

PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

2015 ANALYSIS AND RECOMMENDATIONS ARKANSAS

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 sex 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 Analysis¹:

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a sex 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.*

The Arkansas Human Trafficking Act of 2013, codified as Arkansas Code Ann. § 5-18-101 – § 5-18-105 prohibits domestic minor sex trafficking and does not require proof of force, fraud, or coercion if the victim is a minor. Under Ark. Code Ann. § 5-18-103(a)² a person commits the offense of trafficking of persons if he or she knowingly:

- (1) Recruits, harbors, transports, or obtains, entices, solicits, isolates, provides, or maintains a person knowing that the person will be subjected to involuntary servitude;
- (2) Benefits financially or benefits by receiving anything of value from participation in a venture under (a)(1) of this section;
- (3) Subjects a person to involuntary servitude;

¹ This report includes legislation enacted as of August 1, 2015.

² The text of Ark. Code Ann. § 5-18-103(a) included here and elsewhere in this report includes amendments made by the passage of House Bill 1530 during the regular session of the 90th Arkansas General Assembly 2015. (effective July 1, 2015).

- (4) Recruits, entices, solicits, isolates, harbors, transports, provides, maintains, or obtains a minor for commercial sexual activity; or
- (5) Sells or offers to sell travel services that he or she knows includes an activity prohibited under subdivision (a)(1) – (4) of this section.

A separate offense under Ark. Code Ann. § 5-18-104 (Patronizing a victim of human trafficking) covers the purchase of commercial sexual activity. It is a Class B felony to engage in commercial sexual activities if the defendant knows the person performing the sexual activities is a victim of human trafficking. If the victim is a minor at the time of the offense, then the charge is upgraded to a Class A felony. A Class A felony conviction is punishable by 6 to 30 years of imprisonment. Ark. Code Ann. § 5-4-401.

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

The following laws criminalize CSEC in Arkansas:

1. Ark. Code Ann. § 5-70-104(a)(2), (b) (Promoting prostitution in the first degree) creates a Class D felony if a person “knowingly . . . (2) Advances prostitution or profits from prostitution of a person less than eighteen (18) years of age.” This crime is punishable by imprisonment up to 6 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-4-201(a)(2), 5-4-401(a)(5).
2. Ark. Code Ann. § 5-27-303(a) (Engaging children in sexually explicit conduct for use in visual or print medium) states when “any person eighteen (18) years of age or older who employs, uses, persuades, induces, entices, or coerces any child³ to engage in or who has a child assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual or print medium depicting the sexually explicit conduct is guilty” of a felony. A first offense is a Class B felony punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-303(a)(1), 5-4-401(a)(3), 5-4-201(a)(1). Subsequent offenses are Class A felonies punishable by imprisonment for 6–30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-303(a)(2), 5-4-401(a)(2), 5-4-201(a)(1).
3. Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct) states,
 - (a) A person commits the offense of transportation of a minor for prohibited sexual conduct if the person transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of any minor, and the actor:
 - (1) Knows or has reason to know that prostitution or sexually explicit conduct involving the minor will be commercially exploited by any person; and
 - (2) Acts with the purpose that the minor will engage in:
 - (A) Prostitution; or
 - (B) Sexually explicit conduct.

This crime is a Class A felony punishable by imprisonment for 6–30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-305(b), 5-4-401(a)(2), 5-4-201(a)(1).

4. Under Ark. Code Ann. § 5-27-402(a) (Employing or consenting to the use of a child in a sexual performance), “It is unlawful for a person, knowing the character and content of the performance, to

³ “Child” is defined for purposes of subchapter 3 (Arkansas Protection of Children Against Exploitation Act of 1979) as “any person under eighteen (18) years of age.” Ark. Code Ann §5-27-302(1).

employ, authorize, or induce a child under eighteen (18) years of age to engage in a sexual performance.”⁴ A first offense is a Class C felony punishable by imprisonment for 3–10 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-27-402(c)(1), 5-4-401(a)(4), 5-4-201(a)(2). Second and subsequent offenses are Class B felonies punishable by imprisonment for 5-20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-402(c)(2), 5-4-401(a)(3), 5-4-201(a)(1).

5. Ark. Code Ann. § 5-27-403(a) (Producing, directing, or promoting a sexual performance by a child) makes it a crime for a person “knowing the character and content of the material, to produce, direct, or promote a performance that includes sexual conduct by a child under eighteen (18) years of age.” This crime is a Class B felony punishable by imprisonment for 5-20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-403(b), 5-4-401(a)(3), 5-4-201(a)(1).
6. Ark. Code Ann. § 5-27-307 (Sexually grooming a child) states that “A person commits sexually grooming a child if he or she knowingly disseminates to a child thirteen (13) years of age or younger with or without consideration a visual or print medium depicting sexually explicit conduct with the purpose to entice, induce, or groom the child thirteen (13) years of age or younger to engage in the following with a person: (1) Sexual intercourse; (2) Sexually explicit conduct; or (3) Deviate sexual activity.” This crime is a Class A misdemeanor if the actor is younger than 21 years of age, which may be punishable by imprisonment not to exceed 1 year and a possible fine not to exceed \$2,500. Ark. Code Ann. §§ 5-27-307(c)(2), 5-4-401(b)(1), 5-4-201(b)(1).

Additionally, although not expressly commercial, the following offenses could apply to cases of domestic minor sex trafficking:

1. Ark. Code Ann. § 5-27-306(a)(1), (2) (Internet stalking of a child) makes it a crime for a person over the age of 21 to knowingly use the Internet to do the following:
 - (1) Seduce, solicit, lure, or entice a child fifteen (15) years of age or younger [or, for purposes of subsection (2), an individual believed to be 15 or younger] in an effort to arrange a meeting with the child for the purpose of engaging in:
 - (A) Sexual intercourse;
 - (B) Sexually explicit conduct; or
 - (C) Deviate sexual activity;

....

If the individual merely “attempts to arrange a meeting” with a real child or a person believed to be a child, this crime is a Class B felony punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(1), (2), 5-4-401(a)(3), 5-4-201(a)(1). If the meeting with the child actually occurs, even if the sexual activity does not occur, the crime is a Class A felony punishable by imprisonment for 6–30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(3), 5-4-401(a)(2), 5-4-201(a)(1) .

2. Ark. Code Ann. § 5-27-306(a)(3), (4) (Internet stalking of a child) makes it a crime for a person over the age of 21 to knowingly use the Internet to do the following:

⁴ “Performance” is defined for purposes of subchapter 4 (Use of children in sexual performance) as “any play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation or a part of a play, dance, act, drama, piece, interlude, pantomime, show, scene, or other three-dimensional presentation, whether: (A) Performed live or photographed; (B) Filmed; (C) Videotaped; or (D) Visually depicted by any other photographic, cinematic, magnetic, or electronic means.” Ark. Code Ann. § 5-27-401(1). “Sexual performance” is defined for purposes of subchapter 4 (Use of children in sexual performance) as “any performance or part of a performance that includes sexual conduct by a child under eighteen (18) years of age.” Ark. Code Ann. § 5-27-401(5).

(3) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, electronic mail address, residence address, picture, physical description, characteristics, or any other identifying information on a child fifteen (15) years of age or younger [or, for purposes of subsection (4), on an individual that the person believes to be 15 or younger] in furtherance of an effort to arrange a meeting with the child for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity;

....

If the individual merely “attempts to arrange a meeting,” with either a real child or a person believed to be a child this crime is a Class B felony punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(1), (2), 5-4-401(a)(3), 5-4-201(a)(1). If the meeting with the child actually occurs, even if the sexual activity does not occur, the crime is a Class A felony punishable by imprisonment for 6-30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(3), 5-4-401(a)(2), 5-4-201(a)(1) .

3. Ark. Code Ann. § 5-27-603(a) (Computer child pornography) establishes a crime when a person knowingly “(1) Compiles, enters into, or transmits by means of computer, makes, prints, publishes, or reproduces by other computerized means, knowingly causes or allows to be entered into or transmitted by means of computer or 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 purposes of facilitating, encouraging, offering, or soliciting sexually explicit conduct of or with any child or another individual believed by the person to be a child, or the visual depiction of the conduct; or (2) Utilizes a computer online service, internet service, or local bulletin board service to seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another individual believed by the person to be a child, to engage in sexually explicit conduct.” This crime is a Class B felony punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-603(b), 5-4-401(a)(3), 5-4-201(a)(1).
4. Ark. Code Ann. § 5-27-605(a)(1) (Computer exploitation of a child) establishes the crime of computer exploitation in the first degree when a person “(A) Causes or permits a child to engage in sexually explicit conduct; and (B) Knows, has reason to know, or intends that the prohibited conduct may be: (i) Photographed; (ii) Filmed; (iii) Reproduced; (iv) Reconstructed in any manner, including on the internet; or (v) Part of an exhibition or performance.” A first offense of this crime is a Class B felony punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-605(a)(2)(A), 5-4-401(a)(3), 5-4-201(a)(1). Subsequent offenses are Class A felonies punishable by imprisonment for 6-30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-605(a)(2)(B), 5-4-401(a)(2), 5-4-201(a)(1).
5. Ark. Code Ann. § 5-27-605(b)(1) (Computer exploitation of a child) establishes the crime of second degree computer exploitation of a child if the individual does either of the following: “(A) Photographs or films a child engaged in sexually explicit conduct; or (B) Uses any device, including a computer, to reproduce or reconstruct the image of a child engaged in sexually explicit conduct.” This crime is a Class C felony punishable by imprisonment for 3–10 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-27-605(b)(2), 5-4-401(a)(4), 5-4-201(a)(2).
6. Ark. Code Ann. § 5-14-103(a)(3)(A) (Rape) establishes a crime when a person “engages in sexual intercourse or deviate sexual activity with another person . . . [w]ho is less than fourteen (14) years of age.”

However, subsection (3)(B) creates an affirmative defense to this provision if “the actor was not more than three (3) years older than the victim.” Rape is a Class Y felony punishable by imprisonment for 25–40 years or a life sentence. Ark. Code Ann. §§ 5-14-103(c), 5-4-401(a)(1).

7. Ark. Code Ann. § 5-14-125(a)(3)(A) (Sexual assault in the second degree) establishes a crime when a person over 18 “engages in sexual contact with another person who is: (A) Less than fourteen (14) years of age.” This crime is a Class B felony punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-14-125(b)(1), 5-4-401(a)(3), 5-4-201(a)(1).
8. Ark. Code Ann. § 5-14-127(a)(1)(A) (Sexual assault in the fourth degree) establishes a crime if a person 20 or older “[e]ngages in sexual intercourse or deviate sexual activity with another person who is: (i) Less than sixteen (16) years of age; and (ii) Not the person’s spouse.” For a violation of this subsection, a person is guilty of a Class D felony punishable by imprisonment not to exceed 6 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-14-127(b)(1), 5-4-401(a)(5), 5-4-201(a)(2). The statute also makes it a crime when a person “[e]ngages in sexual contact with another person who is: (i) Less than sixteen (16) years of age; and (ii) Not the person’s spouse.” Ark. Code Ann. § 5-14-127(a)(1)(B). This crime is a Class A misdemeanor, which may be punishable by imprisonment not to exceed 1 year and a possible fine not to exceed \$2,500. Ark. Code Ann. §§ 5-14-127(b)(2), 5-4-401(b)(1), 5-4-201(b)(1).
9. A violation of Ark. Code Ann. § 5-14-110(a)(1) (Sexual indecency with a child) occurs if
 - (1) Being eighteen (18) years of age or older, the person solicits⁵ another person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age to engage in:
 - (A) Sexual intercourse;
 - (B) Deviate sexual activity; or
 - (C) Sexual contact.

The crime is a Class D felony punishable by imprisonment not to exceed 6 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-14-110(b), 5-4-401(a)(5), 5-4-201(a)(2).

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

Ark. Code Ann. § 5-70-102(a) (Prostitution) refers to the human trafficking statute to establish an affirmative defense to the charge of prostitution for victims of human trafficking under Ark. Code Ann. § 5-18-103. Ark. Code Ann. § 5-70-102(c). Ark. Code Ann. 5-18-102(15) (Definitions) defines a victim of human trafficking as a person who has been subjected to trafficking of persons. Additionally, Ark. Code Ann. § 5-70-103 (Sexual solicitation) states establishes an affirmative defense to prosecution if a trafficking victim “solicits or requests a person to engage in sexual activity with him or her in return for a fee.” Ark. Code Ann. § 5-70-103(c).

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.

Ark. Code Ann. § 5-74-104 (Engaging in a continuing criminal gang, organization, or enterprise) states,

⁵In *Heape v. State*, the court “h[e]ld that the evidence was sufficient to show that appellant, by offering the girl money in exchange for sex, solicited her to engage in sexual intercourse, deviate sexual activity, or sexual contact.” *Heape v. State*, 192 S.W.3d 281, 286 (Ark. Ct. App. 2004).

- (a)
 - (1) A person commits the offense of engaging in a continuing criminal gang, organization, or enterprise in the first degree if he or she:
 - (A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and
 - (B) That offense is part of a continuing series of two (2) or more predicate criminal offenses that are undertaken by that person in concert with two (2) or more other persons with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management.
 - (2) A person who engages in a continuing criminal gang, organization, or enterprise in the first degree is guilty of a felony two (2) classifications higher than the classification of the highest underlying predicate offense referenced in subdivision (a)(1)(A) of this section.
- (b)
 - (1) A person commits the offense of engaging in a continuing criminal gang, organization, or enterprise in the second degree if he or she:
 - (A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and
 - (B) That offense is part of a continuing series of two (2) or more predicate criminal offenses that are undertaken by that person in concert with two (2) or more other persons, but with respect to whom that person does not occupy the position of organizer, a supervisory position, or any other position of management.
 - (2) A person who engages in a continuing criminal gang, organization, or enterprise in the second degree is guilty of a felony one (1) classification higher than the classification of the highest underlying predicate offense referenced in subdivision (b)(1)(A) of this section.
- (c) A person who engages in a continuing criminal gang, organization, or enterprise when the underlying predicate offense is a Class A felony or a Class Y felony is guilty of a Class Y felony.
- (d) Any sentence of imprisonment imposed pursuant to this section is in addition to any sentence imposed for the violation of a predicate criminal offense.

Under Ark. Stat. Ann. 5-74-103(4) “Predicate criminal offense” means any violation of Arkansas law that is a crime of violence or a crime of pecuniary gain.

Legal Components:

- 2.1 *The state sex trafficking law can be applied to the buyers of commercial sex acts with a victim of domestic minor sex trafficking.*
- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under 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 or other electronic communication 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 the buyers of sex with a victim of domestic minor sex trafficking.*

Arkansas law applies to buyers directly under Ark. Code Ann. § 5-18-104 (Patronizing a victim of human trafficking). A person patronizes a victim of human trafficking if he or she “knowingly engages in commercial sexual activity with another person knowing that the other person is a victim of human trafficking.” Ark. Code Ann. §5-18-104(a). To be convicted under this provision, the government must prove that the buyer knew the person patronized was a victim of human trafficking.

However, the primary trafficking law, Ark Code Ann. § 5-18-103(a)(4) (Trafficking of persons) also applies to buyers following federal precedent⁶ through the term “obtains.” It states, “A person commits the offense of

⁶ See *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013). In this case, the Eighth Circuit held that the federal sex trafficking law, 18 U.S.C. § 1591 (Sex trafficking of children or by force, fraud, or coercion) applies to buyers of sex with minors. Reversing 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)), the Eighth Circuit concluded that 18 U.S.C. § 1591 does not contain “a latent exemption for purchasers” because buyers can “engage in at least some of the prohibited conduct.” *Jungers*, 702 F. 3d 1066, 1072. Congress codified *Jungers* clarifying that the federal sex trafficking law is intended to apply to buyers in the Justice for Victims of Trafficking Act (JVTA) of 2015 Pub. L. No. 114-22, 129 Stat 227), enacted on May 29, 2015. The JVTA adds the terms “patronize” and “solicit” to the list of prohibited conduct and expressly states, “section 108 of this title amends section 1591 of title 18, United States Code, to add the words ‘solicits or patronizes’ to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.” *Id.* at Sec. 109. The Eighth Circuit decision in *United States v. Jungers* and the federal sex trafficking law as amended by the Justice for Victims of Trafficking Act establish persuasive authority when state courts interpret the string of verbs constituting prohibited conduct in state sex

trafficking of persons if he or she knowingly ...Recruits, entices, solicits, isolates, harbors, transports, provides, maintains, or obtains a minor for commercial sexual activity.”

Ark Code Ann. § 5-18-103(a) (Trafficking of persons) is a Class Y felony when the victim was a minor at the time of the offense. Ark. Code Ann. 5-18-103(c). A Class Y felony is punishable by 10–40 years, or life. Ark. Code Ann. §§ 5-4-401, 5-4-201(a)(1). Additionally, violators of this statute must pay \$250.00 to be deposited in the Safe Harbor Fund for Sexually Exploited Children. Ark. Code Ann. § 5-18-103(d). Patronizing a victim of human trafficking under Ark. Code Ann. § 5-18-104 is a Class A felony, punishable by 6–30 years in prison and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-18-104(b)(2), 5-4-401(2), 5-4-201(a)(1).

2.1.1 Recommendation: Amend Ark Code Ann. § 5-18-103(a)(4) (Trafficking of persons) to clarify that buyer conduct is included as a violation of Ark Code Ann. § 5-18-103(a)(4) (Trafficking of persons).⁷

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

A buyer of commercial sex acts with a minor may be found in violation of Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct) under certain circumstances. Ark. Code Ann. § 5-27-305(a) states,

- (a) A person commits the offense of transportation of a minor for prohibited sexual conduct if the person transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of any minor, and the actor:
- (1) Knows or has reason to know that prostitution or sexually explicit conduct involving the minor will be commercially exploited by any person; and
 - (2) Acts with the purpose that the minor will engage in:
 - (A) Prostitution; or
 - (B) Sexually explicit conduct.

This crime is a Class A felony punishable by imprisonment for 6–30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-305(b), 5-4-401(a)(2), 5-4-201(a)(1).

However, if not identified as a child sex trafficking or CSEC case, a buyer of sex with a minor 15–18 may be charged with Ark. Code Ann. § 5-70-103 (Sexual solicitation), the same statute that applies for solicitation of adults. Under this statute a buyer of commercial sex is guilty of a crime when “he or she: (1) Offers to pay a fee to a person to engage in sexual activity with him or her or another person; or (2) Solicits or requests a person to engage in sexual activity with him or her in return for a fee.” Ark. Code Ann. § 5-70-103(a). For the first offense, this crime is only a Class B misdemeanor, and second and subsequent offenses are Class A misdemeanors. Ark. Code Ann. § 5-70-103(b).

trafficking laws (in particular the term “obtains”) to the extent such interpretation does not conflict with state case law.

⁷ See generally SHARED HOPE INTERNATIONAL, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf (discussing need to include buyer conduct in core sex trafficking offense regardless of whether victim is under control of a third party and explaining negative impact on victims and victim-identification when buyers are excluded as sex trafficking offenders).

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

Arkansas's solicitation for prostitution law does not directly distinguish the purchase of commercial sex acts with children from those with adults. Ark. Code Ann. § 5-70-103(a) (Sexual solicitation) states, "A person commits the offense of sexual solicitation if he or she: (1) Offers or agrees to pay a fee to a person to engage in sexual activity with him or her or another person; or (2) Solicits or requests a person to engage in sexual activity with him or her in return for a fee." A first offense is a Class B misdemeanor, and a second or subsequent offense is a Class A misdemeanor. Ark. Code Ann. § 5-70-103(b).

2.3.1 Recommendation: Amend Ark. Code Ann. § 5-70-103(a) (Sexual solicitation) to distinguish between soliciting a minor versus an adult for commercial sex and provide a heightened penalty that aligns with penalties under Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct).

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

Buyers who violate Ark. Code Ann. § 5-18-103(a)(4) (Trafficking of persons) will be guilty of a Class Y felony punishable by imprisonment for 10–44 years or life and a mandatory fine of \$250 dollars paid to the Safe Harbor Fund for Sexually Exploited Children. Ark. Code Ann. §§ 5-18-1032(c)(2), (d), 5-4-201(a)(1), 5-18-103. Additionally, pursuant to Ark. Code Ann. § 16-93-618 (Parole) a person who was found guilty, or pled guilty, to "trafficking persons a Class Y felony, § 5-18-103" may not be eligible for parole or community correction transfer until the guilty party has served 70 percent of their sentence.

A buyer convicted under Ark. Code Ann. § 5-18-104 (Patronizing a victim of human trafficking) faces a Class A felony punishable by 6–30 years imprisonment and a possible fine not to exceed \$ 15,000. Ark. Code Ann. §§ 5-4-401, 5-4-201(a)(1).

If convicted under Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct) a buyer will be guilty of a Class A felony punishable by imprisonment for 6–30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-305(b), 5-4-401(a)(2), 5-4-201(a)(1).

When the minor is under 15 and the buyer is convicted of violating Ark. Code Ann. § 5-14-110(a)(1) (Sexual indecency with a child), the crime is a Class D felony punishable by imprisonment not to exceed 6 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-14-110(b), 5-4-401(a)(5), 5-4-201(a)(2).

If convicted of violating either Ark. Code Ann. § 5-27-209(a) (Contributing to the delinquency of a minor) or Ark. Code Ann. § 5-27-220 (Contributing to the delinquency of a juvenile), the buyer is subject to a Class A misdemeanor, which may be punishable by imprisonment up to 1 year and a possible fine not to exceed \$2,500. Ark. Code Ann. §§ 5-27-209(b), 5-27-220(d)(1), 5-4-201(b)(1), 5-4-401(b)(1).

Under Ark. Code Ann. § 5-70-103 (Sexual solicitation), a first time offense is a Class B misdemeanor regardless of the prostituted person's age. Ark. Code Ann. § 5-70-103(b)(1)., A Class B misdemeanor may be punished by imprisonment up to 90 days and a possible fine not to exceed \$1,000. Ark. Code Ann. § 5-4-401(b)(2), 5-4-201(b)(2). A second or subsequent offense is a Class A misdemeanor, which may be punished by imprisonment up to 1 year and a possible fine not to exceed \$2,500. Ark. Code Ann. §§ 5-70-103(b)(2), 5-4-201(b)(1), 5-4-401(b)(1). Additionally anyone convicted will have to pay a fine of 250 dollars to the Safe Harbor Fund for Sexually Exploited Children. Ark. Code Ann. § 5-70-103(d).

Sexual offenses that are not specific to commercial sexual exploitation but may be used to prosecute a buyer are felonies. Under Ark. Code Ann. § 5-27-306(a) (Internet stalking of a child), if a buyer over 21 attempts to

arrange a meeting with a child under 15 for sexual purposes and the meeting never occurs, the buyer is guilty of a Class B felony. Ark. Code Ann. § 5-27-306(b)(1). As a Class B felony this crime is punishable by imprisonment for 5-20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-4-401(a)(3), 5-4-201(a)(1). If the meeting actually occurs, regardless of whether actual sexual intercourse, sexually explicit conduct, or deviate sexual activity occurs, the person is guilty of a Class A felony punishable by imprisonment for 6-30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(3), 5-4-401(a)(2), 5-4-201(a)(1).

When the victim is less than fourteen (14), the buyer could be charged with a Class Y felony under Ark. Code Ann. § 5-14-103 (Rape), punishable by imprisonment for 25–40 years or a life sentence. Ark. Code Ann. §§ 5-14-103(c), 5-4-401(a)(1).

If the buyer is over 18 and charged with a Class B felony under Ark. Code Ann. § 5-14-125 (Sexual assault in the second degree), the buyer is subject to imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-14-125(a)(3)(A), (b)(1), 5-4-401(a)(3), 5-4-201(a)(1). If the buyer is 20 or older and charged with the Class D felony of Ark. Code Ann. § 5-14-127 (Sexual assault in the fourth degree), the buyer is subject to imprisonment not to exceed 6 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-14-127(a)(1)(A), (b)(1), 5-4-401(a)(5), 5-4-201(a)(2).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense⁸ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,⁹ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.¹⁰

2.5 *Using the Internet or other electronic communication 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.*

Ark. Code Ann. § 5-27-306(a) (Internet stalking of a child) states in part,

⁸ Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

⁹ 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).

¹⁰ 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).

A person commits the offense of internet stalking of a child if the person being twenty-one (21) years of age or older knowingly uses a computer online service, internet service, or local internet bulletin board service to:

(1) Seduce, solicit, lure, or entice a child fifteen (15) years of age or younger in an effort to arrange a meeting with the child for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity;

...

(3) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, electronic mail address, residence address, picture, physical description, characteristics, or any other identifying information on a child fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the child for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity;

....

If the individual “attempts to arrange a meeting,” the buyer is guilty of a Class B felony punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(1), (2), 5-4-401(a)(3), 5-4-201(a)(1). If the meeting with the child actually occurs, even if the sexual activity does not occur, the person is guilty of a Class A felony punishable by imprisonment for 6-30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(3), 5-4-401(a)(2), 5-4-201(a)(1).

It is also possible that a buyer could be prosecuted under Ark. Code Ann. § 5-27-603 (Computer child pornography), which states that it is a Class B felony for a person to “[u]tilize[] a computer online service, internet service, or local bulletin board service to seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another individual believed by the person to be a child, to engage in sexually explicit conduct.” Ark. Code Ann. § 5-27-603(a)(2), (b). For the purpose of this statute, a child is defined as “any person under seventeen (17) years of age.” Ark. Code Ann. § 5-27-601(1).

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

Ark. Code Ann. § 5-18-103 (Trafficking of persons) expressly prohibits a mistake of age defense. Ark. Code Ann. § 5-18-103(b)(1–2) states, “It is not a defense to prosecution under subdivision (a)(4) of this section that the actor . . . [d]id not have knowledge of a victim's age; or . . . [m]istakenly believed a victim was not a minor.” However, Ark. Code Ann. § 5-18-104 (Patronizing a victim of human trafficking) does not prohibit a defendant from asserting a defense based on mistake of age and expressly requires that a defendant know that the person from whom sexual acts are purchased is a victim of human trafficking.

Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct) also does not prohibit a buyer from asserting a mistake of age defense.

Ark. Code Ann. § 5-27-602(c) (Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child) states, “It is an affirmative defense to a prosecution under this section that the defendant in good faith reasonably believed that the person depicted in the matter was seventeen (17) years of age or older.” In addition, traffickers (and potentially facilitators) who commit subchapter 4 (Use of Children in Sexual Performances) offenses can assert an affirmative defense pursuant to Ark. Code Ann. § 5-27-404 (Good faith defense) “that the defendant in good faith reasonably believed that the person who engaged in the sexual conduct was eighteen (18) years of age or older.”

Similarly, there are no specific provisions prohibiting a defendant charged under Ark. Code Ann. § 5-27-209 (Contributing to the delinquency of a minor) and Ark. Code Ann. § 5-27-220 (Contributing to the delinquency of a juvenile) from using the age mistake defense for buying commercial sex with a minor. In general, a mistake of fact defense is only allowed if “the actor engaged in the conduct charged to constitute the offense under a mistaken belief of fact if: (1) The statute defining the offense or a statute relating to the offense expressly provides that a mistaken belief of fact constitutes a defense; or (2) Mistaken belief of fact establishes a defense of justification provided by § 5-2-601 et seq. [provisions unrelated to CSEC or sexual offenses against children].” Ark. Code Ann. § 5-2-206(a).¹¹

2.6.1 Recommendation: Amend Ark. Code Ann. § 5-27-602(c) (Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child) and § 5-27-404 (Good faith defense) to repeal the affirmative defenses provided under those provisions.

2.6.2 Recommendation: Amend Ark. Code Ann. § 5-18-104 (Patronizing a victim of human trafficking) § 5-27-305(a) (Transportation of minors for prohibited sexual conduct) to prohibit a mistake of age defense in trafficking and CSEC prosecutions.

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

Both Ark. Code Ann. § 5-18-103 (Trafficking of persons) and § 5-18-104 (Patronizing a victim of human trafficking) provide substantial base penalties for all offenses against a minor under 18. Ark. Code Ann. § 5-18-103 (Trafficking of persons) is a Class Y felony punishable by imprisonment for 10–40 years and a mandatory fine of \$250 paid to the Safe Harbor Fund for Sexually Exploited Children. Ark. Code Ann. §§ 5-18-103(c), 5-4-401(a)(2). Ark. Code Ann. § 5-18-104 (Patronizing a victim of human trafficking) is a Class A felony punishable by 6–30 years imprisonment and a possible fine not to exceed \$ 15,000. Ark. Code Ann. §§ 5-4-401, 5-4-201(a)(1).

Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct) likewise does not stagger penalties based on the age of the minor victim.

In contrast, a buyer of sex acts with a minor age 15–18 faces only a Class A misdemeanor under Ark. Code Ann. § 5-27-220 (Contributing to the delinquency of a juvenile) or Ark. Code Ann. § 5-27-209 (Contributing to the delinquency of a minor). Ark. Code Ann. §§ 5-27-220(d)(1), 5-27-209(b), 5-25-101(4). A Class A misdemeanor is punishable by imprisonment up to 1 year and a possible fine not to exceed \$2,500. Ark. Code Ann. §§ 5-4-201(b)(1), 5-4-401(b)(1).

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

Fines for trafficking and CSEC crimes range greatly. While convictions under Ark. Ann. Code § 5-18-103 (Trafficking of persons) do not carry a fine when the victim is a minor, anyone convicted of human trafficking must deposit \$250 into the Safe Harbor Fund for Sexually Exploited Children.¹² Additionally, buyers convicted

¹¹ Ark. Code Ann. § 5-2-206(e) (Ignorance or mistake) states, “A mistake of law other than as to the existence or meaning of the statute under which the defendant is prosecuted is relevant to disprove the specific culpable mental state required by the statute under which the defendant is prosecuted.”

¹² Pursuant to Ark. Code Ann. § 16-92-119 (Training regarding fines dedicated for the Safe Harbor Fund for Sexually Exploited Children),

(a) The Administrative Office of the Courts shall educate judges regarding the fines dedicated for the Safe Harbor Fund for Sexually Exploited Children under §§ 5-18-103(d), 5-70-102(d), and 5-70-103(d).

under Ark. Code Ann. 5-18-104 (Patronizing a victim of human trafficking) face a fine of up to \$15,000. If convicted of violating Ark. Code Ann. § 5-14-110(a)(1) (Sexual indecency with a child), a fine not to exceed \$10,000 may be assessed for this Class D felony. Ark. Code Ann. §§ 5-14-110(b), 5-4-201(a)(2). If convicted of violating either Ark. Code Ann. § 5-27-209(a) (Contributing to the delinquency of a minor) or Ark. Code Ann. § 5-27-220(a) (Contributing to the delinquency of a juvenile), the buyer is subject to a Class A misdemeanor, which may be punishable by a fine not to exceed \$2,500. Ark. Code Ann. §§ 5-27-209(b), 5-27-220(d)(1), 5-4-201(b)(1). A first offense under Ark. Code Ann. § 5-70-103 (Sexual solicitation) is a Class B misdemeanor subject to a possible fine not to exceed \$1,000, and a second offense is a Class A misdemeanor with a possible fine not to exceed \$2,500. Ark. Code Ann. §§ 5-70-103(b), 5-4-201(b). Those convicted will also be ordered to pay a \$250.00 fine “deposited into the Safe Harbor Fund for Sexually Exploited Children.” Ark. Code Ann. § 5-70-103(d). Additionally, if a person is convicted of “offering to pay, agreeing to pay, or paying a fee to engage in sexual activity” they will be ordered to pay a fine of 250 dollars deposited into the Safe Harbor Fund for Sexually Exploited Children. Ark. Code Ann. § 5-70-102.

If convicted of Ark. Code Ann. § 5-27-306(a) (Internet stalking of a child), potentially applicable to CSEC crimes, even if the meeting never occurs, the buyer is still guilty of a Class B felony with a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(1), 5-4-201(a)(1). If the meeting does occur, the person is guilty of a Class A felony and subject to a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(3), 5-4-201(a)(1).

If the buyer is convicted of violating Ark. Code Ann. § 5-14-125(a)(3)(A) (Sexual assault in the second degree), the buyer is guilty of a Class B felony and is subject to a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-14-125(a)(3), (b)(1), 5-4-201(a)(1). Ark. Code Ann. § 5-14-127(a)(1)(A) (Sexual assault in the fourth degree) is a Class D felony with a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-14-127, (b)(1), 5-4-201(a)(2).

In addition to any other sentence, under Ark. Code Ann. § 5-4-703(a)¹³ (Additional fine – Offense committed against a child or in the presence of a child.), the court shall assess an additional fine of \$25.00 for the following offenses if the finder of fact determines that the offense was committed against a child or in the presence of a child:

- (8) § 5-14-110 (Sexual indecency with a child), § 5-14-112 (indecent exposure)...
- (9) § 5-18-103 (Trafficking of persons), § 5-18-104 (patronizing a victim of human trafficking);
-
- (12) § 5-27-303 (Engaging in sexually explicit conduct for use in visual or print medium), § 5-27-304 (Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child), § 5-27-305 (Transportation of minors for prohibited sexual conduct), § 5-27-306 (Internet stalking of a child), § 5-27-307 (Sexually grooming a child);
- (13) § 5-27-402 (Employing or consenting to the use of a child in a sexual performance), or § 5-27-403 (producing, directing, or promoting a sexual performance by a child);

(b) The Prosecutor Coordinator’s office shall educate prosecutors regarding the fines dedicated for the fund under §§ 5-18-103(d), 5-70-102(d), and 5-70-103(d).

(c) The Arkansas Circuit Clerks Association and the Arkansas District Court Clerks Association shall educate circuit and district court clerks regarding the fines dedicated for the fund under §§ 5-18-103(d), 5-70-102(d), and 5-70-103(d).

The text of Ark. Code Ann. § 16-92-119 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 1012 during the regular session of the 90th Arkansas General Assembly 2015. (effective July 1, 2015).

¹³ The text of Ark. Code Ann. § 5-4-703 included here and elsewhere in this report includes amendments made by the passage of Senate Bill 867 during the regular session of the 90th Arkansas General Assembly 2015. (effective July 1, 2015).

(14) Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child, § 5-27-602, computer child pornography, § 5-27-603, failure to report child pornography, § 5-27-604, or computer exploitation of a child, § 5-27-605;

....

A buyer could also be required to pay restitution to the victim under Ark. Code Ann. § 5-4-205(a)(1) (Restitution), which states that “[a] defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution.” The restitution is based on the “actual economic loss caused to a victim by the offense” and if bodily injury has occurred, the restitution order may require the defendant to, among other things, “[p]ay the cost of a necessary medical or related professional service or device relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing; . . . [p]ay the cost of necessary physical and occupational therapy and rehabilitation; [and] . . . [r]eimburse the victim for income lost by the victim as a result of the offense,” with a maximum income reimbursement of \$50,000. Ark. Code Ann. § 5-4-205(b)(1), (2).

Buyers also face vehicle asset forfeiture pursuant to Ark. Code Ann. § 5-5-201(a)(5) (Forfeiture, criminal conveyances) which requires anyone convicted under Ark. Code Ann. § 5-18-103 (Trafficking of persons) to forfeit “any conveyance, including an aircraft, motor vehicle, or vessel” if it is used “in the commission or attempt” of the crime. Additionally any conveyance “may be seized by any law enforcement agent upon process issued by any court having jurisdiction” when there is probable cause indicating that the conveyance was “used in the commission or attempt” of trafficking of persons, § 5-18-103. Ark. Code Ann. § 5-5-202.

Additionally, under Ark. Code Ann. § 5-5-101(a) (Disposition of contraband and seized property), “Any seized property shall be returned to the rightful owner or possessor of the seized property except contraband owned by a defendant.” Pursuant to Ark. Code Ann. § 5-5-101(b)(1) contraband is defined as including the following:

- (A) Article possessed under a circumstance prohibited by law;
- (B) Weapon or other instrument used in the commission or attempted commission of a felony;
- (C) Visual, print, or electronic medium that depicts sexually explicit conduct involving a child prohibited under § 5-27-304;
- (D) Visual, print, or electronic medium that contains a sexual performance of a child prohibited under § 5-27-403;
- (E) Item the possession of which is prohibited by § 5-27-602 [Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child];
- (F) Item the production of which is prohibited by § 5-27-603 [Computer child pornography];
- (G) Item the production of which is prohibited by § 5-27-605 [Computer exploitation of a child]; or
- (H) Other article designated “contraband” by law.

Contraband listed in Ark. Code Ann. § 5-5-101(b)(1)(C)-(H) shall be destroyed. Ark. Code Ann. § 5-5-101(c)(1). Other contraband may be retained for use by law enforcement or sold, the proceeds to be used to reimburse the rightful owner or to be “paid into the general fund of the county, city, or town whose law enforcement agency performed the seizure.” Ark. Code Ann. § 5-5-101(g).

Buyers are also subject to civil judgments. Under Ark. Code Ann. § 16-118-109 (Civil cause of action for victims of human trafficking), a prevailing plaintiff is entitled to attorney’s fees and costs and may be awarded actual, compensatory, or punitive damages, injunctive relief, and if the defendant’s acts were willful and malicious, the plaintiff may be awarded treble damages. Ark. Code Ann. § 16-118-109 (b)-(e).

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

Two Arkansas statutes establish crimes for buying and possessing child pornography in Arkansas.

Under Ark. Code Ann. § 5-27-304(a)(2) (Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child) it is illegal to “[k]nowingly solicit, receive, purchase, exchange, possess, view, distribute, or control any visual or print medium depicting a child participating or engaging in sexually explicit conduct.” A first violation of this section is a Class C felony punishable by imprisonment for 3–10 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-27-304(b)(1), 5-4-401(a)(4), 5-4-201(a)(2). Subsequent violations are Class B felonies punishable by imprisonment for 5-20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-304(b)(2), 5-4-401(a)(3), 5-4-201(a)(1).

Under Ark. Code Ann. § 5-27-602(a)(2) (Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child), it is illegal for someone to “knowingly: . . . (2) Possess[] or view[] through any means, including on the internet, any photograph, film, videotape, computer program or file, computer-generated image, video game, or any other reproduction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.” A first offense is a Class C felony punishable by imprisonment for 3-10 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-27-602(b)(1), 5-4-401(a)(4), 5-4-201(a)(2). Subsequent offenses are Class B felonies punishable by imprisonment for 5-20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-602(b)(2), 5-4-401(a)(3), 5-4-201(a)(1).

In comparison, a federal conviction for possession of child pornography¹⁴ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.¹⁵ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.¹⁶

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

¹⁵ 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).

¹⁶ 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).

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

Ark. Code Ann. § 12-12-905(a)(1) applies the registration requirements to, among others, “a person who: (1) Is adjudicated guilty on or after August 1, 1997, of a sex offense, aggravated sex offense, or sexually violent offense.” Ark. Code Ann. § 12-12-903(12)(A)(i)¹⁷ states,

“Sex offense” includes, but is not limited to:

(i) The following offenses:

(a) Rape, § 5-14-103;

(b) Sexual indecency with a child, § 5-14-110;

(c) Sexual assault in the first degree, § 5-14-124;

(d) Sexual assault in the second degree, § 5-14-125;

(e) Sexual assault in the third degree, § 5-14-126;

(f) Sexual assault in the fourth degree, § 5-14-127;

...

(k) Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child, § 5-27-304;

...

(w) Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child, § 5-27-602;

(x) Internet stalking of a child, § 5-27-306;

.....

(bb) Sexually grooming a child, § 5-27-307;

(cc) Trafficking of persons under § 5-18-103(a)(4); and

(dd) Patronizing a victim of human trafficking, § 5-18-104

However, Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct) and Ark. Code Ann. § 5-70-103 (Sexual solicitation) are not specifically enumerated as sex offenses. Ark. Code Ann. § 12-12-903(12)(A). Defendants convicted of crimes that are not enumerated may still be required to register as a sex offender because “[t]he sentencing court has the authority to order the registration of any offender shown in court to have attempted to commit or to have committed a sex offense even though the offense is not enumerated in subdivision (12)(A)(i) of this section” unless the state assembly “expresses its intent not to consider the offense to be a true sex offense for the purposes of this subchapter.” Ark. Code Ann. § 12-12-903(12)(B).

¹⁷ The text of Ark. Code Ann. § 12-12-903(12)(A)(i) included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 55 during the regular session of the 90th Arkansas General Assembly 2015 (effective July 1, 2015).

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 or other electronic communication 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.*¹⁸

“Trafficking of persons” is defined as a person who “recruits, entices, solicits, isolates, harbors, transports, provides, maintains, or obtains a minor for commercial sexual activity.” Ark. Code Ann. § 5-18-103(4). Commercial sexual activity is defined in Ark. Code Ann. § 5-18-102 (definitions) as a “sexual act or sexually explicit performance for which anything of value is given, promised, or received...” Ark. Code Ann. 5-18-102(1). When the victim is a minor, Ark. Code Ann. § 5-18-103 (Trafficking of persons) is a Class Y felony punishable by imprisonment for 10-40 years; life. Ark. Code Ann. §§ 5-18-103(c), 5-4-401(a)(2), 5-4-201(a)(1). Additionally 250 dollars will be paid and deposited to the Safe Harbor Fund for Sexually Exploited Children. Ark. Code Ann. § 5-18-103(d). Pursuant to Ark. Code Ann. § 16-93-618 (Parole) a person who was found guilty, or pled guilty, to “trafficking persons a Class Y felony, § 5-18-103” may not be eligible for parole or community correction transfer until the guilty party has served 70 percent of their sentence.

Additionally, a trafficker could be charged with violating Ark. Code Ann. § 5-70-104(a)(2) (Promoting prostitution in the first degree) “if he or she knowingly: . . . (2) Advances prostitution or profits from prostitution of a person less than eighteen (18) years of age.” As a Class D felony, this crime is punishable by imprisonment not to exceed 6 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-4-401(a)(5), 5-4-201(a)(2). Similarly, a trafficker could be charged with Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct). This crime is a Class A felony punishable by imprisonment for 6–30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-305(b), 5-4-401(a)(2), 5-4-201(a)(1). A first time conviction under Ark. Code Ann. § 5-27-402(a) (Employing or consenting to the use of a child in a sexual performance) is a Class C felony punishable by imprisonment for 3-10 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-27-402(c)(1), 5-4-401(a)(4), 5-4-201(a)(2). Subsequent offenses are Class B felonies punishable by imprisonment for 5-20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-402(c)(2), 5-4-401(a)(3), 5-4-201(a)(1).

Additional criminal statutes could be employed to prosecute traffickers. Under Ark. Code Ann. § 5-74-104 (Engaging in a continuing criminal gang, organization, or enterprise), a trafficker can be charged with engaging in a continuing criminal gang in the first degree if he “(A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and (B) That offense is part of a continuing series of two (2) or more predicate criminal offenses that are undertaken by that person in concert with two (2)

¹⁸ See discussion of relevant provisions *supra* Section 1.2.

or more other persons with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management.” Ark. Code Ann. § 5-74-104(a)(1). A “predicate criminal offense” that can be used to bring an action under this chapter includes a “crime of pecuniary gain,” which is defined as “any violation of Arkansas law that results, or was intended to result, in the defendant receiving income, benefit, property, money, or anything of value.” Ark. Code Ann. § 5-74-103(1), (4). If guilty of this crime as an organizer, the individual “is guilty of a felony two (2) classifications higher than the classification of the highest underlying predicate offense.” Ark. Code Ann. § 5-74-104(a)(2). If the underlying offense is Class A felony or Class Y felony, it becomes a Class Y felony. Ark. Code Ann. § 5-74-104(c). A person who is guilty of a violation of this crime but is not the organizer, is guilty in the second degree and the offense is classified only one degree higher than the predicate offense. Ark. Code Ann. § 5-74-104(b).

Additionally, a trafficker could be charged with Ark. Code Ann. § 5-74-203(a) (Soliciting or recruiting a minor to join or to remain a member of a criminal gang, organization, or enterprise). This crime occurs when a person “by intimidation or duress causes, aids, abets, encourages, solicits, or recruits a minor to become or to remain a member of any group that the person knows to be a criminal gang, organization, or enterprise that falls into the definition and intent” of the subchapter on “Recruiting Gang Members.” A “criminal gang, organization, or enterprise” is defined in Ark. Code Ann. § 5-74-202(3) as “any group of three (3) or more individuals who commit a continuing series of two (2) or more predicate criminal offenses that are undertaken in concert with each other.” A trafficker’s operation can be considered a criminal gang, organization, or enterprise because “predicate criminal offenses” include “crimes of pecuniary gain,” which are defined as “any violation of Arkansas law that results, or was intended to result, in the defendant’s receiving income, benefit, property, money, or anything of value.” Ark. Code Ann. § 5-74-202(1), (4). The crime is punishable as a Class B felony with imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-74-203(b), 5-4-401(a)(3), 5-4-201(a)(1).

A trafficker could also be charged with Ark. Code Ann. § 5-27-307 (Sexually grooming a child), which is a Class D felony punishable by imprisonment of no more than 6 years. Ark. Code Ann. 5-4-401. Under Ark. Code Ann. § 5-27-307 a person is guilty of sexually grooming a child when he “knowingly disseminates to a child thirteen (13) years of age or younger with or without consideration a visual or print medium depicting sexually explicit conduct” with the purpose of “enticing, inducing, or grooming the minor” to engage in sexual intercourse, sexually explicit conduct, or deviate sexual activity. Ark. Code Ann. § 5-27-307.

A trafficker could be charged with Ark. Code Ann. § 5-42-204 (Criminal use of property or laundering criminal proceeds), which creates a Class C felony punishable by imprisonment for 3–10 years and a possible fine not to exceed \$10,000 when a person “[u]ses or makes available for use any property in which he or she has any ownership or lawful possessory interest to facilitate a predicate criminal offense.” Ark. Code Ann. §§ 5-42-204(a)(2), (b), 5-4-401(a)(4), 5-4-201(a)(2). A “predicate criminal offense” is defined as “any violation of Arkansas law that is a crime of violence or a crime of pecuniary gain.” Ark. Code Ann. § 5-42-203(7). “Crime of violence is defined as “any violation of Arkansas law in which a person purposely or knowingly causes, or threatens to cause, death or physical injury to another person, specifically including rape,” and “crime of pecuniary gain” is defined as “any violation of Arkansas law that results, or was intended to result, in the defendant receiving income, benefit, property, money, or anything of value,” and thus includes crimes by which a trafficker intends to make a profit. Ark. Code Ann. § 5-42-203(3), (7).

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

§§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense¹⁹ against a minor.

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

A person is guilty of the violating Ark. Code Ann. § 5-27-303(a) (Engaging children in sexually explicit conduct for use in visual or print medium), a CSEC offense, if he is over the age of 18 and he “employs, uses, persuades, induces, entices, or coerces any child to engage in or who has a child assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual or print medium depicting sexually explicit conduct.” A first offense is a Class B felony punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-303(a)(1), 5-4-401(a)(3), 5-4-201(a)(1). Subsequent offenses are Class A felonies punishable by imprisonment for 6-30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-303(a)(2), 5-4-401(a)(2), 5-4-201(a)(1).

Other pornography crimes applicable to a trafficker include the following:

1. Ark. Code Ann. § 5-27-304(a)(2) (Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child) makes it illegal to “[w]ith knowledge of the character of the visual or print medium involved, . . . [k]nowingly solicit, receive, purchase, exchange, possess, view, distribute, or control any visual or print medium depicting a child participating or engaging in sexually explicit conduct.” A first violation of this section is a Class C felony punishable by imprisonment for 3-10 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-27-304(b)(1), 5-4-401(a)(4), 5-4-201(a)(2). Subsequent violations are Class B felonies punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-304(b)(2), 5-4-401(a)(3), 5-4-201(a)(1).
2. Under Ark. Code Ann. § 5-27-403(a) (Producing, directing, or promoting a sexual performance by a child) it is a crime for a person “knowing the character and content of the material, to produce, direct, or promote a performance that includes sexual conduct by a child under eighteen (18) years of age.” As a Class B felony this crime is punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-403(b), 5-4-401(a)(3), 5-4-201(a)(1).
3. Pursuant to Ark. Code Ann. § 5-27-602(a)(1) (Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child), a person is guilty of a Class C felony punishable by imprisonment for 3-10 years and a possible fine not to exceed \$10,000 for a first offense, when he “[r]eceives for the purpose of selling or knowingly sells, procures, manufactures, gives, provides, lends, trades, mails, delivers, transfers, publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers, or agrees to offer through any means, including the internet, any photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.” Ark. Code Ann. §§ 5-27-602(a)(1), (b)(1), 5-4-401(a)(4), 5-4-201(a)(2). Subsequent offenses are Class B felonies punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-602(b)(2), 5-4-401(a)(3), 5-4-201(a)(1).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense²⁰ against a minor. Additionally, a federal conviction for distribution of child pornography²¹ is generally

¹⁹ See *supra* note 8.

²⁰ See *supra* note 8.

punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.²² Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.²³

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

Ark. Code Ann. § 5-27-306(a) (Internet stalking of a child) makes it a crime if a person over 21 “knowingly uses a computer online service, internet service, or local internet bulletin board service to: . . . (3) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, electronic mail address, residence address, picture, physical description, characteristics, or any other identifying information on a child fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the child for the purpose of engaging in: (A) Sexual intercourse; (B) Sexually explicit conduct; or (C) Deviate sexual activity.” If the person merely “attempts to arrange a meeting,” this crime is a Class B felony punishable by imprisonment for 5-20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(1), 5-4-401(a)(3), 5-4-201(a)(1). If the meeting actually occurs, even if sexual activity does not occur, the person is guilty of a Class A felony punishable by imprisonment for 6–30 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-306(b)(3), 5-4-401(a)(2), 5-4-201(a)(1).

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

Fines exist for the various crimes with which the state could charge a trafficker. Ark. Code Ann. § 5-18-103 (Trafficking of persons) establishes a class Y felony punishable by a possible fine not to exceed \$15,000 and an additional fine of \$250 to be deposited in the Safe Harbor Fund for Sexually Exploited Children.²⁴ Ark. Code Ann. §§ 5-18-103(c), (d), 5-4-201(a)(1). Ark. Code Ann. § 5-70-104 (Promoting prostitution in the first degree), establishes a Class D felony punishable by a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-70-104(a)(2), (b), 5-4-201(a)(2). Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct), establishes a Class A felony punishable by a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-305(b), 5-4-201(a)(1). For a first time offense of Ark. Code Ann. § 5-27-402 (Employing or consenting to the use of a child in a sexual performance), as a Class C felony, the trafficker can receive a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-27-402 (c)(1), 5-4-201(a)(2). For subsequent offenses, a trafficker faces a Class B felony with a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-402(c)(2), 5-4-201(a)(1).

When a trafficker is charged with violating Ark. Code Ann. § 5-74-203 (Soliciting or recruiting a minor to join or remain a member of a criminal gang, organization, or enterprise), a Class B felony, the

²¹ 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

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

²³ 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).

²⁴ *See supra* note 12.

trafficker could be subject to a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-74-203(b), 5-4-201(a)(1).

In addition to any other sentences, under Ark. Code Ann. § 5-4-703(a)²⁵ (Additional fine – Offense committed against a child or in the presence of a child.), the court shall assess an additional fine of \$25.00 for the following offenses if the finder of fact determines that the offense was committed against a child or in the presence of a child:

- (8) § 5-14-110 (Sexual indecency with a child), § 5-14-112 (indecent exposure)...
- (9) § 5-18-103 (Trafficking of persons), § 5-18-104 (patronizing a victim of human trafficking);
-
- (12) § 5-27-303 (Engaging in sexually explicit conduct for the use in visual or print medium), § 5-27-304 (Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child), § 5-27-305 (Transportation of minors for prohibited sexual conduct), § 5-27-306 (internet stalking of a child), § 5-27-307 (sexually grooming a child);
- (13) § 5-27-402 (Employing or consenting to the use of a child in a sexual performance), or § 5-27-403 (producing, directing, or promoting a sexual performance by a child);
- (14) § 5-27-602 (Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child), § 5-27-603 (computer child pornography), § 5-27-604 (Failure to report child pornography), § 5-27-605 (Computer exploitation of a child)

A trafficker could also be required to pay discretionary restitution to the victim under Ark. Code Ann. § 5-4-205(a)(1)(Restitution), which states that “[a] defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution.” The restitution is based on the “actual economic loss caused to a victim by the offense,” and if bodily injury has occurred, the restitution order may require the defendant to, among other things, “[p]ay the cost of a necessary medical or related professional service or device relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing; . . . [p]ay the cost of necessary physical and occupational therapy and rehabilitation; [and] . . . [r]eimburse the victim for income lost by the victim as a result of the offense” with a maximum income reimbursement of \$50,000. Ark. Code Ann. § 5-4-205(b)(1), (2).

A violation of Ark. Code Ann. § 5-42-204(a)(2) (Criminal use of property or laundering criminal proceeds) occurs when a person “[u]ses or makes available for use any property in which he or she has any ownership or lawful possessory interest to facilitate a predicate criminal offense.” A “predicate criminal offense” includes a “crime of pecuniary gain,” which is defined as “any violation of Arkansas law that results, or was intended to result, in the defendant receiving income, benefit, property, money, or anything of value.” Ark. Code Ann. § 5-42-203(3), (7). The violator may face a civil action brought by a prosecuting attorney “for damages in an amount equal to property, funds, or a monetary instrument involved in the violation as well as the proceeds acquired by any person involved in the enterprise or by reason of conduct in furtherance of the violation, together with costs incurred for resources and personnel used in the investigation and prosecution of both criminal and civil proceedings.” Ark. Code Ann. § 5-42-204(c)(1). Therefore, when a trafficker uses funds to further any offense relating to child pornography, the trafficker may become liable in a civil proceeding for damages.

Ark. Code Ann. § 5-5-201(a)(5) (Forfeiture, criminal conveyances) requires that anyone convicted of Trafficking of persons, Ark. Code Ann. § 5-18-103, will forfeit “any conveyance, including an aircraft, motor vehicle, or vessel” if it is used “in the commission or attempt” of the crime. Additionally any conveyance “may be seized by any law enforcement agent upon process issued by any court having jurisdiction” when there is

²⁵ See *supra* note 13.

probable cause that the conveyance was “used in the commission or attempt” of Trafficking of persons, § 5-18-103. Ark. Code Ann. § 5-5-202.

Finally, a trafficker may face forfeiture of certain illegal assets. Under Ark. Code Ann. § 5-5-101(a) (Disposition of contraband and seized property), “Any seized property shall be returned to the rightful owner or possessor of the seized property except contraband owned by a defendant.”

Under Ark. Code Ann. § 5-5-101(a) (Disposition of contraband and seized property), “Any seized property shall be returned to the rightful owner or possessor of the seized property except contraband owned by a defendant.” Pursuant to Ark. Code Ann. § 5-5-101(b)(1) contraband is defined as including the following:

- (A) Article possessed under a circumstance prohibited by law;
- (B) Weapon or other instrument used in the commission or attempted commission of a felony;
- (C) Visual, print, or electronic medium that depicts sexually explicit conduct involving a child prohibited under § 5-27-304;
- (D) Visual, print, or electronic medium that contains a sexual performance of a child prohibited under § 5-27-403;
- (E) Item the possession of which is prohibited by § 5-27-602 [Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child];
- (F) Item the production of which is prohibited by § 5-27-603 [Computer child pornography];
- (G) Item the production of which is prohibited by § 5-27-605 [Computer exploitation of a child]; or
- (H) Other article designated “contraband” by law.

Contraband listed in Ark. Code Ann. § 5-5-101(b)(1)(C)-(H) shall be destroyed. Ark. Code Ann. § 5-5-101(c)(1). Other contraband may be retained for use by law enforcement or sold, the proceeds to be used to reimburse the rightful owner or to be “paid into the general fund of the county, city, or town whose law enforcement agency performed the seizure.” Ark. Code Ann. § 5-5-101(g).

Traffickers are also subject to civil judgments. Under Ark. Code Ann. § 16-118-109 (Civil cause of action for victims of human trafficking), a prevailing plaintiff is entitled to attorney’s fees and costs and may be awarded actual, compensatory, or punitive damages, injunctive relief, and if the defendant’s acts were willful and malicious, the plaintiff may be awarded treble damages. Ark. Code Ann. § 16-118-109 (b)-(e).

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

A person who is guilty “of a sex offense, aggravated sex offense, or sexually violent offense” must register as a sex offender. Ark. Code Ann. § 12-12-905(a)(1). Ark. Code Ann. § 12-12-903(12)(A)(i)²⁶ states,

“Sex offense” includes, but is not limited to:

(i) The following offenses:

...

- (h) Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303;
- (i) Transportation of minors for prohibited sexual conduct, § 5-27-305;
- (j) Employing or consenting to the use of a child in a sexual performance, § 5-27-402;
- (k) Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child, § 5-27-304;
- (l) Producing, directing, or promoting a sexual performance by a child, § 5-27-403;
- (m) Promoting prostitution in the first degree, § 5-70-104;

²⁶ See *supra* note 17.

- ...
- (q) Kidnapping pursuant to § 5-11-102(a) when the victim is a minor and the offender is not the parent of the victim;
- (r) False imprisonment in the first degree and false imprisonment in the second degree, §§ 5-11-103 and 5-11-104, when the victim is a minor and the offender is not the parent of the victim;
- (s) Permitting abuse of a minor, § 5-27-221;
- (t) Computer child pornography, § 5-27-603;
- (u) Computer exploitation of a child, § 5-27-605;
- (v) Permanent detention or restraint, § 5-11-106, when the offender is not the parent of the victim;
- (w) Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child, § 5-27-602;
- (x) Internet stalking of a child, § 5-27-306;
-
- (bb) Sexually grooming a child, § 5-27-307
- (cc) Trafficking of persons under § 5-18-103(a)(4); and

A sex offense also includes “[a]n attempt, solicitation, or conspiracy to commit any of the offenses” listed above, and includes “[a]n adjudication of guilt for an offense of the law of another state, for a federal offense, for a tribal court offense, or for a military offense: (a) Which is similar to any of the offenses enumerated in subdivision (12)(A)(i) of this section; or (b) When that adjudication of guilt requires registration under another state’s sex offender registration laws.” Ark. Code Ann. § 12-12-903(12)(A)(ii), (iii).

The crimes of Ark. Code Ann. § 5-70-103 (Sexual solicitation), Ark. Code Ann. § 5-27-220 (Contributing to the delinquency of a juvenile) and Ark. Code Ann. § 5-27-209 (Contributing to the delinquency of a minor) are not specifically mentioned as sex offenses. Ark. Code Ann. § 12-12-903(12)(A). Those crimes not enumerated are nevertheless not specifically excluded because “[t]he sentencing court has the authority to order the registration of any offender shown in court to have attempted to commit or to have committed a sex offense even though the offense is not enumerated in subdivision (12)(A)(i) of this section” unless the state assembly “expresses its intent not to consider the offense to be a true sex offense for the purposes of this subchapter.” Ark. Code Ann. § 12-12-903(12)(B).

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.*

Under Ark. Code Ann. § 9-27-341(b)(3) (Termination of parental rights), to terminate parental rights permanently, the court must base its order on “a finding by clear and convincing evidence: (A) That it is in the best interest of the juvenile, including consideration of the following factors: (i) The likelihood that the juvenile will be adopted if the termination petition is granted; and (ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents.” Ark Code Ann. § 9-27-341(b)(3)(B) specifies that the court must also find “clear and convincing evidence” of one of a number of grounds, including,

- (vi) (a) The court has found the juvenile or a sibling dependent-neglected as a result of neglect or abuse that could endanger the life of the child, sexual abuse, or sexual exploitation,²⁷ any of which was

²⁷ Pursuant to Ark. Code. Ann. § 9-27-303(54) (Definitions—Arkansas Juvenile Code),

“Sexual exploitation” includes:

- (A) Allowing, permitting, or encouraging participation or depiction of the juvenile in:

perpetrated by the juvenile's parent or parents or step-parent or step-parents.

(b) Such findings by the juvenile division of circuit court shall constitute grounds for immediate termination of the parental rights of one (1) or both of the parents;

.....

(ix) (a) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to:

...

(2) Have committed a felony battery that results in serious bodily injury to any juvenile or to have aided or abetted, attempted, conspired, or solicited to commit felony battery that results in serious bodily injury to any juvenile;

(3) (A) Have subjected any juvenile to aggravated circumstances.

(B) "Aggravated circumstances" means:

- (i) A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, sexually exploited, or a determination has been or is made by a judge that there is little likelihood that services to the family will result in successful reunification; or
- (ii) A juvenile has been removed from the custody of the parent or guardian and placed in foster care or in the custody of another person three (3) or more times in the last fifteen (15) months; or
- (iii) A child or a sibling has been neglected or abused such that the abuse or neglect could endanger the life of the child;

.....

Under subsection (b)(3)(B)(ix)(b), "This subchapter does not require reunification of a surviving child with a parent who has been found guilty of any of the offenses listed in subdivision (b)(3)(B)(ix)(a) of this section."

3.6.1 Recommendation: Amend Ark. Code Ann. § 9-27-341(b)(3) (Termination of parental rights) to include a conviction under the human trafficking or CSEC offenses as grounds for terminating parental rights.

-
- (i) Prostitution;
 - (ii) Obscene photographing; or
 - (iii) Obscene filming; or
- (B) Obscenely depicting, obscenely posing, or obscenely posturing a juvenile for any use or purpose;

Legal Components:

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

Legal Analysis:

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

Pursuant to Ark. Code Ann. § 5-18-103 (Trafficking of persons), a person commits human trafficking when he or she “[b]enefits financially or benefits by receiving anything of value from participation in a venture under subdivision (a)(1) of this section.” Since there is no provision that applies to those who facilitate the sex trafficking of minors in violation of subsection (a)(3), Ark. Code Ann. § 5-18-103 criminalizes facilitation of trafficking, but only when the trafficking has been accomplished by force, fraud or coercion.

However, organizations that facilitate human trafficking face additional penalties under Ark. Code Ann. § 5-18-105 (Human trafficking, enhanced liability) which provides, “... an organization convicted of an offense under this chapter is subject to any combination of the following: A suspension or revocation of a license, permit, or prior approval granted to the organization by a state or local government agency; A court order to dissolve or reorganize; and other relief is equitable.” Organization refers to “a legal entity and includes: a corporation, company, association, firm, partnership, or joint-stock company; a foundation, institution, society, union, club, or church; or any other group of persons organized for any purpose.” Ark. Code Ann. §§ 5-18-102, 5-2-501.

Facilitation is also included in Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct), which establishes a Class A felony when a person “transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of any minor, and . . . (1) Knows or has reason to know that prostitution or sexually explicit conduct involving the minor will be commercially exploited by any person; and (2) Acts with the purpose that the minor will engage in: (A) Prostitution; or (B) Sexually explicit conduct.”

In addition, the crime of facilitation is included in Ark. Code Ann. § 5-70-104(a)(2) (Promoting prostitution in the first degree), which makes it a crime when a person knowingly “[a]dvances prostitution or profits from prostitution of a person less than eighteen (18) years of age.” A person “advances prostitution,” when “acting other than as a prostitute or a patron of a prostitute, that person knowingly: . . . (C) Provides a person or premises for prostitution purposes; (D) Operates or assists in the operation of a house of prostitution or a prostitution enterprise; or (E) Engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.” Ark. Code Ann. § 5-70-101(1)(C), (D), (E). Promoting prostitution is a Class D felony punishable by imprisonment not to exceed 6 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-70-104(b), 5-4-401(a)(5), 5-4-201(a)(2).

- 4.1.1 Recommendation: Amend Ark. Code Ann. § 5-18-103 (Trafficking of persons) so that facilitators can be liable for facilitating and benefiting financially from all instances of domestic minor sex trafficking, regardless of whether force, fraud, or coercion has been used.

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.*

Financial penalties against facilitators are incomplete. Only when force, fraud, or coercion is used to traffick minors,²⁸ may facilitators be convicted under Arkansas’s human trafficking law. When this happens, they will be subject to financial penalties.

Facilitators convicted under Ark. Code Ann. § 5-18-103 (Trafficking of persons) face a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-18-103(c), 5-4-401(a)(2), 5-4-201(a)(1), and if convicted under Ark. Code Ann. § 5-27-305(a) (Transportation of minors for prohibited sexual conduct), facilitators face a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-305(b), 5-4-401(a)(2), 5-4-201(a)(1).

In addition to any other sentences, under Ark. Code Ann. § 5-4-703(a)²⁹ (Additional fine – Offense committed against a child or in the presence of a child.), the court shall assess an additional fine of \$25.00 for the following offenses if the finder of fact determines that the offense was committed against a child or in the presence of a child:

- (9) § 5-18-103 (Trafficking of persons), § 5-18-104 (patronizing a victim of human trafficking);
.....
- (12) § 5-27-303 (Engaging in sexually explicit conduct for the use in visual or print medium), § 5-27-304 (Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child), § 5-27-305 (Transportation of minors for prohibited sexual conduct), § 5-27-306 (internet stalking of a child), § 5-27-307 (sexually grooming a child);
.....
- (14) § 5-27-602 (Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child), § 5-27-603 (computer child pornography), § 5-27-604 (Failure to report child pornography), § 5-27-605 (Computer exploitation of a child);

Ark. Code Ann. § 5-5-201(a)(5) (Forfeiture, criminal conveyances) requires that anyone convicted under Ark. Code Ann. § 5-18-103 (Trafficking of persons), will forfeit “any conveyance, including an aircraft, motor vehicle, or vessel” if it is used “in the commission or attempt” of the crime. Additionally any conveyance “may be seized by any law enforcement agent upon process issued by any court having jurisdiction” when there is probable cause that the conveyance was “used in the commission or attempt” of Trafficking of persons, Ark. Code Ann. §§ 5-18-103, 5-5-202.

Ark. Code Ann. § 5-18-105 (enhanced liability) provides that in addition to any other statutory provision:

- ... an organization convicted of an offense under this chapter is subject to any combination of the following:
 - (1) A suspension or revocation of a license, permit, or prior approval granted to the organization by a state or local government agency;
 - (2) A court order to dissolve or reorganize; and
 - (3) other relief as is equitable.

²⁸ See *supra* section 4.1 for a discussion of limitations on facilitator liability.

²⁹ See *supra* note 13.

Organization refers to “a legal entity and includes: a corporation, company, association, firm, partnership, or joint-stock company; a foundation, institution, society, union, club, or church; or any other group of persons organized for any purpose.” Ark. Code Ann. §§ 5-18-102(9), 5-2-501.

Under Ark. Code Ann. § 5-5-101(a) (Disposition of contraband and seized property), “Any seized property shall be returned to the rightful owner or possessor of the seized property except contraband owned by a defendant.” Pursuant to Ark. Code Ann. § 5-5-101(b)(1) contraband is defined as including the following:

- (A) Article possessed under a circumstance prohibited by law;
- (B) Weapon or other instrument used in the commission or attempted commission of a felony;
- (C) Visual, print, or electronic medium that depicts sexually explicit conduct involving a child prohibited under § 5-27-304;
- (D) Visual, print, or electronic medium that contains a sexual performance of a child prohibited under § 5-27-403;
- (E) Item the possession of which is prohibited by § 5-27-602 [Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child];
- (F) Item the production of which is prohibited by § 5-27-603 [Computer child pornography];
- (G) Item the production of which is prohibited by § 5-27-605 [Computer exploitation of a child]; or
- (H) Other article designated “contraband” by law.

Contraband listed in Ark. Code Ann. § 5-5-101(b)(1)(C)-(H) shall be destroyed. Ark. Code Ann. § 5-5-101(c)(1). Other contraband may be retained for use by law enforcement or sold, the proceeds to be used to reimburse the rightful owner or to be “paid into the general fund of the county, city, or town whose law enforcement agency performed the seizure.” Ark. Code Ann. § 5-5-101(g).

A facilitator could also be required to pay discretionary restitution to the victim under Ark. Code Ann. § 5-4-205(a)(1) (Restitution), which states that “[a] defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution.” The restitution is based on the “actual economic loss caused to a victim by the offense,” and if bodily injury has occurred, the restitution order may require the defendant to, among other things, “[p]ay the cost of a necessary medical or related professional service or device relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing; . . . [p]ay the cost of necessary physical and occupational therapy and rehabilitation; [and] . . . [r]eimburse the victim for income lost by the victim as a result of the offense” with a maximum income reimbursement of \$50,000. Ark. Code Ann. § 5-4-205(b)(1), (2).

4.2.1 Recommendation: Amend Ark. Code Ann. § 5-18-103 to impose fines on facilitators who benefit from the trafficking minors without regard to force, fraud, or coercion.

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

Arkansas criminalizes child sex tourism under its human trafficking statute. Pursuant to Ark. Code Ann. § 5-18-103(a)(5)³⁰ a person commits human trafficking if he or she knowingly “[s]ells or offers to sell travel services that he or she knows includes an activity prohibited under subdivision (a)(1) – (4) of this section.” Subsection (4) of Ark. Code Ann. § 5-18-103(a) makes it a crime to “[r]ecruit[], entice[], solicit[], isolate[], harbor[], transport[], provide[], maintain[], or obtain[] a minor for commercial sexual activity.”

³⁰ See *supra* note 2.

4.4 Promoting and selling child pornography is illegal.

Pornography crimes applicable to a facilitator of trafficking include:

1. Ark. Code Ann. § 5-27-304(a) (Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child) makes it illegal to “[w]ith knowledge of the character of the visual or print medium involved . . . : (1) Knowingly advertise for sale or distribution, sell, distribute, transport, ship, exhibit, display, or receive for the purpose of sale or distribution any visual or print medium depicting a child participating or engaging in sexually explicit conduct; or (2) Knowingly solicit, receive, purchase, exchange, possess, view, distribute, or control any visual or print medium depicting a child participating or engaging in sexually explicit conduct.” A first violation of this section is a Class C felony punishable by imprisonment for 3–10 years and a possible fine not to exceed \$10,000. Ark. Code Ann. §§ 5-27-304(b)(1), 5-4-401(a)(4), 5-4-201(a)(2). Subsequent violations are Class B felonies punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-304(b)(2), 5-4-401(a)(3), 5-4-201(a)(1).
2. Under Ark. Code Ann. § 5-27-403(a) (Producing, directing, or promoting a sexual performance by a child) it is a crime for a person “knowing the character and content of the material, to produce, direct, or promote a performance that includes sexual conduct by a child under eighteen (18) years of age.” As a Class B felony, this crime is punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-403(b), 5-4-401(a)(3), 5-4-201(a)(1).
3. Pursuant to Ark. Code Ann. § 5-27-602(a)(1) (Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child), a person is guilty of a Class C felony punishable by imprisonment for 3–10 years and a possible fine not to exceed \$10,000 for a first offense, when he knowingly “[r]eceives for the purpose of selling or knowingly sells, procures, manufactures, gives, provides, lends, trades, mails, delivers, transfers, publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers, or agrees to offer through any means, including the internet, any photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction that depicts a child or incorporates the image of a child engaging in sexually explicit conduct.” Ark. Code Ann. §§ 5-27-602(a)(1), (b)(1), 5-4-401(a)(4), 5-4-201(a)(2). Subsequent offenses are Class B felonies punishable by imprisonment for 5–20 years and a possible fine not to exceed \$15,000. Ark. Code Ann. §§ 5-27-602(b)(2), 5-4-401(a)(3), 5-4-201(a)(1).

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, preventing criminalization of minors under 18 for prostitution offenses.*
 - 5.4 *State law provides a non-punitive avenue to specialized services through one of more points of entry.*
 - 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 another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*
 - 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*
 - 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
 - 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
 - 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
 - 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*
-

Legal Analysis:

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

Ark Code Ann. § 9-27-323 mandates that the Department of Human Services provide services to “sexually exploited children.” “Sexually Exploited children” includes any minor who has been “a victim of trafficking of persons under § 5-18-103; is a victim of child sex trafficking under 18 U.S.C. §1591, as it existed on January 1, 2013; or engages in an act of prostitution under § 5-70-102 (Prostitution or sexual solicitation under 5-70-103 (Solicitation).” Ark. Code Ann. §§ 9-27-323, 12-18-1201.

For the purposes of the Safe Harbor Fund, “sexually exploited child” refers to any minor who has been “a victim of trafficking of persons under § 5-18-103; is a victim of child sex trafficking under 18 U.S.C. § 1591, as it existed on January 1, 2013; or engages in an act of prostitution under § 5-7-102 or sexual solicitation under § 5-70-103.” Ark. Code Ann. § 19-5-1249. Ark Code Ann. § 19-5-1249 (Safe Harbor Fund) establishes a department to collect all “fines collected under 5-18-103(d), 5-70-102(d), 5-70-103(d) and any other revenues authorized by law”. All funds collected will be used for services and programs for sexually exploited children.

For the purposes of the subchapter on “Crime Victims Reparations,” “victim” is defined as “a person who suffers personal injury³¹ or death as a result of criminally injurious conduct committed either within the State of Arkansas or against any Arkansas resident who suffers personal injury as the result of criminally injurious conduct which occurs in states presently not having crime victims reparations programs for which the victim is eligible.” Ark. Code Ann. § 16-90-703(11)(A) (Definitions—Crime Victims Reparations). “Criminally injurious conduct” is defined in relevant part as “an act which occurs or is attempted in this state that results in personal injury or death to a victim, which act is punishable by fine, imprisonment, or death.” Ark. Code Ann. § 16-90-703(5)(A)(i) . Given the definition of “personal injury” and “criminally injurious conduct,” and since all CSEC crimes and Ark. Code Ann. § 5-18-103 (Trafficking of persons) are punishable by a possible fine and imprisonment, a domestic minor sex trafficking victim would be considered a victim for the purposes of the subchapter entitled “Crime Victims Reparations.” However, the statute fails to specifically identify these victims.

For the purposes of the subchapter on “Rights of Victims of Crime,” a “victim” is defined as “a victim of a sex offense or an offense against a victim who is a minor³² and a victim of any violent crime,³³ but does not include a person who is accountable for the crime or a crime arising from the same conduct, criminal episode, or plan and does not include a governmental entity.” Ark. Code Ann. § 16-90-1101(8) (Definitions—Rights of Victims of Crime). Ark. Code Ann. § 16-90-1101(6) includes many CSEC offenses in the definition of a “sex offense,” including,

- (H) Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303;
- (I) Transportation of minors for prohibited sexual conduct, § 5-27-305;
- (J) Employing or consenting to use of a child in sexual performance, § 5-27-402;
- (K) Producing, directing, or promoting a sexual performance, § 5-27-403;
- (L) Promoting prostitution in the first degree, § 5-70-104;
- ...
- (N) An attempt, solicitation, or conspiracy to commit any of the offenses enumerated in this subdivision (6);
- (O) An adjudication of guilt for an offense of the law of another state, for a federal offense, or for a military offense, which is substantially equivalent to any of the offenses enumerated in this subdivision (6);
- (P) Computer child pornography, § 5-27-603;

³¹ “Personal injury” is defined in Ark. Code Ann. § 16-90-703(10) as “actual bodily harm, including pregnancy or mental anguish which is the direct result of a violent criminal act.”

³² “Offense against a victim who is a minor” is defined in Ark. Code Ann. § 16-90-1101(3) as,

- (A) Kidnapping pursuant to § 5-11-102(a)(4) when the victim is a minor and the offender is not the parent of the victim;
- (B) False imprisonment in the first degree pursuant to § 5-11-103 when the victim is a minor and the offender is not the parent of the victim;
- (C) Permanent detention or restraint pursuant to § 5-11-106 when the victim is a minor and the offender is not the parent of the victim;
- (D) Any sex offense when the victim is a minor;
- (E) An attempt, solicitation, or conspiracy to commit any of the offenses enumerated in this subdivision (3);
- (F) An adjudication of guilt for an offense of the law of another state, for a federal offense, or for a military offense, which is substantially equivalent to any of the offenses enumerated in this subdivision (3); or
- (G) A violation of any former law of this state that is substantially equivalent to any of the offenses enumerated in this subdivision (3).

³³ “Violent crime” is defined in Ark. Code Ann. § 16-90-1101(9) as “any felony which resulted in physical injury to the victim, any felony involving the use of a deadly weapon, terroristic threatening in the first degree, § 5-13-301(a), and stalking, as defined in § 5-71-229.”

- (Q) Computer exploitation of a child in the first degree, § 5-27-605(a); or
- (R) A violation of any former law of this state that is substantially equivalent to any of the offenses enumerated in this subdivision (6).

For purposes of victim restitution by the defendant, under Ark. Stat. Ann. § 5-4-205(c)(1) (Restitution), “Victim” is defined as “any person, partnership, corporation, or governmental entity or agency that suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode.” This broad definition would include trafficking in persons and CSEC crimes, but does not expressly identify victims of domestic minor sex trafficking and the injury requirement may exclude some victims.

Ark. Code Ann. § 5-18-103 (Trafficking of persons) is not included in the definition of “sex offense,” and given the definition of “victim,” if a court considers a CSEC victim partly responsible for the conduct of her prostitution, then the minor may not be considered a victim for the purposes of the subchapter entitled “Rights of Victims of Crime.”

- 5.1.1 Recommendation: Amend Ark. Code Ann. § 16-90-1101 to include Ark. Code Ann. § 5-18-103 (Trafficking of persons) for commercial sexual exploitation of minors as a “sex offense” and to clarify that a domestic minor sex trafficking victim is not disqualified from victim status as a result of committing crimes as a consequence of the trafficking.
- 5.1.2 Recommendation: Amend the definitions of “victim” in Ark. Code Ann. § 16-90-703(5)(A)(i) (Definitions—Crime Victims Reparations) and § 5-4-205(c)(1) (Restitution) to expressly include minor victims of Ark. Code Ann. § 5-18-103 (Trafficking of persons) for commercial sexual exploitation and the state 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.*

A defense based on the minor’s consent to the commercial sex act is not expressly mentioned in Ark. Code Ann. § 5-18-103 (Trafficking of persons), § 5-70-104(a)(2) (Promoting prostitution in the first degree), § 5-27-303 (Engaging children in sexually explicit conduct for use in visual or print medium), § 5-27-305 (Transportation of minors for prohibited sexual conduct), § 5-27-402 (Employing or consenting to the use of a child in a sexual performance), or § 5-27-403(a) (Producing, directing, or promoting a sexual performance by a child). However, the code does not specifically prohibit a defendant from raising such a defense. Further, Ark. Code Ann § 5-18-104 (Patronizing a victim of human trafficking) requires that a defendant “knowingly” purchase sex with a human trafficking victim, which may allow a buyer to successfully argue that a victim’s consent made it impossible to “know” that the minor was a victim of sex trafficking.

However, a sub-statute, Ark. Code Ann § 5-18-104 (Patronizing a victim of human trafficking) requires that a defendant “knowingly” purchase sex with a human trafficking victim, which may allow a buyer to successfully argue that a victim’s consent made it impossible to “know” that the minor was a victim of sex trafficking.

Notably, sex offense statutes related to intercourse with minors expressly do not allow the defense of consent, including Ark. Code Ann. § 5-14-103(b) (Rape), Ark. Code Ann § 5-14-124(b) (Sexual assault in the first degree), Ark. Code Ann. § 5-14-125(a)(4)(B) (Sexual assault in the second degree), and Ark. Code Ann. § 5-14-126(b) (Sexual assault in the third degree).

- 5.2.1 Recommendation: Amend Ark. Code Ann. § 5-18-103 (Trafficking of persons) § 5-18-104 (Patronizing a victim of human trafficking), § 5-70-104(a)(2) (Promoting prostitution in the first degree), § 5-27-303 (Engaging children in sexually explicit conduct for use in visual or print

medium), § 5-27-305 (Transportation of minors for prohibited sexual conduct), § 5-27-402 (Employing or consenting to the use of a child in a sexual performance and § 5-27-403(a) (Producing, directing, or promoting a sexual performance by a child) to clarify that a minor victim's consent is not a defense to these crimes.

5.3 *Prostitution laws apply only to adults, preventing criminalization of minors under 18 for prostitution offenses.*

Ark Code Ann. § 5-70-102 (Prostitution) does not differentiate minors from adults, and the language does not state that all minors engaged in prostitution are victims of human trafficking.

5.3.1 Recommendation: Amend Ark. Code Ann. § 5-70-102(a) (Prostitution) to eliminate liability for prostitution offenses for all minors under 18.

5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*

No specific provisions exist in Arkansas providing that a domestic minor sex trafficking victim must be provided a child protective response, and as a result, the victim could enter either the juvenile justice system or the child protective system through various avenues.

Child Identified as Abused/Neglected

Pursuant to Ark. Code Ann. §§ 9-27-303(18)(A)³⁴ (Definitions), § 9-27-303(36)(A)(iii), § 9-27-303(3)(A), § 12-18-103(13)(A)(vii), (viii) and § 9-27-303(52)-(54),³⁵ a sexually exploited child is likely

³⁴ A domestic minor sex trafficking victim could be considered a “dependent-neglected juvenile,” which is defined as including “any juvenile who is at substantial risk of serious harm as a result of the following acts or omissions to the juvenile, a sibling, or another juvenile: . . . (iii) Sexual abuse; (iv) sexual exploitation.” Ark. Code Ann. § 9-27-303(18)(A).

³⁵ “Sexual abuse” is defined in Ark. Code Ann. § 9-27-303(52) (Definitions) as including,

- (A) By a person fourteen (14) years of age or older to a person younger than eighteen (18) years of age:
 - (i) Sexual intercourse, deviant sexual activity, or sexual contact by forcible compulsion;
 - (ii) Attempted sexual intercourse, attempted deviant sexual activity, or attempted sexual contact by forcible compulsion;
 - (iii) Indecent exposure; or
 - (iv) Forcing the watching of pornography or live human sexual activity;
- (B) (i) By a person eighteen (18) years of age or older to a person who is younger than fifteen (15) years of age and is not his or her spouse:
 - (a) Sexual intercourse, deviant sexual activity, or sexual contact;
 - (b) Attempted sexual intercourse, attempted deviant sexual activity, or attempted sexual contact; or
 - (c) Solicitation of sexual intercourse, solicitation deviant sexual activity, or solicitation of sexual contact.
- (ii) By a person twenty (20) years of age or older to a person who is younger than sixteen (16) years of age who is not his or her spouse:
 - (a) Sexual intercourse, deviant sexual activity, or sexual contact;
 - (b) Attempted sexual intercourse, attempted deviant sexual activity, or attempted sexual contact;
 - or
 - (c) Solicitation of sexual intercourse, solicitation of deviant sexual activity, or solicitation of sexual contact;
- (C) By a caretaker to a person younger than eighteen (18) years of age:
 - (i) Sexual intercourse, deviant sexual activity, or sexual contact;
 - (ii) Attempted sexual intercourse, attempted deviant sexual activity, or attempted sexual contact;

to be identified as abused or neglected. If a child is identified as abused or neglected under Ark. Code Ann. § 9-27-303(18)(A), the definition of caretaker under Ark. Code Ann. § 9-27-303(8) and § 12-18-103(3) may not be sufficiently broad to involve Child Protective Services in investigations where the child is in the custody or control of a non-family trafficker.

I Initial Custody

a) *Authority following initial custody*

Pursuant to Ark. Code Ann. § 9-27-313(a)(1)³⁶ (Taking into custody), a juvenile may be taken into custody without a warrant only in one of the following ways:

- (A) Pursuant to an order of the circuit court under this subchapter;
- (B) By a law enforcement officer without a warrant under circumstances as set forth in rule 4.1 of the Arkansas Rules of Criminal Procedure [which includes if the officer has reasonable cause to believe that such person has committed any violation of law in the officer's presence]; or
- (C) By a designated person under § 12-18-1001 et seq.³⁷

Additionally, emergency custody of the juvenile may be taken if “there is probable cause to believe that immediate emergency custody is necessary to protect the health or physical well-being of the juvenile

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- (iii) Forcing or encouraging the watching of pornography;
 - (iv) Forcing, permitting, or encouraging the watching of live sexual activity;
 - (v) Forcing listening to a phone sex line; or
 - (vi) An act of voyeurism;
 - (D) By a person younger than fourteen (14) years of age to a person younger than eighteen (18) years of age:
 - (i) Sexual intercourse, deviant sexual activity, or sexual contact by forcible compulsion; or
 - (ii) Attempted sexual intercourse, attempted deviant sexual activity, or attempted sexual contact by forcible compulsion.

“Sexual exploitation” is defined in Ark. Code Ann. § 9-27-303(54) as including the following:

- (A) Allowing, permitting, or encouraging participation or depiction of the juvenile in:
 - (i) Prostitution;
 - (ii) Obscene photographing; or
 - (iii) Obscene filming; or
- (B) Obscenely depicting, obscenely posing, or obscenely posturing a juvenile for any use or purpose.

³⁶ The text of Ark. Code Ann. § 9-27-313 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 987 during the regular session of the 90th Arkansas General Assembly 2015 (effective July 1, 2015).

³⁷ Ark. Code Ann. § 12-18-1001 (Protective custody generally) authorizes custody by “[a] police officer, law enforcement, a juvenile division of circuit court judge during juvenile proceedings concerning the child or a sibling of the child, or a designated employee of the Department of Human Services . . . or any person in charge of a hospital or similar institution or any physician treating a child . . . if: (1) The child is subjected to neglect as defined under § 12-18-103(14)(B) and the department assesses the family and determines that the newborn and any other children, including siblings, under the custody or care of the mother are at substantial risk of serious harm such that the children need to be removed from the custody or care of the mother; (2) The child is dependent as defined in the Arkansas Juvenile Code of 1989, § 9-27-301 et seq.; or (3) Circumstances or conditions of the child are such that continuing in his or her place of residence or in the care and custody of the parent, guardian, custodian, or caretaker presents an immediate danger to the health or physical well-being of the child.”

from immediate danger or to prevent the juvenile’s removal from the state . . .” Ark. Code Ann. § 9-27-314(a)(1).

II. Outcomes

Assuming any requirement for family services are met, the court can order juveniles found to be dependent-neglected to be “removed from the custody of a parent, guardian, or custodian and placed in the custody of the department or other licensed agency responsible for the care of juveniles or with a relative or other individual.” Ark. Code Ann. § 9-27-328(b)(1). To do so, the court must initially find information about the following: “(A) Whether it is contrary to the welfare of the juvenile to remain at home; (B) Whether the removal and the reasons for the removal of the juvenile is necessary to protect the health and safety of the juvenile; and (C) Whether the removal is in the best interest of the juvenile.” Ark. Code Ann. § 9-27-328(b)(1). Ark. Code Ann. § 9-27-328(b)(2) sets out additional findings to be made within 60 days of removal. For a juvenile found to be dependent-neglected, the court may, among other things, “transfer custody of the juvenile to the Department of Human Services, to another licensed agency responsible for the care of juveniles, or to a relative or other individual” if it is in the child’s best interest. Ark. Code Ann. § 9-27-334(a)(2)(A). If custody of the dependent-neglected child is given to the Department of Human Services, “the juvenile shall be placed in a licensed or approved foster home, shelter, or facility or an exempt child welfare agency.” Ark. Code Ann. § 9-27-334(a)(2)(B).

Within Arkansas’ Child Welfare Agency Licensing Act, entities that house or assist in the placement of child human trafficking victims are included within the definitions of “child welfare agency” and “child placement agency,” bringing them within the purview of the Child Welfare Agency Review Board. Ark. Code Ann. §§ 9-28-402(8)(D), 9-28-402(7)(D), 9-28-405. Specifically, Ark. Code Ann. § 9-28-402(8)(D)³⁸ (Definitions), defines “child welfare agency” to include “any person, corporation, partnership, voluntary association, or other entity or identifiable group of entities having a coordinated ownership of controlling interest, whether established for profit or otherwise, that . . . [r]eceives, places, plans or assists in the placement of a child victim of human trafficking in a home or any type of shelter or facility.” And, Ark. Code Ann. § 9-28-402(7)(D), defines “child placement agency” to include “a child welfare agency . . . that . . . [p]laces, plans for the placement or assists in the placement of a child victim of human trafficking in a home or any type of shelter or facility.” Thus, the Department of Human Services can refer victims to entities that serve juvenile sex trafficking victims. Ark. Code Ann. § 9-27-334(a)(2)(B).

Child Identified as Delinquent

I. Adjudication or referral to alternate program

A “delinquent juvenile” is defined in Ark. Code Ann. § 9-27-303(15)(A) as including “A juvenile ten (10) years old or older: who has committed an act other than a traffic offense or game and fish violation that, if the act had been committed by an adult, would subject the adult to prosecution for a felony, misdemeanor, or violation under the applicable criminal laws of this state; has violated § 5-73-119 [Handguns – possession by minor or possession on school property]; has violated § 5-17-217(d)(2), cyberbullying of a school employee.” Therefore, if a domestic minor sex trafficking victim is charged with Ark. Code Ann. § 5-70-102 (Prostitution), the minor could be considered a delinquent juvenile.³⁹

³⁸ The text of Ark. Code Ann. § 9-28-402 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 1012 during the regular session of the 90th Arkansas General Assembly 2015. (effective July 1, 2015).

³⁹ However, the Ark. Code Ann. § 9-27-323(k)(1), (2) states that the Department of Human Services is required to “develop a statewide referral protocol for helping to coordinate the delivery of services to sexually exploited

Since Ark. Code Ann. § 5-70-102 (Prostitution) is a misdemeanor, the case would proceed as a delinquency hearing pursuant to Ark. Code Ann. § 9-27-318(a), which provides that “[t]he state may proceed with a case as a delinquency only when the case involves a juvenile: . . . (2) Less than eighteen (18) years of age when he or she engages in conduct that if committed by an adult would be any misdemeanor.”

a) Diversion or alternate process

A prosecuting attorney may choose to proceed with diversion in some delinquency cases if “it is in the best interests of the juvenile and the community” and the relevant persons consent. Ark. Code Ann. § 9-27-323(a). Diversion cases are subject to conditions, including the juvenile admitting her involvement in the delinquent act. Ark. Code Ann. § 9-27-323(c)(1)(A). Pursuant to Ark. Code Ann. § 9-27-323(e) (Diversion),

- (e) Diversion agreements shall be limited to providing for:
- (1) Nonjudicial probation under the supervision of the intake officer or probation officer for a period during which the juvenile may be required to comply with specified conditions concerning his or her conduct and activities;
 - (2) Participation in a court-approved program of education, counseling, or treatment;
 - (3) Participation in a court-approved teen court;
 - (4) Participation in a juvenile drug court program; and
 - (5) Enrollment in the Regional Educational Career Alternative School.

II. Outcomes

If the prosecuting attorney does not enter into a diversionary agreement and the court adjudicates the domestic minor sex trafficking victim to be a delinquent, pursuant to Ark. Code Ann. § 9-27-330(a) (Disposition—Delinquency—Alternatives), the court has a number of disposition options, “based upon the best interest of the juvenile,” including,

- (1) (A) Transfer legal custody of the juvenile to any licensed agency responsible for the care of delinquent juveniles or to a relative or other individual.
 - (B) (i) Commit the juvenile to the Division of Youth Services of the Department of Human Services using the risk assessment system for Arkansas juvenile offenders distributed and administered by the Administrative Office of the Courts.
.....
 - (iii) (a) In an order of commitment, the court may recommend that a juvenile be placed in a treatment program or community-based program instead of a youth services center and shall make specific findings in support of such a placement in the order.
.....
 - (iv) Upon receipt of an order of commitment with recommendations for placement, the division shall consider the recommendations of the committing court in placing a juvenile in a youth services facility or a community-based program.
.....

children.” A “sexually exploited child” is defined as a person less than 18 years of age who has been subject to sexual exploitation because the person:

- (A) Is a victim of trafficking of persons under § 5–18–103;
- (B) Is a victim of child sex trafficking under 18 U.S.C. § 1591, as it existed on January 1, 2013; or
- (C) Engages in an act of prostitution under § 5–70–102 or sexual solicitation under § 5–70–103.

(3) Grant permanent custody to an individual upon proof that the parent or guardian from whom the juvenile has been removed has not complied with the orders of the court and that no further services or periodic reviews are required;

(4) (A) Place the juvenile on probation

. . . .

(11) (A) (i) Order that the juvenile remain in a juvenile detention facility for an indeterminate period not to exceed ninety (90) days.

. . . .

(12) Place the juvenile on residential detention with electronic monitoring, either in the juvenile's home or in another facility as ordered by the court;

. . . .

5.4.1 Recommendation: Enact a mandatory protective response for juvenile sex trafficking victims that provides an avenue to specialized services outside detention.

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

Commercial sexual exploitation is a type of abuse in Arkansas's child protection statutes. A "dependent-neglected juvenile" is defined in Ark. Code Ann. § 9-27-303(18)(A) (Definitions) as including "any juvenile who is at substantial risk of serious harm as a result of the following acts or omissions to the juvenile, a sibling, or another juvenile: (i) Abandonment; (ii) Abuse; (iii) Sexual Abuse;⁴⁰ (iv) Sexual exploitation; (v) Neglect; . . ." Pursuant to Ark. Code Ann. § 9-27-303(54), "[s]exual exploitation" is defined to include:

(A) Allowing, permitting, or encouraging participation or depiction of the juvenile in:

(i) Prostitution;

(ii) Obscene photographing; or

(iii) Obscene filming; or

(B) Obscenely depicting, obscenely posing, or obscenely posturing a juvenile for any use or purpose.

Ark. Code Ann. § 9-27-303(17)(G)⁴¹ also defines "dependent juvenile" as "(i) A child who has been a victim of human trafficking as a result of threats, coercion, or fraud. (ii) If the parent knew or should have known the child was a victim of human trafficking as a result of threats, coercion, or fraud, the child is not a dependent juvenile but may be dependent-neglected." Pursuant to Ark. Code Ann. § 9-27-303(18)(B), "'Dependent-neglected juvenile' includes dependent juveniles."

"Neglect" includes "[f]ailure to take reasonable action to protect the juvenile [or child] from abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness when the existence of this condition was known or should have been known." Ark. Code Ann. §§ 9-27-303 (36)(A)(iii). "Abuse," pursuant to Ark. Code Ann. § 9-27-303(3)(A), occurs when "a parent, guardian, custodian, foster parent, person eighteen (18) years of age or older living in the home with a child, whether related or unrelated to the child, or any person who is entrusted with the juvenile's care by a parent, guardian, custodian, or foster parent, including, but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, or any person legally responsible for the

⁴⁰ See *supra* Section 5.4 for definition of "sexual abuse."

⁴¹ The text of Ark. Code Ann. § 9-27-303(G) included here and elsewhere in this report includes amendments made by the enactment of House Bill 1673 during the regular session of the 90th Arkansas General Assembly 2015. (effective April 4, 2015).

juvenile’s welfare” is involved in “(i) Extreme or repeated cruelty to a juvenile; (ii) Engaging in conduct creating a realistic and serious threat of death, permanent or temporary disfigurement, or impairment of any bodily organ; (iii) Injury to a juvenile’s intellectual, emotional, or psychological development as evidenced by observable and substantial impairment of the juvenile’s ability to function within the juvenile’s normal range of performance and behavior” Ark. Code Ann. § 9-27-303(3)(A).

5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*

Arkansas uses the term “caretaker” in its code. For purposes of the subchapter entitled “Arkansas Juvenile Code,” in the title on family law, the term is defined as “a parent, guardian, custodian, foster parent, significant other of the child's parent, or any person fourteen (14) years of age or older who is entrusted with a child’s care by a parent, guardian, custodian, or foster parent, including, but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, or any person responsible for a child’s welfare.” Ark. Code Ann. § 9-27-303(8). For purposes of the chapter entitled “Child Maltreatment Act” in the title on law enforcement, emergency management, and military affairs, “caretaker” is defined as “a parent, guardian, custodian, foster parent, or any person fourteen (14) years of age or older who is entrusted with a child’s care by a parent, guardian, custodian, or foster parent, including without limitation, an agent or employee of a public or private residential home, child care facility, public or private school, or any person responsible for a child’s welfare.” Ark. Code Ann. § 12-18-103(3).

While this definition is likely too narrow to allow child welfare to provide protective services to juvenile sex trafficking victims whose exploiter is not a family member, Ark. Code Ann. § 9-27-303(17)(G)⁴² (Definitions) provides an alternative avenue to child protective services by defining “dependent juvenile” as “(i) A child who has been a victim of human trafficking as a result of threats, coercion, or fraud. (ii) If the parent knew or should have known the child was a victim of human trafficking as a result of threats, coercion, or fraud, the child is not a dependent juvenile but may be dependent-neglected.” Pursuant to Ark. Code Ann. § 9-27-303(18)(B), “‘Dependent-neglected juvenile’ includes dependent juveniles.”

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.*

Several problematic conditions could make domestic minor sex trafficking victims ineligible for Crime Victims Reparations. Under Ark. Code Ann. § 16-90-712(a),

(a) Reparations shall not be awarded:

- (1) Unless the claim has been filed with the Crime Victims Reparations Board within one (1) year after the injury or death upon which the claim is based, unless the board finds good cause for the failure to file a timely claim;
- (2) To a claimant who was the offender or an accomplice of the offender;
- . . .
- (5) To any claimant who has been convicted of a felony involving criminally injurious conduct;
- (6) Unless the criminally injurious conduct resulting in injury or death was reported to the proper authorities within seventy-two (72) hours after its occurrence, or the board finds there

⁴² The text of Ark. Code Ann. § 9-27-303(G) included here and elsewhere in this report includes amendments made by the enactment of House Bill No. 1673 during the regular session of the 90th Arkansas General Assembly 2015. (effective July 1, 2015).

was good cause for the failure to report within that time;

....

Under subsection (b), “Reparations otherwise payable to a claimant shall be diminished to the extent: . . .

(2) Of the degree of responsibility for the cause of the injury or death attributable to the victim, as determined by the board.” Ark. Code Ann. § 16-90-712(b). Furthermore, under subsection (c), an award may be reduced, denied, or withdrawn if it is found that the victim did not cooperate with law enforcement. Ark. Code Ann. § 16-90-712(c).

- 5.7.1 Recommendation: Amend Ark. Code Ann. § 16-90-712 (Conditions for reparations) to clarify that a claimant who is a victim of domestic minor sex trafficking is exempt from the conditions contained therein.

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

Ark. Code Ann. § 16-42-101(b) (Admissibility of evidence of victim’s prior sexual conduct), which, subject to the provisions in the section, prevents the introduction of “opinion evidence, reputation evidence, or evidence of specific instances of the victim’s prior sexual conduct” applies only “[i]n any criminal prosecution under § 5-14-101 et seq. [Sexual Offenses including rape, sexual indecency with a child, public sexual indecency, sexual Assault] or § 5-26-202 [Incest], or for criminal attempt to commit, criminal solicitation to commit, or criminal conspiracy to commit an offense defined in any of those sections” Ark. Code Ann. § 16-42-101(b). Therefore, the statute does not apply to domestic minor sex trafficking victims if the perpetrators are not charged with the crimes listed.

Similarly, “In any prosecution for a sexual offense or inchoate offense to a sexual offense, upon motion of the prosecuting attorney and after notice to opposing counsel, the court may, for good cause shown, allow the presence of the parent, stepparent, guardian, custodian, or other person with custody of an alleged minor victim of a sexual offense or inchoate offense to a sexual offense during the examination and cross-examination of the minor at any hearing, deposition, or trial.” Ark. Code Ann. § 16-42-102.

However, for child victims of any crime, including domestic minor sex trafficking crimes, it is possible that a child’s testimony may be taken via closed circuit television. Ark. Code Ann. § 16-43-1001(a)(1). Under Ark. Code Ann. § 16-43-1001(a)(1) (*Closed-circuit television in criminal proceedings, upon motion by the prosecution or defense*), “the court may, upon a showing of clear and convincing evidence that testifying in open court would be harmful or detrimental to the child, order that the testimony of a victim or witness who is a child twelve (12) years of age or under be taken outside the courtroom.” Finally, Ark. Code Ann. § 16-43-1202 (Safeguards for child victims testifying in judicial and administrative proceedings) requires that the “prosecuting attorney, victim-witness coordinator, attorney ad litem, or Office of Chief Counsel attorney” provide the child with information about the proceedings and protect the testifying child from “argumentative or harassing questioning” by objecting appropriately. Ark. Code Ann. § 16-43-1202(1), (7). The child is permitted, upon motion by the “prosecuting attorney, attorney ad litem, or Office of Chief Counsel attorney,” a “comfort item,” “support person,” or both during the testimony “[i]f it is in the child’s best interests.” Ark. Code Ann. § 16-43-1202(5), (6).

- 5.8.1 Recommendation: Amend Ark Code Ann. § 16-42-101 (Admissibility of evidence of victim’s prior sexual conduct) to include child victims of § 5-18-103 (Trafficking of persons), § 5-70-104(a)(2) (Promoting prostitution in the first degree), § 5-27-303 (Engaging children in sexually explicit conduct for use in visual or print medium), § 5-27-305 (Transportation of minors for prohibited sexual conduct), § 5-27-402 (Employing or consenting to the use of a child in a sexual performance and § 5-27-403(a) (Producing, directing, or promoting a sexual performance by a child) where commercial sexual abuse of a child is involved.

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.*

Under Ark. Code Ann. § 9-27-309(b)-(c) (Confidentiality of Records),

- (b) (1) (A) Records of delinquency adjudications for which a juvenile could have been tried as an adult shall be kept for ten (10) years after the last adjudication of delinquency or the date of a plea of guilty or nolo contendere or a finding of guilt as an adult.
- (B) Thereafter they may be expunged.
- (2) The court may expunge other juvenile records at any time and shall expunge all the records of a juvenile upon his or her twenty-first birthday, in other types of delinquency, dependency-neglect, or families in need of services cases.
- (3) For purposes of this section, “expunge” means to destroy.
- (c) Records of juveniles who are designated as extended juvenile jurisdiction offenders shall be kept for ten (10) years after the last adjudication of delinquency, date of plea of guilty or nolo contendere, or finding of guilt as an adult or until the juvenile’s twenty-first birthday, whichever is longer.

Additionally, under Ark. Code Ann. § 16-90-1412 (b)(1)⁴³ (Sealing certain convictions for victims of human trafficking⁴⁴), a person convicted of prostitution under Ark. Code Ann. § 5-70-102 can file a petition to seal the conviction “if it was obtained as a result of having been a victim of human trafficking.” Pursuant to § 16-90-1412(b)(2), “a uniform petition under this section may be filed at any time and it may be filed for a conviction imposed at any time.”⁴⁵

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.*

A domestic minor sex trafficking victim could receive restitution under Ark. Code Ann. § 5-4-205(a)(1) (Restitution), which states that “[a] defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution.” The restitution is based on the “actual economic loss caused to a victim by the offense,” and if bodily injury has occurred, the restitution order may require the defendant, among other things, to “[p]ay the cost of a necessary medical or related professional service or device relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing; . . . [p]ay the cost of necessary physical and occupational therapy and rehabilitation; [and] . . . [r]eimburse the victim for income lost by the victim as a result of the offense” with a maximum income reimbursement of \$50,000. Ark. Code Ann. § 5-4-205(b)(1), (2).

Any victim of a felony offense, including domestic minor sex trafficking victims, may bring a civil action. Specifically, under Ark. Code Ann. § 16-118-107(a)(1) (Civil action by crime victim), “Any person injured or damaged by reason of conduct of another person that would constitute a felony under Arkansas law may file a civil action to recover damages based on the conduct.”

⁴³ The text of Ark. Code Ann. § 16-90-1412 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 120 during the regular session of the 90th Arkansas General Assembly 2015 (effective April 6, 2015).

⁴⁴ Ark. Code Ann. § 16-90-1412(a) defines a “victim of human trafficking” as a person who has been subjected to trafficking of persons, § 5-18-103, or any former law of the state of Arkansas, law of another state, or federal law that is substantially similar.

⁴⁵ To grant the petition, the court must find “by a preponderance of the evidence that . . . the [prostitution] conviction was obtained . . . as a result of having been a victim of human trafficking.” Ark. Code Ann. § 16-90-1412(c)(2).

A violation of Ark. Code Ann. § 5-42-204(a)(2) (Criminal use of property or laundering criminal proceeds) occurs when a person “[u]ses or makes available for use any property in which he or she has any ownership or lawful possessory interest to facilitate a predicate criminal offense.” A “predicate criminal offense” includes a “crime of pecuniary gain,” which is defined as “any violation of Arkansas law that results, or was intended to result, in the defendant receiving income, benefit, property, money, or anything of value.” Ark. Code Ann. § 5-42-203(3), (7). The violator may face a civil action brought by a prosecuting attorney “for damages in an amount equal to property, funds, or a monetary instrument involved in the violation as well as the proceeds acquired by any person involved in the enterprise or by reason of conduct in furtherance of the violation, together with costs incurred for resources and personnel used in the investigation and prosecution of both criminal and civil proceedings.” Ark. Code Ann. § 5-42-204(c)(1).

Additionally, Ark Code Ann. § 16-118-109 (Civil cause of action for human trafficking victims) creates a private right of action for survivors of human trafficking against their exploiters. The statute provides an action for actual damages, compensatory damages, punitive damages, and injunctive relief. A prevailing plaintiff will be awarded attorneys’ fees, and if the plaintiff can prove the defendant acted maliciously and willfully, he or she may be awarded 3 times the actual damages. Ark Code Ann. § 16-18-109(d), (e).

- 5.10.1 Recommendation: Amend Ark. Code Ann. § 5-4-205(a)(1) (Restitution) to make restitution mandatory for victims of domestic minor sex trafficking and to expand the basis for restitution so that victims do not need to prove bodily injury before receiving restitution to cover the costs of psychiatric and psychological care.

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.*

Although minor sex trafficking is not specifically included as an offense that has no statute of limitations, several CSEC statutes are included. Pursuant to Ark. Code Ann. § 5-1-109(a)(1),(2) (Statute of limitations),

A prosecution for the following offenses may be commenced at any time:

- (D) Rape, § 5-14-103, if the victim was a minor at the time of the offense;
- (E) Sexual indecency with a child, § 5-14-110;
- (F) Sexual assault in the first degree, § 15-14-124;
- (G) Sexual assault in the second degree, § 5-14-125, if the victim was a minor at the time of the offense;
- (H) Incest, § 5-226-202, if the victim was a minor at the time of the offense;
- (I) Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303
- (J) Transportation of minors for prohibited sexual conduct, § 5-27-305;
- (K) Employing or consenting to the use of a child in a sexual performance, § 5-27-402;
- (L) Producing, directing, or promoting a sexual performance by a child, § 5-27-403; and
- (M) Computer exploitation of a child in the first degree, § 5-27-605.

A prosecution may be commenced for a violation of the following offenses, if, when the alleged violation occurred, the offense was committed against a minor, the violation has not been previously reported to a law enforcement agency or prosecuting attorney, and the victim has not reached the age of twenty-eight (28) years of age:

- (A) Sexual assault in the third degree, § 5-14-126;
- (B) Sexual assault in the fourth degree, § 5-14-127;
- (C) Endangering the welfare of a minor in the first degree, § 5-27-205;

- (D) Permitting the abuse of a minor, § 5-27-221; and
- (E) Computer child pornography, § 5-27-603.

For civil actions, the statute of limitations for a minor will not start until he or she has reached 18 years of age. Ark Code Ann. § 16-18-109(f)(2). If the minor is being threatened, intimidated, or manipulated “by the defendant or by any person acting in the interest of the defendant, the time period during which the threats, intimidation, manipulation, or fraud occurred will not be part of the statute of limitations for the commencement of this action.” Ark Code Ann. § 16-18-109(f)(4).

- 5.11.1 Recommendation: Amend Ark. Code Ann. § 5-1-109(a)(2) (Statute of limitations) to include Ark. Code Ann. § 5-70-104(a)(2) (Promoting prostitution in the first degree) and Ark. Code Ann. § 5-18-103(b)(1)(G) (Trafficking of persons) when the victim is a minor, or eliminate the statute of limitations for bringing prosecutions of these offenses.

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 or other electronic communication 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.*

Ark. Code Ann. § 12-18-1202 (Training regarding sexually exploited children) establishes training programs for “intake officers, law enforcement, prosecutors, and any other appropriate staff, concerning how to identify a sexually exploited child.” Additionally these trainings will explain the “appropriate services for a sexually exploited child.” Ark. Code Ann. § 12-18-1202.

Training on related topics is also required. Under Ark. Code Ann. § 12-9-113(a)(1) (Domestic violence training), new law enforcement officers must receive “at least twenty (20) hours of training in domestic violence and twenty (20) hours of training in child abuse.” The training on “child abuse victim interview techniques” must include the following: “(1) Current law, including the Child Maltreatment Act, § 12-18-101 et seq., and the Arkansas Juvenile Code of 1989, § 9-27-301 et seq.; (2) Child sexual abuse; and (3) Physical and behavioral indicators.” Ark. Code Ann. §12-9-113(c).

Additionally, all law enforcement officers must receive 20 hours of training on sexual assaults. Ark. Code Ann. § 12-9-114(a)(1). Ark. Code Ann. § 12-9-114(b) (Training concerning sexual assaults) states, “At a minimum, the training shall cover the following topics: (1) The dynamics of sexual assault; (2) The laws concerning sexual assault; (3) Sexual assault victim interview techniques; and (4) Support services available to sexual assault victims.”

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

Arkansas law allows for single party consent to audiotaping. Pursuant to Ark. Code Ann. § 5-60-120(a) (Interception and recording), “It is unlawful for a person to intercept a wire, landline, oral, telephonic communication, or wireless communication, and to record or possess a recording of the communication unless the person is a party to the communication or one (1) of the parties to the communication has given prior consent to the interception and recording.” Furthermore, § 5-60-120(c)(1) states, “It is not unlawful for the act to be committed by a person acting under the color of law.”

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

Ark. Code Ann. § 5-60-120(c)(1) (Interception and recording) states, “It is not unlawful for the act [of intercepting a wire, landline, oral, telephonic communication, or wireless communication, and to record or possess a recording of the communication] to be committed by a person acting under the color of law.”

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.*

As noted below in Section 6.5, Ark. Code Ann. §§ 5-27-603 and 5-27-306 use language that indicates a decoy may be used in prosecutions. However, the trafficking in persons statute and other CSEC statutes are silent on the permissibility of using a law enforcement officer or adult agent of law enforcement as a decoy in investigating the sex trafficking of children.

6.4.1 Recommendation: Enact a law to specifically allow law enforcement to investigate sex trafficking of children through the use of decoys.

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

Use of the Internet or electronic communication is allowed for some investigations of traffickers under Ark. Code Ann. § 5-27-306(a) (Internet stalking of a child) when a person 21 or older “knowingly uses a computer online service, internet service, or local internet bulletin board service to” do any of the following:

(2) Seduce, solicit, lure, or entice an individual that the person believes to be fifteen (15) years of age or younger in an effort to arrange a meeting with the individual for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity;

...

(4) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, electronic mail address, residence address, picture, physical description, characteristics, or any other identifying information on an individual that the person believes to be fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the individual for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity.

Use of the phrase, “believes to be fifteen (15) years of age or younger,” in both of these subsections, implies that law enforcement officers are allowed to use the Internet or other electronic communication to investigate domestic minor sex trafficking cases when the victim is 15 or younger.

It is also possible that a law enforcement officer could investigate violations of Ark. Code Ann. § 5-27-603 (Computer child pornography) against a child under 17 through the Internet or other electronic communication. This crime prohibits using “a computer online service, internet service, or local bulletin board service to seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another individual believed by the person to be a child, to engage in sexually explicit conduct.” Ark. Code Ann. § 5-27-603(a)(2), (b).

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

Ark. Code Ann. § 12-12-205(d) provides that “[u]pon receiving notice of a missing child, a law enforcement agency shall complete a missing person report and immediately enter identifying and descriptive information about the missing child into the computerized system of the clearinghouse.” Additionally, under Ark. Code Ann. § 12-12-801(a)(1) (Report of missing child–Notation on records), “When either a law enforcement officer or the Attorney General is notified by the parents, guardian, or other person having custody of a child that the child is missing, the law enforcement officer or the Attorney General shall: (1) Ensure that the missing child information is entered into the Missing Persons Information Clearinghouse within the Arkansas Crime Information Center under Section 12-12-205 and the National Crime Information Center.” Ark. Code Ann. § 12-12-205(d)(3) specifies that the computer entry should be canceled “when the missing child . . . is located or returned.”

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