

## 2018 ANALYSIS AND RECOMMENDATIONS

### SOUTH CAROLINA

#### 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 or commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute child sex 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.*

South Carolina's human trafficking statute criminalizes sex trafficking of minors without requiring use of force, fraud, or coercion. S.C. Code Ann. § 16-3-2010(7)<sup>2</sup> (Definitions) states,

“Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for one of the following when it is induced by force, fraud, or coercion or the person performing the act is under the age of eighteen years and anything of value is given, promised to, or received, directly or indirectly, by any person:

- (a) criminal sexual conduct pursuant to Section 16-3-651;
- (b) criminal sexual conduct in the first degree pursuant to Section 16-3-652;
- (c) criminal sexual conduct in the second degree pursuant to Section 16-3-653;

<sup>1</sup> This report includes legislation enacted as of August 1, 2018.

<sup>2</sup> The text of S.C. Code Ann. § 16-3-2010 cited here and elsewhere in this report includes amendments made by the enactment of House Concurrent Resolution 3329 and Senate Concurrent Resolution 3329 during the 2018 Regular Session of the South Carolina Legislature (effective May 17, 2018).

- (d) criminal sexual conduct in the third degree pursuant to Section 16-3-654;
- (e) criminal sexual conduct with a minor pursuant to Section 16-3-655;
- (f) engaging a child for sexual performance pursuant to Section 16-3-810;
- (g) producing, directing or promoting sexual performance by a child pursuant to Section 16-3-820;
- (h) sexual battery pursuant to Section 16-3-651;
- (i) sexual conduct pursuant to Section 16-3-800; or
- (j) sexual performance pursuant to Section 16-3-800.

S.C. Code Ann. § 16-3-2020<sup>3</sup> (Trafficking in persons; penalties; defenses) states,

- (A) A person is guilty of trafficking in person if he:
- (1) recruits, entices, solicits, isolates, harbors, transports, provides, or obtains, or so attempts, a victim, knowing that the victim will be subjected to, or for the purposes of, sex trafficking . . . through any means or who benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in this subsection, is guilty of trafficking in persons.
  - (2) aids, abets, or conspires with another person to violate the criminal provisions of this section, or
  - (3) knowingly gives, agrees to give, or offers to give anything of value so that any person may engage in commercial sexual activity with another person when he knows that the other person is a victim of human trafficking.

....

(D) A business owner who uses his business<sup>4</sup> in a way that participates in a violation of this article, upon conviction, must be imprisoned for not more than ten years in addition to the penalties provided in this section for each violation.

....

(F) In a prosecution of a person who is a victim of trafficking in persons, it is an affirmative defense that he was under duress or coerced into committing the offenses for which he is subject to prosecution, if the offenses were committed as a direct result of, or incidental or related to, trafficking. A victim of trafficking in persons convicted of a violation of this article or prostitution may motion the court to vacate the conviction and expunge the record of the conviction. The court may grant the motion on a finding that the person's participation in the offense was a direct result of being a victim.

(G) If the victim was a minor at the time of the offense, the victim of trafficking in persons may not be prosecuted in court pursuant to this article or a prostitution offense, if it is determined after investigation that the victim committed the offense as a direct result of, or incidental or related to, trafficking.

....

(I) Evidence of the following facts or conditions do not constitute a defense in a prosecution for a violation of this article, nor does the evidence preclude a finding of a violation:

- (1) the victim's sexual history or history of commercial sexual activity, the specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct;
- (2) the victim's connection by blood or marriage to a defendant in the case or to anyone

<sup>3</sup> The text of S.C. Code Ann. § 16-3-2020 cited here and elsewhere in this report includes amendments made by the enactment of House Concurrent Resolution 3329 and Senate Concurrent Resolution 3329 during the 2018 Regular Session of the South Carolina Legislature (effective May 17, 2018).

<sup>4</sup> “‘Business’ means a corporation, partnership, proprietorship, firm, enterprise, franchise, organization, or self-employed individual.” S.C. Code Ann. § 16-3-2010(1).

- involved in the victim’s trafficking;
  - (3) the implied or express consent of a victim to acts which violate the provisions of this section do not constitute a defense to violations of this section;
  - (4) age of consent to sex, legal age of marriage, or other discretionary age; and
  - (5) mistake as to the victim’s age, even if the mistake is reasonable.
- (J) A person who violates the provisions of this section may be prosecuted by the State Grand Jury, pursuant to Section 14-7-1600 when a victim is trafficked in more than one country or a trafficker commits the offense of trafficking in persons in more than one county.

A first offense is a felony punishable by up to 30 years imprisonment, while subsequent convictions are felonies punishable by up to 45 years imprisonment. S.C. Code Ann. § 16-3-2020(C).

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.*

South Carolina has several statutes specifically criminalizing the commercial sexual exploitation of children<sup>5</sup>. The following laws criminalize CSEC in South Carolina:

1. S.C. Code Ann. § 16-15-415 (Promoting prostitution of a minor defined; defenses; penalties) states in subsection (A) that “[a]n individual commits the offense of promoting prostitution of a minor if he knowingly: (1) entices, forces, encourages, or otherwise facilitates a minor to participate in prostitution; or (2) supervises, supports, advises, or promotes the prostitution of or by a minor.” This crime is a Class C felony. S.C. Code Ann. § 16-1-90(C). A conviction under this section is punishable by imprisonment for 3–20 years without eligibility for parole or suspended sentence for the first 3 years. S.C. Code Ann. §§ 16-15-415(C), 16-1-20(A)(3).
2. S.C. Code Ann. § 16-15-425(A) (Participating in prostitution of a minor defined; defenses; penalties) states, “An individual commits the offense of participating in the prostitution of a minor if he is not a minor and he patronizes a minor prostitute,” which includes “(1) soliciting or requesting a minor to participate in prostitution; (2) paying or agreeing to pay a minor, either directly or through the minor’s agent, to participate in prostitution; or (3) paying a minor, or the minor’s agent, for having participated in prostitution, pursuant to a prior agreement.” This crime is a Class F felony punishable by imprisonment for 2–5 years, and the offender is not eligible for parole or suspended sentence for the first 2 years. S.C. Code Ann. §§ 16-15-425(C), 16-1-90(F), 16-1-20(A)(6).
3. S.C. Code Ann. § 16-15-395(A) (First degree sexual exploitation of a minor defined; presumptions; defenses; penalties) states,

An individual commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:

- (1) uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation for a live performance or for the purpose of producing material that contains a visual representation depicting this activity or a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation;
- (2) permits a minor under his custody or control to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation for

<sup>5</sup> Pursuant to S.C. Code Ann. § 63-19-20(1), “child” or “juvenile” is defined as, “a person less than eighteen years of age.”

a live performance or for the purpose of producing material that contains a visual representation depicting this activity or a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation;

(3) transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation for a live performance or for the purpose of producing material that contains a visual representation depicting this activity or a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation;

or  
(4) records, photographs, films, develops, duplicates, produces, or creates a digital electronic file for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity or a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.

This crime is a Class C felony punishable by imprisonment for 3–20 years and the offender is not eligible for parole or suspended sentence for the first 3 years. S.C. Code Ann. §§ 16-15-395(D), 16-1-90(C), 16-1-20(A)(3).

4. S.C. Code Ann. § 16-3-820 (Producing, directing or promoting sexual performance by child; penalty) states, “It is unlawful for any person to produce, direct, or promote a performance that includes sexual conduct by a child younger than eighteen years of age.” These acts constitute third degree criminal sexual conduct, a Class E felony punishable by imprisonment up to 10 years. S.C. Code Ann. §§ 16-3-820(b), 16-3-654(2), 16-1-90(E), 16-1-20(A)(5).
5. S.C. Code Ann. § 16-15-387 (Employment of person under eighteen to appear in public in state of sexually explicit nudity; mistake of age, penalties). Pursuant to this statute, “[i]t is unlawful for a person to employ a person under the age of eighteen years to appear in a state of sexually explicit nudity, as defined in Section 16-15-375(6),<sup>6</sup> in a public place.” S.C. Code Ann. § 16-15-387(A). This crime is a class E felony punishable by imprisonment up to 10 years, a fine up to \$5,000, or both. S.C. Code Ann. §§ 16-15-387(B), 16-1-90(E), 16-1-20(A)(5).
6. S.C. Code Ann. § 16-15-405(A) (Second degree sexual exploitation of a minor defined; presumptions; defenses; penalties) states,

An individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he:

(1) records, photographs, films, develops, duplicates, produces, or creates digital electronic file material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation; or

(2) distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.

This crime is a class E felony punishable by imprisonment for 2–10 years and the offender is not eligible for parole or suspended sentence for the first 2 years. S.C. Code Ann. §§ 16-15-405(D), 16-1-90(E), 16-1-20(A)(5).

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<sup>6</sup> S.C. Code Ann. § 16-15-375(6) defines “sexually explicit nudity” as “the showing of: (a) uncovered, or less than opaquely covered human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast; or (b) covered human male genitals in a discernibly turgid state.”

7. S.C. Code Ann. § 16-3-810 (Engaging child for sexual performance; penalty) provides that “[i]t is unlawful for any person to employ, authorize, or induce a child younger than eighteen years of age to engage in a sexual performance.” S.C. Code Ann. § 16-3-810(a). This crime qualifies as second degree criminal sexual conduct, a Class C felony, and is punishable by imprisonment up to 20 years. S.C. Code Ann. §§ 16-3-810(b), 16-3-653(2), 16-1-90(C), 16-1-20(A)(3).

Other crimes against children that are not specifically targeted at commercial sexual exploitation but may be used in a case of domestic minor sex trafficking include the following:

1. S.C. Code Ann. § 16-15-342 (Criminal solicitation of a minor; defenses; penalties) states in subsection (A), “A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5)<sup>7</sup> . . . or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.” This crime is a Class E felony punishable by imprisonment for 10 years, a fine up to \$5,000, or both. S.C. Code Ann. §§ 16-15-342(E), 16-1-90(E), 16-1-20(A)(5).
2. Pursuant to S.C. Code Ann. § 16-15-335 (Permitting minor to engage in any act constituting violation of this article prohibited; penalties), a crime is committed when a person at least 18 years of age “knowingly hires, employs, uses, or permits a person under the age of eighteen years to do or assist in doing an act or thing constituting an offense pursuant to this article [Obscenity, material harmful to minors, child exploitation, and child prostitution] and involving any material, act, or thing he knows or reasonably should know to be obscene within the meaning of Section 16-15-305.” This crime is a Class E felony punishable by imprisonment up to 10 years. S.C. Code Ann. §§ 16-15-335, 16-1-90(E), 16-1-20(A)(5).

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

South Carolina’s prostitution statute, S.C. Code Ann. § 16-15-90 (Prostitution; lewdness, assignation and prostitution generally), does not refer to the trafficking in persons law when a minor is involved in prostitution.

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<sup>7</sup> Pursuant to S.C. Code Ann. § 16-15-375(5),

“Sexual activity” includes any of the following acts or simulations thereof:

- (a) masturbation, whether done alone or with another human or animal;
- (b) vaginal, anal, or oral intercourse, whether done with another human or an animal;
- (c) touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female;
- (d) an act or condition that depicts bestiality, sado-masochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or the condition of being fettered, bound, or otherwise physically restrained on the part of the one so clothed;
- (e) excretory functions;
- (f) the insertion of any part of a person’s body, other than the male sexual organ, or of any object into another person’s anus or vagina, except when done as part of a recognized medical procedure.

However, South Carolina’s sex trafficking law, S.C. Code Ann. § 16-3-2020(G)<sup>8</sup> (Trafficking in persons; penalties; defenses) provides a specific exception for victims of sex trafficking to prosecution for prostitution offenses, thus acknowledging the interplay between prostitution and sex trafficking. S.C. Code Ann. § 16-3-2020(G) states in part,

If the victim was a minor at the time of the offense, the victim of trafficking in persons may not be prosecuted in court pursuant to this article or a prostitution offense, if it is determined after investigation that the victim committed the offense as a direct result of, or incidental or related to, trafficking.

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

South Carolina has not enacted a racketeering statute, but patterns of criminal activity committed by groups of five or more associates<sup>9</sup> may be prosecuted under the Criminal Gang Prevention Act. S.C. Code Ann. § 16-8-210 to 340 under which prohibited acts include the use of force or coercion related to participation or continued participation in gang activity (§ 16-8-240 (Use of or threat of physical violence by criminal gang member; penalties)) and witness intimidation (§ 16-8-250 (Preventing witness or victim from testifying; penalty; coerced person's right to bring civil action)).

Under S.C. Code Ann. § 16-8-230(4) (Definitions), “pattern of criminal gang activity” is defined as “the commission or attempted commission of, commission as an accessory before or after the fact to, or solicitation or conspiracy to commit, by a criminal gang member, while knowingly and actively participating in criminal gang activity, four or more of the following offenses occurring within a two-year period, provided that at least three of these offenses occurred after July 1, 2007.” The offenses listed include “a violent offense as defined in Section 16-1-60 committed as a part of criminal gang activity.” S.C. Code Ann. § 16-8-230(4)(a). S.C. Code Ann. § 16-1-60 (Violent crimes defined) states,

For purposes of definition under South Carolina law, a violent crime includes the offenses of: . . . criminal sexual conduct in the first and second degree (Sections 16-3-652 and 16-3-653); criminal sexual conduct with minors, first and second degree (Section 16-3-655); assault with intent to commit criminal sexual conduct, first and second degree (Section 16-3-656) . . . kidnapping (Section 16-3-910); trafficking in persons (Section 16-3-2020) . . . engaging a child for a sexual performance (Section 16-3-810) . . . producing, directing, or promoting sexual performance by a child (Section 16-3-820); lewd act upon a child under sixteen (Section 16-15-140 - repealed); sexual exploitation of a minor first degree (Section 16-15-395); sexual exploitation of a minor second degree (Section 16-15-405); promoting prostitution of a minor (Section 16-15-415); participating in prostitution of a minor (Section 16-15-425) . . . and attempt to commit any of the above offenses (Section 16-1-80). Only those offenses specifically enumerated in this section are considered violent offenses.

Financial penalties are also provided under S.C. Code Ann. § 16-8-260(2), (3) (Seizure of firearms,

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<sup>8</sup> See *supra* note 3.

<sup>9</sup> See S. C. Code Ann. § 16-8-230(2), which states,

“Criminal gang” means a formal or informal ongoing organization, association, or group that consists of five or more persons who form for the purpose of committing criminal activity and who knowingly and actively participate in a pattern of criminal gang activity.

ammunition, electronic records, money, etc.; forfeiture actions), which is part of the “Criminal Gang Prevention Act” and states,

(2) Any written or electronic communications, records, money, negotiable instruments, or valuables may be seized by a law enforcement officer or agency when the law enforcement officer or agency reasonably believes that the written or electronic communications, records, money, negotiable instruments, or valuables have been used in a pattern of criminal gang activity or have been used for the purpose of benefiting, promoting, or furthering the interests of a criminal gang.

(3) Any contraband, as defined in Section 16-8-230,<sup>10</sup> or other asset owned or titled in the name of the gang or an individual gang member may be seized by a law enforcement officer or agency when the law enforcement officer or agency reasonably believes that the contraband or asset has been used in a pattern of criminal gang activity or has been used for the purpose of benefiting, promoting, or furthering the interests of a criminal gang.

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<sup>10</sup> “Contraband” is defined in S.C. Code Ann. § 16-8-230(1) as “any real or personal property, including money, that is owned by, in the possession of, or subject to the control of a criminal gang member and which is acquired by, derived from, or traceable to criminal gang activity.”

**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 laws differentiate between soliciting sex acts with an adult and soliciting 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 images of child sexual exploitation carries penalties as high as similar federal offenses.*
- 2.10 *Convicted buyers of commercial sex acts with minors are required to register as sex offenders.*

**Legal Analysis:**

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

Buyers of sex with minors face criminal liability under two separate provisions of South Carolina’s human trafficking law. Applying to buyers through the term “solicits” and, following federal precedent, through the term “obtains,”<sup>11</sup> S.C. Code Ann. § 16-3-2020(A)(1)<sup>12</sup> (Trafficking in persons; penalties; defenses) states, “[a] person who recruits, entices, solicits, isolates, harbors, transports, provides, or obtains, or so attempts, a victim, knowing that the victim will be subjected to, or for the purpose of, sex trafficking . . . [or] for the purposes of sex trafficking . . . is guilty of trafficking in persons.” Under S.C. Code Ann. § 16-3-2010(7)<sup>13</sup> (Definitions), “sex trafficking” is defined as, “the recruitment, harboring,

<sup>11</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.

<sup>12</sup> See *supra* note 3.

<sup>13</sup> See *supra* note 2.



transportation, provision, or obtaining of a person for one of the following<sup>14</sup> when it is induced by force, fraud, or coercion or the person performing the act is under the age of eighteen years and anything of value is given, promised to, or received, directly or indirectly, by any person.”

Additionally, buyers face additional, albeit narrower, criminal liability under S.C. Code Ann. § 16-3-2020(A)(3), which criminalizes a person who, “knowingly gives, agrees to give, or offers to give anything of value so that any person may engage in commercial sexual activity with another person when he knows that the other person is a victim of human trafficking.” However, under this provision, only buyers who know that the child is a victim of trafficking victim would face liability under the trafficking law. Resultantly, S.C. Code Ann. § 16-3-2020(A)(3) likely requires the minor victim to be under the control of a trafficker or controlling third party.

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

S.C. Code Ann. § 16-15-425 (Participating in prostitution of a minor defined; defense; penalties) specifically targets those who buy sex with minors under 18. The statute states that “[a]n individual commits the offense of participating in the prostitution of a minor if he is not a minor and he patronizes a minor prostitute.” S.C. Code Ann. § 16-15-425(A). The statute defines “patronizing a minor prostitute” as “(1) soliciting or requesting a minor to participate in prostitution; (2) paying or agreeing to pay a minor, either directly or through the minor’s agent, to participate in prostitution; or (3) paying a minor, or the minor’s agent, for having participated in prostitution, pursuant to a prior agreement.” S.C. Code Ann. § 16-15-425(A). A minor is defined as a person under 18. S.C. Code Ann. § 16-15-375(3).

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

South Carolina’s solicitation laws differentiate between soliciting sex acts with an adult and soliciting sex acts with a minor, with the crimes appearing in different code title sections. S.C. Code Ann. § 16-15-425 (Participating in prostitution of a minor defined; defenses; penalties) appears in Chapter 15, Article 3 (Obscenity, material harmful to minors, child exploitation, and child prostitution), whereas S.C. Code Ann. § 16-15-90 (Prostitution; lewdness, assignation and prostitution generally) falls within Chapter 15, Article 1, (Miscellaneous offenses). Soliciting sex with a minor is punishable as a Class F felony by imprisonment for 2–5 years, with the convicted offender ineligible for parole or a suspended sentence in the first two years. S.C. Code Ann. §§ 16-15-425(C), 16-1-90(F), 16-1-20(A)(6). In contrast, the punishment for soliciting an adult for the purpose of prostitution is punishable by a fine not to exceed \$200 or imprisonment up to 30 days for the first offense. S.C. Code Ann. § 16-15-110(1). For third and subsequent offenses, the crime is punishable by a fine not to exceed \$3,000, imprisonment for a minimum of one year, or both. S.C. Code Ann. § 16-15-110(3).

2.4 *Penalties for buyers of commercial sex with minors are as high as those for federal trafficking offenders of domestic minor sex trafficking.*

A conviction for buying sex with a minor under S.C. Code Ann. § 16-15-425 (Participating in prostitution of a minor defined; defenses; penalties) is punishable by imprisonment for 2–5 years without eligibility for parole for 2 years. A buyer convicted of child sex trafficking under S.C. Code § 16-3-2020(A) (Trafficking in persons; penalties; defenses) would face up to 30 years for a first conviction and up to 45 years for a second or subsequent conviction. S.C. Code § 16-3-2020(C).

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<sup>14</sup> See *supra* Component 1.1 for list of enumerated offenses.

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>15</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>16</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>17</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.*

No specific statute or sentencing enhancement exists for using the Internet or electronic communications to purchase sex with a minor. The criminal solicitation statute, S.C. Code Ann. § 16-15-342(A) (Criminal solicitation of a minor; defenses; penalties), may apply to Internet or electronic solicitation as it states in part that “[a] person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) . . . or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.” A conviction under this section is punishable as a Class E felony by imprisonment up to 10 years, a fine up to \$5,000, or both. S.C. Code Ann. §§ 16-15-342(E), 16-1-90(E), 16-1-20(A)(5).

2.5.1 Recommendation: Amend S.C. Code Ann. § 16-15-342 (Criminal solicitation of a minor; defenses; penalties) to specifically criminalize, with an enhanced penalty, the use of the Internet or electronic communications to lure, entice, or recruit a minor for purposes of commercial sexual exploitation.

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<sup>15</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as,

[A]n 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>16</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>17</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).

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

S.C. Code Ann. § 16-15-425(B) (Participating in prostitution of a minor defined; defenses; penalties) precludes a mistake of age defense, stating “[m]istake of age is not a defense to a prosecution under this section.” Likewise, S.C. Code Ann. § 16-15-405(C) (Second degree sexual exploitation of a minor defined; presumptions; defenses; penalties) provides, “[m]istake of age is not a defense to a prosecution under this section.”

Additionally, S.C. Code Ann. § 16-3-2020(I)(5)<sup>18</sup> (Trafficking in persons; penalties; defenses), prohibits a buyer from asserting a defense concerning “mistake as to the victim’s age, even if the mistake is reasonable.” S.C. Code Ann. § 16-3-2020 (I) states,

Evidence of the following facts or conditions do not constitute a defense in a prosecution for a violation of [Article 19, Trafficking in Persons], nor does the evidence preclude a finding of a violation:

...  
(5) mistake as to the victim's age, even if the mistake is reasonable.

However, S.C. Code Ann. § 16-3-830 (Reasonable belief as to majority of child as affirmative defense) states, “[i]t is an affirmative defense to a prosecution under this article [Sexual performance by children] that the defendant, in good faith, reasonably believed that the person who engaged in the sexual conduct was eighteen years of age or older.”

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

South Carolina’s trafficking law does not stagger penalties based on a minor’s age and provides sufficiently high penalties. A conviction under S.C. Code § 16-3-2020 (A)<sup>19</sup> (Trafficking in persons; penalties; defenses) is punishable by imprisonment for up to 30 years for a first conviction and up to 45 years for a second conviction. S.C. Code Ann. § 16-3-2020(C).

Similarly, South Carolina’s buyer-applicable CSEC law, S.C. Code Ann. § 16-15-425 (Participating in prostitution of a minor defined; defenses; penalties), does not stagger penalties based on a minor’s age; however, penalties under this offense are not sufficiently high. A conviction under S.C. Code Ann. § 16-15-425 is only punishable by imprisonment for 2–5 years, without the possibility of parole or suspended sentence for the first 2 years. S.C. Code Ann. §§ 16-15-425(C), 16-1-90(F), 16-1-20(A)(6).

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.*

A buyer convicted under S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses) may face severe financial penalties including mandatory restitution and asset forfeiture.<sup>20</sup> In addition, a victim of trafficking is entitled to all of the benefits, rights, and compensation granted under S.C. Code Ann. § 16-3-1110 (Definitions). S.C. Code Ann. §§ 16-3-2020(E),<sup>21</sup> 16-3-2070.

Regarding restitution, S.C. Code Ann. § 16-3-2040(D) (Restitution for victims of trafficking) states,

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<sup>18</sup> See *supra* note 3.

<sup>19</sup> See *supra* note 3.

<sup>20</sup> See *infra* Component 3.4 for a comprehensive description of the financial penalties resulting from a violation of S.C. Code Ann. § 16-3-2020.

<sup>21</sup> See *supra* note 3.

Restitution . . . means payment for all injuries, specific losses, and expenses, including, but not limited to, attorney's fees, sustained by a crime victim resulting from an offender's criminal conduct pursuant to Section 16-3-1110(12)(a). In addition, the court may order an amount representing the value of the victim's labor or services.

Under S.C. Code Ann. § 16-3-1110(A)(11), (B),

(A) . . . .

. . . .

(11) "Restitution" means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct. It includes, but is not limited to:

- (a) medical and psychological counseling expenses;
- (b) specific damages and economic losses;
- (c) funeral expenses and related costs;
- (d) vehicle impoundment fees;
- (e) child care costs; and
- (f) transportation related to a victim's participation in the criminal justice process.

(B) Restitution does not include awards for pain and suffering, wrongful death, emotional distress, or loss of consortium. Restitution orders do not limit any civil claims a crime victim may file.

A buyer may also be ordered to pay restitution to a victim's spouse, issue, descendants, or estate if "the victim of trafficking dies as a result of being trafficked." S.C. Code Ann. § 16-3-2040(B).

Any property related to or profited by the crime could be subject to civil forfeiture at the discretion of the court. S.C. Code Ann. § 16-3-2090 (Forfeiture). Under S.C. Code Ann. § 16-3-2090(A)(1), the following items are subject to forfeiture:

- (a) all monies used, or intended for use, in violation of Section 16-3-2020;
- (b) all property constituting the proceeds obtained directly or indirectly, for a violation of Section 16-3-2020;
- (c) all property derived from the proceeds obtained, directly or indirectly, from any sale or exchange for pecuniary gain from a violation of Section 16-3-2020;
- (d) all property used or intended for use, in any manner or part, to commit or facilitate the commission of a violation for pecuniary gain of Section 16-3-2020;
- (e) all books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or which have been positioned for use, in violation of Section 16-3-2020;
- (f) all conveyances including, but not limited to, trailers, aircraft, motor vehicles, and watergoing vessels, which are used or intended for use unlawfully to conceal or transport or facilitate a violation of Section 16-3-2020. No motor vehicle may be forfeited to the State under this item unless it is used, intended for use, or in any manner facilitates a violation of Section 16-3-2020;
- (g) all property including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for any kind of services under Section 16-3-2020, and all proceeds including, but not limited to, monies, and real and personal property traceable to any exchange under Section 16-3-2020; and
- (h) overseas assets of persons convicted of trafficking in persons also are subject to forfeiture to the extent they can be retrieved by the government.

. . . .

Seizure is permitted by process, or without process under S.C. Code Ann. § 16-3-2090(A)(2), which

provides:

- (a) seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
- (b) property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding based upon under Section 16-3-2020;
- (c) the investigating agency has probable cause to believe that the property is directly or indirectly dangerous to health of safety; or
- (d) the investigating agency has probable cause to believe that the property was used or is intended to be used in violation of Section 16-3-2020.

In addition, buyers are subject to discretionary criminal asset forfeiture. The asset forfeiture law within Chapter 15, Article 3 (Obscenity, material harmful to minors, child exploitation, and child prostitution) allows for forfeiture for some crimes a buyer may commit. S.C. Code Ann. § 16-15-445(A) (Seizure and forfeiture of equipment used in committing violation; hearing; disposition of forfeited property; allocation of sale proceeds) states,

All equipment used directly by a person in committing a violation of Sections 16-15-305 [Disseminating, procuring or promoting obscenity unlawful], 16-15-342 [Criminal solicitation of a minor; defenses; penalties], 16-15-395 [First degree sexual exploitation of a minor defined; presumptions; defenses; penalties], 16-15-405 [Second degree sexual exploitation of a minor defined; presumptions; defenses; penalties], or 16-15-410 [Third degree sexual exploitation of a minor defined], including necessary software, may be seized by the law enforcement agency making the arrest and ordered forfeited by the court in which the conviction was obtained.

Seizure of the property may be executed at the time of arrest by the arresting agency. S.C. Code Ann. § 16-15-445(A). Disposition of forfeited property is governed by S.C. Code Ann. § 16-15-445(C), which states in part,

[P]roperty forfeited pursuant to court order must be destroyed by the arresting law enforcement agency, unless that law enforcement agency can show good cause for retaining the property. Ownership of property so retained vests in the arresting law enforcement agency which may use the property in the performance of its duties, destroy it, or sell it at public auction. Retained property may be sold at public auction . . . . After payment of the expenses of the auction, one-half of the net proceeds may be retained by the arresting law enforcement agency, and one-half must be remitted to the State Treasurer for deposit to the credit of the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation, Victim Compensation Fund.

Pursuant to S.C. Code Ann. § 16-3-2090(B)(7),

Disposition of forfeited property under this section must be accomplished as follows:

- (a) Property forfeited under this subsection shall first be applied to payment to the victim. The return of the victim to his home country or other absence of the victim from the jurisdiction shall not prevent the victim from receiving compensation.
- (b) The victim and the South Carolina Victims' Compensation Fund shall each receive one-fourth, and law enforcement shall receive one-half of the value of the forfeited property.
- (c) If no victim is named, or reasonable attempts to locate a named victim for forfeiture and forfeiture fails, then all funds shall revert to the South Carolina Victims' Compensation Fund and law enforcement to be divided equally.
- (d) If federal law enforcement becomes involved in the investigation, they shall equitably split the share local law enforcement receives under this section, if they request or pursue any

of the forfeiture. The equitable split must be pursuant to 21 U.S.C. Section 881(e)(1)(A) and (e)(3), 18 U.S.C. Section 981(e)(2), and 19 U.S.C. Section 1616a.

Otherwise, most crimes that buyers of commercial sex can be charged with, including the CSEC offense under S.C. Code Ann. § 16-15-425 (Participating in prostitution of a minor defined; defenses; penalties), do not have financial penalties and S.C. Code § 16-3-2020 (Trafficking in Persons) do not impose a mandatory fine. However, the non-commercial offense under S.C. Code Ann. § 16-15-342(E) (Criminal solicitation of a minor; defenses; policies), includes soliciting a minor for sexual purposes and subjects a buyer to a possible fine not to exceed \$5,000.

2.8.1 Recommendation: Amend S.C. Code § 16-3-2020 (Trafficking in persons; penalties; defenses) and other CSEC offenses, including S.C. Code Ann. § 16-15-425 (Participating in prostitution of a minor defined; defenses; penalties), to include significant mandatory fines and amend S.C. Code Ann. § 16-15-342(E) (Criminal solicitation of a minor; defenses; penalties) to raise the fine and make it mandatory in cases of commercial sexual exploitation of a child.

## 2.9 *Buying and possessing images of child sexual exploitation carries penalties as high as similar federal offenses.*

Buying images of child sexual exploitation (ICSE) is prohibited under S.C. Code Ann. § 16-15-405 (Second degree sexual exploitation of a minor defined; presumptions; defense; penalties), which states in part, “(A) An individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he: . . . (2) distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.” A violation of this statute is punishable by imprisonment for 2–10 years and the offender will not be eligible for parole or a suspended sentence for the first 2 years of the sentence. S.C. Code Ann. § 16-15-405(D).

Additionally, a buyer could be charged with S.C. Code Ann. § 16-15-410 (Third degree sexual exploitation of a minor defined; penalties; exception), which states in subsection (A), “An individual commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.” A violation of this statute is punishable by imprisonment up to 10 years. S.C. Code Ann. § 16-15-410(C).

In comparison, a federal conviction for possession of ICSE<sup>22</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>23</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>24</sup>

<sup>22</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>23</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>24</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under

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

In South Carolina, a buyer must register when convicted of various offenses related to domestic minor sex trafficking, pursuant to S.C. Code Ann. § 23-3-430 (Sex offender registry; convictions and not guilty by reason of insanity findings requiring registration). Specifically, registration is required for, among other things, a violation of S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses ) and any offense falling within Title 16, Chapter 15, Article 3 (Obscenity, material harmful to minors, child exploitation, and child prostitution) when a minor is involved, which includes S.C. Code Ann. § 16-15-425 (Participating in prostitution of a minor; defense; penalties) and § 16-15-342 (Criminal solicitation of a minor; defenses; penalties). S.C. Code Ann. § 23-3-430(A), (C)(13), (17).

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

**Legal Components:**

- 3.1 Penalties for trafficking a child for sexual exploitation are as high as federal penalties.
- 3.2 Creating and distributing images of child sexual exploitation 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 parental custody and termination of parental rights include sex trafficking or commercial sexual exploitation of children (CSEC) offenses as grounds for sole custody or termination in order to prevent traffickers from exploiting their parental rights as a form of control.

**Legal Analysis:**

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

S.C. Code Ann. § 16-3-2020 (A)(1)<sup>25</sup> (Trafficking in persons; penalties; defenses) states that “[a] person who recruits, entices, solicits, isolates, harbors, transports, provides, or obtains, or so attempts, a victim, knowing that the victim will be subjected to sex trafficking, or for the purposes of sex trafficking . . . through any means . . . is guilty of trafficking in persons.” A first offense is a felony punishable by up to 30 years imprisonment, while a second and subsequent offenses are punishable by a maximum of 45 years imprisonment. S.C. Code Ann. § 16-3-2020(C).

Under S.C. Code Ann. § 16-15-415 (Promoting prostitution of a minor defined; defenses; penalties), “(A) An individual commits the offense of promoting prostitution of a minor if he knowingly: (1) entices, forces, encourages, or otherwise facilitates a minor to participate in prostitution; or (2) supervises, supports, advises, or promotes the prostitution of or by a minor.” A conviction under this statute is a Class C felony punishable by imprisonment for 3–20 years. S.C. Code Ann. §§ 16-15-415(A), (C), 16-1-90(C), 16-1-20(A)(3). The trafficker is not eligible for parole or suspended sentence during the first 3 years. S.C. Code Ann. § 16-15-415(C).

S.C. Code Ann. § 16-15-395(A) (First degree sexual exploitation of a minor defined; presumption; defenses; penalties), which includes when a person “uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation for a live performance or for the purpose of producing material that contains a visual representation depicting this activity,” is a Class C felony punishable by imprisonment for 3–20 years. S.C. Code Ann. §§ 16-15-395(A), (D), 16-1-90(C), 16-1-20(A)(3). The trafficker would not be eligible for parole or suspended sentence in the first 3 years. S.C. Code Ann. § 16-15-395(D).

S.C. Code Ann. § 16-3-810 (Engaging child for sexual performance; penalty), a Class C felony, criminalizes, among other things, employing or inducing a child less than 18 “to engage in a sexual performance.” S.C. Code Ann. §§ 16-3-810(a), 16-1-90(C). A violation of this section is punishable by imprisonment for a maximum of 20 years. S.C. Code Ann. §§ 16-3-810(b), 16-3-653(2), 16-1-90(C), 16-

<sup>25</sup> See *supra* note 3.



1-20(A)(3).

Lastly, a trafficker can be found guilty of the Class E felony under S.C. Code Ann. § 16-15-342 (Criminal solicitation of a minor; defenses; penalties), “if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) . . . or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.” A violation of this section is a Class E felony punishable by imprisonment up to 10 years, a fine not to exceed \$5,000, or both. S.C. Code Ann. §§ 16-15-342(A), (E), 16-1-90(E), 16-1-20(A)(5).

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>26</sup> against a minor. 18 U.S.C. § 3559(e)(1).

### 3.2 *Creating and distributing images of child sexual exploitation carries penalties as high as similar federal offenses.*

Under S.C. Code Ann. § 16-3-810 (Engaging child for sexual performance; penalty), a person who “employ[s], authorize[s], or induce[s] a child younger than eighteen years of age to engage in a sexual performance” is guilty of second degree criminal sexual conduct, which is punishable by imprisonment up to 20 years. S.C. Code Ann. §§ 16-3-810, 16-3-653(2).

Similarly, under S.C. Code Ann. § 16-15-405 (Second degree sexual exploitation of a minor defined; presumptions; defenses; penalties), a person who, among other things,

knowing the character or content of the material, . . . records, photographs, films, develops, duplicates, produces, or creates digital electronic file material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation

will face between 2 and 10 years imprisonment. S.C. Code Ann. § 16-15-405(A)(1), (D). The offender will not be eligible for parole or suspended sentence for the first 2 years. S.C. Code Ann. § 16-15-405(D).

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>27</sup> against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a

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<sup>26</sup> See *supra* note 15 for the definition of “federal sex offense.”

<sup>27</sup> See *supra* note 15 for the definition of “federal sex offense.”

federal conviction for distribution of images of child sexual exploitation (ICSE)<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 imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>30</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.*

South Carolina law does not have a separate law criminalizing the use of the Internet to lure, entice, recruit, or sell commercial sex acts with a minor. However, S.C. Code Ann. § 16-15-342(A) (Criminal solicitation of a minor; defenses; penalties) may apply in some cases as it applies to communications generally. It states,

A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) . . . or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.

A violation of this statute is a Class E felony punishable by imprisonment for 10 years, a fine up to \$5,000, or both. S.C. Code Ann. §§ 16-15-342(E), 16-1-90(E), 16-1-20(A)(5).

- 3.3.1 Recommendation: Amend S.C. Code Ann. § 16-15-342 (Criminal solicitation of a minor; defenses; penalties) to expressly apply to the conduct of traffickers who use the Internet or other electronic communications to lure, entice, recruit, or sell commercial sex acts with a minor under 18.

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

A trafficker convicted of trafficking under S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses) faces mandatory restitution orders and asset forfeiture. Further, S.C. Code Ann. § 16-3-2020(E)<sup>31</sup> states, “the victim of trafficking in persons [is entitled] to all benefits, rights, and compensation granted pursuant to Section 16-3-1110.”

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<sup>28</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>29</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>30</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>31</sup> *See supra* note 3.

Regarding restitution, S.C. Code Ann. § 16-3-2040 (D) (Restitution for victims of trafficking) defines restitution as

payment for all injuries, specific losses, and expenses, including, but not limited to, attorney's fees, sustained by a crime victim resulting from an offender's criminal conduct pursuant to Section 16-3-1110(12)(a). In addition, the court may order an amount representing the value of the victim's labor or services.

Under S.C. Code Ann. § 16-3-1110(A)(11), (B) (Definitions),

(A) . . . .

(11) Restitution means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct. It includes, but is not limited to:

- (a) medical and psychological counseling expenses;
- (b) specific damages and economic losses;
- (c) funeral expenses and related costs;
- (d) vehicle impoundment fees;
- (e) child care costs; and
- (f) transportation related to a victim's participation in the criminal justice process.

(B) Restitution does not include awards for pain and suffering, wrongful death, emotional distress, or loss of consortium. Restitution orders do not limit any civil claims a crime victim may file.

A trafficker may also be ordered to pay restitution to a victim's spouse, issue, descendants, or estate if "the victim of trafficking dies as a result of being trafficked." S.C. Code Ann. § 16-3-2040(B).

Additionally, under S.C. Code Ann. § 16-3-2090(A)(1) (Forfeiture), the following items are subject to discretionary civil forfeiture:

- (a) all monies used, or intended for use, in violation of Section 16-3-2020;
- (b) all property constituting the proceeds obtained directly or indirectly, for a violation of Section 16-3-2020;
- (c) all property derived from the proceeds obtained, directly or indirectly, from any sale or exchange for pecuniary gain from a violation of Section 16-3-2020;
- (d) all property used or intended for use, in any manner or part, to commit or facilitate the commission of a violation for pecuniary gain of Section 16-3-2020;
- (e) all books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or which have been positioned for use, in violation of Section 16-3-2020;
- (f) all conveyances including, but not limited to, trailers, aircraft, motor vehicles, and watergoing vessels, which are used or intended for use unlawfully to conceal or transport or facilitate a violation of Section 16-3-2020. No motor vehicle may be forfeited to the State under this item unless it is used, intended for use, or in any manner facilitates a violation of Section 16-3-2020;
- (g) all property including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for any kind of services under Section 16-3-2020, and all proceeds including, but not limited to, monies, and real and personal property traceable to any exchange under Section 16-3-2020; and
- (h) overseas assets of persons convicted of trafficking in persons also are subject to forfeiture to the extent they can be retrieved by the government.

"The Attorney General or his designee or the circuit solicitor or his designee has the burden of proof to

establish by a preponderance of the evidence that the property is subject to forfeiture. If the judge finds a forfeiture, he shall then determine the lienholder's interest<sup>32</sup> as provided in this article." S.C. Code Ann. § 16-3-2090(B)(2).

Property may be seized upon process or without process under S.C. Code Ann. § 16-3-2090(A)(2) which provides:

- (a) seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
- (b) property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding based upon under Section 16-3-2020;
- (c) the investigating agency has probable cause to believe that the property is directly or indirectly dangerous to health of safety; or
- (d) the investigating agency has probable cause to believe that the property was used or is intended to be used in violation of Section 16-3-2020.

In addition, the discretionary criminal asset forfeiture law within Chapter 15, Article 3 (Obscenity, material harmful to minors, child exploitation, and child prostitution) allows for forfeiture for some crimes a trafficker may commit. S.C. Code Ann. § 16-15-445(A) (Seizure and forfeiture of equipment used in committing violation; hearing; disposition of forfeited property; allocation of sale proceeds) states,

All equipment used directly by a person in committing a violation of Sections 16-15-305 [Disseminating, procuring or promoting obscenity unlawful], 16-15-342 [Criminal solicitation of a minor; defenses; penalties], 16-15-395 [First degree sexual exploitation of a minor defined; presumptions; defenses; penalties], 16-15-405 [Second degree sexual exploitation of a minor defined; presumptions; defenses; penalties], or 16-15-410 [Third degree sexual exploitation of a minor defined], including necessary software, may be seized by the law enforcement agency making the arrest and ordered forfeited by the court in which the conviction was obtained.

Although no fines apply if convicted under S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses) or CSEC laws, a conviction under S.C. Code Ann. § 16-15-342(A) (Criminal solicitation of a minor; defenses; penalties) may include as part of the sentence a fine up to \$5,000. S.C. Code Ann. § 16-15-342 (E). Similarly, a person convicted under S.C. Code Ann. § 16-15-387 (Employment of person under eighteen to appear in public state of sexually explicit nudity; mistake of age; penalties) could receive a fine not to exceed \$5,000. S.C. Code Ann. § 16-15-387(B).

- 3.4.1 Recommendation: Amend South Carolina's CSEC laws and S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses) to include mandatory fines.
- 3.4.2 Recommendation: Amend S.C. Code Ann. § 16-15-445(A) (Seizure and forfeiture of equipment used in committing violation; hearing; disposition of forfeited property; allocation of sale proceeds) to include all violations of South Carolina's CSEC laws and S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses) as grounds under which traffickers' assets could be seized and forfeited.

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<sup>32</sup> An innocent owner, manager, or owner of a licensed rental agency or any common carrier or carrier of goods for hire may apply to the court of common pleas for the return of any item seized. Notice of hearing or rule to show cause accompanied by copy of the application must be directed to all persons and agencies entitled to notice. If the judge denies the application, the hearing may proceed as a forfeiture hearing. S.C. Code Ann. § 16-3-2090(C)(1).

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

In South Carolina, a trafficker must register when convicted of various offenses related to domestic minor sex trafficking. S.C. Code Ann. § 23-3-430. Specifically, registration is required for, among other things, a violation of S.C. Code Ann. § 16-3-2010 (Trafficking in persons; penalties; defenses) and any offense falling within Title 16, Chapter 15, Article 3 (Obscenity, material harmful to minors, child exploitation, and child prostitution) when a minor is involved. S.C. Code Ann. § 23-3-430(A), (C)(13), (17).

3.6 *Laws relating to parental custody and termination of parental rights include sex trafficking or commercial sexual exploitation of children (CSEC) offenses as grounds for sole custody or termination in order to prevent traffickers from exploiting their parental rights as a form of control.*

Human trafficking and other CSEC convictions may be grounds for termination of parental rights in South Carolina. Pursuant to S.C. Code Ann. § 63-7-2570(9) (Grounds), a parent can lose rights if the court finds termination to be “in the best interest of the child” and if the court also makes one or more findings, including that

[t]he physical abuse of a child of the parent resulted in the death or admission to the hospital for in-patient care of that child and the abuse is the act for which the parent has been convicted of or pled guilty or nolo contendere to committing, aiding, abetting, conspiring to commit, or soliciting an offense against the person as provided for in Chapter 3, Title 16, criminal domestic violence as defined in Section 16-25-20, criminal domestic violence of a high and aggravated nature as defined in Section 16-25-65, or an assault and battery offense as provided in Article 7, Chapter 3, Title 16.

Offenses within Title 16, Chapter 3 include S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses), § 16-3-810 (Engaging a child for sexual performance; penalty), and § 16-3-820 (Producing, directing or promoting sexual performance by child; penalty). Therefore, in cases where the trafficker’s actions resulted in hospitalization of the minor victim, parental rights can be terminated, but if the minor victim was not hospitalized, the statute does not provide for the termination of parental rights. S.C. Code Ann. § 63-7-2570(9).

**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 images of child sexual exploitation carries penalties as high as similar federal offenses.*

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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.*

S.C. Code Ann. § 16-3-2020 (A)(1), (2)<sup>33</sup> (Trafficking in persons; penalties; defenses) makes it a crime to facilitate sex trafficking of minors, stating,

A person is guilty of trafficking in persons if he:

- (1) recruits, entices, solicits, isolates, harbors, transports, provides, or obtains, or so attempts, a victim, knowing that the victim will be subjected to, or for the purpose of, sex trafficking . . . through any means or who benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in this subsection, is guilty of trafficking in persons.
- (2) aids, abets, or conspires with another person to violate the criminal provisions of this section.

A first offense is punishable by no more than 30 years imprisonment, while a second and subsequent offenses are punishable by a maximum of 45 years imprisonment. S.C. Code Ann. § 16-3-2020(C).

Furthermore, business owners who use their businesses to participate in a violation of this article are subject to imprisonment by no more than 10 years in addition to the other penalties prescribed in this article. S.C. Code Ann. § 16-3-2020(D). S.C. Code Ann. § 16-3-2030 (A) (Criminal liability of principal owners of business; penalties) states,

The principal owners of a business, a business entity, including a corporation, partnership, charitable organization, or another legal entity, that knowingly aids or participates in an offense provided in this article is criminally liable for the offense and will be subject to a fine or loss of business license in the State, or both. In addition, the court may consider disgorgement of profit from activity in violation of this article and disbarment from state and local government contracts.

Under S.C. Code Ann. § 16-15-415(A)(1) (Promoting prostitution of a minor defined; defenses, penalties), “(A) An individual commits the offense of promoting prostitution of a minor if he knowingly: (1) entices, forces, encourages, or otherwise facilitates a minor to participate in prostitution.” This offense is a Class C felony punishable by imprisonment for 3–20 years and the offender is not eligible for parole or suspended sentence for the first 3 years. S.C. Code Ann. §§ 16-15-415(C), 16-1-90(C), 16-1-

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

20(A)(3).

Under S.C. Code Ann. § 16-15-395(A) (First degree sexual exploitation of a minor defined; presumptions; defenses; penalties),

An individual commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:

(1) uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation for a live performance or for the purpose of producing material that contains a visual representation depicting this activity;

....

(3) transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(4) records, photographs, films, develops, duplicates, produces, or creates a digital electronic file for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.

This crime is a Class C felony punishable by imprisonment for 3–20 years, and the offender is not eligible for parole or suspended sentence for the first 3 years. S.C. Code Ann. § 16-15-395(D), 16-1-90(C), 16-1-20(A)(3).

Although not specifically directed to domestic minor sex trafficking victims, S.C. Code Ann. § 58-23-1320 (Use of taxi for prostitution or lewd act or transporting person to place for such purpose) states,

It shall be unlawful for the driver of any such taxi to permit any person to occupy or use such taxi for the purpose of prostitution or for any other lewd or indecent act, knowing or having reasonable cause to know that it is being used or is to be used for any such purpose, or to direct, take or transport or offer or agree to take or transport any person to any building or place knowing or having reasonable cause to know that the purpose of such directing, taking or transporting is prostitution or any other lewd or indecent act.

A violation of this provision is a misdemeanor punishable by a fine up to \$100 or imprisonment up to 30 days. S.C. Code Ann. § 58-23-1410.

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.*

No fines apply to facilitators who are convicted under S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses) or CSEC laws. However, if a facilitator is convicted under S.C. Code Ann. § 16-3-2020(E)<sup>34</sup> (Trafficking in persons; penalties; defenses), the facilitator is subject to mandatory orders of restitution and asset forfeiture. Further, “the victim of trafficking in persons [is entitled] to all benefits, rights, and compensation granted pursuant to Section 16-3-1110.” S.C. Code Ann. §§ 16-3-2020(E), 16-3-2070.

Regarding restitution, S.C. Code Ann. § 16-3-2040(D) (Restitution for victims of trafficking) defines restitution as

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<sup>34</sup> See *supra* note 3.

payment for all injuries, specific losses, and expenses, including, but not limited to, attorney's fees, sustained by a crime victim resulting from an offender's criminal conduct pursuant to Section 16-3-1110(12)(a). In addition, the court may order an amount representing the value of the victim's labor or services.

Under S.C. Code Ann. § 16-3-1110(A)(11), (B) (Definitions),

(A) . . . .

(11) "Restitution" means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct. It includes, but is not limited to:

- (a) medical and psychological counseling expenses;
- (b) specific damages and economic losses;
- (c) funeral expenses and related costs;
- (d) vehicle impoundment fees;
- (e) child care costs; and
- (f) transportation related to a victim's participation in the criminal justice process.

(B) Restitution does not include awards for pain and suffering, wrongful death, emotional distress, or loss of consortium. Restitution orders do not limit any civil claims a crime victim may file.

A trafficker may also be ordered to pay restitution to a victim's spouse, issue, descendants, or estate if "the victim of trafficking dies as a result of being trafficked." S.C. Code Ann. § 16-3-2040(B).

A violation may also result in a forfeiture of the following items under S.C. Code Ann. § 16-3-2090(A)(1) (Forfeiture):

- (a) all monies used, or intended for use, in violation of Section 16-3-2020;
- (b) all property constituting the proceeds obtained directly or indirectly, for a violation of Section 16-3-2020;
- (c) all property derived from the proceeds obtained, directly or indirectly, from any sale or exchange for pecuniary gain from a violation of Section 16-3-2020;
- (d) all property used or intended for use, in any manner or part, to commit or facilitate the commission of a violation for pecuniary gain of Section 16-3-2020;
- (e) all books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or which have been positioned for use, in violation of Section 16-3-2020;
- (f) all conveyances including, but not limited to, trailers, aircraft, motor vehicles, and watergoing vessels, which are used or intended for use unlawfully to conceal or transport or facilitate a violation of Section 16-3-2020. No motor vehicle may be forfeited to the State under this item unless it is used, intended for use, or in any manner facilitates a violation of Section 16-3-2020;
- (g) all property including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for any kind of services under Section 16-3-2020, and all proceeds including, but not limited to, monies, and real and personal property traceable to any exchange under Section 16-3-2020; and
- (h) overseas assets of persons convicted of trafficking in persons also are subject to forfeiture to the extent they can be retrieved by the government.

Property is subject to seizure upon process or without process under S.C. Code Ann. § 16-3-2090(A)(2) which provides:

- (a) seizure is incident to an arrest or a search under a search warrant or an inspection under an



- administrative inspection warrant;
- (b) property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding based upon under Section 16-3-2020;
- (c) the investigating agency has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
- (d) the investigating agency has probable cause to believe that the property was used or is intended to be used in violation of Section 16-3-2020.

Businesses who are in violation of S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses) would also have to surrender their charters and face a revocation of their certificates to conduct business in the state. S.C. Code Ann. § 16-3-2030(B)(3).

The criminal asset forfeiture law within Title 16, Chapter 15, Article 3 (Obscenity, material harmful to minors, child exploitation, and child prostitution) is more limited and only allows for forfeiture in some crimes a facilitator may commit. S.C. Code Ann. § 16-15-445(A) (Seizure and forfeiture of equipment used in committing violation; hearing; disposition of forfeited property; allocation of sale proceeds) states,

All equipment used directly by a person in committing a violation of Sections 16-15-305 [Disseminating, procuring or promoting obscenity unlawful], 16-15-342 [Criminal solicitation of a minor; defenses; penalties], 16-15-395 [First degree sexual exploitation of a minor defined; presumptions; defenses; penalties], 16-15-405 [Second degree sexual exploitation of a minor defined; presumptions; defenses; penalties], or 16-15-410 [Third degree sexual exploitation of a minor defined], including necessary software, may be seized by the law enforcement agency making the arrest and ordered forfeited by the court in which the conviction was obtained.

- 4.2.1 Recommendation: Amend South Carolina’s CSEC laws and S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses) to include mandatory fines for facilitators.
- 4.2.2 Recommendation: Amend S.C. Code Ann. § 16-15-445(A) (Seizure and forfeiture of equipment used in committing violation; hearing; disposition of forfeited property; allocation of sale proceeds) to require facilitators who violate any of South Carolina’s CSEC laws or S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses) to forfeit property used in or acquired through the commission of the crime.

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

There is no South Carolina law that addresses 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 Carolina.

#### 4.4 *Promoting and selling images of child sexual exploitation carries penalties as high as similar federal offenses.*

Under S.C. Code Ann. § 16-3-820(a) (Producing, directing or promoting sexual performance by child; penalty), “[i]t is unlawful for any person to produce, direct, or promote a performance that includes sexual conduct by a child younger than eighteen years of age.” “Promote” is defined as “to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above.” S.C. Code Ann. § 16-3-800(4).

Additionally, S.C. Code Ann. § 16-15-405(A)(2) (Second degree sexual exploitation of a minor defined; presumptions; defenses; penalties) criminalizes the facilitating actions of a person who, “knowing the character or content of the material, . . . distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity or appearing in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation.”

Under S.C. Code Ann. § 16-15-395(A) (First degree sexual exploitation of a minor defined; presumptions; defenses; penalties),

An individual commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:

(1) uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation for a live performance or for the purpose of producing material that contains a visual representation depicting this activity;

. . . .

(3) transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(4) records, photographs, films, develops, duplicates, produces, or creates a digital electronic file for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.

This crime is a Class C felony punishable by imprisonment for 3–20 years, and the offender is not eligible for parole or suspended sentence for the first 3 years. S.C. Code Ann. §§ 16-15-395(D), 16-1-90(C), 16-1-20(A)(3).

**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 asserting a defense based on the willingness of the 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 commercial sexual exploitation of children (CSEC).*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Child sex trafficking victims may vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.*
- 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 to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

**Legal Analysis:**

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.<sup>35</sup>*

Under South Carolina’s core sex trafficking offense, S.C. Code Ann. § 16-3-2020 (Trafficking in persons; penalties; defenses), all commercially sexually exploited children are included as victims of sex trafficking. The definition of sex trafficking under S.C. Code Ann. § 16-3-2010(7) (Definitions) does not require proof of force, fraud, or coercion when the victim is a minor,<sup>36</sup> and the definition of sex trafficking under S.C. Code Ann. § 16-3-2020(A)(2)<sup>37</sup> provides criminal liability for buyers of sex with minors without requiring that the child be under the control of a third party trafficker.<sup>38</sup> Consequently, all commercially sexually exploited children may access the protections, services, and benefits intended for child sex trafficking victims.

<sup>35</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>36</sup> See *supra* Component 1.1.

<sup>37</sup> See *supra* note 3.

<sup>38</sup> See *supra* Component 2.1.

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.*<sup>39</sup>

South Carolina’s trafficking statute prohibits a defendant from asserting a defense to prosecution based on the willingness of the minor to engage in the commercial sex act. S.C. Code Ann. § 16-3-2020 (I)(3)<sup>40</sup> (Trafficking in persons; penalties; defenses) states, “the implied or express consent of a victim to acts which violate the provisions of this section do not constitute a defense to violations of this section . . . .”

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>41</sup>

Although South Carolina’s prostitution offense, S.C. Code Ann. § 16-15-90(1) (Prostitution; lewdness, assignation, and prostitution generally), is age neutral, South Carolina’s human trafficking offense prohibits the criminalization of minor victims for prostitution.<sup>42</sup> S.C. Code Ann. § 16-3-2020(G)<sup>43</sup> (Trafficking in persons; penalties; defenses) states in part,

If the victim was a minor at the time of the offense, the victim of human trafficking in persons may not be prosecuted in court pursuant to this article [Trafficking in Persons] or a prostitution offense, if it is determined after investigation that the victim committed the offense as a direct result of, or incidental or related to, trafficking.

Therefore, while the state prostitution statute, S.C. Code Ann. § 16-15-90(1) does not prevent minors under 18 years of age from facing prosecution for prostitution-related offenses, minors identified as victims of child sex trafficking are provided a specific exemption from criminalization for prostitution and trafficking offenses.

5.3.1 Recommendation: Clarify S.C. Code Ann. § 16-15-90(1) (Prostitution; lewdness, assignation, and prostitution generally) to specify that all minors shall be protected from criminal or delinquency charges for prostitution-related offenses.<sup>44</sup>

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

A juvenile sex trafficking victim is not subject to prosecution for prostitution<sup>45</sup> and will likely be identified as abused or neglected.<sup>46</sup> Further, a minor victim may receive specialized services through “certified specialized service providers” and the Human Trafficking Acute Crisis Care and Resource Centers under the auspices of the Office of the Attorney General. S.C. Code Ann. § 16-3-2020(H)<sup>47</sup> (Trafficking in persons; penalties; defenses). Pursuant to S.C. Code Ann. § 16-3-2020(H),

<sup>39</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>40</sup> See *supra* note 3.

<sup>41</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>42</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>43</sup> See *supra* note 3.

<sup>44</sup> See generally SHARED HOPE INTERNATIONAL, “Seeking Justice: Legal approaches to eliminate criminal liability for child sex trafficking victims” (2018), [https://sharedhope.org/wp-content/uploads/2018/08/ANALYSIS-OF-STATUTORY-APPROACHES\\_ver7.pdf](https://sharedhope.org/wp-content/uploads/2018/08/ANALYSIS-OF-STATUTORY-APPROACHES_ver7.pdf) (discussing need to eliminate a minor’s criminal liability for prostitution and other offenses committed pursuant to trafficking victimization and to establish a statutory avenue to specialized services).

<sup>45</sup> See *supra* Component 5.3 for provisions concerning the non-criminalization of minors for prostitution offenses.

<sup>46</sup> See *infra* Components 5.5 and 5.6 for provisions concerning child abuse and neglect.

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

The human trafficking specialized service providers must be certified by the Attorney General through criteria established by the Human Trafficking Task Force. The Attorney General, through the task force, must also establish necessary criteria for Human Trafficking Acute Crisis Care and Resource Centers to be established in the communities in South Carolina. Once the service providers are certified and the assessment centers are open, the information must be disseminated to the family court bench and bar as well as law enforcement to be utilized in carrying out the mandates of this statute. The court must determine the most appropriate way to provide specialized services to the juveniles to address the concerns relating to human trafficking.

However, S.C. Code Ann. § 16-3-2020(H) does not provide a mechanism for referring or connecting child victims to such services outside of the family court system. As a result, some child sex trafficking victims may not benefit from services provided through the Resource Centers and certified service providers.

5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*<sup>48</sup>

Child sex trafficking is specifically defined as a type of abuse or neglect under the definition of “child abuse or neglect” pursuant to S.C. Code Ann. § 63-7-20(6)(b)<sup>49</sup> (Definitions). S.C. Code Ann. § 63-7-20(6)(b) states,

“Child abuse or neglect” or “harm” occurs when: . . . (b) a child is a victim of trafficking in persons as defined in Section 16-3-2010, including sex trafficking, regardless of whether the perpetrator is a parent, guardian, or other person responsible for the child’s welfare. Identifying a child as a victim of trafficking in persons does not create a presumption that the parent, guardian, or other individual responsible for the child’s welfare abused, neglected, or harmed the child.

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.*<sup>50</sup>

Under S.C. Code Ann. § 63-7-20(4) (Definitions). “caregiver” is limited to a child’s “foster parent, kinship foster parent, or employee of a group home . . . .” However, the definition of “child abuse or neglect” under S.C. Code Ann. § 63-7-20(6)(b)<sup>51</sup> expressly defines “trafficking in persons” as a form of child abuse and neglect, regardless of whether a parent or caregiver is responsible for the child’s exploitation. S.C. Code Ann. § 63-7-20(6)(b) states,

“[c]hild abuse or neglect” or “harm” occurs when: . . . (b) a child is a victim of trafficking in persons as defined in Section 16-3-2010, including sex trafficking, regardless of whether the perpetrator is a parent, guardian, or other person responsible for the child’s welfare. Identifying a child as a victim of trafficking in persons does not create a presumption that the parent, guardian, or other individual responsible for the child’s welfare abuse, neglected, or harmed the child.

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<sup>48</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>49</sup> The text of S.C. Code Ann. § 63-7-20 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 3701 and Senate Bill 3701 during the 2018 Regular Session of the South Carolina Legislature (effective April 4, 2018).

<sup>50</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>51</sup> See *supra* note 49.

Therefore, victims of non-familial child sex trafficking who come to the attention of child welfare do not face statutory barriers in accessing the care and protection of child welfare.

5.7 *Crime victims' compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC).*

The state Victim's Compensation Fund is codified at S.C. Code Ann. § 16-3-1110 et seq. It defines "victim" in part as "a person who suffers direct or threatened physical, emotional, or financial harm as the result of an act by someone else, which is a crime." S.C. Code Ann. § 16-3-1110(A)(8) (Definitions). Additionally, victims of trafficking "are considered victims for the purposes of the Victims' Bill of Rights and are entitled to all appropriate forms of compensation available pursuant to the State Crime Victim's Compensation Fund." S.C. Code Ann. § 16-3-2070(A). All crimes at the state and federal level are included in the definition of a crime, with the exception of some vehicular crimes. S.C. Code Ann. § 16-3-1110(A)(6).

Under S.C. Code Ann. § 16-3-1170(A) (Basis for award),

No award may be made unless:

- (1) a crime was committed;
- (2) the crime directly resulted in physical or psychic trauma to the victim;
- (3) the crime was promptly reported to the proper authority and recorded in police records; and
- (4) the claimant or other award recipient has fully cooperated with all law enforcement agencies and with the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation.

Under S.C. Code Ann. § 16-3-1170(B), barring the "showing of special circumstances or causes which justify the delay," crimes reported after more than 48 hours are not "promptly reported." Furthermore, pursuant to S.C. Code Ann. § 16-3-1200 (Conduct of victim or intervener contributing to infliction of injury), an award may be reduced or rejected based on a determination that "because of his conduct the victim or intervener of such crime contributed to the infliction of his injury . . . ." Similarly, a person is ineligible if he "committed or aided in the commission of the crime upon which the claim is based or engaged in other unlawful activity which contributed to or aggravated the resulting injury." S.C. Code Ann. § 16-3-1220(1) (Persons ineligible for award). As a result, since minors can be charged with prostitution in South Carolina, it is possible the minor victim could be disqualified from receiving victims' compensation from the Fund if it is determined that the prostitution "contributed to or aggravated the resulting injury."

Additionally, a claim must generally be filed within "one hundred eighty days after the latest of the following events: (1) the occurrence of the crime upon which the claim is based; (2) the death of the victim; (3) the discovery by the law enforcement agency that the occurrence was the result of crime; or (4) the manifestation of a mental or physical injury is diagnosed as a result of a crime committed against a minor." S.C. Code Ann. § 16-3-1230(B) (Claim filed on behalf of minor or incompetent; time limitations). This requirement potentially limits the ability of domestic minor sex trafficking victims to gain compensation dependent upon how the "occurrence" of the crime is defined because many victims may not come forward and report the crime due to the ongoing effects of trafficking. South Carolina allows for extending the filing period "[u]pon good cause shown"; however, "[g]ood cause' for the above purposes includes reliance upon advice of an official victim assistance specialist who either misinformed or neglected to inform a victim of rights and benefits of the Victim Compensation Fund but does not mean simply ignorance of the law." S.C. Code Ann. § 16-3-1230(C).

- 5.7.1 Recommendation: Amend S.C. Code Ann. § 16-3-1220(1) (Persons ineligible for award) and § 16-3-1200 (Conduct of victim or intervener contributing to infliction of injury) to ensure that domestic minor sex trafficking victims are not ineligible due to crimes their traffickers forced them to commit. Also, amend S.C. Code Ann. § 16-3-1170(B) (Basis for award) and § 16-3-1230 (Claim filed on behalf of minor or incompetent; time limitations) to relax the time requirements in cases of domestic minor sex trafficking.

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

South Carolina has a few victim-friendly criminal justice procedures. According to S.C. Code Ann. § 16-3-659.1(1) (Criminal sexual conduct: admissibility of evidence concerning victim's sexual conduct), "evidence of a victim's past sexual conduct or reputation is inadmissible in certain cases, including cases of first, second, or third degree criminal sexual conduct, criminal sexual conduct with a minor, and sex trafficking. However, under the provision, "evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded." Nevertheless, for victims of sex trafficking, "the victim's sexual history or history of commercial sexual activity, the specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct" may not constitute a defense. S.C. Code Ann. § 16-3-2020(I)(1)<sup>52</sup> (Trafficking in persons; penalties; defenses).

Also, for victims of rape, S.C. Code Ann. § 16-3-660 (Deposition testimony of rape victim or victim of assault with intent to ravish) states that "the deposition of [the female witness who is alleged to have been assaulted may] be taken at a time and place designated in such order within the county in which the trial is to be had . . . ." The procedure for these depositions requires that only the witness, the accused, and the attorneys be present at the taking of the deposition. S.C. Code Ann. § 16-3-670. According to S.C. Code Ann. § 16-3-700 (Reading deposition to jury), "Such deposition shall be read to the jury upon the trial and shall be considered by them as though such testimony had been given orally in court." South Carolina also provides for the destruction of these depositions when the case is closed and appeals have both been taken and settled or the time for taking an appeal has elapsed. S.C. Code Ann. § 16-3-720.

Further, S.C. Code Ann. § 16-3-730 (Publishing name of victim of criminal sexual conduct unlawful) states,

Whoever publishes or causes to be published the name of any person upon whom the crime of criminal sexual conduct has been committed or alleged to have been committed in this State in any newspaper, magazine or other publication shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years. The provisions of this section shall not apply to publications made by order of court.

Under S.C. Code Ann. § 16-3-2070(B) (Compensation for victims of trafficking; identity of victim and victim's family confidential), "in a prosecution for violations of the criminal provisions of [trafficking in persons], the identity of the victim and the victim's family must be kept confidential by ensuring that names and identifying information of the victim and victim's family are not released to the public,

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<sup>52</sup> See *supra* note 3.

including by the defendant.”

S.C. Code Ann. § 17-23-175(A) (Admissibility of out-of-court statement of child under twelve; determination of trustworthiness; notice to adverse party) allows for out-of-court statements for children under 12 to be admissible if certain conditions are met:

In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child<sup>53</sup> is admissible if:

- (1) the statement was given in response to questioning conducted during an investigative interview of the child;
- (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
- (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
- (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

5.9 *Child sex trafficking victims may vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.*<sup>54</sup>

South Carolina law does not provide a mechanism for minors to vacate delinquency adjudications related to trafficking victimization, and juvenile records may only be expunged after a waiting period.

Regarding record expungement, S.C. Code Ann. § 63-19-2050 (A)(1) (Petition for record destruction) provides,

A person who has been taken into custody for, charged with, or adjudicated delinquent for having committed a status or a nonviolent crime, as defined in Section 16-1-70, may petition the court for an order destroying all official records relating to:

- (a) being taken into custody;
- (b) the charges filed against the child;
- (c) the adjudication; and
- (d) disposition.

Generally, a court must grant expungement for a status offense and may grant expungement for multiple status offense or nonviolent offenses.<sup>55</sup> S.C. Code Ann. § 63-19-2050(C). However, certain eligibility

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<sup>53</sup> A “child” for the purposes of this statute include “(1) a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of making the statement; and (2) a person who is the alleged victim of, or witness to, a criminal act for which the defendant, upon conviction, would be required to register pursuant to the provisions of Article 7, Chapter 3, Title 23 [Sex offender registry].” S.C. Code Ann. § 17-23-175(C).

<sup>54</sup> The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>55</sup> Pursuant to S.C. Code Ann. § 16-1-70 (Nonviolent crimes), nonviolent offenses are all crimes not specifically listed as violent crimes within S.C. Code Ann. § 16-1-60 (Violent crimes defined), which does not include the offense of prostitution, S.C. Code Ann. § 16-15-90 (Prostitution; lewdness, assignation and prostitution generally). However, violent crimes listed in S.C. Code Ann. § 16-1-60 do include:

producing, directing, or promoting sexual performance by a child (Section 16-3-820); sexual exploitation of a minor first degree (Section 16-15-395); sexual exploitation of a minor second degree (Section 16-15-



requirements are listed; “[a] person may not petition the court if [he] has a prior adjudication for an offense that would carry a maximum term of imprisonment of five years or more if committed by an adult.” S.C. Code Ann. § 63-19-2050(A)(2). In addition, the court must “not grant the expungement order unless [it] finds that the person” who is seeking to have the records destroyed “is at least seventeen years of age, has successfully completed any dispositional sentence imposed, has not been subsequently adjudicated for or convicted of any criminal offense, and does not have any criminal charges pending in family court or general sessions court.” S.C. Code Ann. § 63-19-2050(C)(3).<sup>56</sup>

If granted, expungement serves to completely eliminate all evidence of the records and to “restore the person in the contemplation of the law to the status the person occupied before being taken into custody.” S.C. Code Ann. § 63-19-2050(E).

A child under the age of 17 who has committed a non-violent offense that is either a misdemeanor; Class D, E, or F felony; or is punishable by a maximum sentence of no greater than 15 years is eligible for “youthful offender” status if the minor “has been bound over for proper criminal proceedings to the court of general sessions pursuant to Section 63-19-1210 . . . .” S.C. Code Ann. § 24-19-10(d)(i). Additionally, a minor who is at least 17 but less than 25 when convicted of an “offense that is not a violent crime, as defined in Section 16-1-60, and that is a misdemeanor; a Class D, Class E, or Class F felony; or a felony which provides for a maximum term of imprisonment of fifteen years or less” falls under the definition of “youthful offender.” S.C. Code Ann. § 24-19-10(d)(ii). A youthful offender’s criminal record may be expunged once pursuant to S.C. Code Ann. § 22-5-920(B)<sup>57</sup> (Conviction as a youthful offender), which states in part,

(1) Following a first offense conviction as a youthful offender for which a defendant is sentenced pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act, the defendant, who has not been convicted of any offense, including an out-of-state offense, while serving the youthful offender sentence, including probation and parole, for a period of five years from the date of completion of his sentence, including probation and parole, may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction.

(2) However, this section does not apply to:

- (a) an offense involving the operation of a motor vehicle;
- (b) an offense classified as a violent crime in Section 16-1-60;
- (c) an offense contained in Chapter 25, Title 16, except as otherwise provided in Section 16-25-30; or
- (d) an offense for which the individual is required to register in accordance with the South Carolina Sex Offender Registry Act.

(3) If the defendant has had no other conviction, to include out-of-state convictions, during the service of the youthful offender sentence, including probation and parole, during the five-year period following completion of his sentence, including probation and parole, for a first offense conviction as a youthful offender for which the defendant was sentenced pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act, the circuit court may issue an order

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405); promoting prostitution of a minor (Section 16-15-415); participating in prostitution of a minor (Section 16-15-425) . . . .

<sup>56</sup> Under S.C. Code Ann. § 63-19-2050(F), “[f]or purposes of this section, an adjudication is considered a previous adjudication only if it occurred prior to the date the subsequent offense was committed.”

<sup>57</sup> The text of S.C. Code Ann. § 22-5-920 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 3209 during the 2018 Regular Session of the South Carolina Legislature (effective December 27, 2018).

expunging the records. No person may have his records expunged under this section more than once. A person may have his record expunged even though the conviction occurred before the effective date of this section. A person eligible for a sentence pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act, and who is not sentenced pursuant to those provisions, is not eligible to have his record expunged pursuant to the provisions of this section; however, a person who was convicted prior to June 2, 2010, and was a youthful offender as that term is defined in Section 24-19-10(d) is eligible to have his record expunged pursuant to the provisions of this section.

Because South Carolina's general expungement laws mandate a minimum 5 year waiting period or that a minor turn 17, child sex trafficking victims may face collateral consequences associated with having delinquency records during those periods.

Regarding vacatur, S.C. Code Ann. § 16-3-2020(F)<sup>58</sup> (Trafficking in persons; penalties; defenses) allows victims of human trafficking to petition the court for vacatur of certain convictions. Specifically, S.C. Code Ann. § 16-3-2020(F) provides,

[a] victim of trafficking in persons convicted of a violation of this article [Trafficking in Persons] or prostitution may motion the court to vacate the conviction and expunge the record of the conviction. The court may grant the motion on a finding that the person's participation in the offense was a direct result of being a victim.

Pursuant to S.C. Code Ann. § 63-19-1410 (Adjudication), however, “[n]o adjudication by the court of the status of a child is a conviction . . . .” Because S.C. Code Ann. § 16-3-2020(F) applies specifically to “convictions,” a delinquency adjudication cannot be vacated under S.C. Code Ann. § 16-3-2020(F).

- 5.9.1 Recommendation: Amend S.C. Code Ann. § 16-3-2020(F) (Trafficking in persons; penalties; defenses) to allow child sex trafficking victims to vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.<sup>59</sup>

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

Under S.C. Code Ann. § 16-3-2060(A) (Civil action for victim of trafficking; statute of limitations),

[a] person who is a victim of trafficking in persons may bring a civil action in court of common pleas. The court may award actual damages, compensatory damages, punitive damages, injunctive relief, and other appropriate relief.<sup>60</sup> A prevailing plaintiff also must be awarded attorney's fees and costs. Treble damages must be awarded on proof of actual damages when the defendant's acts were willful and malicious.

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<sup>58</sup> See *supra* note 3.

<sup>59</sup> The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>60</sup> In the forfeiture of a defendant's property during a criminal investigation, “[a]ny property taken or detained under [Section 16-3-2090] is not subject to replevin but is considered to be in the custody of the investigating agency making the seizure subject only to the orders of the court having jurisdiction over the forfeiture proceedings. Property is forfeited and transferred to the government at the moment of illegal use. Seizure and forfeiture proceedings confirm the transfer.” S.C. Code Ann. § 16-3-2090(A)(4).

A victim of trafficking or a surviving family member is also entitled to mandatory restitution from the offender under S.C. Code Ann. § 16-3-2040 (Restitution for victims of trafficking), which includes,

payment for all injuries, specific losses, and expenses, including, but not limited to, attorney's fees, sustained by a crime victim resulting from an offender's criminal conduct pursuant to Section 16-3-1110(12)(a). In addition, the court may order an amount representing the value of the victim's labor or services.

The victim is also entitled to one-fourth of the value of any forfeited property. S.C. Code Ann. § 16-3-2090(B)(7)(b).<sup>61</sup>

S.C. Code Ann. § 17-25-322(A) (Restitution to crime victim by person convicted of crime; hearing; determination of method, manner, and amount; entry of order) also states in part, “When a defendant is convicted of a crime which has resulted in pecuniary damages or loss to a victim, the court must hold a hearing to determine the amount of restitution due the victim or victims of the defendant’s criminal acts.” The following items may be considered by the court when determining the amount, method, or manner of restitution: “(1) the financial resources of the defendant and the victim and the burden that the manner or method of restitution will impose upon the victim or the defendant; (2) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court; (3) the anticipated rehabilitative effect on the defendant regarding the manner of restitution or the method of payment; (4) any burden or hardship upon the victim as a direct or indirect result of the defendant's criminal acts; (5) the mental, physical, and financial well-being of the victim.” S.C. Code Ann. § 17-25-322(B). Additionally, subsection (E) provides, “An offender may not be granted a pardon until the restitution and collection fees required by the restitution order have been paid in full.” S.C. Code Ann. § 17-25-322(E).

*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 to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

“South Carolina does not have a general statute of limitations for criminal actions; however, in a few very rare instances, a period of limitations is incorporated in specific criminal statutes.”<sup>62</sup>

Civil actions based on sexual abuse or incest may be available to victims of domestic minor sex trafficking. S. C. Code Ann. § 15-3-555(A) (Statute of limitations for action based on sexual abuse or incest) states,

An action to recover damages for injury to a person arising out of an act of sexual abuse<sup>63</sup> or

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<sup>61</sup> Pursuant to S.C. Code Ann. § 16-3-2090(B)(7)(a), (b),

Disposition of forfeited property under this section must be accomplished as follows:

(a) Property forfeited under this subsection shall first be applied to payment to the victim. The return of the victim to his home country or other absence of the victim from the jurisdiction shall not prevent the victim from receiving compensation.

(b) The victim and the South Carolina Victims' Compensation Fund shall each receive one-fourth, and law enforcement shall receive one-half of the value of the forfeited property.

<sup>62</sup> *Summary Court Judges Bench Book—Substantive and Procedural Law*, SOUTH CAROLINA JUDICIAL DEPARTMENT, <http://www.judicial.state.sc.us/summaryCourtBenchBook/HTML/CriminalA.htm> (last visited September 20, 2016).

<sup>63</sup> S.C. Code Ann. § 17-25-135(2) defines “sexual abuse” as “(a) actual or attempted sexual contact with a child; or (b) permitting, enticing, encouraging, forcing, or otherwise facilitating a child’s participation in prostitution or in a

incest must be commenced within six years after the person becomes twenty-one years of age or within three years from the time of discovery by the person of the injury and the causal relationship between the injury and the sexual abuse or incest, whichever occurs later.

In the event the crime was perpetrated by a parent, subsection (B) states, “Parental immunity is not a defense against claims based on sexual abuse or incest that occurred before, on, or after this section’s effective date.”

The statute of limitations for civil actions for trafficking victims authorized under S.C. Code Ann. § 16-3-2060(A) (Civil action for victim of trafficking; statute of limitations) is provided under S.C. Code Ann. § 16-3-2060 subsections (B)–(F) as follows:

(B) Pursuant to Section 16-3-1110, the applicable statute of limitations for a crime victim who has a cause of action against an incarcerated offender is tolled and does not expire until three years after the offender’s sentence is completed, including probation and parole, or three years after release from commitment pursuant to Chapter 48, Title 44, whichever is later. However, this provision does not shorten any other tolling period of the state of limitations which may exist for the victim.

(C) The statute of limitations for the filing of a civil suit does not begin until a minor victim has reached the age of majority.

(D) If a victim entitled to sue is under a disability at the time the cause of action accrues, so that it is impossible or impractical for him to bring an action, then the time of the disability is not part of the time limited for the commencement of the action. Disability includes, but is not limited to, insanity, imprisonment, or other incapacity or incompetence.

(E) The running of the statute of limitations may be suspended when a victim could not have reasonably discovered the cause of action due to circumstances resulting from the trafficking situation, such as psychological trauma, cultural and linguistic isolation, and the inability to access services.

(F) A defendant is estopped to assert a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the victim to delay the filing of the action or placing the victim under duress.

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live performance or photographic representation of sexual activity or sexually explicit nudity; by any person including, but not limited to, a person responsible for the child’s welfare, as defined in Section 63-7-20.” However, S. C. Code Ann. § 15-3-555 does not cross reference this definition.

***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 and commercial sexual exploitation of children (CSEC).*
- 6.4 *Using a law enforcement decoy to investigate buying or selling commercial sex 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 *State law requires reporting of missing children and located missing children.*

***Legal Analysis:***

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

South Carolina law authorizes law enforcement training on human trafficking. Specifically, S.C. Code Ann. § 16-3-2050(E) (Interagency task force established to develop and implement state plan for prevention of trafficking in persons; members; responsibilities; grants) states,

The task force shall consider carrying out the following activities either directly or through one or more of its constituent agencies:

. . . .

(7) mandatory training for law enforcement agencies, prosecutors, and other relevant officials in addressing trafficking in persons;

. . . .

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

S.C. Code Ann. § 17-30-30(B) (Interception by employee of Federal Communications Commission, by person acting under color or law, and when party has given prior consent) permits single party consent to audiotaping. It states, “It is lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.” S.C. Code Ann. § 17-30-30(B). Subsection (C) states, “It is lawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception.” S.C. Code Ann. § 17-30-30(C).

- 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking and commercial sexual exploitation of children (CSEC).*

Investigations related to domestic minor sex trafficking are not authorized to use wiretapping pursuant to S.C. Code Ann. § 17-30-70 (Orders authorizing interception). The offenses for which law enforcement can specifically use wiretapping are “murder (Section 16-3-10); assault and battery with intent to kill (Section 16-3-620 - Repealed kidnapping (Section 16-3-910); voluntary manslaughter (Section 16-3-50); armed robbery

(Section 16-11-330(A)); attempted armed robbery (Section 16-11-330(B)); drug trafficking as defined in Sections 44-53-370(e) and 44-53-375(C); arson in the first degree (Section 16-11-110(A)); arson in the second degree (Section 16-11-110(B)); accessory before the fact to commit any of the above offenses (Section 16-1-40); or attempt to commit any of the above offenses (Section 16-1-80).” S.C. Code Ann. § 17-30-70(A)(1).

Additionally, pursuant to S.C. Code Ann. § 17-30-95(A) (Interception prior to obtaining order; oral notification of judge in emergency),

(A) Notwithstanding any other provision of this chapter, any agent of the South Carolina Law Enforcement Division specifically designated by the Attorney General or his designated Assistant Attorney General may intercept the wire, oral, or electronic communication if an application for an order approving the interception is made within forty-eight hours after the interception begins to occur, and the agent determines that more likely than not:

- (1) an emergency exists that involves an offense provided for in Section 17-30-70 and an immediate danger of death or serious physical injury to any person or the danger of escape of a prisoner and requires that a wire, oral, or electronic communication be intercepted before an order authorizing the interception can, with due diligence, be obtained; and
- (2) there are grounds upon which an order could be entered under this chapter to authorize the interception.

Therefore, since an offense authorizing emergency wiretapping must involve one of the same offenses listed for normal wiretapping investigations, domestic minor sex trafficking investigations may not use this law enforcement tactic.

6.3.1 Recommendation: Amend S.C. Code Ann. § 17-30-70(A)(1) (Orders authorizing interception) to include § 16-3-2020 (Trafficking in persons; penalties; defenses), § 16-15-415 (Promoting prostitution of a minor; defenses; penalties), § 16-15-395 (First degree sexual exploitation of a minor; presumptions’ defenses; penalties), § 16-3-810 (Engaging child for sexual performance; penalty), and § 16-3-820 (Producing, directing or promoting sexual performance by child; penalty) as offenses for which law enforcement can utilize wiretapping.

6.4 *Using a law enforcement decoy to investigate buying or selling commercial sex is not a defense to soliciting, purchasing, or selling sex with a minor.*<sup>64</sup>

S.C. Code Ann. § 16-15-342 (Criminal solicitation of a minor, defenses; penalties) expressly prohibits a defendant from raising a defense as to the use of a law enforcement decoy posing as a minor when a defendant is charged with soliciting, purchasing, or selling sex with a child. S.C. Code Ann. § 16-15-342(D) states, “[i]t is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity.”

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

Law enforcement officers are not clearly authorized to use the Internet to investigate the crime of buying or selling sex with minors.

6.5.1 Recommendation: Enact a law that expressly permits the use of the Internet and electronic

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<sup>64</sup> The analysis in this component is predicated upon the recommendation in 2.1. being simultaneously or previously enacted.

communications to investigate the crime of buying or selling sex with minors.

*6.6 State law requires reporting of missing children and located missing children.*

S.C. Code Ann. § 23-3-200 (Creation of Center; use of FBI file) states that the Missing Person Information Center (“MPIC”) has the purpose of “serv[ing] as a central repository for information regarding missing persons and missing and exploited children, with special emphasis on missing children.” Among other things, the MPIC collects and disseminates information on missing and exploited children and “distribute[s], both intrastate and interstate, a monthly bulletin of missing persons and missing children from South Carolina to law enforcement agencies.” S.C. Code Ann. § 23-3-260(c), (e). Additionally, the MPIC “[m]aintain[s] all available information on any missing person or missing child including, but not limited to, the missing person report, fingerprints, blood types, dental information, and photographs.” S.C. Code Ann. § 23-3-260(i). Pursuant to S.C. Code Ann. § 23-3-250 (Dissemination of missing persons data by law enforcement agencies), “A law enforcement agency, upon receipt of a missing person report by a parent, spouse, guardian, legal custodian, public or private agency or entity, or any person responsible for a missing person, immediately shall make arrangements for the entry of data about the missing person or missing child into the national missing persons file in accordance with criteria set forth by the FBI/NCIC, inform all of the agency’s on-duty law enforcement officers of the missing person report, initiate a statewide broadcast to all other law enforcement agencies to be on the lookout for the individual, contact the agency’s local media outlets when appropriate, and transmit a copy of the report to the MPIC.”

Once a missing person is reported located, then the MPIC “shall instigate and confirm the deletion of the individual’s records from the FBI/NCIC’s missing person file, as long as there are no grounds for criminal prosecution, and follow up with the local law enforcement agency having jurisdiction of the records.” S.C. Code Ann. § 23-3-270.

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