or where the offense occurs on the grounds or facilities or within 1,000 feet of a public or private school, secondary school, preschool, child care agency, public library, recreational center, or public park,” in which case a possible fine not to exceed \$50,000 may be imposed. Tenn. Code Ann. §§ 39-13-309(c), 40-35-111(b)(1). For the Class E felony of patronizing a prostitute when the victim is a minor under 18, a buyer can receive a fine not to exceed \$3,000. Tenn. Code Ann. §§ 39-13-514(b), 40-35-111(b)(5). Hiring a minor online for sexual activity in violation of Tenn. Code Ann. § 39-13-529(a) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) is a Class B felony with a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2). An conviction under Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor) can result in a fine ranging between \$2,500 and \$25,000 based on the crime classification determined by the victim’s age and the defendant’s age. Tenn. Code Ann. § 40-25-111(b).

Buyers may be sentenced to pay restitution to a minor who has been sexually victimized through any of the trafficking, CSEC, or sexual offenses applicable to buyers of commercial sex acts with minors. Tennessee law allows a court, at its discretion, to order restitution to victims of any crime. Tenn. Code Ann. §§ 39-11-118, 40-35-104(c)(2), 40-35-304. Tenn. Code Ann. § 40-33-101 (Conveyances subject to forfeiture) provides for

²⁹ See *supra* note 2.

discretionary, criminal asset forfeiture.³⁰ Upon conviction of sexual offenses pursuant to title 39, chapter 13, section 5 [Sexual offenses], which includes patronizing prostitution of adults or minors, a buyer may be ordered to forfeit “[a]ny conveyance, including a vehicle, aircraft or vessel used in the commission of,” among other offenses, a sexual “offense under title 39, chapter 13, part 5 [Sexual offenses].”³¹ Property subject to forfeiture under this section may be seized upon process issued by any circuit or criminal court with jurisdiction over the property. Seizure is permitted without process where it is incident to arrest or search, pursuant to a search warrant. Tenn. Code Ann. § 40-33-102. Disposition of the forfeited property is governed by Tenn. Code Ann. §40-33-110, which provides that the property “shall inure to the benefit of the county in which the goods were seized . . . provided, that the forfeited conveyance or the funds derived from the confiscated goods shall go to the law enforcement agency that seized the conveyance and shall be used exclusively for law enforcement purposes . . . In all other cases, the proceeds shall be transmitted to the state treasurer and deposited in the state treasury.”

This discretionary, criminal forfeiture provision is reiterated, with a special focus on minor victims, in Tenn. Code Ann. § 39-13-530(a) (Forfeiture of any conveyance or real or personal property used in a sexual offense committed against minors—Child abuse fund) which provides for the forfeiture of “[a]ny conveyance or real or personal property used in the commission of an offense under this part [Sexual offenses],” which is committed “against a person under eighteen (18) years of age and was committed on or after July 1, 2006.” This forfeiture is subject to the provisions of title 40, chapter 33, part 2. However, “the proceeds from all forfeitures made pursuant to this section shall be transmitted to the general fund, where there is established a general fund reserve to be allocated through the general appropriations act, which shall be known as the child abuse fund.” Tenn. Code Ann. §39-13-530(b).

Also, vehicle forfeiture specifically for sexual exploitation of children crimes is found in Tenn. Code Ann. § 39-17-1008(a) (Forfeiture of any conveyance or real or personal property used in commission of an offense under this part), which provides that “[a]ny conveyance or real or personal property used in the commission of an offense under this part [Sexual exploitation of children] is subject to forfeiture under the provisions of title 40, chapter 33, part 2 [Forfeiture procedures generally].” This forfeiture is subject to the provision of title 40, chapter 33, part 2. However, “the proceeds from all forfeitures made pursuant to this section shall be transmitted to the general fund, where there is established a general fund reserve to be allocated through the general appropriations act, which shall be known as the child abuse fund.” Tenn. Code Ann. §39-17-1008(b).

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

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

³⁰ For additional information on asset forfeiture laws and procedures, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHIStateAssetForfeitureLawsChart.pdf>.

³¹ Tenn. Code Ann. § 40-33-101 does contain some exceptions, including that “(1) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture . . . unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a robbery offense under title 39, chapter 13, part 4, or felony theft under title 39, chapter 14, part 1.”

2.8.1 Recommendation: Amend Tenn. Code Ann. § 39-11-118 to include a mandatory minimum fines for human trafficking and CSEC crimes.

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

Pursuant to Tenn. Code Ann. § 39-17-1004(a)(1) (Offense of aggravated sexual exploitation of a minor), “It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material, or possess with the intent to promote, sell, distribute, transport, purchase or exchange material, that includes a minor engaged in: (A) Sexual activity;³² or (B) Simulated sexual activity that is patently offensive.”³³ Under subsection (b)(1), “It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material that is obscene, as defined in § 39-17-901,³⁴ or possess material that is obscene, with the intent to promote, sell, distribute, transport, purchase or exchange the material, which includes a minor engaged in: (A) Sexual activity; or (B) Simulated sexual activity that is patently offensive.”

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

Under Tenn. Code Ann. § 39-17-1003(a) (Offense of sexual exploitation of a minor), “[i]t is unlawful for any person to knowingly possess material that includes a minor engaged in: (1) Sexual activity; or (2) Simulated sexual activity that is patently offensive.” The crime is a Class D felony punishable by imprisonment for 2–12 years and a possible fine not to exceed \$5,000 for each individual image possessed. Tenn. Code Ann. §§ 39-17-1003(b), (d), 40-35-111(b)(4). If the number of images and materials exceeds 50, then the crime is a Class C felony punishable by imprisonment for 3–15 year and a possible fine not to exceed \$10,000. Tenn. Code Ann. §§ 39-17-1003(d), 40-35-111(b)(3) If the number of images and materials exceeds 100, then the crime is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-17-1003(d), 40-35-111(b)(2).

In comparison, a federal conviction for possession of child pornography³⁵ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.³⁶ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.³⁷

³² See *supra* note 7.

³³ See *supra* note 8.

³⁴ “Obscene” is defined as follows: “(A) The average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (B) The average person applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct; and (C) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” Tenn. Code Ann. § 39-17-901(10).

³⁵ 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).

³⁶ 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

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

Persons in Tennessee convicted of a violent sexual offense or a sexual offense are required to register as sex offenders. Tenn. Code Ann. § 40-39-212(a). A “violent sexual offense” includes “[a]ggravated sexual exploitation of a minor, under § 39-17-1004,” “[s]olicitation of a minor, under § 39-13-528 [Offense of solicitation of a minor] when the offense is classified as a Class B or Class C felony,” and Tenn. Code Ann. §39-13-309 (Trafficking for commercial sex acts). Tenn. Code Ann. §§ 40-39-202(30) (F), (K), (Y). “Sexual offense” includes “[s]exual exploitation of a minor, under § 39-17-1003,” “[s]olicitation of a minor under § 39-13-528 when the offense is classified as a Class D felony, Class E felony or a misdemeanor,” “[s]tatutory rape under § 39-13-506(b), (d)(2)(B)³⁸, or aggravated statutory rape under § 39-13-506(c), and “[s]oliciting sexual exploitation of a minor—Exploitation of a minor by electronic means, under § 39-13-529.” Tenn. Code Ann. § 40-39-202(20)(A)(iv), (viii), (xvii). Those buyers convicted of purchasing commercial sex acts with a minor under Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) are not required to register as sex offenders.

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

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).

³⁷ 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).

³⁸ “In addition to the punishment provided for a person who commits statutory rape for the first time, the trial judge may order, after taking into account the facts and circumstances surrounding the offense, including the offense for which the person was originally charged and whether the conviction was the result of a plea bargain agreement, that the person be required to register as a sexual offender pursuant to title 40, chapter 39, part 2.” The text of Tenn. Code Ann. § 39-13-506 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 3154 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts [Page 883] (effective July 1, 2012).

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.³⁹

Tenn. Code Ann. § 39-13-309⁴⁰ (Trafficking for commercial sex acts) is:

(c) a Class B felony, except where the victim of the offense is a child under fifteen (15) years of age, or where the offense occurs on the grounds or facilities or within one thousand feet (1,000') of a public or private school, secondary school, preschool, child care agency, public library, recreational center, or public park, a violation of subsection (a) is a Class A felony.

A Class A felony is punishable by imprisonment for 15–60 years and a possible fine not to exceed \$50,000 and a class B felony is punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000.⁴¹ Tenn. Code Ann. §§ 39-13-309(c), 40-35-111(b)(1), (2).

³⁹See discussion of relevant provisions *supra* Sections 1.1, 1.2.

⁴⁰See *supra* note 2.

⁴¹Traffickers who are members of criminal gangs could receive enhanced penalties pursuant to Tenn. Code Ann. § 40-35-121(b) (Criminal gang offenses—Enhanced punishment—Procedure): “A criminal gang offense committed by a defendant who was a criminal gang member at the time of the offense shall be punished one (1) classification higher than the classification established by the specific statute creating the offense committed.” Furthermore, pursuant to subsection (e), “A criminal gang offense committed by a defendant who was a criminal gang member at the time of the offense shall be punished two (2) classifications higher than the classification established by the specific statute creating the offense committed if the criminal gang member was also a leader or organizer of the criminal gang at the time the offense was committed.” Tenn. Code Ann. § 40-35-121(e). A “criminal gang offense” is defined as “any violation of Tennessee law: (A) During the perpetration of which the defendant knowingly causes, or threatens to cause, death or bodily injury to another person or persons and specifically includes rape of a child, aggravated rape and rape; or (B) That results, or was intended to result, in the defendant’s receiving income, benefit, property, money or anything of value from the commission of any aggravated burglary, or from the illegal sale, delivery or manufacture of a controlled substance or firearm.” Tenn. Code Ann. § 40-35-121(a)(3). A “criminal gang member” is defined in Tenn. Code Ann. § 40-35-121(a)(2) as the following:

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

- (A) Admits to criminal gang involvement;
- (B) Is identified as a criminal gang member by a parent or guardian;
- (C) Is identified as a criminal gang member by a documented reliable informant;

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

Tenn. Code Ann. § 39-13-529(a) (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) prohibits a person “eighteen (18) years or older, by means of oral, written or electronic communication, electronic mail or Internet service, including webcam communications, directly or through another, to intentionally command, hire, persuade, induce or cause a minor to engage in sexual activity or simulated sexual activity that is patently offensive,⁴² . . . where such sexual activity or simulated sexual activity is observed by that person or by another.” This crime is a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2). Lastly, pursuant to Tenn. Code Ann. § 39-13-528(c) (Offense of solicitation of a minor), “A violation of this section shall constitute an offense one (1) classification lower than the most serious crime solicited, unless the offense solicited was a Class E felony, in which case the offense shall be a Class A misdemeanor.”

In addition to the above offenses, a trafficker could be found guilty of money laundering pursuant to Tenn. Code Ann. § 39-14-903. Tenn. Code Ann. § 39-14-903(b)(1) states, “It is an offense to knowingly use proceeds⁴³ derived directly or indirectly from a specified unlawful activity⁴⁴ with the intent to promote, in whole or in part, the carrying on of a specified unlawful activity.” A violation of the money laundering statute constitutes a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-14-903(a)(2), (b)(2), 40-35-111(b)(2).

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

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

⁴²See *supra* note 68.

⁴³ “‘Proceeds’ includes gross profits from the commission of any specified unlawful activity, including property, real, personal or intangible of any kind, acquired or derived, directly or indirectly, from, produced through, realized through or caused by an act or omission.” Tenn. Code Ann. § 39-14-902(4).

⁴⁴ “‘Knowingly uses or attempts to use proceeds derived directly or indirectly from a specified unlawful activity’ means that any person or party to the transaction or act knew that the property or proceeds involved in the transaction or act represented or constituted, either in whole or in part, proceeds from some form, though not necessarily which form, of any criminal offense under the laws of this state, or any other jurisdiction. A person, corporation or financial institution receiving funds or property in the ordinary course of business shall not have ‘knowledge’ that the funds or property so received represented proceeds of any specified unlawful activity solely because of: (A) The identity or reputation of the transferor of the funds or property; or (B) The identity or reputation of an associate of the transferor.” Tenn. Code Ann. § 39-14-902(3). Additionally, “‘Specified unlawful activity’ means any act, including any preparatory or completed offense, committed for financial gain that is punishable as a felony under the laws of this state, or if the act occurred outside this state, would be punishable by confinement for more than one (1) year under the laws of the state in which it occurred.” Tenn. Code Ann. § 39-14-902(6)(A). It “does not mean an act, including any preparatory or completed offense, committed for financial gain that is punishable under chapter 17, part 5 of this title, or similar provisions of law in another state.” Tenn. Code Ann. § 39-14-902(6)(B).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)⁴⁵ 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 offense⁴⁶ against a minor.

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

Pursuant to Tenn. Code Ann. § 39-17-1004(a)(1) (Offense of aggravated sexual exploitation of a minor), “It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material, or possess with the intent to promote, sell, distribute, transport, purchase or exchange material, that includes a minor engaged in: (A) Sexual activity;⁴⁷ or (B) Simulated sexual activity that is patently offensive.”⁴⁸ Under subsection (b)(1), “It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material that is obscene, as defined in § 39-17-901,⁴⁹ or possess material that is obscene, with the intent to promote, sell, distribute, transport, purchase or exchange the material, which includes a minor engaged in: (A) Sexual activity; or (B) Simulated sexual activity that is patently offensive.”

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

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

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense⁵⁰ against a minor. Additionally, a federal conviction for distribution of child pornography⁵¹

⁴⁵See *supra* note 19.

⁴⁶See *supra* note 24.

⁴⁷See *supra* note 7.

⁴⁸See *supra* note 8.

⁴⁹See *supra* note 34.

⁵⁰See *supra* note 25 for the definition of “federal sex offense.”

is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.⁵² Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁵³

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

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

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

Traffickers are subject to various criminal fines. Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts) is a Class B felony subject to a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 40-35-111(b)(2), 39-13-309(b). However, a violation of Tenn. Code Ann § 39-13-309 (Trafficking for commercial sex acts) is a Class A felony “where the victim of the offense is a child under (15) years of age, or where the offense occurs on the grounds or facilities or within 1,000 feet of a public or private school, secondary school, preschool, child care agency, public library, recreational center, or public park.” A Class A felony is punishable a possible fine not to exceed \$50,000. Tenn. Code Ann. §§ 39-13-309(c), 40-35-111(b)(1). For violating Tenn. Code Ann. § 39-13-515 (Promoting prostitution), which is a Class E felony, a trafficker can receive a fine not to exceed \$3,000. Tenn. Code Ann. §§ 39-13-515, 40-35-111(b)(5). Hiring a minor online for sexual activity in violation of Tenn. Code Ann. § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) is a Class B felony with a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-13-529(e)(1), 40-35-111(b)(2). An offense under Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor) can result in a fine ranging between \$2,500 and \$25,000 based on the crime classification determined by the age of the victim and the defendant. Tenn. Code Ann. § 40-35-111(b)(2). A money laundering violation under Tenn. Code Ann. § 39-14-903(b)(1) is a Class B felony subject to a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-14-903(b)(2), 40-35-111(b)(2).

⁵¹ 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).

⁵² 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).

⁵³ 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).

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

Pursuant to Tenn. Code Ann. § 39-11-703(c) (Criminal proceeds subject to forfeiture), a trafficker will be subject to mandatory, criminal asset forfeiture for violating Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts). Tenn. Code Ann. § 39-11-703(a), (b) (Criminal proceeds subject to forfeiture) states in relevant part,

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

...

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

In particular, Tenn. Code Ann. § 39-11-703(c) (Criminal proceeds subject to forfeiture) identifies the following items as subject to judicial forfeiture:⁵⁴

- (1) Conveyances, including aircraft, motor vehicles, and other vessels when used or intended to be used in connection with a violation of Sections 39-13-307 [Involuntary labor servitude– Restitution], 39-13-308 [Trafficking for forced labor or services] and 39-13-309 [Trafficking for commercial sex acts] committed on or after July 1, 2011;
- (2) Books, records, telecommunication equipment, or computers when used or intended to be used in connection with a violation of Sections 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011;
- (3) Money or weapons when used or intended to be used in connection with a violation of Sections 39-13-307, 39-13-308 39-13-309 committed on or after July 1, 2011;
- (4) Real property when used or intended to be used in connection with a violation of Sections 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011;
- (5) Everything of value furnished, or intended to be furnished, in exchange for an act in connection with a violation of Sections 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011, all proceeds traceable to the exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate the violation;

⁵⁴ Pursuant to Tenn. Code Ann. § 39-13-312(c) after using the proceeds to pay for the cost of the proceedings, 20% will be awarded “to the law enforcement agency conducting the investigation that resulted in the forfeiture for use in training and equipment for the enforcement of human trafficking laws,” 20% will be awarded to “the district attorneys general conference for education, expenses, expert services, training or the enhancement of resources for the prosecution of and asset forfeiture in human trafficking cases.” After an additional 5% is awarded to the clerk of the court where the proceedings occurred, the remainder will go into “the anti-human trafficking fund” for grants to non-profits for services to victims of human trafficking, prevention programs, and education programs. Tenn. Code Ann. § 39-13-312(d)–(f).

(6) Any property, real or personal, directly or indirectly acquired by or received in violation of such violation or as an inducement to violate such statutes, or any property traceable to the proceeds from the violation; and

(7) Any real property, including any right, title and interest in the whole of or any part of any lot or tract of land and any property used as an instrumentality in or used in furtherance of a in connection with a violation of Sections 39-13-307, 39-13-308 and 39-13-309 committed on or after July 1, 2011.

Seizure of forfeitable property is governed by Tenn. Code Ann. §39-11-707, which provides that the property “may be seized by the attorney general, the attorney general's agents, or any law enforcement officer, when acting pursuant to a lawful arrest or search, the execution of a search warrant, a petition to abate a nuisance, or a court order.” Disposition of forfeited property is governed by Tenn. Code Ann. §39-11-713, which provides first for the sale of the property and the use of sale proceeds for expenses incurred. The court shall award the remainder of the funds to the state general fund. The funds shall be disbursed in other ways if the investigating agency is not a state agency.

A trafficker could also lose any conveyance used in the commission of other related crimes. Tenn. Code Ann. § 40-33-101 (Conveyances subject to forfeiture) provides for discretionary criminal asset forfeiture, upon conviction, of “[a]ny conveyance, including a vehicle, aircraft or vessel used in the commission of,” among other things, a sexual “offense under title 39, chapter 13, part 5,” which includes promoting prostitution, solicitation of a minor and soliciting sexual exploitation of a minor.⁵⁵ Property subject to forfeiture under this section may be seized upon process issued by any circuit or criminal court with jurisdiction over the property. Seizure is permitted without process where it is incident to arrest or search, pursuant to a search warrant. Tenn. Code Ann. § 40-33-102. Disposition of the forfeited property is governed by Tenn. Code Ann. §40-33-110, which provides that the property “shall inure to the benefit of the county in which the goods were seized . . . provided, that the forfeited conveyance or the funds derived from the confiscated goods shall go to the law enforcement agency that seized the conveyance and shall be used exclusively for law enforcement purposes . . . In all other cases, the proceeds shall be transmitted to the state treasurer and deposited in the state treasury.”

More specifically, this discretionary, criminal forfeiture provision is reiterated in Tenn. Code Ann. § 39-13-530(a) (Forfeiture of any conveyance or real or personal property used in a sexual offense committed against minors), with a particular emphasis in crimes involving minors. Tenn. Code Ann. §29-13-530(a) provides for the forfeiture of “[a]ny conveyance or real or personal property used in the commission of an offense under this part [Sexual offenses],” which is committed “against a person under eighteen (18) years of age and was committed on or after July 1, 2006.” Forfeiture proceedings under this section are subject to the provisions of title 40, chapter 33, part 2. However, “the proceeds from all forfeitures made pursuant to this section shall be transmitted to the general fund, where there is established a general fund reserve to be allocated through the general appropriations act, which shall be known as the child abuse fund.” Tenn. Code Ann. §39-13-530(b).

Finally, vehicle forfeiture specifically for sexual exploitation of children crimes is found in Tenn. Code Ann. § 39-17-1008(a) (Forfeiture of any conveyance or real or personal property used in commission of an offense under this part), which provides that “[a]ny conveyance or real or personal property used in the commission of an offense under this part [Sexual exploitation of children] is subject to forfeiture under the provisions of title 40, chapter 33, part 2 [Forfeiture procedures generally].” However, “the proceeds from all forfeitures made pursuant to this section shall be transmitted to the general fund, where there is established a general fund reserve

⁵⁵ Tenn. Code Ann. § 40-33-101 does contain some exceptions, including that “(1) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture . . . unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a robbery offense under title 39, chapter 13, part 4, or felony theft under title 39, chapter 14, part 1.”

to be allocated through the general appropriations act, which shall be known as the child abuse fund.” Tenn. Code Ann. §39-17-1008(b).

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

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

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

3.4.1 Recommendation: Amend Tenn. Code Ann. §39-11-118 to provide for mandatory minimum fines for human trafficking and CSEC offenses.

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

Persons convicted of a violent sexual offense or a sexual offense are required to register as sex offenders. Tenn. Code Ann. § 40-39-212(a).⁵⁶ A “sexual offense” under Tenn. Code Ann. § 40-39-202(20) includes Tenn. Code Ann. § 39-13-529 (Soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) and Tenn. Code Ann. § 39-13-515 (Promotion of prostitution). Tenn. Code Ann. §§ 40-39-202(20)(A)(iv), (xvii). Pursuant to Tenn. Code Ann. § 40-39-202(30) (Part definitions). A “violent sexual offense” under Tenn. Code Ann. § 40-39-202(30) includes: “(F) Aggravated sexual exploitation of a minor, under § 39-17-1004; (G) Especially aggravated sexual exploitation of a minor under § 39-17-1005; . . . (K) Solicitation of a minor, under § 39-13-528 when the offense is classified as a Class B or Class C felony; . . . (Y) Trafficking for commercial sex acts, under § 39-13-309.”

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.*

Pursuant to Tenn. Code Ann. § 37-1-147 (Termination of parental rights), the reasons and methods for terminating parental rights are governed by Tenn. Code Ann. title 36, chapter 1, part 1 (Domestic Relations; Adoption; General Provisions). Tenn. Code Ann. § 36-1-113(a)⁵⁷ (Termination of parental rights) states, “The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 [General provisions] and title 37, chapter 2, part 4 [Foster care].” Under subsection (c), “Termination of parental or guardianship rights must be based upon: (1) A finding by the court by clear and convincing

⁵⁶ The text of Tenn. Code Ann. 40-39-202 (Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004) includes amendments made by the passage of House Bill 2853 during the Tennessee 107th General Assembly. 2012 Tenn. Pub. Acts 753 (effective July 1, 2012).

⁵⁷ The text of Tenn. Code Ann. § 36-1-113 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 2847 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 1042. (effective May 21, 2012).

evidence that the grounds for termination of parental or guardianship rights have been established; and (2) That termination of the parent's or guardian's rights is in the best interests of the child." Under subsection (g),

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

...

(3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home;

(4) The parent or guardian has been found to have committed severe child abuse⁵⁸ as defined in § 37-1-102⁵⁹ [Definitions], under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against the child who is the subject of the petition or against any sibling or half-sibling of such child, or any other child residing temporarily or permanently in the home of such parent or guardian;

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

⁵⁸ "Severe child abuse" is defined in Tenn. Code Ann. § 37-1-102(b)(23) (Definitions) as,

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

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

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

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

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

⁵⁹ A portion of Tenn. Code Ann. § 37-1-102 has been redacted as of June 30, 2012, and the current version does not include Tenn. Code Ann. § 37-1-102(b)(4)(G).

or guardian;

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

....

(11) (A) The parent has been found to have committed severe child sexual abuse⁶⁰ under any prior order of a criminal court.

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

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

- 3.6.1 Recommendation: Amend Tenn. Code Ann. § 36-1-113(h)(1)(C) (Termination of parental rights) to include Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts) and § 39-13-515 (Promoting prostitution) when the victim is any minor as crimes for which the department of human services may file a petition to terminate parental rights.

⁶⁰ “For the purposes of this section, severe child sexual abuse means the parent is convicted of any of the following offenses towards a child:

- (i) Aggravated rape, pursuant to Section 39-13-502;
- (ii) Aggravated sexual battery, pursuant to Section 39-13-504;
- (iii) Aggravated sexual exploitation of a minor, pursuant to Section 39-17-1004;
- (iv) Especially aggravated sexual exploitation of a minor, pursuant to Section 39-17-1005;
- (v) Incest, pursuant to Section 39-15-302;
- (vi) Rape, pursuant to Section 39-13-503; or
- (vii) Rape of a child, pursuant to Section 39-13-522.

Legal Components:

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

Tenn. Code Ann. § 39-13-309(a)(1), (2)⁶¹ (Trafficking for commercial sex acts) includes all facilitators as it applies to a person who “knowingly . . . benefits from or attempts to benefit from another person's provision of a commercial sex act . . . or [r]ecruits, entices, harbors, transports, provides or obtains by any means another person for the purpose of providing a commercial sex act.”

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

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

Facilitators who knowingly advertise the sale of minors for commercial sex acts are subject to criminal liability. Pursuant to Tenn. Code Ann. § 39-13-315 (Offense of advertising commercial sexual abuse of a minor),⁶² “A person commits the offense of advertising commercial sexual abuse of a minor if the person knowingly sells or offers to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act, as defined in § 39-13-309,⁶³ with a minor.” Tenn. Code Ann. § 39-13-315(a) (Offense of advertising commercial sexual abuse of a minor. Advertising commercial sexual abuse of a minor is a Class C felony and is punishable by 3–15 years imprisonment. Tenn. Code Ann. §§ 39-13-315(b)(1), 40-35-111(b)(3).

A facilitator could be charged with violating certain CSEC statutes. Tenn. Code Ann. § 39-13-515 (Promoting prostitution) creates a Class E felony for promoting prostitution of a minor. “Promoting prostitution of a minor” is defined as “engaging in any of the activities described in subdivision (4) when one (1) or more of the persons engaged in prostitution is less than eighteen (18) years of age or has an intellectual disability.” Tenn. Code

⁶¹ See *supra* note 2.

⁶² The text of Tenn. Code Ann. § 39-13-315 included here and elsewhere in this report includes amendments made by the passage of during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 1075 § 3 (effective July 1, 2012).

⁶³ See *supra* note 2.

Ann. § 39-13-512(5). Pursuant to Tenn. Code Ann. § 39-13-512(4) (Prostitution—Definitions), “promoting prostitution” is defined as

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

Additionally, a facilitator could be found guilty of money laundering pursuant to Tenn. Code Ann. § 39-14-903. Tenn. Code Ann. § 39-14-903(b)(1) states, “It is an offense to knowingly use proceeds⁶⁴ derived directly or indirectly from a specified unlawful activity⁶⁵ with the intent to promote, in whole or in part, the carrying on of a specified unlawful activity.” A violation of this statute constitutes a Class B felony punishable by imprisonment for 8–30 years and a possible fine not to exceed \$25,000. Tenn. Code Ann. §§ 39-14-903 (b)(2), 40-35-111(b)(2).

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

For those facilitators charged with Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts), the facilitator would be subject to fines, restitution orders, and asset forfeiture. Tenn. Code Ann. § 39-13-309(b) is a Class B felony punishable by a possible fine not to exceed \$25,000. Tenn. Code Ann. § 40-35-111(b)(2). Facilitators charged with Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts) "where the victim of the offense is a child under (15) years of age, or where the offense occurs on the grounds or facilities or within 1,000 feet of a public or private school, secondary school, preschool, child care agency, public library, recreational center, or public park" are subject to a Class A felony punishable by a possible fine not to exceed \$50,000. Tenn. Code Ann. §§ 39-13-309(c), 40-35-111(b)(1). Tenn. Code Ann. § 39-13-515 (Promoting prostitution) is a Class E felony, punishable by a possible fine not to exceed \$3,000. Tenn. Code Ann. §§ 39-13-515, 40-35-111(b)(5).

Facilitators are also subject to criminal offenses related to advertisement of minors and commercial sex acts. Pursuant to Tenn. Code Ann. § 39-13-315(Offense of advertising commercial sexual abuse of a minor),⁶⁶ “A person commits the offense of advertising commercial sexual abuse of a minor if the person knowingly sells or offers to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act, as defined in § 39-13-301,⁶⁷ with a minor.” Tenn. Code Ann. § 39-13-315(a) (Offense of advertising commercial sexual abuse of a minor). Advertising commercial sexual abuse of a minor is a Class C felony and is punishable by 3–15 years imprisonment. Tenn. Code Ann. §§ 39-13-315(b)(1), 40-35-111(b)(3).

⁶⁴See *supra* note 43.

⁶⁵See *supra* note 44.

⁶⁶The text of Tenn. Code Ann. § 39-13-315 included here and elsewhere in this report includes amendments made by the passage of during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 1075 § 3 (effective July 1, 2012).

⁶⁷See *supra* note 2.

Violations of Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts) and § 39-13-515 (Promoting prostitution) also subject the offender to mandatory criminal asset forfeiture under Tenn. Code Ann. § 39-11-703(a), (b) (Criminal proceeds subject to forfeiture), which states,

(a) Any property, real or personal, directly or indirectly acquired by or received in violation of any statute or as an inducement to violate any statute, or any property traceable to the proceeds from the violation, is subject to judicial forfeiture, and all right, title, and interest in any such property shall vest in the state upon commission of the act giving rise to forfeiture.

(b) Any real property, including any right, title and interest in the whole of or any part of any lot or tract of land and any property used as an instrumentality in or used in furtherance of a violation of the following laws shall be subject to judicial forfeiture:

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

Seizure of forfeitable property is governed by Tenn. Code Ann. §39-11-707, which provides that the property “may be seized by the attorney general, the attorney general's agents, or any law enforcement officer, when acting pursuant to a lawful arrest or search, the execution of a search warrant, a petition to abate a nuisance, or a court order.” Disposition of forfeited property is governed by Tenn. Code Ann. §39-11-713, which provides first for the sale of the property and the use of sale proceeds for expenses incurred. The court shall award the remainder of the funds to the state general fund. The funds shall be disbursed in other ways if the investigating agency is not a state agency.

Additionally, a facilitator could lose any conveyance used in committing certain crimes. Pursuant to Tenn. Code Ann. § 40-33-101 (Conveyances subject to forfeiture), which provides for discretionary, criminal asset forfeiture, “Any conveyance, including a vehicle, aircraft or vessel used in the commission of an offense under title 39, chapter 13, part 5 [Sexual offenses including Tenn. Code Ann. § 39-13-515 (Promoting prostitution)] . . . where there is a final judgment of conviction is, in the discretion of the court, subject to forfeiture” subject to some exceptions. Property subject to forfeiture under this section may be seized upon process issued by any circuit or criminal court with jurisdiction over the property. Seizure is permitted without process where it is incident to arrest or search, pursuant to a search warrant. Tenn. Code Ann. § 40-33-102. Disposition of the forfeited property is governed by Tenn. Code Ann. §40-33-110, which provides that the property “shall inure to the benefit of the county in which the goods were seized . . . provided, that the forfeited conveyance or the funds derived from the confiscated goods shall go to the law enforcement agency that seized the conveyance and shall be used exclusively for law enforcement purposes . . . In all other cases, the proceeds shall be transmitted to the state treasurer and deposited in the state treasury.”

This discretionary, criminal forfeiture provision is reiterated, with special emphasis on minor victims, in Tenn. Code Ann. § 39-13-530(a) (Forfeiture of any conveyance or real or personal property used in a sexual offense committed against minors—Child abuse fund) which provides for the forfeiture of “[a]ny conveyance or real or personal property used in the commission of an offense under this part [Sexual offenses including Tenn. Code Ann. § 39-13-515 (Promoting prostitution)],” which is committed “against a person under eighteen (18) years of age and was committed on or after July 1, 2006.” This forfeiture is subject to the provisions of title 40, chapter 33, part 2. However, “the proceeds from all forfeitures made pursuant to this section shall be transmitted to the general fund, where there is established a general fund reserve to be allocated through the general appropriations act, which shall be known as the child abuse fund.” Tenn. Code Ann. §39-13-530(b).

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

(b) Any person who uses, occupies, establishes or conducts a nuisance,⁶⁸ or aids or abets therein, and the owner, agent or lessee of any interest in any such nuisance, together with the persons employed in or in control of any such nuisance by any such owner, agent or lessee, is guilty of maintaining a nuisance and such nuisance shall be abated as provided hereinafter.

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

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

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

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

4.2.1 Recommendation: Amend Tenn. Code Ann. §39-11-118 to require mandatory minimum fines for human trafficking and CSEC offenses.

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

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

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

4.4 *Promoting and selling child pornography is illegal.*

Pursuant to Tenn. Code Ann. § 39-17-1004(a)(1), (Offense of aggravated sexual exploitation of a minor), “(a)(1) It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material, or possess with the intent to promote, sell, distribute, transport, purchase or exchange material, that includes a minor engaged in: (A) Sexual activity; or (B) Simulated sexual activity that is patently offensive.”⁶⁹ Under subsection (b)(1), “It is unlawful for a person to knowingly promote, sell, distribute, transport, purchase or exchange material that is obscene, as defined in § 39-17-901,⁷⁰ or possess material that is obscene, with the intent to promote, sell, distribute, transport, purchase or exchange the material, which includes a minor engaged in: (A) Sexual activity; or (B) Simulated sexual activity that is patently offensive.”

⁶⁸The definition of “nuisance” includes “[a]ny place in or upon which lewdness, prostitution, promotion of prostitution, patronizing prostitution, . . . any sale, exhibition or possession of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver or distribute . . . are carried on or permitted” Tenn. Code Ann. § 29-3-101(a)(2)(A).

⁶⁹See *supra* note 8.

⁷⁰See *supra* note 34.

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

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

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.*

Pursuant to Tenn. Code Ann. § 29-13-102(12) (Definitions) within the Criminal Injuries Compensation provisions, a “victim” is defined as “a person who suffers personal injury or death as a direct and proximate result of any act of a person which is within the description of any of the offenses specified in § 29-13-104 [Offenses to which compensation applies].”⁷¹

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

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

⁷¹ Pursuant to Tenn. Code Ann. § 29-13-104(1), compensation can be paid, with some exceptions, for injury or death that was caused by “[a]n act committed in this state, which if committed by a mentally competent, criminally responsible adult, would constitute a crime under state or federal law”

Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts), § 39-13-515 (Promoting prostitution), § 39-13-514 (Patronizing prostitution), § 39-17-1005 (Offense of especially aggravated sexual exploitation of a minor), and § 39-13-529 (Offense of soliciting sexual exploitation of a minor—Exploitation of a minor by electronic means) do not refer to a defense based on consent of the minor to the commercial sex act. However, the code does not specifically prohibit a defendant from raising such a defense.

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

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

Minors under 18 are immune from being charged with Tenn. Code Ann. § 39-13-513 (Prostitution).⁷² Pursuant to Tenn. Code Ann. § 39-13-513(d),

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

Additionally, a defense is available for a victim charged with prostitution for conduct that occurred because the person was a victim of sex trafficking or involuntary labor servitude. An offender convicted of prostitution is subject to a Class B misdemeanor, or a Class A misdemeanor if the offense was committed within proscribed distances from a school or church. Tenn. Code Ann. § 39-13-513(b). However, House Bill 2823 amended Tenn. Code Ann. § 39-16-513 to add the following defense for trafficking victims:

(e) It is a defense to prosecution under this section that a person charged with a violation of this section was so charged for conduct that occurred because the person was a victim of an act committed in violation of § 39-13-307 or § 39-13-309, or because the person was a victim as defined under the Trafficking Victims Protection Act, 22 U.S.C. § 7102.⁷³

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.*

I. Child Initially Identified as Abused/Neglected

Pursuant to Tenn. Code Ann. § 37-1-102(b)(12) (Definitions),⁷⁴ a sexually exploited child is likely to be identified as abused or neglected. However, even if a child is identified as abused or neglected under Tenn.

⁷² The text of Tenn. Code Ann. § 39-13-513 includes amendments made by the passage of House Bill 2823 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 891 (effective July 1, 2012).

⁷³ Victim is defined under 22 U.S.C. § 7102 as a person subjected to either “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age” or “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” 22 U.S.C. § 7102 (8)(A), (B).

⁷⁴ See *infra* section 5.5 for a full analysis of child abuse and neglect definitions.

Code Ann. § 37-1-102(b)(12), the definition of “custodian” under Tenn. Code Ann. § 37-1-102(b)(7) (Definitions)⁷⁵ is not sufficiently broad to involve Child Protective Services in investigations where the a child is in the custody or control of a non-family trafficker. To the extent that a victim of domestic minor sex trafficking is identified as abused or neglected, law enforcement agencies have certain reporting duties related to a domestic minor sex trafficking victim. Pursuant to Tenn. Code Ann. § 37-1-403 (Reporting of brutality, abuse, neglect or child sexual abuse—Notification to parents of abuse on school grounds or under school supervision—Confidentiality of records),

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

....

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

....

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

....

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

Additionally, childhood sexual abuse victims,⁷⁶ including victims of commercial sexual exploitation under 13 years of age, may be referred to a child protective response team for investigation. Tenn. Code Ann. §§ 37-1-

⁷⁵ See *infra* section 5.6 for a full analysis of the definition of “custodian” under the child welfare statutes.

⁷⁶ “Child sexual abuse” is defined to include “The sexual exploitation of a child, which includes allowing, encouraging, or forcing a child to: (a) Solicit for or engage in prostitution; or (b) Engage in an act prohibited by § 39-17-1003 [Offense of sexual exploitation of a minor].” Tenn. Code Ann. § 37-1-602(3)(C)(vi). Although Tenn. Code Ann. § 37-1-602(a)(3)(C) (Part definitions—Harm to child’s health or welfare) does not specify an age, other portions of the statute define “child sexual abuse” as limited to children under 13. Tenn. Code Ann. § 37-1-602(a)(3)(A), (B). Furthermore, Tenn. Code Ann. § 37-1-602(a)(3)(D) states “For the purposes of the reporting, investigation, and treatment provisions of §§ 37-1-603–37-1-615 ‘child sexual abuse’ also means the commission of any act specified in subdivisions (a)(3)(A)–(C) against a child thirteen (13) years of age through seventeen (17) years of age if such act is committed against the child by a parent, guardian, relative, person residing in the child’s

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

a. Points of contact for initial custody of abused/neglected child

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

- (1) Pursuant to an order of the court under this part;
- (2) Pursuant to the laws of arrest;
- (3) By a law enforcement officer, social worker of the department of human services, or duly authorized officer of the court, if there are reasonable grounds to believe that the conditions specified in § 37-1-114(a)(2) [Detention or shelter care of child prior to hearing on petition] exist; or
- (4) By a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that the child has run away from the child’s parents, guardian or other custodian.

Thus, if the law enforcement officer has “reasonable grounds to believe” that the child is “a neglected, dependent or abused child,” then the law enforcement officer may take the child into custody. Tenn. Code Ann. §§ 37-1-(a)(3), 37-1-114(a)(2). Pursuant to Tenn. Code Ann. § 37-1-102(b)(12)(I) (Definitions), a “dependent and neglected child” includes a child “[w]ho is or has been allowed, encouraged or permitted to engage in prostitution or obscene or pornographic photographing, filming, posing, or similar activity and whose parent, guardian or other custodian neglects or refuses to protect such child from further such activity.” Finally, the taking of a child into custody is not an arrest under this section. Tenn. Code Ann. § 37-1-113(b).

b. Process following initial custody of abused/neglected child

If an abused or neglected child is taken into custody under Tenn. Code Ann. § 37-1-113(a)(3) before a petition is filed, “a petition under § 37-1-120 shall be filed as soon as possible but in no event later than two (2) days after the child is taken into custody excluding Saturdays, Sundays and legal holidays.” Tenn. Code Ann. § 37-1-115(a)(2). Additionally, “the petition may be made by any person, including a law enforcement officer, who has knowledge of the facts alleged or is informed and believes that they are true.” Tenn. Code Ann. § 37-1-119 (Petition – who may make). Pursuant to Tenn. Code Ann. § 37-1-114(a) (Detention or shelter care of child prior to hearing on petition),

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

.....

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

home, or other person responsible for the care and custody of the child,” creating the same assumption that the child must be under 13 for purposes of Tenn. Code Ann. § 37-1-603(a)(3)(C).

custodian available that would reasonably and adequately protect the child's health or safety or prevent the child's removal from the jurisdiction of the court pending a hearing.

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

- (1) A licensed foster home or a home approved by the court;
 - (2) A facility operated by a licensed child care agency;
 - ...
 - (4) Subject to subsection (e), any other suitable place or facility designated or operated by the court.
- The child may be detained in a jail or other facility for the detention of adults only if:
- (A) Other facilities in subdivision (a)(3) are not available⁷⁷;
 - (B) The detention is in a room separate and removed from those for adults; and
 - (C) It appears to the satisfaction of the court that public safety and protection reasonably require detention, and it so orders.

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

c. Adjudication of abuse/neglect

Pursuant to Tenn. Code Ann. § 37-1-129(a) (Hearings—Findings—Disposition of child—Interdepartmental case management team—Pilot projects),⁷⁸

- (1) After hearing the evidence on the petition, the court shall make and file its findings as to whether the child is a dependent or neglected child . . . If the court finds that the child is not a dependent or neglected child . . . , it shall dismiss the petition and order the child discharged from any detention or other restriction theretofore ordered in the proceeding.
- (2) If the petition alleged the child was dependent and neglected as defined in § 37-1-102(b)(12)(G), or if the court so finds regardless of the grounds alleged in the petition, the court shall determine whether the parents or either of them or another person who had custody of the child committed severe child abuse. The court shall file written findings of fact that are the basis of its conclusions on that issue within thirty (30) days of the close of the hearing or, if an appeal or a petition for certiorari is filed, within five (5) days thereafter, excluding Sundays.

The court then may vest custody of the child with the department for placement under Tenn. Code Ann. § 37-1-129(e) (Hearings—Findings—Disposition of child—Interdepartmental case management team—Pilot projects) which states that,

- (1) Any order of the court that places custody of a child with the department shall empower the department to select any specific residential or treatment placements or programs for the child according to the determination made by the department, its employees, agents or contractors.

⁷⁷ Allegedly dependent or neglected children may not be placed in “[a] detention home or center for delinquent children that is under the direction or supervision of the court or other public authority or of a private agency approved by the court” except for under this specific exception. Tenn. Code Ann. § 37-1-116(a)(3), (a)(4)(A).

⁷⁸ The text of Tenn. Code Ann. § 37-1-129 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 2957 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 1016 § 1 (effective July 1, 2012).

(2) The court may review the residential or treatment placement of a child placed in the department's custody, and within ninety (90) days of the placement, the court may, on its own motion, order a hearing to receive evidence and testimony with regard to the appropriateness of the child's residential or treatment placement. The court shall provide notice of the hearing to the department, to the child's biological parent or parents, and any other person who has been primarily responsible for the care of the child during the twelve (12) months prior to the child's placement in the department's custody

d. Process outcomes

If after a hearing, a child is found dependent or neglected, then pursuant to Tenn. Code Ann. § 37-1-130(a) (Dependent or neglected child—Disposition), the child may be allowed to remain in the custody of the parents, guardian, or other custodian, subject to the court's conditions, or temporary custody may be transferred to a person "qualified to receive and care for the child," the department of children's services, "[a]n agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child," or "[a]n individual in another state with or without supervision by an appropriate officer under § 37-1-142 [Nonresident child—Transfer from another state]." Moreover, pursuant to Tenn. Code Ann. § 37-1-130(d),

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

Tennessee has not enacted statutorily mandated ongoing services following placement, a formal multidisciplinary approach to victim services, or specialized long-term placement option available for victims of domestic minor sex trafficking that may be identified as abused, neglected, or dependent. In response to the absence of procedures and services specific to domestic minor sex trafficking victims, Tennessee is developing a multi-agency plan to identify victims and provide community-based services and benefits to which they may be entitled.⁷⁹

⁷⁹ Tennessee is developing a plan to identify and provide services to victims of human trafficking. During 2012, the Tennessee 107th General Assembly passed Senate Bill 2370,⁷⁹ establishing a new section under Title 71, Chapter 1 which requires that:

(a) the commissioner of the department of human services shall establish a plan for the delivery of services to victims of human trafficking after consultation with the following departments:

- (1) Department of children's services;
- (2) Department of health;
- (3) Department of intellectual and developmental disabilities;
- (4) Department of mental health; and
- (5) Tennessee bureau of investigation.

(b) The plan developed under subsection (a) shall include, but not be limited to, provisions to:

- (1) Identify victims of human trafficking in this state;
- (2) Identify community-based services for victims of human trafficking
- (3) Assist victims of human trafficking through the provision of information regarding access to benefits and services to which those victims may be entitled
- (4) Coordinate delivery of services and information concerning health care, mental health care, legal services, housing, job training, education and victim's compensation funds;
- (5) Prepare and disseminate educational materials and provide training programs to increase awareness of human trafficking and the services available to victims; and
- (6) Assist victims of human trafficking with family reunification.

II. Child Initially Identified as an Unruly Child

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

- (i) Habitually and without justification is truant from school while subject to compulsory school attendance under § 49-6-3007 [Attendance and truancy reports—Enforcement of compulsory attendance];
- (ii) Habitually is disobedient of the reasonable and lawful commands of the child’s parent(s), guardian or other legal custodian to the degree that such child’s health and safety are endangered;
- (iii) Commits an offense that is applicable only to a child; or
- (iv) Is away from the home, residence or any other residential placement of the child’s parent(s), guardian or other legal custodian without their consent. Such child shall be known and defined as a “runaway.”

a. Points of contact for initial custody of an unruly child

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

- (1) Pursuant to an order of the court under this part;
- (2) Pursuant to the laws of arrest;
- (3) By a law enforcement officer, social worker of the department of human services, or duly authorized officer of the court, if there are reasonable grounds to believe that the conditions specified in § 37-1-114(a)(2) [Detention or shelter care of child prior to hearing on petition] exist; or
- (4) By a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that the child has run away from the child’s parents, guardian or other custodian.

Thus, if the child has “committed the delinquent or unruly act with which the child is charged,” then the law enforcement officer may take the child into custody. Tenn. Code Ann. §§ 37-1-113(a)(3), 37-1-114(a)(1).

b. Process following initial custody of an unruly child

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

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

-
- (c) In addition to the requirements of subsection (b), the plan shall include a timeline for which the department anticipates the state would be capable of implementing the plan, along with anticipated rates of assistance to victims of human trafficking, cost of implementation, an itemized rationale for both, and any other factor that the department opines will significantly contribute to or detract from the success of implementing the plan.

2012 Tenn. Public Acts 963 (effective July 1, 2012).

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

c. Adjudication of an unruly child

Under Tenn. Code Ann. § 37-1-119 (Petition—Who may make), a petition may be filed “by any person, including a law enforcement officer, who has knowledge of the facts alleged or is informed and believes that they are true.”

The court will then hear the petition concerning an allegedly unruly child. Pursuant to Tenn. Code Ann. § 37-1-129 (Hearings—Findings—Disposition of child—Interdepartmental case management team—Pilot projects) in relevant part,

(a)(1) After hearing the evidence on the petition, the court shall make and file its findings as to . . . whether the acts ascribed to the child were committed by that child. If the court finds that the child is not a dependent or neglected child or that the allegations of delinquency or unruly conduct have not been established, it shall dismiss the petition and order the child discharged from any detention or other restriction theretofore ordered in the proceeding.

. . . .

(c) If the court finds from clear and convincing evidence that the child is . . . unruly, the court shall proceed immediately or at a postponed hearing to make a proper disposition of the case.

d. Process outcome

When a child is determined to be an unruly child then the court may, among other dispositions, place the child in any of the same dispositions as a dependent or neglected child, place the child on probation, order community service, or assess a fine. Tenn. Code Ann. § 37-1-132(a), 37-1-131(a). If an unruly child is removed from the home, then the child must be placed in the “least drastic or restrictive alternative.” Tenn. Code Ann. § 37-1-132(b)(1). Tennessee is also developing a plan to identify services and benefits to which a domestic minor sex trafficking victim identified as an unruly child may be entitled.⁸⁰

III. Child Initially Identified as Delinquent

Since minors in Tennessee are not subject to prosecution for Tenn. Code Ann. § 39-13-513 (Prostitution), a prostituted minor will not be considered a delinquent child.⁸¹ Once a police officer determines the age of the minor after taking the minor into custody for a prostitution offense, the officer shall not charge the minor as a delinquent but instead shall “provide the minor with the telephone number for the national human trafficking resource center hotline and release the minor to the custody of a parent or legal guardian.” Tenn. Code Ann. § 39-13-513(d). A “delinquent child” is “a child who has committed a delinquent act and is in need of treatment

⁸⁰ See *supra* note 79.

⁸¹ See *supra* section 5.3 for a full analysis of this immunity.

or rehabilitation.” Tenn. Code Ann. § 37-1-102(b)(10).⁸² A “delinquent act” is defined in part as “an act designated a crime under the law, including local ordinances of this state, or of another state if the act occurred in that state, or under federal law, and the crime is not a status offense under subdivision (b)(25)(A)(iii) [definition of severe child abuse]” Tenn. Code Ann. § 37-1-102(b)(9).

a. Points of contact for initial custody of delinquent child

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

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

b. Process following initial custody of a delinquent child

Pursuant to Tenn. Code Ann. § 37-1-116(a) (Place of detention – Escape or attempted escape—Shelter care), a variety of placement options are available to children alleged to be delinquent, including only

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

Additionally, under Tenn. Code Ann. § 37-1-116(h) a juvenile may be temporarily detained for as short a time as feasible, not to exceed forty-eight (48) hours, in an adult jail or lockup, if:

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

⁸² A portion of Tenn. Code Ann. § 37-1-102 has been redacted as of June 30, 2012, and the current version does not include Tenn. Code Ann. § 37-1-102(b)(4)(G).

and willing to contract for the placement of the juvenile; and
(5) A determination is made that there is no existing acceptable alternative placement available for the juvenile.

c. Adjudication of a delinquent child

Pursuant to Tenn. Code Ann. § 37-1-129 (Hearings—Findings—Disposition of child—Interdepartmental case management team—Pilot projects) in relevant part,

(a)(1) After hearing the evidence on the petition, the court shall make and file its findings as to whether the child is a dependent [and] whether the acts ascribed to the child were committed by that child. If the court finds that . . . the allegations of delinquency or unruly conduct have not been established, it shall dismiss the petition and order the child discharged from any detention or other restriction theretofore ordered in the proceeding.

....

(b) If the court finds on proof beyond a reasonable doubt that the child committed the acts by reason of which the child is alleged to be delinquent, it shall proceed immediately or at a postponed hearing to hear evidence as to whether the child is in need of treatment or rehabilitation and to make and file its findings thereon. If the court finds that the child is not in need of treatment or rehabilitation, it may dismiss the proceeding and discharge the child from any detention or other restriction theretofore ordered. In the absence of evidence to the contrary, evidence of the commission of acts that constitute a felony or that reflect recidivistic delinquency is sufficient to sustain a finding that the child is in need of treatment or rehabilitation.

d. Process outcomes

Pursuant to Tenn. Code Ann. § 37-1-131 (Delinquent child—Disposition—Restitution), a child adjudicated as a delinquent may be ordered by the court to the “disposition best suited to the child’s treatment, rehabilitation, and welfare,” which includes

- (1) Any order authorized by § 37-1-130 for the disposition of a dependent or neglected child;⁸³
- (2) (A) Placing the child on probation under the supervision of the probation officer of the court or the department of children's services, any person, or persons or agencies designated by the court, or the court of another state as provided in § 37-1-143, under conditions and limitations the court prescribes.

5.4.1 Recommendation: Establish a mandatory response law that directs any minor involved in prostitution or who is a victim of trafficking for commercial sex acts into a protective system that provides specialized services and housing.

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

Commercial sexual exploitation is identified as a type of abuse and neglect in Tennessee. Pursuant to Tenn. Code Ann. § 37-1-102(b)(12) (Definitions), a “dependent and neglected child” includes a child who is subject to any of the following situations:

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

...

⁸³ See *supra* section 5.4(I)(d) for a full analysis of placement options for a dependent or neglected child.

- (E) Who, because of lack of proper supervision, is found in any place the existence of which is in violation of law;
- (F) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others;
- (G) Who is suffering from abuse⁸⁴ or neglect;
- (H) Who has been in the care and control of one (1) or more agency or person not related to such child by blood or marriage for a continuous period of six (6) months or longer in the absence of a power of attorney or court order, and such person or agency has not initiated judicial proceedings seeking either legal custody or adoption of the child;
- (I) Who is or has been allowed, encouraged or permitted to engage in prostitution or obscene or pornographic photographing, filming, posing, or similar activity and whose parent, guardian or other custodian neglects or refuses to protect such child from further such activity; . . .

. . . .

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

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

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

5.6.1 Recommendation: Clarify that child protection laws reach traffickers by amending the definition of “custodian” to include a person who has physical custody or control over 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.*

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

Compensation is not allowed for “any personal injury or loss alleged to have been incurred as a result of pain and suffering, except for victims of the crime of rape and victims of crime involving sexual deviancy, including

⁸⁴ Pursuant to Tenn. Code Ann. § 37-1-102(b)(1) (Definitions), “‘Abuse’ exists when a person under the age of eighteen (18) is suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions of a parent, relative, guardian or caretaker.”

minors who are victims of the crimes contained in the provisions of §§ 39-13-502–39-13-505 [Aggravated rape; Rape; Aggravated sexual battery; Sexual battery], 39-12-101 [Criminal attempt], 39-13-522 [Rape of a child], 39-15-302 [Incest], 39-17-902 [Producing, importing, preparing, distributing, processing or appearing in obscene material or exhibition], 39-17-1003–39-17-1005 [Offense of sexual exploitation of a minor; Offense of aggravated sexual exploitation of a minor; Offense of especially aggravated sexual exploitation of a minor], and/or any attempt, conspiracy or solicitation to commit such offenses.” Tenn. Code Ann. § 29-13-106(c). This statute could be a barrier to compensation for victims of crimes stated in Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts), Tenn. Code Ann. § 39-13-515 (Promoting prostitution), or Tenn. Code Ann. § 39-13-514 (Patronizing prostitution) from recovering for pain and suffering.

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

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

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

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

may all constitute good cause.

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

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

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

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

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

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

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

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

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

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

One victim-friendly criminal justice procedure that extends to all victims is the availability of a crime victim advocate. Tenn. Code Ann. § 40-38-115. Pursuant to Tenn. Code Ann. § 40-38-115(a) (Crime victim

advocate), “Any victim of crime may have a crime victim advocate from a crime assistance program or a victim-witness coordinator as provided for in § 8-7-206 present at any defense interviews with the victim. . . . The role of the crime victim advocate or victim-witness coordinator is to provide emotional support to the victim.”

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

5.9 *Expungement or sealing of juvenile 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.*

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

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

- (A) (i) Is currently eighteen (18) years of age or older;
- (ii) Is at least one (1) year removed from the person’s most recent delinquency adjudication; and
- (iii) Has never been convicted of a criminal offense as an adult, has never been convicted of a criminal offense following transfer from juvenile court pursuant to § 37-1-134 [Transfer from juvenile court], and has never been convicted of a sexual offense as defined in § 40-39-202 [Part definitions], whether in juvenile court, following transfer from juvenile court pursuant to § 37-1-134, or as an adult;
- (iv) Does not have an adjudication of delinquency for a violent juvenile sexual offense as defined in Section 40-39-202(28).
- (B) Has maintained a consistent and exemplary pattern of responsible, productive and civic-minded conduct for one (1) or more years immediately preceding the filing of the expunction petition; or
- (C) The juvenile has made such an adjustment of circumstances that the court, in its discretion, believes that expunction serves the best interest of the child and the community.

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

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

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

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

Buyers, facilitators, and traffickers may be liable to pay damages under a civil cause of action for trafficking victims. In 2012, the Tennessee 107th General Assembly passed House Bill 2489⁸⁵ which added a new section to Title 39, Chapter 13, Part 3 that states:

(a) (1) ‘Human trafficking offense’ means the commission of any act that constitutes the criminal offense of:

- (A) Involuntary labor servitude, under § 39-13-307;
- (B) Trafficking persons for forced labor or services, under § 39-13-308;
- (C) Trafficking a person for sexual servitude, under § 39-13-309; or
- (D) Promoting the prostitution of a minor, under § 39-13-512.

(b)(1) A trafficked person may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those or any other appropriate relief.

(2) A prevailing plaintiff is entitled to an award of attorney's fees and costs.

Pursuant to enacted House Bill 2489, subsection (c) provides,

(c) Restitution under this section shall include items covered by the criminal injuries compensation fund under § 40-24-107 and any of the following, if not already covered by the court’s restitution order:

- (1) Costs of medical and psychological treatment, including physical and occupational therapy and rehabilitation, at the court’s discretion;
- (2) Costs of necessary transportation, temporary housing, and child care, at the court’s discretion;

⁸⁵ The text of Tenn. Code Ann. § 39-13-3(x) included here and elsewhere in this report includes amendments made by the passage of House Bill 2489 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 613 (effective July 1, 2012).

- (3) Attorney’s fees and other court-related costs such as victim advocate fees;
- (4) The greater of:
 - (A) The value of the victim’s labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) or state equivalent; or
 - (B) The gross income or value to the defendant of the victim’s labor or services or of any commercial sex acts engaged in by the victim while in the human trafficking situation;
- (5) Return of property, cost of damage to property, or full value of property if destroyed or damaged beyond repair;
- (6) Compensation for emotional distress, pain, and suffering;
- (7)
 - (A) Expenses incurred by a victim and any household members or other family members in relocating away from the defendant or the defendant's associates, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items;
 - (B) Expenses incurred pursuant to subdivision (c) (7)(A) shall be verified by law enforcement to be necessary for the personal safety of the victim or household or family members, or by a mental health treatment provider to be necessary for the emotional well-being of the victim;
- (8) Repatriation of the victim to their home country, if applicable; and
- (9) Any and all other losses suffered by the victim as a result of human trafficking offenses.

Pursuant to Tenn. Code Ann. § 40-24-107(e), “A person named in this section may not receive any funds from restitution if such person engaged in violations of a human trafficking offense.”

5.10.1 Recommendation: Amend Tenn. Code Ann. § 39-11-118 to provide for mandatory restitution for victims of human trafficking and CSEC offenses.

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.

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

- (h) A person may be prosecuted, tried and punished for any offense committed against a child on or after June 20, 2006, that constitutes a criminal offense under the provisions of §§ 39-13-502–39-13-505 [Aggravated rape; Rape; Aggravated sexual battery; Sexual battery], § 39-13-522 [Rape of a child], § 39-13-527 [Sexual battery by authority figure] or § 39-15-302 [Incest], no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.
- (i) A person may be prosecuted, tried and punished for any offense committed against a child on or after July 1, 2007, that constitutes a criminal offense under the provisions of § 39-13-531 [Aggravated rape of a child] or § 39-13-532 [Statutory rape by an authority figure], no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.

For civil actions under Tenn. Code Ann. § 29-13-403 (Defendant’s income—Collection—Deposit) a three-year statute of limitation exists, but it is tolled until “[a]n escrow account has been established for the benefit of the defendant’s victims.” Tenn. Code Ann. § 29-13-404(2). Additionally, the right to bring a civil action by an

individual under 18 is tolled until the minor reaches 18. Tenn. Code Ann. § 28-1-106. Then, pursuant to Tenn. Code Ann. § 28-1-106 (Persons under disability on accrual of right), the individual may bring the action “after legal rights are restored [of minority], within the time of limitation [for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from the restoration of legal rights.”

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

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 is a permissible investigative technique.*
- 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*

Legal Analysis:

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

Tennessee requires training on child sexual abuse pursuant to Tenn. Code Ann. § 37-1-603(b)(4)(A)(ii) (Comprehensive state plan), which states that “[t]he course of training leading to the basic certificate issued by the Tennessee peace officer standards and training commission shall include adequate instruction in the procedures described in subdivision (b)(4)(A)⁸⁶ and shall be included as a part of the in-service training requirement to be eligible for the salary supplement authorized in § 38-8-111 [In-service Training—Cash supplements].” Tenn. Code Ann. § 37-1-602(3)(C)(vi) (Part definitions—Harm to child’s health or welfare), defines “child sexual abuse” as including “[t]he sexual exploitation of a child, which includes allowing, encouraging, or forcing a child to: (a) Solicit for or engage in prostitution; or (b) Engage in an act prohibited by § 39-17-1003 [Offense of sexual exploitation of a minor.]” Therefore, it is possible that the childhood sexual abuse training required by Tenn. Code Ann. § 37-1-603(b)(4)(A)(ii) could include training on domestic minor sex trafficking.

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

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

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

⁸⁶ Tenn. Code Ann. § 37-1-603(b)(4)(A) states in part, “(A) The Jerry F. Agee Tennessee Law Enforcement Academy, the Tennessee peace officer standards and training commission, and the department of children’s services shall work together in developing ways to inform and instruct appropriate local law enforcement personnel in the detection of child sexual abuse and in the proper action that should be taken in a suspected case of child sexual abuse: (i) Guidelines shall be prepared establishing a standard procedure that may be followed by police agencies in the investigation of cases involving sexual abuse of children, including police response to, and treatment of, victims of such crimes;”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 6.5.1 Recommendation: Amend Tenn. Code Ann. § 39-13-528(a) (Offense of solicitation of a minor) to include the offenses of Tenn. Code Ann. § 39-13-309 (Trafficking for commercial sex acts), § 39-13-514 (Patronizing prostitution), § 39-13-515 (Promoting prostitution), § 39-17-1004 (Offense of aggravated sexual exploitation of a minor), and § 39-17-1005 (Offense of especially aggravated sexual exploitation of a minor) to allow for criminal prosecutions in cases of Internet-based recruitment and exploitation.

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

Law enforcement agencies are required to report missing children.⁸⁷ Pursuant to Tenn. Code Ann. § 37-10-203⁸⁸ (Formal missing child report—Reports to law enforcement agencies),

Every law enforcement officer receiving information from a parent or any source that it deems creditable shall prepare a formal missing child report. A law enforcement agency reporting a missing child is further required to enter or cause to be entered the report of the missing child into the National Crime Information Center (NCIC) within two (2) hours of the receipt of the initial missing child report.

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

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

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

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

⁸⁷ For the purposes of these statutes, “child” is defined as “any person under twenty-one (21) years of age.” Tenn. Code Ann. § 37-10-201(b)(1).

⁸⁸ The text of Tenn. Code Ann. § 39-10-203 includes amendments made by the passage of House Bill 2986 during the Tennessee 107th General Assembly. 2012 Tenn. Public Acts 856 (effective July 1, 2012).

Additionally, pursuant to Tenn. Code Ann. § 37-1-403(c)(3)(A) (Reporting of brutality, abuse, neglect or child sexual abuse—Notification to parents of abuse on school grounds or under supervision—Confidentiality of records), “if the department⁸⁹ receives information containing references to alleged human trafficking or child pornography which does or does not result in an investigation by the department, the department shall notify the appropriate law enforcement agency immediately upon receipt of such information.”

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

© January 19, 2012 Shared Hope International and the American Center for Law and Justice. All rights reserved. © November 29, 2012 Shared Hope International. All rights reserved.

⁸⁹ Pursuant to Tenn. Code Ann. § 37-1-401(2) (Part definitions) “department” is defined as “the department of children’s services.”