

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2016 ANALYSIS AND RECOMMENDATIONS SOUTH DAKOTA

### FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

#### *Legal Components:*

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*
- 1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*
- 1.3 *Prostitution statutes refer to the sex trafficking statute to acknowledge the intersection of prostitution with trafficking victimization.*
- 1.4 *The state racketeering or gang crimes statute includes sex trafficking and commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute trafficking crimes.*

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

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

S.D. Codified Laws § 22-49-1<sup>2</sup> (Human trafficking prohibited) states, “No person may recruit, harbor, transport, provide, receive, or obtain, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude. Nor may any person benefit financially or by receiving anything of value from participation in a venture that has

<sup>1</sup> This report includes legislation enacted as of August 1, 2016.

<sup>2</sup> The text of S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 168 during the 91st Session of the South Dakota Legislature (effective July 1, 2016).

engaged in acts set forth in this section. Any violation of this section constitutes the crime of human trafficking.”

Under S.D. Codified Laws § 22-49-2<sup>3</sup> (First degree human trafficking–Felony), the crime is a Class 2 felony, and it occurs when the human trafficking acts defined in § 22-49-1:

- (1) Involve committing or attempting to commit kidnaping;
- (2) Involve a victim under the age of eighteen years;
- (3) Involve prostitution or procurement for prostitution; or
- (4) Result in the death of a victim;

Under S.D. Codified Laws § 22-49-3 (Second degree human trafficking—Felony) is a Class 4 felony and occurs when a person does either of the following:

- (1) Recruits, harbors, transports, provides, or obtains, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude; or
- (2) Benefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in this section.

Under S.D. Codified Laws § 22-49-4 (Penalty for hiring or attempting to hire someone to engage in sexual activity for a fee), “[i]t is a Class 6 felony for a person to hire or attempt to hire another person for a fee to engage in sexual activity,<sup>4</sup> as defined in S.D. Codified Laws § 22-23-1.1 [Definitions], if the person knew or should have known the other person was being forced to engage in the activity through human trafficking.”

A Class 2 felony is punishable by imprisonment up to 25 years and a possible fine of \$50,000.<sup>5</sup> S.D. Codified Laws § 22-6-1(5). A Class 4 felony is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). A Class 6 felony is punishable by imprisonment up to 2 years, a fine of \$4,000, or both. S.D. Codified Laws § 22-6-1(9).

- 1.1.1 Recommendation: Amend S.D. Codified Laws §§ 22-49-1 (Human trafficking prohibited), 22-49-2 (First degree human trafficking–Felony), 22-49-3 (Second degree human trafficking—Felony) to eliminate the requirement to prove force, fraud, or coercion in the trafficking of minors.

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<sup>3</sup> The text of S.D. Codified Laws § 22-49-2 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 168 during the 91st Session of the South Dakota Legislature (effective July 1, 2016).

<sup>4</sup> S.D. Codified Laws § 22-23-1.1(definitions) states “[a]s used in this chapter the term, sexual activity, references both sexual penetration . . . and sexual contact . . . .”

<sup>5</sup> S.D. Codified Laws § 22-6-1.2 (Minimum sentence for subsequent felony convictions for a sex crime) states, “If an adult has a previous conviction for a felony sex crime as defined by § 22-24B-1, any subsequent felony conviction for a sex crime as defined by subdivisions 22-24B-1(1) to (15), inclusive, and (19) shall result in a minimum sentence of imprisonment equal to the maximum term allowable under § 22-6-1, up to twenty-five years. The court may suspend a portion of the prison sentence required under this section.” See discussion of “sex crime” pursuant to S.D. Codified Laws § 22-24B-1 *infra* Component 2.10.

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 law criminalizes CSEC in South Dakota:

1. S.D. Codified Laws § 22-32-2 (Promotion of prostitution) identifies commercial sexual activity as a separate and distinct offense from general sexual offenses. S.D. Codified Laws § 22-32-2 states,

Any person who:

- (1) Encourages, induces, procures, or otherwise purposely causes another to become or remain a prostitute;
- (2) Promotes the prostitution of minor; or
- (3) Promotes the prostitution of his or her spouse, child, ward, other dependent person is guilty of promoting prostitution.

This crime is a Class 5 felony punishable by imprisonment up to 5 years and a possible fine of \$10,000. S.D. Codified Laws §§ 22-23-2, 22-6-1(8).

Certain non-commercial sex offenses against children may apply in cases of commercial sexual exploitation of a child. These include the following:

1. S.D. Codified Laws § 22-22-24.3 (Sexual exploitation of minor) establishes a felony when an individual “causes or knowingly permits a minor to engage in an activity or the simulation of an activity that: (1) Is harmful to minors; (2) Involves nudity; or (3) Is obscene.” A first violation is a Class 6 felony punishable by imprisonment up to 2 years, a fine of \$4,000, or both. S.D. Codified Laws §§ 22-22-24.3, 22-6-1(9). A subsequent violation within 15 years is a Class 5 felony punishable by imprisonment up to 5 years and a possible fine of \$10,000. S.D. Codified Laws §§ 22-22-24.3, 22-6-1(8).
2. Under S.D. Codified Laws § 22-22-7 (Sexual contact with child under sixteen), an individual over 16 is guilty of a Class 3 felony if the individual “knowingly engages in sexual contact with another person, other than that person’s spouse if the other person is under the age of sixteen years.” This crime is punishable by imprisonment up to 15 years and a possible fine of \$30,000. S.D. Codified Laws § 22-6-1(6). The crime is only a Class 1 misdemeanor if the victim is 13 or older and the perpetrator is “less than five years older than the victim,” which is punishable by imprisonment in the county jail up to 1 year, a fine of \$2,000, or both. S.D. Codified Laws §§ 22-6-2(1), 22-22-7.
3. S.D. Codified Laws § 22-24A-5(1) (Solicitation of minor) creates a Class 4 felony when a person 18 or older “(1) Solicits<sup>6</sup> a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act.” Under S.D. Codified Laws § 22-24A-4, a “minor” is defined as someone 15 or younger.<sup>7</sup> This crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7).

*1.3 Prostitution statutes refer to the sex trafficking statute to acknowledge the intersection of prostitution with trafficking victimization.*

South Dakota’s prostitution offense, S.D. Codified Laws § 22-23-1 (Prostitution) refers to the human trafficking statute to provide an affirmative defense for victims of trafficking charged with prostitution offenses. S.D. Codified Laws § 22-23-1 provides an affirmative defense for trafficking victims charged with committing a prostitution offense when,

[B]y a preponderance of the evidence that the defendant is a victim of human trafficking under chapter 22-49 or that the defendant committed the act only under compulsion by another person who, by implicit or explicit threat, created a reasonable apprehension in the mind of the defendant that if the defendant did not commit the act, the person would inflict bodily harm upon the defendant.” S.D. Codified Laws § 22-23-1.2.

*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.*

South Dakota has not enacted a racketeering statute. However, under S.D. Codified Laws Chapter 22-10A (Street Gang Activity) sentences for violent crimes are intensified when committed as part of a “[p]attern of street gang activity,” defined as “the commission, attempted commission, or solicitation by any member or members of a street gang of two or more felony or violent misdemeanor offenses on separate occasions within a three-year period for the purpose of furthering gang activity.” S.D. Codified Laws § 22-10A-1(3). This would include sex trafficking and CSEC offenses, but can only be used in sentencing members of street gangs consisting of three or more individuals identified as a group. See S.D. Codified Laws § 22-10A-1(1).

- 1.4.1 Recommendation: Enact a racketeering statute that includes CSEC and trafficking offenses, including S.D. Codified Laws § 22-49-1 (Human Trafficking), § 22-23-2 (Promotion of prostitution), § 22-22-24.3 (Sexual exploitation of minor), and § 22-24A-5(1) (Solicitation of minor) as predicate crimes so the racketeering law may be used to prosecute trafficking enterprises.

**Legal Components:**

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts with a minor.*
- 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 electronic communications 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.*

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**Legal Analysis:**

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

S.D. Codified Laws § 22-49-1<sup>8</sup> (Human trafficking prohibited) can apply to buyers of sex with minors following federal precedent through the term “obtain.”<sup>9</sup> The law states, “No person may recruit, harbor, transport, provide, receive, or obtain, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude.”

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<sup>8</sup> See *supra* note 2.

<sup>9</sup> 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 laws (in particular the term “obtains”) to the extent such interpretation does not conflict with state case law.

However, the placement of the words “receive” and “obtain” in the statute requires the buyer to know that force, fraud, or coercion “will be used” in the commission of the crime. This requirement presents significant barriers to prosecuting buyers under S.D. Codified Laws § 22-49-1; South Dakota’s human trafficking offense is unlikely to apply to buyers.

Furthermore, S.D. Codified Laws § 22-49-1<sup>10</sup> states, “[i]t is a Class 6 felony for a person to hire or attempt to hire another person for a fee to engage in sexual activity, as defined in § 22-23-1.1 (Sexual activity defined), if the person knew or should have known the other person was being forced to engage in the activity through human trafficking.” Therefore, to be convicted of a human trafficking offense, buyers of commercial sex with a minor are required to have knowledge that the minor is a victim of human trafficking.

- 2.1.1 Recommendation: Amend S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) to clarify that buyer conduct is included as a violation of S.D. Codified Laws §§ 22-49-1 (Human trafficking prohibited), 22-49-2 (First degree human trafficking—Felony), 22-49-3 (Second degree human trafficking—Felony) without regard to force, fraud, or coercion.

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

South Dakota’s CSEC laws do not make it a crime to purchase sex with a minor. While S.D. Codified Laws § 22-24A-5(1) (Solicitation of minor) establishes a Class 4 felony when a person 18 or older “(1) Solicits a minor,<sup>11</sup> or someone the person reasonably believes is a minor, to engage in a prohibited sexual act,” the lack of an express reference to commercial sexual activity makes it uncertain whether the offense can be applied to buyers of sex acts with a minor.<sup>12</sup>

- 2.2.1 Recommendation: Enact a law that specifically criminalizes buying or attempting to buy sex with a minor and provides penalties that reflect the seriousness of the offense.

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

S.D. Codified Laws § 22-23-9 (Hiring another to engage in sexual activity) does not differentiate between buying sex with an adult and buying sex with a minor. The statute creates a Class 1 misdemeanor for “[a]ny person who hires or attempts to hire another person for a fee to engage in sexual activity,” regardless of the age of the victim.

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<sup>10</sup> See *supra* note 2.

<sup>11</sup> S.D. Codified Law § 22-24A-2(3) (Definitions) defines “minor” as any person under the age of 18.

<sup>12</sup> S.D. Codified Laws § 22-24A-2(16) defines “prohibited sexual act” as “actual or simulated sexual intercourse, sadism, masochism, sexual bestiality, incest, masturbation, or sadomasochistic abuse; actual or simulated exhibition of the genitals, the pubic or rectal area, or the bare feminine breasts, in a lewd or lascivious manner; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; defecation or urination for the purpose of creating sexual excitement in the viewer; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. The term includes encouraging, aiding, abetting or enticing any person to commit any such acts as provided in this subdivision. The term does not include a mother’s breast-feeding of her baby.”

S.D. Codified Laws § 22-24A-5 (Solicitation of minor) can apply to situations of purchase of commercial sex acts with a minor<sup>13</sup> by creating a Class 4 felony when an individual who is 18 or older “(1) Solicits a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act; or (2) Knowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act,” where the “prohibited sexual act” is a commercial sex act.

2.3.1 Recommendation: Amend S.D. Codified Laws § 22-24A-5 (Solicitation of minor) to specifically prohibit solicitation of a minor for commercial sex acts and raise the age of a minor victim to under 18.

2.3.2 Recommendation: Amend S.D. Codified Laws § 22-23-9 (Hiring another to engage in sexual activity) to provide a heightened penalty for purchasing sex with a minor under 18.

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

When applicable to buyers, S.D. Codified Laws § 22-49-2 (First degree human trafficking—Felony) states that a buyer convicted of human trafficking is guilty of a Class 2 felony, which is punishable by imprisonment up to 25 years and a possible fine of \$50,000.<sup>14</sup> S.D. Codified Laws § 22-6-1(5).

S.D. Codified Laws § 22-24A-5(1) (Solicitation of minor) makes it a Class 4 felony when a person 18 or older “(1) Solicits a minor,<sup>15</sup> or someone the person reasonably believes is a minor, to engage in a prohibited sexual act,” which could include forms of CSEC. This crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7).

The general solicitation of prostitution law, S.D. Codified Laws § 22-23-9 (Hiring another to engage in sexual activity), establishes a Class 1 misdemeanor, which is punishable by imprisonment up to 1 year in the county jail, a fine of \$2,000, or both. S.D. Codified Laws § 22-6-2(1).

Buyers of commercial sex with minors charged with a sexual offense face a range of penalties. A conviction under S.D. Codified Laws § 22-22-7 (Sexual contact with child under sixteen) is punishable as a Class 3 felony by imprisonment up to 15 years and a possible fine of \$30,000. S.D. Codified Laws § 22-6-1(6). If, however, the buyer was less than 5 years older than the victim and the victim was 13 or older, the crime would only be a Class 1 misdemeanor punishable by imprisonment up to 1 year in the county jail, a fine of \$2,000, or both. S.D. Codified Laws §§ 22-6-2(1), 22-22-7.

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<sup>13</sup> S.D. Codified Laws § 22-24A-4 (Solicitation of minor—Definitions), “minor” is defined as someone 15 or younger.

<sup>14</sup> S.D. Codified Laws § 22-6-1.2 (Minimum sentence for subsequent felony convictions for a sex crime) states, “If an adult has a previous conviction for a felony sex crime as defined by § 22-24B-1, any subsequent felony conviction for a sex crime as defined by subdivisions 22-24B-1(1) to (15), inclusive, and (19) shall result in a minimum sentence of imprisonment equal to the maximum term allowable under § 22-6-1, up to twenty-five years. The court may suspend a portion of the prison sentence required under this section.” See discussion of “sex crime” pursuant to S.D. Codified Laws § 22-24B-1 *infra* Component 2.10.

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 offense<sup>16</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>17</sup> a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>18</sup>

2.5 *Using the Internet or electronic communications 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.*

Under S.D. Codified Laws § 22-24A-5(2) (Solicitation of minor), a buyer may be guilty of a Class 4 felony when the buyer “[k]nowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s<sup>19</sup> name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act.” Under this statute, whether or not a computer is used, a conviction is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). This statute also makes it a crime to “[s]olicit[] a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act.” S.D. Codified Laws § 22-24A-5(1). In this statute, “solicits” is defined as “to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or persuade a specific person by telephone, in person, by letter, by using a computer or any other electronic means.” S.D. Codified Laws § 22-24A-4(2).

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<sup>16</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

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

<sup>17</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

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

<sup>19</sup> *See supra* note 13.



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

South Dakota does not prohibit a mistake of age defense to a prosecution for the buying of sex with any minor under 18 years of age.

While both S.D. Codified Laws §§ 22-24A-5(2) (Solicitation of a minor) and 22-22-24.3 (Sexual exploitation of a minor) prohibit a buyer from raising a mistake of age defense for sex acts with a minor under 18 years of age, neither statutes are commercial in nature and, therefore, are not clearly applicable to commercial sexual activity.

2.6.1 Recommendation: Amend S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) to prohibit a defense based on mistake of age in cases of commercial sexual exploitation of a 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.*

While South Dakota's CSEC statute does not criminalize the purchasing of sex with a minor, the core human trafficking statute, S.D. Codified Laws § 22-49-1<sup>20</sup> (Human trafficking prohibited) is buyer applicable and does not have a staggered penalty structure. For buyers charged with violating S.D. Codified Laws § 22-49-2 (First degree human trafficking— Felony), the offense is a Class 2 felony, punishable by imprisonment up to 25 years and a possible fine of \$50,000. S.D. Codified Laws § 22-6-1(5). For buyers charged with violating S.D. Codified Laws § 22-49-3 (Second degree human trafficking—Felony), the offense is a Class 4 felony, punishable by imprisonment up to 10 years and a possible fine of \$20,000.

Additionally, in the absence of a CSEC law that applies to buyers, S.D. Codified Laws § 22-24A-5 (Solicitation of minor) may apply to soliciting commercial sex acts and is punishable as a Class 4 felony by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). However, under S.D. Codified Laws § 22-24A-4 (Solicitation of minor — Definitions), “minor” is defined as someone 15 or younger.<sup>21</sup>

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.*

When a buyer can be found guilty of human trafficking in the first degree under S.D. Codified Laws § 22-49-2(3), which includes sex trafficking, then the crime may be punishable by a fine of \$50,000. S.D. Codified Laws § 22-6-1(5). S.D. Codified Laws § 22-24A-5 (Solicitation of minor) may carry a fine of \$20,000 when the solicited minor is under 15. S.D. Codified Laws § 22-6-1(7).

In contrast, if a buyer is charged with solicitation under S.D. Codified Laws § 22-23-9 (Hiring another to engage in sexual activity) a fine of \$2,000 is possible. S.D. Codified Laws § 22-6-2(1).

If charged with violating any of the sexual offense laws, buyers of commercial sex with minors could receive significant financial penalties. For S.D. Codified Laws § 22-22-24.3 (Sexual exploitation of minor) the buyer could receive a fine of \$4,000. S.D. Codified Laws § 22-6-1(9). A buyer convicted of a violating S.D. Codified Laws § 22-22-7 (Sexual contact with child under sixteen) may be punished by a maximum fine of \$30,000. S.D. Codified Laws § 22-6-1(6). If, however, the buyer was less than 5 years older than the victim and the

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<sup>20</sup> The text of S.D. Codified Laws § 22-49-1 (Human trafficking prohibited) cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 168 during the 91st Session of the South Dakota Legislature (effective July 1, 2016).

<sup>21</sup> See *supra* note 11

victim was 13 or older, the crime would only carry a possible fine of \$2,000. S.D. Codified Laws §§ 22-6-2(1), 22-22-7.

A buyer may also be subject to restitution orders, at the discretion of the court. S.D. Codified Laws § 23A-28-3 (Restitution plan—Present inability to pay—Absence of pecuniary damages—Condition of parole) provides “If the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant . . . promptly prepare a plan of restitution, including the name and address of each victim, a specific amount of restitution to each victim, and a schedule of restitution payments.” For the purposes of restitution to crime victims, “victim” is defined as including “any person . . . who has suffered pecuniary damages<sup>22</sup> as a result of the defendant’s criminal activities . . .” S.D. Codified Laws § 23A-28-2(5). “Criminal activities” is defined as “any crime [excluding petty offenses] for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted.” S.D. Codified Laws § 23A-28-2(2). Moreover, South Dakota’s state policy is that “restitution shall be made by each violator of the criminal laws to the victims of the violator’s criminal activities to the extent that the violator is reasonably able to do so.” S.D. Codified Laws § 23A-28-1.

Additionally, under S.D. Codified Laws § 23A-28-12 (Medical, psychological or psychiatric treatment of minor victim), “Anyone convicted under . . . § 22-22-7 [Sexual contact with child under sixteen] . . . shall be required as part of the sentence imposed by the court to pay all or part of the cost of any necessary medical, psychological, or psychiatric treatment, or foster care of the minor resulting from the act or acts for which the defendant is convicted.”

A buyer is also subject to mandatory, criminal asset forfeiture under S.D. Codified Laws § 22-24A-15 (Person convicted forfeits certain property interests—Distribution of seized assets) when found guilty of certain crimes. Crimes allowing for asset forfeiture include, “22-24A-1 to 22-24A-20 [including sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], inclusive, [or] 22-24B-1 [Sex crimes], 22-49-1 to 22-49-3 [Human trafficking], inclusive . . .”<sup>23</sup> S.D. Codified Laws § 22-24A-15. Therefore, those buyers convicted of violations of § 22-24A-3 (Possession, manufacture, or distribution of child pornography), § 22-24A-5 (Solicitation of minor), § 22-22-24.3 (Sexual exploitation of minor), § 22-22-7 (Sexual contact with child under sixteen), § 22-49-1 (Human trafficking prohibited), § 22-49-2 (First degree human trafficking), § 22-49-3 (Second degree human trafficking) and the age-neutral patronizing offense under § 22-23-9 (Hiring another to engage in sexual activity) would be subject to asset forfeiture. S.D. Codified Laws §§ 22-24A-15, 22-24B-1.

Pursuant to S.D. Codified Laws § 22-24A-15 (Person convicted forfeits certain property interests – Distribution of seized assets), property subject to forfeiture includes the following:

- (1) Any photograph, film, videotape, book, digital media or visual depiction that has been manufactured, distributed, purchased, possessed, acquired, or received in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

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<sup>22</sup> S.D. Codified Laws § 23A-28-2 (Definition of terms) defines “pecuniary damages” as, “all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and damages for pain and suffering, mental anguish, and loss of consortium. Without limitation, the term includes damages for wrongful death.”

<sup>23</sup> See discussion of “sex crime” pursuant to S.D. Codified Laws § 22-24B-1 *infra* Component 2.10.

(2) Any material, product, and equipment of any kind that is used or intended for use in manufacturing, processing, publishing, selling, possessing, or distributing any visual depiction proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

(3) Any property that is used, or intended for use, as a container for property described in subdivisions (1) and (2) of this section, including any computers and digital media;

(4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used, or intended for use, to transport, or in any manner facilitate any activity proscribed under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;<sup>24</sup>

(5) Any book, record, and research, including microfilm, tape, and data that is used, or intended for use, in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

(6) Any funds or other things of value used for the purposes of unlawfully carrying out any activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, 43-43B-1 to 43-43B-3, inclusive, and 22-23-2, 22-23-8, and 22-23-9; and

(7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, 43-43B-1 to 43-43B-3, inclusive, and 22-23-2, 22-23-8, and 22-23-9.

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<sup>24</sup> Exceptions to § 22-24A-15(4) include:

[N]o conveyance used by any person as a common carrier in the transaction of business as a common carrier may be forfeited under the provisions of sections 4 to 16, inclusive, of this Act, unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to a violation of this chapter.

The text of House Bill 1088 Section 3 states,

[N]o conveyance may be forfeited under the provisions of this Act, by reason of any act or omission established by the owner of the conveyance to have been committed or omitted by any person other than the owner while the conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state, or while the conveyance was rented or leased from a motor vehicle dealer or a leasing or rental agency and the dealer or agency had no knowledge that the conveyance was being used or intended for use, to transport or in any manner facilitate the commission of any crime

The text of Section 3 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1088 during the 2016 91<sup>st</sup> Session of the South Dakota Legislature (effective July 1, 2016)

The text House Bill 1088 Section 4 states,

[N]o conveyance may be forfeited under the provisions of this Act, by reason of any act committed or omitted by a person other than an owner of the conveyance unless the owner knew or in the exercise of ordinary care should have known that the conveyance was being used or was intended for use to facilitate the commission of any crime.

The text of Section 4 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1088 during the 2016 91<sup>st</sup> Session of the South Dakota Legislature (effective July 1, 2016).

S.D. Codified Laws § 22-24A-15 states that property from subdivision (1) shall be deemed contraband and forfeited to the state. Regarding the use of the other listed property, S.D. Codified Laws § 22-24A-15 states that “[a]ny amount over and above the amount necessary to reimburse for the investigation and prosecution shall be used to satisfy any civil judgments received by victims. All remaining proceeds from the sale of any forfeited property shall be paid into the South Dakota internet crimes against children fund.”

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

Under S.D. Codified Laws § 22-24A-3(3) (Possession, manufacture, or distribution of child pornography), a person who “[k]nowingly possesses, distributes, or otherwise disseminates any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act” is guilty of a Class 4 felony. This crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). A subsequent offense within 15 years is a Class 3 felony punishable by imprisonment up to 15 years and a possible fine of \$30,000. S.D. Codified Laws §§ 22-24A-3, 22-6-1(6). A person convicted of this crime also faces several financial penalties including asset forfeiture and civil damages. S.D. Codified Laws §§ 22-24A-7, 22-24A-15, 22-24B-1(5).<sup>25</sup>

Pursuant to S.D. Codified Laws § 22-24A-15<sup>26</sup> (Property subject to forfeiture), offenders convicted of child pornography offenses under S.D. Codified Laws § 22-24-3(3) are subject to the forfeiture of any property<sup>27</sup> used in the commission of the crime.

In comparison, a federal conviction for possession of child pornography<sup>28</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>29</sup> Subsequent convictions, however, are punishable by

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<sup>25</sup> See discussion *supra* Component 2.8.

<sup>26</sup> The text of S.D. Codified Laws § 22-24A-15, cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1088 and Senate Bill 25 during the 2016 91st Session of the South Dakota Legislature (effective July 1, 2016).

<sup>27</sup> Under S.D. Codified Laws § 22-24A-15, property subject to forfeiture includes:

- (1) Any photograph, film, videotape, book, digital media or visual depiction that has been manufactured, distributed, purchased, possessed, acquired, or received in violation of . . . § 22-24A-1 to 22-24A-20;
- (2) Any material, product, equipment of any kind that is used or intended for use in manufacturing, processing, publishing, selling, possessing, or distributing any visual depiction proscribed by . . . § 22-24A-1 to 22-24A-20;
- (3) Any property that is used, or intended for use, as a container for property described in subdivisions (1) and (2) of this section, including any computers and digital media;
- (4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used or intended for use, to transport, or in any manner facilitate any activity proscribed under . . . § 22-24A-1 to 22-24A-20;
- (5) Any book, record, or research, including microfilm, tape, and data that is used, or intended for use, in violation of § 22-24A-1 to § 22-24A-20;
- (6) Any funds or other things of value used for the purposes of unlawfully carrying out any activity proscribed in . . . § 22-24A-1 to 22-24A-20; and
- (7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful activity proscribed by . . . § 22-24A-1 to 22-24A-20.

*See supra* note 26.

<sup>28</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4)(A) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>29</sup> 18 U.S.C. § 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20

imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>30</sup>

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

Buyers convicted under S.D. Codified Laws § 22-49-2 (First degree human trafficking) or under S.D. Codified Laws § 22-49-3 (Second degree human trafficking) are required to register as sex offenders if the victim is a minor. S.D. Codified Laws § 22-24B-1 (“Sex crime” defined). Pursuant to S.D. Codified Laws § 22-24B-2 (Registration of convicted sex offenders), “Any person who has been convicted for commission of a sex crime, as defined in § 22-24B-1, shall register as a sex offender.” According to S.D. Codified Laws § 22 24B-1<sup>31</sup> (“Sex crime” defined), “sex crimes” include the following:

- (1) Rape as set forth in § 22-22-1;
- (2) Felony sexual contact with a minor under sixteen as set forth in § 22-22-7 if committed by an adult;
- .....
- (5) Possessing, manufacturing, or distributing child pornography as set forth in § 22-24A-3;
- (6) Sale of child pornography as set forth in § 22-24A-1;
- (7) Sexual exploitation of a minor as set forth in § 22-22-24.3;
- (8) Kidnapping, as set forth in § 22-19-1, if the victim of the criminal act is a minor;
- (9) Promotion of prostitution of a minor as set forth in subdivision 22-23-2(2);
- .....
- (12) Solicitation of a minor as set forth in § 22-24A-5;
- .....
- (15) An attempt, conspiracy, or solicitation to commit any of the crimes listed in this section;
- .....
- (17) Any federal crime . . . that would constitute a sex crime under federal law;
- (18) Any crime committed in another state if that state also requires that anyone convicted of that crime register as a sex offender in that state;
- .....
- (21) First degree human trafficking as set forth in § 22-49-2 if the victim is a minor; or
- (22) Second degree human trafficking as set forth in § 22-49-3 involving the prostitution of a minor.

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

<sup>30</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (b)(1), 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 (b)(1), 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).

<sup>31</sup> The text of S.D. Codified Laws § 22-24B-1 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 26 during the 91st Session of the South Dakota Legislature (effective July 1, 2016).

***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 electronic communications 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.*

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***Legal Analysis:***

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*

Human trafficking in the second degree is a Class 4 felony when an individual “[r]ecruits, harbors, transports, provides, receives, or obtains, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude.” S.D. Codified Laws § 22-49-1<sup>32</sup> (Human trafficking prohibited). Class 4 felonies are punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). S.D. Codified Laws § 22-49-2<sup>33</sup> (First degree human trafficking—Felony) creates a Class 2 felony for human trafficking in the first degree when the crimes “(1) Involve committing or attempting to commit kidnaping; (2) Involve a victim under the age of eighteen years; (3) Involve prostitution or procurement for prostitution; or (4) Result in the death of a victim.” When these elements are involved, the crime is punishable by imprisonment up to 25 years and a possible fine of \$50,000. S.D. Codified Laws § 22-6-1(5).

A trafficker could also be found guilty of S.D. Codified Laws § 22-23-2(1), (2) (Promotion of prostitution) when the trafficker “[p]romotes the prostitution of a minor” or “[e]ncourages, induces, procures, or otherwise purposely causes another to become or remain a prostitute.” This crime is a Class 5 felony punishable by imprisonment up to 5 years and a possible fine of \$10,000. S.D. Codified Laws §§ 22-23-2, 22-6-1(8).

Additionally, a trafficker could be charged with S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron), which creates a Class 6 felony when an individual does any of the following:

- (1) Solicits another person to patronize a prostitute;
- (2) Procures a prostitute for a patron;
- (3) Transports a person into or within this state to engage in prostitution, or procures or pays for transportation for that purpose;
- (4) Knowingly permits a place owned, managed, supervised, or controlled by himself or herself, alone, or in association with others, to be regularly used for prostitution or the promotion of prostitution, or fails to make reasonable effort to abate such use by ejecting the tenant, notifying

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<sup>32</sup> See *supra* note 2.

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

law enforcement authorities, or using other legally available means; or  
(5) Solicits, receives, or agrees to receive any benefit for doing or agreeing to do anything prohibited by this section;

This crime is punishable by imprisonment for 2 years, a fine of \$4,000, or both. S.D. Codified Laws § 22-6-1(9).

A trafficker could be charged under S.D. Codified Laws § 22-24A-5(2) (Solicitation of minor), which creates a Class 4 felony when an individual 18 or older “[k]nowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act.” This crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(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 offense<sup>34</sup> against a minor. 18 U.S.C. § 3559(e)(1).

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

S.D. Codified Laws § 22-24A-3 (Possession, manufacture, or distribution of child pornography) creates a Class 4 felony when an individual does any of the following:

- (1) Creates any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act;
- (2) Causes or knowingly permits the creation of any visual depiction of a minor engaged in a prohibited sexual act, or in the simulation of such an act; or
- (3) Knowingly possesses, distributes, or otherwise disseminates any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act.

As a Class 4 felony, this crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). Subsequent convictions within 15 years are Class 3 felonies punishable by imprisonment up to 15 years and a possible fine of \$30,000. S.D. Codified Laws §§ 22-24A-3, 22-6-1(6).

Pursuant to S.D. Codified Laws § 22-24A-15<sup>35</sup> (Property subject to forfeiture), persons convicted of child pornography crimes under S.D. Codified Laws § 22-24A-3 (Possession, manufacture, or distribution of child pornography) are subject to the forfeiture of any property used in the commission of the crime.

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<sup>34</sup> See *supra* note 16 for the definition of “federal sex offense.”

<sup>35</sup> See *supra* note 26.

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 offense<sup>36</sup> against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of child pornography<sup>37</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>38</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>39</sup>

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

A person 18 or older violates S.D. Codified Laws § 22-24A-5(2) (Solicitation of minor) when he “[k]nowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s<sup>40</sup> name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act.” This is a Class 4 felony punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws §§ 22-24A-5, 22-6-1(7). S.D. Codified Laws § 22-24A-5(1) creates a Class 4 felony when a person 18 or older “(1) Solicits<sup>41</sup> a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act.” Under S.D. Codified Laws § 22-24A-4, “minor” is defined as someone 15 or younger. This crime is punishable by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7).

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<sup>36</sup> See *supra* note 16 for the definition of “federal sex offense.”

<sup>37</sup> 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).

<sup>38</sup> 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).

<sup>39</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>40</sup> See *supra* note 13.

<sup>41</sup> “Solicit” is defined in S.D. Codified Laws § 22-24A-4 as “to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or persuade a specific person by telephone, in person, by letter, by using a computer or any other electronic means.”



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

Financial penalties for traffickers include fines, asset forfeiture, and victim restitution. A person found guilty of human trafficking in the first degree faces a possible fine of \$50,000. S.D. Codified Laws §§ 22-49-2 (First degree human trafficking—Felony), 22-6-1(5). The crime of human trafficking in the second degree carries a possible fine of \$20,000. S.D. Codified Laws §§ 22-49-3, 22-6-1(7).

For a violation of S.D. Codified Laws § 22-23-2 (Promotion of prostitution), a trafficker could receive a possible fine of \$10,000. S.D. Codified Laws §§ 22-23-2, 22-6-1(8). In contrast, a violation of S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron) carries a possible fine of \$4,000 for violations. S.D. Codified Laws § 22-6-1(9). Lastly, S.D. Codified Laws § 22-24A-5 (Solicitation of minor) is punishable by a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7).

Traffickers may be subject to restitution orders, at the discretion of the court. S.D. Codified Laws § 23A-28-3 (Restitution plan—Present inability to pay—Absence of pecuniary damages—Condition of parole) provides “If the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant . . . promptly prepare a plan of restitution, including the name and address of each victim, a specific amount of restitution to each victim, and a schedule of restitution payments.” For the purposes of restitution to crime victims, “victim” is defined as including “any person . . . who has suffered pecuniary damages<sup>42</sup> as a result of the defendant’s criminal activities . . .” S.D. Codified Laws § 23A-28-2(5). “Criminal activities” is defined as “any crime [excluding petty offenses] for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted.” S.D. Codified Laws § 23A-28-2(2). Moreover, South Dakota’s state policy is that “restitution shall be made by each violator of the criminal laws to the victims of the violator’s criminal activities to the extent that the violator is reasonably able to do so.” S.D. Codified Laws § 23A-28-1.

Additionally, under S.D. Codified Laws § 23A-28-12 (Medical, psychological or psychiatric treatment of minor victim), “[a]nyone convicted under § 26-10-1 [Abuse of or cruelty to minor as felony], 22-22-7 [Sexual contact with child under sixteen] . . . or subdivision 22-22-1(1) or (5) [Rape], shall be required as part of the sentence imposed by the court to pay all or part of the cost of any necessary medical, psychological, or psychiatric treatment, or foster care of the minor resulting from the act or acts for which the defendant is convicted.”

A trafficker is subject to mandatory criminal asset forfeiture under S.D. Codified Laws § 22-24A-15 (Person convicted forfeits certain property interests—Distribution of seized assets) when found guilty of certain crimes. Crimes allowing for asset forfeiture include, “§§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20 [including sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], inclusive, 22-24B-1 [Sex crimes]<sup>43</sup>. . .” Therefore, those traffickers convicted of § 22-24A-3 (Possession, manufacture, or distribution of child pornography), § 22-24A-5 (Solicitation of a minor), § 22-22-24.3 (Sexual exploitation of minor), §§ 22-49-1 (Human trafficking prohibited) to 22-49-3 (Human trafficking), § 22-22-7 (Sexual contact with child under sixteen), § 22-23-2 (Promotion of prostitution) and § 22-23-8 (Solicitation or procurement of prostitute for patron) would be subject to asset forfeiture. S.D. Codified Laws §§ 22-24A-15, 22-24B-1.

Pursuant to S.D. Codified Laws § 22-24A-15 (Person convicted forfeits certain property interests—

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<sup>42</sup> See *supra* note 22

Distribution of seized assets), property subject to forfeiture includes the following:

- (1) Any photograph, film, videotape, book, digital media or visual depiction that has been manufactured, distributed, purchased, possessed, acquired, or received in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (2) Any material, product, and equipment of any kind that is used or intended for use in manufacturing, processing, publishing, selling, possessing, or distributing any visual depiction proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (3) Any property that is used, or intended for use, as a container for property described in subdivisions (1) and (2) of this section, including any computers and digital media;
- (4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used, or intended for use, to transport, or in any manner facilitate any activity proscribed under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (5) Any book, record, and research, including microfilm, tape, and data that is used, or intended for use, in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (6) Any funds or other things of value used for the purposes of unlawfully carrying out any activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, 43-43B-1 to 43-43B-3, inclusive, and 22-23-2, 22-23-8, and 22-23-9; and
- (7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, 43-43B-1 to 43-43B-3, inclusive, and 22-23-2, 22-23-8, and 22-23-9.

Pursuant to House Bill 1088 Section 7<sup>44</sup> “any property subject to forfeiture under this Act may be seized by any law enforcement officer or designated agent of the Division of Criminal Investigation upon process issued by any court having jurisdiction over the property.” Moreover, seizures can be made without process if:

- (1) The seizure is incident to an arrest or a search under a search warrant or to an inspection under an administrative inspection warrant;
- (2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this act;
- (3) The law enforcement officer or agent has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
- (4) The law enforcement officer or agent has probable cause to believe that the property has been used or intended to be used in violation of crimes . . . of this act.

Additionally, under House Bill 1088 Section 11,<sup>45</sup> if property is seized under the provisions of this act, the attorney general may:

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<sup>44</sup> The text of Section 7 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1088 during the 2016 91st Session of the South Dakota Legislature (effective July 1, 2016).

<sup>45</sup> The text of Section 11 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1088 during the 2016 91<sup>st</sup> Session of the South Dakota Legislature (effective July 1, 2016).

- (1) Place the property under seal;
- (2) Remove the property to a place designated by the attorney general; or
- (3) Take custody of the property and remove it to an appropriate location for disposition.

S.D. Codified Laws § 22-24A-15 states that property from subdivision (1) shall be deemed contraband and forfeited to the state. Regarding the use of the other listed property, S.D. Codified Laws § 22-24A-15 states that “[a]ny amount over and above the amount necessary to reimburse for the investigation and prosecution shall be used to satisfy any civil judgments received by victims. All remaining proceeds from the sale of any forfeited property shall be paid into the South Dakota internet crimes against children fund.”

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

A trafficker convicted of first or second degree human trafficking of a minor under either S.D. Codified Laws § 22-49-2 (First degree human trafficking–Felony) or § 22-49-3 (Second degree human trafficking—Felony), will be required to register as a sex offender. S.D. Codified Laws § 22-24B-1. (“Sex crime” defined). Pursuant to S.D. Codified Laws § 22-24B-2 (Registration of convicted sex offenders), “Any person who has been convicted for commission of a sex crime, as defined in § 22-24B-1, shall register as a sex offender.” According to S.D. Codified Laws § 22-24B-1<sup>46</sup> (“Sex crime” defined), “sex crimes” include the following:

- (1) Rape as set forth in § 22-22-1;
- (2) Felony sexual contact with a minor under sixteen as set forth in § 22-22-7 if committed by an adult;
- .....
- (5) Possessing, manufacturing, or distributing child pornography as set forth in § 22-24A-3;
- (6) Sale of child pornography as set forth in § 22-24A-1;
- (7) Sexual exploitation of a minor as set forth in § 22-22-24.3;
- (8) Kidnapping, as set forth in § 22-19-1, if the victim of the criminal act is a minor;
- (9) Promotion of prostitution of a minor as set forth in subdivision 22-23-2(2);
- .....
- (12) Solicitation of a minor as set forth in § 22-24A-5;
- .....
- (15) An attempt, conspiracy, or solicitation to commit any of the crimes listed in this section;
- .....
- (17) Any federal crime court martial offense, or tribal offence that would constitute a sex crime under federal law;
- (18) Any crime committed in another state if that state also requires that anyone convicted of that crime register as a sex offender in that state;
- .....
- (21) First degree human trafficking as set forth in § 22-49-2 if the victim is a minor; or
- (22) Second degree human trafficking as set forth in § 22-49-3 involving the prostitution of a minor.

S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron) is not included as sex crimes requiring registration as a sex offender.

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<sup>46</sup> See *supra* note 31.

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.*

Under S.D. Codified Laws § 26-8A-26.1 (Additional reasons for termination of parental rights), the parental rights of traffickers may be terminated if the parent committed an offense requiring registration on the sex abuse registry, pursuant to S.D. Codified Law § 22-24B-1 (Sex crimes defined), which includes several CSEC and trafficking offenses.

S.D. Codified Laws § 26-8A-26 (Termination of parental rights—Alternative Dispositions—permanency review for children in foster care) states in part, “If an adjudicated, abused, or neglected child whose parental rights have not been terminated has been in the custody of the Department of Social Services and it appears at a dispositional or review hearing that all reasonable efforts have been made to rehabilitate the family, that the conditions which led to the removal of the child still exist, and there is little likelihood that those conditions will be remedied so the child can be returned to the custody of the child’s parents, the court shall affirmatively find that good cause exists for termination of the parental rights of the child’s parents and the court shall enter an order terminating parental rights.” S.D. Codified Laws § 26-8A-26.1 further provides, “In addition to the provisions of § 26-8A-26(11), the court may find that good cause exists for termination of parental rights of a parent who,” among other things “Is required to register as a sex offender pursuant to chapter 22-24B.”

Under S.D. Codified Law § 22-24B-1, offenses required registration include,

- . . . .  
(2) Felony sexual contact with a minor under sixteen as set forth in § 22-22-7 if committed by an adult;  
. . . .
- (6) Sale of child pornography as set forth in § 22-24A-1;
- (7) Sexual exploitation of a minor as set forth in § 22-22-24.3;  
. . . .
- (9) Promotion of prostitution of a minor as set forth in § 22-23-2(2);  
. . . .
- (12) Solicitation of a minor as set forth in § 22-24A-5;  
. . . .
- (15) An attempt, conspiracy, or solicitation to commit any of the crimes listed in this section;  
. . . .
- (21) First degree human trafficking as set forth in § 22-49-2 if the victim is a minor; or
- (22) Second degree human trafficking as set forth in § 22-49-3 involving the prostitution of a minor.

Under S.D. Codified Laws § 26-8A-21.1(3),(11) (Reunification with parent not required), a parent need not be reunified with a child who is already in the dependency system due to neglect or abuse if said parent “committed a crime defined in § 22-18-1.1, 22-22-7 [Sexual contact with child under sixteen], or subdivision 22-23-2(2) [Promotion of prostitution] against the child or another child of such parent, or committed conduct described by those sections that violate the law or ordinance of another jurisdiction having elements similar to the offense describe by those sections” or who “[i]s required to register as a sex offender pursuant to chapter 22-24B.”

**Legal Components:**

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

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**Legal Analysis:**

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

South Dakota’s human trafficking law applies to facilitators and generally creates a Class 4 felony for any person who “[b]enefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in this section.” S.D. Codified Laws § 22-49-3(2). S.D. Codified Laws § 22-49-2<sup>47</sup> (First degree human trafficking—Felony) creates a Class 2 felony for human trafficking in the first degree when the crimes “(1) Involve committing or attempting to commit kidnaping; (2) Involve a victim under the age of eighteen years; (3) Involve prostitution or procurement for prostitution; or (4) Result in the death of a victim.” When these elements are involved, the crime is punishable by imprisonment up to 25 years and a possible fine of \$50,000. S.D. Codified Laws § 22-6-1(5).

Additionally, under S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron) a facilitator could be guilty of a Class 6 felony if the individual does either of the following: “(3) Transports a person into or within this state to engage in prostitution, or procures or pays for transportation for that purpose; (4) Knowingly permits a place owned, managed, supervised, or controlled by himself or herself, alone, or in association with others, to be regularly used for prostitution or the promotion of prostitution, or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means; or (5) Solicits, receives, or agrees to receive any benefit for doing or agreeing to do anything prohibited by this section.”

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

A person found guilty of human trafficking in the first degree faces a possible fine of \$50,000. S.D. Codified Laws §§ 22-49-2, 22-6-1(5). The crime of human trafficking in the second degree carries a possible fine of \$20,000. S.D. Codified Laws §§ 22-49-3 (Second degree human trafficking—Felony), 22-6-1(7). A violation of S.D. Codified Laws § 22-23-8 (Solicitation or procurement of prostitute for patron) carries a possible fine of \$4,000 for violations.

A facilitator may be subject to restitution orders at the discretion of the court. S.D. Codified Laws § 23A-28-3

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

(Restitution plan—Present inability to pay—Absence of pecuniary damages—Condition of parole) provides “If the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant . . . promptly prepare a plan of restitution, including the name and address of each victim, a specific amount of restitution to each victim, and a schedule of restitution payments.” For the purposes of restitution to crime victims, “victim” is defined as including “any person . . . who has suffered pecuniary damages<sup>48</sup> as a result of the defendant’s criminal activities . . .” S.D. Codified Laws § 23A-28-2(5). “Criminal activities” is defined as “any crime [excluding petty offenses] for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted.” S.D. Codified Laws § 23A-28-2(2). Moreover, South Dakota’s state policy is that “restitution shall be made by each violator of the criminal laws to the victims of the violator’s criminal activities to the extent that the violator is reasonably able to do so.” S.D. Codified Laws § 23A-28-1.

Crimes that could subject a facilitator to mandatory criminal asset forfeiture include, “§§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20 [including Sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], inclusive, 22-24B-1[“Sex crime” defined], 22-49-1 to 22-49-3 [Human trafficking] . . . and . . . 22-23-8 [Solicitation or procurement of prostitute for patron].” S.D. Codified Laws § 22-24A-15. Sex crimes listed in S.D. Codified Laws § 22-24B-1<sup>49</sup> (“Sex crime” defined) include several relevant to facilitators, including,

- . . . .
- (5) Possessing, manufacturing, or distributing child pornography as set forth in § 22-24A-3;
- (6) Sale of child pornography as set forth in § 22-24A-1;
- . . . .
- (15) An attempt to commit any of the crimes listed in this section or any conspiracy or solicitation to commit any of the crimes listed in this section;
- . . . .
- (17) Any federal crime or court martial offense that would constitute a sex crime under federal law;
- (18) Any crime committed in another state if that state also requires that anyone convicted of that crime register as a sex offender in that state
- . . . .
- (21) First degree human trafficking as set forth in § 22-49-2 if the victim is a minor; or
- (22) Second degree human trafficking as set forth in § 22-49-3 involving the prostitution of a minor.

Pursuant to S.D. Codified Laws § 22-24A-15 (Person convicted forfeits certain property interests—Distribution of seized assets), property subject to forfeiture includes the following:

- (1) Any photograph, film, videotape, book, digital media or visual depiction that has been manufactured, distributed, purchased, possessed, acquired, or received in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;
- (2) Any material, product, and equipment of any kind that is used or intended for use in manufacturing, processing, publishing, selling, possessing, or distributing any visual depiction

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<sup>48</sup> See *supra* note 22.

proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

(3) Any property that is used, or intended for use, as a container for property described in subdivisions (1) and (2) of this section, including any computers and digital media;

(4) Any conveyances including aircraft, vehicles, or vessels, that transport, possess, or conceal, or that is used, or intended for use, to transport, or in any manner facilitate any activity proscribed under §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

(5) Any book, record, and research, including microfilm, tape, and data that is used, or intended for use, in violation of §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, and 43-43B-1 to 43-43B-3, inclusive;

(6) Any funds or other things of value used for the purposes of unlawfully carrying out any activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, 43-43B-1 to 43-43B-3, inclusive, and 22-23-2, 22-23-8, and 22-23-9; and

(7) Any asset, interest, profit, income, and proceed acquired or derived from the unlawful activity proscribed by §§ 22-19A-1, 22-24A-1 to 22-24A-20, inclusive, 22-24B-1, 22-49-1 to 22-49-3, inclusive, 23A-27-14.1, 43-43B-1 to 43-43B-3, inclusive, and 22-23-2, 22-23-8, and 22-23-9.

Pursuant to House Bill 1088 Section 7<sup>50</sup> “any property subject to forfeiture under this Act may be seized by any law enforcement officer or designated agent of the Division of Criminal Investigation upon process issued by any court having jurisdiction over the property.” Moreover, seizures can be made without process if:

(1) The seizure is incident to an arrest or a search under a search warrant or to an inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this Act;

(3) The law enforcement officer or agent has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The law enforcement officer or agent has probable cause to believe that the property has been used or intended to be used in violation of the crimes . . . of this act.

If property is seized under the provisions of this act, the attorney general may:

(1) Place the property under seal;

(2) Remove the property to a place designated by the attorney general; or

(3) Take custody of the property and remove it to an appropriate location for disposition in

S.D. Codified Laws § 22-24A-15 states that property from subdivision (1) shall be deemed contraband and forfeited to the state. Regarding the use of the other listed property, S.D. Codified Laws § 22-24A-15 states that “[a]ny amount over and above the amount necessary to reimburse for the investigation and prosecution shall be used to satisfy any civil judgments received by victims. All remaining proceeds from the sale of any forfeited property shall be paid into the South Dakota internet crimes against children fund.”

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<sup>50</sup> See *supra* note 44.

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

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

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

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

S.D. Codified Laws § 22-24A-1<sup>51</sup> (Sale of child pornography) creates a Class 4 felony when a person “sells, or displays for sale, any book, magazine, pamphlet, slide, photograph, film, or electronic or digital media image depicting a minor engaging in a prohibited sexual act, or engaging in an activity that involves nudity, or in the simulation of any such act.” This crime is a Class 4 felony punishable by imprisonment up to 10 years and a possible fine of \$20,000.

Additionally, S.D. Codified Laws § 22-24A-3(3) (Possession, manufacture, or distribution of child pornography) creates a Class 4 felony for certain crimes including when an individual “[k]nowingly possesses, distributes, or otherwise disseminates any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act.” A first time violation of this statute is punishable as a Class 4 felony by imprisonment up to 10 years and a possible fine of \$20,000. S.D. Codified Laws § 22-6-1(7). A subsequent offense within 15 years is a Class 3 felony punishable by imprisonment up to 15 years and a possible fine of \$30,000. S.D. Codified Laws §§ 22-24A-3, 22-6-1(6).

Under S.D. Codified Laws § 22-24A-15, persons convicted of committing an offense under S.D. Codified Laws § 22-24A-1 (Possession, manufacture or distribution of child pornography) are subject to the forfeiture of any property used in the commission of the crime.

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<sup>51</sup> The text of S.D. Codified Laws § 22-24A-1 cited here and elsewhere in this report includes amendments made by the enactment of Senate Bill 169 during the 91st Session of the South Dakota Legislature (effective July 1, 2016).



***Legal Components:***

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*
  - 5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor under 18 to engage in the commercial sex act.*
  - 5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*
  - 5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*
  - 5.5 *Child 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 CSEC.*
  - 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
  - 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
  - 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
  - 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*
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***Legal Analysis:***

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*<sup>52</sup>

S.D. Codified Laws § 22-49-1<sup>53</sup> (Human trafficking prohibited) does not include all sexually exploited children, as the elements of force, fraud or coercion are required, regardless of a trafficking victim’s minor status.<sup>54</sup> However, while S.D. Codified Laws § 22-49-1 and S.D. Codified Laws § 22-49-4 (Hiring person forced to engage in sexual activity–Felony) provides criminal liability for buyers of sex with minors,<sup>55</sup> the applicability of the statutes are limited by requiring that the buyer “knew or should have known . . .” that the victim was forced to engage in commercial sex. Therefore, the offense of human trafficking under S.D. § 22-49 requires that a trafficker or controlling third party be identified. Consequently, while South Dakota’s human trafficking offense includes the act of purchasing sex with a minor, all commercially sexually exploited children are not defined as human trafficking victims, as the means of force, fraud, or coercion are necessary to the commission of the offense and third party control is required.

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<sup>52</sup> 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](http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf) (discussing need to include all commercially sexually exploited children within sex trafficking definitions and corresponding need to include buyer conduct in core sex trafficking offenses regardless of whether victim is under control of a third party).

<sup>53</sup> See *supra* note 2.

<sup>54</sup> See *supra* Component 1.1.

<sup>55</sup> See *supra* Component 2.1.

5.1.1 Recommendation: Amend the definition of S.D. Codified Laws § 22-49-1<sup>56</sup> (Human trafficking prohibited) so that all commercially sexually exploited children are identifiable as victims and eligible for protections pursuant to their victim status.

5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor under 18 to engage in the commercial sex act.*

Although South Dakota prohibits a defendant from asserting a defense based on the willingness of a minor to engage in the commercial sex act consent of the minor as a defense to committing certain crimes, but not sex trafficking. Specifically, S.D. Codified Laws § 22-24A-3 (Possession, manufacture, or distribution of child pornography), § 22-24A-5 (Solicitation of minor), and § 22-22-24.3 (Sexual exploitation of minor) all explicitly state that “[c]onsent to performing these proscribed acts [or “a prohibited sexual act”] by a minor or a minor’s parent, guardian, or custodian . . . is not a defense to a charge of violating this section.”

5.2.1 Recommendation: Amend S.D. Codified Laws §§ 22-49-1 (Human trafficking prohibited), 22-49-2 (First degree human trafficking—Felony), 22-49-3 (Second degree human trafficking—Felony) § 22-23-2(2) (Promotion of prostitution), and § 22-23-8 (Solicitation or procurement of prostitute for patron) to prohibit a defense to prosecution based on the willingness of the minor to engage in the commercial sex act.

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>57</sup>

Minors in South Dakota are not protected from potential prosecution for the offense of prostitution. S.D. Codified Laws § 22-23-1 (Prostitution) states, “Any person who engages in or offers to engage in sexual activity for a fee is guilty of prostitution.” If convicted, minors are guilty of a Class 1 misdemeanor. S.D. Codified Laws § 22-23-1. However, an affirmative defense is available to all defendants charged under S.D. Codified Laws § 22-23-1 (Prostitution) to prove “by a preponderance of the evidence that the defendant is a victim of human trafficking under chapter 22-49 or that the defendant committed the act only under compulsion by another person who, by implicit or explicit threat, created a reasonable apprehension in the mind of the defendant that if the defendant did not commit the act, the person would inflict bodily harm upon the defendant.” S.D. Codified Laws § 22-23-1.2. However, minors must prove the elements of force, fraud, or coercion, pursuant to S.D. Codified Law § 22-49-1, to be identifiable as a victim of human trafficking.

5.3.1 Recommendation: Amend state law to ensure that all minors are protected from criminalization for prostitution offenses.

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

### **Child Initially Identified as Abused/Neglected**

Pursuant to S.D. Codified Laws § 26-8A-2 (Abused or neglected child defined), an abused or neglected child does not include a child who is a victim of sex trafficking. Pursuant to S.D. Codified Laws § 26-8A-2, an abused or neglected child is one,

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<sup>56</sup> See *supra* note 2.

<sup>57</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

- (1) Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse;
  - (2) Who lacks proper parental care through the actions or omissions of the child's parent, guardian, or custodian;
  - (3) Whose environment is injurious to the child's welfare;
  - (4) Whose parent, guardian, or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care, or any other care necessary for the child's health, guidance, or well-being;
  - (5) Who is homeless, without proper care, or not domiciled with the child's parent, guardian, or custodian through no fault of the child's parent, guardian, or custodian;
  - (6) Who is threatened with substantial harm;
  - (7) Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, with due regard to the child's culture;
  - (8) Who is subject to sexual abuse, sexual molestation, or sexual exploitation by the child's parent, guardian, custodian, or any other person responsible for the child's care;
- ...

## *I. Initial custody*

### a. Authority for initial custody

A minor victim may also be taken into custody if identified as an abused or neglected child. Pursuant to S.D. Codified Laws § 26-8A-2 (Abused or neglected child defined), an “abused or neglected child” is defined as a child who, among other things, “is subject to sexual abuse, sexual molestation, or sexual exploitation by the child’s parent, guardian, custodian, or any other person responsible for the child’s care.” S.D. Codified Laws § 26-8A-2(8).

### b. Placement

An abused or neglected child may “be placed in the temporary care of the Department of Social Services, foster care, or a shelter as designated by the court to be the least restrictive alternative for the child,” for no more than 48 hours (excluding weekends and holidays) absent the filing of a petition and a court order following a hearing. S.D. Codified Laws § 26-7A-14 (Temporary care of child by caretaker designated by court--Limitation of temporary custody—Release). However, under S.D. Codified Laws § 26-7A-16 (Temporary custody until release by order of the court), “Notwithstanding § 26-7A-14, an apparent, alleged or adjudicated abused or neglected child, child in need of supervision or delinquent child may be held in temporary custody until released by order of the court.”

There is no statute that specifies where the child must be placed; however, S.D. Codified Laws § 26-7A-26 (Detention in jail with adult prisoners prohibited for abused or neglected child--Temporary detention--Detention with adults for child transferred to adult court) dictates that, “[n]o apparent, alleged, or adjudicated abused or neglected child may be securely detained at any time in a jail, lockup, or in any type of detention or temporary care facility containing adult prisoners.”

## *II. Process following initial custody of abused/neglected child*

Subsequent to the initial custody, the court may order continued temporary custody of a child pending any

hearing, with or without notice. S.D. Codified Laws § 26-7A-13 (Court-ordered temporary custody--Noticed hearing--Without noticed hearing). Further pursuant to S.D. Codified Laws § 26-7A-13, if the child is taken into custody without notice, the court or intake officer must issue a written custody order, which should be based on receipt of an affidavit or other communication in the following instances:

- (1) On application by a state's attorney, social worker of Department of Social Services, or law enforcement officer respecting an apparent, alleged, or adjudicated abused or neglected child stating good cause to believe as follows:
  - (a) The child is abandoned or is seriously endangered by the child's environment; or
  - (b) There exists an imminent danger to the child's life or safety and immediate removal of the child from the child's parents, guardian, or custodian appears to be necessary for the protection of the child;
- (2) On application by a state's attorney, court services officer, or law enforcement officer respecting an apparent, alleged, or adjudicated child in need of supervision or delinquent child stating good cause pursuant to § 26-8B-3 or 26-8C-3, as applicable, to believe as follows:
  - (a) The child seriously endangers others or there is need for protection of the child; or
  - (b) The child has run away or escaped from the child's parents, guardian, or custodian.

Between initial custody and the adjudication, the court must hold an advisory hearing. S.D. Codified Laws § 26-7A-54 (Advisory hearing before adjudicatory hearing). Pursuant to S.D. Codified Laws § 26-7A-54(2)(a), during the advisory hearing,

The court shall then receive the answer, response, denial, or admission of the parties and, if appropriate, of the child as follows:

- (a) If the petition alleges the child to be abused or neglected, parents, guardian, or custodian of the child may admit the allegations contained in the petition and the court may accept the admissions if the court is satisfied there is a factual basis for them;

### *III. Placement process pending adjudication/investigation*

Pursuant to S.D. Codified Laws § 26-7A-19 (Options of court following temporary custody hearing for abused or neglected child), the court may order several different placements for a child pending adjudication; specifically, the court may:

- (1) Order the release of the child from temporary custody, either with or without restriction or condition or upon written promise of the child's parents, guardian, or custodian regarding the care and protection of the child; or
- (2) Continue the temporary custody of the child under the terms and conditions for duration and placement that the court requires, including placement of temporary custody of the child with the Department of Social Services, in foster care or shelter. The court and the Department of Social Services shall give placement preference to a relative or custodian who is available and who has been determined by the department to be qualified, provided that placement with the relative or custodian is in the best interest of the child . . . .

### *IV. Adjudication*

Pursuant to S.D. Codified Laws § 26-7A-82 (Adjudicatory hearing following advisory hearing--Support of evidence), “[f]ollowing an advisory hearing on a petition, the court shall conduct an adjudicatory hearing . . . . In cases concerning abused or neglected children, evidence that child abuse has occurred is

prima facie evidence that the child is an abused or neglected child regardless of allegations contained in the petition . . . .”

Additionally, there are instances where the adjudicatory hearing is truncated. Pursuant to S.D. Codified Laws § 26-7A-55 (Petition admitted to by all parties--Dispositional hearing--Petition not admitted to--Adjudicatory hearing--Interim order for temporary custody),

If all necessary parties admit the allegations contained in the petition and the court accepts the admissions, the court may find, conclude and make a decision as to adjudication of the child . . . . The court may then proceed with the dispositional phase of the proceedings without conducting a formal adjudicatory hearing on the petition with the concurrence of all parties. However, at the request of any party or if required by the court, the court shall set a later time and date for the dispositional hearing. The court shall then determine interim dispositional arrangements concerning the child and the parties.

. . . .  
If the advisory hearing is adjourned and continued or if the advisory hearing is completed and the adjudicatory hearing on the petition is scheduled for a later time and date, the court shall make an interim order regarding temporary custody of the child as determined by the court.

#### *V. Outcomes*

Pursuant to S.D. Codified Laws § 26-8A-21 (Reasonable efforts to eliminate need for removal--Reasonable efforts to return child to home--Determining adequacy of efforts), there are a number of possible outcomes for a child that has been deemed abused or neglected; however, the goal is for family reunification. Specifically, S.D. Codified Laws § 26-8A-21 dictates that

. . . .  
If the child is to be or has been removed from the home, the court shall first make a judicial determination that removal of the child from the home is or was necessary because continued presence of the child in the home would be contrary to the welfare of the child and that reasonable efforts by the department to avoid removal of the child from the home have been made. If the child has been removed from the home and has not been returned to the home, the court shall first make a judicial determination that reasonable efforts have been made by the department to return the child to the home and that the child cannot be returned to the home because it would be contrary to the welfare of the child.

. . . .  
However, if a parent or guardian has been committed, aided or abetted in the crime of human trafficking, the reunification of the family is not required, pursuant to S.D. Codified Laws § 26-8A-21.1 (Exceptions to § 26-8A-21). Specifically, reunification is not required if the parent or guardian:

. . . .  
(3) Committed a crime defined in . . . subdivision 22-23-2(2) (Promoting prostitution--Felony)<sup>58</sup> against the child or another child of such parent, or committed conduct described by those sections that violated the law or ordinance of another jurisdiction having elements similar to the offense described by those sections;

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<sup>58</sup> In pertinent part, S.D. Codified Laws § 22-23-2 (Promoting prostitution—Felony) criminalizes the act of “[a]ny person who: . . . (2) Promotes the prostitution of a minor . . . .”

(4) Has been determined by a court by clear and convincing evidence to have subjected the child or another child to torture, sexual abuse, abandonment for at least six months, chronic physical, mental, or emotional injury, or chronic neglect if the neglect was a serious threat to the safety of the child or another child;

....

(10) Has exposed the child to or demonstrated an inability to protect the child from substantial harm or risk of harm resulting from a crime, act, or omission as specified in subdivision (1), (2), or (3) of this section;

....

Before the final dispositional hearing, if the family has not been reunified, the court is required to have a permanency hearing. S.D. Codified Laws § 26-8A-21.2 (Permanency hearing required if child is not to be returned to parents--Court to determine placement--Final dispositional hearing); at the hearing the court may make the following determinations:

- (1) The child should be placed for adoption. If the court determines that the child should be placed for adoption, the state shall notify the parties of its intent to seek the termination of parental rights if such notice has not already been provided;
- (2) The child should be referred for legal guardianship;
- (3) The child should be placed permanently with a fit and willing relative; or
- (4) A compelling reason is documented with the court that none of the permanent plans listed in this section would be in the best interest of the child, and the child should be placed in another planned permanent living arrangement.

The final step in the process is the dispositional decree, which is defined by S.D. Codified Laws § 26-8A-22 (Final decree of disposition--Permitted disposition when parental rights not terminated--Annual permanency hearing for child in foster care). Specifically, the statute dictates that if parental rights are not terminated, the court could return the child to the child's parent's custody, place the child in, "another planned permanent living arrangement, order a medical examination to determine the proper placement of the child, whichever, "the court finds appropriate as the least restrictive alternative available."

### **Child Initially Identified as a Child in Need of Supervision ("CHINS")**

Pursuant to S.D. Codified Laws § 26-8B-2 ("Child in need of supervision" defined), a child in need of supervision is defined as a

....

- (2) Any child who has run away from home or is otherwise beyond the control of the child's parent, guardian, or custodian;
- (3) Any child whose behavior or condition endangers the child's own welfare or the welfare of others;

....

#### *I. Initial custody*

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

Domestic minor sex trafficking victims who are not identified and classified as a child in need of supervision as defined in S.D. Codified Laws § 26-8B-2 ("Child in need of supervision" defined) could

still be temporarily detained under S.D. Codified Laws § 26-11-1 (Conduct of proceedings—Temporary detention), which states,

If any child under the age of eighteen years is arrested, with or without a warrant, for a violation of any law or municipal ordinance for which the child is not subject to proceedings as a child in need of supervision as defined in § 26-8B-2 . . . the child shall be brought before the judge of a court having jurisdiction over the offense and proceedings shall be conducted as though the child were eighteen years of age or older.

....

b. Placement

Under S.D. Codified Laws § 26-7A-16 (Temporary custody until release by order of the court), “Notwithstanding § 26-7A-14 (Temporary care of child by caretaker designated by court--Limitation of temporary custody—Release),<sup>59</sup> an apparent, alleged or adjudicated abused or neglected child, child in need of supervision or delinquent child may be held in temporary custody until released by order of the court.”

Prior to a temporary custody hearing, a child alleged to be in need of supervision taken into temporary custody “shall be released to the child’s parents, guardian, or custodian unless the parents, guardian, or custodian cannot be located or in the judgment of the intake officer are not suitable to receive the child, in which case the child shall be placed in shelter.” S.D. Codified Laws § 26-8B-3 (Circumstances requiring release--Circumstances allowing detention--Length of detention). However, if a child is not returned to the custody of a parent or guardian, pursuant to S.D. Codified Laws § 26-7A-26 (Detention in jail with adult prisoners prohibited for abused or neglected child--Temporary detention--Detention with adults for child transferred to adult court), “An apparent, alleged, or adjudicated child in need of supervision may not be securely detained in a jail, lockup, or in any type of detention or temporary care facility containing adult prisoners except for approved collocated detention centers . . . .”

*II. Process following initial custody of child in need of supervision*

Subsequent to the initial custody, the court may order continued temporary custody of a child pending any hearing, with or without notice. S.D. Codified Laws § 26-7A-13 (Court-ordered temporary custody--Noticed hearing--Without noticed hearing). Further pursuant to S.D. Codified Laws § 26-7A-13, if the child is taken into custody without notice, the court or intake officer must issue a written custody order, which should be based on receipt of an affidavit or other communication in the following instances:

- (1) On application by a state's attorney, social worker of Department of Social Services, or law enforcement officer respecting an apparent, alleged, or adjudicated abused or neglected child stating good cause to believe as follows:
  - (a) The child is abandoned or is seriously endangered by the child's environment; or
  - (b) There exists an imminent danger to the child's life or safety and immediate removal of the

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<sup>59</sup> An abused or neglected child may “be placed in the temporary care of the Department of Social Services, foster care, or a shelter as designated by the court to be the least restrictive alternative for the child,” for no more than 48 hours (excluding weekends and holidays) absent the filing of a petition and a court order following a hearing. S.D. Codified Laws § 26-7A-14 (Temporary care of child by caretaker designated by court--Limitation of temporary custody—Release).

- child from the child's parents, guardian, or custodian appears to be necessary for the protection of the child;
- (2) On application by a state's attorney, court services officer, or law enforcement officer respecting an apparent, alleged, or adjudicated child in need of supervision or delinquent child stating good cause pursuant to § 26-8B-3 [Circumstances requiring release--Circumstances allowing detention--Length of detention] or 26-8C-3 [Release--Placement in shelter--Circumstances warranting detention], as applicable, to believe as follows:
    - (a) The child seriously endangers others or there is need for protection of the child; or
    - (b) The child has run away or escaped from the child's parents, guardian, or custodian.

A child in need of supervision may also be held in detention not to exceed 24 hours if the parents, guardian, or custodian are unavailable or unsuitable and, pursuant to S.D. Codified Laws § 27-8B-3, one of the following conditions are satisfied:

- (1) The child has failed to comply with court services or a court-ordered program;
- (2) The child is being held for another jurisdiction as a parole or probation violator, as a runaway or as a person under court-ordered detention;
- (3) The child has a demonstrated propensity to run away from the child's home, from court-ordered placement outside of the child's home or from agencies charged with providing temporary care for the child;
- (4) The child is under court-ordered home detention in this jurisdiction; or
- (5) There are specific, articulated circumstances which justify the detention for the protection of the child from potentially immediate harm to the child or to others.

Between initial custody and the adjudication, the court must hold an advisory hearing. S.D. Codified Laws § 26-7A-54 (Advisory hearing before adjudicatory hearing). Pursuant to S.D. Codified Laws § 26-7A-54, during the advisory hearing,

- ....
- (2) The court shall then receive the answer, response, denial, or admission of the parties and, if appropriate, of the child as follows:

- ....
- (b) If the petition alleges a child to be in need of supervision, parents, guardian, or custodian of the child and the child may admit the allegations contained in the petition and the court may accept the admissions if the court is satisfied there is a factual basis for them . . . .

### *III. Placement process pending adjudication/investigation*

Pursuant to S.D. Codified Laws § 26-8B-7 (Limit of temporary custody), “An alleged or adjudicated child in need of supervision may not be held in temporary custody for more than ninety days beginning with the date the child is first taken into custody unless at the ninetieth day the child is in the process of receiving treatment or care which has a specified duration. In that case the temporary custody may be extended to the end of the treatment or care.”

The South Dakota legislature does not further define specific locations where a child may be held pending adjudication; except that under S.D. Codified Laws § 26-7A-26 (Detention in jail with adult prisoners prohibited for abused or neglected child--Temporary detention--Detention with adults for child transferred to adult court), “An apparent, alleged, or adjudicated child in need of supervision may not be securely detained in a jail, lockup, or in any type of detention or temporary care facility containing adult



prisoners except for approved collocated detention centers . . . .”

#### *IV. Adjudication*

Pursuant to S.D. Codified Laws § 26-7A-82 (Adjudicatory hearing following advisory hearing--Support of evidence), “[f]ollowing an advisory hearing on a petition, the court shall conduct an adjudicatory hearing . . . . The court shall consider . . . whether the allegations of the petition are supported by evidence beyond a reasonable doubt concerning an alleged child in need of supervision . . . .”

Additionally, there are instances where the adjudicatory hearing is truncated. Pursuant to S.D. Codified Laws § 26-7A-55 (Petition admitted to by all parties--Dispositional hearing--Petition not admitted to--Adjudicatory hearing--Interim order for temporary custody),

If all necessary parties admit the allegations contained in the petition and the court accepts the admissions, the court may find, conclude and make a decision as to adjudication of the child . . . . The court may then proceed with the dispositional phase of the proceedings without conducting a formal adjudicatory hearing on the petition with the concurrence of all parties. However, at the request of any party or if required by the court, the court shall set a later time and date for the dispositional hearing. The court shall then determine interim dispositional arrangements concerning the child and the parties.

. . . .

If the advisory hearing is adjourned and continued or if the advisory hearing is completed and the adjudicatory hearing on the petition is scheduled for a later time and date, the court shall make an interim order regarding temporary custody of the child as determined by the court.

#### *V. Referral to alternative process*

Pursuant to S.D. Codified Laws § 26-7A-11.1,

Any apparent child in need of supervision or any apparent delinquent child shall be referred for informal adjustment or informal action pursuant to subdivision 26-7A-10(4) if the following criteria are met:

- (1) The child has no prior adjudications;
- (2) The child has had no informal adjustment or informal action within the last twelve months;
- (3) The child is an apparent child in need of supervision pursuant to § 26-8B-2 or an apparent delinquent pursuant to § 26-8C-2 and the alleged conduct constitutes a misdemeanor;
- (4) The child's alleged conduct did not include use of violence or force against another; and
- (5) All of the requirements in § 26-7A-11<sup>60</sup> are met.

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<sup>60</sup> S.D. Codified Laws § 26-7a-11 states,

A report of a preliminary investigation involving any apparent child in need of supervision or any apparent delinquent child may be referred for informal adjustment or informal action pursuant to subdivision 26-7A-10(4) only if:

- (1) The child and the child's parents, guardian, or other custodian were informed of their constitutional and legal rights, including being represented by an attorney at every stage of the proceedings if a petition is filed;
- (2) The facts are admitted and establish prima facie jurisdiction; and

If the state's attorney has good cause to believe that informal adjustment or informal action is insufficient to meet the purposes of this chapter and chapters 26-8B and 26-8C, the state's attorney file a delinquency petition pursuant to subdivision 26-7A-10(5). The petition shall include notice of the departure from informal adjustment or informal action and notice to the child of the child's right to move for informal adjustment or informal action. Upon motion of the child and upon a finding that no good cause exists, the court may refer the child to informal adjustment or informal action pursuant to subdivision 26-7A-10(4).

## *VI. Outcomes*

Even for children who are not diverted, except in particular circumstances, such as when a child violates a court order or a juvenile correctional facility is deemed by multiple parties to be the least restrictive alternative available, children adjudicated as in need of supervision may not be placed in detention facilities. S.D. Codified Laws § 26-8B-6 (Decree of disposition—Alternatives). Pursuant to S.D. Codified Laws § 26-8B-6, the least restrictive means available must be chosen, and the possible placement options include probation, protective supervision, a rehabilitative supervised work program, or an alternative education program. Additionally, “[t]he Department of Corrections, pursuant to the provisions of chapter 26-11A and § 26-8C-7 or 26-8B-6, may place a child in a group care center operated and maintained by a nonstate entity” pursuant to S.D. Codified Laws § 26-8D-17 or “in a residential treatment center or intensive residential treatment center” pursuant to S.D. Codified Laws § 26-8D-18. S.D. Codified Laws §§ 26-8D-17, 26-8D-18.

### **Child Initially Identified as Delinquent**

As a commercially sexually exploited child, a minor could be charged with S.D. Codified Laws § 22-23-1 (Prostitution), and as a result be considered a delinquent child under S.D. Codified Laws § 26-8C-2 (Delinquent child defined). A delinquent child is “any child ten years of age or older who, regardless of where the violation occurred, has violated any federal, state, or local law or regulation for which there is a penalty of a criminal nature for an adult, except state or municipal hunting, fishing, boating, park, or traffic laws that are classified as misdemeanors, or petty offenses or any violation of § 35-9-2 [Purchase, possession or consumption of beverage by minor as misdemeanor] or 32-23-21 [Under the age of twenty-one—Additional offenses].”<sup>61</sup> S.D. Codified Laws § 26-8C-2.

#### *I. Initial custody*

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

Under S.D. Codified Laws § 26-7A-12 (Temporary custody without court order), a child could be taken into temporary custody without a court order if any of the following conditions are met:

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- (3) Written consent is obtained from the child's parents, guardian, or custodian and from the child if the child is of sufficient age and understanding. Efforts to effect informal adjustment or informal action may extend no longer than four months from the date of the consent.
- The state's attorney may include in the referral to a court-approved juvenile diversion program a requirement that restitution be imposed as a condition of the diversion program.

<sup>61</sup> S.D. Codified Laws § 32-23-21 (Under the age of twenty-one—Additional offenses) refers to alcohol and drug related offenses.

- (1) If the child is subject to arrest under the provisions of §§ 23A-3-2 [Law enforcement officer's power to arrest without warrant] and 23A-3-4 [Advice as to authority and cause of arrest without warrant];
- (2) If the child is abandoned or seriously endangered in the child's surroundings or is seriously endangering others and immediate removal of the child appears to be necessary for the child's protection or for the protection of others;
- (3) If there are reasonable grounds to believe the child has run away or escaped from the child's parents, guardian, or custodian;
- (4) If the officer reasonably believes that temporary custody is warranted because there exists an imminent danger to the child's life or safety and there is no time to apply for a court order and the child's parents, guardian, or custodian refuse an oral request for consent to the child's removal from their custody or the child's parents, guardian, or custodian are unavailable; or
- (5) If the child is under the influence of alcohol, inhalants, or a controlled drug or substance.

A court, pursuant to S.D. Codified Laws § 26-7A-13 (Order of temporary custody), may also order temporary custody under similar conditions of S.D. Codified Laws § 26-7A-12(2)-(4) (Temporary custody without court order). If a child has been taken into temporary custody without a court order, the officer must notify the state's attorney as well as the intake officer, who will conduct the placement hearing immediately. S.C. Codified Laws §§ 26-7A-17 (Notice to state's attorney of child taken into temporary custody--Written report--Notice to court), 26-7A-13.1 (Hearing by intake officer). An intake officer also has the discretion to send a child to a juvenile diversion program instead of holding a temporary custody hearing. S.C. Codified Laws § 26-7A-10(4) (Preliminary investigation by state's attorney--Authorized procedure on basis of investigation).

Domestic minor sex trafficking victims who are not identified and classified as a child in need of supervision as defined in S.D. Codified Laws § 26-8B-2 or a delinquent child as defined in S.D. Codified Laws § 26-8C-2 could still be temporarily detained under S.D. Codified Laws § 26-11-1 (Conduct of proceedings—Temporary detention), which states,

If any child under the age of eighteen years is arrested, with or without a warrant, for a violation of any law or municipal ordinance for which the child is not subject to proceedings as a child in need of supervision as defined in § 26-8B-2 ["Child in need of supervision" defined] or a delinquent child as defined in § 26-8C-2 [Delinquent child defined] or for a violation of subdivision 34-46-2 (2) [Unlawful actions—Tobacco], the child shall be brought before the judge of a court having jurisdiction over the offense and proceedings shall be conducted as though the child were eighteen years of age or older.

. . . .

A child under the age of eighteen years, subject to proceedings pursuant to this section and accused of a Class 1 misdemeanor, may be held in or sentenced to a detention or temporary care facility for up to thirty days if sight and sound separated from adult prisoners.

b. Placement

Under S.D. Codified Laws § 26-7A-16 (Temporary custody until release by order of the court), "Notwithstanding § 26-7A-14 [Temporary care of child by caretaker designated by court--Limitation of

temporary custody--Release],<sup>62</sup> an apparent, alleged or adjudicated abused or neglected child, child in need of supervision or delinquent child may be held in temporary custody until released by order of the court.”

However, pursuant to S.D. Codified Laws § 26-8C-3 (Temporary custody—Placement in detention prior to hearing),

A child may not be placed in detention unless the intake officer finds that the parents, guardian, or custodian are not available or are not suitable to receive the child, and finds at least one of the following circumstances exists:

- (1) The child is a fugitive from another jurisdiction;
- (2) The child is charged with a violation of § 22-22-7 [Sexual contact with child under sixteen--Felony or misdemeanor], a crime of violence under subdivision 22-1-2 (9) [Definition of terms] or a serious property crime, which, if committed by an adult, would be a felony;
- (3) The child is already held in detention or on conditional release in connection with another delinquency proceeding;
- (4) The child has a demonstrable recent record of willful failures to appear for juvenile court proceedings;
- (5) The child has a demonstrable recent record of violent conduct;
- (6) The child has a demonstrable recent record of adjudications for serious property offenses;
- (7) The child is under the influence of alcohol, inhalants, or a controlled drug or substance and detention is the least restrictive alternative in view of the gravity of the alleged offense and is necessary for the physical safety of the child, the public, and others; or
- (8) The child has failed to comply with court services or a court ordered program.

The shelter or detention authorized shall be the least restrictive alternative available.

A child alleged to be delinquent who has been taken into temporary custody by a law enforcement officer is generally released to her parents, guardian, or custodian prior to the temporary custody hearing, unless such individuals cannot be located or placement would not be suitable, in which case the child is placed in a shelter. S.D. Codified Laws § 26-8C-3 (Temporary custody—Placement in detention prior to hearing).

Additionally, pursuant to S.D. Codified Laws § 26-7A-26 (Detention in jail with adult prisoners prohibited for abused or neglected child—Temporary detention—Detention with adults for child transferred to adult court), “An apparent or alleged delinquent child may be held in an adult lockup or jail for up to six hours for purposes of identification, processing, interrogation, transfer to juvenile facility, or release to parents if the child is sight and sound separated from adult prisoners.” However, if the area is not considered a metropolitan area, the child may be held for a period not to exceed forty-eight hours in an adult facility, “if the facility has been certified by the Department of Corrections as providing sight and sound separation of juveniles from adults and if no suitable juvenile facility is available.” S.D. Codified Laws § 26-7A-26.

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<sup>62</sup> An abused or neglected child may “be placed in the temporary care of the Department of Social Services, foster care, or a shelter as designated by the court to be the least restrictive alternative for the child,” for no more than 48 hours (excluding weekends and holidays) absent the filing of a petition and a court order following a hearing. S.D. Codified Laws § 26-7A-14.

## *II. Process following initial custody of allegedly delinquent child*

Subsequent to the initial custody, the court may order continued temporary custody of a child pending any hearing, with or without notice. S.D. Codified Laws § 26-7A-13 (Court-ordered temporary custody--Noticed hearing--Without noticed hearing). Further pursuant to S.D. Codified Laws § 26-7A-13, if the child is taken into custody without notice, the court or intake officer must issue a written custody order, which should be based on receipt of an affidavit or other communication in the following instances:

- (1) On application by a state's attorney, social worker of Department of Social Services, or law enforcement officer respecting an apparent, alleged, or adjudicated abused or neglected child stating good cause to believe as follows:
  - (a) The child is abandoned or is seriously endangered by the child's environment; or
  - (b) There exists an imminent danger to the child's life or safety and immediate removal of the child from the child's parents, guardian, or custodian appears to be necessary for the protection of the child;
- (2) On application by a state's attorney, court services officer, or law enforcement officer respecting an apparent, alleged, or adjudicated child in need of supervision or delinquent child stating good cause pursuant to § 26-8B-3 [Circumstances requiring release--Circumstances allowing detention--Length of detention] or 26-8C-3 [Release--Placement in shelter--Circumstances warranting detention], as applicable, to believe as follows:
  - (a) The child seriously endangers others or there is need for protection of the child; or
  - (b) The child has run away or escaped from the child's parents, guardian, or custodian.

Between initial custody and the adjudication, the court must hold an advisory hearing. S.D. Codified Laws § 26-7A-54 (Advisory hearing before adjudicatory hearing). Pursuant to S.D. Codified Laws § 26-7A-54(2)(c), during the advisory hearing,

- (2) The court shall then receive the answer, response, denial, or admission of the parties and, if appropriate, of the child as follows:
  - . . . .
  - (c) If the petition alleges the child to be delinquent, the child may admit the allegations contained in the petition and the court may accept the admission if the court is satisfied there is a factual basis for them.

## *III. Placement process pending adjudication/investigation*

Pursuant to S.D. Codified Laws § 26-8B-7 (Limit of temporary custody), “An alleged or adjudicated child in need of supervision may not be held in temporary custody for more than ninety days beginning with the date the child is first taken into custody unless at the ninetieth day the child is in the process of receiving treatment or care which has a specified duration. In that case the temporary custody may be extended to the end of the treatment or care.”

The South Dakota legislature does not further define specific locations where a child may be held pending adjudication; except that under S.D. Codified Laws § 26-7A-26 (Detention in jail with adult prisoners prohibited for abused or neglected child--Temporary detention--Detention with adults for child transferred to adult court), “An apparent, alleged, or adjudicated child in need of supervision may not be securely detained in a jail, lockup, or in any type of detention or temporary care facility containing adult prisoners except for approved collocated . . . .”

#### *IV. Adjudication*

Pursuant to S.D. Codified Laws § 26-7A-82 (Adjudicatory hearing following advisory hearing--Support of evidence), “[f]ollowing an advisory hearing on a petition, the court shall conduct an adjudicatory hearing . . . . The court shall consider . . . whether the allegations of the petition are supported by evidence beyond a reasonable doubt concerning an . . . alleged delinquent child . . . .”

Additionally, there are instances where the adjudicatory hearing is truncated. Pursuant to S.D. Codified Laws § 26-7A-55 (Petition admitted to by all parties--Dispositional hearing--Petition not admitted to--Adjudicatory hearing--Interim order for temporary custody),

If all necessary parties admit the allegations contained in the petition and the court accepts the admissions, the court may find, conclude and make a decision as to adjudication of the child . . . . The court may then proceed with the dispositional phase of the proceedings without conducting a formal adjudicatory hearing on the petition with the concurrence of all parties. However, at the request of any party or if required by the court, the court shall set a later time and date for the dispositional hearing. The court shall then determine interim dispositional arrangements concerning the child and the parties.

. . . .

If the advisory hearing is adjourned and continued or if the advisory hearing is completed and the adjudicatory hearing on the petition is scheduled for a later time and date, the court shall make an interim order regarding temporary custody of the child as determined by the court.

#### *V. Referral to alternative process*

Pursuant to S.D. Codified Laws § 26-7A-11.1,

Any apparent child in need of supervision or any apparent delinquent child shall be referred for informal adjustment or informal action pursuant to subdivision 26-7A-10(4) if the following criteria are met:

- (1) The child has no prior adjudications;
- (2) The child has had no informal adjustment or informal action within the last twelve months;
- (3) The child is an apparent child in need of supervision pursuant to § 26-8B-2 or an apparent delinquent pursuant to § 26-8C-2 and the alleged conduct constitutes a misdemeanor;
- (4) The child's alleged conduct did not include use of violence or force against another; and
- (5) All of the requirements in § 26-7A-11<sup>63</sup> are met.

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<sup>63</sup> S.D. Codified Laws § 26-7a-11 states,

A report of a preliminary investigation involving any apparent child in need of supervision or any apparent delinquent child may be referred for informal adjustment or informal action pursuant to subdivision 26-7A-10(4) only if:

- (1) The child and the child's parents, guardian, or other custodian were informed of their constitutional and legal rights, including being represented by an attorney at every stage of the proceedings if a petition is filed;
- (2) The facts are admitted and establish prima facie jurisdiction; and
- (3) Written consent is obtained from the child's parents, guardian, or custodian and from the child if the child is of sufficient age and understanding. Efforts to effect informal adjustment or informal action

If the state's attorney has good cause to believe that informal adjustment or informal action is insufficient to meet the purposes of this chapter and chapters 26-8B and 26-8C, the state's attorney file a delinquency petition pursuant to subdivision 26-7A-10(5). The petition shall include notice of the departure from informal adjustment or informal action and notice to the child of the child's right to move for informal adjustment or informal action. Upon motion of the child and upon a finding that no good cause exists, the court may refer the child to informal adjustment or informal action pursuant to subdivision 26-7A-10(4).

## *VI. Process outcomes*

If the child is not diverted, an allegedly delinquent child may be placed on probation. Under S.D. Codified Laws § 26-8C-4 (Placement on probation without adjudication of delinquency), “If the court is satisfied that the best interests of the public, justice and child will be served, the court may, without entering an adjudication of delinquency, with consent of the child, suspend imposition of adjudication of delinquency and place the child on probation under the terms, conditions and duration required by the court. A court may revoke the suspension at any time during the probationary period and impose an adjudication of delinquency without diminishment or credit for any of the probationary period.”

Under S.D. Codified Laws § 26-8C-6 (Examination or treatment of child), “Following adjudication of a child as a delinquent child, the court may order the child to be examined or treated by a physician or a qualified mental health professional or to receive other special care and may place the child in a hospital or other suitable facility for such purposes.” S.D. Codified Laws § 26-8C-7 (Dispositional decree—Alternatives—Assessment of costs) sets the dispositions alternatives available to the court, which include probation, protective supervision, a rehabilitative supervised work program, or an alternative education program.

- 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 *Child sex trafficking is identified as a type of abuse and neglect<sup>64</sup> within child protection statutes.<sup>65</sup>*

A child sex trafficking victim will not be considered abused or neglected under S.D. Codified Laws § 26-8A-

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may extend no longer than four months from the date of the consent.

The state's attorney may include in the referral to a court-approved juvenile diversion program a requirement that restitution be imposed as a condition of the diversion program.

<sup>64</sup> S.D. Codified Laws § 26-8A-2 states,

In this chapter and chapter 26-7A, the term, abused or neglected child, means a child:

.....

(3) Whose environment is injurious to the child's welfare;

.....

(5) Who is homeless, without proper care, or not domiciled with the child's parent, guardian, or custodian through no fault of the child's parent, guardian, or custodian;

(6) Who is threatened with substantial harm;

.....

<sup>65</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

2(8) (Abused or neglected child defined). While S.D. Codified Laws § 26-8A-2(8) includes “sexual exploitation” within the definition of abuse and neglect, South Dakota’s human trafficking, prostitution and CSEC statutes are not specifically enumerated. S.D. Codified Laws § 26-8A-2(8) states a child is abused or neglected when the child “is subject to sexual abuse, sexual molestation, or sexual exploitation<sup>66</sup> by the child’s parent, guardian, custodian, or any other person responsible for the child’s care.”

5.5.1 Recommendation: Amend S.D. Codified Laws § 26-8A-2(8) (Abused or neglected child defined) to expressly include victims of S.D. Codified Laws §§ 22-49-1 (Human trafficking prohibited), 22-49-2 (First degree human trafficking–Felony), 22-49-3 (Second degree human trafficking—Felony).<sup>67</sup>

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.*

S.D. Codified Laws § 26-8A-2(8) (Abused or neglected child defined) requires fault by the “child’s parent, guardian, custodian, or any other person responsible for the child’s care.” South Dakota law does not define “person responsible for the child’s care” but defines “custodian” as “any foster parent, employee of a public or private residential home or facility, other person legally responsible for a child’s welfare in a residential setting, or person providing in-home or out-of-home care<sup>68</sup>; for purposes of this definition, out-of-home care means any day care as defined in §§ 26-6-14 [Categories of activities for which license may be issued],<sup>69</sup> 26-6-14.1

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<sup>66</sup> S.D. Codified Laws §§ 26-7A-1 (Definitions) and 26-8A-2 do not define “sexual exploitation.” However, for purposes of the criminal code, “[a] person is guilty of sexual exploitation of a minor if the person causes or knowingly permits a minor to engage in an activity or the simulation of an activity that: (1) Is harmful to minors; (2) Involves nudity; or (3) Is obscene.” S.D. Codified Laws § 22-22-24.3.

<sup>67</sup> The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>68</sup> S.D. Codified Laws § 26-8A-2 states,

In this chapter and chapter 26-7A, the term, abused or neglected child, means a child:

.....

(3) Whose environment is injurious to the child's welfare;

.....

(5) Who is homeless, without proper care, or not domiciled with the child's parent, guardian, or custodian through no fault of the child's parent, guardian, or custodian;

(6) Who is threatened with substantial harm;

.....

<sup>69</sup> S.D. Codified Laws § 26-6-14 licenses a child welfare agency for activities that include, among other things, the following:

(1) The providing of group care, maintenance, supervision, and protection of children on a regular full-time basis as a substitute for regular parental care, with or without compensation, in a nonfamily group setting which shall be known as an intensive residential treatment center, a residential treatment center, a group care center, or as a group home as each is defined by standards established pursuant to the provisions of § 26-6-16;

(2) The providing of care, maintenance, supervision, and protection of a child, or children, as a substitute for regular parental care, without transfer of legal custody or placement for adoption, with or without compensation, on a regular full-time basis in a family home, which shall be known as a foster home.



[“Family day care” defined], and 26-6-14.8 [Unregistered family day care].”<sup>70</sup> S.D. Codified Laws § 26-7A-1(11).

Although “person responsible for the child’s care” could include non-familial persons, this definition is not broad enough to include all third party offenders who traffic or commercially sexually exploit minor victims. By requiring fault by a “parent, guardian, custodian, or any other person responsible for the child’s care” under S.D. Codified Laws § 26-8A-2(8), there is significant barrier to accessing services and protections through child welfare for juvenile sex trafficking victims.

5.6.1 Recommendation: Amend the definition of S.D. Codified Laws § 26-8A-2(8) (Abused or neglected child defined) or “custodian” within S.D. Codified Laws § 26-7A-1(11) to allow child welfare protection for juvenile sex trafficking victims irrespective of the perpetrator of the abuse.<sup>71</sup>

## 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or CSEC.*

Under the Crime Victims’ Compensation Program, a “victim” is defined as including “any person who suffers personal injury<sup>72</sup> or death as a direct result of: (a) A crime, including a federal crime occurring in this State.” S.D. Codified Laws § 23A-28B-1(12)(a). A “crime” includes “conduct that occurs or is attempted in this State, including that arising from domestic violence and acts of terrorism, as defined in 18 U.S.C § 2331 as of January 1, 1997, which conduct results in personal injury or death and is punishable as a felony or misdemeanor, or would be so punishable except that the person engaging in the conduct lacked the capacity to commit the crime under the laws of this State.” S.D. Codified Laws § 23A-28B-1(3).

Certain circumstances may prevent a commercially sexually exploited child from receiving crime victims’ compensation. Pursuant to S.D. Codified Laws § 23A-28B-25 (Circumstances not permitting compensation) an application must be filed for compensation within one year after the date of injury, and the crime that caused the injury must have been reported to law enforcement “within five days of its occurrence or, if the crime could not reasonably have been reported within such period, within five days of the date when a report could reasonably have been made.” S.D. Codified Laws § 23A-28B-25(1). Victims of domestic minor sex trafficking may be slow to come forward, and thus may become ineligible for crime victims’ compensation due to this requirement. However, the one year application requirement may be waived if good cause is shown. S.D. Codified Laws § 23A-28B-25(1). Although no guidelines are given for “good cause,” it is possible that the department would consider a human trafficking victim to have “good cause” for delayed reporting.

Similarly, crime victims’ compensation is not allowed when a claimant “[f]ails or refuses to cooperate fully with any appropriate law enforcement officer or agency or with the department in the administration of this chapter.” S.D. Codified Laws § 23A-28B-25(2)(c). Domestic minor sex trafficking victims may be reluctant to cooperate and may distrust law enforcement officers who may have previously arrested them for prostitution; therefore, this cooperation requirement could disqualify these victims from receiving compensation.

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<sup>70</sup> This definition applies to chapters 26-7A [Juvenile court], 26-8A [Protection of children from abuse or neglect], 26-8B [Children in need of supervision], and 26-8C [Delinquent children].

<sup>71</sup> The recommendation in this component is predicated upon the recommendation in 5.1 being previously or simultaneously enacted.

<sup>72</sup> “Personal injury” is defined in S.D. Codified Laws § 23A-28B-1(11) as “actual bodily harm or emotional distress.”

Lastly, a crime victim is not eligible for compensation if she “(a) Engaged in conduct which substantially contributed to the infliction of the victim’s injury or death or engaged in conduct which the victim should reasonably have foreseen could lead to the injury or death . . . [or] (b) Committed or otherwise participated in a crime which caused or contributed to the victim’s injury or death.” S.D. Codified Laws § 23A-28B-25(2). Since domestic minor sex trafficking victims are often involved in prostitution, which contributed to their injury, they could become ineligible under this requirement.

- 5.7.1 Recommendation: Amend S.D. Codified Laws § 23A-28B-25(1) to clarify that “good cause” is shown when an individual is a victim of human trafficking as defined in S.D. Codified Laws §§ 22-49-1 (Human trafficking prohibited). Additionally, amend S.D. Codified Laws § 23A-28B-25(2), (3) to create exceptions for victims of domestic minor sex trafficking.<sup>73</sup>

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

There are few victim-friendly criminal justice procedures, especially ones that extend to domestic minor sex trafficking victims, and the state no longer has “rape shield” laws.<sup>74</sup> If a minor victim of rape under S.D. Codified Laws § 22-22-1, incest under S.D. Codified Laws § 22-22A-2, or sexual contact under S.D. Codified Laws § 22-22-7 makes a request to have her name and information suppressed, “the court shall order that the name of the minor and the specific details of the alleged acts be suppressed,” as long as there is a “compelling interest after consideration of [certain] factors.” S.D. Codified Laws § 23A-6-22.1. These provisions could leave victims of domestic minor sex trafficking in prosecutions under S.D. Codified Laws Chapter 22-49 (Human trafficking), § 22-23-2 (Promotion of prostitution), § 22-23-8 (Solicitation or procurement of prostitute for patron), § 22-24A-1 (Sale of child pornography), and § 22-24A-3 (Possession, manufacture, or distribution of child pornography) without protection of these provisions.

In addition, under S.D. Codified Laws § 23A-12-9 (Videotape of young sex crime victim’s testimony at preliminary hearing or deposition), “If a defendant has been charged with a violation of subdivision 22-22-1(1), (5), or (6) [Rape] or § 22-22-7 [Sexual contact with child under sixteen], where the victim is less than sixteen years of age, the prosecuting attorney or defense attorney may apply for an order that the victim’s testimony at the preliminary hearing or at a deposition, in addition to being stenographically recorded, be recorded and preserved on videotape.” According to the provision, “If at the time of trial the court finds that the victim is otherwise unavailable within the meaning of § 19-16-29, or that such testimony would in the opinion of the court be substantially detrimental to the well-being of the victim, the court may admit the videotape of the victim’s testimony at the preliminary hearing or deposition as former testimony under § 19-16-30.” Since offenses under S.D. Codified Laws Chapter 22-49 (Human trafficking), § 22-23-2 (Promotion of prostitution), § 22-23-8 (Solicitation or procurement of prostitute for patron), § 22-24A-1 (Sale of child pornography), and § 22-24A-3 (Possession, manufacture, or distribution of child pornography) are not included within Chapter 22-22 (Sex offenses), these victims do not receive the protection of the victim-friendly criminal justice procedures outlined above.

One victim friendly criminal justice procedure available to domestic minor sex trafficking victims under the age of 12 is the ability to testify via closed circuit television. S.D. Codified Laws § 26-8A-30. S.D. Codified Laws

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<sup>73</sup> The recommendation in this component is predicated upon the recommendation in 5.1 being previously or simultaneously enacted.

<sup>74</sup> The state “rape shield” law under S.D. Codified Laws § 23A-22-15 (Evidence of victim’s prior sexual conduct in sex offence prosecutions) was repealed by House Bill 1063. H.B. 87th Leg. Assemb., Leg. Sess. (S.D. 2012) (effective July 1, 2012).

§ 26-8A-30 (Testimony of child by closed circuit television) states, “In any proceeding in which a child under the age of twelve . . . is describing any act of sexual contact or rape performed with or on the child by another, or describing any act of physical abuse or neglect of the child by another, or any act of physical abuse or neglect of another child, or any act constituting a crime of violence as defined in § 22-1-2 [Definitions] committed against the child or another child, the court or any party may move to allow that the testimony of the child be taken in a room other than the courtroom and televised at the same time to the courtroom by closed circuit television equipment.”<sup>75</sup>

A victim friendly criminal justice procedure available to all victims is the ability to ask to submit a victim impact statement prior to the defendant’s sentencing pursuant to S.D. Codified Laws § 23A-27-1.1 (Victim’s oral impact statement to court before sentence imposed—Response of defendant—Victim defined) and § 23A-27-1.3 (Victim’s written impact statement to court before sentence imposed—Response of defendant—Victim defined). South Dakota Codified Laws § 23A-27-1.3 offers all crime victims, including victims of human trafficking, with the opportunity to request the court to allow victim impact testimony prior to the sentencing phase of the convicted, which the court may then approve or deny at its discretion. Additionally S.D. Codified Laws § 23A-27-1.1 provides a non-discretionary right to offer victim impact testimony to certain categories of victims, “If a defendant has been convicted of an A, B, or C felony, upon request to the court by a victim and before imposing sentence on a defendant, the victim has the right to orally address the court concerning the emotional, physical, and monetary impact of the defendant’s crime upon the victim and the victim’s family, and may comment upon the sentence which may be imposed upon the defendant.” Pursuant to S.D. Codified Laws § 23A-27-1.3, a victim of an A, B, or C felony also has the right to submit a written impact statement. S.D. Codified Laws § 23A-27-1.3 provides, “If a defendant has been convicted of an A, B, or C felony, upon request to the court by a victim and before imposing sentence on a defendant, a victim has the right to address the court in writing concerning the emotional, physical, and monetary impact of the defendant’s crime upon the victim and the victim’s family, and may comment upon the sentence which may be imposed upon the defendant.” Pursuant to S.D. Codified Laws § 23A-27-1.3 and § 23A-27-1.1, victim impact testimony is not an automatic provision guaranteed to all victims. In some limited circumstances (e.g. rape of a victim under the age of 13, and some forms of kidnapping), acts committed in the course of domestic minor sex trafficking are classified as A, B, or C felonies; in those cases, victims would be guaranteed the opportunity to give their victim impact testimony during the sentencing phase. However, the crime of human trafficking falls outside the scope of the mandatory victim right, and in most circumstances victims could be denied the opportunity to offer their victim impact testimony.

- 5.8.1 Recommendation: Enact a law that prohibits evidence of a testifying sex-trafficked minor victim’s prior sexual conduct from being introduced during prosecutions of CSEC and trafficking offenses.
- 5.8.2 Recommendation: Amend S.D. Codified Laws § 23A-6-22.1 (Suppression of names of minor victims of certain sexual offenses) and § 23A-12-9 (Videotape of young sex crime victim’s testimony at preliminary hearing or deposition) to allow protections for victims of offenses under S.D. Codified Laws Chapter 22-49 (Human trafficking) when the victim is a minor subjected to commercial sex under S.D. Codified Laws § 22-23-2 (Promotion of prostitution), § 22-23-8 (Solicitation or procurement of prostitute for patron), § 22-24A-1 (Sale of child pornography), or § 22-24A-3 (Possession, manufacture, or distribution of child pornography).
- 5.8.3 Recommendation: Amend S.D. Codified Laws §§ 23A-27-1.1 (Victim’s oral impact statement to

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<sup>75</sup> This section may, however, only apply to offenses under Title 26.

court before sentence imposed—Response of defendant—Victim defined) and 23A-27-1.3 to require that victims of CSEC and trafficking offenses be permitted to give victim impact testimony.

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.*

General expungement statutes under S.D. Codified Laws § 23A-3-27 (Motion for expungement of arrest record) allow for a motion of expungement,

- (1) After one year from the date of any arrest if no accusatory instrument was filed;
- (2) After one year from the date the prosecuting attorney formally dismissed the entire criminal case on the record; or
- (3) At any time after an acquittal.

At this point, “The court may enter an order of expungement upon a showing by the defendant or the arrested person by clear and convincing evidence that the ends of justice and the best interest of the public as well as the defendant or the arrested person will be served by the entry of the order.” S.D. Codified Laws § 23A-3-30 (Order of expungement).

Additionally, upon a petition by a child or the child’s parents or on the court’s own motion, a delinquent child’s records may be sealed; “However, no such petition may be filed and considered by the court until after one year from the date of the child’s unconditional release from the court’s jurisdiction or the discharge of the child by the department of corrections, whichever date is later.” S.D. Codified Laws § 26-7A-115 (Sealing records in action involving delinquent child—Inspection). Pursuant to S.D. Codified Laws § 26-7A-115, the sealing of the records may occur if, at the hearing, all the following are satisfied:

- (1) The delinquent child has not been adjudicated as a delinquent under this chapter or chapter 26-8C since the termination of the court’s jurisdiction of the child or the discharge of the child by the department of corrections;
- (2) No proceeding involving the delinquent child concerning a felony, a sexual contact offense, a misdemeanor involving moral turpitude or a petition under this chapter or chapter 26-8C is pending or is being instituted against the child; and
- (3) The rehabilitation of the delinquent child has been attained to the satisfaction of the court.

After the records are sealed, a court may still permit inspection upon a petition by the minor, state attorney, or court services officers for use in Chapter 26-7A (Juvenile Court) or 26-8C (Delinquent Children). S.D. Codified Laws § 26-7A-116.

5.9.1 Recommendation: Amend S.D. Codified Laws § 23A-3-27 (Motion for expungement of arrest record) to allow a juvenile sex trafficking victim to expunge juvenile records related to their trafficking victimization upon turning 18 or earlier.<sup>76</sup>

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<sup>76</sup> The recommendation in this component is predicated upon the recommendation in 5.1 being previously or simultaneously enacted.

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 may be able to receive restitution at the discretion of the court. S.D. Codified Laws § 23A-28-3 (Restitution plan—Present inability to pay—Absence of pecuniary damages—Condition of parole) provides “If the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant . . . promptly prepare a plan of restitution, including the name and address of each victim, a specific amount of restitution to each victim, and a schedule of restitution payments.” For the purposes of restitution to crime victims, “victim” is defined as including “any person . . . who has suffered pecuniary damages<sup>77</sup> as a result of the defendant’s criminal activities . . .” S.D. Codified Laws § 23A-28-2(5). “Criminal activities” is defined as “any crime [excluding petty offenses] for which there is a plea of guilty or verdict of guilty upon which a judgment of conviction may be rendered and any other crime committed after June 30, 1979, which is admitted by the defendant, whether or not prosecuted.” S.D. Codified Laws § 23A-28-2(2). Moreover, South Dakota’s state policy is that “restitution shall be made by each violator of the criminal laws to the victims of the violator’s criminal activities to the extent that the violator is reasonably able to do so.” S.D. Codified Laws § 23A-28-1.

Some specific allotments of restitution are provided for minor victims of certain sex offenses, not including offenses under S.D. Codified Laws Chapter 22-49 (Human trafficking) or S.D. Codified Laws § 22-23-2 (Promotion of prostitution). Under S.D. Codified Laws § 23A-28-12 (Medical, psychological or psychiatric treatment of minor victim), “Anyone convicted under § 26-10-1 [Abuse of or cruelty to minor as felony], 22-22-7 [Sexual contact with child under sixteen] . . . or subdivision 22-22-1(1) or (5) [Rape], shall be required as part of the sentence imposed by the court to pay all or part of the cost of any necessary medical, psychological, or psychiatric treatment, or foster care of the minor resulting from the act or acts for which the defendant is convicted.”

Additionally, certain victims of commercial sexual exploitation may be eligible for civil remedies. Under S.D. Codified Laws § 22-24A-7 (Civil liability for sexual offense), “Any person, except a minor, who knowingly participates in any conduct proscribed by §§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20 [Sale of child pornography; solicitation of a minor; possession, manufacture, and distribution of child pornography], inclusive, 22-24B-1 [“Sex crime” defined],<sup>78</sup> 22-41-1 to 22-49-3, inclusive [Human trafficking] . . . is liable for civil damages.” S.D. Codified Laws s.1 enacted House Bill 1161 § 1 creates a civil cause of action for “victim[s] of human trafficking pursuant to chapter 22-49, or any federal human trafficking offense.”

When entitled to civil damages, the following types of damages may be recovered under S.D. Codified Laws § 22-24A-10 (Civil liability for sexual offenses—Types of damages recoverable):

- (1) Economic damages, including the cost of treatment and rehabilitation, medical expenses, loss of economic or educational potential, loss of productivity, absenteeism, support expenses, accidents or injury, and any other pecuniary loss proximately caused by the proscribed conduct;
- (2) Noneconomic damages, including physical and emotional pain, suffering, physical impairment, emotional distress, mental anguish, disfigurement, loss of enjoyment, loss of companionship, services, and consortium, and other nonpecuniary losses proximately caused by the proscribed conduct;
- (3) Exemplary damages;

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<sup>77</sup> See *supra* note 22.

<sup>78</sup> See *supra* note 23.

- (4) Attorneys' fees; and
- (5) Disbursements.

5.10.1 Recommendation: Amend the restitution law, S.D. Codified Laws § 23A-28-3 (Restitution plan—Present inability to pay—Absence of pecuniary damages—Condition of parole), to make restitution orders mandatory for human trafficking victims and to include non-pecuniary damages.<sup>79</sup>

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.*

S.D. Codified Laws § 22-24A-13 (Civil liability for sexual offense—Statute of limitations) states, “Any action for damages under §§ 22-19A-1 [Stalking], 22-24A-1 to 22-24A-20, inclusive [Sale of child pornography; possession, manufacture, or distribution of child pornography; solicitation of minor], 22-24B-1 [“Sex crime” defined],<sup>80</sup> 22-49-1 to 22-49-3, inclusive [Human trafficking], 23A-27-14.1 [Teacher certification], and 43-43B-1 to 43-43B-3 [Computer programs], inclusive, shall be commenced within six years of the time the plaintiff knew, or had reason to know, of any injury caused by violations of [these offenses].” When the plaintiff is a minor, the statute of limitations is tolled until the minor reaches 18. S.D. Codified Laws § 22-24A-13.

For most criminal actions, including CSEC and domestic minor sex trafficking violations, S.D. Codified Laws § 23A-42-2 specifies that there is a 7-year statute of limitations. However, under S.D. Codified Laws § 22-22-1 (Rape), the statute of limitations is eliminated for any charge “brought pursuant to subdivisions (1) or (2) of this section,” which state, “(1) . . . the victim is less than thirteen years of age; or (2) Through the use of force, coercion, or threats of immediate and great bodily harm against the victim or other persons within the victim’s presence, accompanied by apparent power of execution.” Otherwise, “(3) [i]f the victim is incapable, because of physical or mental incapacity, of giving consent to such act; or (4) [i]f the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis; or (5) [i]f the victim is thirteen years of age, but less than sixteen years of age, and the perpetrator is at least three years older than the victim,” then “a charge brought pursuant to this section may be commenced at any time prior to the time the victim becomes of age twenty-five or within seven years of the commission of the crime, whichever is longer.” S.D. Codified Laws §§ 22-22-1(3), (4), (5).

5.11.1 Recommendation: Amend S.D. Codified Laws § 23A-42-2 to eliminate the statute of limitations for commencing prosecutions under S.D. Codified Laws § 22-49-1 (Human trafficking prohibited), S.D. Codified Laws § 22-23-2 (Promotion of prostitution), and S.D. Codified Laws § 22-24A-5(1) (Solicitation of minor).

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<sup>79</sup> The recommendation in this component is predicated upon the recommendation in 5.1 being previously or simultaneously enacted.

<sup>80</sup> See *supra* note 23.

**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 electronic communications to investigate buyers and traffickers is a permissible investigative technique.*
- 6.6 *Law enforcement 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 required or authorized.*

South Dakota does not mandate or specifically authorize training on domestic minor sex trafficking for law enforcement officers. However, South Dakota does have precedent for enacting statutes related to certain types of law enforcement training, such as S.D. Codified Laws § 23-3-39.4 (Domestic abuse training for law enforcement officers required). S.D. Codified Laws § 23-3-42.1 (Domestic abuse training requirements) requires officers to receive training for certification on the following issues: “(1) Enforcement of criminal laws in domestic abuse situations; (2) Availability of community resources; and (3) Protection of the victim.”

- 6.1.1 Recommendation: Enact a law authorizing training on domestic minor sex trafficking that parallel the training they must receive on domestic abuse issues under S.D. Codified Laws § 23-3-39.4 (Domestic abuse training for law enforcement officers required), § 23-3-39.5 (Initial training to include domestic abuse training), and § 23-3-42.1 (Domestic abuse training requirements).

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

South Dakota allows single party consent to audiotaping. Pursuant to S.D. Codified Laws § 23A-35A-20(1) (Unlawful interception—telephone or telegraph—consent), a Class 5 felony exists if an individual who is “[n]ot a sender or receiver of a telephone or telegraph communication, intentionally and by means of an eavesdropping device overhears or records a telephone or telegraph communication, or aids, authorizes, employs, procures, or permits another to so do, without the consent of either a sender or receiver thereof.” S.D. Codified Laws § 23A-35A-20(1). Therefore, since only one party must consent, single party consent to audio recording is allowed.

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

The newly passed trafficking law is not included in the list of offenses for which wiretapping is authorized. Pursuant to S.D. Codified Laws § 23A-35A-2 (Where interception of communications may be ordered), “Orders authorizing or approving the interception of wire or oral communications may be granted, subject to the provisions of this chapter when the interception may provide or has provided evidence of the commission of, or of any conspiracy to commit, the following offenses as otherwise defined by the laws of this state: murder; kidnapping; gambling; robbery; bribery; theft; unlawful use of a

computer; unauthorized manufacturing, distribution or counterfeiting of controlled substances or marijuana; and, rape.”

6.3.1 Recommendation: Amend S.D. Codified Laws § 23A-35A-2 (Where interception of communication may be ordered) to include offenses under S.D. Codified Laws Chapter 22-49 (Human trafficking), § 22-23-2(2) (Promotion of prostitution), § 22-24A-3 (Possession, manufacture, or distribution of child pornography), § 22-23-8 (Solicitation or procurement of prostitute for patron) when a minor is involved, and § 22-23-9 (Hiring another to engage in sexual activity) when a minor is involved.

6.4 *Use of a by law enforcement decoy in the investigation of prostitution or sex trafficking is no defense to the purchase of sex with a minor.*

South Dakota’s trafficking and CSEC laws do not prohibit a defense to prosecution based on the use of a law enforcement decoy posing as a minor. However, S.D. Codified Laws § 22-24A-5 (Solicitation of a minor), a non-CSEC offense, expressly prohibits the defense to investigations in which a law enforcement decoy posing as a minor to investigate attempts to buy or sell commercial sex acts with a child, stating,

[T]he fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this section does not constitute a defense to a prosecution under this section.

Despite the prohibition in S.D. Codified Laws § 22-24A-5,, the defense is still available for some buyer-applicable offenses, and charges brought against buyers through reverse sting operations are the most likely situations in which a defendant would try to use such a defense. S.D. Codified Laws § 24-49 (Human trafficking) is a buyer applicable sex trafficking offense which does not prohibit this defense, meaning buyers charged with attempting to solicit or purchase a minor under S.D. Codified Laws § 24-49 would not be prohibited from raising a defense based on the fact that an actual minor was involved.

6.4.1 Recommendation: Amend S.D. Codified Laws §§ 22-49-1 (Human trafficking prohibited), § 22-49-2 (First degree human trafficking–Felony), § 22-49-3 (Second degree human trafficking–Felony) to expressly prohibit a defendant from raising a defense as to the use of a law enforcement decoy posing as a minor to investigate the purchase or sale of commercial sex with a minor.

6.5 *Use of the Internet or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*

S.D. Codified Laws § 22-24A-5(2) (Solicitation of minor) is specific to the use of the computer and makes it a crime when a person “[k]nowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor’s [under 16] name, telephone number, place of residence, physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act.” The statute specifically states that “[t]he fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this section does not constitute a defense to a prosecution under this section.” S.D. Codified Laws § 22-24A-5. Because of the inclusion of this provision, an undercover officer can use the Internet under this section to investigate and prosecute cases of buyers and traffickers.



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

If a missing child report is made to law enforcement, then “the law enforcement agency shall gather readily available information about the missing child and integrate such information into the national crime information center computer within twelve hours following the making of the report. The law enforcement agency shall make reasonable efforts to acquire additional information about the missing child following the transmittal of the initially available information and promptly integrate any additional information acquired into such computer systems.” S.D. Codified Laws § 26-17-2.

South Dakota does not mandate reports on rescued domestic minor sex trafficking victims.

- 6.6.1 Recommendation: Amend S.D. Codified Laws § 26-17-2 to require the entry of information on rescued missing children.

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