

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2013 ANALYSIS AND RECOMMENDATIONS GEORGIA

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

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

Paralleling federal law, Georgia's human trafficking law does not require a showing of force, fraud, or coercion of minors under 18 to qualify as sex trafficking. Under Ga. Code Ann. § 16-5-46(c) (Trafficking of persons for labor or sexual servitude), trafficking occurs when one "knowingly subjects another person to or maintains another person in sexual servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of sexual servitude." Ga. Code Ann. § 16-5-46(c). Pursuant to Ga. Code Ann. § 16-5-46(a)(6), "sexual servitude" is defined as "(A) Any sexually explicit conduct<sup>2</sup> or performance involving sexually explicit conduct for which anything of value

<sup>1</sup> Unless otherwise specified, all references to Georgia statutes were taken from the Official Code of Georgia Annotated (LEXIS through 2012 Regular Session, Annotations current through 11/9/2012) and all federal statutes were taken from United States Code (LEXIS through PL 113-13, approved 6/3/13). This report includes legislation enacted as of August 1, 2013.

<sup>2</sup> Ga. Code Ann. § 16-5-46(a)(5) refers to Ga. Code Ann. § 16-12-100 for the definition of "sexually explicit conduct." Ga. Code Ann. § 16-12-100(a)(4)(Sexual exploitation of children) defines "sexually explicit conduct" as the following:

(4) "Sexually explicit conduct" means actual or simulated:

is directly or indirectly given, promised to, or received by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years; or (B) Any sexually explicit conduct or performance involving sexually explicit conduct which is performed or provided by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years.” If committed against a minor under 18, trafficking is a felony punishable by imprisonment for 10–20 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-5-46(f)(2). If, however, the minor was “coerced or deceived into being trafficked,” the crime is punishable by imprisonment for 25–50 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-5-46(f)(2).

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

The following laws make CSEC a crime in Georgia:

1. Under Ga. Code Ann. § 16-6-11 (Pimping),

A person commits the offense of pimping when he or she performs any of the following acts:

- (1) Offers or agrees to procure a prostitute for another;
- (2) Offers or agrees to arrange a meeting of persons for the purpose of prostitution;
- (3) Directs or transports another person to a place when he or she knows or should know that the direction or transportation is for the purpose of prostitution;
- (4) Receives money or other thing of value from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution; or
- (5) Aids or abets, counsels, or commands another in the commission of prostitution or aids or assists in prostitution where the proceeds or profits derived therefrom are to be divided on a pro rata basis.

Pursuant to Ga. Code Ann. § 16-6-13(b)(1) (Penalties for violating Code Sections 16-6-9 through 16-6-12), when the victim is 16 or 17, the crime is punishable by imprisonment for 5–20 years, a fine of \$2,500–\$10,000, or both. Ga. Code Ann. § 16-6-13(b)(1). If the victim is under the age of 16, the perpetrator is guilty of a felony punishable by imprisonment for 10–30 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-6-13(b)(2).

2. A person is guilty of pandering, according to Ga. Code Ann. § 16-6-12 (Pandering),

[W]hen he or she solicits a person to perform an act of prostitution in his or her own behalf or in behalf of a third person or when he or she knowingly assembles persons at a fixed place for the purpose of being solicited by others to perform an act of prostitution.

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- (A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
  - (B) Bestiality;
  - (C) Masturbation;
  - (D) Lewd exhibition of the genitals or pubic area of any person;
  - (E) Flagellation or torture by or upon a person who is nude;
  - (F) Condition of being fettered, bound, or otherwise physically restrained on the part of a person who is nude;
  - (G) Physical contact in an act of apparent sexual stimulation or gratification with any person’s unclad genital, pubic area, or buttocks or with a female’s nude breasts;
  - (H) Defecation or urination for the purpose of sexual stimulation of the viewer; or
  - (I) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.

When the victim is 16 or 17, the crime is punishable by imprisonment for 5–20 years, a fine of \$2,500–\$10,000, or both. Ga. Code Ann. § 16-6-13(b)(1). If the victim is under the age of 16, the perpetrator is guilty of a felony punishable by imprisonment for 10–30 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-6-13(b)(2).

3. Under Ga. Code Ann. § 16-6-10 (Keeping a place of prostitution), “A person having or exercising control over the use of any place or conveyance which would offer seclusion or shelter for the practice of prostitution commits the offense of keeping a place of prostitution when he knowingly grants or permits the use of such place for the purpose of prostitution.” When the victim is 16 or 17, the crime is punishable by imprisonment for 5–20 years, a fine of \$2,500–\$10,000, or both. Ga. Code Ann. § 16-6-13(b)(1). If the victim is under the age of 16, the perpetrator is guilty of a felony punishable by imprisonment for 10–30 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-6-13(b)(2).

4. Ga. Code Ann. § 16-12-100(b) (Sexual exploitation of children) states in part,

(1) It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual medium depicting such conduct.

....

(3) It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of any performance.

....

(5) It is unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute any visual medium which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct.

(6) It is unlawful for any person knowingly to advertise, sell, purchase, barter, or exchange any medium which provides information as to where any visual medium which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct can be found or purchased.

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This crime is a felony punishable by imprisonment for 5–20 years and a fine not to exceed \$100,000. Ga. Code Ann. § 16-12-100(g)(1).<sup>3</sup> However, no fine will be imposed “if the person so convicted is a member of the immediate family of the victim.” Ga. Code Ann. § 16-12-100(g)(1).<sup>4</sup> The law does not

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<sup>3</sup> The text of Ga. Code Ann. § 16-12-100(g) included here and elsewhere in this report includes amendments made by the passage of House Bill 156 during the 2013 regular session of the Georgia Legislature (effective July 1, 2013).

<sup>4</sup> In addition, those convicted of sexual offenses face heightened penalties under Ga. Code Ann. § 17-10-6.2 (“Sexual offense” defined; split sentence; deviation from mandatory minimum sentence). Under subsection (a), “sexual offense” is defined to include, “(6) Enticing a child for indecent purposes, as defined in Code Section 16-6-5, unless subject to the provisions of subsection (c) of Code Section 16-6-5” and “(10) Sexual exploitation of children, as defined in Code Section 16-12-100.” Under subsection (b), subject to exceptions in subsection (c), “notwithstanding any other provisions of law to the contrary, any person convicted of a sexual offense shall be sentenced to a split sentence which shall include the minimum term of imprisonment specified in the Code section applicable to the offense. No portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court and such sentence shall include, in addition to the mandatory imprisonment, an additional probated sentence of at least one year.” Subsection (c) states,

(c)(1) In the court’s discretion, the court may deviate from the mandatory minimum sentence as set forth in subsection (b) of this Code section, or any portion thereof, when the prosecuting attorney and the defendant have agreed to a sentence that is below such mandatory minimum or provided that:

(A) The defendant has no prior conviction of an offense prohibited by Chapter 6 of Title 16 or Part 2 of Article 3 of Chapter 12 of Title 16, nor a prior conviction for any offense under federal law or the laws of another state or territory of the United States which consists of the same or similar elements of offenses prohibited by Chapter 6 of Title 16 or Part 2 of Article 3 of Chapter 12 of Title 16;

apply to “Any person who creates or possesses a visual medium depicting only himself or herself engaged in sexually explicit conduct.” Ga. Code Ann. § 16-12-100(d)(3).<sup>5</sup> The crime is classified as a misdemeanor if the minor depicted is at least 14, the image was created with the minor’s consent, the defendant was 18 years old or younger when it was created, and the image was not distributed with intent to harass or annoy or for commercial purposes. Ga. Code Ann. § 16-12-100(g)(3).<sup>6</sup>

5. Ga. Code Ann. § 16-6-15(a) (Solicitation of sodomy) states, “A person commits the offense of solicitation of sodomy when he solicits another to perform or submit to an act of sodomy. Except as provided in subsection (b) of this Code section, a person convicted of solicitation of sodomy shall be punished as for a misdemeanor.” This statute further states in subsection (b), “A person convicted of solicitation of sodomy when such offense involves the solicitation of a person or persons under the age of 18 years to perform or submit to an act of sodomy for money shall be guilty of a felony” punishable by imprisonment for 5–20 years and a fine of \$2,500–\$10,000.

Although not exclusively commercial, the following crimes could still apply in cases of commercial sexual exploitation of children:

1. Under Ga. Code Ann. § 16-6-3(a) (Statutory rape), statutory rape occurs when an individual “engages in sexual intercourse with any person under the age of 16 years and not his or her spouse . . . .” If an individual under 21 commits this crime, it is punishable by imprisonment for 1–20 years. Ga. Code Ann. § 16-6-3(b). If the individual is 21 years or older and commits this crime, it is punishable by imprisonment for 10–20 years. Ga. Code Ann. § 16-6-3(b). If the victim is 14 or 15 and the perpetrator is 18 or under and not more than 4 years older than the victim, the crime is a misdemeanor. Ga. Code Ann. § 16-6-3(c). Misdemeanors could be punishable by up to 12 months in jail, a fine not to exceed \$1,000, or both or up to 12 months confinement in a detention or diversion center. Ga. Code Ann. § 17-10-3(a)(1), (2).
2. According to Ga. Code Ann. § 16-6-4(a) (Child molestation; aggravated child molestation), child molestation occurs when an individual

- (1) Does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person; or
- (2) By means of an electronic device, transmits images of a person engaging in, inducing, or otherwise participating in any immoral or indecent act to a child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.

Upon a first conviction, this crime is punishable by imprisonment for 5–20 years, and “the Department of Corrections shall provide counseling to such defendant.” Ga. Code Ann. § 16-6-4(b)(1). A second or subsequent offense is punishable by imprisonment for 10–30 years or life imprisonment. Ga. Code Ann. § 16-6-4(b)(1). If the victim is 14 or 15 and the perpetrator is 18 or under and not more than 4 years older than the victim, the crime is a misdemeanor. Ga. Code Ann. §

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(B) The defendant did not use a deadly weapon or any object, device, or instrument which when used offensively against a person would be likely to or actually did result in serious bodily injury during the commission of the offense;

(C) The court has not found evidence of a relevant similar transaction;

(D) The victim did not suffer any intentional physical harm during the commission of the offense;

(E) The offense did not involve the transportation of the victim; and

(F) The victim was not physically restrained during the commission of the offense.

The text of Ga. Code Ann. § 17-10-6.2 included here and elsewhere in this report includes amendments made by the passage of House Bill 349 during the 2013 regular session of the Georgia Legislature (effective July 1, 2013).

<sup>5</sup> The text of Ga. Code Ann. § 16-12-100(d) included here and elsewhere in this report includes amendments made by the passage of House Bill 156 during the 2013 regular session of the Georgia Legislature (effective July 1, 2013).

<sup>6</sup> See *supra* note 3.

16-6-4(b)(2). Misdemeanors could be punishable by up to 12 months in jail, a fine not to exceed \$1,000, or both or up to 12 months confinement in a detention or diversion center. Ga. Code Ann. § 17-10-3(a)(1), (2). Additionally, the crime is aggravated child molestation if the child is physically injured or if the crime involves sodomy. Ga. Code Ann. § 16-6-4(c). If the charge is based on an act that involves sodomy, the victim is “at least 13 but less than 16,” and the perpetrator is 18 or under and no more than 4 years older than the victim, the charge is a misdemeanor. Ga. Code Ann. § 16-6-4(d)(2). Otherwise, aggravated child molestation is punishable by life imprisonment or a split sentence including minimum imprisonment of 25 years and probation for life. Ga. Code Ann. § 17-10-6.1(b)(2),<sup>7</sup> 16-6-4(d)(1). However in subsection e, “In the court’s discretion, the judge may depart from the mandatory minimum sentence specified in this Code section for a person who is convicted of a serious violent felony when the prosecuting attorney and the defendant have agreed to a sentence that is below such mandatory minimum.” Ga. Code Ann. § 17-10-6.1(e)

3. Ga. Code Ann. § 16-6-5(a) (Enticing a child for indecent purposes) states, “A person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts.”<sup>8</sup> This crime is punishable by imprisonment for 10–30 years. Ga. Code Ann. § 16-6-5(b). Subsection (c), however, provides that “[i]f the victim is at least 14 but less than 16 years of age and the person convicted of enticing a child for indecent purposes is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor.” Misdemeanors could be punishable by up to 12 months in jail, a fine not to exceed \$1,000, or both or up to 12 months confinement in a detention or diversion center. Ga. Code Ann. § 17-10-3(a)(1), (2).<sup>9</sup>
4. Ga. Code Ann. § 16-12-100.2(c)(1)<sup>10</sup> (Computer or electronic pornography and child exploitation prevention) is punishable by imprisonment for 1–20 years and a fine not to exceed \$10,000, except as provided in Ga. Code Ann. § 16-12-100.2(c)(3), (4). Ga. Code Ann. § 16-12-100.2(c)(2). Ga. Code Ann. § 16-12-100.2(c)(1) states,

A person commits the offense of computer or electronic pornography if such person intentionally or willfully:

- (A) Compiles, enters into, or transmits by computer or other electronic device;
  - (B) Makes, prints, publishes, or reproduces by other computer or other electronic device;
  - (C) Causes or allows to be entered into or transmitted by computer or other electronic device;
- or
- (D) Buys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement, or any child’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of offering or soliciting sexual conduct of or with an identifiable child or the visual depiction of such conduct.

However Ga. Code Ann. § 16-12-100.2(c)(1) is only punishable as a misdemeanor when,

....

- (A) At the time of the offense, any identifiable child visually depicted was at least 14 years of age when the visual depiction was created;
- (B) The visual depiction was created with the permission of such child;

<sup>7</sup> The text of Ga. Code Ann. § 17-10-6.1 included here and elsewhere in this report includes amendments made by the passage of House Bill 349 during the 2013 regular session of the Georgia Legislature (effective July 1, 2013).

<sup>8</sup> *Kelley v. State*, 686 S.E.2d 810, 813 (Ga. Ct. App. 2009) (quoting *Cimildoro v. State*, 387 SE 2d 335, 336 (Ga. 1990)) (“Here, the asportation element was satisfied by ample evidence of enticement; Kelley initiated contact with B. B., asked her to have sexual intercourse with him, offered her money to do so, and arranged a place to pick B. B. up so that they could have sex at his home.” (footnotes omitted)).

<sup>9</sup> See *supra* note 4.

<sup>10</sup> The text of Ga. Code Ann. § 16-12-100.2 included here and elsewhere in this report includes amendments made by the passage of House Bill 156 during the 2013 regular session of the Georgia Legislature (effective July 1, 2013).

- (C) The defendant possessed the visual depiction with the permission of such child; and
- (D) The defendant was 18 years of age or younger at the time of the offense and:
  - (i) The defendant did not distribute the visual depiction to another person; or
  - (ii) In the court's discretion, and when the prosecuting attorney and the defendant have agreed, if the defendant's violation involved the distribution of such visual depiction to another person but such distribution was not for the purpose of:
    - (I) Harassing, intimidating, or embarrassing the minor depicted; or
    - (II) For any commercial purpose.
- (4) The prohibition contained in paragraph (1) of this subsection shall not apply to any person who creates or possesses a visual depiction of only himself or herself.

Ga. Code Ann. § 16-12-100.2(d)(1) (Computer or electronic pornography and child exploitation prevention) also makes it a crime to “intentionally or willfully . . . utilize a computer wireless service or Internet service, including, but not limited to, a local bulletin board service, Internet chat room, e-mail, instant messaging service, or other electronic device, to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child, or another person believed by such person to be a child, any person having custody or control of a child, or another person believed by such person to have custody or control of a child to commit any illegal act by, with, or against a child as described in Code Section 16-6-2,<sup>11</sup> relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; or Code Section 16-6-8, relating to the offense of public indecency, or to engage in any conduct that by its nature is an unlawful sexual offense against a child.”

This felony is punishable by imprisonment for 1–20 years and a fine not to exceed \$25,000, “provided, however, that if at the time of the offense the victim was at least 14 years of age and the defendant was 18 years of age or younger, then the defendant shall be guilty of a misdemeanor. Ga. Code Ann. § 16-12-100.2(d)(2).

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

Ga. Code Ann. § 16-6-9 (Prostitution) and Ga. Code Ann. § 16-6-16 (Masturbation for hire) do not refer to the human trafficking law. Georgia does, however, provide an affirmative defense to victims of certain sexual crimes that states that “[a] person shall not be guilty of a sexual crime if the conduct upon which the alleged criminal liability is based was committed under coercion or deception while the accused was being trafficked for sexual servitude in violation of subsection (c) of Code Section 16-5-46.” Ga. Code Ann. § 16-3-6(b). “Sexual crime” is defined as “prostitution, sodomy, solicitation of sodomy, or masturbation for hire as such offenses are proscribed in Chapter 6 of Title 16.” Ga. Code Ann. § 16-3-6(a)(3).

*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.*

Ga. Code Ann. § 16-14-4(a), (b) (Prohibited activities) states,

- (a) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.

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<sup>11</sup> The Georgia Supreme Court concluded in *Powell v. State* that “O.C.G.A. § 16-6-2, insofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent, ‘manifestly infringes upon a constitutional provision’ which guarantees to the citizens of Georgia the right of privacy.” 510 S.E. 2d 18, 26 (Ga. 1998) (quoting *Miller v. State*, 472 S.E.2d 74, 78 (Ga. 1996)).

(b) It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

“Racketeering activity” is defined in Ga. Code Ann. § 16-14-3 (Definitions) to include prostitution, keeping a place of prostitution, pimping, pandering, and pandering by compulsion, and trafficking of persons for labor or sexual servitude. Ga. Code Ann. § 16-14-3(9)(A)(xi), (xxx). Under Ga. Code Ann. § 16-14-3(8)(A), “Pattern of racketeering activity” is defined as including

(A) Engaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions 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 at least one of such acts occurred after July 1, 1980, and that the last of such acts occurred within four years, excluding any periods of imprisonment, after the commission of a prior act of racketeering activity . . . .

Racketeering is a felony punishable by imprisonment for 5–20 years, “a fine that does not exceed the greater of \$25,000.00 or three times the amount of any pecuniary value gained by him from such violation,” or both. Ga. Code Ann. § 16-14-5. Asset forfeiture exists for racketeering crimes, and Ga. Code Ann. § 16-14-7(a) (Forfeiture proceedings) states in part, “All property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state.”

Similarly, it is an offense “for any person employed by or associated with a criminal street gang to conduct or participate in criminal gang activity through the commission of any offense enumerated in paragraph (1) of Code Section 16-15-3.” Ga. Code Ann. § 16-15-4(a). “Any offense defined as racketeering activity by Code Section 16-14-3” also constitutes criminal gang activity. Ga. Code Ann. 16-15-3(1)(A). Ga. Code Ann. § 16-15-3(2) defines a “criminal street gang” as “any organization, association, or group of three or more persons associated in fact, whether formal or informal, which engages in criminal gang activity as defined in paragraph (1) of this Code section.”

In addition to any other penalty provided by law, any violation of Ga. Code Ann. § 16-15-4(a) is punishable by imprisonment for 5–15 years, a fine of \$10,000–\$15,000, or both. Ga. Code Ann. § 16-15-4(k)(1). Additionally, “(1) All property which is directly or indirectly used or intended for use in any manner to facilitate a violation of this chapter; and (2) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this chapter” is subject to forfeiture. Ga. Code Ann. § 16-15-5(a).

Additionally, if the perpetrator was found guilty of the racketeering statute, which includes Ga. Code Ann. § 16-5-46 (Trafficking in persons for labor or sexual servitude), § 16-6-11 (Pimping), and § 16-6-12 (Pandering), a victim may seek civil remedies pursuant to Ga. Code Ann. § 16-14-6. Furthermore, Ga. Code Ann. § 16-14-6(c) (Available civil remedies) states,

Any person who is injured by reason of any violation of Code Section 16-14-4 [Prohibited activities – racketeering] shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys’ fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred.

***Legal Components:***

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts with a victim of domestic minor sex trafficking.*
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*
- 2.3 *Solicitation of prostitution laws differentiate between buying sex 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 with a victim of domestic minor sex trafficking.*

Ga. Code Ann. § 16-5-46 (Trafficking of persons for labor or sexual servitude) applies to buyers of sex with victims of domestic minor sex trafficking following federal precedent through the term “obtain.”<sup>12</sup> Under Ga. Code Ann. § 16-5-46 (Trafficking of persons for labor or sexual servitude) sexual servitude is defined as “[a]ny sexually explicit conduct or performance involving sexually explicit conduct for which anything of value is directly or indirectly given, promised to, or received by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years...” Ga. Code Ann. § 16-5-46(6)(A).

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

Ga. Code Ann. § 16-6-12 (Pandering) has been applied to buyers. The law states, “A person commits the offense of pandering when he or she solicits a person to perform an act of prostitution in his or her own behalf or in behalf of a third person or when he or she knowingly assembles persons at a fixed place for the purpose of being solicited by others to perform an act of prostitution.”<sup>13</sup> Although this law is not

<sup>12</sup> See *United States v. Jungers*, 702 F.3d 1066 (8<sup>th</sup> Cir. 2013). In this case, the Eighth Circuit specifically addressed whether the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers when it reversed a District of South Dakota ruling that Congress did not intend the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) (“recruits, entices, harbors, transports, provides, obtains, or maintains”) to reach the conduct of buyers. *United States v. Jungers*, 834 F. Supp. 2d 930, 931 (D.S.D. 2011). Holding that the conduct of buyers who obtain a child for commercial sex can violate 18 U.S.C. § 1591(a)(1), the Eighth Circuit illustrated through hypothetical buyer scenarios that, under certain circumstances, most of the terms in the string of verbs constituting criminal conduct under 18 U.S.C. § 1591(a)(1) could apply to buyers. While other terms may apply to buyers’ conduct under state law as well, the analysis here focuses on the term “obtains” which is most likely to apply in the majority of buyer cases.

<sup>13</sup> See *Fluker v. State*, 282 S.E.2d 112, 115 (Ga. 1981) (concerning an earlier version of the statute) (In *Fluker*, two appellants faced charges of pandering for “soliciting a named female to perform an act of prostitution.” The



specific to minors, it does provide for heightened penalties when a minor is involved. Ga. Code Ann. § 16-6-13(b).<sup>14</sup>

Under Ga. Code Ann. § 16-6-5(a) (Enticing a child for indecent purposes), “A person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts.” Asportation is an element of this crime, and it “is satisfied ‘whether the “taking” involves physical force, enticement, or persuasion.’”<sup>15</sup>

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

Ga. Code Ann. § 16-6-12 (Pandering), the applicable statute for solicitation of prostitution, states, “A person commits the offense of pandering when he or she solicits a person to perform an act of prostitution in his or her own behalf or in behalf of a third person or when he or she knowingly assembles persons at a fixed place for the purpose of being solicited by others to perform an act of prostitution.” Although Ga. Code Ann. § 16-6-12 (Pandering) is age-neutral, Ga. Code Ann. § 16-6-13 provides heightened penalties for this crime when a minor is the subject of the solicitation. When the victim is 16 or 17, the crime is punishable by imprisonment for 5–20 years, a fine of \$2,500–\$10,000, or both. Ga. Code Ann. § 16-6-13(b)(1). If the victim is under the age of 16, the perpetrator is guilty of a felony punishable by imprisonment for 10-30 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-6-13(b)(2).

In the cases in which it is applicable to buyers, enticing a child for indecent purposes under Ga. Code Ann. § 16-6-5 is a crime that can only apply when the victim is a minor under 16 years old. Ga. Code Ann. § 16-6-5(a).

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

Under Ga. Code Ann. § 16-5-46(f)(2) (Trafficking of persons for labor or sexual servitude), if committed against a minor under 18, trafficking is a felony punishable by imprisonment for 10–20 years, a fine not to exceed \$100,000, or both. If, however, the minor was “coerced or deceived into being trafficked,” the crime is punishable by imprisonment for 25–50 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-5-46(f)(2).

If a buyer is convicted under Ga. Code Ann. § 16-6-12 (Pandering) and the victim is 16 or 17, the buyer is guilty of a felony punishable by imprisonment for 5–20 years, a fine of \$2,500–\$10,000, or both. Ga. Code Ann. § 16-6-13(b)(1). If the victim is under 16, the buyer is guilty of a felony punishable by imprisonment for 10–30 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-6-13(b)(2).

A buyer convicted of Ga. Code Ann. § 16-12-100.2(c)<sup>16</sup> (Computer or electronic pornography and child exploitation prevention) faces imprisonment for 1–20 years and a fine not to exceed \$10,000. Ga. Code Ann. § 16-12-100.2(c)(2).

However Ga. Code Ann. § 16-12-100.2(c)(1) is punishable as a misdemeanor if,

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appellants unsuccessfully challenged this statute’s applicability to buyers of commercial sex, and the court stated, “Even if the primary emphasis of the present pandering statute is . . . upon the recruitment of females into the practice of prostitution, the fact remains, as we have pointed out, that the statute’s wording renders one guilty of pandering when he solicits a female to commit an act of prostitution, either for himself or another.”)

<sup>14</sup> See *supra* Section 1.2 for sexual offenses which may apply to buyers of commercial sex acts with minors.

<sup>15</sup> *Kelley v. State*, 686 S.E.2d 810, 813 (Ga. Ct. App. 2009) (quoting *Cimildoro v. State*, 387 SE 2d 335, 336 (Ga. 1990)) (“Here, the asportation element was satisfied by ample evidence of enticement; Kelley initiated contact with B. B., asked her to have sexual intercourse with him, offered her money to do so, and arranged a place to pick B. B. up so that they could have sex at his home.” (footnotes omitted)).

<sup>16</sup> See *supra* note 10.

- ....
- (A) At the time of the offense, any identifiable child visually depicted was at least 14 years of age when the visual depiction was created;
  - (B) The visual depiction was created with the permission of such child;
  - (C) The defendant possessed the visual depiction with the permission of such child; and
  - (D) The defendant was 18 years of age or younger at the time of the offense and:
    - (i) The defendant did not distribute the visual depiction to another person; or
    - (ii) In the court's discretion, and when the prosecuting attorney and the defendant have agreed, if the defendant's violation involved the distribution of such visual depiction to another person but such distribution was not for the purpose of:
      - (I) Harassing, intimidating, or embarrassing the minor depicted; or
      - (II) For any commercial purpose.
- (4) The prohibition contained in paragraph (1) of this subsection shall not apply to any person who creates or possesses a visual depiction of only himself or herself.

A buyer convicted of occupying a room for an immoral purpose, under Ga. Code Ann. § 43-21-61, is guilty of a misdemeanor punishable by up to 12 months in jail, a fine not to exceed \$1,000, or both or up to 12 months confinement in a detention or diversion center. Ga. Code Ann. § 17-10-3(a)(1), (2).

Enticing a minor under 16 for indecent purposes, under Ga. Code Ann. § 16-6-5, is punishable by imprisonment for 10–30 years. Ga. Code Ann. § 16-6-5(b). If the victim is 14 or 15 years old and the accused is 18 or younger and no more than 4 years older than the victim, the crime is a misdemeanor. Ga. Code Ann. § 16-6-5(c). Misdemeanors could be punishable by up to 12 months in jail, a fine not to exceed \$1,000, or both or up to 12 months confinement in a detention or diversion center. Ga. Code Ann. § 17-10-3(a)(1), (2).

Additionally, although the following laws do not expressly deal with commercial transactions, offenders could face penalties under the sexual offense laws of Ga. Code Ann. § 16-6-3 (Statutory rape) and Ga. Code Ann. § 16-6-4 (Child molestation), which both involve sexual acts with minors. If the victim is 14 or 15 and the perpetrator is less than 18 and no more than 4 years older than the victim, the crime of statutory rape is a misdemeanor. Ga. Code Ann. § 16-6-3(c). Misdemeanors could be punishable by up to 12 months in jail, a fine not to exceed \$1,000, or both or up to 12 months confinement in a detention or diversion center. Ga. Code Ann. § 17-10-3(a)(1), (2). If the offender is under 21, statutory rape is punishable by imprisonment for 1–20 years. Ga. Code Ann. § 16-6-3(b). If the offender is 21 or older, the crime is punishable by imprisonment for 10–20 years. Ga. Code Ann. § 16-6-3(b). Child molestation is generally punishable by imprisonment for 5–20 years. Ga. Code Ann. § 16-6-4(b)(1). If, however, the victim is 14 or 15, and the offender is less than 18 and no more than 4 years older than the victim, the crime of child molestation is only a misdemeanor. Ga. Code Ann. § 16-6-4(b)(2).

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

<sup>17</sup> Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

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

an offense under section 1591 [18 USCS § 1591] (relating to sex trafficking of children), 2241 [18 USCS § 2241] (relating to aggravated sexual abuse), 2242 [18 USCS § 2242] (relating to sexual abuse), 2244(a)(1) [18 USCS § 2244(a)(1)] (relating to abusive sexual contact), 2245 [18 USCS § 2245] (relating to sexual abuse resulting in death), 2251 [18 USCS § 2251] (relating to sexual exploitation of children), 2251A [18

U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>19</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>20</sup>

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

Although it is not expressly commercial, buyers could be charged with Ga. Code Ann. § 16-12-100.2(d)(1),<sup>21</sup> (Computer or electronic pornography and child exploitation prevention) which states,

It shall be unlawful for any person intentionally or willfully to utilize a computer wireless service or Internet service, including, but not limited to, a local bulletin board service, Internet chat room, e-mail, instant messaging service, or other electronic device, to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child, or another person believed by such person to be a child, any person having custody or control of a child, or another person believed by such person to have custody or control of a child to commit any illegal act by, with, or against a child as described in Code Section 16-6-2,<sup>22</sup> relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; or Code Section 16-6-8, relating to the offense of public indecency, or to engage in any conduct that by its nature is an unlawful sexual offense against a child.

This crime is punishable by imprisonment for 1–20 years and a fine not to exceed \$25,000. Ga. Code Ann. § 16-12-100.2(d)(2). If, however, “the victims was at least 14 years of age and the defendant was 18 years of age or younger, then the defendant shall be guilty of a misdemeanor.” Ga. Code Ann. § 16-12-100.2(d)(2). Misdemeanors could be punishable by up to 12 months in jail, a fine not to exceed \$1,000, or both or up to 12 months confinement in a detention or diversion center. Ga. Code Ann. § 17-10-3(a)(1), (2).

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

Under the state human trafficking statute, the mistake of age defense is not allowed because the statute states that “[t]he age of consent for sexual activity or the accused’s lack of knowledge of the age of the person being trafficked shall not constitute a defense in a prosecution for a violation of this Code section.” Ga. Code Ann. § 16-5-46(d).

Regarding the heightened penalties that apply to pandering, the law does not explicitly prohibit the mistake of age defense. Ga. Code Ann. § 16-6-13. Therefore, it is possible, albeit unlikely, that buyers could use a mistake of age defense.

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USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 USCS § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 USCS § 2423(a)] (relating to transportation of minors).

<sup>19</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

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

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

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

Case law clarifies that knowledge of a victim’s age is not a necessary element of either statutory rape or child molestation and states in dicta that “[w]ith regard to statutory rape . . . , the defendant’s knowledge of the age of the female is not an essential element of the crime . . . and therefore it is no defense that the accused reasonably believed that the prosecutrix was of the age of consent.”<sup>23</sup>

2.6.1 Recommendation: Enact a provision that explicitly states that mistake of age is not a defense to Ga. Code Ann. § 16-6-13 (Pandering).

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

Ga. Code Ann. § 16-5-46(c) (Trafficking of persons for labor or sexual servitude) imposes the same penalty for all offenses involving a minor under 18. Under Ga. Code Ann. § 16-5-46(f)(2) (Trafficking of persons for labor or sexual servitude), if committed against a minor under 18, trafficking is a felony punishable by imprisonment for 10–20 years, a fine not to exceed \$100,000, or both. If, however, the minor was “coerced or deceived into being trafficked,” the crime is punishable by imprisonment for 25–50 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-5-46(f)(2).

Ga. Code Ann. § 16-6-13 sets the penalty for violations of Ga. Code Ann. § 16-6-12 (Pandering) and staggers penalties based on the victim’s age. If the victim is 16 or 17, the buyer will be guilty of a felony punishable by imprisonment for 5–20 years, a fine of \$2,500–\$10,000, or both; whereas, if the victim is under 16, the buyer will be guilty of a felony punishable by imprisonment for 10–30 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. §§ 16-6-13(b)(1), (2).

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

Under Ga. Code Ann. § 16-5-46 (Trafficking of persons for labor or sexual servitude), those who purchase sex with a minor under 18 may be subject to a fine not to exceed \$100,000. Ga. Code Ann. § 16-5-46(f)(2). Additionally, the buyer would face mandatory asset forfeiture of “[a]ll real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this Code section. . . Forfeiture shall be had by the same procedure set forth in Code Section 16-14-7.” Ga. Code Ann. § 16-5-46(g). “Forfeiture shall be had by a civil procedure. . .” Ga. Code Ann. § 16-14-7. The net proceeds of the forfeiture is to be deposited in the general fund of the state treasury. Ga. Code Ann. § 16-14-7(k). Seizure of forfeitable property is governed by Ga. Code. Ann. § 16-14-7(f).

Pursuant to Ga. Code Ann. § 16-6-13(b)(1), a person convicted of Ga. Code Ann. § 16-6-12 (Pandering) when the minor involved is 16 or 17, may face a fine between \$2,500 and \$10,000. If the minor involved is under 16, the punishment may involve a fine not to exceed \$100,000. Ga. Code Ann. § 16-6-13(b)(2). Additionally, a buyer is subject to motor vehicle forfeiture under Ga. Code Ann. § 16-6-13.2(c) (Defined terms; prosecution; forfeiture and seizure of property) when the buyer has a prior conviction of Ga. Code Ann. § 16-6-12. Asset forfeiture pursuant to this section is discretionary and civil in nature. The items forfeited shall be disposed of pursuant to Ga. Code Ann. § 16-13-49(u)(Contraband; forfeiture; seizure), which provides for the sale of the property and distribution to government agencies.

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<sup>23</sup> Haywood v. State, 642 S.E.2d 203, 204 (Ga. Ct. App. 2007) (quoting Tant v. State, 281 S.E.2d 357 (Ga. Ct. App. 2007)) (alteration in the original). Haywood further states,

Haywood also argues that the evidence regarding F. M.’s age would somehow be relevant to the charges of rape and child molestation. As Haywood was found not guilty of rape, and as his conviction for child molestation merged with the conviction for statutory rape, this argument is moot. Moreover, we note that ‘knowledge of the victim’s age is not an element of the crime of child molestation. The legislature has carefully worded the child molestation statute so that the defendant’s knowledge of the age of the victim is not an element of the crime, just as it is not an element of the crime of statutory rape.’ Id. (quoting Bennett v. State, 631 S.E.2d 402, 404 (Ga. Ct. App. 2006)).

Additionally, for violating Ga. Code Ann. § 16-12-100(b)(8) (Sexual exploitation of children; reporting violation; forfeiture; penalties) by possessing child pornography, a buyer will be subject to asset forfeiture pursuant to Ga. Code Ann. § 16-12-100(e)(1)(B) and must forfeit “such interest as the person may have in: . . . [a]ny property used, or intended to be used, to commit such offense.” This forfeiture action is criminal in nature and mandatory. The property forfeited shall also be disposed of pursuant to Ga. Code Ann. § 16-13-49(u) (Contraband; forfeiture; seizure), which provides for the sale of the property and distribution to government agencies.

Finally, a buyer will be subject to restitution orders. Ga. Code Ann. § 17-14-3 (Restitution to victim; restitution as condition of probation) states, “. . . [I]n addition to any other penalty imposed by law, a judge of any court of competent jurisdiction shall, in sentencing an offender, make a finding as to the amount of restitution due any victim, and order an offender to make full restitution to such victim.” Consideration of restitution is mandatory, although the “nature and amount of restitution” is dependent upon considerations outlined in Ga. Code Ann. § 17-14-10(a) (Considerations for determining nature and amount of restitution; restitution deemed part of financial resources of victim) including:

- (1) The financial resources and other assets of the offender or person ordered to pay restitution including whether any of the assets are jointly controlled;
- (2) The earnings and other income of the offender or person ordered to pay restitution;
- (3) Any financial obligations of the offender or person ordered to pay restitution, including obligations to dependents;
- (4) The amount of damages;
- (5) The goal of restitution to the victim and the goal of rehabilitation of the offender;
- (6) Any restitution previously made;
- (7) The period of time during which the restitution order will be in effect; and
- (8) Other factors which the ordering authority deems to be appropriate.

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

Under Ga. Code Ann. § 16-12-100(b)(8) (Sexual exploitation of children; reporting violation; forfeiture; penalties), “It is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct.” Additionally, “It is unlawful for any person knowingly to . . . purchase . . . any medium which provides information as to where any visual medium which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct can be found or purchased.” Ga. Code Ann. § 16-12-100(b)(6). A person who violates this statute is guilty of a felony, which is punishable by imprisonment for 5–20 years and a fine not to exceed \$100,000. Ga. Code Ann. § 16-12-100(g)(1).<sup>24</sup> However, under Ga. Code Ann. § 16-12-100(g)(3),(4), the creation of child pornography is a misdemeanor if:

- . . . .
- (A) The minor depicted was at least 14 years of age at the time the visual medium was created;
  - (B) The visual medium was created with the permission of the minor depicted; and
  - (C) The defendant was 18 years of age or younger at the time of the offense and:
    - (i) The defendant's violation of such paragraphs did not involve the distribution of such visual medium to another person; or
    - (ii) In the court's discretion, and when the prosecuting attorney and the defendant have agreed, if the defendant's violation of such paragraphs involved the distribution of such visual medium to another person but such distribution was not for the purpose of:
      - (I) Harassing, intimidating, or embarrassing the minor depicted; or
      - (II) For any commercial purpose.”

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<sup>24</sup> See *supra* note 3.

(4) The prohibition contained in paragraph (1) of this subsection shall not apply to any person who creates or possesses a visual depiction of only himself or herself.

Under Ga. Code Ann. § 16-12-100.2(c)(1)(D)<sup>25</sup> (Computer or electronic pornography and child exploitation prevention), any person who “[b]uys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement, or any child’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of offering or soliciting sexual conduct of or with an identifiable child or the visual depiction of such conduct,” is guilty of a felony punishable by imprisonment for 1-20 years and a fine not to exceed \$10,000. Ga. Code Ann. § 16-12-100.2(c)(2).

In comparison, a federal conviction for possession of child pornography<sup>26</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>27</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>28</sup>

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

Under Ga. Code Ann. § 42-1-12(e) (State sexual offender registry), registration is required for, among others, individuals, “convicted on or after July 1, 1996, of a criminal offense against a victim who is a minor;” and those “convicted on or after July 1, 1996, of a dangerous sexual offense.” Ga. Code Ann. § 42-1-12(a)(9)(B) states in part,

(B) “Criminal offense against a victim who is a minor” with respect to convictions occurring after June 30, 2001, means any criminal offense under Title 16 or any offense under federal law or the laws of another state or territory of the United States which consists of:

- ...
- (iii) Criminal sexual conduct toward a minor;
- (iv) Solicitation of a minor to engage in sexual conduct;
- ...
- (viii) Creating, publishing, selling, distributing, or possessing any material depicting a minor or a portion of a minor’s body engaged in sexually explicit conduct;
- (ix) Transmitting, making, selling, buying, or disseminating by means of a computer any descriptive or identifying information regarding a child for the purpose of offering or soliciting sexual conduct of or with a child or the visual depicting of such conduct;
- (x) Conspiracy to transport, ship, receive, or distribute visual depictions of minors engaged in

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<sup>25</sup> See *supra* note 10.

<sup>26</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4)(A) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>27</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>28</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

sexually explicit conduct; or

(xi) Any conduct which, by its nature, is a sexual offense against a victim who is a minor.

Likewise, pursuant to Ga. Code Ann. § 42-1-12(a)(10)(B),

(B) “Dangerous sexual offense” with respect to convictions occurring after June 30, 2006, means any criminal offense, or the attempt to commit any criminal offense, under Title 16 as specified in this paragraph or any offense under federal law or the laws of another state or territory of the United States which consists of the same or similar elements of the following offenses:

...

(iv) Rape in violation of Code Section 16-6-1;<sup>29</sup>

(v) Sodomy in violation of Code Section 16-6-2;<sup>30</sup>

(vi) Aggravated sodomy in violation of Code Section 16-6-2;

(vii) Statutory rape in violation of Code Section 16-6-3, if the individual convicted of the offense is 21 years of age or older;

(viii) Child molestation in violation of Code Section 16-6-4;

(ix) Aggravated child molestation in violation of Code Section 16-6-4, unless the person was convicted of a misdemeanor offense;

(x) Enticing a child for indecent purposes in violation of Code Section 16-6-5;

...

(xv) Sexual exploitation of children in violation of Code Section 16-12-100;. . .

(xvii) Computer pornography and child exploitation prevention in violation of Code Section 16-12-100.2;

...

(xix) Any conduct which, by its nature, is a sexual offense against a victim who is a minor or an attempt to commit a sexual offense against a victim who is a minor.

A “minor” is defined as “any individual under the age of 18 years and any individual that the sexual offender believed at the time of the offense was under the age of 18 years if such individual was the victim of an offense.” Ga. Code. Ann. § 42-1-12(a)(14).

- 2.10.1 Recommendation: Amend the sex offender registry statute, Ga. Code Ann. § 42-1-12 (State Sexual Offender Registry), to include a registration requirement for the offenses of Ga. Code Ann. § 16-6-12 (Pandering) when the victim is a minor and Ga. Code Ann. § 16-5-46 (Trafficking of persons for labor or sexual servitude) when the offense involves sexual conduct of a minor.

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<sup>29</sup> A rape occurs whenever the victim is a female under 10 years old. Ga. Code Ann. § 16-6-1(a)(2).

<sup>30</sup> See *supra* note 11.

***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.*

Trafficking a child under the age of 18 is punishable by imprisonment for 10–20 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-5-46(f)(2). If the trafficker used “coercion or deception” in trafficking the minor, the penalty is life imprisonment or imprisonment for 25–50 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-5-46(f)(2). Additionally, under subsection (g), “All real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this Code section shall be subject to forfeiture to the state.”

A trafficker convicted of keeping a place of prostitution pursuant to Ga. Code Ann. § 16-6-10, pimping pursuant to Ga. Code Ann. § 16-6-11, or pandering pursuant to Ga. Code Ann. § 16-6-12 is guilty of a misdemeanor of a high and aggravated nature. Ga. Code Ann. § 16-6-13(a). Penalties, however, are heightened if the victim is under 18. Ga. Code Ann. § 16-6-13(b). If a person is convicted of any of the above offenses and the victim is 16 or 17, the trafficker is guilty of a felony punishable by imprisonment for 5–20 years, a fine of \$2,500–\$10,000, or both. Ga. Code Ann. § 16-6-13(b)(1). If the minor is under 16, the trafficker is guilty of a felony punishable by imprisonment for 10–30 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-6-13(b)(2).

A trafficker who uses the computer to exploit a child may be convicted under Ga. Code Ann. § 16-12-100.2(c)(1),<sup>31</sup> if he does any of the following:

- (A) Compiles, enters into, or transmits by computer or other electronic device;
- (B) Makes, prints, publishes, or reproduces by other computer or other electronic device;
- (C) Causes or allows to be entered into or transmitted by computer or other electronic device; or
- (D) Buys, sells, receives, exchanges, or disseminates any notice or statement, or advertisement or any child’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of offering or soliciting sexual conduct of or with an identifiable child or the visual depiction of such conduct.

Violating subsection (c) is punishable by imprisonment for 1–20 years and a fine not to exceed \$10,000. Ga. Code Ann. § 16-12-100.2(c)(2).<sup>32</sup>

<sup>31</sup> See *supra* note 10.

<sup>32</sup> See *supra* Section 2.9, for discussion of the limitations of these penalties.



Under Ga. Code Ann. § 16-12-100(b)(3) (Sexual exploitation of children), “It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of any performance.” This offense is a felony punishable by imprisonment for 5–20 years and a fine not to exceed \$100,000. Ga. Code Ann. § 16-12-100(g)(1).<sup>33</sup> In addition, those convicted of sexual offenses face heightened penalties under Ga. Code Ann. § 17-10-6.2.<sup>34</sup> Under subsection (a), “sexual offense” is defined to include, “(6) Enticing a child for indecent purposes, as defined in Code Section 16-6-5, unless subject to the provisions of subsection (c) of Code Section 16-6-5” and “(10) Sexual exploitation of children, as defined in Code Section 16-12-100.” Under subsection (b), subject to exceptions in subsection (c), “notwithstanding any other provisions of law to the contrary, any person convicted of a sexual offense shall be sentenced to a split sentence which shall include the minimum term of imprisonment specified in the Code section applicable to the offense. No portion of the mandatory minimum sentence imposed shall be suspended, stayed, probated, deferred, or withheld by the sentencing court and such sentence shall include, in addition to the mandatory imprisonment, an additional probated sentence of at least one year.” Subsection (c) states,

(1) In the court’s discretion, the court may deviate from the mandatory minimum sentence as set forth in subsection (b) of this Code section, or any portion thereof, when the prosecuting attorney and the defendant have agreed to a sentence that is below such mandatory minimum or provided that:

(A) The defendant has no prior conviction of an offense prohibited by Chapter 6 of Title 16 or Part 2 of Article 3 of Chapter 12 of Title 16, nor a prior conviction for any offense under federal law or the laws of another state or territory of the United States which consists of the same or similar elements of offenses prohibited by Chapter 6 of Title 16 or Part 2 of Article 3 of Chapter 12 of Title 16;

(B) The defendant did not use a deadly weapon or any object, device, or instrument which when used offensively against a person would be likely to or actually did result in serious bodily injury during the commission of the offense;

(C) The court has not found evidence of a relevant similar transaction;

(D) The victim did not suffer any intentional physical harm during the commission of the offense;

(E) The offense did not involve the transportation of the victim; and

(F) The victim was not physically restrained during the commission of the offense.

(2) If the court deviates in sentencing pursuant to this subsection, the judge shall issue a written order setting forth the judge’s reasons. Any such order shall be appealable by the defendant pursuant to Code Section 5-6-34, or by the State of Georgia pursuant to Code Section 5-7-1, unless the sentence imposed was pursuant to an agreement by the prosecuting attorney and the defendant.

In comparison, if the victim is under the age of 14, a conviction under the TVPA<sup>35</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>36</sup> against a minor.

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<sup>33</sup> See *supra* note 3.

<sup>34</sup> The text of Ga. Code Ann. § 17-10-6.2 included here and elsewhere in this report includes amendments made by the passage of House Bill 349 during the 2013 regular session of the Georgia Legislature (effective July 1, 2013)

<sup>35</sup> See *supra* note 17.

<sup>36</sup> See *supra* note 18.

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

Under Ga. Code Ann. § 16-12-100(b)(3), “It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of any performance.” Subsection (b)(1) states, “It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual medium depicting such conduct.” These offenses are punishable by imprisonment for 5-20 years, a fine not to exceed \$100,000, or both. Ga. Code Ann. § 16-12-100(g)(1).<sup>37</sup> These offenses are also subject to the provisions of Ga. Code Ann. § 17-10-6.2.

Ga. Code Ann. § 16-12-80(a) (Distributing obscene material; obscene material defined; penalty),<sup>38</sup> states in part,

A person commits the offense of distributing obscene material when he sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so . . . .

A violation of § 16-12-80, is a misdemeanor of a high and aggravated nature, which is punishable by confinement up to 12 months, a fine not to exceed \$5,000, or both. Ga. Code Ann. §§ 17-10-4(a), 16-12-80(f). Ga. Code Ann. § 16-12-80 (Distributing obscene material; obscene material defined; penalty) is included in the definition of “racketeering activity.” Ga. Code Ann. § 16-14-3(9)(A)(xii). Therefore, if a trafficker is also convicted of racketeering, the offender could be guilty of a felony punishable by imprisonment for 5–20 years, “a fine that does not exceed the greater of \$25,000.00 or three times the amount of any pecuniary value gained by him from such violation,” or both Ga. Code Ann. § 16-14-5(a), (b). Additionally, racketeering is subject to asset forfeiture, pursuant to Ga. Code Ann. § 16-14-7(a) (Forfeiture proceedings), which states, “All property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state.” Ga. Code Ann. § 16-14-7(a).

Similarly, “any offense defined as racketeering activity by Code Section 16-14-3” also constitutes criminal gang activity. Ga. Code Ann. 16-15-3(1)(A). Ga. Code Ann. § 16-15-3(2) defines “criminal street gang” as “any organization, association, or group of three or more persons associated in fact, whether formal or informal, which engages in criminal gang activity as defined in paragraph (1) of this Code section.” It is an offense “for any person employed by or associated with a criminal street gang to conduct or participate in criminal gang activity through the commission of any offense enumerated in paragraph (1) of Code Section 16-15-3.” Ga. Code Ann. § 16-15-4(a). Any violation of this provision is punishable by imprisonment for 5–15 years, a fine of \$10,000–\$15,000, or both. Ga. Code Ann. § 16-5-4(k)(1). Additionally, “(1) All property which is directly or indirectly used or intended for use in any manner to facilitate a violation of this chapter; and (2) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this chapter” is subject to forfeiture. Ga. Code Ann. § 16-15-5(a).

In comparison, if the victim is under the age of 14, a conviction under the TVPA<sup>39</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17 a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment however, if the

<sup>37</sup> See *supra* Section 2.9 for a discussion of the limitations of these penalties. See *supra* note 3.

<sup>38</sup> *But see* *This That & the Other Gift & Tobacco, Inc. v. Cobb County*, 285 F.3d 1319, 1324 (11th Cir. 2002) (holding that the part of Ga. Code Ann. § 16-12-80 that bans all advertising of sexual devices violates the First Amendment).

<sup>39</sup> See *supra* note 17.

trafficker has a prior conviction for a federal sex offense<sup>40</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>41</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>42</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>43</sup>

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.*

According to Ga. Code Ann. § 16-12-100.2(c)<sup>44</sup> (Computer or electronic pornography and child exploitation prevention),

- (1) A person commits the offense of computer or electronic pornography if such person intentionally or willfully:
- (A) Compiles, enters into, or transmits by computer or other electronic device;
  - (B) Makes, prints, publishes, or reproduces by other computer or other electronic device;
  - (C) Causes or allows to be entered into or transmitted by computer or other electronic device;
- or
- (D) Buys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement, or any child's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of offering or soliciting sexual conduct of or with an identifiable child or the visual depiction of such conduct.

This crime is punishable by imprisonment for 1–20 years and a fine not to exceed \$10,000. Ga. Code Ann. § 16-12-100.2(c)(2).<sup>45</sup>

Although not directly commercial, other sections of Ga. Code Ann. § 16-12-100.2, may be applied to those who use the Internet to lure a minor for the purpose of sex acts. Ga. Code Ann. § 16-12-100.2(d)(1) states,

It shall be unlawful for any person intentionally or willfully to utilize a computer wireless service or Internet service, including, but not limited to, a local bulletin board service, Internet chat room, e-mail, instant messaging service, or other electronic device, to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child, or another person believed by such person to be a child, any person having custody or control of a child, or another person believed by such person to have custody or control of a child to commit any illegal act by, with, or against a child as

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<sup>40</sup> See *supra* note 18.

<sup>41</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3)(B), (4)(A) (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) (Obscene visual representations of the sexual abuse of children).

<sup>42</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) or (a)(3) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>43</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>44</sup> See *supra* note 10.

<sup>45</sup> See *supra* Section 2.9 for discussion of the limitations of these penalties.

described in Code Section 16-6-2,<sup>46</sup> relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; or Code Section 16-6-8, relating to the offense of public indecency, or to engage in any conduct that by its nature is an unlawful sexual offense against a child.

This crime is a felony punishable by imprisonment for 1–20 years and a fine not to exceed \$25,000. Ga. Code Ann. § 16-12-100.2(d)(2).<sup>47</sup> However, if the victim was at least 14 years of age and the perpetrator was “18 years of age or younger, then the defendant shall be guilty of a misdemeanor.” Ga. Code Ann. § 16-12-100.2(d)(2).

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

A person convicted of trafficking under Ga. Code Ann. § 16-5-46 (Trafficking of persons for labor or sexual servitude), when the victim is under 18, could face a fine not to exceed \$100,000. Ga. Code Ann. § 16-5-46(f)(2). Additionally, under subsection (g), the trafficker would be subject to mandatory asset forfeiture. “All real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this Code section shall be subject to forfeiture to the state.” Ga. Code Ann. § 16-5-46(g). Forfeiture shall be had by the same procedure set forth in Code Section 16-14-7.” Ga. Code Ann. § 16-5-46(g). “Forfeiture shall be had by a civil procedure. . .” Ga. Code Ann. § 16-14-7. Seizure of forfeitable property is governed by Ga. Code Ann. § 16-14-7(f). The net proceeds of the forfeiture is to be deposited in the general fund of the state treasury. Ga. Code Ann. § 16-14-7(k).

If convicted of Ga. Code Ann. § 16-6-10 (Keeping a place of prostitution), § 16-6-11 (Pimping), or § 16-6-12 (Pandering), and the victim is between 16 and 18, the offender could be subject to a fine between \$2,500 and \$10,000. Ga. Code Ann. § 16-6-13(b)(1). If the victim is under 16, the trafficker could be subject to a fine not to exceed \$100,000. Ga. Code Ann. § 16-6-13(b)(2).

In addition, under Ga. Code Ann. § 16-6-13.3(a) a perpetrator must forfeit “[a]ny proceeds or money which is used, intended for use, used in any manner to facilitate, or derived from a violation of Code Section 16-6-11 [Pimping], wherein any of the persons involved in performing an act of prostitution is under the age of 18 . . . .” When convicted of pimping a minor, the perpetrator’s vehicle is also subject to forfeiture if the perpetrator has the requisite prior convictions or pleas. Ga. Code Ann. § 16-6-13.2(c)(1). Asset forfeiture pursuant to this section is discretionary and civil in nature. The items forfeited shall be disposed of pursuant to Ga. Code Ann. § 16-13-49(u)(Contraband; forfeiture; seizure), which provides for the sale of the property and distribution to government agencies.

An individual convicted of Ga. Code Ann. § 16-12-100 (Sexual exploitation of children; reporting violation; forfeiture; penalties) which includes using a minor in a sexually explicit performance or visual depiction, must forfeit any proceeds and “[a]ny property used, or intended to be used, to commit such offense.” Ga. Code Ann. § 16-12-100(e)(1).<sup>48</sup> This forfeiture action is criminal in nature and mandatory. The property forfeited shall also be disposed of pursuant to Ga. Code Ann. § 16-13-49(u) (Contraband; forfeiture; seizure), which provides for the sale of the property and distribution to government agencies.

Finally, a trafficker may be subject to restitution orders. Ga. Code Ann. § 17-14-3 (Restitution to victim; restitution as condition of probation) states, “. . . [I]n addition to any other penalty imposed by law, a judge of any court of competent jurisdiction shall, in sentencing an offender, make a finding as to the amount of restitution due any victim, and order an offender to make full restitution to such victim.” Consideration of restitution is mandatory, although the “nature and amount of restitution” is dependent

<sup>46</sup> See *supra* note 11.

<sup>47</sup> See *supra* note 3.

<sup>48</sup> Ga. Code Ann. § 16-12-100(e)(3) states, “The court shall order forfeiture of property referred to in paragraph (1) of this subsection if the trier of fact determines, beyond a reasonable doubt, that such property is subject to forfeiture.”

upon considerations outlined in Ga. Code Ann. § 17-14-10(a) (Considerations for determining nature and amount of restitution; restitution deemed part of financial resources of victim) including:

- (1) The financial resources and other assets of the offender or person ordered to pay restitution including whether any of the assets are jointly controlled;
- (2) The earnings and other income of the offender or person ordered to pay restitution;
- (3) Any financial obligations of the offender or person ordered to pay restitution, including obligations to dependents;
- (4) The amount of damages;
- (5) The goal of restitution to the victim and the goal of rehabilitation of the offender;
- (6) Any restitution previously made;
- (7) The period of time during which the restitution order will be in effect; and
- (8) Other factors which the ordering authority deems to be appropriate.

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

Under Ga. Code Ann. § 42-1-12(e) (State sexual offender registry), registration is required for, among others, individuals “convicted on or after July 1, 1996, of a criminal offense against a victim who is a minor;” and those “convicted on or after July 1, 1996, of a dangerous sexual offense.” Subsection 9(B) of Ga. Code Ann. § 42-1-12(a) states in part,

(B) “Criminal offense against a victim who is a minor” with respect to convictions occurring after June 30, 2001, means any criminal offense under Title 16 or any offense under federal law or the laws of another state or territory of the United States which consists of:

....

- (iv) Solicitation of a minor to engage in sexual conduct;
- (v) Use of a minor in a sexual performance;
- (vi) Solicitation of a minor to practice prostitution;
- (vii) Use of a minor to engage in any sexually explicit conduct to produce any visual medium depicting such conduct;
- (viii) Creating, publishing, selling, distributing, or possessing any material depicting a minor or a portion of a minor’s body engaged in sexually explicit conduct;
- (ix) Transmitting, making, selling, buying, or disseminating by means of a computer any descriptive or identifying information regarding a child for the purpose of offering or soliciting sexual conduct of or with a child or the visual depicting of such conduct;
- (x) Conspiracy to transport, ship, receive, or distribute visual depictions of minors engaged in sexually explicit conduct; or
- (xi) Any conduct which, by its nature, is a sexual offense against a victim who is a minor.

Likewise, pursuant to Ga. Code Ann. § 42-1-12(a)(10)(B),

(B) “Dangerous sexual offense” with respect to convictions occurring after June 30, 2006, means any criminal offense, or the attempt to commit any criminal offense, under Title 16 as specified in this paragraph or any offense under federal law or the laws of another state or territory of the United States which consists of the same or similar elements of the following offenses:

...

- (iv) Rape in violation of Code Section 16-6-1;<sup>49</sup>
- (v) Sodomy in violation of Code Section 16-6-2;<sup>50</sup>
- (vi) Aggravated sodomy in violation of Code Section 16-6-2;

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<sup>49</sup> See *supra* note 29.

<sup>50</sup> See *supra* note 11.

- (vii) Statutory rape in violation of Code Section 16-6-3, if the individual convicted of the offense is 21 years of age or older;
- (viii) Child molestation in violation of Code Section 16-6-4;
- (ix) Aggravated child molestation in violation of Code Section 16-6-4, unless the person was convicted of a misdemeanor offense;
- (x) Enticing a child for indecent purposes in violation of Code Section 16-6-5;
- ...
- (xv) Sexual exploitation of children in violation of Code Section 16-12-100;
- ...
- (xvii) Computer pornography and child exploitation prevention in violation of Code Section 16-12-100.2;
- ...
- (xix) Any conduct which, by its nature, is a sexual offense against a victim who is a minor or an attempt to commit a sexual offense against a victim who is a minor.

A “minor” is defined as “any individual under the age of 18 years and any individual that the sexual offender believed at the time of the offense was under the age of 18 years if such individual was the victim of an offense.” Ga. Code. Ann. § 42-1-12(a)(14).

- 3.5.1 Recommendation: Amend the sex offender registry statute, Ga. Code Ann. § 42-1-12 (State Sexual Offender Registry), to include Ga. Code Ann. § 16-6-11 (Pimping), § 16-6-12 (Pandering), and § 16-5-46 (Trafficking of persons for labor or sexual servitude) as offenses for which registration as a sex offender is required when the victim is a minor.

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.*

Georgia does not specifically list the types of violent felonies that could cause the removal of a child from a parent. Ga. Code Ann. § 15-11-310<sup>51</sup> (Grounds for determining termination of parental rights) states in part:

- (a) In considering the termination of parental rights, the court shall first determine whether one of the following statutory grounds for termination of parental rights has been met:
  - (2) The parent has subjected his or her child to aggravated circumstances;
  - ...
  - (5) A child is a dependent child due to lack of proper parental care or control by his or her parent, reasonable efforts to remedy the circumstances have been unsuccessful or were not required, such cause of dependency is likely to continue or will not likely be remedied, and the continued dependency will cause or is likely to cause serious physical, mental, emotional, or moral harm to such child.

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<sup>51</sup> The text of Ga. Code Ann. § 15-11-310 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014). Prior to January 1, 2014, determination of parental rights is governed by Ga. Code Ann. § 15-11-94 (Grounds for termination; other dispositions). In a decision to terminate parental rights, a court may consider:

- (iii) Conviction of the parent of a felony and imprisonment therefor which has a demonstrable negative effect on the quality of the parent-child relationship;
- iv) Egregious conduct or evidence of past egregious conduct of the parent toward the child or toward another child of a physically, emotionally, or sexually cruel or abusive nature;
- ...
- (vi) Injury or death of a sibling under circumstances which constitute substantial evidence that such injury or death resulted from parental neglect or abuse. Ga. Code Ann. § 15-11-94(b)(4)(B).

Ga. Code Ann. § 15-11-310 (Determination of whether child is without proper parental care and control) states:

(a) In determining whether a child is without proper parental care and control, the court shall consider, without being limited to, the following:

...(4) Egregious conduct or evidence of past egregious conduct of a physically, emotionally, or sexually cruel or abusive nature by such parent toward his or her child or toward another child of such parent;

“Aggravated circumstances” includes circumstances in which a parent has “(C) Attempted, conspired to attempt, or has subjected a child or his or her sibling to torture, chronic abuse, sexual abuse, or sexual exploitation; . . .” Ga. Code Ann. § 15-11-2 (Definitions).

**Legal Components:**

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

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

Under Ga. Code Ann. § 16-5-46 (Trafficking of persons for labor or sexual servitude), trafficking for sexual servitude occurs when a person “knowingly subjects or maintains another in sexual servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of sexual servitude.” Ga. Code Ann. § 16-5-46(c). This language could reach some facilitators, but does not include terms such as “benefiting,” “assisting,” or “aiding,” which are terms more explicitly applicable to facilitators.

Georgia’s human trafficking law does, however, allow for the prosecution of corporations in certain circumstances. Ga. Code Ann. § 16-5-46(j). Specifically, a corporation can be prosecuted under the human trafficking law

for an act or omission constituting a crime under this Code section only if an agent of the corporation performs the conduct which is an element of the crime while acting within the scope of his or her 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 his or her 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.

In addition to the trafficking law, Georgia has several other laws applicable to facilitators:

1. Ga. Code Ann. § 16-6-10 (Keeping a place of prostitution) could apply to facilitators and specifically criminalizes “exercising control over the use of any place or conveyance which would offer seclusion or shelter for the practice of prostitution . . . when [the perpetrator] knowingly grants or permits the use of such place for the purpose of prostitution.” Similarly, pursuant to Ga. Code Ann. § 44-7-18(b) (Effect of leases for purposes of prostitution or assignation), leases entered into for the purposes of prostitution “shall be void.”
2. Ga. Code Ann. § 16-6-11 (Pimping). Although not specific to minors, the offense of pimping, as defined in Ga. Code Ann. § 16-6-11, includes when a person,
  - (3) Directs or transports another person to a place when he or she knows or should know that the direction or transportation is for the purpose of prostitution;
  - . . .
  - (5) Aids or abets, counsels, or commands another in the commission of prostitution or aids or assists in prostitution where the proceeds or profits derived therefrom are to be divided on a pro rata basis.



3. Ga. Code Ann. § 39-5-4 (Report of certain information; failure to report required information; penalties). According to this statute, “An interactive computer service doing business in this state that obtains knowledge of facts or circumstances from which a violation of any law of this state prohibiting child pornography is apparent shall make a report, as soon as reasonably possible, of such facts and circumstances to the Cyber Tipline at the National Center for Missing and Exploited Children.” Ga. Code Ann. § 39-5-4(a). A “knowing[] and willful[] violat[ion] [of] subsection (a)” is a misdemeanor. Ga. Code Ann. § 39-5-4(b). Subsequent violations raise the offense to a misdemeanor of a high and aggravated nature. Ga. Code Ann. § 39-5-4(b).
4. Ga. Code Ann. § 16-12-100(b) (Sexual exploitation of children; reporting violation; forfeiture; penalties), states in part, “It is unlawful for any person knowingly to employ, use, persuade, induce, entice or coerce any minor to engage in or *assist* any other person to engage in any sexually explicit conduct for the purpose of producing any visual medium depicting such conduct.” Ga. Code Ann. § 16-12-100(b)(1) (emphasis added). The statute also states that “[i]t is unlawful for any person knowingly to create, reproduce, publish, promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute any visual medium which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct.” Ga. Code Ann. § 16-12-100(b)(5).
5. Ga. Code Ann. § 16-12-100.2(c)(1)(D)<sup>52</sup> (Computer or electronic pornography and child exploitation prevention) states,

A person commits the offense of computer or electronic pornography if such person intentionally or willfully:

. . .

(D) Buys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement, or any child’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of offering or soliciting sexual conduct of or with an identifiable child or the visual depiction of such conduct.

This crime is punishable by imprisonment for 1–20 years and a fine not to exceed \$10,000. Ga. Code Ann. § 16-12-100.2(c)(2).<sup>53</sup>

Where a facilitator is also engaged in criminal gang activity, extra penalties may apply. It is an offense “for any person employed by or associated with a criminal street gang to conduct or participate in criminal gang activity through the commission of any offense enumerated in paragraph (1) of Code Section 16-15-3.” Ga. Code Ann. § 16-15-4(a).<sup>54</sup> In addition to any other penalty provided by law, Any violation of this provision is punishable by imprisonment for 5–15 years, a fine of \$10,000–\$15,000, or both. Ga. Code Ann. § 16-5-4(k)(1). Additionally, “(1) All property which is directly or indirectly used or intended for use in any manner to facilitate a violation of this chapter; and (2) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this chapter” is subject to forfeiture. Ga. Code Ann. § 16-15-5(a).

In addition to criminal penalties, Georgia has also enacted mandatory posting requirements for businesses likely to be used in the course of human trafficking.<sup>55</sup> Such business must post a standard sign in

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<sup>52</sup> See *supra* note 10.

<sup>53</sup> See *supra* Section 2.9 for circumstances that will limit these penalties.

<sup>54</sup> See discussion *supra* in Section 1.2.

<sup>55</sup> Ga. Code Ann. § 16-5-47(b) provides that the businesses subject to the mandatory posting provision are: Adult entertainment establishments Bars; Primary airports; Passenger rail or light rail stations; Bus stations; Truck stops; Emergency rooms within general acute care hospitals; Urgent care centers; Farm labor contractors and day haulers; Privately operated job recruitment centers; Safety rest areas located along interstate highways in this state; Hotels; and Businesses and establishments that offer massage or bodywork services by a person who is not a massage therapist.

prominent locations informing trafficking victims about available services. Failure to post such notice is punishable by a fine of not more than \$500.00 and “[u]pon a second or subsequent conviction, the owner shall be guilty of a high and aggravated misdemeanor and shall be punished by a fine not to exceed \$5,000.00.” Ga. Code Ann. § 16-5-47(d).

4.1.1 Recommendation: Amend Ga. Code Ann. § 16-5-46 (Trafficking of persons for labor or sexual servitude) to expressly include aiding, assisting and benefitting from human trafficking as prohibited conduct.

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.*

A person convicted of trafficking under Ga. Code Ann. § 16-5-46 (Trafficking of persons for labor or sexual servitude), when the victim is under 18, could face a fine not to exceed \$100,000. Ga. Code Ann. § 16-5-46(f)(2). Additionally, under subsection (g), “All real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this Code section shall be subject to forfeiture to the state.” Ga. Code Ann. § 16-5-46(g). “Forfeiture shall be had by the same procedure set forth in Code Section 16-14-7.” Ga. Code Ann. § 16-5-46(g). “Forfeiture shall be had by a civil procedure. . .” Ga. Code Ann. §16-14-7. Seizure of forfeitable property is governed by Ga. Code Ann. §16-14-7(f). The net proceeds of the forfeiture is to be deposited in the general fund of the state treasury. Ga. Code Ann. § 16-14-7(k).

Facilitators prosecuted under Ga. Code Ann. § 16-6-11 (Pimping) may face asset forfeiture. Under Ga. Code Ann. § 16-6-13.3 (Proceeds from pimping; forfeiture; distribution), “Any proceeds or money which is used, intended for use, used in any manner to facilitate, or derived from a violation of Code Section 16-6-11 [pimping], wherein any of the persons involved in performing an act of prostitution is under the age of 18, is contraband and forfeited . . .” Ga. Code Ann. § 16-6-13.3(a). Additionally, if the facilitator has a prior conviction for Ga. Code Ann. § 16-6-11, the facilitator may be subject to motor vehicle forfeiture. Ga. Code Ann. § 16-6-13.2(c). Asset forfeiture pursuant to this section is discretionary and civil in nature. The items forfeited shall be disposed of pursuant to Ga. Code Ann. § 16-13-49(u)(Contraband; forfeiture; seizure), which provides for the sale of the property and distribution to government agencies.

Additional forfeiture exists for those facilitators involved in using a minor for a sexual performance or visual depiction of sexually explicit conduct. Ga. Code Ann. § 16-12-100. Under Ga. Code Ann. § 16-12-100(e)(1), anyone “who is convicted of an offense under this Code section shall forfeit to the State of Georgia such interest as the person may have in: (A) Any property constituting or directly derived from gross profits or other proceeds obtained from such offense; and (B) Any property used, or intended to be used, to commit such offense.” This forfeiture action is criminal in nature and mandatory. The property forfeited shall also be disposed of pursuant to Ga. Code Ann. § 16-13-49(u) (Contraband; forfeiture; seizure), which provides for the sale of the property and distribution to government agencies.

Finally, a facilitator may be subject to restitution orders. Ga. Code Ann. § 17-14-3 states, “. . . [I]n addition to any other penalty imposed by law, a judge of any court of competent jurisdiction shall, in sentencing an offender, make a finding as to the amount of restitution due any victim, and order an offender to make full restitution to such victim.” Consideration of restitution is mandatory, although the order itself is dependent upon considerations outlined in Ga. Code Ann. § 17-14-10 including:

- (1) The financial resources and other assets of the offender or person ordered to pay restitution including whether any of the assets are jointly controlled;
- (2) The earnings and other income of the offender or person ordered to pay restitution;

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The text of Ga. Code Ann. § 16-5-47 included here and elsewhere in this report includes amendments made by the passage of House Bill 141 during the 2013 regular session of the Georgia Legislature (effective May 6, 2013).

- (3) Any financial obligations of the offender or person ordered to pay restitution, including obligations to dependents;
- (4) The amount of damages;
- (5) The goal of restitution to the victim and the goal of rehabilitation of the offender;
- (6) Any restitution previously made;
- (7) The period of time during which the restitution order will be in effect; and
- (8) Other factors which the ordering authority deems to be appropriate.

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

Georgia does not have a specific law that prohibits the promotion or sale of child sex tourism.

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

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

Pursuant to Ga. Code Ann. § 16-12-100 (Sexual exploitation of children; reporting violation; forfeiture; penalties), promoting and selling pornography depicting children under 18 is illegal. Ga. Code Ann. § 16-12-100. Specifically, “It is unlawful for any person knowingly to . . . promote, sell, distribute, give, exhibit, or possess with intent to sell or distribute any visual medium which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct.” Ga. Code Ann. § 16-12-100(b)(5). Similarly, it is also a crime to “advertise, sell, purchase, barter, or exchange any medium which provides information as to where any visual medium which depicts a minor or a portion of a minor’s body engaged in any sexually explicit conduct can be found or purchased.” Ga. Code Ann. § 16-12-100(b)(6). This crime is punishable by imprisonment for 5–20 years and a fine not to exceed \$100,000. Ga. Code Ann. § 16-12-100(g)(1).<sup>56</sup>

Under Ga. Code Ann. § 16-12-100.2(c)(1)<sup>57</sup> (Computer or electronic pornography and child exploitation prevention),

A person commits the offense of computer or electronic pornography if such person intentionally or willfully:

- (A) Compiles, enters into, or transmits by computer or other electronic device;
  - (B) Makes, prints, publishes, or reproduces by other computer or other electronic device;
  - (C) Causes or allows to be entered into or transmitted by computer or other electronic device;
- or
- (D) Buys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement or any child’s name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of offering or soliciting sexual conduct of or with an identifiable child [defined as under 16] or the visual depiction of such conduct.

The crime is punishable by imprisonment for 1–20 years and a fine not to exceed \$10,000. Ga. Code Ann. § 16-12-100.2(c)(2).<sup>58</sup>

<sup>56</sup> See *supra* Section 2.9 for circumstances that will limit these penalties. See also note 3.

<sup>57</sup> See *supra* note 10.

<sup>58</sup> See *supra* Section 2.9 for circumstances that will limit these penalties.

**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.*

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**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 Ga. Code Ann. § 17-14-2(9) (Definitions), Georgia defines a victim deserving restitution fairly broadly and states that a victim includes any

[n]atural person or his or her personal representative or, if the victim is deceased, his or her estate; . . . suffering damages caused by an offender’s unlawful act; provided, however, that the term “victim” shall not include any person who is concerned in the commission of such unlawful act as defined in Code Section 16-2-20 [When a person is a party to a crime].

Therefore, a sexually exploited child generally would qualify as a victim for purposes of restitution. Notably, however, if a court did determine that the minor “[i]ntentionally aid[ed] or abet[ted] in the commission of the crime,” under Ga. Code Ann. § 16-2-20(b)(3) (When a person is a party to a crime), the minor could no longer be considered a victim. Therefore, if a court considers a victim of domestic minor sex trafficking as aiding in his or her trafficking situation or prostitution, the minor may not be considered a victim.

For the purposes of crime victims’ compensation funds, a violation of Ga. Code Ann. § 16-5-46 (Trafficking in persons for labor or sexual servitude) is specifically included in the definition of “crime.”

Ga. Code Ann. § 17-15-2(3)(A). Pursuant to Ga. Code Ann. § 17-15-2(10) (Definitions), a “victim” is defined as someone who

- (A) Is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;
- (B) Suffers a serious mental or emotional trauma as a result of being threatened with a crime which could result in physical injury or death;
- (C) Suffers a serious mental or emotional trauma as a result of being present during the commission of a crime; or
- (D) Suffers a serious mental or emotional trauma as a result of being trafficked for labor or sexual servitude as defined in Code Section 16-5-46.

5.1.1 Recommendation: Amend the definition of “victim” under Ga. Code Ann. § 17-14-2(9) (Definitions) to specifically include victims of Ga. Code Ann. § 16-5-46 (Trafficking in persons for labor or sexual servitude) and Georgia’s CSEC offenses.

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

Under Ga. Code Ann. § 16-5-46(d), “The age of consent for sexual activity or the accused’s lack of knowledge of the age of the person being trafficked shall not constitute a defense in a prosecution for a violation of this Code section.”

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

Georgia’s prostitution statute reads broadly and does not exclude the prosecution of minors for prostitution. The prostitution statute states, “A person commits the offense of prostitution when he or she performs or offers or consents to perform a sexual act, including but not limited to sexual intercourse or sodomy, for money or other items of value.” Ga. Code Ann. § 16-6-9. The offense is punishable as a misdemeanor. Ga. Code Ann. § 16-6-13(a). Similarly, Ga. Code Ann. § 16-6-16 (Masturbation for hire) has no age distinctions and applies regardless of age. Ga. Code Ann. § 16-6-16.

5.3.1 Recommendation: Amend Ga. Code Ann. § 16-6-9 (Prostitution) and Ga. Code Ann. § 16-6-16 (Masturbation for hire) to provide that minors are immune from prosecution of these offenses and direct them to services.

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.*

## **Child Identified as Dependent**

### *I. Initial Custody*

Pursuant to Ga. Code Ann. § 15-11-2(22)(A)<sup>59</sup> (Definitions), a dependent child is one who, “has been abused or neglected and is in need of the protection of the court. . . .”

Abuse of a child is defined by Ga. Code Ann. § 15-11-2(2) as

- (A) Any nonaccidental physical injury or physical injury which is inconsistent with the explanation given for it suffered by a child as the result of the acts or omissions of a person responsible for the care of a child;

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<sup>59</sup> The text of Ga. Code Ann. § 15-11-2 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

- (B) Emotional abuse;
- (C) Sexual abuse<sup>60</sup> or sexual exploitation<sup>61</sup>;
- ...

Pursuant to Ga. Code Ann. § 15-11-2(48)(A), neglect of a child is

- (A) The failure to provide proper parental care or control, subsistence, education as required by law, or other care or control necessary for a child's physical, mental, or emotional health or morals;
- (B) The failure to provide a child with adequate supervision necessary for such child's well-being; or
- (C) The abandonment of a child by his or her parent, guardian, or legal custodian.

a. Authority for initial custody

Pursuant to Ga. Code Ann. § 15-11-133(a)<sup>62</sup> (Removal of child from the home; protective custody), a child may be removed from the home pursuant to a court order, or “[b]y a law enforcement officer or duly authorized officer of the court if a child is in imminent danger of abuse or neglect if he or she remains in the home.”

b. Placement

An abused or neglected child may be placed “with a relative of such child's parent, guardian, or legal custodian, in foster care, or in emergency foster care.” Ga. Code Ann. § 15-11-130<sup>63</sup> (Emergency care and supervision of child without court order; immunity).

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<sup>60</sup> Sexual abuse is defined by Ga. Code Ann. § 15-11-2(69) as

- [A] caregiver or other person responsible for the care of a child employing, using, persuading, inducing, enticing, or coercing any child to engage in any act which involves:
  - (A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
  - (B) Bestiality;
  - (C) Masturbation;
  - (D) Lewd exhibition of the genitals or pubic area of any person;
  - (E) Flagellation or torture by or upon a person who is nude;
  - (F) The condition of being fettered, bound, or otherwise physically restrained on the part of a person who is nude;
  - (G) Physical contact in an act of apparent sexual stimulation or gratification with any person's clothed or unclothed genitals, pubic area, or buttocks or with a female's clothed or unclothed breasts;
  - (H) Defecation or urination for the purpose of sexual stimulation; or
  - (I) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure by a licensed health care professional.

*See supra* note 59.

<sup>61</sup> Sexual exploitation is defined as Ga. Code Ann. § 15-11-2(70) as

- [C]onduct by a caregiver or other person responsible for the care of a child who allows, permits, encourages, or requires a child to engage in:
  - (A) Prostitution, in violation of Code Section 16-6-9; or
  - (B) Sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, in violation of Code Section 16-12-100.

*See supra* note 59.

<sup>62</sup> The text of Ga. Code Ann. § 15-11-133 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>63</sup> The text of Ga. Code Ann. § 15-11-130 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1,

Moreover, Georgia law specifically states that “[n]o child alleged to be or adjudicated as a dependent child shall be detained in any jail, adult lockup, or adult detention facility, nor shall a child be detained in a secure residential facility or nonsecure residential facility unless a child is also alleged to have committed a delinquent act or adjudicated to be a delinquent child.” Ga. Code Ann. § 15-11-135<sup>64</sup> (Placement in eligible foster care).

## *II. Process Following Initial Custody*

Pursuant to Ga. Code Ann. § 15-11-133 (Removal of child from the home; protective custody),

...

(b) Upon removing a child from his or her home, a law enforcement officer or duly authorized officer of the court shall:

- (1) Immediately deliver such child to a medical facility if such child is believed to suffer from a serious physical condition or illness which requires prompt treatment, and, upon delivery, shall promptly contact DFCS;
- (2) Bring such child immediately before the juvenile court or promptly contact a juvenile court intake officer; and
- (3) Promptly give notice to the court and such child's parents, guardian, or legal custodian that such child is in protective custody, together with a statement of the reasons for taking such child into protective custody.

...

(f) A juvenile court intake officer shall immediately determine if a child should be released, remain in protective custody, or be brought before the court upon being contacted by a law enforcement officer, duly authorized officer of the court, or DFCS that a child has been taken into protective custody.

To determine whether a child should be removed from the home, the intake officer is required to make certain findings. Specifically, under Ga. Code Ann. § 15-11-134 (Required findings justifying removal from the home), the officer must find that remaining in the home, “would be contrary to his or her welfare.”

## *III. Placement Process Pending Adjudication/Investigation*

A child that is alleged to be dependent may be placed temporarily in foster care. However, pursuant to Ga. Code Ann. § 15-11-135 (Placement in eligible foster care),

(a) A child taken into custody shall not be placed in foster care prior to the hearing on a petition for dependency unless:

- (1) Foster care is required to protect the child;
- (2) The child has no parent, guardian, or legal custodian or other person able to provide supervision and care and return him or her to the court when required; or
- (3) An order for the child's foster care has been made by the court.

Further, Ga. Code Ann. § 15-11-135(c) (Placement in eligible foster care) allows for a child to be placed in foster care only in the following locations:

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2014).

<sup>64</sup> The text of Ga. Code Ann. § 15-11-135 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

- (1) A licensed or approved foster home or a home approved by the court which may be a public or private home or the home of the child's noncustodial parent or of a relative;
- (2) A facility operated by a licensed child welfare agency; or
- (3) A licensed shelter care facility approved by the court.

Additionally, pursuant to subsection (b), no child, "alleged to be or adjudicated as a dependent child shall be detained in any jail, adult lockup, or adult detention facility. . .secure residential facility or nonsecure residential facility."

Moreover, Georgia law specifically states that "[u]nless a child found to be deprived is found also to be delinquent, such child shall not be committed to or confined in an institution or other facility designed or operated for the benefit of delinquent children." Ga. Code Ann. § 15-11-55(b)<sup>65</sup>.

#### *IV. Adjudication or Referral to Alternate Process*

Ga. Code Ann. § 15-11-181 (Adjudication hearing) requires that the court schedule an adjudication hearing. If the child was held in foster care, the adjudication must, "be scheduled for no later than ten days after the filing of the petition alleging dependency." Ga. Code Ann. § 15-11-181(a)<sup>66</sup>. Further, "[i]f the alleged dependent child is not in foster care, the adjudication hearing shall be held no later than 60 days after the filing of the petition alleging dependency." Ga. Code Ann. § 15-11-181(a).

If the court does not find that the child is dependent, the child must be discharged from foster care. Ga. Code Ann. Ga. Code Ann. § 15-11-181(d). However, if the child is found to be dependent, the court must make a further finding of whether, "such dependency is the result of substance abuse by such child's parent, guardian, or legal custodian." Ga. Code Ann. § 15-11-181(f). Additionally, the court must hold a disposition hearing, if the child is found to be dependent. Ga. Code Ann. § 15-11-181(g).

#### *V. Outcomes*

Pursuant to Ga. Code Ann. § 15-11-212<sup>67</sup> (Disposition of dependent child), the court may order any of the following as possible dispositions:

- (1) Permit such child to remain with his or her parent, guardian, or legal custodian subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of such child;
- (2) Grant or transfer temporary legal custody to any of these persons or entities:
  - (A) Any individual, including a biological parent, who, after study by the probation officer or other person or agency designated by the court, is found by the court to be qualified to receive and care for such child;
  - (B) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for such child;
  - (C) Any public agency authorized by law to receive and provide care for such child; provided, however, that for the purpose of this Code section, the term "public agency" shall not include DJJ; . . .

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<sup>65</sup> The text of Ga. Code Ann. § 15-11-55 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>66</sup> The text of Ga. Code Ann. § 15-11-181 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>67</sup> The text of Ga. Code Ann. § 15-11-212 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).



Additionally, the court may order that the child or guardian(s) participate in counseling. Ga. Code Ann. § 15-11-212(a)(4). However, if the court finds that “preventive or reunification efforts have not been reasonable but that further efforts could not permit a child adjudicated as a dependent child to safely remain at home, the court may nevertheless authorize or continue the removal of such child.” Ga. Code Ann. § 15-11-212(g).

Pursuant to Ga. Code Ann. § 15-11-212(f), if the court finds that the dependency is as a result of the substance abuse of the child’s guardian, the court may not allow for the child’s custody to be transferred back to the child’s parent or guardian until, “such parent, guardian, or legal custodian undergoes substance abuse treatment and random substance abuse screenings and those screenings remain negative for a period of no less than six consecutive months.”

### **Child Identified as In Need of Services**

Under Ga. Code Ann. § 15-11-2(11),<sup>68</sup> a “Child in need of services” means:

- (A) A child adjudicated to be in need of care, guidance, counseling, structure, supervision, treatment, or rehabilitation and who is adjudicated to be:
  - (i) Subject to compulsory school attendance and who is habitually and without good and sufficient cause truant, as such term is defined in Code Section 15-11-381, from school;
  - (ii) Habitually disobedient of the reasonable and lawful commands of his or her parent, guardian, or legal custodian and is ungovernable or places himself or herself or others in unsafe circumstances;
  - (iii) A runaway, as such term is defined in Code Section 15-11-381;
  - (iv) A child who has committed an offense applicable only to a child;
  - (v) A child who wanders or loiters about the streets of any city or in or about any highway or any public place between the hours of 12:00 Midnight and 5:00 A.M.;
  - (vi) A child who disobeys the terms of supervision contained in a court order which has been directed to such child who has been adjudicated a child in need of services; or
  - (vii) A child who patronizes any bar where alcoholic beverages are being sold, unaccompanied by his or her parent, guardian, or legal custodian, or who possesses alcoholic beverages; or
- (B) A child who has committed a delinquent act and is adjudicated to be in need of supervision but not in need of treatment or rehabilitation.

#### *I. Initial Custody*

##### *a. Authority for initial custody*

Pursuant to Ga. Code Ann. § 15-11-410(a)<sup>69</sup> (Taking a child into temporary custody), a child may be taken into custody

- (1) Pursuant to a court order; or
- (2) By a law enforcement officer when there are reasonable grounds to believe that a child has run away from his or her parent, guardian, or legal custodian or the circumstances are such as to endanger a child's health or welfare unless immediate action is taken.

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<sup>68</sup> See *supra* note 59.

<sup>69</sup> The text of Ga. Code Ann. § 15-11-410 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

b. Placement

As set out in Ga. Code Ann. § § 15-11-412<sup>70</sup> (Temporary detention; place of custody),

(a) A child alleged to be a child in need of services may be held in a secure residential facility or nonsecure residential facility until a continued custody hearing is held, provided that a detention assessment has been administered and such child is not held in a secure residential facility or nonsecure residential facility for more than 24 hours and any of the following apply:

- (1) It is alleged that such child is a runaway;
- (2) It is alleged that such child is habitually disobedient of the reasonable and lawful commands of his or her parent, guardian, or legal custodian and is ungovernable; or
- (3) Such child has previously failed to appear at a scheduled hearing.

...

(c) In no case shall a child alleged to be or adjudicated as a child in need of services in custody be detained in a jail, adult lock-up, or other adult detention facility.

*II. Process Following Initial Custody*

Initially, the person exercising custody over a child, which may include a law enforcement officer, may not hold the child for a period exceeding 12 hours. Ga. Code Ann. § 15-11-411<sup>71</sup> (Temporary custody; time limitations). During that period of time, “the court shall be notified and shall place such child in the least restrictive placement consistent with such child’s needs for protection or control. . . .” Ga. Code Ann. § 15-11-411(c).

If the child is placed in a “secured residential facility or nonsecure residential facility” a continued custody hearing must be held within 72 hours. Ga. Code Ann. § 15-11-413(a)<sup>72</sup> (Continued custody hearing). Additionally, pursuant to subsection (b),

If a child alleged to be a child in need of services is not being held in a secure residential facility or nonsecure residential facility and has not been released to the custody of such child’s parent, guardian, or legal custodian, a hearing shall be held promptly and not later than five days after such child is placed in foster care, provided that, if the five-day time frame expires on a weekend or legal holiday, the hearing shall be held on the next day which is not a weekend or legal holiday.

The standard required to continue a child in care is dictated by Ga. Code Ann. § 15-11-415(a)<sup>73</sup> (Detention decision; finding), which states that

Restraints on the freedom of a child prior to adjudication shall be imposed only when there is probable cause to believe that a child committed the act of which he or she is accused, there is clear and convincing evidence that such child’s freedom should be restrained, that no less

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<sup>70</sup> The text of Ga. Code Ann. § 15-11-412 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>71</sup> The text of Ga. Code Ann. § 15-11-411 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>72</sup> The text of Ga. Code Ann. § 15-11-413 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>73</sup> The text of Ga. Code Ann. § 15-11-415 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

restrictive alternatives will suffice, and:

- (1) Such child's detention or care is required to reduce the likelihood that he or she may inflict serious bodily harm on others during the interim period;
- (2) Such child's detention is necessary to secure his or her presence in court to protect the jurisdiction and processes of the court; or
- (3) An order for such child's detention has been made by the court.

Ga. Code Ann. § 15-11-415(f) states that services may still be provided in lieu of removal until the adjudication hearing is held if it is deemed appropriate.

### *III. Placement Process Pending Adjudication/Investigation*

At the continued custody hearing, the court may either release the child to a parent or guardian or may place the child “in the least restrictive placement consistent with such child's need for protection and control. . . .” § 15-11-414 (Continued custody hearing; findings).

### *IV. Adjudication or Referral to Alternate Process*

Pursuant to Ga. Code Ann. § 15-11-415(b) (Detention decision; finding), if a child was not taken into custody pending adjudication, the adjudication hearing must be held within 60 days after the filing of the petition. If the child was held in temporary custody pending adjudication, the adjudication hearing must be held within 10 days of the petition being filed. Ga. Code Ann. § 15-11-415(c).

This timeline is further addressed in Ga. Code Ann. § 15-11-441<sup>74</sup> (Adjudication hearing), which states that

. . . . [T]he adjudication hearing shall be scheduled to be held no later than ten days after the filing of the petition seeking an adjudication that such child is a child in need of services. If such child is not in continued custody, the adjudication hearing shall be scheduled to be held no later than 60 days after the filing of such petition.

Ga. Code Ann. § 15-11-441(b) goes on to further state, “[a]t the conclusion of the adjudication hearing, the court shall determine whether such child is a child in need of services.”

The disposition of the case is not required to be heard immediately after the adjudication hearing. In fact, pursuant to Ga. Code Ann. § 15-11-442(a)<sup>75</sup> (Disposition hearing; time limitations; disposition of a child in need of services), “If the court finds that a child is a child in need of services, a final disposition hearing shall be held and completed within 60 days of the conclusion of the adjudication hearing.”

### *V. Outcomes*

Pursuant to Ga. Code Ann. § 15-11-442(b) (Disposition hearing; time limitations; disposition of a child in need of services),

(b) The court shall order the least restrictive and most appropriate disposition. Such disposition may include:

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<sup>74</sup> The text of Ga. Code Ann. § 15-11-441 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>75</sup> The text of Ga. Code Ann. § 15-11-442 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

- (1) Permitting such child to remain with his or her caregiver without limitations or conditions;
- (2) Permitting such child to remain with his or her caregiver subject to such limitations and conditions as the court may prescribe;
- (3) Placing such child on probation or unsupervised probation on such terms and conditions as deemed in the best interests of such child and the public. An order granting probation to a child in need of services may be revoked on the ground that the terms and conditions of the probation have not been observed;
- (4) Requiring that such child perform community service in a manner prescribed by the court and under the supervision of an individual designated by the court;
- . . .
- (7) Requiring such child to attend structured after-school or evening programs or other court approved programs as well as requiring supervision of such child during the time of the day in which he or she most often used to perform the acts complained of in the petition alleging that such child is a child in need of services;
- (8) Any order authorized for the disposition of a dependent child;
- (9) Any order authorized for the disposition of a delinquent child except that a child in need of services shall not be placed in a secure residential facility or nonsecure residential facility nor shall such facility accept such child; . . .

### **Child Identified as Delinquent**

A child is a “delinquent child” if the child “has committed a delinquent act and is in need of treatment or rehabilitation.” Ga. Code Ann. § 15-11-2(20). Pursuant to Ga. Code Ann. § 15-11-2(19),<sup>76</sup> a “delinquent act” is,

- (A) An act committed by a child designated a crime by the laws of this state, or by the laws of another state if the act occurred in that state, under federal laws, or by local ordinance, and the act is not an offense applicable only to a child or a juvenile traffic offense;
- (B) The act of disobeying the terms of supervision contained in a court order which has been directed to a child who has been adjudicated to have committed a delinquent act; or
- (C) Failing to appear as required by a citation issued for an act that would be a crime if committed by an adult.

#### *I. Initial Custody*

##### *a. Authority for initial custody*

If a child commits an act of prostitution, the child could be considered a delinquent. If the sexually exploited minor is alleged to be delinquent, the child may be detained, pursuant to Ga. Code Ann. § 15-11-9<sup>77</sup> (Authority to issue arrest warrants), which allows for a juvenile judge, “to issue a warrant for the arrest of any child for an offense committed against the laws of this state, based either on personal knowledge or the information of others given under oath.”

Additionally, pursuant to Ga. Code Ann. § 15-11-500<sup>78</sup> (Order to take child into immediate custody), a judge may issue a summons for the child to be taken immediately into custody by a law enforcement officer,

<sup>76</sup> See *supra* note 59.

<sup>77</sup> The text of Ga. Code Ann. § 15-11-9 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>78</sup> The text of Ga. Code Ann. § 15-11-500 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

If it appears from a filed affidavit or from sworn testimony before the court that the conduct, condition, or surroundings of an alleged delinquent child are endangering such child's health or welfare or those of others or that such child may abscond or be removed from the jurisdiction of the court or will not be brought before the court, notwithstanding the service of the summons. . . .

A child may also be taken into custody, pursuant to Ga. Code Ann. § 15-11-501(a)<sup>79</sup> (Taking child into custody; notice to custodian; notification of prosecuting attorney), in the following circumstances:

- (1) Pursuant to an order of the court under this article, including an order to a DJJ employee to apprehend:
  - (A) When he or she has escaped from an institution or facility operated by DJJ; or
  - (B) When he or she has been placed under supervision and has violated its conditions;
- (2) Pursuant to the laws of arrest; or
- (3) By a law enforcement officer or duly authorized officer of the court if there are reasonable grounds to believe that a child has committed a delinquent act.

b. Placement

Pursuant to Ga. Code Ann. § 15-11-504<sup>80</sup> (Place of detention; data on child detained),

- (a) An alleged delinquent child may be detained only in:
  - (1) A licensed foster home;
  - (2) A home approved by the court which may be a public or private home;
  - (3) The home of such child's noncustodial parent or of a relative;
  - (4) A facility operated by a licensed child welfare agency; or
  - (5) A secure residential facility or nonsecure residential facility.

*II. Process Following Initial Custody*

When a child in need of services is taken into custody, the person taking that child into custody may only maintain custody over the child for 12 hours. Ga. Code Ann. § 15-11-47(e)(1)<sup>81</sup>.

A detention hearing must be heard if a child is detained pending a delinquency adjudication. Ga. Code Ann. § 15-11-472<sup>82</sup> (Delinquency case time limitations). Pursuant to subsection (a), a detention hearing is required to be held either

- (1) Two business days after an alleged delinquent child is placed in preadjudication custody if he or she is taken into custody without an arrest warrant; or
- (2) Five business days after an alleged delinquent child is placed in preadjudication custody if he or she is taken into custody pursuant to an arrest warrant.

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<sup>79</sup> The text of Ga. Code Ann. § 15-11-501 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>80</sup> The text of Ga. Code Ann. § 15-11-504 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>81</sup> The text of Ga. Code Ann. § 15-11-47 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>82</sup> The text of Ga. Code Ann. § 15-11-472 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

After the detention hearing, a petition must be filed to begin the delinquency proceedings. Ga. Code Ann. § 15-11-472(c). If the child is released from custody pending adjudication, the petition must be filed “within 30 days of the filing of the complaint or within 30 days after such child is released from preadjudication custody.” Ga. Code Ann. § 15-11-472(c)(1). However, if the child is continued in custody pending the hearing, the petition must be filed within 72 hours. Ga. Code Ann. § 15-11-472(d)(1).

Additionally, pursuant to Ga. Code Ann. § 15-11-472(f), “A child who is released from detention but subject to conditions of release shall not be considered to be in detention for purposes of calculating time frames. . . .”

### *III. Placement Process Pending Adjudication/Investigation*

Pursuant to Ga. Code Ann. § 15-11-504 (Place of detention; data on child detained),

- (a) An alleged delinquent child may be detained only in:
  - (1) A licensed foster home;
  - (2) A home approved by the court which may be a public or private home;
  - (3) The home of such child's noncustodial parent or of a relative;
  - (4) A facility operated by a licensed child welfare agency; or
  - (5) A secure residential facility or nonsecure residential facility.

### *IV. Adjudication or Referral to Alternate Process*

Once the petition is filed, the adjudication hearing must be held within 60 days if the child is not in custody, and within 10 days if the child is in custody. Ga. Code Ann. §§ 15-11-472(c)(4) and (d)(3).

The adjudication hearing is required to be held without a jury, pursuant to Ga. Code Ann. § 15-11-582(a)<sup>83</sup> (Adjudication hearing; time limitations; findings). Additionally, pursuant to Ga. Code Ann. § 15-11-582(b)(4), the hearing must be conducted “[i]n language understandable to the child subject to the delinquency petition and participants, to the fullest extent practicable.”

Ga. Code Ann. § 15-11-582(e) dictates that if the child is found to be delinquent as a result of the adjudication, “the court may proceed immediately or at a postponed hearing to make disposition of the case.”

As an alternative to a delinquency adjudication, a petition for informal adjustment may be filed. Ga. Code Ann. § 15-11-515 (Informal adjustment; circumstances; admissions; exceptions). In order for informal adjustment to be implemented, the following must apply:

- (1) The admitted facts bring the case within the jurisdiction of the court;
- (2) Counsel and advice without an adjudication would be in the best interests of the public and a child, taking into account at least the following factors:
  - (A) The nature of the alleged offense;
  - (B) The age and individual circumstances of such child;
  - (C) Such child's prior record, if any;
  - (D) Recommendations for informal adjustment made by the complainant or the victim; and
  - (E) Services to meet such child's needs and problems may be unavailable within the formal court system or may be provided more effectively by alternative community programs; and

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<sup>83</sup> The text of Ga. Code Ann. § 15-11-582 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

(3) A child and his or her parent, guardian, or legal custodian consent with knowledge that consent is not obligatory.

5.4.1 Recommendation: Establish a statutory protective response procedure for victims of domestic minor sex trafficking that avoids criminal liability and ensures specialized services and shelter for intervention and restoration.

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

Within the title on “social services,” a definition of “child abuse” for the article on “child abuse and deprivation records” includes, “(B) Neglect or exploitation of a child by a parent or caretaker thereof; (C) Sexual abuse of a child; or (D) Sexual exploitation of a child.” Ga. Code Ann. § 49-5-40(3). “Sexual exploitation” is defined as “conduct by any person who allows, permits, encourages, or requires that child to engage in: (A) Prostitution, as defined in Code Section 16-6-9 ; or (B) Sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, as defined in Code Section 16-12-100.” Ga. Code Ann. § 49-5-40 (6). Similarly, “sexual abuse” is defined as including “a person’s employing, using, persuading, inducing, enticing or coercing any minor who is not that person’s spouse to engage in any act which involves: (A) Sexual intercourse . . . .” Ga. Code Ann. § 49-5-40 (5). However, the definition of “sexual abuse” does “not include consensual sex acts involving persons of the opposite sex when the sex acts are between minors or between a minor and an adult who is not more than five years older than the minor.” Ga. Code Ann. § 49-5-40(5).

Additionally, within the title on “Courts” and the Chapter on “Juvenile Code”, Ga. Code Ann. § 15-11-2<sup>84</sup> also includes “sexual abuse or sexual exploitation” as abuse. Ga. Code Ann. § 15-11-2(2)(C). “Sexual exploitation” is defined as “conduct by a caregiver or other person responsible for the care of a child who allows, permits, encourages, or requires a child to engage in: (A) Prostitution, in violation of Code Section 16-6-9; or (B) Sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, in violation of Code Section 16-12-100.” Ga. Code Ann. § 15-11-2(70). Further, the law also defines “aggravated circumstances” to include instances in which a parent “Attempted, conspired to attempt, or has subjected a child or his or her sibling to torture, chronic abuse, sexual abuse, or sexual exploitation.” Ga. Code Ann. § 15-11-2(5)(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.*

Title 49, Social Services, does not supply a definition of “caregiver” for the child welfare statutes. However, under Georgia’s chapter “juvenile code” in title 15, a “caregiver” includes, “any person providing a residence for a child or any person legally obligated to provide or secure adequate care for a child, including his or her parent, guardian, or legal custodian.” Ga. Code Ann. § 15-11-2(8).<sup>85</sup> Additionally, traffickers could be held responsible for the child under Ga. Code Ann. § 15-11-2(55) which defines the “person responsible for the care of the child” as:

- (A) An adult member of a child's household;
- (B) A person exercising supervision over a child for any part of the 24 hour day; or
- (C) Any adult who, based on his or her relationship to the parent, guardian, or legal custodian or a member of a child's household, has access to such child.

5.6.1 Recommendation: Amend Title 49 (Social services) to define a “caregiver” broadly enough to include a trafficker who has physical custody or control of the

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<sup>84</sup> See *supra* note 59.

<sup>85</sup> See *supra* note 59.

child in order to bring the child within the scope 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.*

For the purposes of crime victims' compensation funds, "crime" includes a violation of Ga. Code Ann. § 16-5-46 (Trafficking in persons for labor or sexual servitude). Ga. Code Ann. § 17-15-2(3)(A). Pursuant to Ga. Code Ann. § 17-15-2(9), a "victim" is defined as someone who endures at least one of the following:

- (A) Is injured physically, who dies, or who suffers financial hardship as a result of being injured physically as a direct result of a crime;
- (B) Suffers a serious mental or emotional trauma as a result of being threatened with a crime which could result in physical injury or death;
- (C) Suffers a serious mental or emotional trauma as a result of being present during the commission of a crime; or
- (D) Suffers a serious mental or emotional trauma as a result of being trafficked for labor or sexual servitude as defined in Code Section 16-5-46 [Trafficking in persons for labor or sexual servitude].

Therefore, since the crime of human trafficking is specifically mentioned, and since crime includes the definition of human trafficking, a victim would be eligible for compensation under this statute. Additionally, Georgia defines victims as those who are present during or suffer injury or emotional trauma from certain crimes, including "any act which constitutes a violation of Chapter 6 or Part 2 of Article 3 of Chapter 12 of Title 16," which includes Ga. Code Ann. § 16-12-100 (Sexual exploitation of children; reporting violation; forfeiture; penalties) and § 16-12-100.2<sup>86</sup> (Computer or electronic pornography and child exploitation prevention). Ga. Code Ann. § 17-15-2(3)(A). Therefore, those victims who are exploited to produce pornography could obtain crime victims' compensation funds.

Some crime victims may become ineligible or face reduced awards if they are considered accomplices to the crime, though human trafficking victims are specifically excluded from this ineligibility provision. Ga. Code Ann. § 17-15-7(e). Nonetheless, misidentified human trafficking victims could potentially face a reduced compensation award as a result of Ga. Code Ann. § 17-15-8(d) (Required findings; amount of award; rejection of claim; reductions) which states,

In determining the amount of an award, the director and board shall determine whether because of his or her conduct the victim of such crime contributed to the infliction of his or her injury, serious mental or emotional trauma, or financial hardship, and the director and board may reduce the amount of the award or reject the claim altogether in accordance with such determination.

Even if victims are able to access the victims' compensation funds, a claim for compensation "must be filed by the claimant not later than one year after the occurrence of the crime upon which such claim is based . . . provided, however, that, upon good cause shown, the board may extend that time for filing for a period not exceeding three years after such occurrence." Ga. Code Ann. § 17-15-5(b).

Similarly, it must be found that "the crime was promptly reported to the proper authorities," and "[i]n no case may an award be made where . . . such report was made more than 72 hours after the occurrence of such crime unless the board, for good cause shown, finds the delay to have been justified." Ga. Code Ann. § 17-15-8(a)(3). The statute further provides that there is a presumption that good cause exists in cases of human trafficking victims suffering serious mental or emotional trauma as a result of being trafficked. Ga. Code Ann. § 17-15-8(a)(3). Therefore, the presumption of good cause for human trafficking victims lessens the effect of this ineligibility factor for these victims.

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<sup>86</sup> See *supra* note 10.



Notably, law enforcement officials are required to make human trafficking victims aware of the availability of federal victim compensation. Ga. Code Ann. § 17-17-6(a) states in part,

(a) Upon initial contact with a victim, all law enforcement and court personnel shall make available to the victim the following information written in plain language:

....

(2) The availability of victim compensation and, if the victim has been trafficked for labor or sexual servitude as defined in Code Section 16-5-46, compensation available through the federal government pursuant to 22 U.S.C. Section 7105 . . . .

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

Certain victim-friendly criminal justice procedures exist in Georgia.

Under Ga. Code Ann. § 16-5-46(e), “The sexual history or history of commercial sexual activity of a person alleged to have been trafficked or such person’s connection by blood or marriage to an accused in the case or to anyone involved in such person’s trafficking shall be excluded from evidence if the court finds at a hearing outside the presence of the jury that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”

Similar protections exist for certain sex offenses, including § 16-6-1 (Rape), § 16-6-4 (Child molestation; aggravated child molestation), and § 16-6-22.2 (Aggravated sexual battery). Ga. Code Ann. § 24-4-412. Georgia does not allow the defendant to raise evidence about the complaining witness’s past sexual behavior. Ga. Code Ann. § 24-4-412(a). According to this statute, “[E]vidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness’s marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards.” Ga. Code Ann. § 24-4-412(a). Under subsection (b), “[E]vidence relating to the past sexual behavior of the complaining witness may be introduced if the court, following the procedure described in subsection (c) of this Code section, finds that the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.”

Additionally, under Ga. Code Ann. § 24-8-820<sup>87</sup> (Testimony as to child’s description of sexual contact or physical abuse),

A statement made by a child younger than 16 years of age describing any act of sexual contact or physical abuse performed with or on such child by another or with or on another in the presence of such child shall be admissible in evidence by the testimony of the person to whom made if the proponent of such statement provides notice to the adverse party prior to trial of the intention to use such out-of-court statement and such child testifies at the trial, unless the adverse party forfeits or waives such child’s testimony as provided in this title, and, at the time of the testimony regarding the out-of-court statements, the person to whom the child made such statement is subject to cross-examination regarding the out-of-court statements.

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<sup>87</sup> Ga. Code Ann. § 24-8-820 became effective on January 1, 2013. 2011 Ga. Laws 52. Until January 1, 2013, these protections were provided under Ga. Code Ann. § 24-3-16. The text of Ga. Code Ann. § 24-8-820 included here and elsewhere in this report includes amendments made by the passage of House Bill 349 during the 2013 regular session of the Georgia Legislature. (July 1, 2013).

Pursuant to Ga. Code Ann. § 17-8-54 (Persons in courtroom when person under age of 16 testifies concerning sexual offense), “[W]hen any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters.”

For children ten years of age and younger that are victims of the crimes of Ga. Code Ann. § 16-5-70 (Cruelty to children), § 16-6-1 (Rape), § 16-6-4 (Child molestation; aggravated child molestation), or § 16-6-5 (Sexual assault by persons with supervisory or disciplinary authority), the court can order that their testimony “be taken outside the courtroom and shown in the courtroom by means of a two-way closed circuit television.” Ga. Code Ann. § 17-8-55(a). However, such “[a]n order may be granted in such cases only if: (1) The testimony is taken during the criminal trial proceeding for such violation; and (2) The judge determines that testimony by the child victim in the courtroom will result in the child’s suffering serious emotional distress such that the child cannot reasonably communicate.” Ga. Code Ann. § 17-8-55(a).

Additionally, each county in Georgia is required to have a written child abuse protocol which deals with victims of child abuse and exploitation. Ga. Code Ann. § 19-15-2. Georgia’s written child abuse protocol also focuses on the anonymity of the victim under Ga. Code Ann. § 15-11-16.<sup>88</sup> It states, “(c) On appeal, the anonymity of a child, and where appropriate, a victim or witness who is under the age of 18 years, shall be preserved by appropriate use of a child’s, victim’s, or witness’s initials as appropriate.”

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.*

Georgia allows delinquency adjudications for victims of sex trafficking and sexual exploitation to be vacated or modified. Under Ga. Code Ann. § 15-11-32(d)<sup>89</sup> (Modification or vacation of orders), a court order may be set aside if:

- (d) An order of adjudication of delinquency by a court may be modified or vacated if the child was adjudicated for a delinquent act for a sexual crime as defined in Code Section 16-3-6 and such crime resulted from the child being:
  - (1) Trafficked for sexual servitude in violation of Code Section 16-5-46; or
  - (2) A victim of sexual exploitation as defined in Code Section 49-5-40.
- (e) Any party to the proceeding, the probation officer, or any other person having supervision or legal custody of or an interest in a child may petition the court for the relief provided in this Code section. Such petition shall set forth in clear and concise language the grounds upon which the relief is requested.
- (f) After a petition seeking relief under this Code section is filed, the court shall fix a time for hearing and shall cause notice to be served on the parties to the proceeding or those affected by the relief sought. After the hearing, the court shall deny or grant relief as the evidence warrants.

In addition to its trafficking-specific provisions, Georgia has some general expungement provisions for juveniles. While Georgia does not have automatic expungement, the Georgia Code provides for the sealing of records of delinquent children upon application to the court and a hearing. Ga. Code Ann. § 15-11-79.2(b). Pursuant to Ga. Code Ann. § 15-11-79.2(b) (Sealing of records), in order to seal the records the court must find that:

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<sup>88</sup> The text of Ga. Code Ann. § 15-11-16 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

<sup>89</sup> The text of Ga. Code Ann. § 15-11-32 included here and elsewhere in this report includes amendments made by the passage of House Bill 242 during the 2013 regular session of the Georgia Legislature (effective January 1, 2014).

- (1) Two years have elapsed since the final discharge of the person;
- (2) Since the final discharge of the person he or she has not been convicted of a felony or of a misdemeanor involving moral turpitude or adjudicated a delinquent or unruly child and no proceeding is pending against the person seeking conviction or adjudication; and
- (3) The person has been rehabilitated.

Furthermore, under subsection (a), “Upon dismissal of a petition or complaint alleging delinquency or unruliness, or, in a case handled through informal adjustment, following completion of the informal adjustment, the court shall order the sealing of the files and records in the case, including those specified in Code Sections 15-11-82 and 15-11-83.”

Also, Ga. Code Ann. § 15-11-83(e) (When child shall be fingerprinted or photographed), which protects fingerprints and photographs of children, states,

Upon application of the child, fingerprints and photographs of a child shall be removed from the file and destroyed if a petition alleging delinquency is not filed or the proceedings are dismissed after either a petition is filed or the case is transferred to the juvenile court as provided in Code Section 15-11-30.4 [Transfer of criminal or quasi-criminal proceeding to juvenile court] or the child is adjudicated not to be a delinquent child. The court shall notify the deputy director of the Georgia Crime Information Center when fingerprints and photographs are destroyed pursuant to this subsection, and the Georgia Bureau of Investigation shall treat such records in the same manner as criminal history record information restricted pursuant to Code Section 35-3-37<sup>90</sup> [Inspection of records; correction]<sup>91</sup> [Inspection of criminal records; purging, modifying, of supplementing of records].<sup>92</sup>

*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.*

Under Ga. Code Ann. § 17-14-3(a) (Requirement of restitution by offender as condition of relief generally), “[I]n addition to any other penalty imposed by law, a judge of any court of competent jurisdiction shall, in sentencing an offender, make a finding as to the amount of restitution due any victim, and order an offender to make full restitution to such victim.” Also, pursuant to Ga. Code Ann. § 17-14-9 (Amount of restitution), “The amount of restitution ordered shall not exceed the victim’s damages.” Ga. Code Ann. § 17-14-9. This award, however, will reduce the amount payable to the victim from the Crime Victims Compensation Board. Ga. Code Ann. § 17-14-6(c). Similarly, it sets off the amount a victim is eligible to recover in civil proceedings. Ga. Code Ann. § 17-14-11. Notably, the definition of “victim” for the article on “restitution” excludes “any person who is concerned in the commission of such unlawful act as defined in Code Section 16-2-20.”<sup>93</sup> Ga. Code Ann. § 17-14-2(9). Under Ga. Code Ann. § 16-2-20, “[a] person is concerned in the commission of a crime only if he,” among other things, “[i]ntentionally

<sup>90</sup> The text of Ga. Code Ann. § 35-3-37 included here and elsewhere in this report includes amendments made by the passage of House Bill 349 during the 2013 regular session of the Georgia Legislature (effective July 1, 2013).

<sup>91</sup> Effective July 1, 2013, the provision title for Ga. Code Ann. § 35-3-37 is “Inspection of records; correction”.

<sup>92</sup> Ga. Code Ann. § 15-11-83.

<sup>93</sup> Ga. Code Ann. § 16-2-20 (When a person is a party to a crime) states,

- (a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.
- (b) A person is concerned in the commission of a crime only if he:
  - (1) Directly commits the crime;
  - (2) Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity;
  - (3) Intentionally aids or abets in the commission of the crime; or
  - (4) Intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

aids or abets in the commission of the crime.” § Ga. Code Ann. § 16-2-20(b)(3). This provision could potentially inhibit domestic minor sex trafficking victims from recovering funds if courts view the victims as aiders or abettors in the crime.

- 5.10.1 Recommendation: Amend Ga. Code Ann. § 17-14-2(9) (Restitution–Definitions) to ensure access to restitution by clarifying that unlawful acts committed by a domestic minor sex trafficking victim as a result of his or her victimization do not make that victim a party to the crime or “concerned in the commission” of the crime.

*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.*

Ga. Code. Ann. § 17-3-1 generally requires that prosecutions for felonies, unless otherwise stated, occur within four years of the commission of the crime if the victim was an adult or within seven years if the victim was under 18. Ga. Code Ann. § 17-3-1(c). Certain crimes can be prosecuted at any time, including murder, kidnapping, rape, aggravated child molestation, aggravated sodomy, and aggravated sexual battery, but only “when deoxyribonucleic acid (DNA) evidence is used to establish the identity of the accused.” Ga. Code Ann. § 17-3-1(a), (d).

Under Ga. Code Ann. § 17-3-2.1(b) (Limitation on prosecution of certain offenses involving a victim under 16 years of age), “[f]or crimes committed on or after July 1, 2012, if the victim of: (1) Trafficking a person for sexual servitude, as defined in Code Section 16-5-46... (5) Child molestation or aggravated child molestation, as defined in Code Section 16-6-4; (6) Enticing a child for indecent purposes, as defined in Code Section 16-6-5... a prosecution may be commenced at any time.”

For related “childhood sexual abuse” civil actions, pursuant to Ga. Code Ann. § 9-3-33.1 (Actions for childhood sexual abuse), the case “shall be commenced within five years of the date the plaintiff attains the age of majority.” Ga. Code Ann. § 9-3-33.1(b). “Childhood sexual abuse” is defined as including actions committed against a victim less than 18 where the act would constitute statutory rape, child molestation, enticing a child for indecent purposes, pandering, pandering by compulsion, solicitation of sodomy, and sexual battery. Ga. Code Ann. § 9-3-33.1(a).

**Legal Components:**

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

Georgia law provides for training of law enforcement officers on issues of trafficking. Ga. Code Ann. § 35-1-16 states,

(a) The Georgia Peace Officer Standards and Training Council and the Georgia Public Safety Training Center shall establish guidelines and procedures for the incorporation of training materials and information in:

- (1) Methods for identifying, combating, and reporting incidents where a person has been trafficked for labor or sexual servitude, as such terms are defined in Code Section 16-5-46 [Trafficking of persons for labor or sexual servitude];
- (2) Methods for providing proper detention facilities or alternatives to detention facilities for persons who have been trafficked for labor or sexual servitude . . . including providing information on therapeutic facilities for such persons; and
- (3) Methods for assisting persons who have been trafficked for labor or sexual servitude . . . including providing information on social service organizations available to assist such person.

(b) The guidelines and procedures listed in subsection (a) of this Code section shall be for use by law enforcement training centers monitored by the Georgia Peace Officer Standards and Training Council and monitored and funded by the Georgia Public Safety Training Center in all courses for which they have responsibility and oversight.

Ga. Code Ann. § 35-3-4(13), relating to the Georgia Bureau of Investigation, now has a new paragraph requiring the Bureau to “[i]dentify and investigate violations of Code Section 16-5-46 [Trafficking of persons for labor or sexual servitude].” Also, according to the Editor’s notes for Ga. Code Ann. Ch. 5, tit. 49, the “General Assembly urged certain public organizations and state agencies to develop programs for the education and training of social services and criminal justice professionals in the areas of child abuse, sexual abuse, and sexual exploitation.” Ga. Code Ann. ch.5, tit. 49 editor’s notes (citing 1986 Ga. Laws 1204).

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

Pursuant to Ga. Code Ann. § 16-11-66(a) (Interception of wire, oral, or electronic communication by party thereto; consent requirements for recording and divulging conversations to which child under 18 years is a party; parental exception), single party consent to audiotaping is allowable. Specifically, “Nothing in Code Section 16-11-62 [Eavesdropping, surveillance, or intercepting communication which

invades privacy of another; divulging private message] shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.” Ga. Code Ann. § 16-11-66(a).

Notably, however, obtaining telephone and electronic communication of a minor under 18 requires a judicial order. Ga. Code Ann. § 16-11-66(b). Specifically, Ga. Code Ann. § 16-11-66(b) states in part,

Consent for the recording or divulging of the conversations of a child under the age of 18 years conducted by telephone or electronic communication shall be given only by order of a judge of a superior court upon written application . . . or by a parent or guardian of said child as provided in subsection (d) of this Code section [permitting parents to monitor and intercept certain conversations of their minor child]. Said recording shall not be used in any prosecution of the child in any delinquency or criminal proceeding. An application to a judge of the superior court having jurisdiction over the crime under investigation made pursuant to this Code section need not comply with the procedures set out in Code Section 16-11-64.

A judge may issue the order, according to Ga. Code Ann. § 16-11-66(c), “(1) Upon finding probable cause that a crime has been committed; (2) Upon finding that the child understands that the conversation is to be recorded and that such child agrees to participate; and (3) Upon determining that participation is not harmful to such child.”

6.2.1 Recommendation: Amend Ga. Code Ann. § 16-11-66(b) (Interception of wire, oral, or electronic communication by party thereto; consent requirements for recording and divulging conversations to which child under 18 years is a party; parental exception) to allow for obtaining telephone and electronic communication of a minor where it is suspected that the child is a victim of a human trafficking or CSEC offense.

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

Law enforcement may use wiretapping to investigate sex trafficking. Specifically, pursuant to Ga. Code Ann. § 16-11-64(c),<sup>94</sup>

Upon written application, under oath, of the district attorney having jurisdiction over prosecution of the crime under investigation or the Attorney General made before a judge of superior court having jurisdiction over the crime under investigation, such court may issue an investigation warrant permitting the use of a device for the surveillance of a person or place to the extent the same is consistent with and subject to the terms, conditions, and procedures provided for by 18 U.S.C. Chapter 119. Such warrant shall have state-wide application and interception of communications shall be permitted in any location in this state.

Relevant crimes that allow wiretapping, as outlined in 18 U.S.C. § 2516, include sex trafficking of children by force, fraud, or coercion; violence or travel in aid of racketeering activity; sexual exploitation of children; selling or buying of children; involvement with child pornography, child obscenity, or production of sexually explicit depictions of a minor; and transportation for illegal sexual activity. 18 U.S.C. § 2516(1)(c).

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<sup>94</sup> The text of Ga. Code Ann. § 16-11-64 included here and elsewhere in this report includes amendments made by the passage of House Bill 55 during the regular session of the 2013 Georgia Legislature (effective February 13, 2013).

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.*

Perpetrators caught by decoys are unlikely to have the defense of entrapment. Entrapment is only a defense, according to Ga. Code Ann. § 16-3-25, if a person's

conduct is induced or solicited by a government officer or employee, or agent of either, for the purpose of obtaining evidence to be used in prosecuting the person for commission of the crime. Entrapment exists where the idea and intention of the commission of the crime originated with a government officer or employee, or with an agent of either, and he, by undue persuasion, incitement, or deceitful means, induced the accused to commit the act which the accused would not have committed except for the conduct of such officer.

- 6.4.1 Recommendation: Amend Ga. Code Ann. § 16-5-46 (Trafficking of persons for labor or sexual servitude), § 16-6-12 (Pandering) and § 16-6-11 (Pimping) 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.*

Using the Internet to investigate buyers and traffickers is permissible. Pursuant to Ga. Code Ann. § 16-12-100.2(e)(1)<sup>95</sup> (Computer or electronic pornography and child exploitation prevention),

A person commits the offense of obscene Internet contact with a child if he or she has contact with someone he or she knows to be a child or with someone he or she believes to be a child via a computer wireless service or Internet service . . . and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse . . . .

Therefore, even if the individual the perpetrator thought was a child was in fact a law enforcement officer, a crime has still occurred. The statute states even more explicitly that “[t]he sole fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this Code section shall not constitute a defense to prosecution under this Code section.” Ga. Code Ann. § 16-12-100.2(g).

Additionally, law enforcement officers have the ability to obtain search warrants for “stored wire or electronic communications and transactional records . . . .” Ga. Code Ann. § 16-11-66.1(c).

Lastly, provisions allow for the discovery of electronic documents under Ga. Code Ann. § 35-3-4.3. Specifically, Ga. Code Ann. § 35-3-4.3(a) states,

In any investigation of a violation of Code Section 16-5-46 involving trafficking of persons for labor or sexual servitude, the director, assistant director, or deputy director for investigations shall be authorized to issue a subpoena, with the consent of the Attorney General, to compel the production of books, papers, documents, or other tangible things, including records and documents contained within, or generated by, a computer or any other electronic device.

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

Georgia has a Missing Children Information Center, which collects and disseminates information on missing children. Ga. Code Ann. § 35-3-81. Pursuant to Ga. Code Ann. § 35-1-8(a)(2), (3) (Acquisition, collection, classification, and preservation of information assisting in identifying deceased persons and locating missing persons), every law enforcement agency has a duty to do the following:

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<sup>95</sup> See *supra* note 10.

(2) Acquire, collect, classify, and preserve immediately any information which would assist in the location of any missing person, including any minor, and provide confirmation as to any entry for such a person to the parent, legal guardian, or next of kin of that person and the agency shall acquire, collect, classify, and preserve such information from such parent, guardian, or next of kin;

(3) Exchange such records and information as provided [above] . . . with other law enforcement agencies of this state, any other state, or the United States. With respect to missing minors, such information shall be transmitted immediately to other law enforcement agencies.

Additionally, pursuant to Ga. Code Ann. § 35-3-84 (Sending information to center), law enforcement must send the information acquired through Ga. Code Ann. § 35-1-8 or Ga. Code Ann. § 35-3-4 to the Missing Children Information Center.

Similarly, once a parent or guardian files a police report of a missing child, “[T]he local law enforcement agency receiving such report shall notify all of its on-duty law enforcement officers of the existence of the missing child report, communicate the report to all other law enforcement agencies having jurisdiction in the county and all law enforcement agencies of jurisdictions geographically adjoining that of the local law enforcement agency, and transmit the report to the Missing Children Information Center.” Ga. Code Ann. § 35-3-83.

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